The Harmonized System

and

Tariff Classification in Canada

by

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Summary

This thesis examines the principles of tariff classification in Canadian customs law. Tariff appeals prior to implementation of the Harmonized System in January 1988 are analyzed. The General Rules for Interpretation of the Harmonized System are then discussed. The thesis throughout is that interpretation should not be limited to physical characteristics such as material composition. The naming of goods requires a contextual approach to interpretation which also takes into account their use in application.

Résumé

Cette thèse examine les principes de classification douanière au Canada. Il y a une analyse, d'abord, des appels interjetés avant la mise-en-oeuvre du Système harmonisé en janvier 1988. Les règles générales pour l'interprétation du Système harmonisé sont ensuite étudiées. La thèse maintient que l'interprétation ne devrait pas se limiter aux caractéristiques matérielles des produits, telle que la composition. La classification devrait prendre compte aussi de l'usage des produits en pratique commerciale.

Preface

I would like first of all to express my appreciation to my supervisor Professor A.L.C. de Mestral of the Faculty of Law, McGill University, who has shepherded me through both this thesis and a previous Masters thesis. I am very grateful for his continuing support, guidance and encouragement.

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Mr. H. Asakura, Director, Nomenclature and Classification, Customs Co-operation Council very kindly permitted me to conduct documentary research at the offices of the Council in 1987. I am particularly grateful to Mr. E. Galle of the Classification Centre for his assistance.

Many officials of the Canadian government have assisted me in response to research inquiries. I would especially like to thank Mr. René Noel of Revenue Canada, Customs and Excise, Ms. Penny Rae and Dr. A.N. Polianski of the Tariff Board, as well as Ms. Diane Parsonnage of the Revenue Canada, Customs and Excise library.

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The material in this thesis consists entirely of original research, which is current as of July 1, 1991.

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I. Development

a. The Harmonized System

On January 1, 1988, Canada repealed its existing customs tariff and implemented the Harmonized Commodity Description and Coding System.[1] The Harmonized System (HS) is contained in a convention which took effect internationally on that date, January 1, 1988.[2] The HS entered into force at the same time for a number of other nations: Australia, Austria, Belgium, Botswana, Czechoslovakia, Denmark, Finland, France, Germany, Iceland, India, Ireland, Israel, Japan, Jordan, Korea (Rep.),

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[1]S.C. 1987, c.49 (R.S.C. 1985, c.41 (3rd Supp.)).

[2]International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on June 14, 1983, amended by Protocol of Amendment June 24, 1986, in force January 1, 1988. See Customs Co-operation Council, Introducing the International Convention on the Harmonized Commodity Description and Coding System, Brussels, 1987, Annex C, Annex D.

Lesotho, Madagascar, Malasia, Mauritius, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Swaziland, Sweden, Switzerland, United Kingdom, Yugoslavia, Zaire, Zambia, Zimbabwe. More countries have since joined the HS, including the United States which implemented the system on January 1, 1989.[3] As a contracting party, Canada is now applying the international tariff nomenclature used worldwide for over 80% of global trade.[4] This study examines the impact of the Harmonized System on principles of classification in Canadian customs law.

The Harmonized System was built on the Customs Co-operation Council Nomenclature (CCCN), called the Brussels Tariff Nomenclature (BTN) until the name was changed in 1974 to avoid confusion with institutions of the European Economic

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[3]Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, pp.68-69. The Convention also took effect on January 1, 1988 for the European Economic Community acting as a unit. Under Article 11(b) of the Convention, membership is open to "Customs or Economic Unions to which competence has been transferred to enter into treaties in respect of some or all of the matters governed by this Convention". If such a customs or economic union does join, then the union and its constituent states together have only one vote in the Harmonized System Committee, which oversees the agreement (Article 6(4)). EC acceptance of this limit on voting power was a pre-condition of U.S. membership: Summary Record, 30th Session of the Harmonized System Committee and Working Party, February 7-15, 1983, Doc. 29.850, March 10, 1983, para.58, 64, 69; Summary Record, 31st Session of the Harmonized System Committee and Working Party, April 25-May 13, 1983, Doc. 30.070, June 3, 1983, para.25, 57; United States International Trade Commission, Interim Report on the Harmonized Commodity Description and Coding System, Publication No. 1106, November 1980, pp.13-14.

[4]Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, p.12.

Community.[5] In 1986, there were 52 contracting parties to the CCC Nomenclature. It was also applied in fact in the tariffs of an additional 101 countries, territories and customs areas which were not officially parties to the convention.[6] The CCCN thus was used by most of the major trading nations of the world, except the United States and Canada which had their own unique systems. Development of the Harmonized System allowed for modernization and has resulted in membership for Canada and the United States.

The main predecessor of the CCCN was the 1931 League Draft Customs Nomenclature (Geneva Nomenclature) later revised in 1937. It resulted from the World Economic Conference held in 1927 under the auspices of the League of Nations. Harmonization of tariff nomenclatures was seen as a way of simplifying international negotiations and eliminating preferential arrangements. The classic example of such a

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[5] Convention on the Nomenclature for the Classification of Goods in Customs Tariffs, signed December 15, 1950, amended by Protocol of Amendment on July 1, 1955, into force September 11, 1959, U.N.T.S. vol.347, p.127; vol.347, p.143. For background on the history of tariff nomenclatures, see: Customs Co-operation Council, Introducing the International Convention on the Harmonized Commodity Description and Coding System, Brussels, 1987; Customs Co-operation Council, The CCC Nomenclature for the Classification of Goods in Customs Tariffs: Its Origins, Characteristic Features, Development and Application, Brussels, 1979; United States Tariff Commission, The Development of a Uniform International Tariff Nomenclature from 1853 to 1967, With Emphasis on the Brussels Tariff Nomenclature, study prepared by Howard L. Friedenberg, TC Publication 237, Washington, 1968.

[6] Customs Co-operation Council, Annual Report 1985-86, Bulletin No. 31, p.11.

preference was from a Swiss-German treaty of 1904 which provided a tariff reduction on mountain cattle reared at least 300 metres above sea level and spending at least one month per year grazing at least 800 metres above sea level.[7] When experts in the European Customs Union Study Group were preparing a common customs tariff for a potential European union after World War II, they naturally used the League Nomenclature as a model. The work on the nomenclature was so successful that it was decided to embody the results in a general international convention. The Convention on Nomenclature for the Classification of Goods in Customs Tariffs was signed in Brussels on December 15, 1950, along with the convention establishing an intergovernmental administrative organization, the Customs Co-operation Council.[8]

Prior to 1988, the CCC Nomenclature had 1011 headings (two optional) which were arranged into 99 Chapters under 21 Sections. The headings were identified with a 4-digit code. The CCCN contained general rules for interpretation, as well

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[7]John H. Jackson, World Trade and the Law of GATT (Bobbs-Merrill, 1969), pp.211-12, citing G. Curzon, Multilateral Commercial Diplomacy (1965), p.60 n.1. See also Gordon Blake, Customs Administration in Canada (University of Toronto Press, 1957), p.92.

[8]Convention Establishing a Customs Co-operation Council, December 15, 1950, into force November 4, 1952, U.N.T.S. vol.157, p.129; Can. T.S. 1971, p.38. A convention on customs valuation was signed at the same time: Convention on the Valuation of Goods for Customs Purposes, signed December 15, 1950, into force July 28, 1953, U.N.T.S. vol.171, p.305.

as chapter and section notes which formed part of the Nomenclature. A Nomenclature Committee was set up under the convention. Under its auspices, the Council issued several ongoing publications to assist in the uniform interpretation of the CCCN: Alphabetical Index, Explanatory Notes, Compendium of Classification Opinions. The CCC Nomenclature has undergone amendments since its adoption. The most recent amendment, which took effect when the HS entered into force, replaced the previous CCCN headings with the HS headings at the 4-digit level.[9] Contracting parties are now being encouraged to withdraw from the CCCN and adopt the HS. In 1989, the Council decided not to schedule further meetings of the Nomenclature Committee unless a sufficient number of delegates indicated otherwise, as difficulties had been experienced in getting a quorum.[10]

The Harmonized System is a 6-digit code with 5,019 subheadings under 1,241 headings, 96 chapters and 21 sections. One additional chapter is reserved for future CCC use and two

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[9]Council Recommendations of June 14, 1983 and July 27, 1983. See Customs Co-operation Council, Annual Report 1982-83, Bulletin No. 28, pp.20-21; Customs Co-operation Council, Annual Report 1985-86, Bulletin No. 31, p.11; Customs Co-operation Council, Annual Report 1986-87, Bulletin No. 32, pp.10-11. Previous amendments were adopted in January 1965, January 1972 and January 1978. Under Article XVI of the Nomenclature convention, Council can recommend amendments which come into force a year and a half after contracting parties have received notice, provided there have been no objections.

[10]Customs Co-operation Council, Annual Report 1988-89, Bulletin No. 34, pp.11-12.

additional chapters are reserved for national use by contracting parties. There are rules of interpretation, chapter notes, section notes and subheading notes which are all binding. With the assistance of the Harmonized System Committee, the Customs Co-operation Council issues an Alphabetical Index, as well as up-dated Explanatory Notes and Classification Opinions which are not binding but are nevertheless helpful in encouraging uniform interpretation.

The HS is hierarchical. To be included in a subheading, an import must be properly included in the relevant heading, chapter and section. The first two digits in the HS number represent the chapter, the second two the heading and the last two the subheading. The hierarchy also applies within subheadings, some of which are undivided "1-dash" subheadings with 5 digits and a 0, while others are further divided into "2-dash" subheadings with the full 6 digits. Under Article 4 of the Convention, developing countries can elect to apply the HS at only the 4-digit or 5-digit level if they decide not to use the full 6-digit level of detail. For any particular subheading, they must apply all or none of the 2-dash subheadings; for any particular heading, they must apply all or none of the 1-dash subheadings. This flexibility is intended to make the HS suitable for global trade, while controlling unnecessary administrative costs. As of July 31, 1990, there were 57 contracting parties to the HS, including a number of developing countries. At that time, only one,

Malawi, had elected in favour of partial application.[11]

The HS is a more detailed, modern nomenclature than the CCCN. A major goal of the up-dating project was to provide a system that would be adaptable for the various classifications to which goods were subject in international trade. A study by the CCC Secretariat in 1970 indicated that goods in an international transaction might be coded a number of different ways for import and export formalities, statistics, and modes of transport. This diversity of codes increased relevant administrative costs (to as much as 10% of the value of goods), made statistics unreliable and discouraged the use of electronic data processing.[12] After initial exploratory work, the Harmonized System Study Group reported in 1973 that development of the new system was feasible. The Study Group suggested that it should be based on the BTN and the Standard International Trade Classification (SITC Rev.2, the U.N. statistical nomenclature), but should also take account of a variety of other customs, statistical and transport codes.[13]

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[11]Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, pp.68-69. All other contracting parties must apply the HS in its full version, as reservations are prohibited by Article 18 of the convention.

[12]General Secretariat, Customs Co-operation Council, Development of a Commodity Description and Coding System for Use in International Trade, Doc. 17.210, December 4, 1970, para. 21-23.

[13]The suggested codes were as follows: Customs nomenclatures - Brussels Tariff Nomenclature, Tariff Nomenclature for the Latin American Free Trade Association (NABALALC), Customs tariff of Canada, Customs tariff of the United States, Customs tariff of Japan; Statistical

While the Study Group concentrated its attention on international classifications, the report also hints at wider objectives. The new system was expected to benefit private commercial interests. Those involved substantially in international trade would be likely to add the HS codes to their internal data systems to quote in invoice and shipping information. There might also be a possibility of linking HS codes to national production statistics.[14] At its most ambitious, this could be a universal commodity code capable of describing goods in all contexts, available for use as a basic 6-digit number to which other digits could be added for details of purchase, sale, inventory, finance, product standards, government regulation, taxation, specific characteristics such as colour and size, etc. With the use of computers, many other details could be coded, while the HS

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nomenclatures - Standard International Trade Classification (SITC, Rev.2), Nomenclature of Goods for the External Trade Statistics of the Community and Statistics of Trade between Member States (NIMEXE), Import Commodity Classification (Canada), Export Commodity Classification (Canada), Schedule B (Export, United States); Transport nomenclatures - Standard Commodity Nomenclature (NUM) of the International Union of Railways (UIC), Worldwide Air Cargo Commodity Classification (WACCC), Freight Tariff of the Association of West India Trans-Atlantic Steamship Lines (WIFT), Standard Transportation Commodity Code (STCC); Other classification - Standard Foreign Trade Classification (SFTC) of the Council for Mutual Economic Assistance. See Harmonised System Study Group, Report to the Customs Co-operation Council of the Study Group for the Development of a Harmonised Commodity Description and Coding System for International Trade, Doc. 19.513, March 28, 1973, Annex C.

[14]Harmonised System Study Group, Report, supra, para.23, 42, 45.

number would serve as a multipurpose identification tag for everyone involved.[15]

When Council decided to proceed with development of the HS, it assigned the task to a Harmonized System Committee with representation from the diverse interests involved. A number of countries were members of the Committee, including Canada and the United States which were not applying the CCCN. As well, the Committee included several organizations both intergovernmental and non-governmental: European Economic Community, General Agreement on Tariffs and Trade, North Atlantic Treaty Organization, United Nations Statistical Office, European Trade Promotion Organization, International Air Transport Association, International Chamber of Shipping, International Organization for Standardization, International Union of Railways. A number of organizations also participated in the Working Party set up to assist the Committee.[16] Although

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[15]See J. H. Hoguet, Director of CCC Nomenclature, "The Case for an International Goods Nomenclature", mimeograph, April 1976, p.18: "An instrument which began as a Customs nomenclature (1955), grew into a Customs and statistical Nomenclature (1960-1980), and will eventually evolve into a 'Harmonized System' (1980 onwards) represents a progressive response to the development of various needs which, though not entirely new, are becoming ever more important in such areas as taxation, market research, investment, planning, etc."

[16]Organizations participating in the Working Party were: Caribbean Community, Economic Commission for Europe, Economic and Social Commission for Asia and the Pacific, Food and Agriculture Organization of the United Nations, International Customs Tariffs Bureau, International Olive Oil Council, Organization for Economic Co-operation and Development, United Nations Conference on Trade and Development, European Confederation of Pulp, Paper and Board Industry, International Chamber of Commerce, International Federation of Freight

decisions in the Harmonized System Committee were officially taken by a two-thirds majority of those present and voting,[17] the Committee adopted a practice of accepting the majority decision of the Working Party unless a member entered a reservation.[18] This practice increased the speed of work and also meant that significant weight was given to the opinions of the various organizations involved. A number of organizations were officially members of the Committee and all participants in the Working Party had a right to vote. This attention to commercial non-state actors was particularly appropriate for a nomenclature which was intended to go beyond customs tariff use. The expansive structure has not been maintained on completion of the task. A Harmonized System Committee is set up under the HS Convention, but its membership is restricted by Article 6 to contracting parties and customs or economic unions. International organizations

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Forwarders Associations, International Institute of Synthetic Rubber Producers, Comité français pour la simplification des procédures du commerce international (SIMPROFRANCE), Simplification of International Trade Procedures Board (SITPRO - United Kingdom), Joint UNSO/SOEC Working Group on world level classifications. The CCC Nomenclature Committee and Secretariat were also listed as members of the Harmonized System Committee. See Customs Co-operation Council, Introducing the International Convention on the Harmonized Commodity Description and Coding System, 1987, Annex B.

[17]Rule 17, Rules of Procedure of the Harmonized System Committee, Annex I to Summary Record of the 1st Session of the Harmonized System Committee, October 8-12, 1973, Doc. 20.091, November 22, 1973.

[18]Customs Co-operation Council, Introducing the International Convention on the Harmonized Commodity Description and Coding System,1987, p.18.

may be invited to participate, but only as observers.[19]

There is a legitimate question of whether the HS which emerged from this process is really a different sort of nomenclature from the previous CCCN. The Study Group which reported to Council in 1973 thought that the HS would simply be a recommendation within the CCCN and not a completely new convention.[20] It was not until February 1983, just a few months prior to the signing of the Convention, that the Harmonized System Committee finally settled in favour of that form.[21] A recommendation would have been less disruptive but

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[19]Note the fears expressed by the U.S. representative that while customs administrations could assure uniformity of interpretation, they would be too conservative for the task of up-dating: Summary Record, 22nd Session of the Harmonized System Committee and its Working Party, October 6-24, 1980, Doc. 26.692, November 14, 1980, para.61. The Harmonized System Committee has established a Review Subcommittee to review the whole nomenclature on a revolving basis every three years, starting in January 1990. International organizations and other interested parties may be invited to participate in this work. See United States International Trade Commission, Investigation with Respect to the Operation of the Harmonized System Subtitle of the Omnibus Trade and Competitiveness Act of 1988, Publication No. 2296, June 1990, p.3.

[20]Harmonised System Study Group, Report to the Customs Co-operation Council of the Study Group for the Development of a Harmonised Commodity Description and Coding System for International Trade, March 28, 1973, Doc. 19.513, para.20.

[21]Summary Record, 30th Session of the Harmonized System Committee and Working Party, February 7-15, 1983, Doc. 29.850, March 10, 1983; Summary Record, 27th Session of the Harmonized system Committee and Working Party, February 8-26, 1982, Doc. 28.400, April 8, 1982; Summary Record, 26th Session of the Harmonized System Committee and Working Party, October 5-23, 1981, Doc. 28.000, November 25, 1981; Summary Record, 21st Session of the Harmonized System Committee and Working Party, May 19-June 6, 1980, Doc. 26.320, July 18, 1980; see United States International Trade Commission, Interim Report on the Harmonized Commodity Description and Coding System,

it would also have been optional and therefore less effective. The use of a convention signals a clearer choice in favour of a combined multipurpose nomenclature, rather than the previous CCCN tariff nomenclature with optional statistical digits. The choice of a multipurpose nomenclature is also reflected in Article 3 of the Convention, which makes the HS obligatory for both tariffs and the reporting of trade statistics. As well, the Preamble lists several intended objectives, including the correlation of trade and production statistics,[22] use of the HS in freight tariffs and transport statistics, and general use in commercial coding systems to the greatest extent possible.

Hesitation about such wide aspirations, however, is apparent in the ambivalent attitude to the so-called "descriptors" during development of the HS. The Study Group which reported in 1973 thought that the system should include a list of commodity "descriptors" drawn on diverse nomenclatures and national requirements. The samples prepared by the Study Group demonstrate how these descriptors could

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Publication No.1106, November 1980, pp.11-12.

[22]The U.S. was an early advocate of a nomenclature suitable for domestic production statistics, even if the particular commodities described were not significant in international trade: Summary Record, 6th Session of the Harmonized System Committee and Working Party, June 16-27, 1975, Doc. 21.659, July 16, 1975, para.27. The European Community also adopted the same position: Summary Record, 24th Session of the Harmonized System Committee and Working Party, February 9-27, 1981, Doc. 27.000, April 3, 1981, App.B.3 of Annex IV, para.2.

separate out the details of the HS headings and subheadings for use in the preparation of an alphabetical index and private coding systems.[23] The United States and Canada were both initially in favour of this project, which they thought would assist in the development of a nomenclature suitable for electronic transmission of data.[24] When the work proved very time-consuming, however, questions were raised about whether it was necessary to continue at this level of detail. The International Chamber of Commerce did a study on the aluminum trade of selected European countries and concluded that descriptors with the sort of commercial terminology used in invoices and ordering would only be feasible if the industry in question was sufficiently organized to do the work itself.[25] In response, the Harmonized System Committee in 1978 decided to give priority to other parts of the HS.[26] The decision was

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[23]Harmonised System Study Group, Report to the Customs Co-operation Council of the Study Group for the Development of a Harmonised Commodity Description and Coding System for International Trade, Doc. 19.513, March 28, 1973, Appendices.

[24]Summary Record, 1st Session of the Harmonized System Committee, October 8-12, 1973, Doc. 20.091, November 22, 1973.

[25]Summary Record, 9th Session of the Harmonized System Committee and Working Party, June 28-July 8, 1976, Doc. 22.538, July 29, 1976, Annex III; Summary Record, 11th Session of the Harmonized System Committee and Working Party, February 7-18, 1977, Doc. 23.050, March 8, 1977, Annex III (interim report); Working Party, Status and Development of Commodity Descriptors, Doc. 23.746, October 25, 1977, Annex (final report).

[26]Summary Record, 14th Session of the Harmonized System Committee and Working Party, February 6-17, 1978, Doc. 24.021, March 2, 1978, para.14.

necessary in order to finish preparation of the system in a reasonable time. There were also doubts about the eventual purpose of such descriptors. If they were to be used as separate building blocks for coordination with other statistical nomenclatures, then information would have to be collected and reported at this fine level of detail.[27] That would lead to problems of confidentiality, particularly for smaller countries where one commodity descriptor might apply to the business dealings of only one or two companies.[28] The previous work on descriptors was used in preparation of the Alphabetical Index, and the project has recently been re-activated by Council.[29] The fact that it had to be left aside

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[27]Michael Lux, The Harmonized Commodity Description and Coding System: Current Situation and Consideration, Eurostat, undated but probably 1981, p.36, para.5.2.

[28]Austria, for example, had already encountered such confidentiality problems even at the 4-digit CCCN level in relation to an information request from a Canadian company: Summary Record, 27th Session of the Harmonized System Committee and Working Party, February 8-26, 1982, Doc. 28.400, April 8, 1982, para.41. See also Michael Lux, The Harmonized Commodity Description and Coding System: Current Situation and Consideration, Eurostat, undated but probably 1981, p.40, para.6.3(e).

[29]As a "commodity data base": Customs Co-operation Council, Annual Report 1988-89, Bulletin No. 34, p.14; Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, p.15. The data base will list as many commodities as possible in actual trade, in order to assist parties in identifying the correct HS number. This "super-index" function was always the main purpose of a descriptor list. It does not seem to be contemplated that information will be collected and reported at this level of detail. The idea of descriptors had never been completely abandoned by the HS institutions: Report to the Customs Co-operation Council, 3rd Session of the Interim Harmonized System Committee, October 15-November 2, 1984, Doc. 31.921, Nov.2, 1984; Customs Co-operation Council, Annual

earlier, however, indicates how difficult it actually is to prepare a truly multipurpose code that will satisfy the interests of all potential users.

b. Other Nomenclatures

It can be perhaps too early to tell whether the HS will be successful as a multipurpose nomenclature. Contracting parties are obligated to use it for their customs tariffs and for the reporting of import and export trade statistics "to the extent that publication is not precluded for exceptional reasons such as commercial confidentiality or national security."[30] Governments can, of course, use it as a base for other purposes and can add extra digits to the HS number if they wish, for border controls such as countervailing and anti-dumping duties, for domestic commodity taxes and for other aspects of regulation. Use by non-governmental parties so far has been somewhat disappointing. The HS forms the base of a new tariff established by the International Union of

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Report 1983-84, Bulletin No. 29, p.20; Report to the Customs Co-operation Council, 6th Session of the Interim Harmonized System Committee, May 12-23, 1986, Doc. 32.251, May 23, 1986; Customs Co-operation Council, Annual Report 1985-86, Bulletin No. 31, p.12; Report to the Customs Co-operation Council, 1st Session of the Harmonized System Committee, April 11-22, 1988, Doc. 34.700, April 22, 1988, para.105.

[30]International Convention on the Harmonized Commodity Description and Coding System, Article 3(b).

Railways, however, and other organizations may follow suit.[31] There is certainly potential for private use of the new commodity code -- in industry product standards and trade terminology, in identification bar codes used on goods for retail sale, in various fields of electronic transmission of data concerning goods. With the growth of containerization in long-distance shipping, there is less and less reliance on physical inspection of goods at each stage of a transaction. Documentary descriptions assume greater importance. There is scope for a well-recognized international code which can assist in the electronic management of data.[32]

The CCCN was already closely linked with the United Nations' Standard International Trade Classification (SITC) for statistics on imports and exports. A coding key had been drawn up between the two systems as early as 1951, and a more complete correlation was established in 1960.[33] The CCCN prior to 1988 contained 1,083 supplementary subheadings which were recommended to parties for statistical correlation with the

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[31]Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, p.13.

[32]J.-C. Renoue, "The Harmonized System and Carriers" in Customs Co-operation Council, Implementing the Harmonized System: A Management Perspective, 1986, p.13. The Customs Co-operation Council is also active in encouraging customs administrations themselves to adopt standardized documentation and electronic processing of data: Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, pp.18-19.

[33]Customs Co-operation Council, The CCC Nomenclature for the Classification of Goods in Customs Tariffs: Its Origins, Characteristic Features, Development and Application, 1979, pp.33-34.

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[31]Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, p.13.

[32]J.-C. Renoue, "The Harmonized System and Carriers" in Customs Co-operation Council, Implementing the Harmonized System: A Management Perspective, 1986, p.13. The Customs Co-operation Council is also active in encouraging customs administrations themselves to adopt standardized documentation and electronic processing of data: Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, pp.18-19.

[33]Customs Co-operation Council, The CCC Nomenclature for the Classification of Goods in Customs Tariffs: Its Origins, Characteristic Features, Development and Application, 1979, pp.33-34.

more detailed SITC, then in its second revision.[34] If the problem is that a multiplicity of nomenclatures are applied to goods in international trade, one solution would be to reduce the number of nomenclatures. The idea that the HS might replace the statistical nomenclature, however, would have been too ambitious a goal for the Harmonized System Committee and was not suggested by the Study Group in 1973. It was sufficient that the tariff nomenclature be revised and made more detailed, and that the correlation between it and the SITC be maintained. In response to the work on the HS, a new version of the SITC has been completed, taking effect with statistics for 1988. SITC Rev.3 uses a five-digit code to classify imports and exports into 10 sections, 67 divisions, 261 groups, 1,033 subgroups and 3,118 basic headings, with one digit of the code for each level of detail. Correlation with the HS has been maintained for all goods except refined petroleum products, which the SITC describes in more detail than the HS due to their economic significance.[35]

In revising the SITC, the U.N. Statistical Office took

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[34]Customs Co-operation Council, Introducing the International Convention on the Harmonized Commodity Description and Coding System, 1987, pp.15-16.

[35]United Nations Statistical Office, Standard International Trade Classification, Revision 3, 1986, ST/ESA/STAT/SER.M/34/REV.3, Sales No.E.86.XVII.12, pp.ix,x. For refined petroleum products, the headings of SITC Rev.2 have been retained. SITC Rev.3 was approved by the Statistical Commission in February 1985 and by the Economic and Social Council on May 28, 1985. See further Customs Co-operation Council, Introducing the Harmonized Commodity Description and Coding System, 1987, p.25.

the following criteria into account:

> a) the nature of the merchandise and the materials used in its production;
> b) the processing stage;
> c) market practices and the uses of the product;
> d) the importance of the commodity in terms of world trade;
> e) technological changes.[36]

For economic analysis, the classification needs to provide data according to industrial sector and stage of processing for goods in various categories. This is different from customs nomenclatures, which traditionally have looked mainly to the material from which imports are made.[37] While there may be some attempt to reflect degrees of processing in order to show the duty protecting a relevant domestic industry, the focus of a customs tariff is usually on the first criterion listed by the Statistical Office.

For the HS, the Study Group in 1973 took a fairly customs-oriented approach and recommended that the system should exclude the following criteria "which do not serve to define the commodity itself:"

> a) distinctions made to provide for tariff rate charges directly related to specific dates;
> b) the origin of goods, by country or supplier;
> c) the destination of goods, by country or user;
> d) packaging or handling characteristics such as

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[36]United Nations Statistical Office, Standard International Trade Classification Revision 3, Ibid., p.viii.

[37]United Nations Statistical Office, Standard International Trade Classification Revision 3, Ibid.,p.vi.

'fragile', 'toxic', 'dangerous', etc.[38]

The Study Group expected these criteria to be reflected in other nomenclatures. Concerning the end use of goods, the Group noted that customs authorities generally cannot enforce according to actual use of a particular import. It might be possible to classify according to the main use of goods, but only if this were "directly related to the technological characteristics of the commodity."[39] In a report in 1975, the United States' International Trade Commission took a similarly customs-oriented approach to the criteria which should be used for an international commodity code. The code was to be suitable for import and export regulation, for trade and production statistics and for transport documents. One of the criteria identified by the International Trade Commission was that the code should be capable of uniform application, which implied that:

> [t]o the extent practicable, articles should be properly classifiable within the system by reference to their intrinsic characteristics, without reliance upon extrinsic factors such as subsequent or intended use or the process of manufacture.[40]

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[38]Harmonised System Study Group, Report to the Customs Co-operation Council of the Study Group for the Development of a Harmonised Commodity Description and Coding System for International Trade, Doc. 19.513, March 28, 1973, para.22.

[39]Harmonised System Study Group, Ibid., Annex D, para.9.

[40]United States International Trade Commission, Concepts and Principles Which Should Underlie the Formulation of an International Commodity Code, 94th Congress, 1st Session, House Document No. 94-175, June 1975. The Report itself was criticized for failing to give sufficient weight to progress on the HS up to that point (see especially comments at pp.B-

Many of the chapters in the HS (and also the previous CCCN) do in fact classify according to raw material. It should be noted, however, that the chapters covering manufactured products also reflect use and function (footwear, headgear etc.), since these goods may not have a single dominant component.[41] It can be difficult to verify actual end use for a particular import, but this is a problem of customs nomenclatures not of statistical nomenclatures. For statistics, there is no need to verify in such detail. Goods can be aggregated according to main use. Data from the SITC, in fact, is commonly aggregated in this way into the U.N.'s classification for "Broad Economic Categories" to produce statistics on capital goods, intermediate goods and consumer

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25 to B-29, pp.B-81 to B-92, pp.B-101 to B-105). The Commission was active in the lengthy process of converting the U.S. tariff to the Harmonized System. See: United States Tariff Commission (previous title of the ITC), Tariff Schedules of the United States Annotated Converted to the Harmonized System, 1975; U.S. International Trade Commission, Conversion of TSUSA into the Nomenclature Structure of the Harmonized System, Pub. No. 1400, June 1983; Office of the United States Trade Representative, Conversion of TSUSA into the Nomenclature Structure of the Harmonized System, Revised, Showing Administrative Changes Approved by the Trade Policy Staff Committee, Sept. 1984; Office of the United States Trade Representative, Conversion of TSUSA into the Nomenclature Structure of the Harmonized System, Second Revision, Showing Administrative Changes Approved by the Trade Policy Staff Committee, Oct. 1986; United States Trade Representative, Proposed United States Tariff Schedule Annotated in the Harmonized System Nomenclature, July 1987; U.S. International Trade Commission, Continuity of Import and Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System, Pub. No. 2051, Jan. 1988.

[41]Michael Lux, The Harmonized Commodity Description and Coding System, Eurostat, undated but probably 1981, p.29.

goods. This classification is primarily designed to link imports to destination economic sectors for purposes of national accounts.[42]

To complete production statistics, it is also necessary to identify the sectors of origin for exports. This can be done through the same process of approximation, in which data on goods is linked to other economic information on the sector of origin for most of the exports under a particular item. The statistics are more precise if the classification system uses industrial origin as a criterion, so that a given item will cover goods from only one economic sector.[43] The main goal of participation by the United Nations Statistical Office in elaboration of the Harmonized System was to ensure that industrial origin was reflected in the design of the

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[42]United Nations Statistical Office, International Trade Statistics Concepts and Definitions, 1982, ST/ESA/STAT/SER.M/52/REV.1, Sales No. E.82.XVII.14, para.92-94; United Nations Statistical Office, Classification by Broad Economic Categories, Defined in Terms of SITC, Rev.3, 1989, ST/ESA/STAT/SER.M/53/REV.3, Sales No. E.89.XVII.4.

[43]On the difficulties involved, see Michael Lux, The Harmonized Commodity Description and Coding System, Eurostat, undated but probably 1981, pp.22-25, para.2.4 and 2.5. Concerning national statistics in the United States, see Secretary of Commerce and U.S. International Trade Commission, Principles and Concepts Which Should Guide the Organization and Development of an Enumeration of Articles Which Would Result in Comparability of United States Import, Production and Export Data, Report to the Congress and to the President, August 1, 1975, 94th Congres, 1st Session.

nomenclature to the extent possible.[44] While the correspondence is not complete, most HS headings cover goods produced in only one category of the recently revised International Standard Industrial Classification (ISIC), the recommended U.N. system for national economic and social statistics.[45] For ISIC categories, the same sort of approximate link exists to SITC data, as well as to the provisional Central Product Classification, the new U.N. statistical system which builds on HS categories and also includes non-transportable goods and services.[46]

The purpose for which a nomenclature is designed influences the criteria chosen for elaboration of the categories. The criteria used in the Harmonized System are mainly those of a customs nomenclature, directed to specific imports. Correlation to a statistical nomenclature has to be done at a greater level of generality. Correlation to a transport nomenclature, on the other hand, might require more detail on packaging, weight, durability and the hazardous

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[44]United Nations Statistical Office, International Standard Industrial Classification of All Economic Activities, Third Revision, 1990, ST/ESA/STAT/SER.M/4/REV.3, Sales No.E.90.XVII.11, para.6; Customs Co-operation Council, Annual Report 1976-77, Bulletin No.22, pp.17ff.

[45]United Nations Statistical Office, Ibid., para.161.

[46]United Nations Statistical Office, Ibid., para.163-164.

nature of particular goods.[47] The success of the HS as a multipurpose code is likely to depend on the extent to which criteria relevant to other classification systems can be reflected in interpretation and up-dating of the nomenclature.

II. Interpretation

To assist in interpretation, the Harmonized System contains ,ection, Chapter and Subheading Notes which form part of the nomenclature. For matters which are not settled in these specific clarifications, the HS also provides 6 General Rules for Interpretation. These Rules, as well as the Section, Chapter and Subheading Notes, are legally binding within the system. There are also two supplementary sources for interpretation, which are not part of the official HS and therefore not binding: Explanatory Notes and Classification Opinions. Both are prepared by the Harmonized System Committee and approved by Council to further the goal of uniform application of the Convention. Explanatory Notes represent the official interpretations from the Customs Co-operation Council. Classification Opinions are decisions on specific instances. The Harmonized System Committee will be

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[47]Note, for example, the extra statistical subheadings that were required when the Harmonized System Committee was asked by the United Nations Environment Programme for help in monitoring trade controlled under the Montreal Protocol on Substances the Deplete the Ozone Layer: Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, p.13.

able to resolve most questions without recommending that the Council amend an Explanatory Note or a part of the HS itself. In such cases, the matter may still be issued as a Classification Opinion if it presents a point of some novelty or unusual difficulty.[48]

Questions of interpretation may start as classification enquiries submitted to the CCC Secretariat by customs administrations or private firms. During 1988-89, the Secretariat replied to about 250 classification enquiries. During 1989-90, the number was 300.[49] Under Article 7.1(e) of the Convention, the Harmonized System Committee can provide information or guidance "to Contracting Parties, to Members of the Council and to such intergovernmental or other international organizations as the Committee may consider appropriate." This potential audience is somewhat wider than under the CCCN Convention, which only permits the Nomenclature Committee to communicate with Contracting Parties.[50] It

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[48] International Convention on the Harmonized Commodity Description and Coding System, Articles 7,8; Customs Co-operation Council, Introducting the International Convention on the Harmonized Commodity Description and Coding System, 1987, p.41.

[49] Customs Co-operation Council, Annual Report 1988-89, Bulletin No. 34, p.14; Customs Co-operation Council, Annual Report 1989-90, Bulletin No. 35, p.15.

[50] Convention on the Nomenclature for the Classification of Goods in Customs Tariffs (1950), Article IV(d). Under that Convention, the Secretariat does not act on requests from private individuals or associations, but simply forwards the matter, with its own interpretation, to the Contracting Parties involved who then decide whether to submit it to the Nomenclature Committee: Customs Co-operation Council, The CCC

should be noted, however, that a proposal to allow the Harmonized System Committee to provide advice directly to private firms was rejected during negotiation of the HS Convention.[51]

Under Article 10 of the Convention, dispute settlement between Contracting Parties can be referred to the Harmonized System Committee or the Council. If the Parties so agree, the recommendations of the Committee or Council can be binding. Parties can, of course, resolve points of dispute themselves by direct negotiation. To encourage uniformity, the Council has recently approved a voluntary programme for Parties to exchange national classification rulings through the Secretariat.[52]

Nomenclature for the Classification of Goods in Customs Tariffs: Its Origins, Characteristic Features, Development and Application, 1979, p.28.

[51]Summary Record, 29th Session of the Harmonized System Committee and Working Party, November 22-December 10, 1982, Doc. 29.600, January 12, 1983, para.149.

[52]Customs Co-operation Council, Annual Report, Bulletin No. 35, p.13; Customs Co-operation Council, Annual Report, Bulletin No. 34, p.12. The programme was suggested by the United States. The rulings are to be only those at a fairly high administrative level. The Secretariat is not to comment on the rulings, but simply circulate them without editing or revision: Report to the Customs Co-operation Council, 7th Session of the Interim Harmonized System Committee, October 20-31, 1986, Doc.33.601, October 31, 1986, para.3,4; Report to the CCC, 9th Session of the Interim Harmonized System Committee, Doc.34.391, November 5, 1987, Annex G/3; Report to the CCC, 2nd Session of the Harmonized System Committee, Doc. 35.100, November 11, 1988, para.47; Report to the CCC, 3rd Session of the Harmonized System Committee, Doc. 35.350, April 28, 1989, Annex C/4; Report to the CCC, 4th Session of the Harmonized System Committee, Doc. 35.700, October 26, 1989, para.18, Annex C/3; Report to the CCC, 5th Session of the

The General Rules for Interpretation of the Harmonized System were based closely on the previous CCCN Rules for Interpretation, in part because the topic was not reached until fairly late in the development of the system.[53] The General Rules for the Interpretation of the Harmonized System appear in the Appendix to this study. The CCCN Rules at the time were as follows:

> Interpretation of the Nomenclature shall be governed by the following principles:
>
> 1. - The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.
>
> 2. - (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as imported, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or

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Harmonized System Committee, Doc. 35,960, April 12, 1990, Annex C/1. (The Interim Harmonized System Committee was set up when the Convention was signed, pending its entry into force.)

[53]Major negotiation on the topic took place at sessions in November-December 1982, February 1983 and April-May 1983. See: Summary Record, 27th Session of the Harmonized System Committee and Working Party, February 8-26, 1982, Doc. 28.400, April 8, 1982, Annex IV/1; Summary Record, 29th Session of the Harmonized System Committee and Working Party, November 22-December 10, 1982, Doc. 29.600, January 12, 1983, Annex V; Summary Record, 30th Session of the Harmonized System Committee and Working Party, February 7-15, 1983, Doc. 29.850, March 10, 1983, Annex V; Summary Record, 31st Session of the Harmonized System Committee and Working Party, April 25-May 13, 1983, Doc. 30.070, June 3, 1983, Annexes D/10/(c) and N/12.

falling to be classified as complete or finished by virtue of this Rule), imported unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. - When for any reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs latest among those which equally merit consideration.

4. - Goods not falling within any heading of the Nomenclature shall be classified under the heading appropriate to the goods to which they are most akin.

These rules emphasize the physical features of the imported goods -- their state of assembly and material composition. The approach is solidly in the tradition of customs nomenclatures which focus on observable physical characteristics of the goods, in order to assure uniform

application. Interpretation is to be objective, rejecting extrinsic circumstances such as industrial origin, destination, purpose and use. When the criteria are less concrete -- the "essential character" of the imported goods or the identification of other goods "to which they are most akin" -- the Customs Co-operation Council worries that interpretation will vary "according to the viewpoint of the person" making the decision.[54] Such abstract matters are seen as too subjective, too influenced by the "personal appreciation" of the interpreter.[55] To ensure uniformity, it is assumed that interpretation must concentrate on concrete facts.

Physical features of goods, however, were not the only considerations on which the HS was drafted. Other criteria, including use and purpose, were relevant for some chapters, as was the case in the CCCN and also the 1931/1937 League Nomenclature.[56] The thesis of this study is that interpretation should not be limited to the physical features intrinsic in goods, but should take account of more abstract factors as well, in particular the use of goods in commercial

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[54]Customs Co-operation Council, Introducing the International Convention on the Harmonized Commodity Description and Coding System, 1987, p.39.

[55]Ibid.

[56]United States Tariff Commission, The Development of a Uniform International Tariff Nomenclature from 1853 to 1967, with Emphasis on the Brussels Tariff Nomenclature, prepared by Howard L. Friedenberg, Publication 237, 1968, p.23.

application. It is artificial to assume that description of a good should answer only the questions "What does this look like?" or "What is it made of?", and never "What is this for?". There is no reason to think that the physical features of goods announce their real identity, while any hint of human intervention concerning them is somehow extraneous and unreliable. The Harmonized System, and the goods themselves, were produced to serve a commercial context. An appreciation of that context will not make application less uniform. Attention to surroundings, in fact, can help to make the Harmonized System more successful as a truly multipurpose code linked to statistical and other commercial nomenclatures

III. Thesis

a. Metaphysics

This study is a test of the empirical assumptions behind the idea of pointing to a concrete object and naming it. Those assumptions are tested in a context where decisions have serious financial consequences and where those working in the field think that description should depend on qualities in the object itself. The idea that identity exists in the physical object is almost a classic question in metaphysics about whether there is a real world out there or whether we just imagine it to be so. The claim made for qualities intrinsic in goods is, in fact, wider than the four primary qualities which John Locke thought to be in the object (solidity,

extension, figure and mobility), while others were in the observer.[57] This study does not quarrel with the existence of concrete objects. Attention, rather, is directed to the link between objects and the human mind, or, more precisely, the link between objects and human language.

The conclusion is that this link does not work in the way the Customs Co-operation Council and the observation model assume. Description is a very complicated process, especially if that description is to apply around the world in many different languages. The observation of colour, for example, has been studied by linguists. Languages code colour differently. In other languages, the word which translates the English term "red" might also cover colours which English-speakers call brown, pink, orange or yellow.[58] It has been suggested that there are about eleven universal basic colours, described in various ways in different languages. English calls them white, black, red, green, yellow, blue, brown, purple, pink, orange and grey. Not all languages have all

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[57]John Locke, An Essay Concerning Human Understanding, 1690, Book II, Chapter VIII, Para.9 (Chicago: Gateway Edition, 1956, pp.46-47). These are sometimes listed as five -- size, shape, solidity, numerability, mobility: Marcus Long, The Spirit of Philosophy, Toronto: University of Toronto Press, 1953, p.68.

[58]Bernard Harrison, An Introduction to the Philosophy of Language (London: Macmillan Press, 1979), p.16, citing B.Berlin and P.Kay, Basic Color Terms (Berkeley: University of California Press, 1969). See also: Richard L.Gregory, Mind in Science (Middlesex: Penguin Books, 1981), p.50; W.Haas, "The Theory of Translation" in G.H.R.Parkinson (ed.), The Theory of Meaning (London: Oxford University Press, 1968), p.86 at 97-98.

eleven. Some might have as few as two or three.[59] It is not necessary to decide the debate about the existence of these universal basics to see that descriptions of colour will not match from one language to another.

In a recent article, Clark D. Cunningham recounts an experiment involving English and Tarahumara, a language of Northern Mexico which has one word for the English terms "blue" and "green". In the experiment, subjects were asked to describe the colour differences separating three chips. If the colours were measured scientifically according to their wavelengths, chips A and B were further apart than chips B and C. Chips A and B were both in the colour range which English-speakers identify as "blue", while C was in the colour range which English-speakers identify as "green." When asked to describe the colour differences, Tarahumara-speakers said that the difference between chips A and B was larger than the difference between chips B and C. Presented with all three chips, however, English-speakers found the B-C colour difference greater than the A-B difference. The researchers then tested to see whether it was the common label "blue" for A and B which was influencing the English-speakers' response.

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[59]Geoffrey Leech, Semantics, 2nd ed. (Middlesex: Penguin Books, 1981) p.233-34. The list of eleven comes from Berlin and Kay supra note 58. Since the publication of Basic Color Terms, Kay apparently has proposed that there are actually only ten, with blue and green classified as one. There have also been suggestions that there are languages with twelve basic colours -- including French, which has two terms "brun" and "marron" for what in English is called brown (Leech, p.236).

The experiment was changed so that the tester would initially suggest that chip B was both blue and green. Subjects would then see the pairs A-B and B-C separately and would be asked which colour difference was larger. In that situation, the English-speakers would identify the A-B difference as larger. The researchers concluded that actual perception was the same for the two groups, but when confronted with all three chips together, the English-speakers were influenced by the fact that both A and B were blue.[60] If this result is applicable for other terms, it means that not only is there difficulty agreeing on names when perception is the same, but different names can actually cause us to think we see different things. It is an illustration of how the classification system affects what we perceive and describe. What counts is not the object, but the linguistic reaction.

For the description of colour, which should be a fairly basic process, the observation model is insufficient. It is also, overall, seriously incomplete as an explanation of general names for concrete objects. In experiments, general names do not seem to have definite borderlines. When, for example, subjects were asked to rank certain birds according to their degree of "birdiness", the answers consistently produced the following hierarchy: 1.robins, eagles

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[60]Clark D. Cunningham, "A Tale of Two Clients: Thinking About Law as Language" (1989) 87 Michigan L. Rev. 2459 at 2475 ff. The experiment described is from Paul Kay and Willett Kempton, "What is the Sapir-Whorf Hypothesis?" (1984) 86 Am. Anthropoligist 65.

2.chickens, ducks, geese 3.penguins, pelicans 4.bats. The results were not random, as could be expected if "bird" was a simple in/out category. Subjects seemed to classify by resemblance to a paradigm and there was widespread agreement on what was in the paradigm.[61] The observation model does not explain how these paradigms arise. If general names are like colours, in that we understand them by fitting them into a pattern, we should examine the criteria on which this is done.

It is the thesis of this study that the criteria come not from the objects themselves but rather from the observers. The human mind organizes according to factors relevant for human convenience.[62] In particular, for commodities in commercial trade, this study argues that use is a key concept. Natural kinds such as "bird" may be determined by physical features, but for manufactured goods, function in application is central. Part of the idea of "vehicle" is that it is "for

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[61]Frederick Bowers, Linguistic Aspects of Legislative Expression (Vancouver: U.B.C. Press, 1989), p.139, citing experiments by Heider discussed in G. Lakoff, "Hedges: a Study in Meaning Criteria and Logic" (1972), 8 CLS 183. The experiments also covered other general terms, such as "vegetable", "toy", "fruit", "metal", "crime" and "vehicle".

[62]"To return to general words, it is plain ... that general and universal belong not to the real existence of things; but are the inventions and creatures of the understanding, made by it for its own use, and concern only signs, whether words, or ideas." - John Locke, An Essay Concerning Human Understanding, 1690, Book III, Chapter III, para.11 (Chicago: Gateway Edition, 1956, p.145). See the criticism of the jump from this theory to the question of essences, in Harrison, supra note 58, pp.34-37.

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transporting goods or people."[63] Part of the idea of "cup" is that it "is used for drinking out of."[64] The emphasis on function and use will be particularly marked for products of new technology, which may accomplish the same thing as older goods, but have different physical characteristics. Since the introduction of transistors and Walkmans, for example, what is a radio?[65]

In the early to mid part of this century, empiricism encountered heavy weather. The idea that one can verify through observation was attacked by W.V.O. Quine in "Two Dogmas of Empiricism" first published in 1951. In that paper, he took issue with the notion that synthetic truths (grounded in fact) are different from analytic truths (grounded in meaning). Both are simply grounded in usage, according to Professor Quine, and derive their truth from the overall

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[63]Bowers, supra note 61, p.141.

[64]Leech, supra note 59, p.120. See further the discussion by Harrison, supra note 58, pp.202-06 (p.206:"The introduction of bean-bags into the extension of 'chair', again, surely has something to do with the fact that 'chair' is an artifact term, and so ultimately defined, somehow or other, in terms of function").

[65]With appreciation to Gordon Irish for this suggestion. See further Bowers, supra note 61, p.148, discussing legislation to regulate emerging technology in transportation and factory production from about 1850 to 1950. Professor Bowers notes that, in statutory interpretation, there was increased emphasis on the function of goods as well as increased attention paid to context and technical language.

network of beliefs.[66] The supposed method of verifying a synthetic truth through observation does not provide a secure link to reality. When a non-English-speaker points to what looks like a rabbit and says "gavagai", I can never know for sure what exactly the name means. It may mean "rabbit", "rabbit part", "rabbit colour", "small animal", "sacred beast" which includes rabbits and one other rare species, or any number of possibilities. Even if it is established that the word is a noun for a general kind, empirical observation cannot of itself prove the truth of the assertion: "That is a gavagai." The next instance could be the one in which the rabbit is missing an ear, and I find out that I have misunderstood the term all along.[67] Our whole network of beliefs may impinge on reality at the edges, as Professor Quine suggested, but within the network, what we take to be facts are surprisingly underdetermined. One cannot classify

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[66]W.V.O.Quine, "Two Dogmas of Empiricism" in Quine, From a Logical Point of View (Cambridge: Harvard University Press, 1964), p.20 ("Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system." - p.43). The second dogma was the idea that all meaningful statements can be reduced to terms which refer to immediate experience. See further Friedrich Waismann, "Verifiability" in G.H.R.Parkinson (ed.), The Theory of Meaning (London: Oxford University Press, 1968), p.37 (paper first published 1945).

[67]Example from W.V.O.Quine, Word and Object (Cambridge: MIT Press, 1960), pp.29 ff. See further Harrison, supra note 58, pp.17-19, p.96, pp.104-26.

concrete objects simply by pointing a finger and naming.[68]

b. Hermeneutics

If there is no certainty in concrete objects, then attention shifts away from the relationship between objects and the human mind to the question of communication between minds.[69] In the preface to The Order of Things, Michel Foucault quotes the following classification of animals from Jorge Luis Borges, purportedly taken from an ancient Chinese encyclopedia:

> (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.

The very difficulty of imagining such a system illustrates the assumptions of rationality and human control behind the classic tabulation.[70] Foucault's (or Borges') categories are

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[68]Michael Devitt and Kim Sterelny, who are in the naturalist school of thought, make fun of this counter-intuitive argument in their text Language and Reality: An Introduction to the Philosophy of Language (Cambridge: MIT Press, 1987), p.229: "When the naturalistic philosopher points his finger at reality, the linguistic philosopher discusses the finger." Anthony D'Amato does just that, thoroughly, in "Aspects of Deconstruction: The Failure of the Word 'Bird'" (1990) 84 Nw.U.L.Rev. 536.

[69]Harrison, supra note 58, p.203.

[70]Michel Foucault, The Order of Things: An Archaeology of the Human Sciences (New York: Vintage Books, 1973, translation of Les Mots et les Choses, 1966), p.xv. See Hubert L. Dreyfus and Paul Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics, 2nd ed. (Chicago: University of Chicago Press,

quite distant from the organized, hierarchical headings and subheadings of the Harmonized System in which any given object is to have one and only one correct classification. A coding system for objects depends not on qualities of the objects themselves, but on the human assumptions behind the system.

But does this mean that everything is subjective and uniform interpretation impossible? This study suggests the use of goods in application as a factor to be considered, but use is not immune from interpretation either. Attention to basic assumptions means that we concentrate less on the objects and more on the decision-makers. The question is how uniformity is created, how interpreters learn about the paradigm for "bird" or the paradigm for anything else.

Thomas Kuhn, in The Structure of Scientific Revolutions, examines major shifts of assumptions in the scientific community, such as followed the discovery of oxygen or X-rays. Some fundamental ideas changed, but adjustments would normally be made and the network re-woven. Much of ordinary scientific activity continued in the usual way. Students still learned acquired knowledge through a combination of experiments and textbook examples. The training still provided a common way of seeing things, so that recognition of patterns would become automatic. New problems would be seen as similar to previous examples, and there would be widespread expectation of assent

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1983), pp.19-20.

within the professional community.[71] Even major flaws in the observation model, identified with the development of quantum mechanics at the beginning of this century,[72] have not undermined shared community interpretations. Jeremy Campbell, writing in 1982, reports as an "often repeated bon mot" among scientists the quip that "(t)here is no such thing as an immaculate perception".[73] The abandonment of certainty in concrete objects has not meant the abandonment of shared community understandings.

The idea of meaning from tradition would be consistent with the hermeneutics of Hans-Georg Gadamer, who suggests that interpretation involves a fusion of horizons past and present. The hermeneutic approach attempts to recover the meaning of human action from the point of view of the agents involved.[74]

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[71]Thomas S. Kuhn, The Structure of Scientific Revolutions, 2nd ed. (Chicago: University of Chicago Press, 1970), pp.176-207. See Barry Barnes, "Thomas Kuhn" in Quentin Skinner, ed., The Return of Grand Theory in the Human Sciences (Cambridge: Cambridge University Press, 1985), p.83. Jay M. Feinman discusses legal education as a similar sort of learning by paradigm: "Jurisprudence of Classification" (1989) 41 Stan.L.Rev. 661.

[72]Gary Zukav, The Dancing Wu Li Masters: An Overview of the New Physics (New York: Bantam Books, 1979). Note, in particular, the discussion of the wave/particle controversy, pp.45-66.

[73]Jeremy Campbell, Grammatical Man: Information, Entropy, Language and Life (New York: Simon and Schuster, 1982), p.49.

[74]See Quentin Skinner, "Introduction", in Q.Skinner, ed., supra note 71, p.1 at 6. See also Charles Taylor, Human Agency and Language (Cambridge: Cambridge University Press, 1985), Vol.1, p.280 ("(Y)ou have to understand what it would be like to be a participant").

Meaning emerges through a dialogue between text and interpreter. According to Gadamer, we can never be objective and free from inherited categories. The most that can be hoped for is a "reflective awareness" of communal norms.[75] The assumptions to consider, then, are not just the assumptions behind the text but also the assumptions of current interpreters.

For the Harmonized System, authoritative interpretation at this point is likely to be done by customs officials, either in national administrations or acting through the Customs Co-operation Council. Interpretation of the HS will clearly require standards sufficiently precise and uniform for legal application to particular imports. Customs officers' concern with individual instances of classification will be quite appropriate.

It may be questioned, however, whether the observation model as expressed by the CCC and the emphasis on material composition of goods are really current. More and more, customs clearances are done thrc .gh electronic exchanges of data with large importers or brokers.[76] The standard instance no longer needs to be the wagon pulling up to the customs office, with clearance done through on-the-spot inspection.

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[75]Hans-Georg Gadamer, Reason in the Age of Science, trans. F.G. Lawrence (Cambridge: MIT Press, 1981), p.135.

[76]The Customs Co-operation Council is active in encouraging this development. See: Customs Co-operation Council, Annual Report 1989-90, Bulletin No.35, p.19.

Electronic clearances can take place at a time when fairly complete information is available on relevant transactions. Particularly when more and more imports are products of manufacturing and high technology, their function in application can be more significant than their material composition. The appropriate model for tariff classification should take account of the use of goods in their commercial context. In addition, if the HS is to fulfill its promise as a multipurpose code, the assumptions of other commercial actors should be considered. Customs officials are by training somewhat mercantilist, required in their enforcement role to think of importing as a vaguely suspicious activity. Should they have charge of an initiative intended to facilitate trade?

c. Judges and Interpretation

Legal philosophy in North America after the realists was already somewhat receptive to the idea that judges have some leeway in their legal interpretations. The formalist view that judges simply find meanings already there in existing rules or in the words of a statute had declined in popularity. There was a tendency to recognize the purposive approach to statutory interpretation, judges interpreting according to the

general intentions of democratic institutions.[77] The current interest in interpretation theory has directed increased attention to the assumptions of the judges themselves, as well as to the assumptions in the statutory text.[78]

The defence of formalism often involves the naming of concrete objects:

> The manufacture of a five-pronged instrument for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.[79]

Rejecting the observation model implies a rejection of this formalist stance. It does not, however, involve acceptance of purposive interpretation as the only alternative. Customs tariff statutes will reflect legislative policy to protect and promote certain domestic industries. It is not suggested in this study that interpreters should give special emphasis to those policies. A customs tariff law which implements the Harmonized System is not just an ordinary expression of legislative intent, but part of an international arrangement. The Customs Co-operation Council could not be expected to base

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[77]John Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1.

[78]For two recent reviews of the field, see: Rosemary J. Coombe, "'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 McGill L.J. 603; William N. Eskridge Jr., "Gadamer/Statutory Interpretation" (1990) 90 Colum. L.R. 609.

[79]Templeman J. in Street v. Mountford [1985] A.C. 809 at 819, cited in J.W. Harris, "Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules and Humdrum" (1989) 52 Mod. L. Rev. 42 at 60.

its interpretation decisions on policies in favour of particular domestic industries in member countries. The same approach should be taken when the HS is interpreted in national judicial and administrative decisions. The approach should be contextual in that it looks to the use of goods in application but it should not be purposive in the narrow sense of adherence to legislative policies in favour of particular domestic sectors.

The Harmonized System as a multipurpose code has application in too many potential contexts to allow purposive interpretation that is specific to one context. Interpretation should concentrate on factors with overall, global relevance. These could involve the material composition of goods. It is argued in this study that they should involve as well the use of goods, including both their function and their suitability for the particular application. In some cases, this might mean tracking the actual end use of selected imports. In most cases, information on the chief use of like goods will probably be sufficient.

The focus on assumptions of the decision-makers raises additional general questions about the influence of power and whether all relevant voices are heard.[80] At the international level, this can be seen as a question of whether the interests

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[80]John B. Thompson, Critical Hermeneutics: A Study in the Thought of Paul Ricoeur and Jürgen Habermas (Cambridge: Cambridge University Press, 1981); Anthony Giddens, "Jürgen Habermas" in Skinner ed., supra note 71, p.121.

of developing countries are adequately reflected, in the choice of goods to be classified and in the ongoing administration of the system. It would be unfortunate if the Harmonized System served only the interests of the developed world when customs duties are proportionately more important as a source of revenue for governments of developing countries. UNCTAD and several developing countries participated in the elaboration of the HS. Many developing countries have become contracting parties. The HS is about commodities in international trade and the major trading countries will have an important say in decisions. From the beginning, however, the Customs Co-operation Council has attempted to ensure that the interests of developing countries are also recognized.[81] The Council has undertaken extensive programmes of technical assistance and training for application of the HS. As well, the Council has assisted a number of developing countries with the work of tariff transposition to the new system.[82]

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[81]Harmonised System Study Group, Report to the Customs Co-operation Council of the Study Group for the Development of a Harmonised Commodity Description and Coding System for International Trade, Doc. 19.513, March 28, 1973, para.13-15.

[82]Customs Co-operation Council, Annual Report 1985-86, Bulletin No.31, pp.13-14; Customs Co-operation Council, Annual Report 1986-87, Bulletin No.32, p.12; Customs Co-operation Council, Annual Report 1987-88, Bulletin No.33, pp.11-12; Customs Co-operation Council, Annual Report 1988-89, Bulletin No.34, pp.13-14; Customs Co-operation Council, Annual Report 1989-90, Bulletin No.35, pp.14-15; A. Musa, "Technical Assistance for Developing Countries Implementing the Harmonized System," in Customs Co-operation Council, Implementing the Harmonized System: A Management Perspective,

In the Harmonized System, words alone are used as a basis for international law which is to apply in the domestic systems of differing societies in a number of different contexts. The possibility of consensus in interpretation depends on looking to what is shared -- which will include commercial practice as well as the physical characteristics of goods. Both for national decisions and for decisions from the Customs Cooperation Council, interpretation should be as open as possible to the interests of all potential users of the Harmonized System, including private businesses, non-governmental organizations and governments from all parts of the globe.

1986, p.9.

Chapter 2

Implementation and Procedures

I. Implementation

a. Reference 163 and the HS

The Harmonized System replaced the previous customs tariff legislation and tariff schedule on January 1, 1988.[1] The transition to the new system was the subject of a very extensive reference by the Tariff Board which lasted from 1984 to 1988.[2] The reference was complicated by the need to

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[1]An Act respecting the imposition of duties of customs and other charges, to give effect to the International Convention on the Harmonized Commodity Description and Coding System, to provide relief against the imposition of certain duties of customs or other charges, to provide for other related matters and to amend or repeal certain Acts in consequence thereof, S.C. 1987, c.49 (R.S.C. 1985, c.41 (3rd Supp.)) ("Customs Tariff"), amd. S.C. 1988, c.14 (R.S.C. 1985, c.9 (4th Supp.)); S.C. 1988, c.24 (R.S.C. 1985, c.18 (4th Supp.)); S.C. 1988, c.56 (R.S.C. 1985, c.47 (4th Supp.)); S.C. 1988, c.65; S.C. 1989, c.18; S.C. 1990, c.45. For the repealed legislation and tariff schedule, see Customs Tariff Act, R.S.C. 1985, c.C-54.

[2]Tariff Board, Reference No. 163, The Harmonized System of Customs Classification, Vol. I, Chapters 1-24 (1985); Vol. II, Part 1 - Chapters 25-46 and Part 2 - Chapters 47-67 (1985); Vol. III, Revisions to the Board's Recommendations Respecting Chapters 1 to 67 (1987); Vol. IV, Part 1 - Introduction and Preface, Part 2 - Chapters 68-83, Part 3 -

accommodate changes made in the tariff in the meantime, principally in response to another of the Board's references on tariff items for goods made/not made in Canada.[3]13Y A discussion paper on the Harmonized System had been issued in 1981.[4] The government's decision to implement the HS was announced in the February 1986 Budget.[5]

Conversion of the previous customs tariff to the Harmonized System was a difficult task. In the old tariff, as many as 40% of the items had end use or end user provisions which would not fit into the HS. As well, the legislation had

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Chapters 84-85, Part 4 - Chapters 86-98, Part 5 - Supplementary Annex (1987); Vol. V, Consolidation of Concessionary Provisions - Statutory Concessionary Tariff Items, Part 1, Part 2, Part 3 (1988). The Tariff Board also published two documents at the start of public hearings in 1984: Discussion Paper No.1, Issues and Approach (April 1984); Staff Paper Concerning the Concessionary Annex (June 1984).

[3]Tariff Board, Reference No. 157, Tariff Items Covering Goods Made/Not Made in Canada, Phase I (1982), Phase II (1984). See the following amendments to the tariff schedule: S.C. 1984, c.47 (R.S.C. 1985, c.12 (1st Supp.)); S.C. 1985, c.42 (R.S.C. 1985, c.45 (1st Supp.)); S.C. 1986, c.37 (R.S.C. 1985, c.29 (2nd Supp.)); S.C. 1987, c.29 (R.S.C. 1985, c.23 (3rd Supp.)). There were other tariff amendments in the meantime as well, including some in response to the Board's report on implementation of the GATT Customs Valuation Code, Reference No. 159, The Gatt Agreement on Customs Valuation, Part I (1981), Part II (1983) (See: Tariff Board, Reference No. 163, Vol.III, pp.2-3; Reference No. 163, Vol.IV, Part 1, pp.1.17-1.19, 1.28-1.29; Reference No. 163, Vol.V, Part 1, pp.1,5,6).

[4]Department of Finance, Adoption by Canada of Tariff Nomenclature and Statistical Classification System Developed by Customs Co-operation Council, July 1981.

[5]Securing Economic Renewal, Budget Papers tabled in the House of Commons by the Hon. Michael H. Wilson, Minister of Finance, February 26, 1986, p.48.

not kept pace with changing technology. Many imports were classified in broadly-worded items ("apparatus", "parts", "materials", "equipment", "articles", "accessories" etc.) or in residual items ("n.o.p." - not otherwise provided). It was suggested in 1981, for example, that there were 48 possible tariff items in which diesel engines could be classified.[6] The resulting lack of precision made the system uncertain in application and difficult to convert to the more specific descriptions of the Harmonized System.

For the multilateral negotiations to bring the HS Convention into force, GATT had recommended that where existing tariff concessions had to be modified, the following four methods might be used to produce new tariff rates:

> 1. Applying the lowest rate of any previous heading to the whole of the new heading
> 2. Applying the rate previously applied to the heading or headings with the majority of trade
> 3. Applying the trade weighted average rate of duty for the new heading
> 4. Applying the arithmetic average of the previous rates of duty, where no basis exists for establishing reasonably accurate trade allocations.[7]

In the conversion of the Canadian tariff, methods 2 and 3 were the ones generally used when there was no direct match between a previous tariff item and an HS heading or subheading. This meant that for some goods, there was a change in tariff rates.

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[6]Tariff Board, Reference 163, Vol.I, pp.4-6..

[7]General Agreement on Tariffs and Trade, GATT Concessions Under the Harmonized Commodity Description and Coding System, Decision of 12 July 1983, Basic Instruments and Selected Documents, 30S/17, at 20-21.

In response to submissions from affected parties, the Tariff Board usually recommended retaining the previous rates if possible, especially when the change in duty was significant. Following a general recommendation from the Board, interested parties were given a further period of time to ask for adjustments after the HS was implemented, up to June 30, 1990.[8]

The classification numbers in the new Canadian tariff contain 10 digits -- the 6 digits of the HS, 2 for further tariff detail and 2 for statistics. An additional 4-digit Code number is used to identify goods under various items in concessionary schedules. The tariff contains the binding HS Section, Chapter and Subheading Notes, as well as binding Supplementary Notes which have been developed for the 8-digit Canadian tariff item. There are non-binding Canadian Explanatory Notes added to the HS Explanatory Notes, as well as non-binding Statistical Notes for the full 10-digit classification number. The HS General Rules for Interpretation appear at the beginning of the tariff schedule, along with additional Canadian rules. In order to assure coordination with CCC interpretations, the Act contains the following section:

11. In interpreting the headings and subheadings in

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[8]Tariff Board, Reference No. 163, Vol.IV, Part 1, p.1.17. See Customs Tariff Act, s.129, as amd. by S.C. 1989, c.118, s.14. See further S.C. 1990, c.36, s.1, concerning re-determinations.

> Schedule I, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, as amended from time to time, published by the Customs Co-operation Council, established by the Convention establishing a Customs Co-operation Council, done at Brussels on December 15, 1950 and to which Canada is a party.[9]

Statistics Canada has adopted the Harmonized System as the basis of its new classification standard for goods for both trade and production statistics, starting with data for 1988. Trade and production statistics had previously been done on a common base, first developed in the 1950's. The new system, called the Standard Classification of Goods, is gradually being applied for imports, exports, the annual survey of manufactures, production in selected industries, transport by water, road and rail, family expenditures and the consumer price index. The transition to the new system posed some problems, as the previous classification emphasized the stage of processing of goods while the HS is based largely on physical characteristics. Concordances have been developed to provide historical continuity for various series of data.[10]

At the beginning of 1988, with implementation of the Harmonized System, Revenue Canada also brought into force the Customs Commercial System, which uses electronic data

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[9]S.C. 1987, c.49, s.11 (R.S.C. 1985, c.41 (3rd Supp.), s.11).

[10]Statistics Canada, Standards Division, Standard Classification of Goods, 1988, with amendments for 1989, (Ottawa: Supply and Services Canada, 1990).

interchange to facilitate customs administration. Under the new system, goods can be released initially on minimum documentation, and then importers and brokers can complete the entry information and accounting electronically from their own offices through the Customs Automated Data Exchange (CADEX). In most circumstances, it is not necessary to file further documents in hard copy, provided the importer or broker maintains adequate security and meets performance standards for accuracy and timeliness.[11] The Customs 2000 discussion paper indicates that the Department plans to use electronic communication more extensively in the future to concentrate enforcement resources on high-risk imports and streamline administration for low-risk transactions. It will be possible for cargo carriers and importers to transmit information to Customs prior to arrival of a shipment, so that the "release or examine" decision can be made ahead of time. This could be done for individual transactions, or for a

[11]Revenue Canada, Customs and Excise, Customs Commercial System: General Information on the Customs Commercial System, 1986; Revenue Canada, Customs and Excise, Customs Commercial System: Release of Commercial Shipments, 1986. See the following D-Memoranda: Accounting for Imported Goods and Payment of Duties Regulations, Memorandum D17-1-0, Sept. 29, 1988; Interim Accounting (Sight Procedure), Memorandum D17-1-4, Jan. 1, 1988; Release of Commercial Goods, Memorandum D17-1-5, Jan. 1, 1991; Account Settlement Procedures, Memorandum D17-1-6, June 7, 1991.

series of transactions in low-risk situations.[12] Accounting may also move from transaction-by-transaction procedures to consolidated accounting for a series of imports over a period of time. Enforcement could then switch from individual transactions to general audits at the premises of importers or brokers, during which questions of classification, origin and valuation would be examined. It is also possible that Customs might collect information from importers and make it available to other government departments, thus reducing the number of reports which businesses must file.[13]

The world of Customs 2000 is a far cry from the wooden wagon pulling up to a customs station at the border. With new techniques of administration, the observation model is less suitable as the standard instance for classification theory. Enforcement, in fact, can be done when goods are not even present to announce their physical characteristics and also when fairly complete information is available on the commercial context of a transaction. Particularly if Customs is to be gathering data for other government departments, it will be helpful to take account of wider classification

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[12]Revenue Canada, Customs and Excise, Customs 2000: A Blueprint for the Future, undated (1989-90), p.22. A pre-clearance line release system is being tested on truck traffic in Windsor in 1991. The system can be used for individual transactions or, in low-risk situations, for block releases of goods which do not require certificates or permits. See Revenue Canada, Customs and Excise, Customs Line Release Blueprint: A Customs 2000 Initiative, September 1990.

[13]Customs 2000: A Blueprint for the Future, Ibid., p.23.

criteria such as industrial origin, stage of processing and end use.

b. Previous Revisions and Use of the BTN

The customs tariff was in need of a general revision prior to adoption of the Harmonized System. Since 1897, the tariff schedule had been organized by economic sector rather than alphabetically. The sectors were arranged into 11 groups in 1907 and the same basic structure was preserved for eighty years, with the addition of a 12th group in 1968 for chemicals and plastics.[14] Various tariff items were amended from time to time, but there had been no overall review. The tariff thus had a certain historic charm, but was out of touch with modern conditions. Prior to adoption of the HS, for example, there were still three tariff items for opium, levying a specific duty which varied according to whether the goods were "crude" (22100-1, $1 per pound), "powdered" (22200-1, $1.35 per pound) or "prepared for smoking" (22300-1, $5 per pound). Even if domestic manufacturers had perhaps been protected by these items at one time, government policy had clearly changed since then.

Group XII on chemicals and plastics, which was added in

[14]Gordon Blake, Customs Administration in Canada (Toronto: University of Toronto Press, 1957), pp.79-81; S.C. 1897, c.16; S.C. 1907, c.11. The tariff items were re-numbered in the mid-1960's: S.C. 1965, c.17.

1968 after a Tariff Board reference,[15] incorporated relevant portions of the Brussels Tariff Nomenclature. The link to BTN interpretation was to be maintained through Cabinet regulations, a less direct mechanism than the current link to the HS. The provision was as follows:

> 18. (1) The Governor in Council, on the recommendation of the Minister, may from time to time by regulation prescribe rules for, and explanatory notes to assist in resolving conflicts or doubts respecting, the interpretation of the several descriptions of goods in Group XII of Schedule A, set forth under the group designation "Products of the Chemical, Plastics and Allied Industries".
>
> (2) In the formulation of the rules and explanatory notes to be prescribed by the Governor in Council pursuant to subsection (1), the Governor in Council shall be guided, as nearly as may be, by the Nomenclature for the Classification of Goods in Customs Tariffs published by the Customs Co-operation Council in Brussels (commonly known as the "Brussels Nomenclature"), including the rules for the interpretation of the said Nomenclature, the section and chapter notes and the headings, and the Explanatory Notes to the Brussels Nomenclature published by the Council, as amended from time to time.[16]

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[15]Tariff Board, Reference 120, Report by the Tariff Board Relative to the Inquiry Ordered by the Minister of Finance Respecting Chemicals, Vols. 1-15, 1966-1967.

[16]Customs Tariff Act, R.S.C. 1970, c.C-41, s.18 (originally S.C. 1968-69, c.12, s.4, consolidated as R.S.C. 1985, c.C-54, s.40 prior to implementation of the HS). See Chemical and Plastics Tariff Interpretation Rules, SOR/69-9, 1969 Canada Gazette Part II p.39n, amd. SOR/69-369, 1969 Canada Gazette Part II p.1038; SOR/71-353, 1971 Canada Gazette Part II p.1245, consolidated as C.R.C. 1978, c.518, p.3577. In Chevron Chemical v. DMNRCE, App. 1028, July 30, 1973, 6 TBR 1 (T.B.), the Tariff Board determined that the phrase "to assist in resolving conflicts or doubts" in s.18(1) applied to the explanatory notes, but not to the rules for interpretation. The rules were thus mandatory, but any explanatory notes from the Governor in Council would have less

Group XII involved only a limited incorporation of the Brussels Tariff Nomenclature, and the Interpretation Rules in the regulation did not include all of the applicable BTN Notes. The Tariff Board could, of course, treat the Brussels Nomenclature and its Explanatory Notes as an outside source to clarify commercial vocabulary, even if the provision had not been made relevant under s.18.[17] Decisions by the Customs Co-operation Council were nevertheless not binding unless they were part of the Canadian legislative framework and could be rejected if the Board so chose. In Omya, for example, the Department followed a BTN Classification Opinion which had been adopted as an Explanatory Note for the Harmonized System, then not yet in force. The Tariff Board decided that the interpretation was not in accordance with Canadian provisions and found in favour of the appellant.[18] In the Stochem case,

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force. There were no explanatory notes officially prescribed by regulation, but the Department did issue a D-Memorandum based closely on the relevant BTN Explanatory Notes: see the Gorman dissent in Ener-Gard v. DMNRCE, App. 2524, Dec. 2, 1987, 12 TBR 531, 15 CER 180 (T.B.).

[17]BASF Canada v. DMNRCE, App. 1042, May 27, 1974, 6 TBR 41 (T.B.); BASF Canada v. DMNRCE, App.1160, June 11, 1976, 1977 Canada Gazette Part I p.2612 (T.B.). See International Cordage v. DMNRCE, App. 3085, Sept. 19, 1989, 2 TCT 1193 (C.I.T.T.).

[18]Omya v. DMNRCE, App. 2017, Nov. 21, 1986, 11 TBR 550, 13 CER 72 (T.B.). For other instances in which the Board rejected an argument based on Brussels sources, see: Les Explosifs CDN v. DMNRCE, App. 1480, April 1, 1980, 7 TBR 69, 2 CER 86 (T.B.); G.B. Fermentation v. DMNRCE, App. 1591, March 6, 1981, 7 TBR 303, 3 CER 87 (T.B.); Dowell Schlumberger v.

the Deputy Minister applied an HS Explanatory Note to goods imported in 1986 and 1987, prior to implementation of the Harmonized System. The Department argued that this was in accordance with s.11 of the new legislation, requiring that "regard shall be had to ... the Explanatory Notes to the Harmonized Commodity Description and Coding System", which it said was simply declaratory of the previous situation for chemicals. The Tribunal rejected this submission rather abruptly. Adoption of the entire Harmonized System was quite different from the earlier partial adoption of items for chemicals and plastics. The Explanatory Note used by the Department was part of the HS, but not part of the previous CCCN; it had therefore not been in effect anywhere in 1986 and 1987 when the goods were imported. Section 11 of the new legislation did not apply retroactively prior to January 1, 1988.[19]

During the nearly twenty years of partial incorporation of the Brussels system, there were a number of Tariff Board appeals concerning the incorporated items. Some appeals were

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DMNRCE, App. 2640, Nov. 24, 1987, 12 TBR 499, 15 CER 161 (T.B.).

[19]Stochem v. DMNRCE, Apps. 2957, 2989, Jan. 29, 1990, 3 TCT 2019 (C.I.T.T.). See also: Canadian General Electric v. DMNRCE, App. 2878, Jan. 26, 1988, 13 TBR 15, 15 CER 345 (T.B.); Sealand v. DMNRCE, App. 3042, July 11, 1989, 2 TCT 1149 (C.I.T.T.). Within the Harmonized System, Explanatory Notes and Classification Opinions are intended to be persuasive, but are not officially binding on contracting parties.

based on specific provisions of the items themselves -- particularly items 93901 and 93902 which applied to products "without admixture other than an agent necessary to prevent caking"[20] and Interpretation Rules 9 and 10 stating that certain chapters applied to defined elements or compounds "whether or not containing impurities."[21] Other appeals raised more general questions of tariff interpretation, such as whether trade usage would be recognized,[22] whether secondary uses of goods would affect classification,[23] and

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[20]Petro-Lon v. DMNRCE, App. 2123, Aug. 3, 1984, 9 TBR 321, 7 CER 49 (T.B.); C.N.C. Chemical v. DMNRCE, App. 2571, Jan. 5, 1987, 12 TBR 1, 13 CER 184 (T.B.); BASF Canada v. DMNRCE, App. 2689, Jan. 31, 1990, 3 TCT 2040 (C.I.T.T.). For an early case rejecting admixtures, see Varcum Chemical v. DMNRCE, App.315, May 7, 1954, 1 TBR 181 (T.B.).

[21]Chevron Chemical v. DMNRCE, App. 1028, July 30, 1973, 6 TBR 1 (T.B.); William H. Rorer v. DMNRCE, App. 1152, Sept. 27, 1976, 1977 Canada Gazette Part I p.351 (T.B.); Emery Industries v. DMNRCE, App. 1937, May 6, 1983, 8 TBR 667, 5 CER 391(T.B.).

[22]Recognition was usually accorded to usage within the commercial or scientific community: DMNRCE v. Sealed Air, 5 CER 584, (F.C.A., Sept. 23, 1983), rev'g. Sealed Air v. DMNRCE, App. 1726, July 5, 1982, 8 TBR 208, 4 CER 235 (T.B.); Emery Industries v. DMNRCE, App. 1937, May 6, 1983, 8 TBR 667, 5 CER 391 (T.B.); Burroughs Wellcome v. DMNRCE, App. 2673, March 10, 1989, 2 TCT 1054 (C.I.T.T.). Contra: Chevron Chemical v. DMNRCE, App. 1028, July 30, 1973, 6 TBR 1 (T.B.). See the discussion in the Eo Nomine chapter of the Pfizer case: Pfizer v. DMNRCE, App. 963, June 2, 1971, 5 TBR 223 (T.B.), aff'd. [1973] F.C. 3, 5 TBR 236 (F.C.A., Nov. 28, 1972), rev'd. [1977] 1 S.C.R. 456, 5 TBR 257 (S.C.C., Oct. 7, 1975).

[23]Ener-Gard v. DMNRCE, App. 2542, Dec. 2, 1987, 12 TBR 531, 15 CER 180 (T.B.).

which of two possible items was more specific.[24] It is likely that the same pattern will continue with complete incorporation of the new Harmonized System. The specific provisions and rules will determine some interpretation questions, while other matters will fall to be decided according to established approaches to customs tariff and statutory interpretation. It may be noted that industrial origin was treated as a relevant criterion under Group XII. Item 93819-1 covered "chemical products and preparations of the chemical or allied industries." In the Omya appeal, the Tariff Board decided in favour of the appellant in part because the imported goods had been produced by a mining company, and were therefore not within this item.[25]

In the chapters which follow, tariff classification principles are drawn mainly from decisions of the Tariff Board

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[24]Fisons v. DMNRCE, App. 970, Dec. 20, 1971, 1972 Canada Gazette Part I p.1060 (T.B.); Oliver-MacLeod v. DMNRCE, Apps. 1226, 1227, June 14, 1977, 1978 Canada Gazette Part I p.663 (T.B). The item for articles of plastic (93907-1) was often argued as an alternate classification when others did not apply: Instrumentarium v. DMNRCE, App. 1557, Jan. 16, 1981, 7 TBR 254, 3 CER 12 (T.B.);Beekeepers' Supply v. DMNRCE, App. 2533, June 8, 1987, 12 TBR 209, 14 CER 249 (T.B.); O. Schmidt v. DMNRCE, App. 2601, June 10, 1987, 12 TBR 218, 14 CER 143 (T.B.); Kraus Industries v. DMNRCE, App. 2782, Aug. 9, 1988, 17 CER 164 (T.B.). The Tariff Board in one appeal stated that even small percentages of plastic could qualify goods under this item, so long as they had the essential character of a plastic: Amoco Canada v. DMNRCE, App. 1193, May 18, 1977, 1978 Canada Gazette Part I p.829 (T.B.).

[25]Omya v. DMNRCE, App. 2017, Nov. 21, 1986, 11 TBR 550, 13 CER 72 (T.B.). See also Kallestad v. DMNRCE, App. 2200, April 28, 1986, 11 TBR 197, 11 CER 280 (T.B.), rev'd. on other grounds 14 CER 71 (F.C.A., March 25, 1987).

and, starting in 1989, the Canadian International Trade Tribunal. Principles are analyzed first prior to implementation of the Harmonized System and then under the new HS tariff. The general naming principle is the topic of the Eo Nomine chapter. Processing appeals have been separated out from this topic due to their number and their potential significance in the determination of origin of goods for tariff purposes. Most of the General Rules for Interpretation are discussed in the Harmonized System section of the Eo Nomine chapter. Rule 2(a) is also dealt with in the Parts and Entities chapter. Rule 5 on packaging has been added to the Processing chapter. The End Use chapter contains a section on the treatment of end use items in the Concessionary Annex during Tariff Board Reference 163. The Machinery Remission chapter discusses Tariff Board Reference 157 on tariff items for goods made/not made in Canada, as well as the current availability provisions. The chapter on Interpretation analyzes classification appeals according to ordinary principles of statutory interpretation.

There are occasional references throughout to tariff classification in the United States and in the European Economic Community. These references are for comparative purposes only and are not intended to provide a comprehensive account of tariff classification in these other

jurisdictions.[26] Prior case law of the European Court of Justice is particularly helpful to illustrate features of the previous Customs Co-operation Council Nomenclature in application, given the length of experience with the Nomenclature in the EC. These cases, however, are not from institutions of the Customs Co-operation Council. It should be noted that they do not represent official interpretations by the CCC.

II. Tariff Classification Appeals

Most of the classification decisions analyzed in the following chapters are appeals to the Tariff Board or to the Canadian International Trade Tribunal, the agency which replaced the Board at the beginning of 1989.[27] Classification disputes are reviewed initially within the Department. In the

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[26]On classification in the United States, see the following two sources, both in looseleaf format for updating: Ruth F. Sturm, Customs Law & Administration, 3rd ed. (Oceana, 1982); Peter Buck Feller, U.S. Customs and International Trade Guide (Matthew Bender, 1987). On particular commodities, see also Department of the Treasury, U.S. Customs Service, Office of Commercial Operations, Office of Regulations and Rulings & New York Seaport Area, Commodity Classification Under the Harmonized System (Washington: 1988 -), an ongoing series of classification rulings under the HS. For tariff classification in the European Economic Community, see: Patrick L. Kelley and Ivo Onkelinx, EEC Customs Law (Oxford: ESC Publishing, 1990); D. Lasok and W. Cairns, The Customs Law of the European Economic Community (Deventer: Kluwer, 1983).

[27]Canadian International Trade Tribunal Act, S.C. 1988, c. 24 (R.S.C. 1985, c.47 (4th Supp.)).

current Customs Act,[28] a request for a re-determination will go first to a designated officer under s.59, then to the Deputy Minister under s.63. Under s.67, the decision of the Deputy Minister can be appealed to the Canadian International Trade Tribunal. If the matter is not resolved at that level, an appeal can be taken on a question of law to the Federal Court with leave of a judge of that court,[29] and thereafter to the Supreme Court of Canada.

A question of statutory interpretation is likely to be seen as a question of law reviewable by courts.[30] The review, however, could be subject to a certain judicial reluctance to interfere with decisions of specialized agencies such as the Canadian International Trade Tribunal, under the recent "patently unreasonable" doctrine. Under this doctrine, the decision of an agency would be rejected only if the agency's interpretation of its constitutive legislation is patently

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[28]Customs Act, S.C. 1986, c.1 (R.S.C. 1985, c.1 (2nd Supp.)).

[29]Customs Act, s.68. The appeals are to the Federal Court of Appeal.

[30]See generally: René Dussault and Louis Borgeat, Administrative Law: A Treatise, 2nd ed., vol.4, trans. by D. Breen from Traité de droit administratif, 1986 (Toronto: Carswell, 1990), pp.224-43; J.M. Evans, H.N. Janisch, David J. Mullan, R.C.B. Risk, Administrative Law: Cases, Text and Materials, 3rd ed. (Toronto: Emond Montgomery, 1989), pp.381-93, 429-32; David Phillip Jones and Anne S. de Villars, Principles of Administrative Law (Toronto: Carswell, 1985), pp.273-321.

unreasonable.[31] This approach is more deferential to Board or Tribunal interpretations than has been the case in the past, at least in the area of tariff classification appeals. If the "patently unreasonable" doctrine is applied as a threshold for review in tariff appeals, it would give increased weight to decisions of the Canadian International Trade Tribunal. It may be questioned whether this doctrine meets the expectations of international traders for independent judicial review of decisions from governments which are not their own. If the courts are overly deferential, there would be only one classification review outside the government department and that review would be conducted by a Tribunal with a significant number of members with background in the federal public service, the majority of whom do not have legal training. It is possible that the "patently unreasonable" doctrine will be applied to provide more judicial deference to agency decisions in some areas such as labour relations where the doctrine mainly developed, and less deference in other areas such as trade and tariff law.[32]

In previous classification appeals, the Supreme Court has often upheld Tariff Board decisions, even those which had

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[31]See the reasons of Madam Justice Wilson in American Farm Bureau v. Canadian Import Tribunal, [1990] 2 S.C.R. 1324, concurred in by Dickson, C.J. and Lamer C.J.

[32]See the reasons of Mr. Justice Gonthier, in American Farm Bureau v. Canadian Import Tribunal, [1990] 2 S.C.R. 1324, concurred in by La Forest J., L'Heureux-Dubé J. and McLachlin J.

been reversed at the initial level of judicial review.[33] A number of these appeals involved class or kind decisions, in which the Supreme Court held that the choice of criteria was a question of fact which was non-reviewable so long as the Board had evidence to support its determination. On some occasions, the Supreme Court has rejected an interpretation from the Tariff Board, most notably in the Pfizer appeal, in which the Court substituted its own interpretation of the phrase "tetracycline and its derivatives."[34]

The test for review often used in classification appeals was from Edwards v. Bairstow:

> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a

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[33]Both Exchequer Court and the Supreme Court upheld the Tariff Board in the following appeals: Canadian Lift Truck v. DMNRCE (1955), 1 D.L.R. (2d) 497, 1 TBR 121 (S.C.C., Dec. 22, 1955); Accessories Machinery v. DMNRCE, [1957] S.C.R. 358, 1 TBR 229 (S.C.C., April 12, 1957); Dominion Engineering v. DMNRCE, [1958] S.C.R. 652, 1 TBR 153 (S.C.C., Oct. 7, 1958). In the following appeals, the Supreme Court restored a Tariff Board decision which had been reversed by the Exchequer Court: DMNRCE v. MacMillan & Bloedel, [1965] S.C.R. 366, 3 TBR 9 (S.C.C., March 1, 1965); DMNRCE v. St. John Shipbuilding, [1966] S.C.R. 196, 3 TBR 180 (S.C.C., Dec. 20, 1965); DMNRCE v. Research-Cottrell [1968] S.C.R. 684 (S.C.C., March 18, 1968).

[34]Pfizer v. DMNRCE, [1977] 1 S.C.R. 456, 5 TBR 257 (S.C.C., March 4, 1975). The Supreme Court reversed a Tariff Board decision which had treated motors as part of a winch in DMNRCE v. Ferguson Industries, [1973] S.C.R. 21, 4 TBR 368 (S.C.C., May 1, 1972). The Tariff Board, however, maintained the same tariff classification for the motors, since they were still of a class or kind not made in Canada, even when classified separately: Ferguson Industries v. DMNRCE, App. 911, Feb. 28, 1973, 4 TBR 379 (T.B.).

> question of fact, nevertheless if it appears to the appellate court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the court may proceed on the assumption that a misconception of law has been responsible for the determination.[35]

As applied in Canadian Lift Truck and subsequently in several Federal Court appeals, the test involved the question of whether the Tariff Board had properly interpreted the statute and whether there was evidence to support the Board's conclusion.[36] The classification of goods in an item was a question of fact (or sometimes stated as a question of mixed fact and law), reviewable only if the Board had acted without evidence or if no person properly instructed and acting judicially could have reached the same conclusion. The court

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[35]Edwards v. Bairstow [1956] A.C. 14, [1955] 3 All E.R. 48 (H.L.).

[36]Canadian Lift Truck v. DMNRCE (1955), 1 D.L.R. (2d) 497, 1 TBR 121 (S.C.C., Dec. 22, 1955). See DMNRCE v. Volkswagen, [1973] F.C. 643, 5 TBR 330 (F.C.A., June 12, 1973); DMNRCE v. Kipp Kelly, [1982] 1 F.C. 571, 3 CER 196 (F.C.A., June 1, 1981); SKF Canada v. DMNRCE, 10 CER 6, 47 N.R. 61 (F.C.A., March 4, 1983); Cyanamid v. DMNRCE, 5 CER 463, 49 N.R. 204 (F.C.A., July 5, 1983); DMNRCE v. Skega, 12 CER 204, 72 N.R. 280 (F.C.A., Oct. 7, 1986); First Lady v. DMNRCE, 13 CER 42, 71 N.R. 76 (F.C.A., Nov. 7, 1986). In earlier Exchequer Court decisions, a similar test was elaborated in Parke Davis and Dentists' Supply: DMNRCE v.Parke Davis, [1954] Ex.C.R. 1, 1 TBR 12 (Ex.Ct., Dec. 23, 1953); General Supply v. DMNRCE, [1954] Ex.C.R. 340, 1 TBR 81 (Ex.Ct., May 8, 1954); DMNRCE v. General Supply, [1956] Ex.C.R. 248, 1 TBR 217 (Ex.Ct., Feb. 2, 1956); Dentists' Supply v. DMNRCE, [1956-60] Ex.C.R. 450, 2 TBR 87 (Ex.Ct., April 21, 1960); Metropolitan Life v. DMNRCE, [1966] Ex.C.R. 1112, 3 TBR 216 (Ex.Ct., Jan. 25, 1966); Akhurst v. DMNRCE, 3 TBR 155 (Ex.Ct., May 25, 1966).

could, of course, reject the Board's legal interpretation.[37] The test led, however, to some reluctance to interfere, even when the court would have reached a different decision on the facts.[38] It remains to be seen whether the new "patently unreasonable" test will increase judicial deference to statutory interpretations from the Canadian International Trade Tribunal. It may be noted that in the past, the Exchequer Court said that while statutory construction was a question of law, it had jurisdiction to refuse leave to appeal even for such questions of construction.[39] This jurisdiction was not elaborated further in case law, because from 1958 until the recent amendments to the Customs Act in 1986,[40] leave was not required in many cases. Now that the general requirement of leave has been reinstated, this may be the point at which the new doctrine will be tested.

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[37]Great Canadian Oil Sands v. DMNRCE [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976); DMNRCE v. GTE Sylvania, 10 CER 200, 64 N.R. 322 (F.C.A., Dec. 11, 1985); DMNRCE v. First Lady, 13 CER 42, 71 N.R. 76 (F.C.A., Nov. 7, 1986); Ingersoll-Rand v. DMNRCE, 15 CER 47 (F.C.A., Oct. 21, 1987).

[38]Ayerst v. DMNRCE, 4 TBR 404 (Ex.Ct., June 30, 1970); Denbyware v. DMNRCE, unreported, court file A-274-78 (F.C.A., May 15, 1979, see 8 TBR 158), leave to appeal denied, 31 N.R. 172 (S.C.C., Dec. 3, 1979); Frito-Lay v. DMNRCE, [1981] 1 F.C. 177, 2 CER 143 (F.C.A., June 11, 1980).

[39]DMNRCE v. Rediffusion, 1 TBR 100 (Ex.Ct., April 4, 1953); Canadian Horticultural Council v. J. Freedman, 1 TBR 174 (Ex.Ct., Aug. 23, 1954).

[40]S.C. 1958, c.26, s.2 (see Customs Act, R.S.C. 1970, c.C-40, s.48), rep. S.C. 1986, c.1 (R.S.C. 1985, c.1 (2d Supp.)).

Tariff classification appeals to the Canadian International Trade Tribunal involve quasi-judicial decisions, and the Tribunal must follow procedures appropriate for such decisions. The appeals normally involve a full hearing with evidence from witnesses for each party. In Tariff Board appeals in the past,[41] samples of the imported goods were admitted and examined by the Board.[42] Occasionally, the Tariff Board did its own research, but the acceptability of this procedure for quasi-judicial decisions is debatable.[43]

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[41]For a thorough review of previous Tariff Board procedures, see Philip Slayton & John J. Quinn, The Tariff Board: A Study Prepared for the Law Reform Commission of Canada, with the assistance of James Cassels (Ottawa: Supply and Services Canada, 1981).

[42]Milne & Craighead v. DMNRCE, App. 249, Nov. 19, 1951, 1 TBR 58 (T.B.); General Instruments v. DMNRCE, App. 400, May 9, 1957, 2 TBR 40 (T.B.); L'Atelier du Cadre v. DMNRCE, App. 472, May 2, 1958, 2 TBR 157 (T.B.); Publications Etrangères v. DMNRCE, Apps. 1306, 1320, June 26, 1978, 1978 Canada Gazette Part I p.5375 (T.B.); Denbyware v. DMNRCE, App. 1304, April 5, 1978, 6 TBR 620 (T.B.), aff'd. F.C.A. unreported, court file A-274-78 (F.C.A., May 15, 1979, see 8 TBR 158), leave to appeal denied, 31 N.R. 172 (S.C.C., Dec. 3, 1979); Aritech v. DMNRCE, App. 2156, April 1, 1985, 10 TBR 81, 9 CER 29 (T.B.); Magnatrim v. DMNRCE, App. 2841, Sept. 22, 1988, 18 CER 13 (T.B.). See Gillanders v. DMNRCE, App. 3077, Sept. 12, 1990, 3 TCT 2329 (C.I.T.T.). In General Instruments, the Board had to do much of the questioning, since the appellant did not present evidence through witnesses but simply sent two employees who were not able to act as counsel.

[43]Accessories Machinery v. DMNRCE, App. 505, June 22, 1960, 2 TBR 190 (T.B.);SKF Canada v. DMNRCE, Apps. 1713, 1818, June 4, 1982, 8 TBR 179, 4 CER 209 (T.B.), aff'd. 10 CER 6, 47 N.R. 61 (F.C.A., March 4, 1983); General Mills v. DMNRCE, Apps. 2457 etc., July 14, 1987, 12 TBR 256, 14 CER 209 (T.B.), aff'd. 2 TCT 4101, 18 CER 161 (F.C.A., Dec. 6, 1988). See Schlumberger v. DMNRCE, App. 2898, Sept. 10, 1990, 3 TCT 2302 (C.I.T.T.).

The Board had control of its own procedures, including adjournments.[44] In one appeal, a witness uncomfortable in English was permitted to read prepared answers on examination-in-chief.[45] In another, when the Board wanted more information on end use enforcement procedures, a customs official present at the hearing was called as a witness at the Board's request.[46] The Tariff Board Act officially gave the Board power to act on information that it judged authentic even if unsworn, and the Board occasionally relied on this section in its findings.[47] It is unlikely that the provision would have actually permitted a denial of natural justice.[48] In any event, the same leeway is not given to the Canadian International Trade Tribunal, as the corresponding section in

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[44]Maranda & Labrecque v. DMNRCE, App. 671, April 17, 1963, 3 TBR 81 (T.B.); Jim Morrison v. DMNRCE, App. 730, Feb. 21, 1964, 3 TBR 149 (T.B.); Michelin Tires v. DMNRCE, Apps. 1455, 1456, April 28, 1981, 7 TBR 341, 3 CER 150 (T.B.). See Canadian International Trade Tribunal Act, s.17(2). Concerning costs, see Mylord Shirt v. DMNRCE, App. 1751, July 8, 1982, 8 TBR 216, 4 CER 240 (T.B.).

[45]BASF Canada v. DMNRCE, App. 1160, June 11, 1976, 1977 Canada Gazette part I p.2612 (T.B.).

[46]Superior Brake v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.).

[47]Tariff Board Act, R.S.C. 1985, c.T-1, s.12. See: Dorr-Oliver v. Sherritt Gordon, 2 TBR 113 (Ex.Ct., June 2, 1959 - statement in appellant's brief); DMNRCE v. GTE Sylvania, App. 1068, Feb. 5, 1975, 6 TBR 210 (T.B. - videotape evidence).

[48]DMNRCE v. Aliments Tousain, 16 CER 351 (F.C.A., Feb. 3, 1988).

its legislation is not applicable to appeals.[49] Although the Tribunal is directed to make its hearings informal and expeditious (s.35), parties must still be given a fair opportunity to meet the arguments of their opponents.[50] It may be noted that the Tribunal's legislation provides fairly detailed guidance on the treatment of confidential information, a matter which arose before the Tariff Board as well.[51]

On classification appeals, the Canadian International Trade Tribunal may make "such order, finding or declaration

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[49]Canadian International Trade Tribunal Act., S.C. 1988, c.56 (R.S.C. 1985, c.47 (4th Supp.)), s.34.

[50]The Tribunal has recently been considering the possibility of hearings by way of written submissions (CITT Bulletin, Vol.3, No.2, p.1, May 1991). Previously, the Tariff Board usually rejected written evidence when no witness could testify regarding it: Maranda & Labrecque v. DMNRCE, App. 671, April 17, 1963, 3 TBR 81 (T.B.); Vibro-Plus v. DMNRCE, App. 722, March 2, 1961, 3 TBR 140 (T.B.); Clorox v. DMNRCE, App. 1513, June 12, 1980, 7 TBR 110, 2 CER 145 (T.B.). In the Northern Machinery appeal, however, the appeal was allowed on the basis of written submissions from the appellant even though no-one appeared on behalf of the appellant at the hearing: Northern Machinery v. DMNRCE, App. 633, Nov. 22, 1962, 2 TBR 317 (T.B.). See also University of Winnipeg v. DMNRCE, App. 2522, Jan. 28, 1988, 13 TBR 58, 16 CER 14 (T.B.).

[51]Canadian International Trade Tribunal Act, s.43-s.49. See the following Tariff Board appeals: Accessories Machinery v. DMNRCE, App. 505, June 22, 1960, 2 TBR 190 (T.B.); J.M.Wright v. DMNRCE, App. 600, May 4, 1962, 2 TBR 295 (T.B.); Moffatts v. DMNRCE, App. 723, March 4, 1964, 3 TBR 142 (T.B.); Les Produits Ciment Grandmont v. DMNRCE, App. 731, Sept. 30, 1964, 3 TBR 150 (T.B.); Danfoss v. DMNRCE, App. 940, June 1, 1971, 5 TBR 75 (T.B.), aff'd. DMNRCE v. Danfoss, [1972] F.C. 798, 5 TBR 82 (F.C.A., May 9, 1972).

as the nature of the matter may require."[52] This usually means that the Tribunal will determine the classification of the goods. On occasion in the past, the Tariff Board referred matters back to the Deputy Minister,[53] answered a stated question[54] or offered suggestions for re-drafting.[55] The Board consistently asserted a jurisdiction to choose its own classification for goods, not limited to items suggested by the parties.[56]

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[52]Customs Act, s.67(3).

[53]Ralston Purina v. DMNRCE, App. 440, March 31, 1959, 2 TBR 209 (T.B.);Mannesmann Tube v. DMNRCE, App. 467, March 31, 1959, 2 TBR 149 (T.B.); Geigy Chemical v. DMNRCE, App. 806, March 23, 1966, 3 TBR 285 (T.B.); Norton Christensen v. DMNRCE, App. 2181, Dec. 9, 1985, 10 TBR 280, 10 CER 196 (T.B.).

[54]Stephens-Adamson v. DMNRCE, App. 822, April 1, 1966, 3 TBR 301 (T.B.), aff'd. DMNRCE v. Stephens-Adamson, [1967] 1 Ex.C.R. 482, 3 TBR 303 (Ex.Ct., Dec. 13, 1966). See Leland Publishing v. DMNRCE, App. 397, June 14, 1957, 2 TBR 16 (T.B.), aff'd. 2 TBR 17 (Ex.Ct., Feb. 26, 1958).

[55]Dress Manufacturers Guild v. DMNRCE, App. 160, May 11, 1949, 1 TBR 2 (T.B.); Babson v. DMNRCE, App. 208, March 16, 1950, 1 TBR 31 (T.B.- concurring judgment); Prairie Equipment v. DMNRCE, App. 247, Jan. 9, 1952, 1 TBR 56 (T.B.); Reference ... as to Administration of Tariff Item 326c, App. 322, Dec. 8, 1954, 1 TBR 192 (T.B.).

[56]Yardley of London v. DMNRCE, App. 207, July 10, 1950, 1 TBR 31 (T.B.); Lewis Specialties v. DMNRCE, App. 469, March 19, 1958, 2 TBR 151 (T.B.); J.F. Merrall v. DMNRCE, App. 539, May 1, 1961, 2 TBR 227 (T.B.); DeBell v. DMNRCE, App. 635, Nov. 1, 1962, 2 TBR 320 (T.B.); Union Carbide v. DMNRCE, Apps. 652, 769, Dec. 10, 1964, 3 TBR 69 (T.B.); Feather Industries v. DMNRCE, App. 721, Jan. 14, 1964, 3 TBR 138 (T.B.); Ascor v. DMNRCE, App. 798, May 17, 1965, 3 TBR 273 (T.B.); W.J. Elliott v. DMNRCE, App. 869, Nov. 3, 1967, 4 TBR 83 (T.B.), aff'd. 4 TBR 86 (Ex.Ct., Sept. 24, 1968); Hunt Foods v. DMNRCE, Apps. 907 etc., May 29, 1969, 4 TBR 328 (T.B.), rev'd. [1970] Ex.C.R. 830, 4 TBR 333 (Ex.Ct., Sept. 21, 1970) -

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[54]Stephens-Adamson v. DMNRCE, App. 822, April 1, 1966, 3 TBR 301 (T.B.), aff'd. DMNRCE v. Stephens-Adamson, [1967] 1 Ex.C.R. 482, 3 TBR 303 (Ex.Ct., Dec. 13, 1966). See Leland Publishing v. DMNRCE, App. 397, June 14, 1957, 2 TBR 16 (T.B.), aff'd. 2 TBR 17 (Ex.Ct., Feb. 26, 1958).

[55]Dress Manufacturers Guild v. DMNRCE, App. 160, May 11, 1949, 1 TBR 2 (T.B.); Babson v. DMNRCE, App. 208, March 16, 1950, 1 TBR 31 (T.B.- concurring judgment); Prairie Equipment v. DMNRCE, App. 247, Jan. 9, 1952, 1 TBR 56 (T.B.); Reference ... as to Administration of Tariff Item 326c, App. 322, Dec. 8, 1954, 1 TBR 192 (T.B.).

[56]Yardley of London v. DMNRCE, App. 207, July 10, 1950, 1 TBR 31 (T.B.); Lewis Specialties v. DMNRCE, App. 469, March 19, 1958, 2 TBR 151 (T.B.); J.F. Merrall v. DMNRCE, App. 539, May 1, 1961, 2 TBR 227 (T.B.); DeBell v. DMNRCE, App. 635, Nov. 1, 1962, 2 TBR 320 (T.B.); Union Carbide v. DMNRCE, Apps. 652, 769, Dec. 10, 1964, 3 TBR 69 (T.B.); Feather Industries v. DMNRCE, App. 721, Jan. 14, 1964, 3 TBR 138 (T.B.); Ascor v. DMNRCE, App. 798, May 17, 1965, 3 TBR 273 (T.B.); W.J. Elliott v. DMNRCE, App. 869, Nov. 3, 1967, 4 TBR 83 (T.B.), aff'd. 4 TBR 86 (Ex.Ct., Sept. 24, 1968); Hunt Foods v. DMNRCE, Apps. 907 etc., May 29, 1969, 4 TBR 328 (T.B.), rev'd. [1970] Ex.C.R. 830, 4 TBR 333 (Ex.Ct., Sept. 21, 1970) -

In its declarations, the Tariff Board applied a presumption of correctness to the Deputy Minister's classification, so that the appellant had the burden of introducing evidence to show why the appeal should be allowed.[57] If the appellant did not appear at the hearing, the Board retained discretion to proceed, but would usually simply dismiss the appeal.[58] The Respondent would normally

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Exchequer Court affirmed that Board had power to choose its own tariff item; Amarc Jewellery v. DMNRCE, App. 1191, April 27, 1977, 1978 Canada Gazette Part I p.652 (T.B.); Duro Dyne v. DMNRCE, Apps. 1464, 1486, April 28, 1980, 7 TBR 94, 2 CER 115 (T.B.); Booth Photographic v. DMNRCE, App. 1510, April 13, 1981, 7 TBR 329, 3 CER 124 (T.B.), rev'd. DMNRCE v. Booth Photographic, 4 CER 176 (F.C.A., May 17, 1982), reheard App. 1510, 8 TBR 521, 5 CER 140 (T.B.); D.Byron Palmer v. DMNRCE, App. 1728, Dec. 16, 1981, 8 TBR 22, 4 CER 4 (T.B.); Camstat Graphic v. DMNRCE, App. 1790, Dec. 15, 1982, 8 TBR 415, 5 CER 62 (T.B.); Aliments Tousain v. DMNRCE, Apps. 2135, 2150, April 22, 1985, 10 TBR 134, 9 CER 94 (T.B.), rev'd. DMNRCE v. Aliments Tousain, 16 CER 351 (F.C.A., Feb. 3, 1988) - F.C.A. reversed, in part, because the parties had not had an opportunity to discuss the new item before the Board; reheard App. 2135, Dec. 19, 1988, 18 CER 185 (T.B.); Norton Christensen v. DMNRCE, App. 2181, Dec. 9, 1985, 10 TBR 280, 10 CER 196 (T.B.).

[57]Seventy-Seven Oil v. DMNRCE, App. 321, June 21, 1954, 1 TBR 191 (T.B.); Michelin Tires v. DMNRCE, Apps. 1455, 1456, April 28, 1981, 7 TBR 341, 3 CER 150 (T.B.); International Games v. DMNRCE, App. 2024, Dec. 8, 1983, 9 TBR 41, 6 CER 132 (T.B.); Montini Foods v. DMNRCE, App. 2182, July 30, 1985, 10 TBR 196, 9 CER 248 (T.B.). There may have been a slightly heavier burden of proof on the appellant concerning the end use of goods: Superior Brake v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.); L.E. Baxter v. DMNRCE, App. 794, May 21, 1965, 3 TBR 258 (T.B.).

[58]Samuel E. Sigal v. DMNRCE, App. 647, Nov. 22, 1962, 2 TBR 322 (T.B.); B.C. Interior v. DMNRCE, App. 352, Sept. 21, 1955, 1 TBR 240 (T.B.); Lines Bros. v. DMNRCE, App. 515, Nov. 24, 1959, 2 TBR 202 (T.B.); Thomas Skinner v. DMNRCE, App. 519, Oct. 13, 1960, 2 TBR 207 (T.B.); St. Joseph's v. DMNRCE, App. 550, Nov. 27, 1962, 2 TBR 236 (T.B.); Jim Morrison v.

have only a burden of rebuttal. In made/not made in Canada appeals, the Department had a heavier duty to disclose basic information on the production survey conducted, in order to give the appellant a fair chance to present opposing argument.[59]

Tariff classification appeals to the Tribunal must be appeals from a decision of the Deputy Minister concerning

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DMNRCE, App. 730, Feb. 21, 1964, 3 TBR 149 (T.B.); Laminall v. DMNRCE, App. 939, Dec. 2, 1971, 1972 Canada Gazette Part I p.579 (T.B.); Lemoine Tropica v. DMNRCE, App. 1194, Jan. 5, 1977, 1977 Canada Gazette Part I p.2641 (T.B.); Charro Sales v. DMNRCE, App. 1323, Oct. 24, 1980, 7 TBR 201, 2 CER 291 (T.B.); Gerald J. Forcier v. DMNRCE, App. 1452, Dec. 19, 1980, 7 TBR 229, 3 CER 2 (T.B.); Delta Pump v. DMNRCE, App. 1606, Jan. 7, 1981, 7 TBR 231, 3 CER 8 (T.B.); Al Laporter v. DMNRCE, App. 1388, June 1, 1981, 7 TBR 384, 3 CER 188 (T.B.); Rink Manufacturing v. DMNRCE, App. 1654, Oct. 9, 1981, 7 TBR 470, 3 CER 324 (T.B.); Avenue Medical v. DMNRCE, App. 1644, Jan. 5, 1982, 8 TBR 30, 4 CER 9 (T.B.); Memorial University v. DMNRCE, App. 1757, May 18, 1982, 8 TBR 160, 4 CER 181 (T.B.); Cosa Nova v. DMNRCE, App. 1827, Nov. 8, 1982, 8 TBR 329, 4 CER 387 (T.B.); Apt Art v. DMNRCE, App. 2092, Oct. 25, 1984, 9 TBR 358, 8 CER 53 (T.B.); Robert McClure v. DMNRCE, App. 2263, Jan. 16, 1986, 11 TBR 50, 10 CER 298 (T.B.); Contar Floor v. DMNRCE, App. 2549, Oct. 28, 1987, 12 TBR 453, 15 CER 111 (T.B.); Robert Curle v. DMNRCE, App. 2241, Nov. 20, 1987, 12 TBR 494, 15 CER 148 (T.B.). See also: Original New York Seltzer v. DMNRCE, App. 2820, April 18, 1990, 3 TCT 2101 (C.I.T.T.); Swim v. DMNRCE, App. AP-89-175, April 18, 1990, 3 TCT 2102 (C.I.T.T.); International Sigma v. DMNRCE, Apps. 2338 etc., May 7, 1990, 3 TCT 2146 (C.I.T.T.); Unicare Medical v. DMNRCE, Apps. 2437 etc., June 21, 1990, 3 TCT 2195 (C.I.T.T.).

[59]Leland Electric v. DMNRCE, App. 411, Jan. 11, 1960, 2 TBR 81 (T.B.); Great Canadian Oil Sands v. DMNRCE, App. 1051, June 5, 1975, 6 TBR 116 (T.B.), rev'd. DMNRCE v. Great Canadian Oil Sands, [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976). See Magnasonic Canada v. Anti-dumping Tribunal [1972] F.C. 1239. The Canadian International Trade Tribunal placed a heavier burden on the appellant in Nova Aqua v. DMNRCE, App. 3027, July 26, 1990, 3 TCT 2233 (C.I.T.T.).

specific imported goods. In the past, the Tariff Board held that there could be no appeal from a Departmental Memorandum[60] or a ruling as to future imports,[61] although it was quite acceptable to import goods in order to challenge a Departmental policy.[62] Tariff Board decisions have been held to be binding only for the specific imports in question.[63] A declaration once made would be decisive for that particular appeal or reference,[64] but was not a judgment in rem binding on future imports even of identical goods. The Board would, of course, tend to follow its own precedents and would expect others to do so as well,[65] but there was still a possibility for change, particularly to accommodate new technology and new

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[60]Woburn Chemicals v. DMNRCE, App. 228, Feb.6, 1951, 1 TBR 40 (T.B.).

[61]Oakville Yacht v. DMNRCE, App. 2655, June 16, 1987, 12 TBR 227, 14 CER 156 (T.B.).

[62]Canadian Garden v. DMNRCE, App. 1761, 1762, July 23, 1981, 7 TBR 400 (T.B.). The challenge procedure was less successful in Inax Instrument v. DMNRCE, App. 1203, Aug. 30, 1977, 6 TBR 511 (T.B.).

[63]Oppenheimer v. DMNRCE, App. 398, June 7, 1957, 2 TBR 21 (T.B.), aff'd. Javex v. Oppenheimer 2 TBR 28 (Ex.Ct., Oct. 21, 1959), aff'd. [1961] SCR 170, 2 TBR 35 (S.C.C., Jan. 24, 1960); DMNRCE v. Great Canadian Oil Sands, [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976).

[64]MTD Products v. Tariff Board 13 CER 123 (F.C.A., Dec. 10, 1986).

[65]Wm. Gladstone v. DMNRCE, App. 596, March 12, 1962, 2 TBR 291 (T.B.); E.T.F. Tools v. DMNRCE, App. 718, Feb. 10, 1964, 3 TBR 132 (T.B.); W.J.Elliott v. DMNRCE, App. 792, Nov. 8, 1965, 3 TBR 256 (T.B.), aff'd Ex.Ct. (see 3 TBR 258).

trade usage.[66]

Board and Tribunal decisions interpreting items of the previous customs tariff can be expected to have direct relevance for any continuing appeals under that system. For the headings and subheadings of the new tariff based on the Harmonized System, detailed interpretations of previous items will be less relevant. Of greater interest will be the ordinary principles of statutory interpretation which remain unchanged, and the general approaches to customs tariff legislation such as the recognition of trade usage and the interpretation of specificity.

Of continuing interest will be the habits of thought which appeals under the previous system reveal. Canadian customs tariff interpretation has been quite contextual in the past, directing attention to the use of goods in application. This approach has not been restricted to the interpretation of end use items, but has been prevalent for the rest of the customs tariff. There is, as well, a tradition of close administrative involvement in details of Canadian production, evidenced in the history of the Machinery Remission programme. It is argued throughout this study that the contextual model for tariff interpretation is preferable to the observation

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[66]F.Walter Perkin v. DMNRCE, App. 251, Dec. 21, 1951, 1 TBR 61 (T.B.); Olympia Floor v. DMNRCE, App. 1526, Jan. 6, 1982, 8 TBR 31, 4 CER 10 (T.B.), rev'd. 5 CER 562, 49 N.R. 66 (F.C.A., Sept. 14, 1983), reheard App. 1526, March 9, 1984, 9 TBR 169, 6 CER 218 (T.B.).

model which is reflected in the General Rules for Interpretation of the Harmonized System. If interpretation of the new customs tariff cannot accommodate an awareness of the goods in application, then, for those working with the tariff, the Harmonized System will be an uncomfortable fit.

CHAPTER 3

Eo Nomine Principle

I. Eo Nomine Principle
   a. Introduction
   b. Eo Nomine and n.o.p.
   c. Ordinary Meaning, Trade Meaning, Dictionaries
   d. Components and Production
   e. Use: Function and Purpose
   f. Purposive Interpretation

II. Harmonized System

I. Eo Nomine Principle

a. Introduction

The most basic principle in tariff classification law is that of specificity: an import will be classified under the tariff item which describes it most specifically. This is closely related to, although not synonymous with, the naming or eo nomine principle, which says that when an import has been specifically named in a tariff item, that is the item which applies and which takes priority over other possible classifications. In the Accessories appeal which went to the Supreme Court of Canada in 1957, the Tariff Board, the Exchequer Court and the Supreme Court all found that a replacement motor imported for a power shovel was more specifically classified under "(e)lectric motors ... n.o.p."

than as a part of the power shovel.[1] In summarizing the Board's decision, the Exchequer Court said:

> It is clear from the Board's decision that in solving this problem it came to the conclusion that Parliament in setting up a tariff item for "electric motors" ... dealt with them in a specific way by giving them an eo nomine classification, thereby removing them from the more general and unspecific designation of "all machinery ... n.o.p., and complete parts of the foregoing". ... In the Board's opinion there was nothing in the words "parts of the foregoing" ... which in any way pointed directly to "electric motors"; the word "parts" was therefore inadequate to destroy or overcome the eo nomine classification that Parliament had seen fit to confer on "electric motors."[2]

The eo nomine principle thus says that the best description should prevail, meaning the description that seems to point most directly to the goods imported. This does not explain by virtue of which features the description points to the goods. This chapter examines the factors which seemed important in decided disputes.

The observation model for tariff classification focuses on physical characteristics of goods at the time of importation, with the idea that they determine the name. It is argued throughout this study that the contextual model is more appropriate, however, particularly for manufactured

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[1] Accessories Machinery v. DMNRCE, App. 331, March 1, 1955, 1 TBR 221 (T.B.), aff'd. [1956] Ex.C.R. 289, 1 TBR 223 (Ex.Ct., March 6, 1956), aff'd. [1957] S.C.R. 358, 1 TBR 229 (S.C.C., April 12, 1957). For a discussion of the treatment of parts items in relation to eo nomine items, see the chapter on Parts and Entities.

[2] 1 TBR 227.

goods. Under the contextual model, emphasis is on the use of goods in commercial application. If a motor is designed for one particular commercial application, then the context could show that it is more specifically described as a part than a motor. The better description, then, might not actually be the name which on its surface seems to refer to the smaller class of goods.

In this chapter, Part I looks at Canadian decisions prior to implementation of the Harmonized System. It is divided into several sections. The first section after the Introduction examines the basic eo nomine principle and the term "n.o.p." ("not otherwise provided"). The second looks at decisions relating to the use of dictionaries, and the question of specialized meaning in a trade or commercial context. The next section deals with naming according to production processes and essential components. Decisions on naming according to the use and function of goods are reviewed in the following section. The last section considers the purposive or teleological approach to naming. Part II examines the naming principle within the General Rules for Interpretation of the Harmonized System.

The thesis throughout is that naming on the observation model does not work and that interpretation will automatically incorporate the function of the goods in their commercial application. It is argued that description according to

intrinsic, observable characteristics should not be treated as the primary way to approach classification, and that the best theory of description will take account of the natural tendency to describe goods according to their function in context. It is further argued that this does not necessarily imply teleological or purposive interpretation, since the Harmonized System is intended to have wide, global application and the tariff context is not the only context in which it will be interpreted.

b. Eo nomine and n.o.p.

When two tariff items might be applicable, the choice between the two sometimes seems to be done almost syntactically, according to which item is more specific on its surface. One item might cover a whole category of goods, while the other is more narrow. Or one item may be unrestricted, while another is limited by "n.o.p." ("not otherwise provided"[3]). In Pascal Hotel, for example, utensils for cooking were found to be "spoons" rather than

[3]This was the definition in s.2 of the previous Customs Tariff Act, since repealed: Customs Tariff Act, R.S.C. 1985, c.C-54, rep. R.S.C. 1985, c.41 (3rd Supp.). The phrase in French was "non dénommé (n.d.)". For an early application, see: Dress Manufacturers Guild v. DMNRCE, App. 160, May 11, 1949, 1 TBR 2 (T.B.).

"manufactures ... of iron or steel ... n.o.p.".[4] In Tripar, steel strips coated first with brass and then with resin were classified as "coated with metal or metals other than lead, zinc or tin" rather than under an item for steel strips "coated n.o.p."[5] And in the BCL X-Ray Canada appeal, a fluoroscopic TV camera to be used in medical X-ray diagnosis was found to be "x-ray apparatus" rather than "television apparatus, n.o.p.".[6] As was stated in the Okanagan Gift appeal: "When an article is within the description of goods in more than one tariff item, one of which specifically names the article while the other includes a more general description with an n.o.p. provision, the former is to be preferred."[7]

This sort of surface or grammatical analysis is undoubtedly helpful and draws attention to considerations

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[4]Pascal Hotel v. DMNRCE, App. 1985, Feb. 6, 1984, 9 TBR 116, 6 CER 179 (T.B.). For a similar decision which found souvenir spoons to be "spoons" rather than "electro-plated ware n.o.p.", see Okanagan Gift v. DMNRCE, App. 2035, Jan. 10, 1984, 9 TBR 82, 7 CER 4 (T.B.). Pascal Hotel was applied in Johnson-Rose v. DMNRCE, App.2165, Jan. 29, 1985, 10 TBR 22, 8 CER 204 (T.B.).

[5] Tripar v. DMNRCE, App. 1913, Feb. 28, 1983, 8 TBR 605, 5 CER 216 (T.B.).

[6]BCL X-Ray Canada v. DMNRCE, App. 2530, Jan. 22, 1987, 12 TBR 35, 13 CER 212 (T.B.).

[7]Okanagan Gift v. DMNRCE, App. 2035, Jan. 10, 1984, 9 TBR 82, 7 CER 4 (T.B.)., at 85 TBR. For a further example, see: Commander R.D.C. Sweeney v. DMNRCE, App. 1687, Dec. 10, 1981, 8 TBR 12, 3 CER 348 (T.B.).

which cannot be ignored in interpretation. But it does not provide guidance for complete answers. The Pascal Hotel decision really dealt with whether or not the word "spoons" had to be interpreted as only for tableware, given that other goods listed in the same item were so limited. Tariff Board member Gorman wrote a separate concurring judgment in which he pointed out that there was no qualifying adjective for "spoons" as there was for "table knives" and "table forks." In Tripar, the Board said that "coated with metal" was not only a more specific phrase, but was also a better description of the goods than simply "coated n.o.p."; the question of which coating was applied last was therefore less significant. And "x-ray apparatus" was held to be both more specific and also a better description of the camera in question in BCL X-Ray Canada, which presented the information in a usable form since the x-ray screen itself was too small and had too high a voltage to be viewed directly. While the surface, grammatical analysis is necessary, it is not a sufficient explanation of the factors which determine classification decisions. And the grammatical analysis does not help in situations where there are no obvious surface indications, such as the B.L. Marks appeal, where the Board had to determine whether toaster pastries were biscuits or

confections.[8]

In some cases, the phrase "of all kinds" was added to an item as an indication of generality. When the phrase was used in conjunction with "n.o.p.", it usually meant that the particular item had a certain residual function within a small group of items.[9] In Quality Products, for example, imported baskets fell under "baskets of all kinds, n.o.p." when they did not qualify as "baskets of interwoven vegetable fibres."[10] And in Douglas Hoy, imports were classified as "nuts of all kinds n.o.p." when it was decided that they were not "nuts...preserved in salt...n.o.p.".[11] Since the Canadian

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[8]B.L. Marks v. DMNRCE, App. 2199, May 22, 1986, 11 TBR 216, 11 CER 314 (T.B.), aff'd. 14 CER 56 (F.C.A., March 10, 1987). The Board looked to dictionary definitions and commercial advertising to determine that the goods were in fact better described as confections.

[9]For a good example, see Lewis Specialities v. DMNRCE, App. 469, March 19, 1958, 2 TBR 151 (T.B.), where the phrase was seen to indicate both a wide interpretation and a residual function within a group of items.

[10]Quality Products v. DMNRCE, App. 840, Nov. 15, 1966, 3 TBR 323 (T.B.).

[11]Douglas Hoy Vending v. DMNRCE, App. 1178, March 28, 1977, 6 TBR 435 (T.B.). On interpretation of the term "preserved", see Fahn Products v. DMNRCE, App. 1066, Oct. 3, 1974, 1975 Canada Gazette Part I p.448 (T.B.); Mitsui v. DMNRCE, App. 1641, Jan. 12, 1981, 7 TBR 241, 3 CER 10 (T.B.). For other declarations involving the "of all kinds" phrase, see: Lily Cups v. DMNRCE, App. 1162, July 27, 1977, 6 TBR 503 (T.B.); Delta Printing v. DMNRCE, Apps. 1264, 1275, 1280, 1302, June 12, 1978, 1978 Canada Gazette Part I p.5369 (T.B.); Control Data v. DMNRCE, App. 1184, Aug. 8, 1978, 1978 Canada Gazette Part I p.5924 (T.B.); Rolph-Clark Stone v. DMNRCE, App. 1343, Dec. 18, 1978, 1979 Canada Gazette Part I p.984 (T.B.); Rose Country Snack Foods v. DMNRCE, App. 1413, June

tariff prior to 1988 was not hierarchical, the potential overlap could also be with any other item in the schedule. In the Warner Cowan appeal, imported belt strips were found to be "belts of all kinds n.o.p." despite the absence of buckles, since this item was more specific than the only competing one "manufactures of leather n.o.p."[12] In these decisions, it is not clear that the phrase "of all kinds" had any particular function, except perhaps to confirm that interpretation was indeed wide and not limited to contextual factors identified in the surrounding items. "Baskets n.o.p.", "nuts n.o.p." or "belts n.o.p." might have produced exactly the same results in the decisions cited. Occasionally, however, the phrase was given special emphasis. In Canado Industrial, the Board saw the question as whether certain containers for shipping and mailing were "envelopes" or "paper sacks or bags of all kinds," when trade usage, production processes and dictionary definitions were all ambiguous. Ruling that some weight had to be given to the "of all kinds" phrase, the Board majority found in favour of the "sacks or bags" item, which thus had a wider scope.[13] If the

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28, 1979, 6 TBR 871, 1 CER 203 (T.B.).

[12]Warner Cowan Agencies v. DMNRCE, App. 2333, March 26, 1986, 11 TBR 161, 11 CER 166 (T.B.).

[13]Canado Industrial v. DMNRCE, App. 1587, Aug. 10, 1981, 7 TBR 415, 3 CER 253 (T.B.). This declaration was distinguished from an earlier decision in which photographic film containers were found to be envelopes because of

phrase did have an acknowledged function, it was likely to be this general indication of slightly wider application.

It may be noted that in the early Accessories appeal, the eo nomine item for electric motors had priority despite the fact that it was an "n.o.p." item and the mention of parts in the machinery item was not "n.o.p.".[14] The eo nomine aspect meant that the goods were more specifically electric motors than parts of the power shovel. The item would have given way to another item describing the goods more narrowly as motors or as motive power, but did not give way to the parts item. It was thus possible that an eo nomine item could have priority despite being n.o.p., if the competing description was not as good. In another example, in the Underwood appeal, a machine which added and multiplied automatically was classified as "calculating ... machines ... n.o.p." rather than under an item for "adding machines," since adding machines were construed as a smaller, more limited class of calculating machines taken out of the wider

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differing evidence concerning production and trade usage: Quebec Photo Service v. DMNRCE, App. 1463, Oct. 15, 1980, 7 TBR 185, 2 CER 282 (T.B.). The phrase "of all kinds" was also mentioned as an indication of generality in Samuel Sales v. DMNRCE. App. 2336, Sept. 1, 1987, 12 TBR 306, 14 CER 265 (T.B.), a decision which followed IMRA-R.I.T. v. DMNRCE, App. 2547, Jan. 30, 1987, 12 TBR 109, 13 CER 272 (T.B.).

[14]Accessories Machinery v. DMNRCE, App. 331, March 1, 1955, 1 TBR 221 (T.B.), aff'd. [1956] Ex.C.R. 289, 1 TBR 223 (Ex.Ct., March 6, 1956), aff'd. [1957] S.C.R. 358, 1 TBR 229 (S.C.C., April 12, 1957).

item. Since the imported good could also multiply automatically, it was not in the smaller class.[15]

c. Ordinary Meaning, Trade Meaning and Dictionaries

In Parke Davis, the first appeal to the Exchequer Court under the Customs Act, it was established that ordinary meaning would have priority in the interpretation of the tariff. In the words of Mr. Justice Thorson:

> (I)n the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning.[16]

In the appeal, the court upheld the Board's decision to classify penicillin as a "biological product" because that was in accordance with the technical meaning in the pharmaceutical industry at the time. Evidence concerning this technical meaning was to be based solely on testimony of

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[15]Underwood v. DMNRCE, App. 331, June 30, 1966, 3 TBR 310 (T.B.). See also: Les Publications Etrangères v. DMNRCE, Apps. 1306, 1320, June 26, 1978, 1978 Canada Gazette Part I p.5375 (T.B.) at 5380; Thomas J. Lipton v. DMNRCE, App. 2204, April 25, 1985, 10 TBR 145, 9 CER 102 (T.B.), in which the majority held herbal teas to be "vegetable materials for use as flavourings, n.o.p." rather than under 71100-7 "prepared ...beverages...for human consumption," in part because of the residual nature of the 71100-7 item.

[16]DMNRCE v. Parke Davis, [1954] Ex.C.R. 1, 1 TBR 13 (Ex.Ct., Dec. 23, 1953) at 21 TBR, aff'g. Parke Davis v. DMNRCE, App. 195, Nov. 29, 1949, 1 TBR 10 (T.B.). See: ETF Tools v. DMNRCE, 3 TBR 50 (Ex.Ct., May 8, 1962); DMNRCE v. First Lady, 13 CER 42, 71 N.R. 76 (F.C.A., Nov. 7, 1986).

experts before the Board and Mr. Justice Thorson criticized the dissenting Board member for basing his opinion on his own technical knowledge as a chemist.

The ordinary meaning approach was confirmed by the Supreme Court of Canada in the Pfizer case which had to do with the importation of various forms of the antibiotic oxytetracycline. If the goods were within "tetracycline and its derivatives" they were subject to duty; otherwise they would be duty free, under a general exemption for antibiotics. The appellant argued that since the goods could not actually be produced from tetracycline itself, they were not "derivatives" of tetracycline and thus were not dutiable. The Tariff Board and the majority of the Federal Court of Appeal both decided in favour of the Crown, on evidence which showed a possible wider meaning of "derivative" in the industry, covering substances with closely related chemical structures, even if they could not actually be prepared from the basic substance. This wider meaning was rejected by the Supreme Court of Canada which decided in favour of the appellant and found the goods to be duty free.[17] The judgment of the Supreme Court, written by Mr. Justice Pigeon, confirms the

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[17]Pfizer v. DMNRCE, App. 963, June 2, 1971, 5 TBR 223 (T.B.), aff'd. [1973] F.C. 3, 5 TBR 236 (F.C.A., Nov. 28, 1972), rev'd. [1977] 1 S.C.R. 456, 5 TBR 257 (S.C.C., Oct. 7, 1975).

primacy of the ordinary language approach:

> The rule that statutes are to be construed according to the meaning of the words in common language is quite firmly established and it is applicable to statutes dealing with technical or scientific matters .... Of course, because 'tetracycline' designates a specific substance the composition of which has been determined in terms of a chemical formula, resort may be had to the appropriate sources for ascertaining its meaning. In my view, this does not imply that 'derivative' is to be construed as it might be in a scientific publication. The question concerns the meaning of 'derivative' not of 'tetracycline'.[18]

The decision of the Supreme Court appears to mirror the approach in Parke Davis, but is actually more restrictive in how much territory it is prepared to cede to specialized technical usages. The Exchequer Court in Parke Davis accepted the technical meaning of "biological product" even though both words could be said to be individually part of general linguisitc competence. The Supreme Court of Canada, on the other hand, was not prepared to give up supervision of "tetracycline and its derivatives," even though the phrase is probably not part of everyday speech for the average citizen.

The Supreme Court decision involved as well an assertion of literal interpretation and a rejection of the purposive approach.[19] At the time, there were no manufacturers of

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[18]5 TBR 261

[19]The decision was also based on questions of onus and bilingual legislation, which are discussed in, respectively, the chapter on Implementation and Procedures and the Interpretation chapter.

oxytetracycline in Canada, but there was one manufacturer of chlortetracycline, a directly competitive antibiotic. The majority of the Federal Court of Appeal below had rejected the narrow meaning of "derivative" in part because it seemed to lead to an improbable result. As Chief Justice Jackett stated:

> (t)he result of such an interpretation ... would be that the only protection afforded to the manufacturer in Canada of chlortetracycline and its salts would be against the importation of the salts of tetracycline. Not only would there be no protection against the importation of oxytetracycline or its salts but there would be no protection against the importation of chlortetracycline or its salts.
> It does seem improbable that it would have been intended to afford a chlortetracycline manufacturer protection against tetracycline and its salts but not against chlortetracycline itself or its salts.[20]

While the narrow meaning requiring actual production of one substance from the other existed in both ordinary and specialized usage, the Board and the Court of Appeal were willing to adopt the wider meaning found in some technical usage in order to give effect to the legislator's presumed purpose.

Mr. Justice Pigeon in the Supreme Court clearly rejected this sort of reasoning and opted instead for a literal reading, which reduced the relevance of the commercial context and at the same time gave the Court full jurisdiction over the

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[20] 5 TBR 238

task of interpretation.[21] The Tariff Board had relied heavily on dictionary definitions since the expert witnesses were evenly divided on technical usage. Dictionaries can, of course, be read just as easily by judges on review as by the members of the Tariff Board. The Federal Court of Appeal had been reluctant to re-do the interpretative work of the Board below, but the Supreme Court had no such hesitation. Even if there had been a finding of fact based on the expert testimony as to what industry usage permitted, the approach taken by Mr. Justice Pigeon meant that the Court would still have had jurisdiction to re-interpret. Since the ordinary meaning of "derivative" was the one to use, the judges - not the technical experts - were in control.

There is obviously more than protection of turf in the approach taken by the Supreme Court. Removed from arguments about the proper role of judges in relation to administrative agencies, the trade meaning/ ordinary meaning split becomes a very generalized question of who should decide. In the context of the HS applied on a wide geographic basis and for a number of different uses, this becomes less a question of justifying the supervisory power of the judiciary and more a

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[21]In part, Mr. Justice Pigeon was also giving effect to the presumption that taxing legislation should be interpreted in favour of the taxpayer (see Interpretation chapter). As well, it should be noted that the goods had previously been free of duty as chemicals of a kind not produced in Canada. The question was how much the new scheme was intended to change.

simple question of how much should be determined by each user. In most contexts, those making classification decisions would be within the particular trade or industry and would automatically adopt the trade usage without giving the matter any particular thought. Manufacturers of antibiotics, for example, could be expected to use the technical language of their industry automatically without wondering whether an ordinarily competent speaker of the language in question would agree. The issue is basically how much has to be universal in order for the HS to function as it was intended: - how much has to be common in order for the classifications to be translatable across different contexts and geographic regions. In a sense, this is a question as well of how much has to be susceptible to control by the HS Committee in Brussels and how much can be left to localized practice.

The Supreme Court decision in Pfizer was the high-water mark of the ordinary meaning approach in Canadian tariff law. In some contexts, ordinary meaning will quite naturally have priority. It would normally be used, for example, in the classification of common, everyday objects such as socks,[22] tool bags,[23] hats[24], bread[25] or cooking apparatus.[26] The

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[22]Trimark Athletic v. DMNRCE, App. 2121, July 25, 1984, 9 TBR 311, 7 CER 41 (T.B.).

[23]Cavalier Luggage v. DMNRCE, App. 2573, Jan. 30, 1987, 12 TBR 69, 13 CER 243 (T.B.) - pencil cases were not included.

context, however, can indicate that the ordinary, everyday meaning is not the one intended. In Adams Brands, for example, when the Tariff Board cited an old popular song about chewing gum losing its flavour as evidence of the ordinary meaning of "gums and blends consisting wholly or in chief part of gums, n.o.p.", the Federal Court of Appeal reversed. According to the Court of Appeal, the surrounding tariff items indicated that this one was intended to refer only to natural gums, not to synthetic chemical products like the goods in question.[27]

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[24]Greisman v. DMNRCE, App. 439, May 27, 1957, 2 TBR 107 (T.B.); Midway v. DMNRCE, App. 486, June 10, 1959, 2 TBR 167 (T.B.); Neckwear v. DMNRCE, App. 582, May 4, 1962, 22 TBR 272 (T.B.). The definitions established in these appeals were followed in: Beco v. DMNRCE, App. 1540, Dec. 5, 1980, 7 TBR 220, 2 CER 318 (T.B.); Kates Millinery v. DMNRCE, App. 1660, March 10, 1982, 8 TBR 103, 4 CER 76 (T.B.), aff'd. F.C.A., June 13, 1984 (see [1984] 1 F.C. 1157).

[25]B.L. Marks v. DMNRCE, App. 1186, Jan. 31, 1977, 1977 Canada Gazette Part I p.2821 (T.B.).

[26]Food Machinery v. DMNRCE, App. 443, July 16, 1959, 2 TBR 118 (T.B.), aff'd. Campbell Soup v. DMNRCE, 2 TBR 120 (Ex.Ct., Dec. 9, 1960); A.G.Zuccarini v. DMNRCE, App. 512, Dec.17, 1959, 2 TBR 201 (T.B.). See also: J.H. Ryder v. DMNRCE, App. 255. Jan. 25, 1952, 1 TBR 66 (T.B.); A.P.I. Laboratory v. DMNRCE, App. 1948, July 25, 1983, 8 TBR 730, 5 CER 514 (T.B.).

[27]Adams Brands v. DMNRCE, Apps. 1485 etc., Feb. 26, 1981, 7 TBR 288, 3 CER 71 (T.B.), rev'd. DMNRCE v. Adams Brands, 7 CER 153 (F.C.A., April 8, 1984), reheard Adams Brands v. DMNRCE, Apps. 1485 etc., July 3, 1984, 9 TBR 280, 7 CER 7 (T.B.). The Federal Court of Appeal did not, however, mean that any human intervention in the production process would disqualify goods from being "natural gums" : Kelco Specialty v. DMNRCE, App. 2129, Jan. 21, 1985, 10 TBR 10, 8 CER 191 (T.B.), rev'd. 13 CER 345 (F.C.A., March 2, 1987). For

Furthermore, despite the Supreme Court judgment in Pfizer, it is still quite possible to apply trade meaning to the interpretation of the customs tariff. In Denbyware, an unreported Federal Court of Appeal decision, the court dismissed an appeal from a Tariff Board declaration which had adopted trade usage concerning pottery and porcelain. Mr. Justice Urie of the Court of Appeal said:

> A customs tariff being for commercial usage in respect of the conditions of admission of goods to Canada, the terms used in it should be given the meaning which the term used is generally given in the trade concerned with the production and sale of the goods in question.[28]

This particular passage was quoted in Olympia Floor, a later judgment of the same court, when it allowed an appeal from a Tariff Board decision and directed the Board to follow trade meaning rather than ordinary meaning. The dispute had to do with imported ceramic building tile which the Deputy Minister had classified as "earthenware tiles n.o.p.". The appellant argued that these tiles were less porous and less

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further examples of context over-riding common, everyday meaning, see: Consolidated Sand v. DMNRCE, App. 229, Feb.6, 1951, 1 TBR 42 (T.B.); I.D. Foods v. DMNRCE, App. 2526, Nov. 28, 1986, 11 TBR 559, 13 CER 90 (T.B.).

[28]Denbyware v. DMNRCE, Reasons for Judgment p.2, unreported, F.C.A. file # A-274-78, May 15, 1979, (also cited 5 CER 566), aff'g. Denbyware v. DMNRCE, App. 1304, April 5, 1978, 6 TBR 620 (T.B.). The Supreme Court of Canada refused leave to appeal the Court of Appeal decision in Denbyware: 31 N.R. 172, Dec. 3, 1979. See also: Josiah Wedgwood v. DMNRCE, App. 1634, April 26, 1982, 8 TBR 154, 4 CER 164 (T.B.); Anglo-Canadian v. DMNRCE, App. 2116, Sept. 17, 1984, 9 TBR 345, 7 CER 116 (T.B.).

water-absorbent than the tiles known in the industry as earthenware tiles. Since there was no other item providing a better description, the appellant said the goods should be classified as "manufactures of clay n.o.p.". The Tariff Board majority followed one of the Board's earlier declarations[29] and said that the goods were earthenware tiles according to the ordinary meaning of that phrase. Tariff Board member Martin dissented on the ground that the appellant had presented adequate evidence to support its argument concerning the specialized trade meaning and this was the meaning which should be applied.[30]

The Federal Court of Appeal adopted this dissent when it allowed the appeal. Referring to the judgment of Mr. Justice Pigeon in Pfizer, the court implied that the use of trade meaning here was like relying on technical meaning for interpretation of the word "tetracycline" and it was trade meaning that should be followed. Speaking for the court, Mr. Justice Ryan said:

> (I)f the term 'earthenware tiles' carries a recognized trade meaning, it must be read in that sense. I have no doubt that a legislature could specify that, even though a term has a special meaning in a trade with which a statute deals, it must nevertheless be read in another sense; and if that can be done expressly, it can certainly be done

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[29]Tilechem v. DMNRCE, App. 1102, March 30, 1976, 1977 Canada Gazette Part I p.2810 (T.B.).

[30]Olympia Floor v. DMNRCE, App. 1526, Jan. 6, 1982, 8 TBR 31, 4 CER 10 (T.B.).

> by implication. But I do not read [the tariff item in question], whether alone or in context, as being intended to require giving to 'earthenware tiles' a non-trade meaning where, as here, a trade meaning is proved.[31]

In the result, the matter was referred back to the Tariff Board which held the goods to be "manufactures of clay n.o.p.".[32]

This decision is not as easily reconciled with the Supreme Court judgment in Pfizer as the Federal Court of Appeal seems to imply, although it is quite consistent with the approach in Denbyware and with the judgment of the Exchequer Court in Parke Davis. If ceramic tiles, porcelain and penicillin are all to be classified according to trade usage, why not also derivatives of tetracycline? The Supreme Court's enthusiasm in Pfizer for interpretation by the non-specialist seems out of place. And, given the Court's refusal to grant leave to appeal in Denbyware, it may be that Pfizer no longer represents the definitive position on the question. Where the context requires, it may be that the Court would decide instead to follow outside expert opinion.

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[31]Olympia Floor v. DMNRCE, 5 CER 562, 49 N.R. 66 (F.C.A., Sept. 14, 1983), at 575 CER.

[32]Olympia Floor v. DMNRCE, App. 1526, March 9, 1984, 9 TBR 169, 6 CER 218 (T.B.); see also Olympia Floor v. DMNRCE, Apps. 1617 etc., July 23, 1984, 9 TBR 308, 7 CER 27 (T.B.). The appellant was again successful when the Department reclassified further imports of the goods after a slight change in the tariff item: Olympia Floor v. DMNRCE, App. 2548, 2642, Nov. 10, 1987, 12 TBR 479, 15 CER 137 (T.B.).

Perhaps the best solution is to take the suggestion of the Federal Court of Appeal and concentrate on the context in which each term is used:

> It seems reasonably clear that, if a term used in the Customs Tariff has a particular meaning in a trade, it should be interpreted in that sense. But there are, of course, many words used in the Customs Tariff which are quite ordinary words, words used in ordinary conversation in an everyday way; such words are to be read in their ordinary sense.[33]

As an illustration of this approach, the Court cites an earlier decision of the Exchequer Court, Hunt Foods, in which that court had to interpret "lard compound and similar substances, n.o.p.". The Court followed trade meaning for "lard compound" but said that "similar substances" should be interpreted according to its ordinary meaning since it did not have a specialized trade sense.[34] In form at least, this is reminiscent of the technique in Pfizer. The difference is the implication that trade meaning should have priority if it is shown that a specialized trade usage exists.

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[33]Olympia Floor v. DMNRCE, 5 CER 562 (F.C.A., Sept. 14, 1983) at 565.

[34]Hunt Foods v. DMNRCE, [1970] 1 Ex.C.R. 828, 4 TBR 333 (Ex. Ct., Oct. 26, 1970), rev'g. Apps. 907, 908, 909, May 29, 1969, 4 TBR 320 (T.B.). A Tariff Board reference was held as a result of the Exchequer Court decision in this appeal: 1975 Canada Gazette Part I p.573. For other declarations interpreting the item, see: Consumer Foodcraft v. DMNRCE, App. 343, June 8, 1955, 1 TBR 237 (T.B.); Les Entreprises Mair Fried v. DMNRCE, App. 1220, March 22, 1978, 1979 Canada Gazette Part I p. 3048 (T.B.); Frito-Lay v. DMNRCE, Apps. 1241 etc., April 10, 1978, 6 TBR 634 (T.B.), aff'd. 2 CER 143 (F.C.A., June 11, 1980).

If the question is determined by who the expected audience would be, it probably does make sense to follow established trade meaning, since most users of the customs tariff or of the Harmonised System in general would be business users already operating within the context of that trade. It would be an artificial and unnecessary imposition to expect them to disregard accepted trade terminology and always ask themselves whether a particular interpretation would agree with that of the ordinarily competent speaker. If the Harmonized System is to expand into areas beyond official government enforcement, it should not be hostile to the commercial environment.

After the Federal Court of Appeal judgments in Denbyware and Olympia Floor, the Tariff Board was quite willing to adopt trade usage where relevant. In Beaulieu, for example, the Board looked to the full commercial context and decided that imported jute yarn was not "twine" because it would not be so classified in trade usage. The goods might perhaps have met a dictionary definition of the term. In the trade, however, twine was a more-processed yarn used for binding, while the imported goods were a less expensive, less refined yarn used for the structural backing of rugs. Citing a previous declaration which in turn had referred to Olympia Floor, the Board decided that the imported goods were not twine but jute yarn, and thus eligible for duty exemption under the General

Preferential Tariff.[35] At this point, it may probably be said that trade usage is followed in just as routine a fashion as before the Supreme Court judgment in Pfizer.[36]

When trade meaning is applied, it is the meaning as understood by those knowledgeable in the trade.[37] As the Tariff Board said in Carl Zeiss:

In an issue relating to the interpretation of a

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[35]Beaulieu v. DMNRCE, App. 2386, Jan. 20, 1987, 12 TBR 27, 13 CER 206 (T.B.), citing British Steel v. DMNRCE, App. 2067, May 11, 1984, 9 TBR 240, 7 CER 230 (T.B.).

[36]See: Ocelot Chemicals v. DMNRCE, App. 2019, Dec. 12, 1985, 10 TBR 286, 10 CER 208 (T.B.); Fisher Scientific v. DMNRCE, App. 2650, Nov. 2, 1987, 12 TBR 457, 15 CER 114 (T.B.); Jagenberg v. DMNRCE, App. 2686, Oct. 7, 1988, 17 CER 296 (T.B.); Cassidy's v. DMNRCE, Apps. 2914 etc., March 2, 1989, 2 TCT 1043 (C.I.T.T.); Burroughs Wellcome v. DMNRCE, App. 2673, March 10, 1989, 2 TCT 1054 (C.I.T.T.); International Cordage v. DMNRCE, App. 3085, Sept. 19, 1989, 2 TCT 1193 (C.I.T.T.). For declarations after Denbyware but before Olympia Floor, see: Turmac v. DMNRCE, App. 1401, Oct. 15, 1979, 6 TBR 931, 1 CER 292 (T.B.); C.J. Rush v. DMNRCE, App. 1422, July 24, 1979, 6 TBR 902, 1 CER 231 (T.B.); Wilson Machine v. DMNRCE, App. 1402, July 23, 1979, 6 TBR 895, 1 CER 226 (T.B.), which cites the F.C.A. judgment in Pfizer, but not the Supreme Court decision. For a few earlier examples of routine application of trade usage, see: J.H. Ryder v. DMNRCE, App. 371, March 5, 1956, 1 TBR 252 (T.B.); Reference re Tall Oil Fatty Acids, App. 497, Aug. 5, 1959, 2 TBR 184 (T.B.); American-Standard v. DMNRCE, App. 529, Nov. 22, 1960, 2 TBR 220 (T.B.); Industrial Textiles v. DMNRCE, App. 539, May 1, 1961, 2 TBR 226 (T.B.); Bomac v. DMNRCE, App. 785, March 5, 1965, 3 TBR 243 (T.B.); Beloit Sorel v. DMNRCE, App. 839, Nov. 25, 1966, 3 TBR 321 (T.B.). Trade usage also seems to be readily adopted when it has to do with measurement: Anglophoto v. DMNRCE, App. 1397, Feb. 2, 1979, 6 TBR 767, 1 CER 61 (T.B.); Auto Radiator v. DMNRCE, App. 1424, June 12, 1979, 6 TBR 857, 1 CER 194 (T.B.).

[37]W.B. Elliott v. DMNRCE, 4 TBR 86 (Ex. Ct., Sept. 24, 1968); The King v. Planters Nut, 1 TBR 271 (Ex.Ct., March 21, 1951).

> statute such as the Customs Tariff, neither the technical usage of a particular science or art nor the use current among the uninformed should prevail over the commercial or trade usage common among those informed persons conversant with the subject matter.[38]

It is not the technical or laboratory sense which governs, but rather the terminology of those who deal with the goods as articles of commerce.[39] It is the meaning as understood by users of the goods in ordinary commerce[40] and, in a sense, this is really the ordinary or regular meaning.

In each case, it is a question of deciding what should be the relevant context. In a given context, trade meaning and ordinary meaning might be the same,[41] or at least the evidence might be insufficient to establish a distinctive trade use.[42] And it may be that even if a distinctive trade usage could be proved, the ordinary meaning would still be

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[38]Carl Zeiss v. DMNRCE, App. 849, April 27, 1967, 4 TBR 31 (T.B.) at 37.

[39]Reference re Dehydrated Grasses, App. 493, Dec. 4, 1958, 2 TBR 175 (T.B.); Cosmos Imperial v. DMNRCE, App. 421, Aug. 19, 1957, 2 TBR 99 (T.B.); Sherwin-Williams v. DMNRCE, App. 215, Aug. 28, 1950, 1 TBR 35 (T.B.).

[40]Aries Inspection v. DMNRCE, App.1446, Jan. 25, 1980, 7 TBR 18, 2 CER 25 (T.B.); Mine Equipment v. DMNRCE, App. 948, Dec. 17, 1970, 1971 Canada Gazette Part I p.2829 (T.B.) at 2831; Mount Bruno v. DMNRCE, App. 167, May 19, 1949, 1 TBR 6 (T.B.).

[41]Sefer v. DMNRCE, 5 TBR 52 (Ex.Ct., Nov. 16, 1970).

[42]Universal Fur v. DMNRCE, App. 231, April 2, 1951, 1 TBR 43 (T.B.); Quebec Photo v. DMNRCE, App. 1463, 7 TBR 185, 2 CER 282 (T.B.); Johnson & Johnson v. DMNRCE, App. 1653, April 15, 1982, 8 TBR 147, 4 CER 146 (T.B.).

the one to apply, particularly for goods in common household use.[43] In Perley-Robertson, for example, instant coffee was classified as an extract of coffee in accordance with ordinary meaning, despite the fact that the coffee trade studiously avoided the word "extract" due to its association with an earlier inferior product which had been marketed unsuccessfully. The suppression of the term within the industry had not been so pervasive as to change the ordinary meaning and it was ordinary meaning which governed.[44] It is really a question of looking each time to the context to decide whether specialist or non-specialist meaning should govern. The context for most discussions about instant coffee, for example, is likely to be different from the context for most discussions about derivatives of tetracycline. If the Harmonized System is to be successful in gaining acceptance, it should look to the context in which the term is in general use.

In the Pfizer appeal, one reason given by the Supreme Court of Canada for holding that the Tariff Board had erred was that the Board had referred to two dictionaries after the hearing to try to resolve ambiguities in evidence given by

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[43] Grand Specialties v. DMNRCE, App. 2565, Jan. 28, 1987, 12 TBR 60, 13 CER 233 (T.B.).

[44] G. Perley-Robertson v. DMNRCE, App. 586, Jan. 25, 1962, 2 TBR 274 (T.B.).

witnesses for both sides.[45] The use of dictionaries is obviously very common in interpretation - ordinary dictionaries to show ordinary meaning[46] and trade sources to show trade meaning.[47] On judicial review, other Canadian courts have been more reluctant than the Supreme Court to re-do the Board's interpretations and to limit the Board's use of dictionaries.

In the Dentists' Supply appeal, the Exchequer Court dealt with the question of its role on appeals from Tariff Board interpretations. The appellant had argued that since there was no issue concerning credibility of witnesses, the Exchequer Court was in the same position as the Tariff Board in deciding the correct interpretation. The Court disagreed and in his decision, President Thorson stated:

> The right of appeal conferred by section 45 of the Customs Act is confined to an appeal ... upon a question ... of law and in the present case it is limited to the question stated. ... It is not

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[45]Pfizer v. DMNRCE, App. 963, June 2, 1971, 5 TBR 223 (T.B.), aff'd. [1973] F.C. 3, 5 TBR 236 (F.C.A., Nov. 28, 1972), rev'd. [1977] 1 S.C.R. 456, 5 TBR 257 (S.C.C., Oct. 7, 1975).

[46]For example: Quebec Photo Service, App. 1463, Oct. 15, 1980, 7 TBR 185, 2 CER 282 (T.B.); Swissrose v. DMNRCE, App. 894, June 28, 1968, 4 TBR 241 (T.B.). In excise tax cases, marketing surveys have occasionally been used: Procter & Gamble v. DMNRCE, Apps. 2314 etc., Feb. 27, 1986, 11 TBR 129, 11 CER 100 (T.B.).

[47]East West Fur Dressers v. DMNRCE, App. 1484, Oct. 24, 1980, 7 TBR 194, 2 CER 288 (T.B.); Petrofina v. DMNRCE, App. 1669, Sept. 2, 1981, 7 TBR 452, 3 CER 277 (T.B.); Concentrated Foods v. DMNRCE, App. 2552, Sept. 15, 1987, 12 TBR 321 (T.B.).

> within the competence of this Court to draw its own conclusions from the evidence adduced before the Tariff Board. Its jurisdiction is restricted to determining whether the Tariff Board erred as a matter of law in holding as it did.[48]

Concerning the use of dictionaries, he continued:

> It is established law that the construction of a statutory enactment is a matter of law. ... But once it has been decided that, in the absence of a clear expression to the contrary, words in a statute should receive their ordinary meaning but that if it appears from the context in which they are used that they have a special technical meaning and should be read with such meaning, then it seems clear that what the ordinary meaning of the words is or what their special technical meaning is, if they have one, is a question of fact. ... When it is sought to ascertain the ordinary meaning of a word resort is had to recognized dictionaries, not to judicial decisions, for it is in the dictionaries that the ordinary meaning of a word is to be found. ... And similarly, when it has been held that ... a word has a special technical meaning and should be read with such meaning then what such special technical meaning is should be considered a matter of fact. ... The cases in which resort is had to standard dictionaries in order to ascertain the meaning of words in a statute, whether ordinary, specially technical or particular, are so numerous that they need not be cited.[49]

The Court here approved the use of dictionaries for ordinary and also for trade meaning and indicated its reluctance to interfere with the Board's determinations as to what those

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[48] Dentists' Supply v. DMNRCE, 2 TBR 87 (Ex.Ct., April 21, 1960) at 89, aff'g. App. 415, May 14, 1957, 2 TBR 86 (T.B.).

[49] 2 TBR 91-92.

meanings were, since these would be questions of fact.[50] President Thorson stated that he would have agreed with the Tariff Board's decision even on a full appeal de pleno, and thus he clearly agreed that the decision should be upheld on the more limited review restricted to a question of law.

In a more recent decision, the Federal Court of Appeal distinguished the Supreme Court judgment in Pfizer on the question of use of dictionaries after the hearing. The SKF Canada appeal concerned the classification of adapters for roller bearings. The importer had argued unsuccessfully at the Tariff Board level that they should be classified as parts of the bearings. One of the grounds of appeal was that the Tariff Board had consulted four dictionaries not cited by either counsel during argument to check definitions of the words "adapt" and "adapter." The Court dismissed the appeal and distinguished Pfizer on the ground that the dictionaries in that case had been used to show that tetracycline could be prepared from oxytetracycline, a disputed question of fact. In SKF Canada, however, the Board used the dictionaries simply to show the usual meanings of the words in question. In giving his judgment, Mr. Justice Urie concluded:

There was no reliance placed by the Board in this

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[50]For a further example of reluctance to interfere with a Tariff Board declaration which had made extensive use of dictionaries, see: DMNRCE v. Volkswagen, [1973] F.C. 643, 5 TBR 330 (F.C.A., June 15, 1973), aff'g. Volkswagen v. DMNRCE, App. 980, April 17, 1972, 5 TBR 322 (T.B.).

> case on the dictionary meanings of "adapter" either for the purpose of contradicting testimony given before the Board or as evidence to support a factual determination. The reference to dictionaries here was for the purpose of ascertaining the usual, common and ordinary meaning of the word as part of the determination of the proper classification of the goods for tariff purposes. It did not involve a departure from the rules of natural justice to take judicial notice of such dictionary meanings. The same information was available to the parties and their counsel in common with all other persons able to read. It did not involve in any way the introduction of evidence in respect of which the appellant was unable to respond. As a result there was not, in my opinion, a denial of natural justice.[51]

Counsel were undoubtedly surprised to see the Board basing its decision on material not cited during the hearing, but when dictionaries are used to show ordinary meaning perhaps this is not an objectionable procedure. The Board is, after all, expected to speak English and French and if the dictionary is used to show usage by ordinarily competent speakers of the language in question, this may be a fitting matter for

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[51] SKF Canada v. DMNRCE, 10 CER 6, 47 N.R. 61 (F.C.A., March 4, 1983) at 10 CER, aff'g. Apps. 1713, 1818, June 4, 1982, 8 TBR 179, 4 CER 209 (T.B.). The Court of Appeal has also upheld a Tariff Board decision despite the Board's use of certain regulations and a reference book which were not discussed at the hearing: General Mills v. DMNRCE, Apps. 2457 etc., July 14, 1987, 12 TBR 256, 14 CER 209 (T.B.), aff'd. 18 CER 161 (F.C.A., Dec. 6, 1988). Where, however, findings were not supported by evidence and where the parties were not given a chance to discuss the Board's choice of tariff item, the Court has reversed: Aliments Tousain v. DMNRCE, Apps. 2135, 2150, April 22, 1985, 10 TBR 134, 9 CER 94 (T.B.), rev'd. DMNRCE v. Aliments Tousain, 16 CER 351 (F.C.A., Feb. 3, 1988), reheard Aliments Tousain v. DMNRCE, App. 2135, Dec. 19, 1988, 18 CER 185 (T.B.).

judicial notice. The question of whether ordinary usage really covers adapters for roller bearings is, however, somewhat debatable.[52]

d. Components and Production

In the customs tariff prior to implementation of the Harmonized System, goods could be classified by composition without having to be composed entirely of only one element. In the Dow Chemical appeal, the Tariff Board held that the imports did not have to be 100% ethylene glycol in order to be classified as this since 100% purity was rarely available; all that was necessary was that the product be "of such degree of purity as not to be confused in either technical or commercial language" with various blends of ethylene glycol which were for sale on the market.[53] Similarly, the goods in Toronto Refiners were old lead scrap even though they

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[52]The Canadian International Trade Tribunal did its own dictionary search in Schlumberger v. DMNRCE, App. 2898, Sept. 10, 1990, 3 TCT 2302 (C.I.T.T.) at 2305.

[53]Dow Chemical v. DMNRCE, App. 284, March 12, 1953, 1 TBR 109 (T.B.). See: Reference ... as to the Classification of Dehydrated Grasses, App. 493, Dec. 4, 1958, 2 TBR 175 (T.B.); Canadian Titanium v. DMNRCE, App. 1097, July 28, 1975, 1976 Canada Gazette Part I p.1558 (T.B.); Degussa v. DMNRCE, App. 2545, July 28, 1987, 12 TBR 279, 14 CER 233 (T.B.). Note also the declaration in George Perley-Robertson v. DMNRCE, App. 591, Feb. 26, 1962, 2 TBR 283 (T.B.), in which the goods were classified as tea even though they did not contain the whole tea leaf. They were "100% pure tea" in the sense that they contained nothing that did not come from tea leaves (except of course the container which was included pursuant to the words of the item).

contained some tin,[54] the mirrored sliding doors in Monarch Mirror were mirrors despite the presence of tracks and nylon rollers[55] and the fruit syrups in Imported Delicacies were still fruit syrups even though they contained a small quantity of stabilizer in addition to the fruit juice and sugar.[56] It was the meaning of the language in use which governed, whether ordinary or trade usage. In the Bic appeal, for example, the Tariff Board held that cigarette lighters were nickel-plated even though they were not 100% nickel-plated; the goods would not have worked if they had been. The Federal Court of Appeal agreed, accepting as a finding of fact that there was sufficient plating to justify the classification.[57]

If goods could thus be classified as consisting of one element when other substances might actually be present, how was it determined which component set the description? How did usage show what the "essence" was? One criterion

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[54]Toronto Refiners v. DMNRCE, App. 1861, Feb. 4, 1983, 8 TBR 537, 5 CER 152 (T.B.). Goods did not have to be worthless in order to be "waste": Cloudfoam v. DMNRCE, App. 636, Jan. 30, 1963, 3 TBR 54 (T.B.); Oliver-MacLeod v. DMNRCE, Apps. 1226, 1227, June 14, 1977, 1978 Canada Gazette Part I p.663 (T.B.).

[55]Monarch Mirror v. DMNRCE, App. 1458, Jan. 11, 1980, 7 TBR 13, 2 CER 19 (T.B.).

[56]Imported Delicacies v. DMNRCE, App.1541, Nov. 14, 1980, 7 TBR 207, 2 CER 302 (T.B.), also dealt with in the chapter on Processing and Packaging.

[57]Bic v. DMNRCE, App. 2170, March 1, 1985, 10 TBR 58, 8 CER 280 (T.B.), aff'd. 13 CER 277 (F.C.A., Feb. 5, 1987).

sometimes suggested was that of the component of chief value, but this was not a frequent test in Canadian tariff law. It was listed in the residual item 71100-1, which applied prior to implementation of the HS when goods were not covered by any other tariff item.[58] Where the tariff item gave no specific directions, however, the chief value test was not a significant factor. It was applied in the Microsonic appeal, against the argument of counsel for the Deputy Minister who said that function and use should govern instead. The appeal had to do with calculators which had been attached to rulers for sale as desk ornaments. The Department had classified them as rulers, but the Tariff Board disagreed and held that the goods were electronic data processing apparatus. The calculators represented about 90% of the value of components and the Board specifically adopted chief value as the test, while mentioning that the primary usage of the goods also related to data processing rather than to the ruler

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[58] Alcock, Downing & Wright v. DMNRCE, App. 473, July 7, 1958, 2 TBR 158 (T.B.); Union Carbide v. DMNRCE, Apps. 652, 769, Dec. 10, 1964, 3 TBR 69 (T.B.); Cavalier Luggage v. DMNRCE, App. 2573, Jan. 30, 1987, 12 TBR 69, 13 CER 243 (T.B.). Under the item, if the goods had consisted only of the component of chief value and if that component would have been classified at a higher rate of duty, then the higher rate applied. The component of chief value was the component which exceeded in value any other single component.

functions.[59] The Microsonic appeal contradicted on this point an earlier decision which dealt with Pac-man watches. That appeal, Waltham Watch, had similarly found goods to be electronic data processing apparatus rather than watches, but the reasoning was based on function rather than on the component of chief value. The toy watches relied on micro chip processing for both the game (95% of capacity) and the time-keeping functions (5% of capacity). Classification as data processing apparatus thus covered both functions and best reflected the essential nature of the goods. Relative value of the various components was not the determining factor.[60]

Classification by component of chief value was specifically rejected in Reference on Cotton and Plastic,[61] and in Jossal Trading concerning classification of a needle work kit.[62] The use of relative costs was also rejected as a

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[59]Microsonic v. DMNRCE, App. 2274, Sept. 6, 1985, 10 TBR 210, 9 CER 259 (T.B.). The relative value of components was also mentioned in Monarch Mirror v. DMNRCE, App. 1458, Jan. 11, 1980, 7 TBR 13, 2 CER 19 (T.B.) at 17 TBR.

[60]Waltham Watch v. DMNRCE, App. 2117, Dec. 27, 1984, 9 TBR 388, 8 CER 133 (T.B.), aff'd. DMNRCE v. Waltham Watch, 15 CER 159 (F.C.A., Nov. 18, 1987). See: Jewel Radio v. DMNRCE, App. 282, Jan. 20, 1953, 1 TBR 104 (T.B.); General Instrument v. DMNRCE, App. 400, May 9, 1957, 2 TBR 40 (T.B.).

[61]Reference on Cotton and Plastic Combination Materials, App. 362, Jan. 10, 1956, 1 TBR 243 (T.B.) at 245-46.

[62]Jossal Trading v. DMNRCE, App. 1243, Oct. 25, 1977, 1978 Canada Gazette Part I p.7547 (T.B.) at 7549. The appellant had been arguing that the goods came under the residual item 71100-1, which would have made the criterion relevant.

criterion in the James E. Kelley appeal which had to do with an antique barge made more than 50 years prior to importation but modified somewhat in the interim. The question was whether the modifications prevented the goods from qualifying as an "article ... produced more than fifty years prior to the date of importation." The figures on relative value showed the restorations to be about one-quarter of total value, but the Board did not adopt this as a test:

> The cost of alterations, particularly in the case of restorations, bears a relationship only to the difficulty of maintaining or restoring the integrity or usefulness of the original article and the fragility, inherent or technological, of the original. ... The article must be readily recognizable and indeed identifiable with the original product despite any alterations and regardless whether any restoration was well or badly done, the current cost of these in relation to the cost of the original more than fifty years previous being totally irrelevant.[63]

Since the essence of the vessel had remained the same and the original qualities were still present,[64] the Board held that the barge qualified as an article produced more than 50 years previously. This decision points out some of the difficulties involved in application of a test which depends on the component of chief value. Costs could easily have changed over time and the information required might not be readily

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[63]James E. Kelley v. DMNRCE, App. 2082, March 22, 1985, 10 TBR 70, 9 CER 236 (T.B.) at 79 TBR.

[64]The Board, unfortunately, phrased this as "those essential qualities that gave it its original value." - p.78 TBR.

available. If we look only to prices of components before they are incorporated into the finished product we ignore the changes which the transformation may have effected. The addition of a relatively inexpensive element may be the key factor which makes the finished product suitable for its function and gives it commercial value. The chief value criterion, thus, can be inconvenient and risks being somewhat artificial, judging not the imported good itself but rather the situation that existed prior to creation of the imported good.

A further criterion used in some tariff items was that of the relative weight of components, but this criterion suffers from the same defects as relative value. It was not normally applicable unless required by the terms of the item.[65] When weight was mentioned, it could be difficult to decide whether this meant weight of components prior to processing or weight when the imported goods were subsequently analysed.[66]

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[65]Bic v. DMNRCE, 13 CER 277 (F.C.A., Feb. 5, 1987), aff'g. App. 2170, March 1, 1985, 10 TBR 58, 8 CER 280 (T.B.). But see Monarch Mirror, App. 1458, Jan. 11, 1980, 7 TBR 13, 2 CER 19 (T.B.), in which the Board indicated that the track and rollers did not affect classification of mirrored sliding doors, because they were of minimal value and weight relative to the mirrors.

[66]See, for example, Sealed Air v. DMNRCE, App. 1726, July 5, 1982, 8 TBR 208, 4 CER 235 (T.B.), in which the Board was trying to decide whether goods contained more than 50 per cent by weight of polyether polyols. Since it was not possible to analyse after the goods were processed, the Board used the

The main criterion used to determine which component set the description normally related to the use of the goods in some way. The description had to apply to the whole of the goods, not just a part.[67] It also had to be relevant to the main purpose of the goods, preferably to the component which gave the goods their commercial value or the "active ingredient" which other elements simply enhanced.[68] In the Alcock, Downing & Wright appeal, for example, a combination of asphalt and woven fibreglass was held to be plasticized asphalt rather than a coated fabric since it was used as an asphalt coating to protect pipes from corrosion and the fibreglass component was there merely as a carrier to reinforce the asphalt.[69] In the Garant appeal, the importance

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weight of elements prior to processing. The decision was subsequently reversed by the Federal Court of Appeal, which determined that the criterion relating to weight did not apply to this paragraph of the tariff item: DMNRCE v. Sealed Air, 5 CER 584 (F.C.A., Sept. 23, 1983).

[67]Rema Tip Top v. DMNRCE, App. 880, Jan. 23, 1968, 4 TBR 181 (T.B.).

[68]A.M. Meincke v. DMNRCE, App. 254, June 24, 1952, 1 TBR 65 (T.B.).

[69]Alcock, Downing & Wright v. DMNRCE, App. 473, July 7, 1953, 2 TBR 158 (T.B.). See contra: Andrew Gilchrist v. DMNRCE, App. 745, July 9, 1964, 3 TBR 188 (T.B.), in which the goods were a combination of textile and plastic, but the Board refused to accept function of the goods as the basis for classification. The Board may have been influenced in Gilchrist by a number of previous appeals which had found similar goods to be coated textiles, rather than plastics, based in large part on trade usage: Reference ... on Cotton and Plastic Combination Materials, App. 362, Jan. 10, 1956, 1 TBR 243 (T.B.); Lewis Specialties v. DMNRCE, App. 469, March

of function was so great that the functioning part of an axe, the axe head, was classified under an item for axes even though the item did not mention parts. The Board reasoned that since it was the axe head which gave the tool its special quality, this was the essence of the good, and the handle was only secondary. The tariff item for axes would apply, therefore, whether or not the imported goods had a handle.[70]

Attention to components could mean that the description depended in some way on what the raw materials were before they were processed into the imported good. In the Power Cranes Reference, Board Vice-Chairman Leduc added a note in which he listed the principal types of tariff items:

> (I)n the Canadian Tariff, the commodity may be specifically designated by name (eo nomine); or by the nature of its components (manufactures of rubber, etc. ...); or by the end use to which it is to be put; or, as one of a number of related commodities under a generic term (entering in the cost of production, etc.); or in many instances, left to fall within the ambit of the 'basket' item of the Tariff Schedule, No. 711.[71]

Goods could thus be classified by component under a

19, 1958, 2 TBR 151 (T.B.); Wm. Gladstone v. DMNRCE, App. 596, March 12, 1962, 2 TBR 291 (T.B.). The Reference, Appeal 362, was later followed in Crown Wallpaper v. DMNRCE, App. 825, April 27, 1967, 4 TBR 3 (T.B.). See further: Crown Wallpaper v. DMNRCE, App. 1080, Dec. 18, 1974, 1975 Canada Gazette Part I p.1589 (T.B.); Reed Decorative v. DMNRCE, App. 1375, Oct. 3, 1980, 7 TBR 177, 2 CER 261 (T.B.).

[70]Garant v. DMNRCE, App. 2085, March 27, 1984, 9 TBR 190, 6 CER 233 (T.B.).

[71]Reference ... regarding ... Power Cranes and Shovels, App. 272, March 18, 1953, 1 TBR 90 (T.B.) at 94.

"manufactures of" item, which would normally be n.o.p. In this sense, classification by component was a secondary approach, used when some other item did not apply.[72]

Goods did not need to be composed 100% of only one element to be a "manufacture of" it, but the presence of that element had to be substantial.[73] In Debell,[74] metal binders did not qualify as manufactures of aluminum since they contained both aluminum and steel. In Union Carbide, goods were neither manufactures of regenerated cellulose nor manufactures of paper when they contained elements of both. The Board in Union Carbide would have permitted some light treatment of either paper or cellulose "to give or to enhance some ancillary characteristic" of the goods, but held that when the two elements were substantially combined together, the resulting product was "essentially neither one nor the other" and the tariff classification had changed.[75]

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[72]For examples, see: Garden Research v. DMNRCE, App. 766, Nov. 19, 1964, 3 TBR 225 (T.B.); Acme Slate and Tile v. DMNRCE, App. 835, Sept 19. 1966, 3 TBR 314 (T.B.); and Chinmei Enterprises v. DMNRCE, Nov. 7, 1986, 11 TBR 542, 13 CER 53 (T.B.).

[73]Clorox v. DMNRCE, App. 1246, Oct. 28, 1977, 6 TBR 544 (T.B.).

[74] Debell v. DMNRCE, App. 635, Nov. 1, 1962, 2 TBR 320 (T.B.).

[75]Union Carbide v. DMNRCE, Apps. 652, 769, Dec. 10, 1964, 3 TBR 69 (T.B.), p.73. Note also Kenneth Field v. DMNRCE, App. 2066, Feb. 22, 1985, 10 TBR 39, 8 CER 252 (T.B.), in which the imported goods were classified as manufactures of marble despite having a small quantity of mother-of-pearl.

Classification according to process of production had a minor part in interpretation of certain tariff items. In Motor Coach, for example, goods were not part of an air control assembly because it could not be said that anything had been assembled or put together during their production.[76] And in Gibson Broom, plastic pot scourers were classified as knitted fabrics since the production process involved knitting.[77] Production processes were not a significant factor in general, however. In most cases, some other criterion such as trade meaning would be dominant. In the Cosmos appeal, for example, goods were classified as "knitted" because this met trade usage even though the process of production did not technically involve knitting.[78]

The production process, indeed the identity of the producer, was mentioned specifically in certain tariff items which provided special treatment for art. When these requirements were mentioned, they were followed quite strictly. In the David McMillan appeal, for example, the imported goods were classified as photographs rather than "photographic or photomechanical representations, numbered and

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[76]Motor Coach Industries v. DMNRCE, App. 457, May 1, 1958, 2 TBR 140 (T.B.).

[77]Gibson Broom v. DMNRCE, App. 1387, May 16, 1979, 6 TBR 842, 1 CER 171 (T.B.).

[78]Cosmos Imperial v. DMNRCE, App. 421, Aug. 19, 1957, 2 TBR 99 (T.B.).

signed by the artist" because they had not been numbered and signed, a practice which was not customary in the industry.[79] And in the Gallery Alberta appeal, lithographs from an original painting by Salvador Dali were classified as prints rather than as "original ... lithographs ... printed from plates or blocks wholly executed by hand, and signed by the artist." The Board majority held that the goods did not qualify because Dali's participation in the production process was not sufficient and, in any case, the contract with Dali stipulated that these prints could not be called original lithographs.[80] Attention to the activities of the producer could be crucial in these items. In the David Kelsey and George Mede (Pro-Arte 78) appeal, the Federal Court of Appeal reversed the Tariff Board and held that goods did not qualify as "original sculptures and statuary, including the first twelve replicas made from an original work or model .. the professional production of artists only." The bronzes were not original sculptures because they had been made long after the death of the artist, Suzor-Côté. They did not qualify as replicas even though they had been cast from plaster models

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[79]David McMillan v. DMNRCE, App. 1585, March 27, 1981, 7 TBR 323, 3 CER 120 (T.B.). The Board also held that "photograph" was a more specific description.

[80]Gallery Alberta v. DMNRCE, App. 2243, Jan. 30, 1986, 11 TBR 71, 11 CER 14 (T.B.). aff'd. 18 CER 69 (F.C.A., Oct. 7, 1988). The goods also failed to meet the numbering and signing requirements for photomechanical representations.

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created by Suzor-Côté for this purpose. According to the Court of Appeal, the problem was that the casting had been done by skilled artisans rather than by artists.[81]

e. Use: Function and Purpose

An interpretation which emphasizes the function or purpose of goods under an eo nomine item pays special attention to the context in which language operates beyond the customs tariff. The context can be specialized, involving usage in a particular application, or it can be non-specialized, referring simply to the meaning of a term in ordinary language. Whatever the context, the attention directed to use implies that naming involves the imposition of a human pattern of thought in which goods are arranged according to categories set by human society. Naming is not done simply by observable characteristics, since those characteristics may not have real meaning. It may not matter,

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[81]DMNRCE v. D. Kelsey and G. Mede (Pro-Arte 78), 11 CER 291, 69 N.R. 228 (F.C.A., May 5, 1986), rev'g. D. Kelsey and G. Mede (Pro-Arte 78) v. DMNRCE, App.1987, June 8, 1984, 9 TBR 267, 7 CER 303 (T.B.). Between the Tariff Board and Federal Court of Appeal decisions the Department had settled a similar appeal which turned out to have met the requirements: Kenneth J. Martens v. DMNRCE, App. 2105, Oct. 30, 1984, 9 TBR 361, 8 CER 56 (T.B.). See also: J.E. Hastings v. DMNRCE, App. 1545, June 1, 1981, 7 TBR 376, 3 CER 184 (T.B.); Le Cygne v. DMNRCE, App. 2525, May 16, 1988, 13 TBR 256, 16 CER 269 (T.B.). On the question of what is a "sculpture", see D.E.Gillanders v. DMNRCE, App. 3077, Sept. 12, 1990, 3 TCT 2329 (C.I.T.T.).

for example, whether the object is green or blue, so long as it fulfills the presumed function. The basic assumption here is that the categories which human beings naturally impose will depend on use far more than on observable characteristics. Use is a more fundamental, more reliable criterion for the naming of goods than factors which depend exclusively on inspection at the time of importation.

The use factor may be seen as defining a typical model of what the term means, against which the imports in question can be judged. A good example of how this works appeared in the Beco Imports appeal, dealing with the classification of stainless steel flatware knives designed for use with meals on airplanes. The Department had classified them as "table knives." The appellant said that fold-down trays on aircraft were not tables, and the knives should therefore be classified as "knives n.o.p." The Tariff Board agreed with the Department and found the knives to be "table knives," since:

> The term "table knife" refers to an eating instrument used to reduce portions of food to bite size. That is clearly the function of the subject goods ... . Even if it had been established that a fold-down food tray is not a "table" in the broadest sense, a table knife is defined by its function, not its place of use.[82]

The goods, in other words, met the functions of the typical model of a table knife and were to be classified as such even

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[82]Beco Imports v. DMNRCE, App. 2215, Agu. 14, 1985, 10 TBR 202, 9 CER 253 (T.B.) at 203 TBR.

if the trays in question were not strictly "tables".

In commercial application, attention to use can manifest itself as the wish to give priority to trade meaning. The trade vocabulary brings with it certain automatic assumptions about looking at goods according to their suitability for particular purposes, even in tariff items that are not end use. The Beaulieu appeal discussed above under trade meaning is a good example of this sort of contextual interpretation. The imported goods could be classified as either jute yarn or jute twine. The Department examined them, found that they consisted of two plys twisted together in opposite directions and determined that they therefore met the dictionary definition of "twine." The appellant did not dispute the Department's empirical findings, but denied that this was what twine meant in the trade. In the rug-making business, the jute used for backings was only slightly processed and contained impurities. It was known as jute yarn and was much cheaper than more processed goods known as jute twine which had general use for binding. Despite the fact that the tariff item did not mention end use, the Board found for the appellant and interpreted according to suitability for particular purposes:

> The substantial difference in cost clearly reflects the difference shown to exist between the two products, one of which is obviously produced for and suitable only for use as backing weft in the manufacture of goods such as rugs and carpets, while the other is a product to be used by consumers for

> tying or binding and is far too expensive for industrial use in the manner described above. ... The goods are clearly yarns for use in the weaving of rugs and carpets and are so regarded in the trade rather than twines which are a different, more costly product, produced for use in tying and binding.[83]

The goods were therefore classified according to their suitability for the rug-making business, which was presumed to represent their chief use. Despite the fact that the item was not an end use one, the classification decision was taken in commercial context according to the language and assumptions of those dealing with the goods in regular transactions. In a sense, this is treating the customs tariff as a "Users' Tariff" rather than a "Customs Officers' Tariff." This is precisely the attitude that will be required if the Harmonized System is to attain its goal of becoming a classification system in general application for purposes other than the assessment of customs duties.

Beco and Beaulieu also neatly illustrate the two principal categories of naming according to use: naming by actual functions (table knives in Beco) and naming by suitability for particular purposes (jute yarn in Beaulieu). The cases below are arranged to deal first with naming according to actual function and then with naming according to suitability for given purposes.

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[83] Beaulieu v. DMNRCE, App. 2386. Jan. 20, 1987, 12 TBR 27, 13 CER 206 (T.B.) at 34 TBR.

When naming was done by function, decisions would depend on whether the goods matched a typical model which the words of the tariff item were thought to describe.[84] In Texas Electroniques, for example, the imported deep fryer with an automatic basket lifting device did not qualify under "fryers equipped with automatic conveyors" because this was just a small piece of equipment intended for use in snack bars, not a large fryer with extensive conveyor systems for full-scale commercial processing. Although the goods did actually move food a short distance automatically, this was not what an "automatic conveyor" was taken to mean in the customs tariff.[85] Similarly, the signboards imported in an unassembled condition in Ontario Outdoor Advertising did not qualify as "signs" since they did not yet have a message or

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[84]Certain tariff items mentioned the required function. For them, the analysis was done directly without reference, implicit or explicit, to a typical model. See: Mannesmann Tube v. DMNRCE, App. 467, March 31, 1959, 2 TBR 149 (T.B.) - "strength-testing machines"; Atlas Asbestos v. DMNRCE, App. 498, Nov. 27, 1961, 2 TBR 186 (T.B.) - "strength-testing machines"; Corning Canada v. DMNRCE, App. 1711, June 14, 1982, 8 TBR 188, 4 CER 214 (T.B.) - "high thermal shock resisting glassware"; Montreal Interglass v. DMNRCE, App. 1784, Oct. 25, 1982, 8 TBR 283, 4 CER 362 (T.B.) - "high thermal shock resisting glassware"; Canada Printing v. DMNRCE, App. 2326, Feb. 20, 1986, 11 TBR 125, 11 CER 97 (T.B.) - "lubricating oils, composed wholly or in part of petroleum."

[85]Texas Electroniques v. DMNRCE, App. 2391, Aug. 1, 1986, 11 TBR 351, 12 CER 94 (T.B.). See La Coopérative de Croustilles v. DMNRCE, App. 2870, Sept. 2, 1988, 17 CER 347 (T.B.). Similarly, a labelling machine was not a printing press in Soabar v. DMNRCE, Apps. 2322 etc., Aug. 20, 1986, 11 TBR 397, 12 CER 131 (T.B.).

meaning to convey and thus did not do what a typical sign was supposed to do.[86] A typical "dental instrument" was "a device used and manipulated by the dentist, in part within the mouth of the patient, in treating the teeth,"[87] and a typical "surgical instrument" was "a device required to execute an operation."[88] Even in the Whiteco decision, in which the Board said that "classification ...[of the import] must not

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[86]Ontario Outdoor Advertising v. DMNRCE, App. 448, Jan. 9, 1958, 2 TBR 137 (T.B.). The relevant time is the time of importation. Classification will be done according to the functions which the goods meet at that time: Cytrigen Energy v. DMNRCE, App. 2540, July 30, 1986, 11 TBR 338, 12 CER 85 (T.B.).

[87]Weil Dental v. DMNRCE, App. 856, Nov. 7, 1967, 4 TBR 41 (T.B.) at 49. See also: Dentists' Supply v. DMNRCE, App. 415, May 14. 1957, 2 TBR 86 (T.B.), 2 TBR 87 (Ex.Ct., April 21, 1960); University of Manitoba v. DMNRCE, App. 882, April 25, 1968, 4 TBR 184 (T.B.). In a later appeal, Weil Dental was unable to have this definition applied to cotton rolls, as they were not seen as "devices" even though they met the required function; see Weil Dental v. DMNRCE, Apps. 1038, 1044, May 14, 1973, 1973 Canada Gazette Part I p.3049 (T.B.).

[88]Instrumentarium v. DMNRCE, App. 1557, Jan. 16, 1981, 7 TBR 254, 3 CER 12 (T.B.), which held that this did not cover plastic eye shields used during recovery. See also: First Lady Coiffures v. DMNRCE, App. 2126, Feb. 8, 1985, 10 TBR 26, 8 CER 228 (T.B.), aff'd. & rev'd. DMNRCE v. First Lady Coiffures, 13 CER 42, 71 N.R. 76 (F.C.A., Nov. 7, 1986); Sherwood v. DMNRCE, App. 2397, Nov. 6, 1986, 11 TBR 520, 13 CER 30 (T.B.); Geo.S.Trudell v. DMNRCE, App. 2712, April 27, 1988, 13 TBR 239, 6 CER 162 (T.B.); M.& S. Xray v. DMNRCE, App. 3018, Sept. 15, 1989, 2 TCT 1184 (C.I.T.T.). The word "instrument" may sometimes have a wider interpretation when it is used in a tariff item seen as residual for goods which do not qualify under a more specific item. The term "photographic instruments" was interpreted in this way in Rich Colour Prints v. DMNRCE, Apps. 1819, 1820, Jan. 14, 1983, 8 TBR 481, 5 CER 114 (T.B.) and in Eddie Black's v. DMNRCE, App. 1921, April 29, 1983, 8 TBR 654, 5 CER 376 (T.B.).

be made solely in regard to its function or usage but must take into account its own nature and essential characteristics,"[89] use was the fundamental criterion. The goods were silver nitrate applicators for cauterization and the removal of warts. While the procedure itself was surgical, the goods were not "surgical instruments" because the cauterization was simply a chemical reaction and the disposable applicators did not have an active part in the process.[90]

In naming by function, the best description will be the one that most accurately reflects all of the significant functions of the imported good.[91] When choices have to be made, it can also be important to determine which functions are actually crucial to the description. In Montreal Children's Hospital, for example, the imported cradle warmers

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[89]Whiteco v. DMNRCE, App. 2252, Feb. 6, 1986, 11 TBR 94, 11 CER 48 (T.B.) at 97.

[90]See also Imax Systems v. DMNRCE, App. 2259, Oct. 10, 1986, 11 TBR 460, 12 CER 219 (T.B.) in which the Board stated that the end use tail should not wag the dog to be kennelled in the item (p.471 TBR), but nevertheless looked to end use factors such as the need for a specialized theatre to decide that the film in question was a moving picture film n.o.p. rather than a news feature or recording of a current event.

[91]Waltham Watch v. DMNRCE, App. 2117, Dec. 27, 1984, 9 TBR 388, 8 CER 133 (T.B.), aff'd. DMNRCE v. Waltham Watch, 15 CER 159 (F.C.A., Oct. 21, 1987); Magnasonic v. DMNRCE, App. 2389, Aug. 29, 1986, 11 TBR 407, 12 CER 142 (T.B.); Canadian General Electric v. DMNRCE, App. 2878, Jan. 26, 1988, 13 TBR 15, 15 CER 345 (T.B.). See further Jutan International v. DMNRCE, Apps. 2626, 2648, Feb. 2, 1988, 13 TBR 68, 16 CER 39 (T.B.), aff'd. 2 TCT 4320 (F.C.A., Sept. 26, 1989).

were classified as incubators despite the fact that they did not control oxygen or humidity, since these features were not seen as essential to the definition.[92] Even if the usual name of the goods met the words of the tariff item, they might not be classified under that item if they did not have the essential functions of the typical model. Wooden handles for pick-axes did not qualify as handles for axes in the Tiefenbach appeal, since a pick-axe is a "digging tool quite different in design and use" from the typical model of an axe.[93] A "switch" was defined by its function to open and close an electric or electronic circuit[94] and a video disc player could not be classified under a tariff item for turntables because its technology and functions were much more complex than those of the typical turntable in a stereo sound

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[92]Montreal Children's Hospital v. DMNRCE, App. 318, March 11, 1966, 3 TBR 293 (T.B.); Mansoor Electronics v. DMNRCE, Apps. 2514, 2515, March 24, 1987, 12 TBR 157, 14 CER 120 (T.B.).

[93]Tiefenbach Tool v. DMNRCE, App. 1553, Jan. 15, 1981, 7 TBR 247, 3 CER 15 (T.B.) at 251 TBR.

[94]Volkswagen Canada v. DMNRCE, App. 980, April 17, 1972, 5 TBR 322 (T.B.), aff'd. DMNRCE v. Volkswagen Canada, [1973] F.C. 643, 5 TBR 330 (F.C.A., June 15, 1973). For other decisions which focussed on the actual functioning of goods, see: Cullen Detroit Diesel v. DMNRCE, App. 1380, May 16, 1979, 6 TBR 832, 1 CER 165 (T.B.); ITT Barton Instruments v. DMNRCE, App. 1803, Dec. 6, 1982, 8 TBR 408, 5 CER 49 (T.B.); Astrographic Instruments v. DMNRCE, App. 2579, June 29, 1987, 12 TBR 235, 14 CER 166 (T.B.).

system.[95]

In the Musicstop appeal, Tariff Board member Beauchamp cited the Beco decision (concerning table knives for airplanes) as authority for the proposition that the specificity requirement in naming emphasized function and purpose. Musicstop dealt with the classification of a digital keyboard which could have been either electronic data processing apparatus or "musical instruments of all kinds, n.o.p.". Since the keyboard was created for musicians, was sold in music stores and was used to produce music, the Board opted for the musical instruments item despite the fact that it was n.o.p. In his concurring opinion, Board member Beauchamp stated:

> Clearly ... the goods qualify for both ... tariff items. Of the two, the more specific is musical instruments of all kinds which categorizes as well according to function or end use rather than according to the goods' constitution...[96]

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[95] Philips Electronics v. DMNRCE, App. 1719, May 31, 1982, 8 TBR 173, 4 CER 204 (T.B.).

[96] Musicstop v. DMNRCE, App. 2490, Aug. 6, 1986, 11 TBR 356, 12 CER 97 (T.B.), at 362 TBR. An earlier decision on the electronic data processing apparatus item had opted in favour of that item because it best reflected the goods' dual functions as computer games and as timepieces: Waltham Watch v. DMNRCE, App. 2117, Dec. 27, 1984, 9 TBR 388, 8 CER 133 (T.B.), aff'd. DMNRCE v. Waltham Watch, 15 CER 159 (F.C.A., Nov. 18, 1987). For other decisions giving a wide interpretation to the EDP item, see: Reference re Electronic Apparatus for Use in the Home, App. 1907, Feb. 4, 1983, 8 TBR 587, 5 CER 150 (T.B.); General Datacomm v. DMNRCE, Apps. 1983 etc., Jan. 10, 1984, 9 TBR 78, 7 CER 1 (T.B.); Manitoba Telephone v. DMNRCE, App. 2045, March 15, 1984, 9 TBR 177, 6 CER 223 (T.B.); Digital Equipment v. DMNRCE, App. 2262, Jan.

In the Tractor Reference, when the Board was asked to set the criteria for classification of "internal combustion tractors," the main focus was on the function of the typical goods which the item was thought to describe. The Board decided that a tractor would be self-propelled and would accomplish its work by "the traction or pulsion of vehicles, devices or objects by its own locomotion."[97] Decisions in subsequent appeals then applied these criteria, classifying goods according to whether they were[98] or were not[99] designed to operate primarily by pushing or pulling. Although the

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28, 1986, 11 TBR 58, 11 CER 5 (T.B.); Nevco Scoreboard v. DMNRCE, App. 2435, July 31, 1986, 11 TBR 342, 12 CER 88 (T.B.); Par T Golf (Alberta) v. DMNRCE, Apps. 2670, 2709, Aug. 26, 1987, 12 TBR 300, 14 CER 261 (T.B.). The item would not apply, however, when goods were more specifically described elsewhere: Foxboro v. DMNRCE, App. 2418, Aug. 8, 1986, 11 TBR 384, 12 CER 118 (T.B.), aff'd. 17 CER 1 (F.C.A., May 19, 1988); ROLM Canada v. DMNRCE, Apps. 2600, 2625, Sept. 14, 1988, 17 CER 264 (T.B.); IMS International v. DMNRCE, Apps. 2612, 2616, Sept. 30, 1988, 18 CER 57 (T.B.).

[97] Reference ... as to What Criteria should be Applied in Determining Whether Equipment Should be Classified as an Internal Combustion Tractor ..., App. 795, Sept. 20, 1966, 3 TBR 259 (T.B.), at p.270 (with list of more extensive criteria). The reference was undertaken after the decision in J.M.E. Fortin v. DMNRCE, App. 700, Dec.11, 1963, 3 TBR 107 (T.B.), aff'd. 3 TBR 112 (Ex.Ct., June 24, 1964), which found certain heavy forestry machinery to be within the terms of the item.

[98] Macleod's Lawn Equipment v. DMNRCE, App. 1431, Sept. 13, 1979, 6 TBR 924, 1 CER 249 (T.B.); Rokon Distributors v. DMNRCE, App. 2063, April 9, 1984, 9 TBR 212, 7 CER 155 (T.B.).

[99] Massot Nurseries v. DMNRCE, App. 1073, July 17, 1974, 1975 Canada Gazette Part I p.335 (T.B.); J.R. Macdonald v. DMNRCE, App. 1493, Sept. 17, 1980, 7 TBR 156, 2 CER 228 (T.B.).

criteria did not always produce predictable results,[100] the Board re-affirmed them recently in a reference dealing with the classification of riding lawnmowers.[101]

In the Lawnmower Reference, the Board indicated that naming by function was quite a concrete exercise and did not involve speculation about intentions, which the Board felt would be difficult to determine. In rejecting as irrelevant the Department's mention that the goods were all designed for cutting grass, the Board quoted its earlier words from the Tractor Reference:

> The concept of primary purpose or design gives the Board anxiety. The determination of primacy of purpose or design is fraught with great difficulty; if it is to be determined by knowledge of the mind of the designer then, in the absence of clear and acceptable documentary evidence, this presents many problems ...; if it is to be determined by actual use there is a clear possibility of use for purposes remote from those which motivated the original design; if it is to be determined by speculation, howsoever skilled, from the apparent characteristics of the machine there are evident seeds of conflict already clearly apparent in the thousand pages of the transcript of proceedings in this appeal; if it

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[100]A snow-grooming machine, for example, was not a tractor in Mont Sutton v. DMNRCE, App. 983, Feb. 29, 1972, 1972 Canada Gazette Part I p.1927 (T.B.), but was a tractor in Universal Go-Tract v. DMNRCE, App. 1683, July 20, 1981, 7 TBR 392, 3 CER 239, aff'd. DMNRCE v. Universal Go-Tract, 4 CER 381 (F.C.A., Oct. 29, 1982).

[101]Reference ... Regarding the Tariff Classification of Certain Self-Propelled Lawn Grooming Riding Machines and Related Attachments, App. 2294, Sept. 19, 1986, App. 2294, 11 TBR 440, 12 CER 171 (T.B.). See also, concerning the issue of whether the tractor and attachment might be classified together as an integrated machine: Canadiana Garden v. DMNRCE, App. 1761, 1762, July 23, 1981, 7 TBR 400, 3 CER 244 (T.B.).

> is to be determined by weighing the consideration said to be uppermost in the importer's or the exporter's mind the Board is apprehensive of the degree to which their views might be coloured by variations in rates of duty; ... . Primacy of purpose appears to be a subjective criterion, difficult to determine and replete with perplexity and conflict for all concerned ...[102]

This quote indicates the fear of uncertainty that is associated with a classification based on factors external to the goods themselves. The attitude seems to be that anything which looks beyond the actual functioning and observable structure of the imported goods is inevitably ambiguous. It is presumed that external circumstances are all as problematic as the intent of the designer or the importer, and thus all should be avoided.

While subjective intent of the parties involved may indeed be difficult to determine, and while the Board could not monitor the end uses of goods after importation, the question of "speculation from apparent characteristics" should be viewed quite differently. Throughout this chapter and this study it is argued that such speculation is not only desirable for sensible classification, but is really an inherent part of the activity. When classification involves fitting physical objects into established categories of human thought, it is next to impossible to avoid wondering about the intended purpose of goods. A classification methodology which

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[102]11 TBR 446, quoting from 3 TBR 266.

prohibits asking the question "What is this for?" will be artifical and limited in application. In its own decisions involving the "tractor" item, the Board had speculated about primary purpose,[103] major function[104] and whether or not the import in question was "designed to and does function primarily as a tractor in the pushing and pulling of a variety of implements."[105] When the item for self-propelled power lawn mowers came before it on an appeal, the Board decided that the goods were to be classified under the item rather than as tractors. In a distinct change of heart, the Board noted that while the goods qualified as tractors, they were "more specifically described as self-propelled power lawn mowers, the primary function for which they are intended, designed, sold and used."[106] The decision was affirmed by the Court of Appeal, which stated:

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[103]Mont Sutton v. DMNRCE, App. 983, Feb. 29, 1972, 1972 Canada Gazette Part I p.1927 (T.B.) at 1929;

[104]Massot Nurseries v. DMNRCE, App. 1073, July 17, 1974, 1975 Canada Gazette Part I p.335 (T.B.) at 338.

[105]Universal Go-Tract v. DMNRCE, App. 1683, July 20, 1981, 7 TBR 392, 3 CER 239 (T.B.) at 399 TBR, aff'd. DMNRCE v. Universal Go-Tract, 4 CER 381 (F.C.A., Oct. 29, 1982). See also: Macleod's Lawn Equipment v. DMNRCE, App. 1431, Sept. 13, 1979, 6 TBR 924, 1 CER 249 (T.B.), at 930 TBR; Rokon Distributors v. DMNRCE, App. 2063, April 9, 1984, 9 TBR 212, 7 CER 155 (T.B.) at 216 TBR.

[106]John Deere v. DMNRCE, Apps. 2247 etc., Jan. 28, 1988, 13 TBR 33, 16 CER 22 (T.B.) at 51 TBR. On procedures, note MTD Products v. Tariff Board, 13 CER 123 (F.C.T.D., Dec. 10, 1986).

> It is, of course, true that the majority [of the Board], on several occasions ... referred to the use which was made of the subject goods. This does not mean that they viewed tariff item 42505-1 as an 'end use' item but simply that use was one of the many aspects of the subject goods which the Board looked at in order to determine their true nature. Not only is this no error but it would seem to me that use, along with the other matters mentioned by the Board, is an important and essential consideration to be taken into account whenever the Board is faced with a classification problem. In every such case the Board must ask itself the question 'what are the subject goods' and the use to which the goods are designed to be put is unquestionably relevant to that inquiry.
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> Indeed, far from construing item 42505-1 as an 'end use' item, the Board, in my view, did just the opposite; it determined that, because the goods before it were in their true nature power lawn mowers, they should be classified as such even though they might incidentally be used for other purposes than cutting grass.[107]

The fact that parties may disagree as to purpose does not mean that purpose must be ignored. The disagreement may have to be resolved, perhaps by choosing one purpose as primary or perhaps even by deciding that there are really two or more categories present. But acknowledgement of purpose is nevertheless essential if the classification system is to be properly linked to reality.

The attribution of purpose in a classification exercise is in fact so fundamental that it is the basis of the second type of naming by use, in which naming depends on suitability of the goods for their intended purpose. A prime example of

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[107] John Deere v. DMNRCE, 3 TCT 5097 (F.C.A., Jan. 26, 1990) at 5099.

this type of naming is the Beaulieu decision mentioned at the beginning of this section, in which goods were classified as jute yarn rather than twine since they were for use in rug-making.[108]

Suitability for purpose was quite frequently used in eo nomine classification decisions, in which the Board did not emphasize the subjective intentions of the various parties but rather deduced the primary purpose or chief use from characteristics of the goods themselves. In the Lily Cups appeal, the suitability of the imported cup stock for use in the making of paper cups was the crucial factor in classification. The Department had classified the goods as fibreboard. The appellant maintained that they were instead printing papers since they could carry printing on one side. The Board rejected the fibreboard item, which was mainly for building materials. The Board also rejected the appellant's argument, however, since it did not centre on the chief use of the goods:

> The Board notes that the product in issue in this appeal, cup stock, is designed specifically for the manufacture of drinking cups, and no evidence was adduced to show that it is used for any other purpose. It is coated with polyethylene for the purpose of waterproofing and this coated surface is placed on the inside of the cup. The product must be white, made of virgin fibre and must meet certain bacteriological standards, all for the purpose of making it suitable for a drinking cup. The fact

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[108] Beaulieu v. DMNRCE, App. 2386. Jan. 20, 1987, 12 TBR 27, 13 CER 206 (T.B.).

> that this product may have the quality of printability does not, in the Board's view, make it a printing paper. ... As was stated in evidence, almost every form of paper or board ... is capable of carrying print.[109]

Printability was an undisputed characteristic of the goods, but it was not sufficiently central to their main purpose. It could not be presumed that every form of paper or board was to be covered under the "printing papers" item when this was not descriptive of the intended use. In the result, the Board opted for the Department's alternate choice, "paper of all kinds, n.o.p.".

A similar line of reasoning led the Board to choose the "paper of all kinds" item in two appeals shortly after Lily Cups. In Delta Printing, paperboard for packaging and product inserts was classified under this item rather than as printing papers because printability was again not central:

> Although it was shown that the imported paperboard was coated one side for printing purposes and that the appellant printed on it in four or five colours, it was also shown that the appellant chose stock of sufficient thickness and rigidity to enable him to make goods such as display cards, headers, covers, tags and boxes. Thus the paperboard in issue was not selected ... for printing purposes alone, but because it could fulfill functions other than ordinary printing paper such as is used in books, magazines or newspapers.[110]

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[109] Lily Cups v. DMNRCE, App. 1162, July 27, 1977, 6 TBR 503 (T.B.) at 509.

[110] Delta Printing and Advertising v. DMNRCE, Apps. 1265 etc., June 12, 1978, 1978 Canada Gazette Part I p.5369 (T.B.) at 5374.

In Control Data, as well, printability was not seen as crucial for the goods in issue and they were classified under the general "paper of all kinds" item. In explaining its reasoning, the Board said:

> Considering the evidence and the exhibits, it seems clear ... that the basic characteristics for tabulating card stock relate to its prime use in computer processing. The quality of printability may be such that it may be used to impart information to the person looking at the card, and this may have some additional commercial use. This, however, is not necessary for the card to function in the computer for which these cards are designed and for the most part used. ... The evidence is that the properties essential for tabulating card stock do not relate to properties required for printing paper ... .[111]

In these appeals, the Board was trying to restrict the potential scope of the "printing papers" item, and did this by assuming that the basic characteristics of imported goods would relate in some way to their application.[112]

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[111] Control Data v. DMNRCE, App. 1184, Aug. 8, 1978, 1978 Canada Gazette Part I p.5924 (T.B.) at 5927-928. See also Rolph-Clarke v. DMNRCE, App. 1343, Dec. 18, 1978, 1979 Canada Gazette Part I p.984 (T.B.).

[112] See also McCall Pattern v. DMNRCE, App. 1093, July 29, 1975, 1976 Canada Gazette Part I p. 2085 (T.B.), which classified dressmakers' patterns as "manufactures of paper, n.o.p." rather than under another item for "other printed matter, n.o.p.". That item was rejected both on a noscitur a sociis argument (see Interpretation chapter) and also because the printing was only incidental to the intended use as an outline model for dressmakers. The "manufactures of paper, n.o.p." item was thus more specific. For a decision in which the purpose of the printing made the "printed matter" item more specific, see P.F.Collier v. DMNRCE, App. 1950, Aug. 19, 1987, 12 TBR 285, 14 CER 239 (T.B.), dealing with an educational kit for children.

Classification was done in the full commercial context according to factors which made the goods suitable for their prime use.

The chief use factor was also significant in an appeal by the Institute for Development Education Through the Arts, concerning a hand-carved sculpture in the form of a chair. As the work was too intricate and delicate (as well as too uncomfortable) to be used for sitting, the Tariff Board rejected the Department's classification as house furniture and ruled that it was instead original sculpture.[113] In Reich, model cars were similarly classified by their chief use as toys, rather than as ornaments or decorations as the appellant had argued. Although the cars were "reasonably attractive", they were "unlikely to excite the attention of the adult collector or the interior decorator -- whether professional or amateur -- by reason of their value or their beauty."[114] They were intended to be used as playthings for children and

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[113]Institute for Development Education Through the Arts v. DMNRCE, App. 2257, Oct. 23, 1985, 10 TBR 234, 10 CER 109 (T.B.). See also: Kenneth Field v. DMNRCE, App. 2066, Feb. 22, 1985, 10 TBR 39, 8 CER 252 (T.B.), in which classification of an ornamental marble plaque as a table top was similarly rejected, sirce it clearly was not for use as household furniture.

[114]Reich Bros. v. DMNRCE, App. 584, Dec. 20, 1961, 2 TBR 273 (T.B.) at 274.

classification was thus determined by that purpose.[115]

When naming was done by purpose, it was the main purpose or chief use which counted, and incidental functions of the goods were generally ignored.[116] The miniature railway cars at issue in the Association Montrealaise d'Action Recreative appeal, for example, did not qualify as amusement riding devices, since their main purpose was to transport visitors around a floral exhibition, and it was not relevant that some passengers might find the ride itself entertaining.[117] There can, of course, be disagreements over what is the main purpose and what is incidental. In a few decisions, as well, classification has been based on a secondary purpose, particularly if there was no more specific item relating to the primary purpose. In Mrs. Smith's Pie, for example, pie plates were classified as kitchenware holloware rather than

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[115]For an appeal in which it was decided that toys could also be for adults, see International Games of Canada v. DMNRCE, App. 2024, Dec. 8, 1983, 9 TBR 41, 6 CER 132 (T.B.). The Tariff Board in another appeal stated that the definition of "toy" was "elastic ... ranging according to perception from the rich man's yacht or Ferrari to a baby's hand-held rattle" Reference re Classification of Electronic Apparatus, App. 1907, Feb. 4, 1983, 8 TBR 687, 5 CER 150 (T.B.) at 588 TBR.

[116]Diversified Research v. DMNRCE, App. 287, May 19, 1953, 1 TBR 124 (T.B.); Mansoor Electronics v. DMNRCE, Apps. 2514, 2515, March 24, 1987, 12 TBR 157, 14 CER 120 (T.B.); Ener-Gard v. DMNRCE, App. 2524, Dec. 2, 1987, 12 TBR 531, 15 CER 180 (T.B.).

[117]Association Montrealaise d'Action Recreative et Culturelle v. DMNRCE, App. 2048, Feb. 7, 1984, 9 TBR 126, 6 CER 186 (T.B.).

as manufactures of aluminum, even though the fact that they were re-usable was secondary to their primary purpose of acting as containers for commercially-sold pies.[118]

The intended purpose for goods was a significant factor in many Tariff Board decisions. In Coles Book, the Board held that a 1908 Sears Roebuck catalogue was no longer a catalogue when it was reproduced and sold in 1975. The articles listed were no longer for sale and the purpose had clearly changed:

> (T)he purpose of this publication in its present form is solely to provide the prospective reader with a documentary presentation of life and tastes as they existed in the United States during the early 1900's. No commercial intent is apparent, other than the income to be earned from the sale of the publication itself.[119]

In many instances, the Board could determine purpose as it did in Coles Book, from the characteristics of the goods as imported. In the Publications Etrangères appeal, for example, the Board examined the contents of the periodicals in question to determine that they were "illustrated

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[118]Mrs. Smith's Pie v. DMNRCE, App. 1362, Nov. 2, 1978, 1979 Canada Gazette Part I p.688 (T.B.). See also: Parsons-Steiner v. DMNRCE, App. 209, March 27, 1950, 1 TBR 32 (T.B.); E.A. Glennie v. DMNRCE, App. 679, Nov. 20, 1962, 2 TBR 326 (T.B.); Pyrotronics v. DMNRCE, App. 1414, March 21, 1980, 7 TBR 55, 2 CER 78 (T.B.). Both Glennie and Pyrotronics cite as authority the Supreme Court of Canada judgment in Javex v. Oppenheimer, [1961] S.C.R. 170, 2 TBR 35, in which Clorox bleach qualified for an end use item covering "preparations ... for disinfecting," when there was no more specific item relating to the primary function of bleaching.

[119]Coles Book Stores v. DMNRCE, App. 1270, March 14, 1978, 1978 Canada Gazette Part I p.3948 (T.B.) at 3950.

advertising periodicals" rather than "periodical publications" since they were intended for advertising within the trade.[120] Sometimes the Board also looked to treatment of the goods or statements made about them by the importer or persons linked to the importer. The fact that the goods were sold through music stores was used in favour of the appellant's argument that they were musical instruments in the Musicstop appeal.[121] In Colgate-Palmolive-Peet, the fact that the goods had been advertised as laundry soap was used to defeat the appellant's argument that they should be classified instead as toilet soaps.[122] Advertising is not necessarily limited to the intended purpose for the goods, of course, but can also be used to indicate other factors such as their function[123] or

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[120]Publications Etrangères v. DMNRCE, Apps. 1306, 1320, June 26, 1978, 1978 Canada Gazette Part I p.5375 (T.B.). See also: Cartanna International v. DMNRCE, App. 2122, Jan. 23, 1986, 11 TBR 52, 11 CER 1 (T.B.); British Columbia Automobile Association v. DMNRCE, App. 2464, Nov. 19, 1986, 11 TBR 545, 13 CER 69 (T.B.).

[121]Musicstop v. DMNRCE, App. 2490, Aug. 6, 1986, 11 TBR 356, 12 CER 97 (T.B.). See also: Cockshutt Plow v. DMNRCE, App. 252, Dec. 7, 1951, 1 TBR 63 (T.B.).

[122]Colgate-Palmolive-Peet v. DMNRCE, App. 214, July 10, 1950, 1 TBR 34 (T.B.). See also, concerning the presumed purpose for imported goods: McAinsh v. DMNRCE, App. 487, Oct. 27, 1958, 2 TBR 169 (T.B.); B.L. Marks v. DMNRCE, App. 2199, May 22, 1986, 11 TBR 216, 11 CER 314 (T.B.), aff'd. 14 CER 56 (F.C.A., March 10, 1987).

[123]Ponsen's Trading v. DMNRCE, App. 391, Dec. 14, 1956, 1 TBR 262 (T.B.); Weil Dental v. DMNRCE, Apps. 1038, 1044, May 14, 1973, 1973 Canada Gazette Part I p.3049 (T.B.); J.R. Macdonald v. DMNRCE, App.1493, Sept. 17, 1980, 7 TBR 156, 2 CER 228 (T.B.).

their composition.[124] Advertising evidence was presented to prove purpose in the General Mills appeal, in which the Department tried unsuccessfully to maintain the classification of granola bars as confectionery. Despite the fact that the bars were advertised as snacks and were sold at candy counters, the Board opted instead for evidence of composition and accepted the appellant's argument that they were "prepared cereal food."[125]

Eo nomine items which involved naming by use or purpose were to be distinguished from true end use items. The difference was illustrated in an early Tariff Board reference concerning an item for "articles of glass ... designed to be cut or mounted". Departmental practice had been to admit under this item any glassware which the importer certified would be up-graded by cutting to at least 25% of the value. This practice would be have been appropriate in the application of an end use item, but it was rejected by the Tariff Board for the item in question:

> We find it impossible to overlook the fact that the word "designed" is there; and we can conclude only

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[124] C.Itoh v. DMNRCE, Apps. 1308 etc., June 1, 1979, 6 TBR 847, 1 CER 187 (T.B.); H.T. Griffin v. DMNRCE, App. 2118, July 23, 1984, 9 TBR 305, 7 CER 25 (T.B.).

[125] General Mills v. DMNRCE, Apps.1407, 1411, July 3, 1979, 6 TBR 876, 1 CER 206 (T.B.). See further: I.D. Foods v. DMNRCE, App. 2526, Nov. 28, 1986, 11 TBR 559, 13 CER 90 (T.B.); General Mills v. DMNRCE, Apps. 2457 etc., July 14, 1987, 12 TBR 256, 14 CER 209 (T.B.), aff'd. 18 CER 161 (F.C.A., Dec. 6, 1988).

> that, in incorporating the word in the tariff item, the legislators knew what they had in mind in creating this particular classification and in wording it as they did. We cannot agree that "designed" relates to a concept or an intention existing in the mind of the importer; but, rather, that it relates to a concept and a deliberate intention in the mind of the original manufacturer of the article of glass as to its ultimate use, which intention must be embodied or expressed in the article of glass as imported.[126]

Interpretation was not to be done according to actual end use, but rather according to the presence or absence of features such as quality of the glass which would indicate the intended purpose.[127]

Classification can take account of purpose and context without following actual end use. In Margo Corporation, for example, the Board rejected the appellant's argument that imported paper was "beer mat or coaster board" without checking actual end use of the goods. The paper was of the appropriate thickness, but it did not have the absorbency required for the purpose and thus it could not be classified

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[126]Reference ... re Administration of Tariff Item 326e, App. 322, Dec. 8, 1954, 1 TBR 192 (T.B.) at 193. See further: Terochem v. DMNRCE, App. 2401, May 28, 1986, 11 TBR 223, 11 CER 319 (T.B.); Western Medi-Aid v. DMNRCE, Apps. 2357 etc., June 4, 1986, 11 TBR 229, 11 CER 326 (T.B.).

[127]In Atlas Asbestos v. DMNRCE, App. 498, Nov. 27, 1961, 2 TBR 186 (T.B.), in the absence of other evidence, the Board had to look to actual use of the imported goods to see if they were "strength testing machines."

under the item.[128] In the Harold T. Griffin appeal, the imported goods, dehydrated green pepper, were classified as vegetables rather than as spices because they lacked pungency and colour and thus were "eaten more as a vegetable ... than as a spice."[129] And in Akhurst Machinery, the Board rejected the Department's arguments that an item for "machinists' precision tools" was an end use item. Relying on trade usage, the Board decided that this was an eo nomine item describing the small tools that machinists would normally be expected to supply themselves. It therefore did not cover the imported readout equipment even though that equipment would later be attached to instruments to be used by machinists.[130] Classification can depend on the use and purpose of imported goods in commercial context without requiring a system to monitor actual end use.

The purpose had to apply to the goods in their condition as imported, without further processing. In the Jean

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[128]Margo Corporation v. DMNRCE, App. 2064, March 30, 1984, 9 TBR 206, 6 CER 240 (T.B.).

[129]Harold T. Griffin v. DMNRCE, App. 2118, July 23, 1984, 9 TBR 305, 7 CER 25 (T.B.) at 307 TBR. See also: Redi Garlic v. DMNRCE, App. 2141, Dec. 19, 1984, 9 TBR 385, 8 CER 126 (T.B.); Aliments Tousain v. DMNRCE, Apps. 2135,2150, April 22, 1985, 10 TBR 134, 9 CER 94 (T.B.), rev'd. DMNRCE v. Aliments Tousain, 16 CER 351 (F.C.A., Feb. 3, 1988), reheard Aliments Tousain v. DMNRCE, App. 2135, Dec. 19, 1988, 18 CER 185 (T.B.).

[130]Akhurst Machinery v. DMNRCE, App. 2630, May 1, 1987, 12 TBR 181, 14 CER 98 (T.B.); MTI Canada v. DMNRCE, App. 2776, Feb. 16, 1988, 13 TBR 154, 16 CER 109 (T.B.).

Carruthers appeal, for example, imported toys could not be classified as diagnostic medical instruments since they had not yet been equipped with remote control devices for use in the importer's practice of pediatric ophthalmology.[131] Although there was no doubt about intended end use, that in itself was not sufficient. This does not say that the goods need to be in their final form. In Weil Dental, the imported containers were dental instruments even though they would still have to be shaped before actual use, since they were nevertheless committed to that purpose by the time of importation.[132]

To say that purpose is a fundamental consideration in naming is not to say that it is the only consideration. The fact that goods have the same use and can be substituted for each other does not of itself mean that they will be classified under the same item. Photographic tongs, for example, are not film processors even though they fulfill the same function.[133] And gamma ray equipment is not X-ray

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[131]Jean Carruthers M.D. v. DMNRCE, App. 2551, July 8, 1987, 12 TBR 242, 14 CER 193 (T.B.). See also: Cargill Grain v. DMNRCE, App. 1299, Feb. 29, 1978, 1978 Canada Gazette Part I p.3954 (T.B.); Mitel Corp. v. DMNRCE, App. 2159, April 4, 1985, 10 TBR 90, 9 CER 49 (T.B.).

[132]Weil Dental v. DMNRCE, App. 856, Nov. 7, 1967, 4 TBR 41 (T.B.).

[133]Kindermann v. DMNRCE, App. 614, May 2, 1962, 2 TBR 310 (T.B.).

apparatus even though it serves the same purpose.[134] Even when some functions overlap, such as the decorative function fulfilled by both bedspreads and comforters at issue in the Imperial Feather appeal, distinctions can still be made as they were in that decision based on other characteristics and additional purposes.[135]

Use was acknowledged to have a fundamental place in classification in earlier versions of the Customs Act. A section which was repealed in 1950 provided for classification when no item applied specifically:

> s.58. On each and every non-enumerated article which bears a similitude, either in material or quality, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty shall be payable which is charged on the enumerated article which it most resembles in any of the particulars before mentioned.[136]

Function was also considered directly when the Board and the

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[134]Aries Inspection v. DMNRCE, App. 1446, Jan. 25, 1980, 7 TBR 18, 2 CER 25 (T.B.). See also: O'Driscoll v. DMNRCE, App. 748, Sept. 17, 1964, 3 TBR 189 (T.B.); Ascor v. DMNRCE, App. 798, May 17, 1965, 3 TBR 273 (T.B.); Carl Zeiss v. DMNRCE, App. 849, April 27, 1967, 4 TBR 31 (T.B.); Tri-Hawk International v. DMNRCE, App. 1213, April 26, 1977, 1978 Canada Gazette Part I p.837 (T.B.); G.B.Fermentation v. DMNRCE, App. 1591, March 6, 1981, 7 TBR 303, 3 CER 87 (T.B.); Squibb Canada v. DMNRCE, App. 2261, Oct. 16, 1986, 11 TBR 488, 12 CER 255 (T.B.).

[135]According to the Board, the comforters were intended to provide warmth, were smaller than bedspreads, and were quilted in a different fashion: Imperial Feather v. DMNRCE, Apps. 1668, 1709, Jan. 27, 1982, 8 TBR 80, 4 CER 43 (T.B.).

[136]Customs Act, R.S.C. 1927, chap. 42, s.58; rep. S.C. 1950, c.13, s.4. See Canada Packers v. DMNRCE, App. 236, July 3, 1951, 1 TBR 45 (T.B.).

courts had to construe the notion of similarity in an item for "lard compound and similar substances." In the Frito-Lay appeal, the Board found goods not to be similar substances because of differences in "crystal structure, solidity, colour and translucency, as well as function."[137] In the Hunt Foods appeal, the Exchequer Court found that the goods in issue did qualify as similar substances, because of similarities in "function, use, appearance, melting point, hardness, solidity at various temperatures, stability, flavour, odour and colour."[138] The thesis argued in this section is not that use determines everything, but that it is a fundamental factor which should be considered. Naming which ignores context as extrinsic to goods will be artificial. Application should receive direct acknowledgement in the theory of classification.

The contextual approach to classification appeared in decisions on the long-standing tariff item permitting free entry or reduced duty for agricultural implements and agricultural machinery. The Board decided in an early appeal

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[137]Frito-Lay v. DMNRCE, Apps. 1241, 1264, 1272, April 10, 1978, 6 TBR 634 (T.B.) at 652, aff'd. [1981] 2 F.C. 164, 2 CER 143 (F.C.A., June 11, 1980).

[138]Hunt Foods v. DMNRCE, [1970] Ex.C.R. 828, 4 TBR 333 (Ex.Ct., Oct. 26, 1970), at 342-43 TBR, rev'g. Apps. 907, etc., May 29, 1969, 4 TBR 328 (T.B.). See also: Tariff Board, Reference 154 - Edible Oil Products, September 30, 1978; Consumers Foodcraft v. DMNRCE, App. 343, June 8, 1955, 1 TBR 237 (T.B.); Entreprises Mair Fried v. DMNRCE, App. 1220, March 22, 1978, 1979 Canada Gazette Part I p.3048 (T.B.).

that this meant that the "major if not sole use"[139] should be in agriculture, and statistical evidence could be accepted on this point.[140] Goods could then be classified as agricultural even though there was no guarantee that any particular imports would actually be employed in agriculture.[141] Application could be considered without turning the item into an end use one. If the goods had other significant uses - particularly if those uses were identified in product advertising - then they would not be classified under the item.[142]

The use in question had to be "recognizably" agricultural.[143] Such use was not limited to things employed directly in tilling the soil, but could extend to ancillary

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[139]Superior Separator v. DMNRCE, App. 273, Oct. 20, 1952, 1 TBR 94 (T.B.) at 95.

[140]Franklin Serum v. DMNRCE, Apps. 274,275,276, Jan. 9, 1953, 1 TBR 95 (T.B.). See also ETF Tools v. DMNRCE, App. 623, Dec. 29, 1961, 2 TBR 315 (T.B.).

[141]Cockshutt Plow v. DMNRCE, App. 252, Dec.7, 1961, 1 TBR 63 (T.B.). See also General Bearing v. DMNRCE, App. 2349, March 10, 1986, 11 TBR 150, 11 CER 122 (T.B.).

[142]D.T.Gillespie v. DMNRCE, App. 914, Sept. 23, 1969, 4 TBR 389 (T.B.); Massot Nurseries v. DMNRCE, App. 1073, July 17, 1974, 1975 Canada Gazette Part I p.335 (T.B.). For particular goods, other tariff items might also provide more specific descriptions: A. Zukiwski v. DMNRCE, App.2819, Dec. 18, 1987, 12 TBR 581, 15 CER 217 (T.B.); Ripley's Farm v. DMNRCE, App. 2681, May 31, 1988, 13 TBR 280, 16 CER 153 (T.B.).

[143]W.L. Ballentine v. DMNRCE, App. 237, April 23, 1951, 1 TBR 46 (T.B.) at 47.

goods such as disc sharpeners[144] and seed-cleaning machinery.[145] Household use was excluded,[146] but the concept was otherwise fairly widely interpreted, covering seed-mixing machinery brought to farms by dealers,[147] potato storage machinery used by farmers and dealers,[148] and a greenhouse sprinkler system.[149] In all of these, context was taken into account without necessarily requiring the item to be treated as an end use one.

While interpretation may have been generous to give effect to the presumed legislative intent of encouraging agriculture, the goods still had to qualify as machinery or as implements. In several appeals, the Board determined that

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[144]The Queen v. Specialties Distributors, [1954] Ex.C.R. 535 (Ex.Ct., June 22, 1954).

[145]R.W. Nelson v. DMNRCE, App. 2693, Dec. 9, 1987, 12 TBR 566, 15 CER 206 (T.B.).

[146]Mercury Tool v. DMNRCE, App. 696, Oct. 30, 1962, 2 TBR 328 (T.B.).

[147]A.Dubeau v. DMNRCE, App. 506, Dec.30, 1959, 2 TBR 198 (T.B.).

[148]Alta-Fresh Produce v. DMNRCE, App. 873, April 18, 1968, 4 TBR 145 (T.B.).

[149]WER Holdings v. DMNRCE, App. 2393, July 16, 1986, 11 TBR 306, 12 CER 37 (T.B.). See further Donald Tutt v. DMNRCE, App. 2975, Jan. 31, 1991, 4 TCT 3098 (C.I.T.T.). In Major Irrigation v. DMNRCE, App. 1830, Dec. 31, 1982, 8 TBR 446, 5 CER 93 (T.B.) machinery for off-farm highway transport of agricultural produce was excluded; in that decision, the Board seems to have been reading in qualifications from another part of the same tariff item which listed certain goods eo nomine and required that they be "for use on the farm for farm purposes only."

goods such as disc sharpeners[144] and seed-cleaning machinery.[145] Household use was excluded,[146] but the concept was otherwise fairly widely interpreted, covering seed-mixing machinery brought to farms by dealers,[147] potato storage machinery used by farmers and dealers,[148] and a greenhouse sprinkler system.[149] In all of these, context was taken into account without necessarily requiring the item to be treated as an end use one.

While interpretation may have been generous to give effect to the presumed legislative intent of encouraging agriculture, the goods still had to qualify as machinery or as implements. In several appeals, the Board determined that

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[144]The Queen v. Specialties Distributors, [1954] Ex.C.R. 535 (Ex.Ct., June 22, 1954).

[145]R.W. Nelson v. DMNRCE, App. 2693, Dec. 9, 1987, 12 TBR 566, 15 CER 206 (T.B.).

[146]Mercury Tool v. DMNRCE, App. 696, Oct. 30, 1962, 2 TBR 328 (T.B.).

[147]A.Dubeau v. DMNRCE, App. 506, Dec.30, 1959, 2 TBR 198 (T.B.).

[148]Alta-Fresh Produce v. DMNRCE, App. 873, April 18, 1968, 4 TBR 145 (T.B.).

[149]WER Holdings v. DMNRCE, App. 2393, July 16, 1986, 11 TBR 306, 12 CER 37 (T.B.). See further Donald Tutt v. DMNRCE, App. 2975, Jan. 31, 1991, 4 TCT 3098 (C.I.T.T.). In Major Irrigation v. DMNRCE, App. 1830, Dec. 31, 1982, 8 TBR 446, 5 CER 93 (T.B.) machinery for off-farm highway transport of agricultural produce was excluded; in that decision, the Board seems to have been reading in qualifications from another part of the same tariff item which listed certain goods eo nomine and required that they be "for use on the farm for farm purposes only."

agricultural implements were things like hoes and rakes used in active work. They were to be distinguished from apparatus and other equipment such as milking stalls, fencing and specialized flooring which was only used passively and therefore did not qualify.[150]

Tariff classification can consider the application of goods in commercial context without requiring customs authorities to trace the use of each import. In the U.S. tariff prior to implementation of the Harmonized System, descriptions such as "agricultural implements", "household utensils" and "all medicinal preparations" were viewed as implied use provisions. Classification was done according to the chief use of goods of that class or kind nation-wide. Testimony concerning this chief use could come from importers or from others knowledgeable in the trade.[151] Tariff classification does not have to take place at one moment of

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[150]Babson Bros. v. DMNRCE, App. 208, March 16, 1950, 1 TBR 31 (T.B.); A.Delage v. DMNRCE, App. 757, Sept. 28, 1964, 3 TBR 197 (T.B.); F.Lawson and Sons v. DMNRCE, App. 802, Nov. 25, 1965, 3 TBR 277 (T.B.); Sheep Producers Association of Nova Scotia v. DMNRCE, App. 1379, March 21, 1979, 6 TBR 785, 1 CER 94 (T.B.); Riverside Colony v. DMNRCE, App. 2327, Nov. 6, 1985, 10 TBR 258, 10 CER 129 (T.B.); J.P. Soubry Distribution v. DMNRCE, App. 2442, Sept. 29, 1986, 11 TBR 448, 12 CER 181 (T.B.); Beekeepers' Supply v. DMNRCE, App. 2533, June 8, 1987, 12 TBR 209, 14 CER 149 (T.B.); O. Schmidt v. DMNRCE, App. 2601, June 10, 1987, 12 TBR 218, 14 CER 156 (T.B.); Nova Aqua v. DMNRCE, App. 3027, July 26, 1990, 3 TCT 2233 (C.I.T.T.).

[151]Ruth F. Sturm, Customs Law and Administration, 2nd ed. (New York: American Importers Association, 1980), pp.490-99.

inspection artificially isolated from all knowledge of what will happen to the goods after importation. If the description of physical characteristics is very specific, it may be that there is no need for further inquiry. But it should not be assumed that the function and purpose of goods in domestic commerce must be ignored.

The Canadian International Trade Tribunal recently decided that an imported ship was a "pleasure boat" rather than a commercial vessel, because the importer's intention to use the boat in the sport fishing business was treated as irrelevant. It was also irrelevant that the importer had received an excise tax exemption based on the intended use. The question was debateable, as the boat required some additional work to qualify as a commercial passenger vessel under domestic regulations. But the Tribunal's rejection of all consideration of use was unnecessary, and also probably contrary to the decision of the Federal Court of Appeal in the John Deere appeal concerning power lawn mowers.[152] The customs tariff, of course, could have referred specifically to the excise tax provisions, but even in the absence of such a reference, there was no need to assume that intended use was

[152]John Deere v. DMNRCE, 3 TCT 5097 (F.C.A., Jan. 26, 1990), aff'g. Apps. 2247 etc., Jan. 28, 1988, 13 TBR 33, 16 CER 22 (T.B.)

irrelevant.[153] Naming which ignores use as extrinsic to goods is likely to be artificial. If the Harmonized System is to be accepted as a multipurpose commodity code, then the observation model for tariff classification should be rejected in favour of interpretation which is more contextual.

f. Purposive Interpretation

Economic factors occasionally influenced an eo nomine classification[154] but the Tariff Board generally avoided looking to economic results or a presumed legislative intent to favour particular industries or sectors. Indeed, the reported decisions very rarely contain any indication of what the actual rates were for the items in question[155]. In the

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[153]Sealand v. DMNRCE, App. 3042, July 11, 1989, 2 TCT 1149 (C.I.T.T.). Even based on physical characteristics of the vessel, it may have been possible to argue for a commercial context. The ship was 133 feet long. It had two lounges (one with a fireplace), full kitchen service, television and sound equipment, deck areas with barbecue and jacuzzi, and 17 state rooms with private washrooms.

[154]In Cataphote Corp. v. DMNRCE, App. 572, Jan. 12, 1962, 2 TBR 259 (T.B.), the dissenting member of the Tariff Board declined to find that the imported goods were "broken glass or cullet" since they had been finely ground to a common size and were much more expensive than ordinary waste glass or cullet. While the majority acknowledged the price difference, they found that it was not enough to move the goods to the Department's chosen tariff item: "manufactures of glass." Concerning economic factors and end use items, see Alex L. Clark v. DMNRCE, App. 860, Oct. 152, 1967, 4 TBR 53 (T.B.).

[155]In Dentists Supply v. DMNRCE, 2 TBR 87 (Ex.Ct., April 21, 1960), the Exchequer Court mentioned that the difference in the appeal was between 0% and 20% (p.88). Rates were also mentioned by the Exchequer Court or Federal Court of Appeal

Freedman appeal, the Board refused to consider differences in tariff rates which it called "purely fortuitous".[156] In the Tractor Reference, the Board brushed aside a mention in the Deputy Minister's reference letter that clear guidelines could assist in the establishment of a domestic manufacturing industry:

> [T]he fact that there is or is not Canadian production of a particular type of machine is a circumstance irrelevant to the determination of whether or not the machine is a tractor within the meaning of the tariff item; it is a circumstance which can neither narrow nor broaden the meaning of the word "tractor" nor can it properly be taken into account when the construction of the item is in issue before the Board on an appeal. If Parliament seeks to exclude additional types of tractors from the item, it will, presumably, pass legislation in clear words to that effect ...[157]

This rejection of the purposive approach was quite in line with the Supreme Court's choice of literal interpretation

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in: Metropolitan Life v. DMNRCE, [1966] Ex.C.R. 1112, 3 TBR 216 (Ex.Ct., Jan. 25, 1966); Central Electric v. DMNRCE, 3 TBR 296 (Ex.Ct., April 28, 1967); DMNRCE v. GTE Sylvania, 10 CER 200, 64 N.R. 322 (Dec. 11, 1985). In C.J.Rush v. DMNRCE, App.1422, July 24, 1979, 6 TBR 902, 1 CER 231 (T.B.) the Tariff Board rejected the appellant's argument which was based on the tariff structure and the idea that higher tariff rates indicated a greater degree of manufacturing.

[156]J.Freedman v. DMNRCE, App. 314, April 28, 1954, 1 TBR 172 (T.B.); aff'd Canadian Horticultural Council v. J.Freedman, 1 TBR 174 (Ex.Ct., Aug. 23, 1954). For further rejections of attempted purposive arguments, see: Quaker Oats v. DMNRCE, App. 2115, June 22, 1984, 9 TBR 276, 8 CER 1 (T.B.); Benoit Belanger v. DMNRCE, App. 2102, July 12, 1984, 9 TBR 295, 7 CER 18 (T.B.).

[157]Reference re ...Internal Combustion Tractor[s] ..., App. 795, Sept. 20, 1966, 3 TBR 259 (T.B.) at 261.

in the Pfizer appeal, in which the Court reversed the decisions below and produced a resulting tariff protection which the Federal Court of Appeal had characterised as "improbable":

> [T]he only protection afforded to the manufacturer in Canada of chlortetracycline and its salts would be against the importation of the salts of tetracycline. Not only would there be no protection against the importation of oxytetracycline or its salts but there would be no protection against the importation of chlortetracycline or its salts.[158]

It has been argued above that the Supreme Court's rejection of trade meaning in Pfizer was unnecessarily strong. The rejection of narrow purposive interpretation is, however, in accordance with the thesis of this study. The contextual model looks to the commercial context of goods in application, not to the economic policy of any particular government at any particular time. If the Harmonized System is to be accepted as a multipurpose commodity code suitable for implementation on a worldwide basis, then its interpretation cannot favour the customs or economic policy of any one country or group of countries. Purposive interpretation which is this narrow is out of place in the Harmonized System. It could not be supposed that global interpretation of an HS heading or subheading should depend on whether there was or was not a manufacturer of chlortetracycline in Canada at any given time.

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[158] Pfizer v. DMNRCE, [1973] F.C. 3, 5 TBR 236 (F.C.A., Nov. 28, 1972) at 238 TBR, rev'd. [1977] 1 S.C.R. 456, 5 TBR 257 (S.C.C., Oct.7, 1975).

This is not to say that meaning is to be viewed in an artificial light, detached completely from the circumstances in which communication normally takes place. Such an extreme approach would call into question the ordinary leeway for understanding which is inherent in language. Rejection of the narrow purposive approach does not imply a rejection of more general, teleological interpretation. It will not undermine the goals of the Harmonized System to assume that its headings and subheadings were intended to have some useful effect and to interpret them in this light. In Simplicity Patterns, for example, the Tariff Board interpreted a tariff exemption for catalogues that related exclusively to products or services of countries entitled to the British Preferential Tariff. The Board ruled that the catalogue in question was not disqualified because it contained a Canadian address for ordering. The patterns themselves were clearly products of the U.K. To disqualify the catalogue because of the address would, according to the Board, render the item useless and destroy the purpose of the tariff exemption.[159] Purposive interpretation should be viewed with suspicion in the Harmonized System, but a general teleological approach is not objectionable.

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[159] Simplicity Patterns v. DMNRCE, App. 1508, Dec. 1, 1980, 7 TBR 214, 2 CER 315 (T.B.). See also: Sargent-Welch v. DMNRCE, App. 2813, Feb. 9, 1988, 13 TBR 119, 16 CER 73 (T.B.); AKA Music v. DMNRCE, App. 2883, Feb. 10, 1988, 13 TBR 122, 16 CER 87 (T.B.).

Tariff Board decisions were very rarely purposive in the narrow sense, but in one the Board perhaps went over the line. In the Supreme Plating appeal, the Board decided that the prohibition against importation of "used or secondhand" automobiles did not apply to a vehicle which the owner had purchased through a dealer in Canada and used briefly in Europe before importation. The Board reasoned that the item did not cover an automobile still owned by the original purchaser, especially since the intervening use was minimal. This import did not threaten the market for secondhand vehicles in Canada.[160] The decision may be acceptable as an interpretation of the meaning of "used or secondhand" as applied to automobiles. It may also be acceptable as applying to any market anywhere for secondhand vehicles. When, however, interpretation looks to the circumstances of a particular domestic market in a manner that the institutions of the Customs Co-operation Council could not be expected to follow, then the approach is too narrow and should be rejected.

II. Harmonized System

General Rule 1 for the interpretation of the Harmonized System gives priority to the headings and Legal Notes for any

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[160] Supreme Plating v. DMNRCE, App. 2220, Sept. 3, 1985, 10 TBR 205, 9 CER 255 (T.B.).

doubts concerning classification of particular goods. The drafting of the provisions is very precise. Should difficulties arise, the Explanatory Notes or Classification Opinions may help to resolve the problem. Although these last two sources are not binding within the HS, it is expected that most countries will try to follow them in their classification decisions. When the headings and Legal Notes apply, they determine the relevant factors for interpretation. These can be very detailed, as in the case of an offset printing machine, classified according to the size of the printing area.[161] They can also be more general, such as Note 3 to Section XVI which provides that composite machines are to be classified according to their principal function.[162] General Rule 1 states what would probably be obvious in any case -- that interpretation starts with the headings and Legal Notes.

General Rule 2 contains two parts which are not closely linked to each other and could easily stand alone. The first, Rule 2(a), states that goods will be treated as a complete article even if they are presented unfinished or unassembled. So long as the unfinished or incomplete goods have the "essential character" of the complete article, they will be considered complete. Explanatory Note II clarifies this

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[161]Pollard Banknote v. DMNRCE, App. AP-89-279, Feb. 6, 1990, 4 TCT 3108 (C.I.T.T.).

[162]Royal Telecomm v. DMNRCE, App. AP-90-027, April 5, 1991, 4 TCT 3175 (C.I.T.T.).

somewhat by saying that the Rule would cover blanks not specified in another heading so long as they were committed for processing into the complete article.[163] The Rule verges on a question of customs technique, making sure that goods cannot be imported at lower rates for parts or raw materials when the processing after importation is not significant.[164]

Rule 2(b) provides that a reference to a material or substance includes a reference to that material or substance in combination with other materials or substances. Goods which consist of more than one material or substance are to be classified according to Rule 3. This is not what it looks like at first glance, an immediate detour to Rule 3 for any headings which refer to goods of a given material or substance. The mention of mixtures or combinations is not infinitely elastic, so that goods could be of a named substance even if that substance constituted only an insignificant percentage of the goods' composition. Rule 1 is still paramount and goods must still fit the description in the heading. For items which refer to composition, the goods do not have to consist entirely of the named element,

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[163]See, for example, Fleischer, Case 49/73, [1973] Rec. 1199, in which bulk caramel was classified as "sucreries". The goods were semi-finished on importation, but they were nevertheless destined for processing into the final product.

[164]Concerning unassembled goods, see Bradley v. DMNRCE, App. AP-89-228, June 11, 1990, 3 TCT 2188 (C.I.T.T.) and the discussion in the Parts and Entities chapter.

so long as they are of a sufficient degree of purity to fit the description. It is only past this point that they would be considered to be of more than one substance and thus subject to Rule 3.

The interesting question about Rule 2(b) is why it is in a position of such importance, the first theoretical approach to try when the terms of the headings and Legal Notes are insufficient. It is even prior to Rule 3(a), the principle of greater specificity, the one principle which should be fundamental for the entire classification exercise. Rule 2(b) illustrates the strong pull of the observation model in tariff matters. Classification is thought to depend on physical fact. If difficulty arises, it is assumed that the best description will be one which refers to goods by material composition. It is as if the crucial fact about a wooden table is that it is made of wood, and not that it fulfills certain functions.[165]

If goods might potentially be covered by two or more headings, Rule 3 contains three sections to be applied in order. Rule 3(a) is the principle of greater specificity.

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[165]See Du Pont, Case 234/81, [1982] E.C.R. 3515, in which imitation marble building material was classified as an article of plastic rather than an artificial stone, despite the fact that plastic was only 33% of its composition. Rule 2(b) was used to expand the reference to material composition. Even if Rule 3(a) had been used, the Court would have found the description of articles which had the properties of building stone less specific than the description by material composition.

Rule 3(b) refers to the material or component which gives goods their essential character. If these two fail to provide a solution, Rule 3(c) opts for the heading which occurs last in numerical order. The second sentence of Rule 3(a) negates the principle of greater specificity whenever headings refer to part only of the materials or components of goods or to part only of the items in a set.[166] It was added during the drafting of the Harmonized System, drawn from a previous CCCN Explanatory Note.[167] In these situations, Rule 3(a) does not apply and goods are judged under Rule 3(b) as if they consisted entirely of the substance or component which gives them their essential character. The assumed importance of material composition is again evidence of the power of the observation model. It should be noted, however, that contextual analysis has been present in decisions concerning the "essential character" of goods. Naming has been done by both function and purpose. In Farr, Case 130/82, for example, air filters were classified according to the filtering

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[166]It should be noted that "goods put up in sets for retail sale" could have a fairly wide application, as the Explanatory Notes indicate. In previous EC caselaw, the phrase has been held to apply to composite machinery if the components are not all included in the "functional unit" according to the Notes to Section XVI. See: Metro International, Case 60/83, [1984] E.C.R. 671; Telefunken Fernseh, Case 163/84, [1985] E.C.R. 3299.

[167]See Baupla, Case 28/75, [1975] E.C.R. 989.

material, as that function was their essential character.[168] In Kaffee-Contor, Case 192/82, the essential character of jewellery boxes was the varnished paper covering which made them suitable for their purpose.[169] And in ELBA, Case 205/80, the essential character of decorations with flashing lights was their use as articles for entertainment.[170]

Rule 4 is the residual rule which applies when there are no headings which describe the goods directly. Goods are then to be classified under the heading for goods to which they are most akin. Similarity could depend on many factors. In Bollmann, Case 40/69, it related to the physical characteristics, use and value of the goods.[171] In LUMA, Case 38/76, however, the Court confirmed the primacy of the observation model and descriptions by composition. Goods could not be classified by analogy under Rule 4 if they could be described by composition in some other heading.[172] Rule 4 is only residual. Priority goes to other headings, even other

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[168]Farr, Case 130/82, [1983] E.C.R. 327.

[169]Kaffee-Contor, Case 192/82, [1983] E.C.R. 1769.

[170]ELBA, Case 205/80, [1981] E.C.R. 2097. A contrary example is Schickedanz, Case 298/82, [1984] E.C.R. 1829, in which the leather supports on running shoes were less "essential" than the textile fabric despite their more important function.

[171]Bollmann, Case 40/69, [1970] Rec. 69 ("Turkey Tails"). The function of the goods was significant in Telefunken Fernseh, Case 223/84, [1985] E.C.R. 3335.

[172]Industriemetall LUMA, Case 38/76, [1976] E.C.R. 2027.

headings expanded by Rule 2(b).

The first four rules are very similar to the rules of the previous CCCN, and refer only to headings at the 4-digit level. Rule 6 applies the same system to the subheadings and Subheading Notes up to 6 digits. Canadian Rule 1 applies the same principles to tariff items up to the 8-digit level, along with any related Supplementary Notes. For statistical purposes, the same principles are also to apply to the 10-digit classification numbers under Canadian Rule 3, which is not part of the tariff legislation. The Rules are not specifically made applicable to interpretation of the concessionary provisions in other Schedules to the Customs Tariff Act. These usually refer to the headings, subheadings and tariff items of Schedule I, however; the Rules will apply at least to that extent.[173]

The major criticism of these rules for interpretation is that they give too much emphasis to material composition of goods, reflecting the influence of the observation model for

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[173]Canadian Rule 2 confirms that international terms take precedence in those instances where the tariff contains the Canadian term in parenthesis after the international term. This Canadianization of the tariff occurred after recommendations from the Tariff Board concerning the difficulty of understanding an HS-based tariff which referred to things like "crane lorries" (mobile cranes) and "gear boxes" (transmissions). See: Tariff Board, Reference No. 163, The Harmonized System of Customs Classification, Vol. I, Chapters 1-24 (1985), p.15 and Vol.II, Part 1 - Chapters 25-46 (1985) p.15; Revenue Canada, Customs and Excise, Submission to the Tariff Board, Reference No. 163: Canada's Customs Tariff According to the Harmonized System, July 29, 1986, p.7.

classification. Goods are to be judged by physical characteristics present at the time of importation. Any other factors are thought to be extrinsic, subjective and unreliable. Classification has to be objective and verifiable. Imported jeans in Lampe, Case 222/85, were therefore men's garments because they fastened left over right, despite arguments from the importer that women wore this style as well. The Court reasoned that:

> the intended use of goods, which is not an inherent quality of the goods, cannot be used as an objective criterion for the purposes of its Common Customs Tariff classification at the time of importation since it is impossible at that time to determine the actual use to which the goods will be put.[174]

Interpretation was quite literal, so that a bonded fibre was classified as a fabric despite its use as a floor covering,[175] and a pocket calculator with a simple programming language was classified as a data-processing machine despite its intended use for basic calculating. The requirements of legal certainty and simple checks for customs clearance meant that the definition for data-processing machines had to be applied. Any up-dating to take account of technological developments was to be done through amendments to the tariff and not

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[174]Kleiderwerke Hela Lampe, Case 222/85, [1986] E.C.R. 2449 at 2456. See also: Dr. Ritter, Case 114/80, [1981] E.C.R. 895; Carlsen Verlag, Case 62/77, [1977] E.C.R. 2343.

[175]3M Deutschland, Case 92/83, [1984] E.C.R. 1587.

through judicial interpretation.[176] The requirement of objective certainty at the time of importation was so overwhelming that it was seen as exceptional to rely on certificates of origin to distinguish reindeer meat as either from domestic animals or wildgame since there was no physical difference in the goods as imported.[177]

Some decisions in Community law used the objectivity requirement to distinguish tariff classification from interpretation relating to the system of agricultural levies.[178] This is quite acceptable as avoidance of purposive interpretation which would be, in any case, too narrow for adoption by the Customs Co-operation Council. It is possible as well that the strong emphasis on finality of customs clearance is influenced by the fact that goods can clear customs in one member state of the Community even though they are destined for sale in another member state. The administrative problems of customs unions can be solved through other co-operative measures, however, and do not require that interpretation take place in an artificial setting isolated from all knowledge of ordinary commerce. The

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[176]Casio Computer, Case 234/87, [1989] E.C.R. 63. See also Analog Devices, Case 122/80, [1981] E.C.R. 2781.

[177]Witt, Case 149/73, [1973] Rec. 1587. See D. Lasok & W. Cairns, The Customs Law of the European Economic Community (Deventer: Kluwer, 1983) p.164.

[178]Günther Henck, Case 36/71, [1972] Rec. 187; Paul F. Weber, Case 40/88, [1989] E.C.R. 1395.

contextual model has also been present in Community law, particularly in decisions relating to the "essential character" of goods. It would be worthwhile to examine thoroughly previous decisions in the member states of the Community and in other jurisdictions around the world with experience in applying the CCCN to see if the strong emphasis on material composition in the General Rules for Interpretation is still appropriate.

It is argued throughout this study that interpretation should be based more on the contextual model than on the observation model. For the naming of natural kinds, it may be that physical characteristics are paramount. Manufactured goods, however, reflect human design and can be most reliably identified through approaches to interpretation which consider that design. A wooden table is more like a metal table than it is like a wooden chair. Particularly for products of new technology, use is more important than physical characteristics. The emphasis on material composition in the General Rules risks creating a classification system at odds with commercial practice.

Empirical observation does not guarantee certainty. To the extent that certainty is attainable, it comes from shared understandings which consider as many of the relevant viewpoints as possible. It is the shared understandings from commercial practice and the use of goods in application which

are most likely to provide generally accepted interpretations. Especially if the Harmonized System is to fulfill its promise as a truly multipurpose commodity code, classification theory should concentrate less on "What is this made of?" and more on "What is this for?".

Chapter 4

Parts and Entities

I. Parts and Entities

a. Introduction

In order to operate a tariff classification system, customs authorities must be able to tell when they have been presented with a "something" requiring classification. This is not as easy as it sounds, since the commercial world has evolved somewhat from the days when we were hauling goods across the border in horse-drawn wagons. Many imports are far too big to be shipped in one large package. Different components could be delivered at different times, possibly from different manufacturers. Even if the particular "something" can move across the border in one piece, sales of complex machinery may involve an obligation on the seller to provide replacement parts in the future. It is quite possible that these replacement parts will be included in the tariff description in some way, since they are involved in the same

arrangement.

The whole notion of crossing the border is also becoming more imprecise, especially with current developments in customs administration. The horse-drawn wagon pulling up to the customs house has obviously become the car or truck reporting at the border, but this is not necessarily the time when clearance will take place. For many commercial imports, the truck could easily be making a delivery under bond to a customs warehouse, from which the goods will be released at a later date. In some cases, goods can be released on minimum documentation prior to full accounting. With the introduction of the Customs Automated Data Exchange (CADEX) system at the beginning of 1988, it is now possible for brokers and importers to complete the entry and accounting procedures electronically from their own offices without further paperwork. Revenue Canada plans to increase the use of electronic data interchange (EDI) in the future, so that release and accounting procedures could cover a series of imports in low-risk situations, rather than being repeated for each transaction.[1]

Previous caselaw has established that tariff

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[1]For discussion of EDI in customs administration, see the chapter on Implementation and Procedures.

classification is to be done as of the time of importation.[2] For parts items, it can be necessary to determine whether goods are committed to a particular use on importation, whether they are attached together or whether they are imported at about the same time. There may be some dispute about when the precise moment of importation occurs. For the purposes of classification, it is probably the time when entry documents are first presented.[3] There would still be some possibility of later corrections and adjustments, notably for end use items.[4] The condition of goods on importation, however, can be significant.

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[2]DMNRCE v. MacMillan & Bloedel, [1965] S.C.R. 366, 3 TBR 9 (S.C.C., March 1, 1965); Harvey Carruthers v. DMNRCE, App. 465, March 10, 1958, 2 TBR 147 (T.B.); Jean Carruthers v. DMNRCE, App. 2551, July 8, 1987, 12 TBR 242, 14 CER 193 (T.B.); Ray Fazakas v. DMNRCE, App. 2643, Nov. 24, 1987, 12 TBR 512, 15 CER 152 (T.B.).

[3]Canada Sugar Refining v. The Queen, [1898] A.C. 735; Imperial Tobacco v. DMNRCE, App. 2495, Oct. 24, 1986, 11 TBR 507, 13 CER 13, aff'd. DMNRCE v. Imperial Tobacco, 18 CER 10 (F.C.A., Sept. 14, 1988). There is an argument in favour of the time of accounting, since it is significant for further appeals: Customs Act, S.C. 1986, c.1 (R.S. 1985, ch.1 (2nd Supp.), s.32, s.59. The time of initial presentation of documents may make less sense if procedures for advance release of goods are generally available. As discussed in the chapter on Implementation and Procedures, Revenue Canada is moving towards a system of block releases in low-risk situations, in which the decision to release could be made before goods are in the customs territory.

[4]Brascop v. DMNRCE, App. 898, Nov. 18, 1968, 4 TBR 251 (T.B.), aff'd. DMNRCE v. Brascop, 4 TBR 277 (Ex.Ct., Sept. 24, 1969); R. v. Sun Parlor, [1973] F.C. 1055 (T.D.); R. v. Confection Alapo, 2 CER 249 (F.C.T.D., April 28, 1980); Superior Brake v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.).

The use of EDI removes the classification process from direct physical contact with goods and introduces greater abstraction. This is no longer the world of the customs official peering uncertainly at a parcel in the back of the wagon. The filing of entry and accounting information is not tied to the physical release of goods, the time when any inspection could take place. With EDI, it becomes increasingly difficult to see why any particular time of importation should be significant -- whether it be the time when the truck drives across the border, when officials decide to release, when the goods leave a warehouse, when the accounting is completed, or when any entry adjustments are made. Classification does not have to be linked to inspection of the goods. More and more, the observation model can be replaced by the contextual model, in which the functioning of the goods in application has priority over their physical condition at the time of importation.

The sections below analyze provisions of the Canadian customs tariff prior to implementation of the Harmonized System. Items which included parts are discussed first. The next section deals with items which covered entities without specifically mentioning parts. The tests for parts are examined to see if they differed in any significant way from entity tests developed to decide what was included in a particular entity. The related concept of accessories and

attachments is then discussed in a subsequent section, followed by a look at priorities between parts items and other tariff items. The treatment of parts under the Harmonized System is the topic of the concluding section.

b. Parts Tests

In the Danfoss appeal,[5] the Federal Court of Appeal indicated that parts items were to be distinguished from end use items, which demanded that goods be actually used for the particular purpose. In Danfoss, the imported compressors were not included in the item for "refrigerator parts" and would not have been included even if it had been shown that all such compressors imported into Canada were invariably incorporated into refrigerators. In their condition as imported, there was nothing to prevent the compressors from being used in vending machines, farm milk coolers, water fountain coolers, dehumidifiers and other equipment; therefore, at the time of importation, they were not "refrigerator parts." The Court confirmed the decision of the Tariff Board below which had stated that:

> Tariff item 41507-1 enumerates "refrigerator parts"; such an enumeration implies goods which are either by their very nature parts of refrigerators or are, at the time of importation,

[5] DMNRCE v. Danfoss Manufacturing, [1972] F.C. 798, 5 TBR 82 (F.C.A., May 10, 1972).

> incorporated into a refrigerator or packaged together with the other parts of such a refrigerator. The item does not use words equivalent to "for use as refrigerator parts" or "for use in making refrigerators". It is an item describing goods rather than indicating the use to which they are put.
>
> There exist such things as certain insulated doors and sides, certain door handles, certain refrigerating compartments, certain shelving and other things which, by nature and design, are parts for refrigerators and generally are committed to use as such.
>
> The compressors in issue do not belong in this category.[6]

The manner of physical presentation of the goods at the time of classification obviously has some impact on whether the issue will be raised. Customs authorities are unlikely to start pulling apart assembled entities to see whether each identifiable piece meets a "parts" test. Once some separation appears, however, -- because the goods arrive at different times, because they are intended as replacement parts or because they are components for something being manufactured domestically -- it may be necessary to determine whether the goods are "by nature and design ... committed" to be parts within the meaning of a given tariff item. In decided cases prior to implementation of the Harmonized

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[6]Danfoss Manufacturing v. DMNRCE, App. 940, June 1, 1971, 5 TBR 75 (T.B.) at 76-77. Extracts from these paragraphs were quoted by the Court of Appeal: 5 TBR 84.

System, interpretation sometimes followed the observation model and concentrated on the physical condition of goods at the time of importation. Other cases followed a more contextual model and used factors related to the functioning of the goods in application. The main test, from the Bosch decision discussed below, is a blend of the two models.

Sometimes the required degree of physical commitment was found in the stage of processing, if goods had been treated or manufactured to a degree which destined them to a particular application. In the early Union Tractor appeal, for example, the attachments were parts of power shovels because they were designed for that use and had been "advanced to a point which definitely commits them to a specific machine."[7] This did not mean that the parts had to be completely finished, unless the tariff item contained such a qualification. In the L'Atelier du Cadre appeal, the wood pieces were sufficiently manufactured to be furniture parts even though labour would be required to assemble the furniture for sale,[8] and in Access Corrosion the imported steel anodes were sufficiently finished to be parts of electrical apparatus even though wires would have to be added

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[7]Union Tractor v. DMNRCE, App. 196, Dec. 14, 1949, 1 TBR 25 (T.B.) at 26. See also Ocelot Chemicals v. DMNRCE, App. 2019, Dec. 12, 1985, 10 CER 208 (T.B.).

[8]L'Atelier du Cadre v. DMNRCE, App. 472, May 2, 1958, 2 TBR 157 (T.B.).

before installation.[9] If the required degree of commitment was not present, the goods would not yet be parts,[10] but the simple fact that some further processing was required was not determinative. The line was occasionally difficult to draw, as in the Exchanger Sales appeal involving forgings for a heat exchanger to be used in the recovery of products from natural gas. The majority of the Board found the forgings to be parts of the exchanger, despite the fact that considerable work was still needed to finish them to the precise dimensions required and to drill holes. Tariff Board member Dauphinée dissented on this point since the forgings as imported were still in too rough a form to be physically identified with any particular part of the exchanger. The purchaser's intentions as to use, in his opinion, would be relevant for an end use item, but not for a determination as

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[9]Access Corrosion v. DMNRCE, App. 1965, March 23, 1984, 9 TBR 184, 6 CER 228 (T.B.). See also: Joy Manufacturing v. DMNRCE, App. 2083, March 5, 1984, 9 TBR 155, 6 CER 208 (T.B.); GTE Sylvania v. DMNRCE, App. 1867, Nov. 7, 1986, 11 TBR 535, 13 CER 48 (T.B.).

[10]Harvey Carruthers v. DMNRCE, App. 465, March 10, 1958, 2 TBR 147 (T.B.). Extra manufacturing might also advance the goods to the point where they were no longer parts, but had become something else specifically listed in the tariff: Kirkwood Commutators v. DMNRCE, App. 1551, April 23, 1981, 7 TBR 335, 3 CER 127 (T.B.), where the goods were still automobile parts because they had not yet advanced to the point of being "segments".

to parts, which should demand a closer physical link.[11]

The physical link could easily be found when goods were custom-made for a particular entity, as the steel conveyor belt was for the board-making machine in the Pluswood appeal.[12] If the goods were relatively standard equipment suitable for various applications, they were unlikely to be found to be parts. The chain hoist in Western Agricultural, for example, was not part of a grain loader because it was not significantly different from any other chain hoist of that size and thus was not committed to the loader.[13] Between custom-made goods and standard equipment, there was some leeway for a bit of interchangeability before goods were disqualified as parts. The tail-gate assemblies in Ferguson which were manufactured for any make of truck were not parts

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[11]Exchanger Sales v. DMNRCE, App. 1046, Aug. 14, 1973, 1974 Canada Gazette Part I p.1830 (T.B.).

[12]Pluswood Manufacturing v. DMNRCE, App. 1962, Jan. 20, 1984, 9 TBR 100, 6 CER 166 (T.B.). See also Radex v. DMNRCE, App. 2834, Aug. 3, 1988, 17 CER 155 (T.B.).

[13]Western Agricultural Supply v. DMNRCE, App. 518, June 15, 1959, 2 TBR 206 (T.B.). See: Ackron Plastics v. DMNRCE, App. 760, Oct. 27, 1964, 3 TBR 200 (T.B.); Montreal Standard v. DMNRCE, App. 767, Dec. 15, 1964, 3 TBR 226 (T.B.); Canadian General Electric v. DMNRCE, App. 1970, Feb. 15, 1984, 9 TBR 130, 6 CER 190 (T.B.); Mitel v. DMNRCE, App. 2159, April 4, 1985, 10 TBR 90, 9 CER 40 (T.B.); Anixter v. DMNRCE, App. 2384, Oct. 24, 1986, 11 TBR 495, 13 CER 4 (T.B.); Kraus Industries v. DMNRCE, App. 2782, Aug. 9, 1988, 17 CER 164 (T.B.). In Electrodesign v. DMNRCE, App. 556, June 28, 1961, 2 TBR 241 (T.B.), it was physical commitment in the basic entity which was lacking; the electronometer there in question could be adapted for any type of ionization chamber and the imported chambers were therefore not parts.

of those trucks,[14] but the pipes and attachments for forage blowers in Sperry New Holland were parts of the machines despite the fact that they could be used with forage blowers made by other manufacturers.[15]

In the Robert Bosch appeal, car stereo radio-cassette players were classified as parts of radio receiving sets despite some interchangeability. In its decision, the Board set out the following criteria for parts:

> The true test of whether an article can properly be considered to be a part of goods when parts thereof are mentioned in the tariff item depends on whether it is committed for use with such goods. Whether it is so committed for use with the goods will depend in each case upon the scope of the description of the goods. An article that can be used with goods other than those described is regarded as not so committed and one that has no use other than with such goods and is necessary for their function is committed for use with them. In this appeal the article, consisting of the tuner, pre-amplifier and related apparatus has no use other than as a component of a radio receiving set and is necessary for the functioning of the set. It is a part thereof, and that is so notwithstanding that it may have been

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[14]Ferguson Supply v. DMNRCE, App. 1871, Dec. 1, 1982, 8 TBR 393, 5 CER 22 (T.B.).

[15]Sperry New Holland v. DMNRCE, App. 1205, March 23, 1977, 6 TBR 428 (T.B.). See also Stewart-Warner v. DMNRCE, App. 1356, Jan. 31, 1979, 6 TBR 758, 1 CER 49 (T.B.), concerning accessories for a power lubrication system.

> imported and sold separately, may have been made by a different manufacturer than have the other components and may be substituted by apparatus of a different design or manufacturer.[16]

This test, which was often cited in other decisions, involved two factors: the physical commitment of parts to a particular use (observation model) and the requirement that the parts be essential to the functioning of the underlying goods (contextual model). In Bosch, it was the first factor which was in doubt. It was clear that different components could be substituted for each particular set, and it also appeared that each particular component was not necessarily destined for any specific set. The key fact seems to have been that the components were designed for use with radio receiving sets in general; their application was thus sufficiently limited to constitute commitment.[17]

Goods were more likely to meet the first requirement if

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[16]Robert Bosch v. DMNRCE, App. 2089, April 16, 1985, 10 TBR 110, 9 CER 62 (T.B.) at 116 TBR.

[17]In the Bosch decision, the Board also mentioned an earlier declaration (Canadian Hanson & VanWinkle v. DMNRCE, App. 291, May 21, 1953, 1 TBR 126) in which buffing sections had been found to be not parts because they were usable on any buffing machine. Noting that the sections were nevertheless designed for that application, the Board stated that Canadian Hanson was no longer authoritative in view of the Ferguson Industries appeal discussed below under "Priorities" (Ferguson Industries v. DMNRCE, App. 911, Nov. 5, 1969, 4 TBR 344 (T.B.), aff'd. DMNRCE v. Ferguson Industries, 4 TBR 357 (Ex.Ct., April 21, 1970), rev'd. [1973] S.C.R. 21, 4 TBR 368 (S.C.C., May 1, 1972)). See also Moore Dry Kiln v. DMNRCE, App. 990, July 10, 1972, 5 TBR 401 (T.B.).

their application was narrow. If there was clearly a separate possible use, then the required degree of commitment was not present.[18] Generally speaking, it was the physical possibility of a different use that counted and when goods were so designed that they had to be physically matched, like the deflection yoke for each particular model of television tube in the General Instruments appeal,[19] they were likely to be found to be parts. The link between parts and basic entites could also focus on mechanical functioning and the fact that goods were designed to operate together could indicate that realistically there was no other use. The imported replacement chutes in Burnbrae Farms, for example, were found to be parts of a poultry manure removal system because they were designed specifically to operate with the

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[18]Electrodesign v. DMNRCE, App. 556, June 28, 1961, 2 TBR 241 (T.B.); J. H. Ryder v. DMNRCE, App. 599, May 9, 1962, 2 TBR 292 (T.B.); Opticom v. DMNRCE, App. 2619, Feb. 29, 1988, 13 TBR 196, 16 CER 160 (T.B.); Sherwood Medical v. DMNRCE, App. 2397, Nov. 6, 1986, 11 TBR 520, 13 CER 30 (T.B.); Trudell v. DMNRCE, App. 2712, April 27, 1988, 13 TBR 239, 16 CER 257 (T.B.). These last two appeals can be contrasted with Novocol Chemical v. DMNRCE, App. 2731, Feb. 26, 1988, 13 TBR 183, 16 CER 132 (T.B.).

[19]General Instruments v. DMNRCE, App. 1151, April 29, 1976, 6 TBR 338 (T.B.). Despite the Bosch decision, it helped if goods could be used only with one particular make or model: Walbern Industries v. DMNRCE, App. 1084, May 1, 1975, 6 TBR 246 (T.B.); Outboard Marine v. DMNRCE, App. 1724, Aug. 10, 1981, 7 TBR 423, 3 CER 258 (T.B.). In Bestpipe v. DMNRCE, App. 928, April 23, 1979, 5 TBR 58 (T.B.) the imported pallets and headers found to be parts of the pipe-forming machine were suitable for use only with a particular make of machine, although they could be modified for other makes.

automatic system and were sold only for that purpose.[20] In the Booth Photographic appeal, the Tariff Board originally declared that the imported automatic roller was not part of a film processor, but then changed its decision when this ruling was over-turned by the Federal Court of Appeal.[21] In a finding that indicates the significance of the scope of the description of the basic goods, the Court of Appeal determined that the roller which was designed for only this purpose was so closely connected to the rest of the processor that it changed the nature of the basic goods from manually-driven to power-driven. Once it had been decided that there were thus two distinct types of processors, it was easy for the Board to conclude that the roller was part of a power-driven processor. In Moore Dry Kiln, a previous declaration involving an electronic control system imported for a veneer clipper, the Board had similarly found that the addition of the new automatic control changed the basic nature of the goods; the control had been designed to

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[20]Burnbrae Farms v. DMNRCE, App. 1440, Dec. 3, 1979, 6 TBR 957, 1 CER 323 (T.B.). See also: Leslie Taylor v. DMNRCE, App. 1963, Sept. 13, 1983, 8 TBR 772, 5 CER 557 (T.B.), aff'd. F.C.A. March 15, 1985 without written reasons (see 11 TBR 159); Imperial Tobacco v. DMNRCE, Apps. 1979 etc., March 13, 1986, 11 TBR 158, 11 CER 129 (T.B.); Ingersoll-Rand v. DMNRCE, Apps. 2361 etc., March 8, 1988, 13 TBR 219, 16 CER 235 (T.B.).

[21]Booth Photographic v. DMNRCE, App. 1510, April 13, 1981, 7 TBR 329, 3 CER 124 (T.B.), rev'd. DMNRCE v. Booth Photographic, 4 CER 176 (F.C.A., May 17, 1982), reheard App. 1510, Feb. 1, 1983, 8 TBR 521, 5 CER 140 (T.B.).

function as a single integrated automatic unit with the clipper and was therefore part of it, even though it could be adapted with minor modifications for use on other standard clippers.[22] If various components thus all formed part of a single system, their physical distance from each other was not significant. In the Maple Leaf Potato Chips appeal, a heat exchanger was found to be part of a fryer even though separated by a wall from the rest of the equipment, because all of the parts were designed to operate together in controlling the temperature of the oil and they had no other function.[23]

The parts test in the Robert Bosch appeal quoted above stated that an article was committed for use with certain goods if it "has no use other than with such goods and is necessary for their function." The concern with necessity was linked to the idea that a part should be central in some way, as distinguished from a mere accessory. This second, more contextual branch of the Bosch test was applied by the Federal Court of Appeal in the Androck case, to hold that

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[22]Moore Dry Kiln v. DMNRCE, App. 990, July 10, 1972, 5 TBR 401 (T.B.). See also Outboard Marine v. DMNRCE, App. 1724, Aug. 10, 1981, 7 TBR 423, 3 CER 258 (T.B.).

[23]The whole system had been imported disassembled in three truck-loads: Maple Leaf Potato Chips v. DMNRCE, App. 796, May 18, 1965, 3 TBR 270 (T.B.). Physical distance was similarly found insignificant as an entity test: Shaft Sinkers v. DMNRCE, U. & N. Equipment v. DMNRCE, App. 875, 876, May 23, 1956, 4 TBR 156 (T.B.) (item covered parts, but imported goods held to constitute single entity).

grasscatcher bags were not parts of lawnmowers. While the bags were committed to this use, it was clear that the lawnmowers could operate without them.[24]

Attention generally focused on mechanical necessity, something that had to be present for the goods to function. In the Sperry New Holland appeal, for example, the pipes in question were parts of agricultural machinery because without them "the forage blower would simply propel the forage material twenty to thirty feet into the air in a 'blizzard of hay or corn'."[25] In the Northern Machinery appeal, a trap was part of a grain mill because it was "performing a function essential to the safe and prudent operation of the mill,"[26] a slightly wider interpretation of the requirement. In Walbern Industries, the Board also considered economic necessity. In

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[24]DMNRCE v. Androck, 13 CER 239, 74 N.R. 255 (F.C.A., Jan. 28, 1987), rev'g. Androck v. DMNRCE, App. 2081, Oct. 22, 1984, 9 TBR 352, 8 CER 49 (T.B.). See: Carousel Photographic v. DMNRCE, App. 2477, Nov. 5, 1986, 11 TBR 517, 13 CER 28 (T.B.); Staub Electronics v. DMNRCE, App. 2532, Jan. 6, 1987, 12 TBR 14, 13 CER 193 (T.B.); Digidyne v. DMNRCE, App. 2652, Dec. 24, 1987, 12 TBR 620, 15 CER 301 (T.B.); Staub Electronics v. DMNRCE, App. 2764, Nov. 2, 1989, 2 TCT 1230 (C.I.T.T.).

[25]Sperry New Holland v. DMNRCE, App. 1205, March 23, 1977, 6 TBR 428 (T.B.). See also: General Instrument v. DMNRCE, App. 1151, April 29, 1976, 6 TBR 338 (T.B.); Burnbrae Farms v. DMNRCE, App. 1440, Dec. 3, 1979, 6 TBR 957, 1 CER 323 (T.B.); Leslie Taylor v. DMNRCE, App. 1963, Sept. 13, 1983, 8 TBR 772, 5 CER 557, aff'd. F.C.A. March 15, 1985 (see 11 TBR 159); Imperial Tobacco v. DMNRCE, Apps. 1979 etc., March 13, 1986, 11 TBR 158, 11 CER 129 (T.B.).

[26]Northern Machinery v. DMNRCE, App. 633, Nov. 22, 1962, 2 TBR 317 at 319 (T.B.).

that appeal, a cross-loader was found to be part of an egg-handling machine because without it the machine could not be operated "at an economic rate of speed or ... at the designed capacity."[27] In all of these appeals, goods still had to be committed to that particular use. Functional necessity of itself was not enough. In the Dominion Textile appeal, take-off reels were not parts of dye vats even though necessary for their operation because "there was no evidence that each type of take-off reel is dedicated to use with a particular dye beck."[28]

Parts were expected to be related to the main function of the basic goods; they were "not collateral" but "essential and fundamental."[29] In Control Data, printing cylinders were separate goods and not parts even though essential to the functioning of the machinery, because they were seen as only subsidiary; they were "goods manufactured and supplied separately like type for use in a press."[30] The length of

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[27]Walbern Industries v. DMNRCE, App. 1084, May 1, 1975, 6 TBR 246 (T.B.) at 251.

[28]Dominion Textile v. DMNRCE, App. 865, Nov. 29, 1967, 4 TBR 78 (T.B.) at 81.

[29]Pluswood Manufacturing v. DMNRCE, App. 1962, Jan. 20, 1984, 9 TBR 100, 6 CER 166 (T.B.) at 104 TBR. See also Western Canadian Seed Processors v. DMNRCE, App. 611, Oct. 30, 1963, 3 TBR 53 (T.B.).

[30]Control Data v. DMNRCE, App. 1512, March 15, 1982, 8 TBR 111, 4 CER 81 (T.B.) at 114 TBR. They were also, presumably, not accessories. The Board appears to have found the competing eo nomine item more specific.

time for which goods were used could have some impact on whether they were sufficiently fundamental to qualify as parts. Imported forms and moulds were found to be necessary parts of pipe-making machinery in the Bestpipe appeal, even though they were ir contact with the machine for only a few minut .[31] In Canadian Totalisator, however, specially designed computer paper was not part of a race track's electronic betting system despite the fact that the paper was necessary for the operation of the system. In contrast to the goods in Bestpipe, the paper could not be re-used, and it was therefore found to be a consumable rather than a part. According to the Board, "(p)arts of a machine are used for extended periods of time until they wear out or break and need to be replaced"[32] and the rolls of paper did not have this required quality of permanence.

Parts were supposed to be linked to the functioning of the basic goods. If they served a different function, they were separate goods, not parts. In the SKF Canada appeal, the adapters were separate goods rather than parts of bearings because they served the extra function of connecting

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[31]Bestpipe v. DMNRCE, App. 928, April 23, 1970, 5 TBR 58 (T.B.).

[32]Canadian Totalisator v. DMNRCE, App. 2184, Feb. 18, 1986, 11 TBR 120, 11 CER 91 (T.B.) at 124 TBR. See also: Indel-Davis v. DMNRCE, App. 2775, Dec. 18, 1987, 12 TBR 589, 15 CER 223 (T.B.); Xerox Canada v. DMNRCE, Apps. 2678, 2722, July 15, 1988, 17 CER 47 (T.B.); Light Touch v. DMNRCE, App. 2809, June 23, 1989, 2 TCT 1139 (C.I.T.T.).

the bearings to the shaft.[33] Attention to functions could help to resolve the ambiguity when articles might be parts of two distinct things,[34] but other considerations such as degree of attachment would also have an influence.[35]

In deciding whether something was a part, trade usage was occasionally mentioned,[36] but it was not a significant factor in the reported decisions. Advertising also played a

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[33]SKF Canada v. DMNRCE, App. 1713, 1818, June 4, 1982, 8 TBR 179, 4 CER 209 (T.B.), aff'd. 10 CER 6, 47 N.R. 61 (F.C.A., March 4, 1983). In Moore Dry Kiln v. DMNRCE, App. 990, July 10, 1972, 5 TBR 401 (T.B.), the imported control system had proved unworkable for other purposes and was therefore functioning only as part of a veneer clipper. See the separate opinion of Tariff Board member Gordon in Simark Controls v. DMNRCE, App. 2278, Sept. 24, 1985, 10 TBR 221, 9 CER 270 (T.B.), in which he found the imported goods to be parts of meters, rather than meters themselves, since they did not have separate measuring capacity but functioned as part of a system which did the measuring and recording. See also Maxi-Torque v. DMNRCE, App. 2699, Jan. 27, 1988, 13 TBR 21, 16 CER 6 (T.B.).

[34]Superior Electronics v. DMNRCE, Apps. 1082, 1083, July 5, 1976, 1977 Canada Gazette Part I p.2803 (T.B.).

[35]Sperry New Holland v. DMNRCE, App. 1205, March 23, 1977, 6 TBR 428 (T.B.). The question might also depend on which item was more specific: DMNRCE v. GTE Sylvania, App. 1068, Feb. 5, 1975, 6 TBR 210 (T.B.); Shaw's Sales v. DMNRCE, App. 2688, April 14, 1988, 13 TBR 226, 16 CER 247 (T.B.); N.S. Tractors v. DMNRCE, App. 2827, Aug. 10, 1988, 17 CER 180 (T.B.). Concerning accessories, see Frantek Software v. DMNRCE, App. 2223, Jan. 7, 1986, 11 TBR 9, 10 CER 268 (T.B.).

[36]Leepo Machine v. DMNRCE, App. 759, Sept. 25, 1964, 3 TBR 199 (T.B.); Cascade Co-operative Union v. DMNRCE, Vernon Fruit Union v. DMNRCE, App. 804, 823, Jan. 6, 1966, 3 TBR 281 (T.B.); SKF Canada v. DMNRCE, App. 1713, 1818, June 4, 1982, 8 TBR 179, 4 CER 209 (T.B.), aff'd. 10 CER 6, 47 N.R. 61 (F.C.A., March 4, 1983).

role but a minor one;[37] an article could be a part within the meaning of a tariff item even though it was described as an accessory or attachment in the manufacturer's literature.[38] In the Danfoss appeal quoted at the beginning of this section, the Tariff Board stated that imports might be found to be parts if they were either "incorporated into" the basic goods or "packaged together with other parts" at the time of importation.[39] While packaging or selling goods together was some indication that they were parts,[40] it seems that the opposite conclusion did not hold. The fact that goods were packaged and sold separately did not mean that they were not parts, even for sales at the retail level. The radio-cassette players in the Robert Bosch appeal, for example, were parts of radio receiving sets even though they

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[37]SKF Canada v. DMNRCE, App. 1713, 1818, June 4, 1982, 8 TBR 179, 4 CER 209 (T.B.), aff'd. 10 CER 6, 47 N.R. 61 (F.C.A., March 4, 1983); Electrodesign v. DMNRCE, App. 556, June 28, 1961, 2 TBR 241 (T.B.).

[38]Northern Machinery v. DMNRCE, App. 633, Nov. 22, 1962, 2 TBR 317 (T.B.); Walbern Industries v. DMNRCE, App. 1084, May 1, 1975, 6 TBR 246 (T.B.).

[39]Danfoss Manufacturing v. DMNRCE, App. 940, June 1, 1971, 5 TBR 75 (T.B.) at 76, aff'd. DMNRCE v. Danfoss, [1972] F.C. 798, 5 TBR 82 (F.C.A., May 10, 1972).

[40]Northern Machinery v. DMNRCE, App. 633, Nov. 22, 1962, 2 TBR 317 (T.B.); Burnbrae Farms v. DMNRCE, App. 1440, Dec. 3, 1979, 6 TBR 957, 1 CER 323 (T.B.).

were "imported and sold separately."[41] In Bosch, the Board stated as well that parts did not have to be made by the manufacturer of the basic goods.[42] The fact that the sources were different was used, however, in other cases as some indication that goods were not parts.[43]

In the Danfoss appeal,[44] the Federal Court of Appeal distinguished parts items from end use items and held that for parts items, the intended use of the goods without some further commitment was not enough. The importer's intentions for the goods, however, occasionally influenced classification as parts. In Joy Manufacturing, the imported transporter belts were classified as parts of filters rather than as parts for conveyors because it was intended all along that they would be used in filters after holes and grooves

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[41]Robert Bosch v. DMNRCE, App. 2089, April 16, 1985, 10 TBR 110, 9 CER 62 (T.B.) at 116 TBR; Outboard Marine v. DMNRCE, App. 1724, Aug 10, 1981, 7 TBR 423, 3 CER 258 (T.B.); Harry D. Shields v. DMNRCE, App. 1489, Jan. 3, 1980, 7 TBR 1, 2 CER 1 (T.B.). But see contra Canadian General Electric v. DMNRCE, App. 1970, Feb. 15, 1984, 9 TBR 130, 6 CER 190 (T.B.).

[42]See Moore Dry Kiln v. DMNRCE, App. 990, July 10, 1972, 5 TBR 401 (T.B.).

[43]Ferguson Supply v. DMNRCE, App. 1871, Dec. 1, 1982, 8 TBR 393, 5 CER 22 (T.B.); Control Data v. DMNRCE, App. 1512, March 15, 1982, 8 TBR 111, 4 CER 81 (T.B.); J. H. Ryder v. DMNRCE, App. 599, May 9, 1962, 2 TBR 292 (T.B.).

[44]Danfoss Manufacturing v. DMNRCE, App. 940, June 1, 1971, 5 TBR 75 (T.B.) at 76, aff'd. DMNRCE v. Danfoss, [1972] F.C. 798, 5 TBR 82 (F.C.A., May 10, 1972).

had been drilled in them.[45] The General Bearing appeal did not deal with a parts item strictly speaking, but was analyzed almost as if the tariff item had read "parts for use with" certain agricultural machinery, rather than "belts and belting ... for use with" the machinery. The question, according to the Board, was whether the goods should be classified in a general item for belting "rather than the eo nomine tariff items providing for belts and belting as parts of specific machinery because the belting was imported in random lengths and not specifically made up into various endless lengths designed and limited for use in the specific machines involved".[46] The Board decided in favour of the item linked to use with specific machinery, since the goods were for resale to farmers and were too expensive for ordinary industrial applications. The decision was obviously influenced by the fact that this was an end use item, but this may also represent a certain softening of the commitment test for parts items with end use qualifications.[47]

In Great Canadian Oil Sands, the Federal Court of Appeal

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[45]Joy Manufacturing v. DMNRCE, App. 2083, March 5, 1984, 9 TBR 155, 6 CER 208 (T.B.).

[46]General Bearing Service v. DMNRCE, App. 2349, March 10, 1986, 11 CER 122 (T.B.) at 125 TBR. See also Exchanger Sales v. DMNRCE, App. 1046, Aug. 14, 1973, 1974 Canada Gazette Part I p.1830 (T.B.).

[47]See also Udisco v. DMNRCE, App. 2028, Feb. 2, 1984, 9 TBR 110, 6 CER 166 (T.B.).

took a purposive approach to end use items, in line with presumed legislative policy to favour particular economic sectors. In that judgment, which dealt with a class or kind determination, the Court of Appeal gave special prominence to end use factors in the determination and stated that "(w)here a use provision is enacted use becomes more than a facet of the evidence as to the nature of the goods, it becomes the basis for classification under the item."[48] The purposive approach from Great Canadian Oil Sands was initially applied to a parts question by the Tariff Board in Androck and then subsequently rejected on appeal. In order to give effect to presumed legislative policy, the Board had found the imported grasscatcher bags to be "parts ... for use in the manufacture or repair of power lawnmowers". The decision was reversed by the Federal Court of Appeal, since the bags were optional and the lawnmowers could operate without them. The goods had to meet the end use to qualify under the item. They also had to qualify as parts and this they had failed to do.[49] The strict

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[48]Great Canadian Oil Sands v. DMNRCE, [1976] F.C. 281 at 287, 6 TBR 160 at 166 (F.C.A., March 4, 1976), quoting from Tariff Board level, Great Canadian Oil Sands v. DMNRCE, App. 1051, June 5, 1975, 6 TBR 116 at 151 (dissent, member Dauphinée). For discussion, see the End Use chapter.

[49]Androck v. DMNRCE, App. 2081, Oct. 22, 1984, 9 TBR 352, 8 CER 49 (T.B.), rev'd. DMNRCE v. Androck, 13 CER 239, 74 N.R. 255 (F.C.A., Jan. 28, 1987. Although Great Canadian Oil Sands is not cited, a similar priority to end use appeared in the dissent by Tariff Board member Gorman in the Canadian General Electric appeal, almost to the point of rejecting any parts test at all: Canadian General Electric v. DMNRCE, App. 1970,

parts test from Bosch was thus preserved, at least in its second branch requiring that the parts be necessary for the functioning of the basic goods.

The parts test which had evolved in reported decisions prior to implementation of the Harmonized System was a blend of the observation model and the contextual model. Parts had to be physically committed to a particular application, and in application they had to be essential to the basic function. The refrigerator compressors in Danfoss failed the first branch of the test. The grasscatcher bags in Androck failed the second. Economic factors had some minor influence on interpretation, but when a strong purposive approach appeared at the Tariff Board level, it was rejected by the Court of Appeal.

C. Entity Tests

In entity appeals, the tariff item in question does not cover parts. Anything imported as a replacement part therefore does not qualify. The problem arises when several related things are imported either together or at about the same time and it appears that they will be linked in some way in application. It is then necessary to decide how many entities have been presented for classification and exactly what each entity includes. This is like the analysis that

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Feb. 15, 1984, 9 TBR 130, 6 CER 190 (T.B.).

would be done on the same facts if the tariff description covered parts. In reported cases prior to implementation of the Harmonized System, entity tests were similar to parts tests but not exactly the same.

In entity appeals, it was possible that the strict commitment test requiring an absence of other uses did not apply with the same rigour. While the question of use had some relevance and the fact of two independent uses could lead to a finding that goods were in fact two separate things,[50] entity appeals (particularly those from the 1950's) seem to be more concerned with commercial and marketing factors, with whether the goods were seen in the trade as constituting a single entity. In the Accessories Machinery appeal, for example, the Tariff Board held that the Department was wrong to classify the three components of a truck crane separately, since technological developments indicated that the entire crane had itself emerged as a single commercial entity.[51] Similarly, in Photographic

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[50]New Holland v. DMNRCE, App. 532, June 8, 1961, 2 TBR 223 (T.B.). In Bouffard v. DMNRCE, App. 593, March 12, 1962, 2 TBR 287 (T.B.), the Board also looked to the possibility of independent use, this time to find that it did not exist and that the pallets there in question were of the "very essence" of the machinery; as the tariff item involved in the appeal also referred to parts, this was a "hybrid" parts appeal (see cases discussed at the end of this section).

[51]Accessories Machinery v. DMNRCE, App. 242(No. 1), March 24, 1952, 1 TBR 48 (T.B.). See also: Ballentine v. DMNRCE, App. 237, April 23, 1951, 1 TBR 46 (T.B.); Accessories Machinery v. DMNRCE, App. 221, Jan. 11, 1951, TBR 37 (T.B.).

Survey, the various components of an aerial mapping system were to be classified together as they formed a "complete article of commerce."[52] It helped if, as in that case, goods were specifically designed to operate together, but this was not always a determining factor.[53]

In addition, if goods were physically connected at the time of entry, there was an increased tendency to consider them as all one entity. In the Jutan International appeal, a clock radio and a telephone were held to constitute one entity, "electric apparatus...n.o.p.," because they were mounted together on a plastic base and because they were imported and marketed together in a single package. According to the majority decision of the Tariff Board, these were "two separate and distinct products ... joined in a design to provide efficiency and probably save space on a bedroom night table"[54] and they should be treated together

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[52]Photographic Survey v. DMNRCE, App. 244, July 19, 1951, 1 TBR 52 at 53 (T.B.). All three components had to be operated simultaneously in order for the measurements to be made. See also IMS International Mailing Systems v. DMNRCE, Apps. 2612, 2616, Sept. 30, 1988, 18 CER 57 (T.B.).

[53]J.H. Ryder v. DMNRCE, App. 245, Nov. 26, 1951, 1 TBR 53 (T.B.); Ferguson Industries v. DMNRCE, App.911, Nov. 5, 1969, 4 TBR 344 (T.B.), aff'd. DMNRCE v. Ferguson Industries, 4 TBR 357 (Ex.Ct., April 21, 1970), rev'd. [1973] S.C.R. 21, 4 TBR 368 (S.C.C., Oct. 29, 1971), reheard Ferguson Industries v. DMNRCE, App. 911, Feb.28, 1973, 4 TBR 379 (T.B.).

[54]Jutan International v. DMNRCE, App. 2098, Aug. 14, 1984, 9 TBR 326, 7 CER 70 (T.B.) at 329 TBR. On the relationship of entity items and eo nomine items, see the discussion of the Ferguson appeal, infra in the section on Priorities.

despite their independent functions because classification had to be done at the time of entry. Tariff Board member Gorman dissented and would have classified the goods separately as "electric telephone apparatus" and "domestic radio receiving set" because they were designed to function independently and neither was necessary to the operation of the other. While it is true that marketing can have some effect on a parts determination and this may be like the reference to goods packaged together with other parts of a refrigerator in the Danfoss appeal,[55] it is still doubtful that these goods would have met the Bosch commitment test for a part as something "that has no use other than with such goods and is necessary for their function."[56] Perhaps entity items, unlike parts items, presumed physical connection and the presence of such a link had an exaggerated effect on interpretation.

The issues of packaging and function were raised in a series of appeals concerning the following tariff item enacted in October 1980:

> 89905-1 Chemical and biological preparations of a kind not produced in Canada, not including kits containing articles or materials other than the

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[55]Danfoss Manufacturing v. DMNRCE, App. 940, June 1, 1971, 5 TBR 75 (T.B.) at 76, aff'd. DMNRCE v. Danfoss, [1972] F.C. 798, 5 TBR 82 (F.C.A., May 10, 1972).

[56]Robert Bosch v. DMNRCE, App. 2089, April 16, 1985, 10 TBR 110, 9 CER 62 (T.B.).

> foregoing, when for use in medical diagnosis by public hospitals or medical laboratories licensed or accredited by provincial government authorities to provide diagnostic testing services.

The difficult phrase was "not including kits containing" disqualified substances. In the first appeal, A.P.I. Laboratory, it was determined that the word "kits" would be given its ordinary meaning and as such would cover bacterial diagnostic packages which included plastic strips, incubation trays and recording sheets. Since these were not all "chemical and biological preparations," the kits did not qualify under 89905-1 and had to be classified in the residual tariff item, 71100-1.[57]

The next appeal, Abbott Laboratories,[58] involved diagnostic kits imported with and without accessories. The diagnostic preparations were packaged in a styrofoam or plastic container and then put into a cardboard box which also included in some cases a separate package containing accessories such as reaction trays, plungers and sealers. The Tariff Board held that the kits without accessories could be classified in 89905-1, but that the kits with accessories

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[57]A.P.I. Laboratory Products v. DMNRCE, App. 1948, July 25, 1983, 8 TBR 730, 5 CER 514 (T.B.). In Boehringer Mannheim v. DMNRCE, App. 2201, Feb. 7, 1986, 11 TBR 98, 11 CER 51 (T.B.), a pair of tweezers alone was not enough to disqualify a kit, as it was viewed as part of the packaging.

[58]Abbott Laboratories v. DMNRCE, App. 1977, Sept. 6, 1984, 9 TBR 334, 7 CER 95 (T.B.), rev'd. 11 CER 357 (F.C.A., June 18, 1986).

could only fit in the residual item 71100-1. The Board held that the accessories were included in these "kits" because it was clear that the preparations and accessories were "designed and intended to be used together. ...(T)he accessories (were) ... shipped together with the chemical and biological preparations in the optimum combination required for the performance of the diagnostic tests as a single article of commerce."[59] The Federal Court of Appeal rejected this functional test from the Tariff Board and found that all the diagnostic kits were separate entities under 89905-1 and the accessories were classified separately in 71100-1. A kit had to be something different from its elements and, according to the Court, the difference had to be discernible at the time of importation. The Court therefore decided that "the word 'kit' does not simply mean a collection of objects having a special purpose but means such a collection contained in a specially designed case or container."[60]

The Court did not direct its attention solely to the physical condition of goods, however. In Kallestad, the imported goods were kits for testing blood. They could not be classified in 89905-1 because their components were of a kind produced in Canada. The Tariff Board had decided that each

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[59]9 TBR 343.

[60]Abbott Laboratories v. DMNRCE, 11 CER 357 (F.C.A., June 18, 1986) at 359.

component should be treated separately because there was no other tariff item which would cover the whole kit. The Federal Court of Appeal rejected this approach since the kits were "a single entity all of whose components contribute to a single defined function."[61] Since there was no other tariff item which applied, the kits were classified under 71100-1, the residual item. The entity test resulting from these appeals relied heavily on the physical condition and packaging of goods at the time of importation, but still required that the various components contribute in some way to a single defined function.

It will be appreciated that "contributing to a single function" was not as onerous as the Bosch parts test which required that parts have no other use and be essential to the functioning of the basic goods. In one decision, the Federal Court of Appeal used an entity test which was in fact stricter than the Bosch test. In First Lady Coiffures, the Tariff Board had decided that earring studs used with ear-piercing equipment should be classified along with the equipment as surgical instruments, since the goods had been

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[61] DMNRCE v. Kallestad, 14 CER 71 (F.C.A., March 25, 1987) at 71, rev'g. Kallestad v. DMNRCE, App. 2200, April 28, 1986, 11 TBR 197, 11 CER 280 (T.B.). If another tariff item had been applicable, it would have had priority over 71100-1: Jossal Trading v. DMNRCE, App. 1243, Oct. 25, 1977, 1978 Canada Gazette Part I p.7547 (T.B.); P.F. Collier v. DMNRCE, App. 1950, Aug. 19, 1987, 12 TBR 285, 14 CER 239 (T.B.).

"designed to be used together ... and for no other purpose."[62] The decision was reversed by the Court of Appeal which said that the evidence did not support the finding of only one single purpose. The Court did not suggest that the studs had some other application, since they were too large for ordinary wear and would be used only during the healing process after the ears were pierced. The "other purpose" to which the Court referred was their "secondary and, perhaps, from a merchandising viewpoint, at least ... equally important function of providing for the purchaser decorative earrings to be worn and seen"[63] during healing. It was, thus, not the actual use that was distinct, but rather the additional intention associated with that use that made the studs jewellery and not components of the ear-piercing equipment. This decision had a potentially wide application, since components could often be designed with some intention that they be decorative and one would not want them to be thereby disqualified as parts. Perhaps the Court's opinion was influenced by the difference in timing for the use of the studs and the rest of the equipment.

It would be wrong to place too much emphasis on a few appeals and conclude that entity tests differed widely from

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[62]First Lady Coiffures v. DMNRCE, App. 2126, Feb. 8, 1985, 10 TBR 26, 8 CER 228 (T.B.) at 35 (TBR).

[63]DMNRCE v. First Lady Coiffures, 13 CER 42, 71 N.R. 76 (F.C.A., Nov. 7, 1986) at 80 N.R.

parts tests. In many respects, they were the same. As with parts tests, economic factors could be considered to determine whether there were other likely uses of the goods. In the AG Marketing appeal, a truck chassis and sprayer were classified together as a single entity. Although the truck chassis could theoretically be converted to separate road use, the cost including conversion would be $88,000 to $93,000, while a chassis designed just for road use would cost $35,000 to $40,000. In these circumstances, according to the Tariff Board:

> The question ... is not whether it is physically possible to adapt the chassis to other uses but whether such adaptation is feasible or likely to happen. ... (W)hile most anything is possible in this technological world, it would not be economically feasible to convert the chassis ... to other use as a regular motor vehicle. Nor, according to testimony, does it happen.[64]

The chassis and sprayer together were therefore held to be a "spraying and dusting machine for agricultural and horticultural purposes." Although the item was an end use one, there was no specific reliance on this factor and interpretation was not done in a particularly purposive manner to benefit the agricultural industry.

In a number of appeals, parts and entity analyses were

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[64] AG Marketing v. DMNRCE, App. 2309, Oct. 22, 1985, 10 TBR 228, 10 CER 105 (T.B.) at 231 TBR.

mixed together. Although the tariff item mentioned parts, the analysis did not focus on whether a smaller thing was to be treated as part of a whole, but rather whether altogether the goods formed an entity. This approach was particularly common for items dealing with machinery and -- perhaps influenced by computers -- was often phrased as deciding whether or not the imported goods were a "system." In these hybrid decisions, then, although the item mentioned parts, the Tariff Board's declaration concentrated on whether an entity (a "single commercial entity")[65] had been created.

Once the entity was identified, it did not matter that separately its various components might themselves have qualified as entities.[66] It also did not matter that the various components were somewhat distant from each other when in operation, although it probably helped if they were physically connected in some way -- through wires, ropes, tubes, etc. In the Shaft Sinkers appeal, for example, a mining hoist was treated as one entity with three main components, -- a friction hoist, a compensating tower and a rope storage drum all connected by ropes and electrical

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[65]Esco v. DMNRCE, App. 1923, April 18, 1984, 9 TBR 224, 7 CER 205 (T.B.) at 229 TBR.

[66]Shaft Sinkers v. DMNRCE and U.&N. Equipment v. DMNRCE, Apps. 875, 876, May 23, 1968, 4 TBR 156 (T.B.); Esco v. DMNRCE, App. 1923, 9 TBR 224, 7 CER 205 (T.B.). See also, concerning entity items, Accessories Machinery v. DMNRCE, App. 242 (No.1), March 24, 1952, 1 TBR 48 (T.B.).

wires.[67]

The basic test for identifying an entity in these hybrid cases was whether the components all worked together for one function. In an early pair of appeals,[68] this was treated as a matter of whether each component had the same overall purpose in order to qualify as part of a grading machine. The "systems" approach, which appeared in Metropolitan Bio-Medical, looked instead to whether or not the various pieces were designed to work together.[69] The components in that appeal were incompatible with other computer systems except

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[67]Shaft Sinkers and U.& N. Equipment appeals, supra. See also: Metropolitan Bio-Medical Laboratories v. DMNRCE, App. 1218, March 30, 1977, 6 TBR 445 (T.B.), aff'd. without written reasons, F.C.A., Oct. 25, 1977 (see 9 TBR 340); Stewart-Warner v. DMNRCE, App. 1356, Jan. 31, 1979, 6 TBR 758, 1 CER 49 (T.B.); R. Mabit v. DMNRCE, App. 2622, Jan. 20, 1988, 13 TBR 1, 15 CER 329 (T.B.); dissenting opinion of C.I.T.T. member Trudeau in Schlumberger v. DMNRCE, App. 2898, Sept. 10, 1990, 3 TCT 2302 (C.I.T.T.). Concerning parts tests and similar distance, see Maple Leaf Potato Chips v. DMNRCE, App. 796, May 18, 1965, 3 TBR 270 (T.B.).

[68]Naramata Co-operative v. DMNRCE, App. 726, March 10, 1964, 3 TBR 144 (T.B.); Cascade Co-operative v. DMNRCE and Vernon Fruit Union v. DMNRCE, Apps. 804, 823, Jan. 6, 1966, 3 TBR 281 (T.B.). The two decisions are not consistent. The later one, Cascade & Vernon, finds an entire line of equipment from the dump table to the lidding machine to be a grading machine for fruit and vegetables, without requiring that each component itself perform a grading function.

[69]Metropolitan Bio-Medical Laboratories v. DMNRCE, App. 1218, March 30, 1977, 6 TBR 445 (T.B.), aff'd. without written reasons, F.C.A., Oct. 25, 1977 (see 9 TBR 340). In an earlier appeal, a steel mill and a vertical edger were treated as two separate entities despite being designed to operate together: Algoma Steel v. DMNRCE, App. 517, Nov. 25, 1960, 2 TBR 204 (T.B.).

at great expense and each was necessary for the entity to perform its function of diagnosing blood samples. They would have met a strict parts test if there had been anything for them to be a part of. The Tariff Board decided that together they formed an entity to be classified as a diagnostic article. In Windsor Management, there was some interchangeability, in that a different printer could be substituted, but still a printer was necessary in order for the computerized editing system to function.[70] For the "systems" analysis to work, there had to be a tariff item describing the whole system as an entity. As the Tariff Board noted in the Centrilift appeal, the identification of a system did not mean that the components became parts of each other.[71] As well, it helped if there was a central unit to establish the basic function. In Fromagerie d'Oka, the various components were found to be a cheese-making system, but not a machine or separate customs entity because there was no central unit and a great deal of work was done by

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[70]Windsor Management Services v. DMNRCE, App. 1294, June 5, 1978, 6 TBR 674 (T.B.). Interchangeability was, however, a problem in Astrographic v. DMNRCE, App. 2579, June 29, 1987, 12 TBR 235, 14 CER 166 (T.B.), along with the fact that the electric motors and the other components of the machine could be ordered separately from different manufacturers. See also Stewart-Warner v. DMNRCE, App. 1356, Jan. 31, 1979, 6 TBR 758, 1 CER 49 (T.B.).

[71]Centrilift v. DMNRCE, App. 2539, May 11, 1987, 12 TBR 191, 14 CER 130 (T.B.); Baker Oil v. DMNRCE, Apps. 2742, 2773, Dec. 24, 1987, 12 TBR 611, 15 CER 294 (T.B.); Maxi-Torque v. DMNRCE, App. 2699, Jan. 27, 1988, 13 TBR 21, 16 CER 6 (T.B.).

hand.[72]

As with parts tests, economic factors were considered in some of the hybrid cases. In the Agri-Feed Systems appeal, overhead bins and roof and side enclosures were held to form an entirety along with the feed mill for which they were supplied. They were found to be necessary for the efficient operation of the mill, as well as for the protection of the machinery and the comfort of the operator.[73] The economic efficiency argument did not work, however, in Schlumberger, where the data transmission equipment was seen as separate from the well-logging equipment, even though it greatly enhanced the efficiency with which oil well drilling records ("logs") could be produced.[74] Logs could be prepared through other means, and the transmission of data to a distant computer was therefore not essential.

In summary, parts tests and entity tests did differ

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[72]Fromagerie d'Oka v. DMNRCE, App. 1410, Nov. 15, 1979, 6 TBR 945, 1 CER 309 (T.B.). In Dari Farm Supply v. DMNRCE, App. 655, April 17, 1963, 3 TBR 75 (T.B.), various pieces of milking equipment were held to constitute "a system which properly falls within the meaning of the phrase 'milking machines and attachments therefor'"(p.76), despite some minor human intervention to pour the milk from one receptacle to another. It is not clear from the decision whether anything was to be separately identified as an "attachment."

[73]Agri-Feed Systems v. DMNRCE, App. 921, Oct. 2, 1969, 4 TBR 411 (T.B.). The Board also found the bins and enclosures to be parts.

[74]Schlumberger v. DMNRCE, App.2898, Sept. 10, 1990, 3 TCT 2302 (C.I.T.T.).

somewhat. For "pure" entity tests, there was greater emphasis on commercial recognition (especially in the earlier appeals) and it is likely that physical condition and packaging had special significance. The "hybrid" cases directed more attention to the functioning of goods in application. As could be expected, those cases were developing a test similar to the strict parts test which would require that goods have no other use and be essential to the operation of the system.

d. Accessories, Equipment and Apparatus

An early decision dealing with accessories was the General Supply appeal which went to the Exchequer Court of Canada in February 1956.[75] The case involved a blade and connecting mechanism for use on a tractor to turn it into a bulldozer with earth-moving functions. The two pieces of machinery had been designed to work together for this purpose. The Deputy Minister maintained that the blade assembly should be classified as a separate entity itself. The Tariff Board rejected this argument and held that the blade was a "subsidiary adjunct," usable only with a particular tractor model and thus an accessory for the

[75] General Supply Company of Canada v. DMNRCE, App. 326, March 7, 1955, 1 TBR 214 (T.B.), aff'd. DMNRCE v. General Supply Company of Canada, [1956] Ex.C.R. 248, 1 TBR 217 (Ex.Ct., Feb. 22, 1956).

tractor within the terms of the tariff item. This decision was affirmed on review in the Exchequer Court.

A significant criterion in accessory cases was the absence of other possible uses for the particular article. The imported good had to be dedicated or committed to a given use, but in some subsidiary way. To use the vocabulary of the Bosch parts test, an accessory had no other use, but it was not absolutely necessary in order for the basic entity to function. In the Ferguson Supply appeal,[76] for example, the appellant was successful in maintaining that tail gate assemblies for dump trucks used in oil-sands operations were accessories but not parts. The tail gates were specially designed to handle clay and other wet materials. When in operation, they would be welded onto the trucks, but this did not of itself make them parts. They were manufactured and supplied by separate companies, not by the manufacturers of the trucks, and the trucks could be used for other general purposes without the tail gates. In the Frantek Software appeal,[77] interface boards to permit computers to be connected to printers were accessories for those computers, and not

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[76]Ferguson Supply v. DMNRCE, App. 1871, Dec. 1, 1982, 8 TBR 393, 5 CER 22 (T.B.). See also: Falcon Equipment v. DMNRCE, App. 257, March 10, 1952, 1 TBR 67 (T.B.); Staub Electronics v. DMNRCE, App. 2532. Jan. 6, 1987, 12 TBR 14, 13 CER 193 (T.B.).

[77]Frantek Software v. DMNRCE, App. 2223, Jan. 7, 1986, 11 TBR 9, 10 CER 268 (T.B.).

accessories for the printers as the appellant had argued. They could be used for a variety of printers but were committed to be slotted into particular computers, from which they derived their power. The Board noted that they would not be computer parts, however, since parts criteria would be "more restrictive,"[78] presumably requiring that the boards be necessary for the computers to function, which was not the case on the facts. Here, as with parts tests, defining the basic entity was crucial. In the Excelsior appeal, generators for electronic accordions were held to be accessories only, not parts, because the instruments would function as ordinary accordions if the generators were not attached. Accordingly, the Board held that "(a)lthough dedicated in its inception and manufacture to a single type of accordion, the generator does not become an essential part so as to form an entity with that instrument."[79] This determination can be contrasted with two previous appeals in which the addition of operative power in effect created a new basic entity, of which the power source was a part. In Moore

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[78]10 CER 270; EMJ Data v. DMNRCE, Apps. 2690 etc., Dec. 2, 1987, 12 TBR 520, 15 CER 170 (T.B.). See also Digidyne v. DMNRCE, App. 2652, Dec. 24, 1987, 12 TBR 620, 15 CER 301 (T.B.).

[79]Excelsior Supply v. DMNRCE, App. 2094, May 31, 1984, 9 TBR 257, 7 CER 274 (T.B.) at 260 TBR.

Dry Kiln,[80] the Board held that an automatic control system was part of a veneer clipper. In Booth Photographic,[81] the Federal Court of Appeal held that an automatic roller was so closely connected to a film processor that it created a new entity, a power-driven processor; the Tariff Board then on re-hearing found the roller to be part of this entity. In both these cases, as in Excelsior, the entity could function without the power source, but not as well. One possible distinction which may have influenced the Board to adopt a different attitude in Excelsior was that the generators were not seen as musical instruments themselves "not being played in any manner by a musician."[82] Automatic control systems may thus seem more natural on machinery than on musical instruments, and perhaps the link between the generator and the accordion was not seen as sufficiently close.

The idea that accessories should have no other use was applied to distinguish accessories from tools in the interpretation of a tariff item which covered "machinery ...

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[80] Moore Dry Kiln v. DMNRCE, App. 990, July 10, 1972, 5 TBR 401 (T.B.).

[81] Booth Photographic v. DMNRCE, App. 1510, April 13, 1981, 7 TBR 329, 3 CER 124 (T.B.), rev'd. 4 CER 176 (F.C.A., May 17, 1982), reheard App. 1510, Feb. 1, 1983, 8 TBR 521, 5 CER 140 (T.B.). See also: Canadiana Garden v. DMNRCE, Apps. 1761, 1762, July 23, 1981, 7 TBR 400, 3 CER 244 (T.B.); Reference ... Regarding...Certain Self-Propelled Lawn Grooming Riding Machines ..., App. 2294, Sept. 19, 1986, 11 TBR 440, 13 CER 123 (T.B.).

[82] 9 TBR 260.

for working metal ... and accessories and attachments therefor; parts of the foregoing." In the Ryder appeal,[83] a cutting implement named a hob did not qualify as an accessory since it was not committed to the machine in question and could be used on many other milling machines. In Leland Electric,[84] lamination dies were similarly found to be tools because they were not committed to use with a particular press and the attaching devices were especially designed to permit use in other machines.

The Stewart-Warner appeal[85] involved interpretation of the general machinery tariff item in its full form: "(m)achines, n.o.p., and accessories, attachments, control equipment and tools for use therewith; parts of the foregoing." The appellant had imported a pump, reels and

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[83]Ryder Machinery v. DMNRCE, App. 371, March 5, 1956, 1 TBR 252 (T.B.). Trade usage also influenced the decision. The hobs were "as a general rule, catalogued, ordered, and sold separately from the machines upon which ultimately they may be used"(p.252) and were not viewed as accessories, attachments or parts in the trade. See also Leepo Machine v. DMNRCE, App. 759, Sept. 25, 1964, 3 TBR 199 (T.B.), in which trade usage also helped to determine that rotary blades were parts of power lawn mowers, rather than just tools. Tools were similar to accessories in that they were collateral and both could be distinguished from parts which were "essential and fundamental": Pluswood Manufacturing v. DMNRCE, App. 1962, Jan. 20, 1984, 9 TBR 100, 6 CER 166 (T.B.) at 104 TBR. See opinion of Board member Gorman in Imperial Granite v. DMNRCE, App. 2142, April 11, 1986, 11 TBR 164, 11 CER 200 (T.B.).

[84]Leland Electric v. DMNRCE, App. 411, Jan. 11, 1960, 2 TBR 81 (T.B.).

[85]Stewart-Warner v. DMNRCE, App. 1356, Jan. 31, 1979, 6 TBR 758, 1 CER 49 (T.B.).

various hoses and components for a motor oil lubrication system. The Tariff Board found the pump and main reel to be an entity, and then addressed the question of whether the other components might qualify as "accessories, attachments and control equipment." Despite evidence of a fair amount of interchangeability, the overhead hoses, control valve and other components were held to qualify because they were necessary for the system to operate in a garage or workshop. It had been suggested in argument that the overhead reels might qualify separately as machinery, but the Board decided that they could in any case be classified as accessories because their central purpose was for use in systems designed by the appellant. None of the various components were really committed to use with any particular pump and if a stringent commitment test had been applied, they probably would not have qualified. The Board's somewhat lenient approach (and willingness to consider the necessity factor, the other branch of the Bosch parts test) was perhaps related to the idea that mechanical systems should not be split up too readily for classification purposes, particularly when all the various components were entered at about the same time.

The length of time for which something was used influenced the question of whether or not it was an accessory. While it was accepted that both parts and accessories wear out with use, if they did so too quickly,

they gave the impression of being raw materials, something consumed in the manufacturing process. In the Monarch Inks appeal,[86] grinding balls for an agitator mill were held to be neither parts nor accessories. The Board based its finding on ordinary meaning and trade usage, but the decision was probably influenced by the fact that the balls would normally wear out during the manufacturing process and extra pounds of them had to be added every two to three months. A shortened usable life did not of itself determine the question, however. In a Ryder Machinery appeal, steel cutting components were found to be parts of die-heads (which were themselves accessories), despite limited usable time, since they were nevertheless committed to that use.[87]

Throughout the accessories appeals, the terms "accessories" and "attachments" seemed to be synonymous.[88] The term "equipment," which appeared in some items, usually depended on whether the piece of equipment itself worked

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[86]Monarch Inks v. DMNRCE, App. 2022, Nov. 30, 1983, 9 TBR 36, 6 CER 129 (T.B.); CAE Metal v. DMNRCE, App. 2041, Dec. 28, 1983, 9 TBR 62, 6 CER 152 (T.B.), aff'd. 9 CER 159 (F.C.A., May 30, 1985).

[87]J.H. Ryder Machinery v. DMNRCE, App. 379, April 6, 1956, 1 TBR 253 (T.B.). See also Bestpipe v. DMNRCE, App. 928, April 23, 1970, 5 TBR 58 (T.B.).

[88]Except for an argument in DMNRCE v. General Supply, 1 TBR 217 (Ex.Ct., Feb. 22, 1956) that in the trade in question, attachments were for a particular task or job, while accessories simply enhanced ease, safety or comfort. The suggested distinction was not adopted by either the Tariff Board or the Exchequer Court in their decisions.

toward the required function; it could not, in other words, be simply subsidiary to another component which was performing the main function. In the Porter appeal, for example, pipes which carried sludge from a dredging ship to the dumping ground on shore were not equipment of the ship because "dredging" referred only to the act of bringing material from the bottom of the water to the surface and the pipes were not involved in this function.[89] In the Geo-X Surveys appeal, ground-reading instruments used for navigation of aircraft during flight were not "geophysical precision instruments and equipment" when used by a surveying company to produce accurate contour maps, since "geophysical" equipment would measure some physical property of the earth and the instruments in question did not do that. The Board found that:

> even though the articles in issue may ... be electronically or electrically integrated with or linked to geophysical precision instruments in such a manner as to become an integral part of a geophysical survey system, their function within that system is to 'position' or locate on the ground the information obtained from the geophysical precision instruments carried by the aircraft and not, of themselves, to provide such

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[89] J.P. Porter v. DMNRCE, App. 693, Oct. 21, 1963, 3 TBR 94 (T.B.). In Southeastern Commonwealth v. DMNRCE, App. 2653, June 3, 1988, 13 TBR 290, 16 CER 286 (T.B.), on a settlement between the appellant and the Deputy Minister, beacons were found to be equipment of a drilling barge because they were essential for controlling the position of the barge during drilling.

geophysical information.[90]

Since they were not themselves involved in the required function, they did not qualify as geophysical equipment.[91]

The word "apparatus" was a rather amorphous one, taking its meaning from surrounding provisions according to the systematic method of interpretation. It was at times used without particular analysis as the alternative tariff item to apply when some other item had been found inappropriate.[92] It could also, as in the Sherritt Gordon appeal,[93] be interpreted in accordance with the item in which it was found. In that appeal, the Tariff Board held that the rest of the item in question referred to complex machinery; "apparatus", therefore, did not cover standard pipe fittings, which were

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[90]Geo-X Surveys v. DMNRCE, App. 991, April 10, 1972, 1972 Canada Gazette Part I p.2148 (T.B.) at 2152.

[91]The Board, here, rejected the possibility of an entity analysis, as appeared in Metropolitan Bio-Medical v. DMNRCE, App. 1218, March 30, 1977, 6 TBR 445 (T.B.). The idea that each component had to be involved in performing the main function appeared occasionally in parts appeals, but was generally discarded in favour of other tests; see Naramata Co-operative v. DMNRCE, App. 726, March 10, 1964, 3 TBR 144 (T.B.). See also, concerning "peripheral equipment" for electronic data processing machines: Nevco Scoreboard v. DMNRCE, App. 2435, July 31, 1986, 11 TBR 342, 12 CER 88 (T.B.); EMJ Data v. DMNRCE, Apps. 2690 etc., Dec. 2, 1987, 12 TBR 520, 15 CER 170 (T.B.).

[92]For example: Ferguson Supply v. DMNRCE, App. 1871, Dec. 1, 1982, 8 TBR 393, 5 CER 22 (T.B.); Excelsior Supply v. DMNRCE, App. 2094, May 31, 1984, 9 TBR 257, 7 CER 274 (T.B.).

[93]Sherritt Gordon Mines v. DMNRCE, App. 549, Sept. 7, 1961, 2 TBR 234 (T.B.). See also Sherritt Gordon Mines v. DMNRCE, App. 548, Aug. 2, 1961, 2 TBR 231 (T.B.).

more specifically described elsewhere. In Access Corrosion, the imported goods were chrome steel castings for a corrosion protection system to be operated by electricity. The Board examined dictionary definitions of "apparatus" which were very general: "a collection or set of materials, instruments, appliances, or machinery designed for a particular use, ... any compound instrument or appliance designed for a specific mechanical or chemical action or operation, ... any complex device or machine designed or prepared for the accomplishment of a special purpose."[94] The Board also noted that in the Customs Tariff, "apparatus" was used as both a singular and a plural noun, and that its occasional use in the phrase "machines and apparatus" indicated that it had wider meaning than "machines," not being restricted to just mechanical power. The corrosion protection system in question was held to qualify as electric apparatus and the imported castings were found to be complete parts.[95] A possible limitation on

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[94]Access Corrosion Services v. DMNRCE, App. 1965, March 23, 1984, 9 TBR 184, 6 CER 228 (T.B.) at 187 TBR. See also Ocelot Chemicals v. DMNRCE, App. 2019, Dec. 12, 1985, 10 TBR 286, 10 CER 208 (T.B.).

[95]For other decisions with a similarly wide interpretation of "apparatus", see: Phillips Electronics v. DMNRCE, App. 1719, May 31, 1982, 8 TBR 173, 4 CER 204 (T.B.); GTE Sylvania v. DMNRCE, App. 1867, Nov. 7, 1986, 11 TBR 535, 13 CER 48 (T.B.); Camco v. DMNRCE, App. 2594, March 9, 1987, 12 TBR 149, 14 CER 51 (T.B.), aff'd. DMNRCE v. Camco, 18 CER 160 (F.C.A., Dec. 7, 1988); Centrilift v. DMNRCE, App. 2539, May 11, 1987, 12 TBR 191, 14 CER 130 (T.B.); Ingenuity v. DMNRCE, App. 2602, Oct. 22, 1987, 12 TBR 416, 15 CER 52 (T.B.); Indel-Davis v. DMNRCE, App. 2775, Dec. 18, 1987, 12 TBR 589, 15 CER 223

the meaning of "apparatus" was suggested in the Jutan appeal,[96] where the dissenting member of the Board held that "apparatus" had to be a single purpose entity. This opinion, however, was not shared by the majority of the Board who found that a combination clock radio should be classified as electric apparatus.

e. Priorities

The most significant appeal concerning the relationship of parts and entity items to other tariff items was the Accessories Machinery appeal which went to the Supreme Court of Canada in 1957.[97] The case concerned a replacement electric motor imported for a power shovel. The power shovel as a unit would qualify as machinery of a class or kind not made in Canada and the appellant argued that the replacement motor should therefore be classified as a part under the tariff item which read "(a)ll machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing." The Deputy Minister, however, was successful at all levels in

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(T.B.).

[96]Jutan International v. DMNRCE, App. 2098, Aug. 14, 1984, 9 TBR 326, 7 CER 70 (T.B.).

[97]Accessories Machinery v. DMNRCE, App. 331, March 1, 1955, 1 TBR 221 (T.B.), aff'd. [1956] Ex.C.R. 289, 1 TBR 223 (Ex.Ct., March 6, 1956), aff'd. [1957] S.C.R. 358, 1 TBR 229 (S.C.C., April 12, 1957).

maintaining that the motor should instead be classified under another item which covered "(e)lectric motors, and complete parts thereof, n.o.p.". The Tariff Board reasoned that classification had to be under the electric motors item to give that item a useful effect, since motors are by their nature intended to be parts of machines and Parliament must have wanted the item to have some content. The "n.o.p." in the motors item would, therefore, exclude things that were specifically covered elsewhere as motors, but would not exclude things covered elsewhere only in a more general fashion as parts. The Board stated that "(i)t is conceivable that there might come into being an electric motor of such unique shape or design as to make it ... more specifically a part of a particular machine than an electric motor, n.o.p.,"[98] but that such a situation did not exist here.

The Exchequer Court accepted the Tariff Board's interpretation and stated that the "n.o.p." in the electric motors item would give way to another item specifically providing for motors of motive power, but would not give way to a more general item referring only to parts. The Court left open the question of priorities if the other item were an end use one, since that situation did not arise in this

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[98] 1 TBR 223.

case.[99] The Supreme Court of Canada upheld the Exchequer Court by a 3-2 decision. The majority judgment followed the reasoning below in favour of the electric motors item because it was more specific and because Parliament must have intended it to have some useful effect.

In the result, the Accessories Machinery appeal may be said to stand for the proposition that a parts item gave way to a specific eo nomine item even if that eo nomine item was n.o.p., but this is a rather wide statement of the rule. It should not be forgotten that the reasoning depended largely on the idea of preserving a useful effect for the eo nomine item, and that the Tariff Board did suggest that in some instances the parts item might actually be more specific. As well, the Exchequer Court judgment explicitly left open the question of priorities if the parts item were also an end use item.[100]

The decision should be seen in the context of the

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[99]1 TBR 228.

[100]The decision in Accessories was fore-shadowed by the earlier Tariff Board decision in J.H. Ryder v. DMNRCE, App. 261, Sept. 19, 1952, 1 TBR 69 (T.B.), concerning replacement tires for fork lift trucks. The Board in that declaration also stated that an eo nomine item would have priority over a parts item, but found the tires to be parts in the appeal because the competing item applied only to "manufactures of rubber," and was thus less specific. The Board stated further that a "parts n.o.p." item would have lower priority than a simple parts item, but was not more explicit because the question did not arise in the appeal. On this last point, see Superior Brake v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.) at 280 CER.

Attached Motors Reference[101] decided by the Tariff Board in 1953.. Since a number of tariff items at the time referred to motive power separately, the Department had adopted a practice of segregating all but built-in motors for duty purposes. The reference was to determine if this policy was correct, particularly in the case of attached motors. The Tariff Board in its reply emphasized the condition of the goods as imported and declared that if they all formed a single physical unit at that time, "there would be required quite specific legislative sanction to justify segregation of any component for separate tariff classification." The Board went on to say that if the motors were imported separately for repair or replacement, they could be treated separately.[102]

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[101]Reference by DMNRCE re Attached Electric Motors, App. 283, July 6, 1953, 1 TBR 105 (T.B.).

[102]1 TBR 106. See also J.H. Ryder v. DMNRCE, App. 245, Nov. 26, 1951, 1 TBR 53 (T.B.), in which the Board found that the motor on a fork lift truck should not be segregated from the truck for separate classification since both together formed an entity as imported. In the Attached Motors Reference, the Board also suggested that the test was not just the presence or absence of a physical link, but rather whether the motor was "attached in such a manner that its removal would destroy or weaken or alter the indivisibility of the machine or piece of machinery" (1 TBR 106). In a separate concurring opinion in the Reference, Board Vice-Chairman Leduc expressed the idea that a motor which was to be classified with a machine would be "one possessing such mechanical features that, when separated from the equipment into which it is built, the usefulness of the latter for practical purposes disappears" (1 TBR 108). This concurring opinion was applied in Esco v. DMNRCE, App. 1923, April 18, 1984, 9 TBR 224, 7 CER 205 (T.B.). A motor was classified separately in Astrographic v. DMNRCE, App. 2579, June 29, 1987, 12 TBR 235, 14 CER 166 (T.B.), an entity appeal, although the point is not

The decision in Accessories, then, seemed to agree with this conclusion since the motors involved in that appeal were for replacement purposes. When Accessories and the Attached Motors Reference were read together, they provided both a priority for eo nomine over parts items when physical separation appeared in the goods in the condition as imported and a tendency to classify together if there was a physical link at the time of importation (or, perhaps, if goods were imported at the same time).[103] For parts items, however, the Attached Motors Reference did not imply that parts tests could be ignored. In the J.H. Ryder appeal, for example, a power unit was not part of the metal-working machine with which it was imported, since it had other uses and thus was not committed to this particular application.[104] The Ryder decision is not directly contrary to the Attached Motors Reference, since the power unit and machine were imported in separate crates, but it does indicate that while physical condition at the time of importation was a significant factor, it was not the only matter to be considered in

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fully discussed in the decision.

[103]Sherritt Gordon Mines v. DMNRCE, App. 549, Sept. 7, 1961, 2 TBR 234 (T.B.) at 235; Stewart-Warner v. DMNRCE, App. 1356, Jan.31, 1979, 6 TBR 758, 1 CER 49 (T.B.) at 766 TBR (this last appeal involving "accessories" rather than "parts").

[104]J.H. Ryder v. DMNRCE, App. 599, May 9, 1962, 2 TBR 292 (T.B.).

determining the coverage of parts items.

The Accessories rule of parts giving way to eo nomine items, even to eo nomine items that were n.o.p., was followed in subsequent appeals.[105] The eo nomine item received priority even when the more "general" item was not n.o.p., as the machinery item was in Accessories. In the Tobin Tractor appeal, for example, the contest was between an item covering "diesel...engines... and complete parts thereof, n.o.p." and another item covering "combination excavating and transporting scraper units ... parts thereof." When diesel engine parts were imported for a scraper, the Accessories judgment was applied and the parts were classified under the engines item.[106] The conflict in Accessories, of course, depended on the goods being potentially entitled to qualify for both eo nomine and parts items. If the goods had some other use and were not therefore parts, then the eo nomine

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[105]Hewitt Equipment v. DMNRCE, App. 482, July 7, 1958, 2 TBR 163 (T.B.); Brunner Mond v. DMNRCE, App. 521, Nov. 10, 1960, 2 TBR 208 (T.B.); T.M. Holdsworth v. DMNRCE, App. 615, Nov. 27, 1961, 2 TBR 311 (T.B.); Timmins Aviation v. DMNRCE, App. 764, April 2, 1965, 3 TBR 212(T.B.); Valon Kone v. DMNRCE, App. 1932, Jan. 20, 1984, 9 TBR 97, 6 CER 170 (T.B.); Cornelius Manufacturing v. DMNRCE, App. 1824, March 25, 1983, 8 TBR 627, 5 CER 262 (T.B.); Akhurst Machinery v. DMNRCE, App. 2630, May 1, 1987, 12 TBR 181, 14 CER 98 (T.B.); AIS Industries v. DMNRCE, App. 2765, July 15, 1988, 17 CER 25 (T.B.); Light Touch v. DMNRCE, App. 2809, June 23, 1989, 2 TCT 1139 (C.I.T.T.); R.F. Hauser v. DMNRCE, App. 2909, May 31, 1990, 3 TCT 2171 (C.I.T.T.).

[106]Tobin Tractor v. DMNRCE, App. 890, July 15, 1968, 4 TBR 192 (T.B.).

item was the only one applicable.[107] When a true conflict was present, however, the ordinary parts item gave way except perhaps in the case where the eo nomine item had other useful effect and the goods were more specifically parts,[108] a possibility suggested in the Tariff Board declaration in Accessories.

The Exchequer Court suggested in Accessories that eo nomine items might not have priority when the parts item was end use. In the Exchanger Sales appeal, for example, imported forgings were classified as parts of machinery and apparatus for use in the natural gas industry rather than under an eo nomine item, because to do otherwise would defeat the intent of the legislator to favour that industry.[109] The priority for an end use parts item could also be explained on the useful effect analysis, since the industry- or user-

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[107]See, for example, Power Machinery v. DMNRCE, App. 641, Jan. 14, 1963, 3 TBR 58 (T.B.); Consolidated-Bathurst v. DMNRCE, App 1249, March 22, 1978, [1979] Canada Gazette Part I p.3474 (T.B.). As well, if the eo nomine item was not really applicable, the parts item had priority: Norton Christensen v. DMNRCE, App. 2181, Dec. 9, 1985, 10 TBR 280, 10 CER 196 (T.B.).

[108]W.J. Elliott v. DMNRCE, App. 609, June 21, 1962, 2 TBR 308 (T.B.).

[109]Exchanger Sales v. DMNRCE, App. 1046, Aug. 14, 1973, [1974] Canada Gazette Part I p.1830. See also dissent of Tariff Board member Gorman in Canadian General Electric v. DMNRCE, App. 1970, Feb. 15, 1984, 9 TBR 130, 6 CER 190 (T.B.). The goods still had to qualify as parts: DMNRCE v. Androck, 13 CER 239, 74 N.R. 255 (F.C.A., Jan. 28, 1987), rev'g. Androck v. DMNRCE, App. 2081, Oct. 22, 1984, 9 TBR 352, 8 CER 49 (T.B.).

specific end use would not be likely to leave the eo nomine item without content.

A few decisions moved slightly away from the Accessories strong priority for eo nomine items. In the Leslie Taylor appeal, the Tariff Board had to decide between "belting n.o.p." and an item covering parts of contact printers for the classification of imported belts specifically designed to fit a particular type and make of printer. The Board used two lines of reasoning to conclude that the belts should be classified as parts. Dictionary definitions of the word "belting" showed that it referred either to belts collectively or to material for making belts. From this, the Board concluded that the eo nomine item for "belting" did not really apply to the goods imported. In addition, on reasoning that is somewhat contrary to Accessories, the Board also said that the parts item should have priority because the goods were specifically provided for as parts and the eo nomine item was n.o.p.[110] The Tariff Board declaration was confirmed on appeal without written reasons by the Federal Court of Appeal, and has been followed subsequently without necessarily adopting the anti-Accessories reasoning.[111] If a

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[110]Leslie Taylor v. DMNRCE, App. 1963, Sept. 13, 1983, 8 TBR 772, 5 CER 557 (T.B.) at 775 TBR.

[111]Decision of Federal Court of Appeal, unreported, March 15, 1985 (see 11 CER 131). See Imperial Tobacco v. DMNRCE, Apps. 1979, 1992, 2003 and 2015, March 13, 1986, 11 TBR 158,

strict parts test was used as in Leslie Taylor, and especially if the parts item referred to the particular machine as in that case rather than just to "machines n.o.p." as in Accessories, it could easily be that the parts item was really more specific. This trend probably stopped, however, with the Diatech appeal in 1987, in which the imported batteries had been quite specifically designed for X-ray machines. With one dissent, the Board, citing Accessories, found that the goods were "electric ... batteries n.o.p." rather than parts of X-ray apparatus.[112]

For parts items, as discussed above, there was a tendency to classify goods together if they were imported together (either physically linked or, possibly, imported at the same time). For entity items, where parts were not expressly mentioned, the physical linking of the goods at the time of entry was especially important. In DMNRCE v. Ferguson Industries, the Supreme Court of Canada held that electric motors could not be classified along with two trawler winches for which they had been designed and built, but had to be treated separately under the eo nomine motors

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11 CER 129 (T.B.). In Pluswood v. DMNRCE, App. 1962, Jan. 20, 1984, 9 TBR 100, 6 CER 166 (T.B.), the Board also followed Leslie Taylor, but mentioned only the issue involving the definition of belting. See further General Bearing v. DMNRCE, App. 2349, March 10, 1986, 11 TBR 150, 11 CER 122 (T.B.), where the item in question read "belts and belting."

[112]Diatech v. DMNRCE, App. 2443, Oct. 16, 1987, 12 TBR 347, 14 CER 341 (T.B.).

item. All of the components for the winches were imported except for a connecting rod which had to be machined in place to the exact measurements of the trawlers. Even though the motors later became part of the winches, the Court decided that they did not have this status at the time of entry, when classification must be done. In the words of the majority judgment delivered by Mr. Justice Pigeon:

> Can it be said ... that because each motor was designed as a unit to form a single entity with the winch and controls, each imported motor was to be considered as a single entity with the winch to be driven by it? This would mean that parts are to be regarded as falling within the classification of the whole thing rather than as such. In my view, the Board erred in law when so holding. Parts or complete parts are mentioned with many things in a number of items of the tariff classification... . In other items, parts are not mentioned ... (or) ... are dealt with separately. Within such a context, parts cannot properly be considered as included in items in which they are not mentioned. To do so would render meaningless the mention of parts or of complete parts in a great many item.[113]

The dissenting judgment delivered by Mr. Justice Laskin stated that there was nothing in the Customs Tariff Act requiring that classification be finally fixed at the time of

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[113] DMNRCE v. Ferguson Industries, [1973] S.C.R. 21, 4 TBR 368 (S.C.C., May 1,1972) at 373-74 TBR, rev'g. DMNRCE v. Ferguson Industries, 4 TBR 357 (Ex. Ct., April 21, 1970), aff'g. Ferguson Industries v. DMNRCE, App. 911, Nov. 5, 1969, 4 TBR 344(T.B.); reheard Ferguson Industries v. DMNRCE, App. 911, Feb.28, 1973, 4 TBR 379 (T.B.).

entry if the goods might also be covered by an appropriate item on an entity basis. According to the dissent, there was no error of law in the Tariff Board's decision to treat the motors as included with the winches and that decision should therefore be upheld.

There are several factors which distinguished the situation in Ferguson from the one in Accessories apart from the fact that parts were not mentioned in the item. As the Tariff Board noted, this was not a case of a replacement part being imported, but rather a complete original installation, which was arriving more or less at the same time, given its size. The motors and electrical controls had been shipped from England by a subcontractor who had made them under the direction of the main manufacturer in Belgium. The rest of the mechanical components arrived from that manufacturer three days later (in the case of one winch) and three months later (in the case of the other). It was clear that all the various pieces had been carefully and precisely built to operate together. For equipment this large, it is difficult to see what else could have been done to indicate that this was really just one entity being imported. The physical separation was largely for practical reasons and not due to the functioning of the goods themselves. There was no difficulty in classifying the electrical controls and other mechanical components all together as components of the

trawler winch. It was only the motors that were separated out, presumably because of the influence of the Accessories decision.

As the Tariff Board noted, the situation in Ferguson further differed from Accessories in that the "general" winch item was actually an end use one which covered "manufactures of iron, brass or other metal, of a class or kind not made in Canada, for use exclusively in the construction or equipment of ships or vessels...". Eo nomine classification under the motors item thus was not necessary in order to give that item useful effect. The dissenting judgment in the Supreme Court of Canada would have given priority to the end use item. Even on the general reasoning in Accessories favouring eo nomine over parts items, it is not clear that the eo nomine item actually had to be chosen here. Furthermore, the absence of a mention of parts in the competing tariff item was not necessarily as significant as the majority judgment in the Supreme Court would indicate, since it is not clear that the motors actually had to be treated as parts in order to be included with the rest of the winch. [114] If tariff items for large machinery had to mention parts in order to cover that machinery when it was being imported in pieces, it is almost as if the general mention of the entity was being

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[114]For a contrary example under the Excise Tax Act which was cited unsuccessfully by the importer, see Kirk's Stokers v. DMNRCE, App. 337, Feb. 7, 1955, 1 TBR 234 (T.B.).

denied useful effect.

In the final result, when the matter was referred back to the Tariff Board by the Supreme Court, the motors were classified under the end use item anyway, since the Board found that because of their special design, they were of a class or kind not made in Canada and qualified for this treatment independently.[115] This decision was not appealed.

If parts were not mentioned in an item, it seems simple to conclude that components imported separately to enter into domestic production would not be covered. The same conclusion would apply to goods imported as replacement parts. If the tariff item only referred to entities, then that is all it covered. When, however, the whole entity was being imported and pieces of it arrived at different times, the Ferguson decision placed very heavy emphasis on the physical condition of goods and the separate arrival of each piece. If a piece was described in another tariff item, then the fact of physical separation at the time of entry gave greater weight to the other item.

The interpretation of parts items prior to implementation of the Harmonized System involved both the observation model and the contextual model for tariff interpretation. The physical condition of goods on

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[115] Ferguson Industries v. DMNRCE, App. 911, Feb. 28, 1973, 4 TBR 379 (T.B.).

importation was important. Attention was also directed to their functioning in application. For entity items, physical linkage at the time of importation was especially significant, although some "hybrid" decisions also used aspects of the parts analysis of functions. When goods could potentially be classified under two tariff items, there was a strong priority in favour of eo nomine items over items which described the goods as either parts or components. Purposive interpretation did not play a large role for parts or entity items, even after the Great Canadian Oil Sands decision.[116]

II. Harmonized System

In the Harmonized System, in accordance with General Rule 1, interpretation starts with the terms of the headings and any relevant section or chapter notes.[117] Note 2 to Section XV provides a definition which is applicable "throughout the Nomenclature". That note defines the term "parts of general use" as covering headings for things such as nails, tacks, screws, bolts, springs, metal frames,

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[116]Great Canadian Oil Sands v. DMNRCE, [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976), rev'g. App. 1051, June 5, 1975, 6 TBR 116 (T.B.).

[117]For details on the treatment of parts and a comparison to previous Canadian administrative practice, see Tariff Board, Reference 163, The Harmonized System of Customs Classification, Vol. IV, Part 1, Introduction and Preface, pp.1.22-1.28.

chains, fittings, buckles, cables, and clasps. The point of the definition is to exclude these goods from the mention of "parts" in other headings. Subject to other specific notes, a reference to "parts" does not cover these parts of general use. They will be classified under the headings where they are named as nails, tacks, screws, etc., even if they are very specifically designed to function as a part of certain machinery. The Section Note, in effect, confirms priority for what would have been called eo nomine items in previous Canadian tariff classification. "Parts of general use" will not be classified as parts.

The next important Note to consider is Note 2 to Section XVI. It applies just to that Section, but the Section covers the main chapter for machinery, Chapter 85.[118] This Note provides that parts which are named in any of the headings of Chapters 84 and 85 are classified under those headings rather than as parts. Once again, this confirms the priority for specific headings. Other parts can be classified with the machines to which they belong, provided that they are "suitable for use solely or principally" with that particular kind of machine. This is the parts test, therefore, for goods not covered in a specific heading. For parts which are not covered elsewhere and which do not meet this test, there

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[118]Other Sections also deal with parts and accessories, generally following the same pattern. See, especially, Notes to Section XVII (transport equipment).

are two residual headings - 84.85 for non-electrical parts and 85.48 for electrical parts. The HS thus gives strong priority to specific headings for parts of general use (throughout the Nomenclature) and for goods covered by Section XVI. Goods not covered in a specific heading can be classified as parts of machinery if they meet the sole or principal use test. If they do not meet this test, they can be classified under one of the residual parts headings.

One of the advantages of the Harmonized System over the previous Canadian customs tariff is its greater precision. Machinery is described in much greater detail and fewer goods will be entered under general provisions for "parts", "accessories", "apparatus", etc. The classification of parts confirms this priority for specific headings. In its introductory manual for the new tariff, Revenue Canada uses an example to illustrate the principle that parts headings have low priority. The example concerns laminated safety glass, shaped and intended for use as port hole windows in aircraft. The two possible headings identified are 70.07 "safety glass, ... laminated glass" and 88.03 parts of certain aircraft. There is no Section or Chapter Note which would give priority to either heading. The goods probably meet the sole or principal use test, adopted in Note 3 to Section XVII which includes Chapter 88. Nevertheless, the Department says that 70.07 takes priority on the authority of

General Rule 3(a), in favour of the most specific description. This is an application of Departmental policy that "a description by name is more specific than a description by class."[119]

General Rule 3(a) may not always give priority to the non-parts heading, however. The parts description could be the more specific one. The situation is much the same as with the previous Accessories test, in which it was at least theoretically possible for the parts item to have priority. The possibility arose before the European Court of Justice in the Fuss decision, Case 60/77, under the previous CCCN. The goods involved were movement detectors for alarm systems. In application, they would be connected by cables to the alarm signalling device. German customs officials ruled that they should be classified as electrical appliances and apparatus. The importer objected and maintained that they were instead parts of electric signalling apparatus. The Court found in favour of the parts description.[120] The result was the same in the more recent Senelco decision, Case 57/85, in which security tags for retail goods were classified as parts under the same heading rather than as electrical appliances and

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[119]Revenue Canada, Customs and Excise, Customs Commercial System : Introduction to the Canadian Tariff and Import Statistics Nomenclature, with amendments as of July 1987, Part 4, page 13.

[120]Fritz Fuss, Case 60/77, [1977] E.C.R. 2453.

apparatus.[121]

These two decisions did not actually threaten the classification system for parts. Both headings were in Chapter 85 and the relevant Section Notes giving priority generally to a non-parts heading were similar to the current HS provisions. The heading for electrical appliances and apparatus, however, was also residual and did not apply to goods falling within another heading of the Chapter. In a sense, both headings tied for last place and it was hardly surprising that the parts heading would have priority. In other cases, classification as parts would clearly be secondary.[122] The two decisions illustrate, however, that the parts heading might sometimes be more specific. Particularly if interpretation were to follow a contextual model and emphasize the function of goods in application, it would be possible to argue that glass designed and cut for airplane windows is specifically described as part of an airplane.

For classification of goods imported separately as parts or components, the main change with implementation of the HS is the greater precision of the applicable headings and

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[121]Senelco, Case 57/85, [1986] E.C.R. 821.

[122]See Van Gend & Loos, Case 32/84, [1985] E.C.R. 779, in which sails were classified as sails rather than as parts of sailboards. If this is the same importer of Van Gend & Loos, Case 26/62, [1963] Rec. 1, [1963] C.M.L.Rep. 105, it appears that not even the gratitude of Community lawyers could decide this one in the company's favour.

subheadings. Should imports fall to be classified as parts, the "sole or principal use" test is less onerous than the previous Bosch test requiring the absence of other uses. The question will arise less often, however, since other headings will have priority. It is not clear whether parts under the HS would have to be essential to the functioning of the basic goods, as was required by the second branch of the Bosch test. The distinction between parts and accessories does not seem to be crucial to HS classification, probably because of the greater precision of the headings, subheadings and Legal Notes.[123]

Greater precision may also assist with the question of deciding when an entity has been presented for classification if all the components are imported at about the same time. Note 4 to Section XVI refers to machinery consisting of components, whether separate or interconnected, which are

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[123]See Telefunken Fernseh und Rundfunk, Case 223/84, [1985] E.C.R. 3335 at 3349, where the European Court of Justice uses a test like the previous Canadian test, assuming that accessories are committed to the basic goods but not necessary for those goods to function. In the drafting of the General Rules for Interpretation of the HS, a rule for accessories was considered and then dropped because it was difficult to agree on a definition and there was some fear that the Rule might conflict with certain Explanatory Notes. The proposed Rule was as follows: "Accessories presented with the principal article with which they normally belong shall be classified with that article, provided they are of a kind and in a number normally sold therewith." (Summary Record, 29th Session of the Harmonized System Committee and Working Party, Nov. 22-Dec. 10, 1982, Doc. 29.600E, Jan. 12, 1983, Appendix to Annex V).

intended to contribute together to a clearly defined function. The relevant Explanatory Note says that only components essential to the performance of the function are covered, and auxiliary equipment is to be excluded. Where the provisions of the headings leave some doubt, this test is somewhat more onerous than the entity test applied previously in Canadian caselaw. Contributing to a single function is the basic criterion. Although Explanatory Notes are not binding within the CCC, it can be expected that Canadian customs authorities will follow the Explanatory Note and exclude goods performing only an auxiliary function.[124]

One significant improvement under the new HS is that the Ferguson problem has been solved. Components do not have to be attached or assembled together on importation in order to be considered to form an entity. Most of the relevant HS headings are likely to cover parts. Even if they do not, General Rule 2(a) would apply. Under that Rule, an article can be presented unassembled or disassembled and still be

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[124]On multi-function and composite machines, see also Note 3 to Section XVI, which was applied to cordless telephones in Royal Telecom v. DMNRCE, App. AP-90-027, 4 TCT 3175 (C.I.T.T.). Under the previous CCCN, decisions of the European Court of Justice excluded components which could be used independently for functions other than those performed by all the components together. While such groups of components would not be functional units as such, they could be classified together under Rule 3(b) as composite goods made up of different components or perhaps goods put up in sets: Metro International, Case 60/83, [1984] E.C.R. 671; Telefunken Fernseh, Case 163/84, [1985] E.C.R. 3299; Telefunken Fernseh, Case 223/84, [1985] E.C.R. 3335.

classified under the heading for that article. The motors and other parts of the trawler winches in Ferguson would likely have been classified together, depending on how extensive the assembly operation was.[125] Under Rule 2(a), if a number of components are imported at about the same time, the quantity sufficient for defined entities can be classified as such and any extras will be treated as parts. The IMCO decision, Case 165/78, for example, covered components which were imported for pens and pencils. The goods from which complete articles could be assembled were classified as those articles. Only the surplus components were classified as parts.[126]

For parts and entities analysis, the major change on implementation of the Harmonized System is the greater precision of what would have previously been called eo nomine items. Goods are more specifically described than under the previous tariff and fewer imports will be classified as parts. The contextual model applies to some extent in that the use or function of parts and components can be relevant. While the physical condition of goods on importation is less significant, the observation model has not been rejected.

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[125]The Explanatory Note points out that the assembly intended should be fairly simple, with screws, nuts, bolts, riveting or welding. See International Flavors, Case 295/81, [1982] E.C.R. 3239, in which this Rule did not cover fruit juice and flavour concentrates which had to be mixed together after importation.

[126]IMCO, Case 165/78, [1979] E.C.R. 1837. See also Explanatory Note VII to Rule 2(a).

Goods do not have to be imported already assembled, but they probably still have to be imported within a reasonable time of each other to benefit from the application of General Rule 2(a). Likely areas for interpretation difficulty in the future will be the question of defining entities for complex machinery under Section XVI and the continuing problem of parts descriptions and specificity.

The Harmonized System

and

Tariff Classification in Canada.

by

Maureen Irish

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Processing and Packaging

I. Processing

a. Introduction

This chapter examines the classification of goods at various stages of processing from raw material to finished product. The transition from one tariff item to another is discussed under the tariff prior to 1988, and then under the revised tariff based on the Harmonized System. The related question of packaging is considered, as well, in the previous system and under General Interpretative Rule 5 in the Harmonized System.

A change in classification according to levels of processing can obviously have a significant effect on the assessment of customs duty. In some cases, it can also be relevant to the determination of origin of goods. For imports from the United States on or after January 1, 1989, the rules of origin to qualify for tariff reductions under the Free Trade Agreement depend in part on whether goods have been

substantially transformed so as to change their tariff classification.[1]

Tariff classification is done for goods in their condition at the time of importation, according to the stage of processing reached at that point. In the Intercontinental Fabrics appeal, for example, two fabrics bonded together at the time of importation were classified as a textile manufacture rather than as woven fabrics. The patterns were improperly matched and the fabrics were later separated for sale, but they had been joined on importation.[2] In Harvey Carruthers, copper tubing was not, on importation, apparatus

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[1]In most cases, it is also required that a certain percentage of the cost of processing be incurred in Canada or the United States. See United States Tariff Rules of Origin Regulations, SOR/89-49, 1989 Canada Gazette Part II p.773. For imports from other countries, origin is usually linked to the cost of production or value of goods, rather than to a change in tariff classification. See: British Preferential Tariff and Most-Favoured-Nation Tariff Rules of Origin Regulations, SOR/78-215, 1978 Canada Gazette Part II p.981, amd. SOR/88-76, 1988 Canada Gazette Part II p.812, SOR/89-52, 1989 Canada Gazette Part II p.800; General Preferential Tariff and Least Developed Developing Countries Rules of Origin Regulations, C.R.C. c.528, amd. SOR/79-568, 1979 Canada Gazette Part II p.2892, SOR/83-78, 1983 Canada Gazette Part II p.426, SOR/84-655, 1984 Canada Gazette Part II p.3485, SOR/88-76, 1988 Canada Gazette Part II p.812, SOR/89-52, 1989 Canada Gazette Part II p.800; Caribcan Rules of Origin Regulations, SOR/87-290, 1987 Canada Gazette Part II p.2143, amd. SOR/88-76, 1988 Canada Gazette Part II p.812, SOR/89-52, 1989 Canada Gazette Part II p.800; New Zealand and Australia Rules of Origin Regulations, SOR/83-88, 1983 Canada Gazette Part II p.476, amd. SOR/88-76, 1988 Canada Gazette Part II p.812, SOR/89-52, 1989 Canada Gazette Part II p.800.

[2]Intercontinental Fabrics v. DMNRCE, App. 887, May 15, 1968, 4 TBR 187 (T.B.).

for use in metallurgical operations because it had not yet been cut into lengths suitable for this purpose.[3] While subsequent use could be taken into account to reflect commercial context, classification had to be done as of the time of importation.[4]

b. Manufacturing and Listed Processes

Some tariff items referred directly to a list of named processes which would qualify or disqualify goods for classification under the item. Such stipulations could be construed quite strictly, on the assumption that drafting was deliberate and precise. In the Beaver Lumber appeal, for example, shiplap lumber was held to be "further manufactured than planed, dressed, jointed, tongued or grooved"; it had undergone extra cutting to prepare it to serve the same function as tongued or grooved lumber but the item did not allow for substitute processes.[5] As well, in the Uddeholm Steel appeal, imported steel which had been rough-machined

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[3]Harvey Carruthers v. DMNRCE, App. 465, March 10, 1958, 2 TBR 147 (T.B.).

[4]See further: Plastic Contact Lens v. DMNRCE, App. 643, Jan. 23, 1963, 3 TBR 67 (T.B.); Exchanger Sales v. DMNRCE, App. 1046, Aug. 14, 1973, 1974 Canada Gazette Part I p.1830 (T.B.); Kirkwood Commutators v. DMNRCE, App. 1551, April 23, 1981, 7 TBR 335, 3 CER 127 (T.B.); Mitsui v. DMNRCE, App. 2324, Oct. 29, 1985, 10 TBR 250, 10 CER 116 (T.B.).

[5]Beaver Lumber v. DMNRCE, App. 446, Nov. 18, 1957, 2 TBR 129 (T.B.). See also Tiefenbach Tool v. DMNRCE, App. 1553, Jan. 15, 1981, 7 TBR 247, 3 CER 15 (T.B.).

was held to be "further manufactured than hot-rolled". The legislation defined the term "hot-rolled" to cover steel that had been "annealed, tempered, pickled, limed or polished", and rough-machining was not included on the list, despite evidence from the appellant that it was a substitute for pickling.[6] Occasionally, interpretation might also be restrictive following a teleological approach in accordance with the assumed purpose of the item. In Malden Mills, for example, goods did not qualify under an item for fabric produced in Canada and sent abroad for electrostatic flocking, since the fabric had also been printed and dyed before being returned to Canada. The Board concluded that this did not come within the four corners of the item, which was a concessionary, end use one.[7]

In other cases, interpretation might be less strict. In Loudee Steel, sheet piling was not "further manufactured than hot-rolled" despite the fact that holes had been burned into it. The holes were simply for the purpose of allowing cranes to pick up the used piling from previous installations; this

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[6]Uddeholm Steels v. DMNRCE, App. 1290, June 8, 1978, 6 TBR 680 (T.B.). See also: Central Electric v. DMNRCE, App. 820, Dec. 2, 1966, 3 TBR 294 (T.B.), 3 TBR 296 (Ex.Ct., April 28, 1967).

[7]Malden Mills v. DMNRCE, App. 1772, March 29, 1982, 8 TBR 126, 4 CER 89 (T.B.).

was not within the intended meaning of "further manufacture."[8] In other appeals, extra processing did not disqualify goods as "sausage ... casings, cleaned"[9], or as "woven fabrics ... plain laundered, for use in the manufacture of ... bandages."[10] Trade usage had an important influence on a number of these decisions. In Graphic Controls, trade usage determined that imported rolls of paper were not "converted" within a list requiring that they not be "punched, perforated, scored, ruled, printed, folded, embossed, decorated or otherwise converted." The paper had been coated, but trade usage did not consider this a conversion.[11] The question of whether extra work was done in a primary mill or elsewhere was discussed, but was not an overriding factor. In Foss Lumber, the Supreme Court held that lumber was still "sawn, split or cut, and dressed on one side only, but not further manufactured" even though it had been sawn an extra time on one side at the secondary mill. It still met the description in the item and the second sawing did not constitute further

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[8]Loudee Steel v. DMNRCE, App. 293, June 18, 1953, 1 TBR 128 (T.B.).

[9]F. Marie v. DMNRCE, App. 1105, Feb. 16, 1976, 1976 Canada Gazette Part I p.3203 (T.B.).

[10]Johnson & Johnson v. DMNRCE, App. 1653, April 15, 1982, 8 TBR 147, 4 CER 146 (T.B.).

[11]Graphic Controls v. DMNRCE, Apps. 2272, 2273, Nov. 12, 1985, 10 TBR 262, 10 CER 131 (T.B.). See also Reference ... as to Classification of Dehydrated Grasses, App. 493, Dec. 4, 1958, 2 TBR 175 (T.B.).

manufacture.[12]

Some tariff items did not refer to listed processes, but simply described goods as being "manufactured", "unmanufactured" or "manufactures of" something else. For the application of those items, it was necessary to decide what was meant by manufacturing -- a question which was the subject of several Tariff Board and judicial appeals, in various contexts.

Some appeals on the meaning of "manufacturing" involved tariff items which provided reduced rates or drawbacks of duty on imports "for use in the manufacture of" named goods. Application of these items would be favourable to the importer, who would argue that the activity in question really did constitute manufacturing. The Department would normally counter that the activity was only an assembly operation, and not of sufficient scope to receive beneficial treatment. In interpretation of a duty drawback item, the Supreme Court of Canada on one occasion took a restrictive approach and found that the assembly of electrostatic mining precipitators from imported and domestic components did not constitute manufacturing in Canada. The Exchequer Court below had said that since the precipitators did not exist outside Canada, they must have been manufactured inside the country. The majority of the Supreme Court rejected this "existence" test,

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[12] Foss Lumber v. The King (1912), 47 S.C.R. 130.

which would find virtually any assembly operation to be manufacturing, and said that while assembly might in some cases be manufacturing, it would not qualify for a drawback in this case.[13]

Tariff Board and lower court decisions on items with reduced rates were less restrictive than the Supreme Court's approach. When a tariff item provides for "materials and articles for use in the manufacture of" named goods, it is reasonable to conclude that Parliament intended to favour that industry with reduced rates of customs duty. The item might receive priority over other items[14] and interpretation could be generous. In the two Kipp Kelly appeals, the Tariff Board held that mounting imported engines and generators on a common base qualified as manufacturing, and this decision was affirmed by the Federal Court of Appeal.[15] In other appeals, putting together bicycle components was enough to qualify as

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[13]DMNRCE v. Research-Cottrell, [1968] S.C.R. 684 at 693. Drawback items were given priority over other items: Central Electric v. DMNRCE, 3 TBR 296 (Ex. Ct., April 28, 1967), rev'g. App. 820, Dec. 2, 1966, 3 TBR 294 (T.B.),

[14]This would be the case especially after Great Canadian Oil Sands v. DMNRCE, [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976), a decision which established priority treatment for end use items. See the chapter on End Use. See also: Unident v. DMNRCE, App. 1377, Feb. 16, 1979, 6 TBR 771, 1 CER 64 (T.B.); Universal Grinding v. DMNRCE, App. 2057, March 29, 1984, 9 TBR 194, 6 CER 236 (T.B.), aff'd. DMNRCE v. Universal Grinding, 11 CER 157 (F.C.A., Feb. 19, 1986).

[15]Kipp Kelly v. DMNRCE, App. 1182, July 20, 1977, 6 TBR 493 (T.B.); Kipp Kelly v. DMNRCE, App. 1479, May 21, 1980, 7 TBR 102, 2 CER 129 (T.B.), aff'd. DMNRCE v. Kipp Kelly, [1982] 1 F.C. 571, 3 CER 196 (F.C.A., June 8, 1981).

manufacturing,[16] as was the rewinding of thread[17] and a dentist's small-scale operation of implanting dental crowns.[18] In Geigy Chemicals, a colouring agent was found to be for use in the manufacture of synthetic resins even though the resins were compounded with other materials before the pigment was added.[19] Just about the only process not found to be sufficient was the repair of books in the North West Bindery appeal.[20]

Many of these decisions referred to appeals under the

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[16]Harry D. Shields v. DMNRCE, App. 1489, Jan. 3, 1980, 7 TBR 1, 2 CER 1 (T.B.). See also RCA Victor v. DMNRCE, App. 834, Nov. 25, 1966, 3 TBR 311 (T.B.).

[17]Montreal Swiss Embroidery v. DMNRCE, App. 771, Feb. 8, 1965, 3 TBR 209 (T.B.) (An appeal on an earlier version of the same item was unsuccessful: Montreal Swiss Embroidery v. DMNRCE, App. 763, Feb. 8, 1965, 3 TBR 203 (T.B.)). Hemming of cloth was sufficient to qualify as manufacturing under a different item which applied to rags unfit for use without further manufacture: Hamida Textiles v. DMNRCE, App. 2804, May 16, 1988, 13 TBR 264, 16 CER 275 (T.B.).

[18]Unident v. DMNRCE, App. 1377, Feb. 16, 1979, 6 TBR 771, 1 CER 64 (T.B.). See also Novocol v. DMNRCE, App. 2731, Feb. 26, 1988, 13 TBR 183, 16 CER 132 (T.B.); Boeing v. DMNRCE, App. 2636, July 28, 1988, 17 CER 160 (T.B.).

[19]Geigy Chemical v. DMNRCE, App. 806, March 23, 1966, 3 TBR 285 (T.B.). The approach to the time element was stricter in a later appeal on an item which used the phrase "for the manufacture of", rather than "for use in the manufacture of": Ayerst, McKenna v. DMNRCE, App. 920, Nov. 19, 1969, 4 TBR 398 (T.B.), aff'd. 4 TBR 404 (Ex.Ct., June 30, 1970).

[20]North-West Bindery v. DMNRCE, App. 950, March 17, 1971, 5 TBR 133 (T.B.). See also City of Sherbrooke v. DMNRCE, App. 1495, June 16, 1981, 7 TBR 386, 3 CER 215 (T.B.), in which water purification equipment was found not to qualify under a somewhat different item for "automatic scales ... for use in Canadian manufactures" / "balances ... automatiques ... devant entrer dans des produits canadiens."

federal Excise Tax Act which at the time imposed a sales tax on manufacturers or producers. One provision of that legislation contained an exemption for machinery and apparatus used directly in the manufacture or production of goods.[21] Numerous appeals under both the liability section and the exemption provided a rich source of case law which was cited in tariff decisions despite the different statutory context. Appeals concerning the Excise Tax Act exemption went to the Tariff Board, the body which also heard tariff classification appeals. A Supreme Court decision in 1956 established that the Tariff Board had not been given jurisdiction to determine whether any particular person was a manufacturer or producer and liable for the tax.[22] Appeals concerning the section imposing liability, therefore, went to the regular court system and not the Board. The excise tax decisions examined below cover both exemption appeals before the Tariff Board and liability appeals before the courts. It is argued that the definition of manufacturing developed in this context was too

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[21]Excise Tax Act, R.S.C. 1985, c.E-15, s.50, s.51, Schedule III, Part XIII, s.1. The legislation has since been significantly amended to impose a general goods and services tax: S.C. 1990, c.45.

[22]Goodyear Tire and Rubber v. T.Eaton Co. [1956] S.C.R. 610, rev'g. Goodyear Tire and Rubber v. T.Eaton Co. [1955] Ex.C.R. 229, which aff'd Reference ... as to the 'Manufacturer or Producer' of Special Brand Tires, App. 325, Dec. 7, 1954, 1 TBR 194 (T.B.). See also Goodyear Tire and Rubber v. T.Eaton Co. [1955] Ex. C.R. 98. See further: Cefer Designs v. DMNRCE [1972] F.C. 911 (T.D.); R. v. Cefer Designs, [1974] 1 F.C. 481 (T.D.).

wide for general application in customs tariff matters.

Appeals under the Excise Tax Act exemption for machinery and apparatus used directly in manufacture or production were similar to appeals under customs tariff items for imports used in manufacturing. The taxpayer would claim that the particular activity was manufacturing or production, while the Department would argue the contrary. In appeals under the excise exemption, the Supreme Court ruled in one instance that transformers used in electrical transmission lines were exempt,[23] while pressure regulators in a gas transmission line in another case were not exempt.[24] The pressure regulators simply controlled the flow of gas as it was transmitted, but the transformers were involved in manufacture because they actually sent out a new current at a different voltage suitable for use by customers.[25] In a more recent case, the

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[23]Quebec Hydro-Electric Commission v. DMNRCE [1970] S.C.R. 30. This did not mean that all parts of the transmission system were directly involved in manufacture or production: Gould Manufacturing v. DMNRCE, App. 1099, Feb. 9, 1975, 6 TBR 296 (T.B.).

[24]Consumers' Gas Company v. DMNRCE, [1976] S.C.R. 640.

[25]In some cases, the Tariff Board and the Federal Court of Appeal were fairly generous in deciding that machinery and apparatus which did not itself manufacture or produce could still qualify as directly used in manufacturing or production if it was a necessary part of a complete system. For the development of this approach, see: Canadian Utilities v. DMNRCE, App. 941, Nov. 4, 1970, 5 TBR 88 (T.B.); Canadian Utilities v. DMNRCE, App.942, Nov. 2, 1970, 5 TBR 92 (T.B.); National Sea Products v. DMNRCE, App. 953, May 18, 1971, 5 TBR 162 (T.B.); Candiv Corporation v. DMNRCE, App. 1013, March 27, 1974, 5 TBR 447 (T.B.); Steetley of Canada v. DMNRCE, App. 1034, Dec. 24, 1973, 6 TBR 30 (T.B.); I-XL Industries v.

Supreme Court exempted an emergency electrical generator as it was involved in manufacturing electricity, even though the electricity was not for resale, but was simply provided as part of the manufacturer's obligations as landlord of a large office building.[26] In this decision, the Court applied a definition of manufacturing cited in numerous other appeals:

> the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations

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DMNRCE, App. 1050, Dec. 20, 1973, 6 TBR 106 (T.B.); Amoco Canada v. DMNRCE, Apps. 1158 etc., April 20, 1977, 6 TBR 386 (T.B.); Horton CBI v. DMNRCE, App. 1187, Jan. 6, 1977, 6 TBR 415 (T.B.); Calgary Power v. DMNRCE, App. 1310, July 4, 1979, 6 TBR 886, 1 CER 213 (T.B.); Amerada Minerals v. DMNRCE, App. 1945, Jan. 31, 1984, 9 TBR 106, 6 CER 176 (T.B.); Petro-Canada v. DMNRCE 9 CER 121 (F.C.A., May 3, 1985); DMNRCE v. Amoco Canada Petroleum, 13 CER 102, 63 N.R. 303 (F.C.A., Dec. 3, 1985); contra: Foundation-Comstock v. DMNRCE, App. 919, March 12, 1970, 5 TBR 32 (T.B.), aff'd. 5 TBR 39 (Ex.Ct., Dec. 18, 1970). This is not to say that the manufacturing or production process had no outside limit. In AMF Tuboscope v. DMNRCE, App. 1708, April 1, 1982, 8 TBR 132, 4 CER 127 (T.B.) inspection apparatus was not exempt, and in Lorne Shields v. DMNRCE, App. 2277, Sept. 10, 1985, 10 TBR 215, 9 CER 262 (T.B.) bicycle carriers were not exempt because they were added after the bicycle had been manufactured. In Coca-Cola v. DMNRCE, [1984] 1 F.C. 447, 6 CER 90 (F.C.A., Dec. 22, 1983), however, the Federal Court of Appeal ruled that it would be erroneous to use a narrow test to decide when manufacturing ended. Soft drink cases and carriers were thus exempt since they were used at the end of the production line (and also at the beginning) before the warehousing and distribution stages started.

[26]Royal Bank of Canada v. DMNRCE, [1981] 2 S.C.R. 139, 3 CER 320 (S.C.C., Oct. 6, 1981). See also: British Columbia Railway v. DMNRCE, App. 1637, May 4, 1981, 7 TBR 349 (T.B.); Industrial Electrical Contractors v. DMNRCE, App. 2432, June 18, 1986, 11 TBR 254, 11 CER 245 (T.B.).

whether by hand or machinery.[27]

The Tariff Board, using this definition from Dominion Shuttle, found that a hammer mill which shredded scrap for sale to steel mills was exempt,[28] as were blasting caps which produced crushed rock for road construction.[29] In Controlled Foods, however, the Federal Court of Appeal rejected the argument of a restaurant which claimed to manufacture food and drink under the Dominion Shuttle test. While the finished product might have new forms, qualities and properties, the Court of Appeal decided that it was proper to apply the generally accepted commercial understanding of terms, under which a restaurant would not be considered a manufacturer or producer.[30] Cases dealing with the excise exemption do not

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[27]Minister of National Revenue v. Dominion Shuttle Company (1933), 72 Que. S.C. 15 at 18 (case concerning liability of the taxpayer under the Special War Revenue Act, the predecessor of the Excise Tax Act).

[28]General Scrap and Car Shredder v. DMNRCE, App. 916, Nov. 19, 1969, 4 TBR 391 (T.B.). See also, on similar facts, Mandak Metal Processors v. DMNRCE, App. 922, Nov. 19, 1969, 4 TBR 415 (T.B.), which also mentions the further criterion of whether the process can be reversed. Reversibility was also discussed in Candiv Corp. v. DMNRCE, App. 1013, March 27, 1974, 5 TBR 447 (T.B.), in which a leveller for flattening and cutting sheet steel was held to be exempt.

[29]G.H. Poulin v. DMNRCE, App. 2154, June 6, 1985, 10 TBR 170, 9 CER 165 (T.B.). But see: Arthur A. Voice v. DMNRCE, Apps. AP-89-123, AP-89-133, Oct. 24, 1990, 3 TCT 2383 (C.I.T.T.); Pillar Construction v. DMNRCE, App. AP-89-140, Oct. 25, 1990, 3 TCT 2401 (C.I.T.T.).

[30]Controlled Foods v. R., [1981] 2 F.C. 238, 2 CER 293 (F.C.A., Nov. 3, 1980). The matter was on appeal from the Federal Court Trial Division, where the restaurant had argued that it was a manufacturer, in order to qualify for the

seem to have made a significant distinction between manufacturing and production, except perhaps where ordinary vocabulary demanded use of one term or the other in the context.[31] Although the Excise Tax Act at various times contained extended definitions of manufacturing and production for purposes of the liability section, these definitions were not treated as binding (or even relevant) for interpretation of the exemption.[32]

Appeals concerning liability for tax as a manufacturer or producer under the Excise Tax Act occurred in a different context, outside the jurisdiction of the Tariff Board. The Department would normally be arguing that the particular activity was manufacturing or production and it would be the potential taxpayer who was trying to deny this.

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exemption for its equipment. See further Dominion Stores v. DMNRCE (1982) 10 CER 1 (F.C.A. May 6, 1982), rev'g. Loblaws v. DMNRCE, App. 1546, Aug. 26, 1980, 7 TBR 136, 2 CER 216 (T.B.). Concerning ordinary meaning, see also Mil-ko v. DMNRCE, App. 392, Dec. 14, 1952, 1 TBR 264 (T.B.).

[31]Hobart Canada v. DMNRCE, 61 N.R. 233, 10 CER 64 (F.C.A., Sept. 18, 1985). See also the dissent by Spence J. (with Laskin C.J., Ritchie J. and de Grandpré) in Consumers' Gas v. DMNRCE, [1976] 2 S.C.R. 640.

[32]Steinberg v. DMNRCE, App. 1931, Sept. 23, 1983, 8 TBR 780, 5 CER 577 (T.B.); Coca-Cola v. DMNRCE, [1984] 1 F.C. 447, 6 CER 90 (F.C.A., Dec. 22, 1983); but see Roto-Pak International v. DMNRCE, 18 CER 300 (F.C.A., Jan. 6, 1989). See further, concerning a different exemption, Eastern Canada v. DMNRCE, App. 1030, June 6, 1974, 6 TBR 19 (T.B.), leave to appeal to Federal Court refused Sept. 27, 1974 (6 TBR 356); Robertson Building v. DMNRCE, App. 1154, Feb. 9, 1978, 6 TBR 353 (T.B.), aff'd. DMNRCE v. Robertson Building, [1980] 1 F.C. 58, 6 TBR 368, 1 CER 246 (F.C.A., Sept. 10, 1979).

Identification of the person liable for the tax was the basis for administration of a whole system of tax collection and licences. It was in this context that judicial definitions of manufacturing were developed under the Excise Tax Act and its predecessor the Special War Revenue Act. The Dominion Shuttle test was from a judgment of the Quebec Superior Court in 1934 which found a company liable as a manufacturer under the Special War Revenue Act because it took lengths of lumber and cut, treated, milled and bored them for sale as cross-arms on telephone poles. The full statement of the test was as follows:

> First, what is a manufacturer? There is no definition of the word 'manufacturer' in the Act and it is practically impossible to find a definition which will be absolutely accurate, but from all the definitions contained in leading dictionaries, Corpus Juris, Encyclopedias, etc., the Court gathers that to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.[33]

This definition was applied in the York Marble decision[34] of the Supreme Court of Canada in 1968, when the Court reversed the Exchequer Court below and found that the activity in question was manufacturing because it involved giving the

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[33]Minister of National Revenue v. Dominion Shuttle (1934), 72 Que.C.S. 15 at 18.

[34]The Queen v. York Marble, Tile and Terrazzo Limited, [1968] S.C.R. 140.

goods new forms, qualities and properties. The appellant took raw slabs of marble, finished and installed them in building projects. In the process, the slabs were cut to exact shapes (a change of form), were extensively polished (a change of qualities) and were strengthened with rods and grouting (a change of properties). The Exchequer Court below had said that there had been no change in the character of the product, since the marble was still marble, but the Supreme Court found that this was nevertheless manufacturing and thus subject to tax. Almost any treatment of goods, in fact, would result in some sort of change in form, qualities or properties and could be seen as manufacturing under the Dominion Shuttle test. Applied too liberally, the test could lead to a conclusion of liability for tax in many cases. The concentration on new "forms, qualities, and properties or combinations" tends to obscure the question of whether something new has really been produced, whether, in the words of other parts of the test, "raw or prepared material" has been transformed into an "article for use".

In Myer Franks, the Trial Division of the Federal Court applied the Dominion Shuttle test to find that the reconditioning of oil drums was manufacturing or production.[35]

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[35]Myer Franks v. The Queen, [1974] C.T.C. 128 (F.C.T.D.). In an earlier analogous decision, the Supreme Court had found the retreading of tires to be manufacturing or production, although Dominion Shuttle was not cited: Biltrite Tire v. The King, [1937] S.C.R. 364. See also MNR v. Enseignes Imperial, 3 TCT 5113 (F.C.A., Feb. 28, 1990).

The drums were given new forms because they were cleaned and any leaks or dents were repaired. They had new qualities because they no longer leaked and they would fit tight. They had new properties because they were again suitable for any use to which new drums could be put. The court said that this activity was more extensive than a simple bailment for service such as sending clothes to the laundry or shoes to the shoe repairer, two examples suggested by the appellant. The difference is not, however, self-evident. Shoes which have been repaired could have acquired new forms, qualities and properties. On the Dominion Shuttle test, shoe repair might indeed be considered manufacturing. The distinction in Myer Franks may not have depended solely on a change in the goods, but could have been influenced by the fact that Myer Franks took title to the drums while shoes are usually repaired by a bailee.[36] In neither case is there a significant change in the basic nature of the goods: shoes are still shoes and oil drums still oil drums. The Dominion Shuttle test as applied in both York Marble and Myer Franks demonstrates a tendency toward finding that the activity in question is manufacturing.

In York Marble, the Supreme Court stated that even if there were any doubt about whether the activity was manufacturing, at the very least it would still be taxable as

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[36]The fact that the taxpayer had taken title was crucial in R. v. Vandeweghe, [1934] S.C.R. 244.

production.[37] In 1971, on facts which recall those of Dominion Shuttle, the Court similarly found that railway ties which had been bored and treated with creosote were manufactured, or at least produced.[38] The idea that production covers more than manufacturing is illustrated by a 1950 decision of the Ontario High Court, in which the placing of watch movements into cases did not qualify as manufacturing but was subject to tax anyway as production.[39] In Piggott Enterprises, the Federal Court Trial Division similarly distinguished between manufacturing and production with the idea that production was a wider term. The case involved a company which assembled blank tape cartridges and also recorded tapes of background music which it supplied to customers for a royalty. Both activities were found taxable -- the assembly of cartridges as manufacturing and production, and the supply of background music simply as production.[40] When added to the rather generous definition of manufacturing in Dominion Shuttle, this approach to production meant that many activities would be taxable. If something was not quite

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[37][1968] S.C.R. 140 at 147.

[38]R. v. Canadian Pacific Railway, [1971] C.T.C. 163 (S.C.C.). See also: British Columbia Railway v. R. [1979] 2 F.C. 122 (T.D.), aff'd. [1981] 2 F.C. 783 (F.C.A.).

[39]Gruen Watch v. Attorney-General of Canada, [1950] O.R. 429 (H.C.).

[40]R. v. Piggott Enterprises, [1973] C.T.C. 65, 73 DTC 5013 (F.C.T.D.).

caught as manufacturing, it could still be taxable as production. Liability could then expand subtly, even into the area of services (such as the supply of music in Piggott), which were not normally subject to excise tax.

One of the few liability cases to go against the government was the Stuart House decision of the Federal Court Trial Division in 1976. The defendant ran a packaging operation in which aluminium foil was cut to length and placed in cardboard packages for consumers. The Court found that there was no change in form, quality or properties of the goods and thus no tax liability.[41] In a restrictive approach to Dominion Shuttle, the Court also suggested that the test should be read conjunctively, so that for liability there would need to be changes in form, qualities and properties (or changes in form, qualities and combinations). The case was decided just after the Supreme Court decision in Consumers' Gas, cited in the judgment, in which exemption had been denied for pressure regulators in a gas pipeline since there was no production of new goods.[42] While the restrictive interpretation of Dominion Shuttle was not picked up in subsequent decisions, it may be that a balancing of liability and exemption cases acted as a restraint on the Department's enforcement zeal.

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[41] R. v. Stuart House, [1976] C.T.C. 37 (F.C.T.D.).

[42] Consumers' Gas Company v. DMNRCE, [1976] S.C.R. 640.

A further limit on the scope of the Dominion Shuttle test came from a somewhat different approach which appeared in a few decisions. This approach focused on the transformation of goods through various stages in the process and considered whether or not the goods were in their final, or nearly final, form. In Fiat Auto, the Federal Court Trial Division found that automobiles were not manufactured or produced when the importer had radios installed prior to sale, despite an extended statutory definition which said that a manufacturer or producer included "any person who, by himself or through another person acting for him, assembles, blends, mixes, cuts to size, dilutes, bottles, packages, repackages or otherwise prepares goods for sale ...".[43] The Court said that there was no change in the form, qualities or combinations of the goods, and also that the vehicles were completely operative prior to importation and ready for sale then. The extra accessory did not effect a real change. The mention of "otherwise prepares goods for sale" thus had to be read ejusdem generis with the preceeding words and there was nothing in the prior list

[43]The definition presumably would have reversed the result in Stuart House. For decisions on other statutory definitions of "manufacturer or producer", see: R. v. Bank of Nova Scotia, [1930] S.C.R. 174, [1930] 1 D.L.R. 721; R. v. Fraser Companies, [1931] 4 D.L.R. 145 (S.C.C.); R. v. Shore, [1949] Ex.C.R. 225; Rexair v. R., [1958] S.C.R. 577; Turnbull Elevator v. R., [1963] Ex.C.R. 221; R. v. Canadian Imperial Bank of Commerce, 11 CER 387 (F.C.A., July 2, 1986).

analogous to the installation of radios.[44] Such a "stage of processing" approach could also, of course, be used expansively to say that manufacturing covered every activity up to the stage when goods were in their final form. The Exchequer Court in 1969 took this view when it determined that an aircraft had two manufacturers, one to put together the basic machine and a second to add the interior furnishings and instrumentation. Without the interior work the aircraft was not safe to fly, so it was not in final manufactured form until then.[45] The approach is not free from problems, but it at least has the advantage of looking at the commercial context. Insignificant, minor changes are less likely to be over-emphasized.[46]

The link between excise tax and customs tariff decisions was usually just in one direction, application of the excise tax definition to the interpretation of tariff items.[47] A

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[44] Fiat Auto v. R. [1984] 1 F.C. 447, 6 CER 82 (F.C.T.D., Nov. 21, 1983).

[45] Crothers v. Minister of National Revenue, [1969] C.T.C. 546 (Ex.Ct.).

[46] A few early decisions took an "ordinary usage" approach and ruled that activites would not be taxable if they were not called manufacturing in ordinary vocabulary. See: R. v. Pedrick (1921), 21 Ex.C.R. 14; R. v. Shelly, [1936] 1 D.L.R. 415 (Ex.Ct.). For cases contra, finding liability, see: R. v. Karson (1922), 21 Ex.C.R. 257; R. v. Dominion Bakery (1923), 44 O.L.R. 656 (A.D.).

[47] In York Marble, however, the Supreme Court of Canada used the wording of two tariff items to show a general legislative intent to treat the processing and finishing of marble as manufacturing. The items were for "building stone

question to be addressed is whether definitions from this context should be seen as setting a general notion of "manufacturing" for both areas. In tariff classification, the context could be much less stark than a complete exemption or determination of the main base for tax liability. The Dominion Shuttle test includes a potentially wide range of activity as manufacturing, since almost any treatment of goods will involve changes in "form, qualities and properties or combinations." This meant that the tax exemption could receive generous interpretation, in line with presumed legislative intent. The liability section could also receive wide interpretation, also probably in line with legislative intent. The same test, however, is less appropriate for tariff classification purposes, where choices are less stark and legislative intent less clear-cut. The definition is not really suitable for deciding what constitutes "manufactured" or "unmanufactured" goods, or goods which are "manufactures" of some other element. To focus on changes according to the level of processing, it would be better to analyze the nature of those changes more closely, to look at factors such as whether goods had reached final functional form, whether constituent elements had lost their separate identity and whether raw materials had reached the stage of being committed

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.. further manufactured than sawn" and "marble, not further manufactured than sawn". The Court said this indicated that mere sawing of the marble would be manufacturing: R. v. York Marble, [1968] S.C.R. 140 at 149.

to the final product. This "processing" approach, illustrated in Fiat above, will not solve all problems. It does have, however, the merit of being connected to the function of products in ordinary commerce and thus the potential for adaptability across a number of different classification contexts (or at least as much potential for adaptability as a test based on minor changes in the physical qualities of the goods).[48]

In customs appeals on tariff items describing goods as "manufactured" or "unmanufactured", the Tariff Board and Federal Court of Appeal tended not to use the wide Dominion Shuttle/York Marble definition of manufacturing. To decide whether treated sewage was "manufactured fertilizer" in an early decision, the Tariff Board considered a number of criteria as indications of manufacturing, including the level of complication, technical skill, expenditure, and

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[48]In administration of end use tariff items, the Department has developed a test for "manufacturing" which is not as wide as that in Dominion Shuttle. The administrative test is as follows: "Canadian manufacturing is generally considered to be a process that includes a substantial operation performed in Canada, which adds Canadian Value, and which results in creation of a product that serves a different function from those served by the component inputs." See Revenue Canada, Customs and Excise, Administrative Policy - End Use Provisions, Memorandum D11-8-1, Sept. 22, 1989, para.22. The emphasis on new functions also appears in MNR v. Enseignes Imperial, 3 TCT 5113 (F.C.A., Feb.28, 1990), although the Court of Appeal found a very minor change in functions to be sufficient.

profitability, as well as changes in the goods.[49] The place of processing might also have an influence, so that goods would still be "unmanufactured" as they left the primary mill, before undergoing processing at the secondary mill.[50]

In Skega, a recent appeal, the Dominion Shuttle test was put directly in question. The imported goods were strips and slabs of a rubber compound, slightly processed prior to shipment to Canada. After importation, the rubber would be vulcanized and moulded into shape for use as conveyor belts in mines. The processing in Canada would increase the value of the goods by 300%. The Department had classified the goods as "manufactures of rubber", but the importer was successful at both the Tariff Board and the Federal Court of Appeal in arguing that the goods were instead "rubber, crude, ... unmanufactured." The Department based its classification on the Dominion Shuttle/York Marble definition of manufacturing and argued that the processing from raw rubber to the imported

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[49]Toronto Salt v. DMNRCE, App. 313, April 5, 1954, 1 TBR 169 (T.B.). See also: Mo-Son Furs v. DMNRCE, App. 737, March 4, 1964, 3 TBR 152 (T.B.), in which goods were manufactures of fur even though made from fur scraps. Classification as a manufacture would, however, give way to another more specific item covering goods produced from waste or discarded material: Durie & Miller v. DMNRCE, App. 569, Oct. 10, 1962, 2 TBR 256 (T.B.); Cataphote v. DMNRCE, App. 572, Jan. 12, 1962, 2 TBR 259 (T.B.).

[50]Industrial Commutator v. DMNRCE, App. 1878, March 1, 1983, 8 TBR 610, 5 CER 224 (T.B.). See also D.Byron Palmer v. DMNRCE, App. 1728, Dec. 16, 1981, 8 TBR 22, 4 CER 4 (T.B.). Trade usage to the contrary would, however, take priority: British Steel v. DMNRCE, App. 2067, May 11, 1984, 9 TBR 240, 7 CER 230 (T.B.).

compound had resulted in a change in form, qualities and properties. Mr. Justice Heald in the Federal Court of Appeal rejected this submission, emphasizing instead other parts of the definition: "the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations ..." The French version of "manufactures of rubber", "articles en caoutchouc", indicated that the item was to cover only the end product, the vulcanized rubber ready for use, and not any of the intermediate stages of preparation. There was evidence before the Tariff Board to the effect that the intermediate stage had no marketable use as such, and was not therefore an article of commerce. While some processing occurred when the rubber was compounded, there was no real change in the basic nature of the goods, because the process was still reversible at that stage. The imported goods were closer to "unmanufactured" than "manufactured", since they were not yet ready for use in their designated function.[51] The Dominion

[51] DMNRCE v. Skega Canada, 12 CER 204, 72 N.R. 280 (F.C.A., Oct. 7, 1986), aff'g. Skega Canada v. DMNRCE, App. 2006, Dec. 13, 1983, 9 TBR 50, 6 CER 139 (T.B.). At the Federal Court of Appeal, Stone J. agreed with dismissing the appeal out of deference to the Tariff Board and on the basis that the intermediate goods had no other use than for conversion into vulcanized rubber. Thurlow C.J. dissented. For a decision in which intermediate goods were similarly found to be still "unmanufactured", see Royal Canadian Mint v. DMNRCE, App. 2694, Dec. 30, 1987, 12 TBR 628, 15 CER 307 (T.B.). Both cases seem contrary to an earlier decision in which tobacco in an intermediate stage of processing was found to be "manufactured": Benson & Hedges v. DMNRCE, App. 491, Jan. 2, 1959, 2 TBR 173 (T.B.).

Shuttle test was thus not applied as generously as in excise tax matters.

A few months after its decision in Skega, the Tariff Board used a similar analysis to interpret an item covering "manufactures of" clay in the Abitibi Price appeal. The imported product was processed clay for use as a coating in the pulp and paper industry. The importer again won at both the Tariff Board and Federal Court of Appeal, arguing that the goods were still "china clay" and had not become manufactures. Citing the declaration in Skega, the Tariff Board said that the processing did not change the basic properties of the clay, but merely enhanced its suitability for the eventual end use. It was still "prepared material" for the pulp and paper industry and had not become "articles en argile", the French version of the item in question. In a subsidiary line of reasoning, the Board also noted that there was a separate tariff item for "china clay ... not further manufactured than ground"; the general item for "china clay", therefore, had to cover goods which had been subjected to further processing. While the Department's appeal was dismissed by the Federal Court of Appeal, the Court relied mainly on the subsidiary argument. The Court did not accept the idea that the goods had not been manufactured, but held that the Board was nevertheless entitled to decide in favour of the specific eo

nomine item for china clay.[52] The result should not, however, be taken as a rejection of the Court of Appeal's reasoning in Skega. In the Court of Appeal, Abitibi Price was decided over a year before Skega. Skega thus is the more recent, binding expression of the Court's opinion, a more narrow use of the Dominion Shuttle definition in the establishment of distinctions for tariff items referring to goods as "unmanufactured" or as "manufactures."

The question remains how to decide when goods have moved from raw material into the category of "manufactures" in English or "articles" in French.[53] In part, the problem is

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[52]Abitibi-Price v. DMNRCE, App. 2025, March 30, 1984, 9 TBR 199, 6 CER 244 (T.B.), aff'd. DMNRCE v. Abitibi-Price, 9 CER 204 (F.C.A., June 18, 1985). The Tariff Board had also noted that the term "china clay" in trade usage was wide enough to allow for a certain amount of processing. The subsidiary argument about the scope of the item for "china clay" works less well in French. In the French version, the items are: "l'argile à porcelaine ... n'ayant pas reçu de préparation plus avancée que ..." and "terre à porcelaine." Both expressions "argile à porcelaine" and "terre à porcelaine" are rendered in English as "china clay". It would presumably be a question of trade usage to determine if there was any difference between the two expressions in French.

[53]For "manufactures of" items in English, the most common equivalent in French has been "articles en" or "articles de". See the items at issue in the following appeals: Northwood Mills v. DMNRCE, App. 1104, Jan. 19, 1976, 1976 Canada Gazette Part I p.4570 (T.B.); Plaques Lithographiques v. DMNRCE, App. 1398, April 2, 1979, 6 TBR 800, 1 CER 125 (T.B.); Wilson Machine v. DMNRCE, App. 1402, July 23, 1979, 6 TBR 895, 1 CER 226 (T.B.); Les Produits Ménagers v. DMNRCE, App. 1572, Dec. 15, 1981, 8 TBR 15, 3 CER 350 (T.B.); D.Byron Palmer v. DMNRCE, App. 1728, Dec. 16, 1981, 8 TBR 22, 4 CER 4 (T.B.); Crown Cork v. DMNRCE, Apps. 1592, 1786, June 21, 1982, 8 TBR 193, 4 CER 226 (T.B.); Plaques Lithographiques v. DMNRCE, App. 1729, Nov. 8, 1982, 8 TBR 330, 4 CER 389 (T.B.); Skega Canada v. DMNRCE, App.2006, Dec. 13, 1983, 9 TBR 50, 6 CER 139

particularly one of English terminology, since it is mainly in English that there will be a mixing of definitions between "manufactured/ unmanufactured" goods and goods which are "manufactures of" something. In French, there is less danger of the same confusion between goods which are "ouvré/non ouvré"[54] and goods which are "articles (en/de)." The standard equivalents in French favour the Skega approach of demanding that manufactures be the finished product, or at least independently marketable goods. If manufactures are indeed to

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(T.B.), aff'd. DMNRCE v. Skega Canada, 12 CER 204 (F.C.A., Oct. 7, 1986); Abitibi-Price v. DMNRCE, App. 2025, March 30, 1984, 9 TBR 199, 6 CER 244 (T.B.), aff'd. DMNRCE v. Abitibi-Price, 9 CER 204 (F.C.A., June 18, 1985).

A few appeals also dealt with an item for "textile manufactures", which was "produits textiles" in French: Intercontinental Fabrics v. DMNRCE, App. 887, May 15, 1968, 4 TBR 187 (T.B.); Jossal Trading v. DMNRCE, App. 1243, Oct. 25, 1977, 1978 Canada Gazette Part I p.7547 (T.B.); Symack Sales v. DMNRCE, App. 1262, Nov. 3, 1978, 1978 Canada Gazette Part I p.7404(T.B.); Imperial Tobacco v. DMNRCE, App. 1315, Jan. 19, 1979, 6 TBR 729, 1 CER 22 (T.B.), aff'd. DMNRCE v. Imperial Tobacco [1980] 2 F.C. 164 (F.C.A., March 20, 1980); Gates Canada v. DMNRCE, App. 1615, May 29, 1981, 7 TBR 365, 3 CER 177 (T.B.); Youngstar v. DMNRCE, App. 2365, Sept. 18, 1986, 11 TBR 419, 12 CER 157 (T.B.); IMRA-RIT v. DMNRCE, App. 2547, Jan. 30, 1987, 12 TBR 109, 13 CER 272 (T.B.). Other possibilities in decided appeals were "ouvrages en" (C.J.Rush v. DMNRCE, App. 1422, July 24, 1979, 6 TBR 920, 1 CER 231 (T.B.)) and "objets fabriqués" (Royal Canadian Mint v. DMNRCE, App. 2694, Dec. 30, 1987, 12 TBR 628, 15 CER 307 (T.B.)).

[54]In decided appeals, this is the standard equivalent in French of "manufactured/unmanufactured": D.Byron Palmer v. DMNRCE, App. 1728, Dec. 16, 1981, 8 TBR 22, 4 CER 4(T.B.); Industrial Commutator v. DMNRCE, App. 1878, March 1, 1983, 8 TBR 610, 5 CER 224 (T.B.); Skega Canada v. DMNRCE, App. 2006, Dec. 13, 1983, 9 TBR 50, 6 CER 139 (T.B.), aff'd. DMNRCE v. Skega Canada 12 CER 204 (F.C.A., Oct. 7, 1986); Royal Canadian Mint v. DMNRCE, App. 2694, Dec. 30, 1987, 12 TBR 628, 15 CER 307 (T.B.).

be given this interpretation, there could be a great deal of distance from the unmanufactured material to the finished manufacture. It would be quite consistent with the French terminology and not inconsistent with the English to recognize a middle stage which would be manufactured material, without yet being a completed manufacture. Imports could thus be manufactured rubber or processed china clay without necessarily falling into an item for the finished article.

In U.S. tariff law prior to implementation of the Harmonized System, this precise distinction was recognized. Items for "manufactured material" would cover goods which had been processed if the material still retained its original identity. Items for "manufactures of" would cover goods which had been transformed into a new article of commerce distinct from the original raw material.[55] While the Skega decision of the Federal Court of Appeal does not use these exact categories, it points in the same direction. The usual French terminology would tend to show that a distinction should be made in English between "manufactured" items and "manufactures of" items.[56]

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[55]Ruth F. Sturm, Customs Law and Administration, 2nd ed., New York, American Importers Association, 1980, pp.536-41.

[56]If "manufactures" are to mean the same thing as "articles" in both French and English, it could be that an article is expected to have a "specific design, size and shape": CAE Metal Abrasive v. DMNRCE, App. 2041, Dec. 28, 1983, 9 TBR 62, 6 CER 152 (T.B.) at 68, aff'd. F.C.A. (see [1985] 1 F.C. p.D28, index). Articles are thus to be distinguished from "materials", which can be more amorphous

Although the decisions did not follow this U.S. distinction, many tariff appeals allowed leeway for some processing before the goods were classified as manufactures, often as a reflection of trade usage.[57] Sometimes the focus was on the processing itself,[58] particularly the stage of processing. Goods which had not undergone a secondary stage of processing could still be slightly processed without becoming manufactures.[59] They would become manufactures if work continued beyond the primary stage.[60] The General

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(for example, in items covering "materials for use in ..."). On this distinction, see: Grant Corporation v. DMNRCE, App. 2395, Jan. 30, 1987, 12 TBR 104, 13 CER 268 (T.B.); Ipsco v. DMNRCE, App. 2982, Jan. 3, 1989, 2 TCT 1016, 18 CER 91 (T.B.).

[57]Other interpretation principles such as ejusdem generis could also, of course, apply: Northwood Mills v. DMNRCE, App. 1104, Jan. 19, 1976, 1976 Canada Gazette Part I p.4570 (T.B.).

[58]To qualify as manufacturing, it helped if the processing was complicated in some way, involving expertise or capital expenditure: Mo-Son Furs v. DMNRCE, App. 737, March 4, 1964, 3 TBR 152 (T.B.); Essex Packers v. DMNRCE, App. 810, March 22, 1966, 3 TBR 288 (T.B.); C.J. Rush v. DMNRCE, App. 1422, July 24, 1979, 6 TBR 902, 1 CER 231 (T.B.). The "manufactures of" item might also be chosen as an alternative when some other item was rejected, with little attention directed to the exact nature of the manufacturing: Chinmei Enterprises v. DMNRCE, App. 2454, Nov. 7, 1986, 11 TBR 542, 13 CER 53 (T.B.).

[59]Les Produits Ménagers v. DMNRCE, App. 1572, Dec. 15, 1981, 8 TBR 15, 3 CER 350 (T.B.). See also: R.W.Crabtree v. DMNRCE, App. 485, Dec. 4, 1958, 2 TBR 165 (T.B.);Plaques Lithographiques v. DMNRCE, App. 1398, April 2, 1979, 6 TBR 800, 1 CER 125 (T.B.).

[60]Reference ... re Classification of Processed Aluminum Sheet, App. 543, Oct. 19, 1959, 2 TBR 228 (T.B.); Wilson Machine v. DMNRCE, App. 1402, July 23, 1979, 6 TBR 895, 1 CER 226 (T.B.); Crown Cork and Seal v. DMNRCE, Apps. 1592, 1786, June 21, 1982, 8 TBR 193, 4 CER 226 (T.B.); Plaques Lithographiques v. DMNRCE, App. 1729, Nov. 8, 1982, 8 TBR 330,

Fabrics appeal in 1969 used analysis similar to that of U.S. decisions. The appeal involved fabric which had been hemmed on both selvedges. The goods were held to be still "woven fabric" and not manufactures because the processing had not transformed the fabric into a "new or different manufacture with a new and distinctive name, character or use."[61] The potential uses of the fabric had not been limited in any way, but actually enhanced since the edges were stronger and the goods could be more easily transported. There had not been a sufficient change to turn the fabric into a "textile manufacture."[62]

For items describing goods as "manufactured",

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4 CER 389 (T.B.).

[61]General Fabrics v. DMNRCE, App. 891, June 2, 1969, 4 TBR 200 (T.B.) at 206. See also: Screen Fashions v. DMNRCE, App. 1195, May 10, 1977, 1978 Canada Gazette Part I p.654 (T.B.); Gates Canada v. DMNRCE, App. 1615, May 29, 1981, 7 TBR 365, 3 CER 177 (T.B.).

[62]Trade usage was influential in determining when a new article had been created. For appeals classifying goods as textile manufactures after processing, see: Intercontinental Fabrics v. DMNRCE, App. 887, May 15, 1968, 4 TBR 187 (T.B.); Hudson's Bay v. DMNRCE, App. 1197, Feb. 7, 1977, 1977 Canada Gazette Part I p. 2827 (T.B.). For a time, the item for "textile manufactures" received wide interpretation, covering such things as needlework kits, embroidery kits and even material for cigarette filters: Jossal Trading v. DMNRCE, App. 1243, Oct. 25, 1977, 1978 Canada Gazette Part I p.7547 (T.B.); Symack Sales v. DMNRCE, App. 1262, Nov. 3, 1978, 1978 Canada Gazette Part I p.7404 (T.B.); Imperial Tobacco v. DMNRCE, App. 1315, Jan. 19, 1979, 6 TBR 729, 1 CER 22 (T.B.), aff'd. [1980] 2 F.C. 164, 2 CER 75 (F.C.A., March 20, 1980). A more restricted interpretation appeared in: Youngstar v. DMNRCE, App. 2365, Sept. 18, 1986, 11 TBR 419, 12 CER 157 (T.B.); IMRA-RIT v. DMNRCE, App. 2547, Jan. 30, 1987, 12 TBR 109, 13 CER 272 (T.B.).

"unmanufactured" or "manufactures of", custom tariff appeals had generally found the Dominion Shuttle definition of manufacturing to be too wide. A tendency was developing to treat "manufactures of"/"articles de" items as referring only to finished products. The classification of intermediate goods was ambiguous. The Dominion Shuttle definition focused too narrowly on what might be relatively minor physical changes in goods. An approach giving more emphasis to the commercial context and the level of processing was in order.

c. Changes in Form and Components

This section deals with physical changes in goods which cause them to move from one tariff item to another. The changes could be in form or arrangement only, or could involve the effects of mixing in additional components during processing.

A simple change in form was not likely to result in a change of classification, at least where the essential elements of the goods remained the same. Soya bean meal, for example, did not change classification when it was processed into pellets.[63] Slight processing such as removal of water

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[63]Milne & Craighead v. DMNRCE, App. 249, Nov. 19, 1951, 1 TBR 58 (T.B.).

might not be significant,[64] unless there was a trade usage to the contrary.[65] Peeled potatoes, however, were no longer "fresh vegetables" in the Wonder Pak appeal, since the processing:

> so changed the characteristics of the potatoes that they can no longer be marketed, stored and graded in accordance with the procedures commonly used and prescribed for fresh vegetables[66]

If the form changed drastically, a new product could be created. In Redi Garlic, raw garlic which had been peeled and crushed into a puree was not longer identifiable as a vegetable and had become a "vegetable material".[67] In Aliments Tousain, however, capers preserved in brine or vinegar remained vegetables because their form had not

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[64]Sherwin-Willaims v. DMNRCE, App. 215, Aug. 28, 1950, 1 TBR 35 (T.B.); George Perley-Robertson v. DMNRCE, App. 591, Feb. 26, 1962, 2 TBR 283 (T.B.); Entreprises Mair Fried v. DMNRCE, App. 1220, March 22, 1978, 1979 Canada Gazette Part I p.3048 (T.B.); Marc's & Toussaint's v. DMNRCE, App. 1573, May 19, 1982, 8 TBR 161, 4 CER 182 (T.B.).

[65]O'Driscoll v. DMNRCE, App. 748, Sept. 17, 1964, 3 TBR 189 (T.B.); Bowes v. DMNRCE, App. 952, April 26, 1971, 5 TBR 151 (T.B.), aff'd. F.C.A. sub nom Standard Brands v.Bowes (see 5 TBR 161), leave to appeal refused [1972] S.C.R. xiv (S.C.C., Feb. 7, 1972).

[66]Wonder Pak v. DMNRCE, App. 688, April 17, 1963, 3 TBR 90 (T.B.) at 91-92. See also Shehirian v. DMNRCE, App. 2270, Aug. 13, 1985, 10 TBR 199, 9 CER 251 (T.B.).

[67]Redi Garlic v. DMNRCE, App. 2141, Dec. 19, 1984, 9 TBR 385, 8 CER 126 (T.B.).

changed.[68]

Several appeals concerned newly-developed goods, such as flavoured croutons,[69] granola bars,[70] specialized crackers,[71] rice mixes[72] and fruit bars.[73] The question was whether the changes in form and composition had created a new, distinct product with a new tariff classification. Raw popcorn by itself was still corn,[74] but became a new product when mixed with salt in a block of shortening, according to the Exchequer Court. Although each component retained its identity and could be separated out again, the Court held that the mixture was:

> an entirely new product differing in appearance,

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[68]Aliments Tousain v. DMNRCE, App. 2135, Dec. 19, 1988, 18 CER 185 (T.B.), reheard after DMNRCE v. Aliments Tousain, 16 CER 351 (F.C.A., Feb. 3, 1988), rev'g. Aliments Tousain v. DMNRCE, Apps. 2135, 2150, April 22, 1985, 10 TBR 134, 9 CER 94 (T.B.).

[69]In B.L. Marks v. DMNRCE, App. 1186, Jan. 31, 1977, 1977 Canada Gazette Part I p. 2821 (T.B.), the croutons were still bread. In Clorox v. DMNRCE, App. 1513, June 12, 1980, 7 TBR 110, 2 CER 145 (T.B.), however, the salad crispins had been so altered by additives that the tariff classification had changed.

[70]General Mills v. DMNRCE, App. 1407 etc., July 3, 1979, 6 TBR 876, 1 CER 206 (T.B.).

[71]I.D. Foods v. DMNRCE, App. 2197, Nov. 21, 1985, 10 TBR 268, 10 CER 146 (T.B.).

[72]I.D. Foods v. DMNRCE, App. 2526, Nov. 28, 1986, 11 TBR 559, 13 CER 90 (T.B.).

[73]General Mills v. DMNRCE, Apps. 2457 etc., July 14, 1987, 12 TBR 256, 14 CER 209 (T.B.), aff'd. 2 TCT 4101 (F.C.A., Dec. 6, 1988).

[74]Essex Hybrid v. DMNRCE, App. 566, Dec. 13, 1961, 2 TBR 254 (T.B.).

> form and function from those of the three original ingredients. ... - an article which contained within itself all the ingredients necessary for a householder to use in the preparation of popcorn - in effect a 'ready-mix' article.[75]

A number of other appeals showed this same concern for both the form of goods and their use. Changes in composition were clearly important, if the additives produced a change in the essential properties of the goods.[76] As the ready-mix popcorn appeal demonstrates, components did not need to mix in and lose their original identity in order to create a new product. This might be one factor to consider,[77] but the commercial significance of the change would be determinative.

Some appeals specifically mentioned the use of goods in

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[75] W.T.Hawkins v. DMNRCE, 2 TBR 11 (Ex.Ct., Feb. 27, 1958) at 13, aff'g. App. 395, Feb. 27, 1957, 2 TBR 10 (T.B.). To the same effect, concerning packages of microwave popcorn, see Hunt-Wesson Canada v. DMNRCE, App. 2527, Aug. 22, 1988, 17 CER 212 (T.B.). In Hunt-Wesson, while the components had not lost their identity, the Board considered the processing irreversible, since it was hardly likely that the kernels of corn would be separated out again and handled by the bushel, the assessment unit for the tariff item for corn.

[76] See, for example, the following declarations in which changes in material composition moved goods from the item for "chocolate paste" to the item for "preparations of chocolate", even though they were not yet in final form for retail sale: Preiswerck v. DMNRCE, App. 184, Aug. 26, 1949, 1949 Canada Gazette Part I p.3447 (T.B.); Aetna Biscuit v. DMNRCE, App. 166, Aug. 26, 1949, 1 TBR 5 (T.B.); Splendid Chocolates v. DMNRCE, App. 1675, Sept. 21, 1981, 7 TBR 462, 3 CER 291 (T.B.); Splendid Chocolates v. DMNRCE, Apps. 1998 etc., March 16, 1984, 9 TBR 179, 6 CER 225 (T.B.).

[77] See, for example, Semmons-Taylor v. DMNRCE, App. 1976, July 29, 1983, 8 TBR 758, 5 CER 527 (T.B.), where the chemical reaction altered the nature of the original materials and led to a change in classification.

context. In Husky Industries, char briquets could not be classified as lignite coal, since the additives and processing had created a new good differing in "composition, appearance and performance" from its raw materials.[78] In Grand Specialties, a small amount of flavouring meant that the goods were no longer "natural mineral water", since there was a change in odour and taste, and the difference was significant enough to warrant marketing under separate labels.[79] And in Nortesco, the addition of a rubber binder did not change the nature of cork industrial safety mats, because "the properties of the goods that make them desirable for their particular uses are derived from their cork content ..." rather than from

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[78]Husky Industries v. DMNRCE, App. 1281, May 11, 1978, 1978 Canada Gazette Part I p. 4213 (T.B.) at 4216. See also Clorox v. DMNRCE, App. 1246, Oct. 28, 1977, 6 TBR 544 (T.B.).

[79]Grand Specialties v. DMNRCE, App. 2565, Jan. 28, 1987, 12 TBR 60, 13 CER 233 (T.B.). In other appeals, however, a small amount of additive did not change the classification. In Imported Delicacies v. DMNRCE, App. 1541, Nov. 14, 1980, 7 TBR 207, 2 CER 302 (T.B.) fruit syrup remained fruit syrup after stabilizers were added in minute quantity to prevent fat separation. See also: Meincke v. DMNRCE, App. 254, June 24, 1952, 1 TBR 65 (T.B.); Durie & Miller v. DMNRCE, App. 569. Oct. 10, 1962, 2 TBR 256 (T.B.); Omya v. DMNRCE, App. 2417, Nov. 21, 1986, 11 TBR 550, 13 CER 72 (T.B.) Although some tariff items specified that they covered goods "with or without" a particular element, it was not necessary for the item in question in Imported Delicacies to say "with or without stabilizers", since this addition did not change the nature of the goods. For confirmation on this point, see also Central Electric v. DMNRCE, 3 TBR 296 (Ex.Ct., April 28, 1967).

the binder.[80]

The treatment of intermediate goods which had undergone some physical change on the way to becoming a finished product was raised in some appeals. A simple change in form alone might not cause a change in tariff classification. In Toronto Refiners, lead scrap was still lead scrap even though it had been remelted for ease of transportation.[81] A temporary change might also be seen as unimportant. The temporary coating on the imported steel rods in Central Electric was not significant enough to affect their classification.[82] But in GTE Sylvania, metal strips were no longer metal strips because they had been cut, marked and plated. They were ready for the final attachments to become parts of circuit breakers. They had moved further along in the processing, and the Federal Court of Appeal held that the classification had changed.[83] Both form and use of the goods were considered in the early Plastic Contact Lens appeal. The imported goods were not yet

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[80]Nortesco v. DMNRCE, App. 2004, March 9, 1984, 9 TBR 164, 6 CER 211 (T.B.).

[81]Toronto Refiners v. DMNRCE, App. 1861, Feb. 4, 1983, 8 TBR 537, 5 CER 152 (T.B.).

[82]Central Electric v. DMNRCE, 3 TBR 296 (Ex.Ct., April 28, 1967), rev'g. App. 820, Dec. 2, 1966, 3 TBR 294 (T.B.). But see Canada Dry v. DMNRCE, App. 846, Nov. 15, 1971, 1972 Canada Gazette Part I p.577 (T.B.).

[83]DMNRCE v. GTE Sylvania, 10 CER 200, 64 N.R. 322 (F.C.A., Dec. 11, 1985), rev'g. GTE Sylvania v. DMNRCE, App. 1867, Feb. 23, 1983, 8 TBR 569, 5 CER 196 (T.B.). See also St. Lawrence v. DMNRCE, App. 316, July 5, 1954, 1 TBR 181 (T.B.), in which classification changed when goods were assembled.

contact lenses because they had not been cut to the appropriate sizes and shapes for use. They had received some treatment and could function as rudimentary lenses, but they were not sufficiently processed to be sold for fitting as contact lenses.[84]

Physical changes in form or composition of goods could lead to a change in tariff classification. In decided appeals, the appearance and characteristics of the resulting product were examined. Attention was directed as well to the use of the goods, to see if the change had commercial consequences.

d. Purpose and Commercial Context

It has been argued throughout this study that the commercial context is fundamental in all tariff classification. As set out in detail in the chapter on the Eo Nomine Principle, the use of goods has been an important factor which should not be ignored in the establishment of principles for interpretation. This section describes a few appeals which focused directly on the economic context, trade terminology and expense associated with processing. The contextual approach could relate directly to the purpose or expense of the processing itself. In the Tripar appeal, a final resin coating on steel was not significant because it

[84]Plastic Contact Lens Company v. DMNRCE, App. 643, Jan. 23, 1963, 3 TBR 67 (T.B.).

was intended only to prevent tarnishing and did not change the basic character of the goods.[85] In Royal Leather, the appellant was successful in arguing that the sueding on one side of the imported leather was significant for classification - in part because the process involved extra expense that would not have been undertaken if that side was to be worn on the inside.[86]

The use of the imported goods has been significant in appeals which focus on the condition of goods at a specific stage of processing. In Cornell Jewellery, for example, sterling silver findings could not be classified as jewellery since they were not yet in a form suitable for sale or use as jewellery. The tariff item covered "jewellery ... for the adornment of the person." The Board ruled that this did not include the unfinished product which did not meet the intended purpose.[87] Goods could also move from one item to another as new components and functions were added during processing. In the early General Instrument appeal, television parts were no longer circuit switches when new functions, including a

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[85]Tripar v. DMNRCE, App. 1913, Feb. 28, 1983, 8 TBR 605, 5 CER 216 (T.B.). See also Libby, McNeill v. DMNRCE, App. 162, May 11, 1949, 1 TBR 3 (T.B.).

[86]Royal Leather v. DMNRCE, App. 1823, Feb. 22, 1983, 8 TBR 561, 5 CER 190 (T.B.).

[87]Cornell Jewellery v. DMNRCE, App. 1298, June 13, 1978, 1978 Canada Gazette Part I p.4989 (T.B.). Even if goods could meet the purpose, another item might be more specific: Commander Sweeney v. DMNRCE, App. 1687, Dec. 10, 1981, 8 TBR 12, 3 CER 348 (T.B.).

fine-tuning mechanism, had been added on.[88]

Trade terminology for the various stages had obvious importance. In the Gates appeal, trade usage confirmed the finding that woven fabric was still woven fabric even after it had been bias-cut to prepare it for use on industrial belts.[89] Recognized trade terminology was used in British Steel to confirm that the imported goods had advanced to the stage of being steel bars even though the processing had been done only at a primary mill.[90] Commercial context was significant in Quality Products for the determination that paper was a step removed from "vegetable fibre"; the tariff item for "baskets of interwoven vegetable fibre" thus covered baskets of rattan, cane or bamboo but not baskets of paper.[91] Advertising and marketing techniques have also been used in a number of appeals to show the trade or commercial treatment

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[88]General Instrument v. DMNRCE, App. 400, May 9, 1957, 2 TBR 40 (T.B.).

[89]Gates Canada v. DMNRCE, App. 1615, May 29, 1981, 7 TBR 365, 3 CER 177 (T.B.).

[90]British Steel v. DMNRCE, App. 2067, May 11, 1984, 9 TBR 240, 7 CER 230 (T.B.). See also: Warner Cowan v. DMNRCE, App. 2333, March 26, 1986, 11 TBR 161, 11 CER 166 (T.B.); Grant Corp. v. DMNRCE, App. 2395, Jan. 30, 1987, 12 TBR 104, 13 CER 268 (T.B.).

[91]Quality Products v. DMNRCE, App. 840, Nov. 15, 1966, 3 TBR 323 (T.B.).

of goods at particular stages of processing.[92]

II- Packaging

In the Canadian customs tariff prior to implementation of the Harmonized System, usual coverings would be dutiable with goods if included in the invoice price. If not so included, they would be classified separately.[93] "Coverings" were defined as "packing boxes, crates, casks, cases, cartons, wrapping, sacks, bagging, rope, twine, straw or other articles used in covering or holding goods ... and the labour and charges for packing such goods." The major exception was for coverings "designed for use other than in the bona fide transportation of the goods they contain", which had to be classified as if they had been imported separately.[94] In the Volvo appeal, the Tariff Board decided that this exception did not apply to wooden pallets designed for repeated use. They were still being used for transportation of goods and thus did

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[92]Hahamovitch v. DMNRCE, App. 1372, April 3, 1979, 6 TBR 804, 1 CER 128 (T.B.); General Mills v. DMNRCE, Apps. 1407, 1411, July 3, 1979, 6 TBR 804, 1 CER 128 (T.B.); Clorox v. DMNRCE, App. 1513, June 12, 1980, 7 TBR 110, 2 CER 145 (T.B.); General Mills v. DMNRCE, Apps. 2457 etc., July 14, 1987, 12 TBR 256, 14 CER 209 (T.B.), aff'd. 2 TCT 4101 (F.C.A., Dec. 6, 1988).

[93]J.S. Mason v. DMNRCE, App. 305, Dec. 17, 1953, 1 TBR 139 (T.B.).

[94]Customs Tariff Act, R.S.C. 1985, c.C-54, Schedule II, items 71001-1, 71002-1, 71003-1, 71004-1, 71005-1, 71006-1.

not have to be treated separately.[95]

The definition of "coverings" was interpreted widely, updating for new technology.[96] Labour charges for packing were dutiable even if separately billed.[97] A few tariff items mentioned the packaging for goods, usually to include it in the weight when weight was a relevant factor.[98] In one appeal, large cartons were ignored because they had no function other than to take goods from a mailing house in New York to a Post Office in Montreal. The tariff item applied to advertising material "when in packages valued at not more than $1.00 each." The material had been prepared in separate envelopes addressed to individual households. The Board held that the goods qualified, since the cartons were simply a convenient way of organizing the envelopes by postal code. They were not "packages" within the meaning of the tariff item.[99]

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[95]Volvo Canada v. DMNRCE, App. 1807, Aug. 19, 1982, 8 TBR 240, 4 CER 281 (T.B.).

[96]Essex Hybrid v. DMNRCE, App. 566, Dec. 13, 1961, 2 TBR 254 (T.B.).

[97]R. v. Gas and Oil, [1948] S.C.R. 215.

[98]G. Perley-Robertson v. DMNRCE, App. 591, Feb. 26, 1962, 2 TBR 283 (T.B.); A.G. Bowes v. DMNRCE, App. 669, June 17, 1963, 3 TBR 80 (T.B.).

[99]Time v. DMNRCE, App. 1155, Sept. 30, 1976, 6 TBR 372 (T.B.).

III - Harmonized System

In the Harmonized System, descriptions and drafting are more precise than in the previous Canadian tariff. Many of the headings and subheadings describe carefully the details of processing which will qualify or disqualify goods for coverage under the provision. In this connection, there are a number of definitions relating to processing which apply throughout the Nomenclature. "Dried", for example, is defined in Note 2 to Section I. "Knitted" is defined in Note 3 to Chapter 60.[100]

The detail in the headings and subheadings will probably prevent many of the problems which arose in the past over the classification of intermediate goods. As well, provisions of the Harmonized System tend to refer to "articles" of a particular material, rather than "manufactures." It is unlikely that interpretation of these headings and subheadings will be complicated by a transfer of case law from excise tax matters. "Articles" may refer to goods which are close to the final product, but it should be kept in mind that Rule 2(a) allows incomplete or unfinished goods to be classified under the description for the finished or complete goods.

When the state of processing is specifically mentioned in the heading or subheading, it will be necessary to decide

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[100]See also: "man-made fibres", Note 1 to Chapter 54; "metal clad with precious metal", Note 7 to Chapter 71; various definitions concerning textiles and fabrics, Subheading Notes 1(b) to 1(k), Section XI.

if interpretation should be strict or generous. In two cases before the European Court of Justice under the previous CCCN, the Court took a fairly generous approach. In Past, Case 128/73, sheepskin was not necessarily further processed than tanned when grease was added to the tanning liquids. If the addition was simply incidental to tanning and was not intended to soften the skins for direct use, the leather would not advance to a further stage of processing and a new heading.[101] As well, in Drünert, Case 167/84, balsa wood could be simply sawn, and not yet planed, even though it did not have saw marks when it was imported. A small amount of rudimentary work was acceptable after the sawing before it would move to a new heading for wood that had been planed.[102]

As discussed in the chapter on the Eo Nomine Principle, interpretation of the CCCN was to be done according to "objective" characteristics of the goods, and not according to extrinsic matters such as the mode of production unless the heading so required.[103] In Smuling-De Leeuw, Case 160/80, however, xanthan gum could not be classified as a vegetable extract despite the fact that it qualified according to its

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[101]Past & Co., Case 128/73, [1973] Rec. 1277.

[102]J.Henr. Drünert, Case 167/84, [1985] E.C.R. 2235.

[103]Henck, Case 36/71, [1972] Rec. 187. See: Howe & Brainbridge, Case 317/81, [1982] E.C.R. 3257; Artimport, Case 42/86, [1987] E.C.R. 4817; Paul F. Weber, Case 40/88, [1989] E.C.R. 1395. Trade usage was, however, considered in Henck, Case 14/71, [1971] Rec. 779 at 787.

objective nature and composition. Extensive industrial processing had turned the goods into a new product, the result of a chemical conversion, and they had moved to a new heading.[104] Recently, the European Court of Justice took a very contextual approach to the classification of silicon disks which it ruled had not yet been processed to the point of becoming semiconductors. Semiconductors had two essential functions -- one-way transmission of electricity and control over the current. The silicon disks would not be capable of performing these functions until they had received certain processing after importation. In their condition as imported, therefore, they could not be classified as semiconductors.[105] It is argued in this study that classification will be most reliable it if takes this sort of approach, looking to the function and purpose of goods in application, and not solely to characteristics seen as "objective."

Rule 5(b) of the General Rules for Interpretation states that the usual packing materials and containers are to be classified with goods, unless they are "clearly suitable for repetitive use." This rule, presumably, would reverse the result in the Volvo decision from the Tariff Board.[106] Rule 5(a) provides an exception for specially designed containers

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[104]Smuling-De Leeuw, Case 160/80, [1981] E.C.R. 1767.

[105]Powerex-Europe, Case C-66/89, [1990] Rec. 1959.

[106]Volvo Canada v. DMNRCE, App. 1807, Aug. 19, 1982, 8 TBR 240, 4 CER 281 (T.B.).

which can be classified with goods even if they are suitable for long-term use. The exception does not apply to containers which give the product its essential character. An expensive cigarette case, for example, would not be classified as incidental to the cigarettes, even if it was very specially designed to fit them.

Under the previous CCCN, the European Court of Justice occasionally had to interpret headings which mentioned packaging of goods for retail sale. The Court decided that this meant retail sale to individual consumers, rather than to institutions or industrial users.[107]

[107]Lohmann, Case 289/82, [1983] E.C.R. 3025. See also Chem-Tec, Case 278/80, [1982] E.C.R. 439, in which "packaging" was given a wide interpretation.

CHAPTER 6

End Use

I. End Use Items

a. Tariff Board Reference 163

One of the distinctive features of the Canadian customs tariff prior to implementation of the Harmonized System was the presence of numerous end use items, in which classification depended on the use to which goods were put after they were imported. These items generally represented concessions to a particular industry or activity, allowing importation either free of duty or at a reduced rate. Instead of drafting very specific descriptions of relevant goods so that only a given industry or activity could benefit, the legislator provided for the end use directly and stipulated that the use had to be met in order for the goods to qualify.

Classification under the items depended on actual use of the goods imported, not on their primary, normal or ordinary

use.[1] Customs treatment therefore could not be completely finalized at the time of entry. If goods were diverted from the qualifying use, they had to be reclassified at the initiative of the importer or customs officials.[2] In consequence, the status of goods did not depend solely on intrinsic physical characteristics, and the observation model of tariff classification was less influential for these items. Interpretation focused more on the commercial context and the circumstances surrounding the transaction. Particularly after the decision of the Federal Court of Appeal in Great Canadian Oil Sands,[3] there could also be a direct acknowledgement of the legislator's intention to benefit the industry or activity in question. In this chapter, the tariff items themselves demanded that interpretation go beyond the observation model to an examination of the wider context.

The Harmonized System does not provide for items which depend directly on the actual use of specific imports. The transition to the new tariff, therefore, required a careful

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[1]Superior Brake & Hydraulic v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.).

[2]R. v. Confection Alapo (1980), 2 CER 249 (F.C.T.D.); R. v. Paragon Computer (1985), 12 CER 185 (B.C.C.A.); Superior Brake v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.).

[3]Great Canadian Oil Sands v. DMNRCE, [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976), rev'g. App. 1051, June 5, 1975, 6 TBR 116 (T.B.).

examination of previous end use items to move goods into the new system without affecting rates more than absolutely necessary. To preserve existing rates for items which could not be accommodated in the HS, Schedule II of the Customs Tariff Act contains a list of statutory concessions identified by 4-digit Code numbers. In Reference 163, the Tariff Board was asked to study the possibility of moving as many of these concessionary items as possible into the HS tariff in Schedule I. Prior to adoption of the HS, 738 tariff items were administered on an end use basis. Of these, about one-third were absorbed into the 6-digit HS tariff and the end use provisions were dropped. A further third were added to Schedule I as end use items beyond the HS at the 7th and 8th digits. The remaining items, which were complex or had wide potential coverage, were retained in Schedule II.[4]

End use items are still part of the Canadian customs tariff. Past decisions can be expected to have some effect on future interpretations, although definitions have changed. As well, past decisions provide illustrations of both the contextual model for classification and also, especially after

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[4]Tariff Board, Reference 163, Canada's Customs Tariff According to the Harmonized System: Volume V, Consolidation of Concessionary Provisions - Statutory Concessionary Tariff Items, Part 3, pp.4-5. The Board lists 233 items absorbed into the HS tariff, 256 items added at the 7th and 8th digits and 245 retained in Schedule II. Despite the Board's usually careful arithmetic, these figures total only 734. The count is, therefore, not quite exact.

Great Canadian Oil Sands, the very specific purposive approach to interpretation. It is the thesis of this study that the contextual model is the appropriate one to adopt for tariff classification, but that a narrow purposive approach can undermine the goals of the Harmonized System.

b. Types of End Use

The dividing line between end use items and naming items was not always clear. Some items were unambiguously end use:

> Articles and materials which enter into the cost of manufacture of the goods enumerated in Tariff Items 40900-1, 40902-1, ... -- when imported for use in the manufacture of the goods enumerated in the aforesaid tariff items ...;
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> Self-propelled trucks, ...; logging cars; ... parts of the foregoing; all the foregoing for use exclusively in the operation of logging ...[5]

Other items, however, were more difficult to label. In the Oppenheimer appeal, the Tariff Board decided that a tariff item covering "non-alcoholic preparations or chemicals for disinfecting" was a use item and that Clorox bleach could qualify even though disinfecting was only secondary to its

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[5]Previous tariff items 44200-1 and 41105-1, quoted from Thomas Lindsay and Bruce Lindsay, Outline of Customs in Canada, 6th ed. (Vancouver: Erin, 1985), p.13. The French version of end use items normally referred to goods "devant servir à/dans" or "utilisé pour/dans" the particular use.

main function of bleaching.[6] In the Industrial and Road Equipment appeal, the Board decided that "apparatus for chemical conversion, extraction, reduction or recovery" meant apparatus for use in the various processes and covered equipment that did not itself perform any of the listed functions.[7] Similarly, in the Landis and Gyr appeal, the Board decided that "meters for indicating and/or recording" meant meters for the purpose of indicating and/or recording and the measurements did not have to be in a form to be read by humans.[8]

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[6]Oppenheimer v. DMNRCE, App. 398, June 7, 1957, 2 TBR 21 (T.B.), aff'd. Javex v. Oppenheimer, 2 TBR 28 (Ex.Ct., Oct. 21, 1959), aff'd. [1961] S.C.R. 179, 2 TBR 35, 26 D.L.R. (2nd) 523 (S.C.C., Jan. 24, 1960). The function was determined by looking at company advertising to see what the product was supposed to do in ordinary household use.

[7]The overall tariff item involved was end use, since it covered "sundry articles of metal ... for use in metallurgical operations": Industrial and Road Equipment v. DMNRCE, Canadian Chromalox v. DMNRCE, Sherritt Gordon v. DMNRCE, Clark Compressor v. DMNRCE, Apps. 441, 449, 451, 461, March 10, 1958, 2 TBR 110 (T.B.), aff'd. Dorr-Oliver Long v. Sherritt Gordon, 2 TBR 113 (Ex.Ct., June 2, 1959). For examination of the comparable issue concerning entity items, see Naramata Co-operative v. DMNRCE, App. 726, March 10, 1964, 3 TBR 144 (T.B.), Cascade Co-operative v. DMNRCE and Vernon Fruit Union v. DMNRCE, Apps. 804, 823, Jan. 6, 1966, 3 TBR 281 (T.B.) and discussion in the Parts and Entities chapter.

[8]Landis and Gyr v. DMNRCE, App. 708, Dec. 23, 1963, 3 TBR 122 (T.B.). The item was subsequently held applicable to a whole host of machine-readable indicators: Aritech v. DMNRCE, App. 2156, April 1, 1985, 10 TBR 81, 9 CER 29 (T.B.); United Industrial v. DMNRCE, App. 2528, Dec. 8, 1986, 13 CER 111 (T.B.); Akhurst Machinery v. DMNRCE, App. 2630, May 1, 1987, 12 TBR 181, 14 CER 98 (T.B.); MTI Canada v. DMNRCE, App. 2776, Feb. 16, 1988, 13 TBR 154, 16 CER 109 (T.B.); Ripley's Farm v. DMNRCE, App. 2681, May 31, 1988, 13 TBR 280, 16 CER

For tariff items on the dividing line between end use and naming items, it may not have been necessary to monitor the actual use of goods, since this could be apparent from their nature alone. Although use was perhaps not the dominant criterion for classification, it could still have a significant impact on interpretation. In two appeals involving one such item for:

> books and pamphlets, and replacement pages therefore, for the promotion of religion, medicine and surgery, the fine arts, law, science, technical training, and the study of languages, not including dictionaries

evidence on the specialized distribution chains for certain books helped to prove that they were "for the promotion of religion."[9] In an earlier appeal, when the appellant did not present such evidence concerning similar manuals for Sunday School teachers, the goods did not qualify.[10]

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153 (T.B.); Stewart Warner v. DMNRCE, App.2838, Aug. 10, 1988, 17 CER 188 (T.B.). See also Nord Photo v. DMNRCE, Apps. 1273, 1276, March 7, 1978, 1978 Canada Gazette Part I p.3951 (T.B.).

[9]Home Evangel v. DMNRCE, App. 1185, Feb. 3, 1977, 1977 Canada Gazette Part I p.2629 (T.B.); Dawn Distributors v. DMNRCE, App. 1781, Nov. 10, 1982, 8 TBR 338, 4 CER 409 (T.B.).

[10]Scripture Press v. DMNRCE, App. 490, Nov. 3, 1958, 2 TBR 172 (T.B.). For other appeals interpreting parts of this tariff item, see: Thonger v. DMNRCE, App. 213, June 15, 1950, 1 TBR 34 (T.B.) -- technical business manual not covered; Leland Publishing v. DMNRCE, App. 397, June 14, 1957, 2 TBR 16 (T.B.), aff'd. 2 TBR 17 (Ex.Ct., Feb.26, 1958) -- encyclopedias not covered; McClelland & Stewart v. DMNRCE, App. 1180, Feb, 7, 1977, 1977 Canada Gazette Part I p.3286 (T.B.) -- history book not covered; A la Tricoteuse v. DMNRCE, App. 1332, Nov. 22, 1978, 1979 Canada Gazette Part I p.679 (T.B.) -- macramé instruction book not covered; RCA v. DMNRCE,

In the pure observation model for classification, the importer's intentions concerning use of the goods are irrelevant. In the Allied Toys appeal, for example, the imported goods were classified as cigarette holders even though the importer planned to use them in the manufacture of toys.[11] The intentions of the importer and subsequent purchasers are crucial, however, for the contextual model which was appropriate for the interpretation of end use items. In the Joy Manufacturing appeal, the Tariff Board, choosing between two end use items, decided that transporter belts were parts of filters rather than parts of conveyors because the importer purchased them specifically for filters and the conveying of material was only a minor part of their intended function.[12] The importer's intentions also meant that an imported scow was not a vessel "destined for use or service in Canadian waters" in the Autoport appeal, since by the time of importation it had been determined that repairs to up-grade

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App. 1307, April 30, 1979, 6 TBR 824, 1 CER 154 (T.B.) -- technical servicing manual not covered. See also PTL Television v. DMNRCE, App. 1814, Dec. 1, 1982, 8 TBR 389, 5 CER 25 (T.B.), for an appeal concerning a comparable end user item: "for the use of any society or institution incorporated or established solely for religious, educational, scientific or literary purposes."

[11]Allied Toys v. DMNRCE, App. 499, June 8, 1959, 2 TBR 188 (T.B.).

[12]Joy Manufacturing v. DMNRCE, App. 2083, March 5, 1984, 9 TBR 155, 6 CER 208 (T.B.). See also Ingenuity v. DMNRCE, App. 2602, Oct. 22, 1987, 12 TBR 417, 15 CER 52 (T.B.).

the scow for transportation use were too expensive and that it would have to be left simply as a permanent part of the wharf.[13]

The distinction is illustrated neatly in the Danfoss appeal, in which the Tariff Board decided that compressors were not refrigerator parts because they had other potential uses and because the tariff item mentioned simply "parts" rather than articles "for use as refrigerator parts" or "for use in the manufacture of refrigerators."[14] In dismissing the Deputy Minister's appeal from this decision, the Federal Court of Appeal stated:

> (E)ven assuming that it be accepted that compressors of the kind in question had never been used in Canada except in the manufacture of refrigerators, ... this Court is of the view that the Tariff Board's conclusion that the compressors in question were not 'refrigerator parts' was a conclusion that was open to the Board. As they existed at the time of importation, there was nothing to cause the compressors in question to be classified as 'refrigerator parts' and not as 'dehumidifier parts' or parts for some other equipment ... except the admitted fact that the proposed purchaser from the importer was a refrigerator manufacturer who intended to use them for making refrigerators. Another importation of compressors that were exactly the same in all respects might be ... for use in manufacturing dehumidifiers. There would be no possible justification for classifying such

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[13]Autoport Limited v. DMNRCE, App. 2058, Aug. 2, 1984, 9 TBR 316, 7 CER 45 (T.B.) -- referring specifically to Great Canadian Oil Sands v. DMNRCE, [1976] 2 F.C. 281 (F.C.A.).

[14]Danfoss Manufacturing v. DMNRCE, App. 940, June 1, 1971, 5 TBR 75 (T.B.) at 76-77. The Board accepted the importer's argument that the goods should be classified instead as parts of machines.

> compressors differently depending on their intended use.[15]

Since the item was not specifically end use, the fact that these compressors would inevitably be incorporated into refrigerators could not determine their classification. If the item had been an end use one, however, the pure observation model would have been inapplicable and the commercial context would have had priority.

The contrast between the two models does not have to be absolute. The contextual model is not limited to instances in which customs authorities are willing to monitor use of particular imports. In U.S. tariff law prior to adoption of the HS, "use" items normally had priority over naming items. There were two types of use items - actual use and implied use. Actual use items were like end use items in Canadian law, except that importers were required to furnish proof of compliance within 3 years of importation. Implied use covered items such as "tableware," "medicinal preparations," "agricultural implements," and "household utensils," in which use was seen as integral to identification of the goods. Classification would be done according to the chief use of articles of that class or kind nationwide -- chief use meaning

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[15] DMNRCE v. Danfoss Manufacturing, [1972] F.C. 798, 5 TBR 82 (F.C.A., May 9, 1972) at 86 (TBR).

the use which exceeded all others combined.[16] If all of the compressors in Danfoss were going to be incorporated into refrigerators, if this was the standard situation in the trade and if there was no specific item covering compressors as such, it is worthwhile asking why they could not be classified as refrigerator parts. Who would have called them anything else?

c. Coverage

In a number of end use appeals, the question to resolve was whether the specific activity in which the imported goods would be involved was part of the general activity covered by the end use. Interpretation was fairly generous in favour of wide coverage. In three early decisions on an end use item for logging operations, the Board ruled that the following were covered: trucks which transported logs to the log dump,[17] railway cars owned by a logging company but used by a common carrier to transport logs to the log dump,[18] machinery used by a logging company or one of its contractors for the

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[16]Ruth F. Sturm, Customs Law and Administration, 2nd ed. (New York: American Importers Association, 1980), pp.469-72, 490-501.

[17]Reference ... re Logging Motor Trucks, App. 243, July 3, 1951, 1 TBR 51 (T.B.).

[18]Fleetwood v. DMNRCE, App. 308, Jan. 21, 1954, 1 TBR 161 (T.B.), aff'd. DMNRCE v. Fleetwood, [1954] Ex.C.R. 695, 1 TBR 162 (Ex.Ct., Oct. 9, 1954).

construction and maintenance of roads, camps, log dumps, wharves and docks, as well as machinery used by a logging company for fire prevention.[19] In the Fleetwood decision concerning the railway cars, the Exchequer Court on appeal specifically mentioned the legislative purpose of assisting the logging industry and remarked that a contrary result would create a disadvantage for logging companies which did not have log dumps on their own property and thus had to use common carriers.[20]

A generous view of what processes were included in a metallurgical operation for chemical conversion, extraction, reduction and recovery appears in a later series of appeals involving the Sherritt Gordon plant in Fort Saskatchewan.[21]

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[19]Reference ... on Logging Camp Machinery, App. 380, March 5, 1956, 1 TBR 258 (T.B.). See also Port Arthur Shipbuilding v. DMNRCE, App. 340, March 22, 1955, 1 TBR 236 (T.B.).

[20]1 TBR 166. The Court was relying on s.2(2) of the Customs Act: "All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit." For discussion, see the chapter on Interpretation.

[21]Industrial and Road Equipment v. DMNRCE, Canadian Chromalox v. DMNRCE, Sherritt Gordon v. DMNRCE, Clark Compressor v. DMNRCE, Apps. 441, 449, 451, 461, March 10, 1958, 2 TBR 110 (T.B.), aff'd. Dorr-Oliver Long v. Sherritt Gordon, 2 TBR 113 (Ex.Ct., June 2, 1959); Sherritt Gordon v. DMNRCE, App. 548, Aug. 2, 1961, 2 TBR 231 (T.B.). The pipe fittings in Sherritt Gordon v. DMNRCE, App. 549, Sept. 7, 1961, 2 TBR 234 (T.B.) would have been covered by the same end use item as well, except that they were not sufficiently complex to be described as "apparatus," as the item required.

The Board also took a wide approach in the Ersco decision, in which the phrase "fire brick ... for use exclusively in the construction or repair of a furnace, kiln, or other equipment of a manufacturing establishment" was held to cover brick used for abrasion resistance in various areas of a factory and was not limited to equipment incidental to kilns or furnaces.[22] A more narrow view of the physical scope of an end use item was taken in the Major Irrigation appeal concerning equipment used for handling potatoes. The Board held that the equipment was not agricultural machinery since it was used for highway shipment as well as on the farm and the qualification "for use on the farm for farm purposes only", which appeared several times in the tariff item, was taken to apply to the whole

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See further Ocelot Industries v. DMNRCE, App.2019, Dec. 12, 1985, 10 TBR 286, 10 CER 208 (T.B.), in which the Board confirmed a settlement between the parties to the effect that catalyst carriers and reformer tube assemblies were included in a tariff item for "machinery and apparatus for use in the distillation or recovery of products from natural gas ... parts thereof," under a rather wide interpretation of the word "recovery" in trade usage to mean "production."

[22]Ersco v. DMNRCE, App. 1571, Aug. 11, 1981, 7 TBR 432, 3 CER 263 (T.B.). See also Canadian Pacific v. DMNRCE, App. 2331, Oct. 31, 1985, 10 TBR 252, 10 CER 121 (T.B.). A similarly wide view was taken in an Excise Tax Act appeal, Underwater Gas v. DMNRCE, App. 516, Nov. 28, 1960, 2 TBR 210 (T.B.), in which work boats and a hydraulic lift used in their repair and maintenance were covered by an end use item for the development of natural gas wells since they were part of a drilling operation in Lake Erie.

item.[23]

In the Simark appeal, the Board considered the functioning of the imported meters in context to decide that they were "fixed or stationary meters for hydraulic engineering" rather than "electrical instruments and apparatus, ... viz.: meters or gauges for indicating ... volume," since the former item applied more specifically to their use in the petroleum industry in measuring amounts of crude oil, gas and water.[24] Cost factors occasionally had some influence, as in the Alex Clark appeal, in which the Board decided that imported tape was not "for use in the recording and reproduction of sound" even though it could function quite well for this purpose. The imported goods were actually computer tape, which is more expensive than ordinary

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[23]Major Irrigation v. DMNRCE, App. 1830, Dec. 31, 1982, 8 TBR 446, 5 CER 93 (T.B.). See also: Heavy Duty v. DMNRCE, App. 590, Jan. 12, 1962, 2 TBR 282 (T.B.), in which stainless steel sinks for washing milking apparatus did not qualify as "equipment for milking parlours" since for sanitary reasons they could not be used in the milking parlours themselves where the cows were kept; Martin & Stewart v. DMNRCE, App. 1659, Jan. 25, 1983, 8 TBR 502, 5 CER 126 (T.B.), in which hides and skins were not farm produce within the phrase "wire and twine for baling farm produce" because they had been too far processed from the point at which the animal passed the farm gate. See further Caristrap v. DMNRCE, App. 863, Dec. 20, 1967, 4 TBR 61 (T.B.).

[24]Simark Controls v. DMNRCE, App. 2278, Sept. 24, 1985, 10 TBR 221, 9 CER 270 (T.B.), esp. p. 225 TBR. See also Foxboro Canada v. DMNRCE, App. 2418, Aug. 8, 1986, 11 TBR 384, 12 CER 118 (T.B.), aff'd. 17 CER 1 (F.C.A., Jan.6, 1989). A functional approach also appears in Canadian Linotype v. DMNRCE, Apps. 811, 816, March 21, 1966, 3 TBR 290 (T.B.).

audio tape, and the price differential may have helped the Board to determine that the end use would not be met.[25]

Interpretation of end use items was often strongly purposive. In the Malden Mills appeal, for example, the Board was willing to read a qualification into an item for "fabrics ... sent abroad for electrostatic flocking ... for use in Canadian manufactures" to exclude fabrics which had received additional processing before being re-imported. The goods which had been further processed still met the literal wording of the item, but were excluded presumably because of legislative intent to encourage manufacturing in Canada.[26] The purposive approach was most common in interpretation of a certain group of end use items -- those covering imports "for use in the manufacture of" listed goods, and especially those covering "articles and materials for use in the manufacture of" goods. Here, the intention to encourage the domestic activity was central and obvious. When the item was extremely end use and covered basically any imports which were to be used in the manufacturing process, there was not even a named category for which border inspection could take place.

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[25]Alex L. Clark v. DMNRCE, App. 860, Oct. 12, 1967, 4 TBR 53 (T.B.).

[26]Malden Mills v. DMNRCE, App. 1772, March 28, 1982, 8 TBR 126, 4 CER 89 (T.B.).

"Articles and materials" is, after all, a very wide phrase.[27] For such items, the legislative intent was obvious and paramount.

The main question in most of the "for use in the manufacture of" appeals was whether or not a given activity could be characterized as manufacturing. When disputes arose, it was up to the Tariff Board to decide whether the processing which took place in Canada was sufficient to merit the end use concession. In effect, the Board was filling in the details of Parliament's economic policy for these items. In classification decisions in this area, interpretation was usually generous in favour of finding that the activity qualified as manufacturing, with the exception of one Supreme Court of Canada decision which was not a case of a simple duty on importation but rather a claim for a drawback.

In the Supreme Court decision,[28] the appellant Research-Cottrell was claiming under a drawback item for "materials ... when used in the manufacture of" certain machinery and

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[27]But see, contra, dissent of Tariff Board member Bertrand in Universal Grinding v. DMNRCE, App.2057, March 29, 1984, 9 TBR 194, 6 CER 236 (T.B.), aff'd. DMNRCE v. Universal Grinding, 11 CER 157 (F.C.A., Feb. 19, 1986).

[28]DMNRCE v. Research-Cottrell, [1968] S.C.R. 684, 68 D.L.R. (2d) 194 (S.C.C., April 29, 1968), rev'g. Research-Cottrell v. DMNRCE, [1967] 2 Ex.C.R. 3, 3 TBR 251 (Ex.Ct., Feb. 2, 1967), rev'g. App. 790, Nov. 23, 1965, 3 TBR 248 (T.B.). For cases interpreting the words "manufacturing" and "production" in other commodity tax statutes, see the chapter on Processing and Packaging.

apparatus, in this case eight electrostatic precipitators installed at the Inco plant in Copper Cliff. The drawback claimed was for imported components which went into the precipitators, which Research-Cottrell said it had manufactured in Canada. Only the Exchequer Court agreed that this was manufacturing, on the theory that the precipitators did not exist until they were assembled from domestic and imported parts in Canada, and thus they had to have been manufactured in Canada. This analysis was rejected by the majority in the Supreme Court, since it would result in any assembly activity being considered manufacturing and this was not a necessary conclusion as a matter of law. The dissent of Mr. Justice Pigeon in the Supreme Court (Cartwright C.J. concurring) would have accepted the Exchequer Court's reasoning and rejected the Tariff Board's analysis which had examined "whether assembly and erection were of sufficient importance to justify the benefit of the drawback ... a factor which ought not to enter into consideration on the construction of the tariff item" according to Mr. Justice Pigeon's dissent.[29] In the result, while the Supreme Court decision involves a narrow interpretation of manufacturing, it seems to vindicate the strong purposive approach taken by the Tariff Board in first instance. In its declaration, the

[29][1968] S.C.R. 688.

Board had stated that:[30]

> (t)he intent of the drawback items ... is clearly the encouragement of the manufacture in Canada of the goods or articles described ... as opposed to their acquisition abroad. In such a context it hardly seems a reasonable construction of the word manufacture to extend the benefits of the drawback items to imported goods which are simply assembled and erected on site.

When the issue arose in ordinary tariff classification decisions not involving drawback claims, the Tariff Board tended to be more generous on the question of whether assembly could qualify as manufacturing. In the RCA Victor appeal,[31] the Board distinguished the situation from that in Research Cottrell, where the components had been simply shipped to the site and assembled there. In RCA Victor, the appellant put together radio relaying equipment at its plant in Montreal and then further assembled and installed it in various relaying stations in the CP/CN telecommunications system. The Board rejected the Department's submission that only the activity in Montreal was manufacturing, and held that the work at the relay stations was also part of the full process. All the imported equipment, therefore, qualified as "for use in the

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[30] 3 TBR 250.

[31] RCA Victor v. DMNRCE, App. 834, Nov. 25, 1966, 3 TBR 311 (T.B.).

manufacture of" radio apparatus.[32]

In the more recent Harry D. Shields and Kipp Kelly appeals, the Board again dealt with the question of assembly and manufacturing. In Harry D. Shields,[33] the Board decided that the assembly of bicycles qualified as manufacturing since this was a complex process involving investment of capital and labour and was also an essential link in production which added new qualities and properties.[34] The department's practice of deciding according to percentages of Canadian material content was rejected since it was not authorized in the tariff item. In the Kipp Kelly appeals,[35] involving diesel engines of a class or kind not made in Canada imported for assembly in electric generating sets, the Board similarly rejected the Canadian content factor and found the operations to be manufacturing, despite evidence in the first Kipp Kelly

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[32]See also: J.& P.Coats v. DMNRCE, App. 781, Feb. 8, 1965, 3 TBR 236 (T.B.) (goods can be for use in the manufacture of products "without entering into every part of the whole process of manufacture" so long as they are for use in some part of that process - p.238); Geigy Chemical v. DMNRCE, App. 806, March 23, 1966, 3 TBR 285 (T.B.).

[33]Harry D. Shields v. DMNRCE, App. 1489, Jan. 3, 1980, 7 TBR 1, 2 CER 1 (T.B.).

[34]The Board here was using tests from Excise Tax decisions. See discussion in the chapter on Processing and Packaging.

[35]Kipp Kelly v. DMNRCE, App. 1182, July 20, 1977, 6 TBR 493 (T.B.); Kipp Kelly v. DMNRCE, App. 1479, May 21, 1980, 7 TBR 102, 2 CER 129 (T.B.), aff'd. DMNRCE v. Kipp Kelly, [1982] 1 F.C. 571, 3 CER 196 (F.C.A., June 8, 1981).

appeal to the effect that the value added in Canada was less than 15 per cent of the value of the finished product. The Board emphasized that it was deciding in the context of the particular tariff item. It may be that the decision was influenced by the fact that the engines had to be of a class or kind not made in Canada in order to qualify. The item, in other words, was intended for components which could not be sourced locally and it may have been contemplated that Canadian content in the finished goods would not be high.

The Board has not gone so far as to say that everything required to prepare the finished product is manufacturing. In the City of Sherbrooke appeal, automatic scales used in the purification of municipal water were not "for use in Canadian manufactures," since this was simply treatment of the water, not manufacturing of goods.[36] And, at the beginning of the process, it cannot be said that everything done to collect and prepare the necessary raw materials can qualify as manufacturing.[37]

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[36]City of Sherbrooke v. DMNRCE, App. 1495, June 16, 1981, 7 TBR 386, 3 CER 215 (T.B.). See also North-West Bindery v. DMNRCE, App. 950, March 17, 1971, 5 TBR 133 (T.B.).

[37]Ayerst, McKenna & Harrison v. DMNRCE, App. 920, Nov. 19, 1969, 4 TBR 398 (T.B.), aff'd. 4 TBR 404 (Ex.Ct., June 30, 1970) -- containers used to collect urine from pregnant mares and transport it to premises where estrogen was produced were not "apparatus, equipment ... for the manufacture of ... hormones." This decision may be constrasted with 3M Canada v. DMNRCE, App. 2069, June 7, 1984, 9 TBR 262, 7 CER 299 (T.B.), in which coated papers used to transfer photographs by laserfax for newspapers were found to be used in

In most cases, the approach has been generous in favour of finding an activity to be manufacturing.[38] Even when the analysis was not directly purposive, there was still a strong sense of the system in context, in application. In the Calko Mills appeal, for example, the Board had to determine whether imported yarn was for use in the manufacture of cotton sewing thread. To decide whether the end product was sewing thread, the Board looked to the actual use made of it by the appellant and found that it did not qualify because it was used for weaving rather than conventional sewing.[39]

In some cases, the emphasis in the tariff item was on the end user, and not just the particular activity -- for example: "findings of metal ... when imported by manufacturers of jewellery or ornaments for the adornment of the person, for use exclusively in the manufacture of such articles, in their

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"production" of the newspapers even though they did not become a physical part of the final paper.

[38]Unident v. DMNRCE, App. 1377, Feb. 16, 1979, 6 TBR 771, 1 CER 64 (T.B.) -- the reconstruction of damaged teeth was the manufacturing of dental surgical prostheses. See also Novocol Chemical v. DMNRCE, App. 2731, Feb. 26, 1988, 13 TBR 183, 16 CER 132 (T.B.).

[39]Calko Mills v. DMNRCE, App. 1064, Oct. 17, 1975, 6 TBR 199 (T.B.). See also Promo-Wear v. DMNRCE, App. 1568, Jan. 30, 1981, 7 TBR 267, 3 CER 32 (T.B.), in which actual use was relevant in the Board's decision that the imported urethane foam rolls were used in the manufacture of tips and sides of caps.

own factories."[40] One such tariff item provided a concession to several public and artistic institutions able to meet the wording in the item:

> scientific apparatus ... and preparations, etc. ... when for the use of any society or institution incorporated or established solely for religious, educational, scientific or literary purposes, or for the encouragement of the fine arts (namely architecture, sculpture, painting, engraving and music), or for the use of any public hospital, public library, public museum, university, college, academy, school or seminary of learning in Canada and not for sale or rental unless to those mentioned herein ...[41]

In the Pharmacia appeal,[42] the Board had to decide whether certain pharmaceutical tablets would qualify under this item because they were purchased by public hospitals and would be administered to hospital patients under medical supervision. The Board referred to its earlier declaration in the Wang appeal, in which calculators for sale to educational institutions were found to qualify even when they were for classroom and teaching use, and not just for research.[43] The

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[40]Amarc Jewellery v. DMNRCE, App. 1191, April 27, 1977, 1978 Canada Gazette Part I p.652 (T.B.). See also: Montreal Quilting v. DMNRCE, App. 779, Nov. 24, 1964, 3 TBR 233 (T.B.); L.E. Baxter v. DMNRCE, App. 794, May 21, 1965, 3 TBR 258 (T.B.).

[41]Item 69605-1 (at the time of the Pharmacia appeal)

[42]Pharmacia (Canada) v. DMNRCE, Apps. 1164, 1165, July 19, 1976, 6 TBR 403 (T.B.).

[43]Wang Laboratories v. DMNRCE, App. 949, May 20, 1971, 5 TBR 119 (T.B.). See also: Terochem v. DMNRCE, App. 2401, May 28, 1986, 11 TBR 223, 11 CER 319 (T.B.); Fisher Scientific v. DMNRCE, App. 2650, Nov. 2, 1987, 12 TBR 457, 15 CER 114

calculators in Wang were scientific apparatus because mathematics is a science and they qualified under the item because it emphasized the end user without restricting the actual use to which the goods were to be put. On similar reasoning, the Board decided that the tablets in Pharmacia were also covered because there was nothing in the item limiting use by hospitals and, in any case, the use was scientific since medicine is a science.[44] The identity of the end user thus was the dominant criterion in interpretation, but it cannot be said that actual use was completely ignored. In R & D Pool, the Board held that pool control equipment for sale to municipal and YMCA pools where swimming lessons were taught to school children did not qualify, since it could not be established that recreational use was sufficiently

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(T.B.).

[44]In these two appeals, the Board was following a trend towards generous interpretation of the item and its predecessors established in McGill University v. DMNRCE, App. 761, Dec. 16, 1964, 3 TBR 201 (T.B.) and Anglophoto v. DMNRCE, App. 932, June 5, 1970, 5 TBR 64 (T.B.). In an earlier appeal, the Board had held that, while use by a public hospital was not limited, the goods had to be out of the ordinary to be "philosophical and scientific" preparations, the wording at the time: Consolidated Laboratories v. DMNRCE, App. 701, Oct. 31, 1963, 3 TBR 115 (T.B.). See also James H. Wilson v. DMNRCE, App. 480, March 17, 1960, 2 TBR 161 (T.B.). On the question of resale of goods to University students, see: University of Manitoba v. DMNRCE, App. 882, April 25, 1968, 4 TBR 184 (T.B.); Ontario Institute for Studies in Education v. DMNRCE, App. 951, March 9, 1971, 5 TBR 144 (T.B.).

educational to be included in the item.[45]

The decisions on the scope of end use items were made within a system in which it was presumed that Customs officials had power to follow the goods after importation to make sure that the end use was met. This sort of monitoring may not have occurred too often, but the acknowledgement that it could happen added a sense of the provisions in application to the entire interpretive process. For these items, the contextual model in effect replaced the observation model as the standard instance for classification theory. In addition, especially when the item covered imports "for use in the manufacture of" certain goods, a purposive approach favouring the presumed economic policy of the legislator had a strong influence on interpretation.

d. Priorities

In order to administer the customs tariff, Revenue Canada had to establish a certain hierarchy among types of tariff items to deal with situations in which goods could qualify under more than one item. The hierarchy did not have specific legislative backing but was developed through several years

[45] R. & D. Pool Control v. DMNRCE, App. 1848, July 27, 1983, 8 TBR 753, 5 CER 524 (T.B.).

of practice.[46] The hierarchy used was as follows:

1. All-embracing items
2. Eo nomine items
3. End use items
4. Eo nomine items n.o.p
5. End use items n.o.p
6. Other items:
    a. basket items
    b. according-to-material items
    c. residual item 71100-1

The "n.o.p" meant "not otherwise provided," indicating that the item included only those goods not covered elsewhere in the tariff. Basket items were simply very general naming (eo nomine) items such as "electrical apparatus" or "machines," which would be expected to give way to more specific items. According-to-material items were those that referred to the constituent material, such as "manufactures, articles or wares of iron or steel." The really difficult problem in characterization of tariff items under this hierarchy was the question of all-embracing items which had priority over everything else. Examples given of this category usually included items of the type "materials and articles for use in the manufacture of ... " as well as the item discussed above concerning scientific apparatus and preparations for the use of public hospitals etc. In effect, the hierarchy attempted to take these very generalized end use items and give them a special priority, distinguishing them from ordinary end use

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[46]Thomas Lindsay & Bruce Lindsay, Outline of Customs in Canada, 6th ed. (Vancouver: Erin Publishers, 1985), p.13.

items such as "self-propelled trucks ... for use exclusively in the operation of logging," which had a certain naming element as well as the required end use. It seemed that the very generalized, "super end use" items were to have priority in order to make sure that the concession granted by the legislators was actually effective. When the legislative intent to favour a particular end use was so clear, then anything which could qualify under that item was to be classified there even if it might also be covered by another item.

The case which disrupted this tidy hierarchy and seemed to say that all end use items had over-riding priority was the Great Canadian Oil Sands appeal involving dump trucks for use in the Alberta tar sands.[47] The trucks had been classified as "machinery and apparatus ... for operating oil-sands by mining operations...", and the appellant maintained that because of their special suitability for use in the wet silt conditions of the tar sands, they were of a separate class or kind not made in Canada. The Federal Court of Appeal adopted the dissenting opinion from the Tariff Board level

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[47]Great Canadian Oil Sands v. DMNRCE, App. 1051, June 5, 1975, 6 TBR 116 (T.B.), rev'd. [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976). See further Great Canadian Oil Sands v. DMNRCE, App. 1386, Aug. 27, 1979, 6 TBR 915, 1 CER 239 (T.B.), rev'd. DMNRCE v. Suncor (formerly Great Canadian Oil Sands), 3 CER 340 (F.C.A., Nov. 19, 1981), reheard Suncor v. DMNRCE, App. 1386, March 18, 1982, 8 TBR 116, 4 CER 83 (T.B.). The class or kind issue in these appeals is discussed in the Machinery Remission chapter.

and agreed that this was a separate class or kind since the determination had to be made in light of the required end use. Quoting the dissent from Tariff Board member Dauphinée, the Court of Appeal stated that:

> (W)here end use is enacted as part of an item, the item becomes only in part a description of goods as such. Classification must then be based both upon the goods as described, and the use as designated. ... Where a use provision is enacted use becomes more than a facet of the evidence as to the nature of the goods, it becomes the basis for classification under the item. This will exclude for purposes of findings of class or kind, all goods that do not meet this end use requirement, inasmuch as they will not be the goods described in the item.[48]

In this part of its decision, the Court thus indicated a strong tendency to favour the stated end use in order to give effect to the legislative concession granted to the industry in question. Concerning priorities for end use items, the Court of Appeal and all members of the Tariff Board agreed on certain other comments favouring end use items that were elicited because of arguments put forward by the intervenant at the Tariff Board level, who did not participate in the appeal. The intervenant had argued that instead of being "machinery and apparatus ... for operating oil-sands by mining operations," the trucks should be classified as "diesel-powered self-propelled dump trucks ... for off-highway use in carrying minerals or other excavated materials at mines ...

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[48] 6 TBR 165, 166, quoting Tariff Board dissent at 6 TBR 151.

." Since the trucks were used to carry excavated material at the tar sands site, they qualified under both items, and the Tariff Board majority even stated that the off-highway dump truck item was more precise and specific.[49] The Board nevertheless decided in favour of the oil sands item because of the strong legislative intent to encourage tar sands development. In support of its decision on the conflict between the two end use items, the Board majority stated:

> (W)hen it is clear that the legislator has enacted a tariff classification of goods specifically for use by a particular industry, then that classification should have precedence where it applies, even if such goods are more precisely described in another tariff item.[50]

This statement was supported by the dissenting member of the Board[51] and by the Court of Appeal.[52] In the context of the decision, the Board majority was actually only deciding as between two end use items and choosing the one that referred more directly to a particular industry. As the oil sands item was for "machinery and apparatus" which met the declared use, the item could have been seen as a general, all-embracing, super end use item at the top of the hierarchy without calling the whole system into question. The statement, however,

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[49] 6 TBR 138.

[50] 6 TBR 140.

[51] 6 TBR 147-48.

[52] 6 TBR 164.

seemed to have a much wider meaning and seemed to give the priority position to all end use items, moving them all up to the top of the list above naming items. Almost any end use item could be interpreted as being enacted "for use by a particular industry". The statement implied that they should all be given priority over naming items even when those items described the goods very precisely.

There had never been any doubt in previous decisions that end use items would have priority over eo nomine "n.o.p" items, which covered only those goods "not otherwise provided" for elsewhere in the tariff.[53] The question posed by the comments in Great Canadian Oil Sands was really about the conflict between end use items and ordinary unconditional eo nomine items. The judgment which had seemed to give strong priority to eo nomine items was the Accessories Machinery appeal, decided by the Supreme Court of Canada in 1957.[54] In

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[53]See: General Supply v. DMNRCE, [1954] Ex.C.R. 340 at 347, 1 TBR 81 at 85 (Ex.Ct., May 8, 1954); Super Electric v. DMNRCE, App. 947, Oct. 19, 1970, 1970 Canada Gazette Part I p.2850 (T.B.); Canadian Reynolds v. DMNRCE, App. 851, Jan. 17, 1972, 1972 Canada Gazette Part I p.1067 (T.B.); DMNRCE v. Ferguson Industries, 4 TBR 368 (S.C.C., May 1, 1972), rev'g. 4 TBR 357 (Ex.Ct., April 21, 1970), aff'g. Ferguson Industries v. DMNRCE, App. 911, Nov. 5, 1969, 4 TBR 344 (T.B.) -- reheard Ferguson Industries v. DMNRCE, App. 911, Feb. 28, 1973, 4 TBR 379 (T.B.); Applied Electronics v. DMNRCE, App. 2661, Feb. 5, 1988, 13 TBR 98, 16 CER 60 (T.B.).

[54]Accessories Machinery v. DMNRCE, App. 331, March 1, 1955, 1 TBR 221 (T.B.), aff'd. [1956] Ex.C.R. 289, 1 TBR 223 (Ex.Ct., March 6, 1956), aff'd. [1957] S.C.R. 358, 1 TBR 229 (S.C.C., April 12, 1957). See discussion in Parts and Entities chapter.

the decision, replacement electric motors for a power shovel were held to be included under an item for "electric motors, ... n.o.p." rather than under an item for "machinery ...n.o.p.; complete parts of the foregoing." Neither item in Accessories was end use, and the case actually just gave priority to an eo nomine n.o.p. item over a "parts" item. At about that time, however, the Tariff Board was making a link between parts items and end use items, perhaps because both related to the system in application.[55] Whether as a result of these decisions or as a result of the general dominance of the observation model in customs administration, the hierarchy developed by the Department gave eo nomine items priority over ordinary end use items.

In its own decisions, however, the Tariff Board was sometimes more generous to end use items, even before the Great Canadian Oil Sands appeal. In the Anglophoto appeal, the Board classified film projectors under item 69605-1 as mechanical equipment for the use of educational institutions rather than under an eo nomine item for motion picture projectors, since the goods operated on a continuous loop of

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[55]See J.H. Ryder v. DMNRCE, App. 261, Sept. 19, 1952, 1 TBR 69 (T.B.), in which the Board gave priority to a parts item over an according-to-material item. In the course of the decision, the Board remarked that parts items had high priority because they were use items, and also that an item covering a component as a part of machinery would give way to an eo nomine item naming that component specifically (pp.70-71).

film and were particularly suitable for use in schools. The intervenant had argued that the eo nomine item should have priority but the Board disagreed and stated that Parliament's intention to grant duty-free entry to goods for educational use was "of such force, clarity and specificity" that the end use item had priority.[56] The same item 69605-1 took priority over an item for "calculating machines ... n.o.p." in the Wang appeal concerning electronic calculators for use in schools.[57] In argument, the Department had cited Accessories and had suggested that the eo nomine item should have priority despite the "n.o.p." qualification since the goods were not otherwise provided for specifically as calculators. The Board disagreed and distinguished the situation in Wang on the basis that 69605-1 was an end use or "end-user" item, not a basket or parts item as in Accessories; giving priority to the end use item would in no way rob the eo nomine item of useful effect. In the Exchanger Sales appeal, the Board had to make a similar choice between eo nomine items and an end use item, but this time the end use item covered parts. The Department argued

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[56]Anglophoto v. DMNRCE, App. 932, June 5, 1970, 5 TBR 64 (T.B.) at 67. Another precursor of Great Canadian Oil Sands was Central Electric v. DMNRCE, 3 TBR 296 (Ex.Ct., April 28, 1967), rev'g. App. 820, Dec. 2, 1966, 3 TBR 204 (T.B.), in which the Exchequer Court gave priority to an end use item on the basis that it was more specific than the competing eo nomine item.

[57]Wang Laboratories v. DMNRCE, App. 949, May 20, 1971, 5 TBR 119 (T.B.).

that the imported forgings should be classified under the eo nomine items (either as hollow forgings or under another item for "forgings ... n.o.p."), as these were more specific than a parts item. Again the Board disagreed, and held that the goods should be classified under an item for "machinery and apparatus for use in the ... recovery of products from natural gas ...; parts thereof", since they were to be incorporated into a heat exchanger which met the required end use. It was no surprise that the end use item here had priority over the eo nomine n.o.p. item, but the Board also gave it priority over the ordinary, unconditional eo nomine item, since these were "parts of an apparatus for which the legislator has provided special classification"[58] and legislative intent seemed to favour the end use. These three decisions (Anglophoto, Wang and Exchanger Sales) did not necessarily threaten the established hierarchy for classification. Anglophoto and Wang gave priority to item 69605-1, an item often listed in the top, all-embracing category. Exchanger Sales involved an end use item for "machinery and apparatus," which might also be seen as sufficiently general to be placed in the super end use, all-embracing category. In none of these decisions, however, did the Board make a distinction between super end use and ordinary end use. All three

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[58] Exchanger Sales v. DMNRCE, App. 1046, Aug. 14, 1973, 1974 Canada Gazette Part I p.1830 (T.B.) at 1835.

decisions took the same approach as in Great Canadian Oil Sands and treated all end use items alike, having top priority because of legislative intent to favour a particular industry.

After Great Canadian Oil Sands, the Board continued to give top priority to end use items without distinguishing among types of end use. In some appeals, the Board would cite the comments of the majority decision in the case, approved by the Court of Appeal, and state that end use had precedence because the legislator had demonstrated an intention to favour a particular industry.[59] In others, the Board would cite the dissent, also approved by the Court of Appeal and emphasize that in an end use item, use was the basis for classification, not just a facet of the evidence. End use items regularly had priority over eo nomine items -- both eo nomine n.o.p. and ordinary, unconditional eo nomine -- and the scope of the end use would be interpreted widely in the actual commercial context.[60] In Universal Grinding,[61] the imported goods were

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[59]Pharmacia (Canada) v. DMNRCE, Apps. 1164, 1165, July 19, 1976, 6 TBR 403 (T.B.); Amoco Canada v. DMNRCE, App. 1193, May 18, 1977, 1978 Canada Gazette Part I p. 829 (T.B.); Centrilift Hughes v. DMNRCE, App. 2539, May 11, 1987, 12 TBR 191, 14 CER 130 (T.B.).

[60]Johnson & Johnson v. DMNRCE, App. 1653, April 15, 1982, 8 TBR 147, 4 CER 146 (T.B.); Redi Garlic v. DMNRCE, App. 2141, Dec. 19, 1984, 9 TBR 385, 8 CER 126 (T.B.); Kulka v. DMNRCE, App. 2128, Feb. 22, 1985, 10 TBR 48, 8 CER 258 (T.B.); Indel-Davis v. DMNRCE, App. 2775, Dec. 18, 1987, 12 TBR 589, 15 CER 223 (T.B.); Applied Electronics v. DMNRCE, App. 2661, Feb. 5, 1988, 13 TBR 98, 16 CER 60 (T.B.).

classified as "materials and articles for use exclusively in the manufacture of" dental instruments, rather than under a specific eo nomine item for grinding wheels. The end use item had priority on the authority of Great Canadian Oil Sands, and also because such priority was necessary to give the item useful effect to benefit manufacturers of dental instruments. In the Coopérative Fédérée appeal,[62] potato waste products which were re-processed for compounding in animal and poultry feed were classified under an end use item covering "feeds, n.o.p., for animals and poultry, and ingredients for use therein, n.o.p.," rather than under an eo nomine item for "potato products ... n.o.p.". The end use item had priority on the authority of Great Canadian Oil Sands. In the Federal Court of Appeal, the concurring judgment of Mr. Justice Hugessen took the purposive argument further and looked to detailed economic policy. Since the end use item prescribed duty-free entry, it was for the benefit of producers of animals and poultry; since the potato products item carried a duty of 10%, it was for the benefit of the Canadian potato industry. Granting free entry to these goods made from potato

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[61]Universal Grinding v. DMNRCE, App. 2057, March 29, 1984, 9 TBR 194, 6 CER 236 (T.B.), aff'd. DMNRCE v. Universal Grinding, 11 CER 157 (F.C.A., Feb. 19, 1986).

[62]Coopérative Fédérée v. DMNRCE, App. 2134, Dec. 11, 1984, 9 TBR 381, 8 CER 121 (T.B.), aff'd. DMNRCE v. Coopérative Fédérée, 13 CER 338, 76 N.R. 218 (F.C.A., Feb.24, 1987). See Cargill v. DMNRCE, App. AP-2802, Oct. 29, 1990, 3 TCT 2409 (C.I.T.T.).

waste gave effect to the policy behind both items.[63]

An end use item, of course, did not always need Great Canadian Oil Sands in order to take priority. The Board could find that other suggested items of whatever type simply did not apply,[64] or were, in any case, more general and of a lower priority.[65] If a conflict arose, the idea of giving end use items priority over eo nomine items on the authority of the Great Canadian Oil Sands appeal seemed to be fairly well-established.[66] Some difficulty remained over end use items that also covered parts. In theory, and according to the reasoning in Exchanger Sales[67], decided prior to Great Canadian Oil Sands, the end use item would still have priority. In Exchanger Sales, the imported goods were classified as parts of machinery and apparatus for use in the distillation and recovery of products from natural gas, rather than under eo nomine items for iron forgings.

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[63]The other two judges in the Federal Court of Appeal, Pratte J. and Marceau J., filed separate concurring judgments which did not adopt the economic analysis.

[64]Cargill Grain v. DMNRCE, App. 1299, Feb. 28, 1978, 1978 Canada Gazette Part I p.3954.

[65]Hudson's Bay Oil and Gas v. DMNRCE, App. 1699, March 5, 1982, 8 TBR 98, 4 CER 73 (T.B.).

[66]Except perhaps for Duro Dyne v. DMNRCE, Apps. 1464, 1486, April 28, 1980, 7 TBR 94, 2 CER 115 (T.B.), where the eo nomine item chosen by the Board on its own initiative was found to be more specific.

[67]Exchanger Sales v. DMNRCE, App. 1046, Aug. 14, 1973, 1974 Canada Gazette Part I p.1830.

The difficulty had to do with the distinction between parts items which required that goods be defined as parts at the time of customs entry and end use items which depended on actual use. As discussed in the Parts and Entities chapter, the dominant parts test was that parts had to be committed to use with the basic goods -- which meant that the part could have no use other than with such goods and that the part must also be necessary for the functioning of the goods.[68] If something could be put to a certain use but was not necessarily committed to that use, it could qualify under an end use item but not under a parts item. Even if it was committed to a given use, if it was just optional equipment or an accessory and not really necessary for the functioning of the basic goods, it still would not qualify as a part under the very strict parts test. The distinction between the two types of item arose in the Canadian General Electric and Androck appeals. In Canadian General Electric,[69] imported batteries were held not to be "parts ... for use in the manufacture of television set converters or controls" because they were not committed to that use. Tariff Board member Gorman dissented in the decision and would have ignored parts tests to concentrate on the end use nature of the item. In

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[68]Robert Bosch v. DMNRCE, App. 2089, April 16, 1985, 10 TBR 110, 9 CER 62 (T.B.).

[69]Canadian General Electric v. DMNRCE, App. 1970, Feb. 15, 1984, 9 TBR 130, 6 CER 190 (T.B.).

Androck,[70] the Federal Court of Appeal reversed the Tariff Board and found that grasscatcher bags were not "parts of power lawn mowers ... for use in the manufacture or repair of power lawn mowers," since the grasscatchers were optional and were not necessary for the mowers to function. A partial solution which would give priority to the end use nature of these items was suggested in the Superior Brake appeal[71] in which various components were classified as for use in the manufacture or repair of motor vehicles according to percentages which depended on the importer's actual use. The appeal was not a good precedent for true "parts-end use" items, however, since the item in question named the particular components -- compressors, diaphragms, switches, etc. -- rather than referring to them as "parts." If a strict parts test were to be applied, the parts would have to be absolutely committed to and necessary for the basic goods and end use percentages then would only be helpful for the basic goods.

In summary, it was clear that in the Great Canadian Oil Sands appeal, and in previous and subsequent appeals, the Tariff Board was developing a position which differed quite

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[70]Androck v. DMNRCE, App. 2081, Oct. 22, 1984, 9 TBR 352, 8 CER 49 (T.B.), rev'd. DMNRCE v. Androck, 13 CER 239, 74 N.R. 255 (F.C.A., Jan. 28, 1987).

[71]Superior Brake v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.).

substantially from the hierarchy which the Department had established. Not only was the Board not distinguishing among varieties of end use items, but it was also giving all end use items top priority in classification, even over very specific eo nomine items. Even if the customs tariff had not been revised to accommodate the switch to the Harmonized System, the question of priorities among various tariff items was in need of examination and revision.

II. Harmonized System

The new customs tariff retains some end use items, but they are not exactly the same as the previous items. The phrase "for use in" has now been defined in the legislation to mean that "unless the context otherwise requires, ... the goods must be wrought into, attached to or incorporated into other goods" as provided for in the tariff line or concessionary code.[72] To preserve the coverage of some concessionary items for goods which have a less direct application, those Code items have been re-worded to refer to goods "to be employed in" the activity or sector in

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[72]Customs Tariff Act, S.C. 1987, c.49 (R.S.C. 1985, c.41 (3rd Supp.)), s.4. The French version of s.4 applies the same requirement to the phrases "devant servir à" and "devant servir dans."

question.[73] The distinction can be illustrated by the facts in the Camstat Graphic appeal concerning coated paper which was used for photostats of artwork as one stage in the manufacture of offset printing plates.[74] The appellant was unsuccessful in arguing that the goods were "for use in the manufacture of master units for offset duplicating machines." The French version of the tariff item was not the usual equivalent "devant servir à la fabrication de ...", but rather a more narrow phrase "devant être transformé en clichés pour machines offset de bureau." The photostats were used in the manufacturing process, but were not physically incorporated into the final plates. In these circumstances, the Tariff Board applied the narrow meaning which did not cover the imported paper. Under the new definition of "for use in", the result would be the same, since the paper was not physically connected to the plates. The paper could have been "employed in" their production, in the terms of the new vocabulary, but would not qualify under a "for use in" tariff heading or subheading.

In the previous system for end use items, the burden of proof was normally on the importer, since the circumstances

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[73]In the French version, these Code items have been reworded to refer to goods "devant être utilisé pour" or "devant être utilisé dans" the particular sector.

[74]Camstat Graphic v. DMNRCE, App. 1790, Dec. 15, 1982, 8 TBR 415, 5 CER 62 (T.B.).

concerning use would be within the knowledge of the importer and subsequent purchasers. The burden could sometimes be difficult for importers to meet, especially if the end use involved sales at the retail level. In the Keymar appeal, for example, the imported kerosene heaters were suitable for use on boats, but the distribution and marketing of the goods were not sufficiently limited to prove that they were "for use exclusively in the ... equipment of ships or vessels."[75]

For the administration of end use items, it was possible to allocate shipments among more than one item where use differed. The Department would rely on end use certificates, which could be verified if necessary, and also on arrangements with certain importers who would undertake to make adjustments after entry according to actual use of the goods.[76] End use certificates seem to have been part of common administrative practice at least as early as the 1950's. In a decision in 1954,[77] the Tariff Board over-ruled a practice which the Department had followed for "many years" to accept such

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[75]Keymar Equipment v. DMNRCE, App. 1898 etc., Oct. 27, 1983, 9 TBR 1, 6 CER 104 (T.B.), aff'd. 10 CER 87 (F.C.A., Oct. 17, 1985).

[76]Superior Brake & Hydraulic v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.); General Bearing Service v. DMNRCE, App. 2349, March 10, 1986, 11 TBR 150, 11 CER 122 (T.B.); R. v. Paragon Computer, 12 CER 185 (B.C.C.A., Sept. 11, 1985).

[77]Reference re Administration of Tariff Item 326e, App. 322, Dec. 8, 1954, 1 TBR 192 (T.B.).

certificates for entry under an item covering "articles of glass ... designed to be cut." In interpreting this wording, the Board decided that the crucial factor was not whether the glass was actually to be embellished later by cutting, but rather whether it was of a particular quality which indicated that the manufacturer had designed it for this purpose.[78]

In the new HS customs tariff, Revenue Canada will accept importations under end use items in the following situations:

> a. the goods are committed by their design or nature only to the use specified in the end use provision;
> b. the importer/owner is the qualified end-user;
> c. the importer/owner submits satisfactory evidence as to the end use of the goods; or
> d. the importer/owner holds a valid stocking authorization or percentage arrangement covering the goods and end use provision(s) concerned.[79]

This administrative policy presumably will apply to both sorts of end use items under the new tariff - i.e. both to headings and sub-headings which cover goods "for use in" a certain application and to concessionary Codes which refer to goods "to be employed in" a certain application. Goods which are committed by design or nature to a specific use would be like the glassware designed to be cut, in that it would not be

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[78]For similar items, see: Terochem v. DMNRCE, App. 2401, May 28, 1986, 11 TBR 223, 11 CER 319 (T.B.); Western Medi-Aid v. DMNRCE, Apps. 2357 etc., June 4, 1986, 11 TBR 229, 11 CER 326 (T.B.).

[79]Revenue Canada, Customs and Excise, Administrative Policy - End Use Provisions, Memorandum D11-8-1, Sept. 22, 1989, para.5.

necessary to monitor their actual use after importation.[80] The "satisfactory evidence" concerning end use in paragraph(c) would include end use certificates, or purchase and sales documents. A percentage arrangement under paragraph(d) could be authorized for up to 2 years for situations in which the end use on resale can be estimated with reasonable accuracy but it is impractical because of low value of goods to submit end use certificates for each subsequent purchase. A stocking authorization could also be authorized for 2 years, for cases where end use cannot be confirmed until goods are resold or otherwise disposed of.[81] Current administrative practice for end use items is thus much like the past. The items themselves have changed. They are far more specific in identifying goods and in emphasizing the link to a final product. There are relatively few items left which put over-riding emphasis on the particular industry or activity benefited. The administration of percentage arrangements and stocking authorizations will be very similar to administration of consolidated entries under procedures for electronic release

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[80]See the list of committed by design or nature rulings contained in Revenue Canada, Customs and Excise, Goods Committed by Design or Nature to a Use Specified in an End Use Provision, Memorandum D11-8-4, May 18, 1990.

[81]Revenue Canada, Customs and Excise, Memorandum D11-8-1, para.7,23,24,29,30.

and accounting in the CADEX system.[82] Indeed, past experience with end use items has probably prepared Canadian customs officials well for the greater use of electronic data in modern customs administration.[83] Interpretation is likely to be less purposive in the narrow sense in the future, simply because HS items themselves are drafted to identify goods in ordinary commerce and not to provide benefits to specific economic sectors in member states. There will be no need, however, to reject all past experience with the contextual model. Both administration and interpretation can and should continue to examine the full context of surrounding circumstances, including the use of goods after importation.

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[82]See discussion in the chapter on Implementation and Procedures.

[83]Past mistakes, however, should not be repeated. It should be clear that percentage arrangements, stocking authorizations and similar release and accounting procedures are not simply discretionary largesse to be withdrawn from importers whenever they contest a ruling. The criteria for accuracy and reliability of records should be as definite as possible. Importers should not be vulnerable to the "manifest and obvious" bad faith of officials, as the court found had happened in RCP v. MNR and DMNRCE, [1986] 1 F.C. 485, 10 CER 214 (F.C.T.D., Dec. 13, 1985).

CHAPTER 7

Machinery Remission

I. Introduction: Tariff Board Reference 157

This chapter examines a feature of Canadian customs law which has disappeared in one form and re-appeared in another. For many years, several significant items in the Canadian tariff classified goods according to whether or not they were of a class or kind made in Canada. Goods not made in Canada received favourable treatment in the form of free entry or reduced duties. If there were no established sources of supply in Canada, importers could have access to cheaper goods without injury to domestic production. The first significant phasing-out of made/not made items occurred in 1968 following the Kennedy Round of GATT negotiations. The process has now been completed as a result of a Tariff Board reference following commitments made during the Tokyo Round of

negotiations.[1]

Made/not made tariff items were objectionable to our trading partners because of their unreliability and lack of transparency. Goods could change tariff status unpredictably through administrative action in response to adjustments in Canadian production. If the difference in tariff rates was significant, made/not made items would act as a deterrent to trade. From a domestic perspective, potential importers and suppliers had similar concerns about the difficulties of business planning in the face of uncertainty. The expense of the bureaucracy necessary to administer the items also should not be overlooked.

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[1]Canada's agreement to eliminate or review remaining made/not made tariff items was part of negotiations with the United States, given to obtain concessions for Canadian exports of agricultural machinery, equipment and parts. See Government of Canada, Multilateral Trade Negotiations, 1973-79, p.90. The Tariff Board reference was divided into two phases: Tariff Board, Reference 157, Tariff Items Covering Goods Made/Not Made in Canada, Report, Phase I, December 15, 1982 ("Tariff Board, Report I"); Tariff Board, Reference 157, Tariff Items Covering Goods Made/Not Made in Canada, Report, Phase II, December 20, 1984 ("Tariff Board, Report II"). During the reference, the Board held extensive hearings. A Discussion Paper and a Background Paper were published in November 1979 at the start of the reference. From March 1980 to February 1983, the Board Staff published ten further Background Papers with analysis of specific items. Staff appraisals were also collected and published in connection with each Phase of the reference: Tariff Board, Reference 157, Tariff Items Covering Goods Made/Not Made in Canada, Phase I, Appraisals by the Staff, December 1982; Tariff Board, Reference 157, Tariff Items Covering Goods Made/Not Made in Canada, Phase II, Appraisals by the Staff, December 1984.

In 1968, when the first phasing-out was done for the residual item covering machinery, it was replaced with a programme of duty remission based on availability in Canada. The programme has been maintained since that time and was not subject to the Tariff Board review. Availability is thus the current version of the made/not made distinction. It applies mainly to machinery imports, including automotive goods. In this chapter, Reference 157 is discussed and there is a short review of decisions on the definition of "machinery." The previous "class or kind not made in Canada" standard is then described and compared to the availability standard for remission. The chapter concludes with a brief look at the current situation under the Harmonized System.

Tariff items using the made/not made distinction appeared as early as 1880 but were not common until the 1930's.[2] Prior to 1968, the made/not made distinction was also used in anti-dumping matters instead of an injury test. Until the Kennedy Round GATT Anti-dumping Code was implemented, dumping duties were levied only on under-priced imported goods "of a class or kind made or produced in Canada."[3] It was in the anti-dumping context that the section defining the phrase first appeared. That section, which has now become s.12 of the Customs Tariff Act, provides as follows:

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[2]For a detailed history, see: Tariff Board, Report I, pp. 9-13; Tariff Board, Report II, pp. 8-12.

[3]Customs Tariff Act, R.S.C. 1952, ch.60, s.6(1); rep. S.C. 1968-69, c. 10.

> 12. (1) For the purposes of this Act, goods shall be deemed not to be of a class or kind of goods made or produced in Canada unless goods of that class or kind are made or produced in Canada in substantial quantities.
>
> (2) The Governor in Council may, by order, for the purposes of subsection (1), provide that the quantities, in order to be substantial, shall be sufficient to supply such percentage of the normal Canadian consumption of the goods as is fixed by the order.[4]

The current version of the relevant Order in Council is as follows:

> 2. For the purposes of subsection 12(1) of the Customs Tariff, goods shall not be deemed to be of a class or kind made or produced in Canada unless a quantity sufficient to supply 10 per cent of the normal Canadian consumption of such goods is so made or produced.[5]

The 10% mark, thus, was originally seen as the point at which Canadian production was sufficiently established to deserve protection from dumping. Since the same Order was used for made/not made tariff items, 10% was also the point at which Canadian production was sufficiently established to deserve protection under those items. Below 10%, the advantage shifted in favour of the consumer.

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[4]Customs Tariff Act, S.C. 1987, c.49 (R.S.C. 1985, c.41 (3rd Supp.)), s.12. In its earlier version, this was s.6(10) of the Customs Tariff Act, R.S.C. 1952, ch.60 and s.6 of the Customs Tariff Act, R.S.C. 1970, c.C-41.

[5]Substantial Quantity of Goods Percentage Order, 1987, SOR/88-81, P.C. 1987-2745 of Dec. 31, 1987, 1988 Canada Gazette Part II p.843. The original Order was made in 1936: Order in Council P.C. 1618 of July 2, 1936 (see Substantial Quantity of Goods Percentage Order, C.R.C. 1978, c.548).

Interpretation of made/not made items was said to require a balancing of interests,[6] although the purpose was probably more concessionary than protective, since the higher rates did not apply to encourage domestic production at the early stages before it had reached the 10% mark.[7] The benefits of the not made items were very frequently directed at particular economic sectors. Of the 112 made/not made items included in Tariff Board Reference 157, fully 99 had specific end uses.[8] The following was an example:

> Machinery and apparatus for use in producing unrefined oil from shales or for operating oil-sands by mining operations or for extracting oil from the sands so mined:
>
> 49215-1 Of a class or kind made in Canada; parts thereof
>
> 49216-1 Of a class or kind not made in Canada; parts thereof[9]

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[6]Reference re Power Cranes, App. 272, March 18, 1953, 1 TBR 90 at 92-93 (T.B.); Lyman Tube v. DMNRCE, App. 383, June 28, 1960, 2 TBR 3 at 4-5, 7 (T.B.); Union Gas v. DMNRCE, App. 847, March 6, 1967, 4 TBR 21 at 25 (T.B.).

[7]The Crown's submission that the purpose was primarily protective was rejected in the Dominion Engineering case by both the Exchequer Court and the majority of the Supreme Court of Canada: see Dominion Engineering v. DMNRCE, 1 TBR 143 at 147, 148 (Ex.Ct., March 7, 1956), aff'd. [1958] S.C.R. 652, 1 TBR 152 (S.C.C., Oct. 7, 1958).

[8]Tariff Board, Report I, p. 3; Tariff Board, Report II, p. 3.

[9]These items appeared in this form in 1964, consolidating two earlier items (Tariff Board, Reference 157, Background Study #2, Machinery and Apparatus for Use in the Development of Resources of Oil, Natural Gas, Potash or Rock Salt, March 1980, pp. 40-41). The consolidation occurred after a Tariff Board reference on the oil and gas industries, although the

In 1968, the made/not made distinction for general machinery imports was replaced with the remission programme based on availability. The amended item, in force with only minor changes until implementation of the Harmonized System, was as follows:

> 42700-1 Machines, n.o.p., and accessories, attachments, control equipment and tools for use therewith; parts of the foregoing
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> Except that in the case of the importation into Canada of any goods enumerated in this item, the Governor in Council ... may, whenever he considers that it is in the public interest and that the goods are not available from production in Canada, remit the duty specified in this item applicable to the goods ...[10]

In the letter of reference from the Minister of Finance which initiated Reference 157, the Tariff Board was instructed to review only the made/not made tariff items, not the remission programme based on availability. The Board was asked to recommend replacing the made/not made items with specific product descriptions whenever possible. The Minister did not necessarily rule out the possibility of

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Board had recommended that the item should be duty-free (Tariff Board, Reference 130, Machinery and Equipment Used in the Mining Industry and in the Oil and Gas Industries, 1960-63, Volume 1, pp. 61, 84-85).

[10]S.C. 1968, c. 12, Schedule B.

using an availability test if specific descriptions were not feasible, but he did state that the government wanted to use availability only in "specialized circumstances."[11]

In its Report, the Tariff Board recommended specific descriptions for most items. In a few cases, the Board recommended remissions based on availability, but the government generally declined to expand the availability programme when it implemented the Report.[12] The class or kind not made in Canada standard is now of mainly historical interest, except for ongoing appeals and occasional duty reductions. Its replacement, however, the machinery remission programme, is based on a standard which is not all that different from the previous one and may actually present extra disadvantages.

II. Machinery

The most commonly-cited definition of machinery in Canadian customs law is contained in the Tariff Board's

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[11]Letter from Finance Minister John C. Crosbie to Tariff Board Chairman McDougall, August 20, 1979, reprinted in Tariff Board, Report I, p. 102.

[12]See, for example, the recommendation for availability with 49215-1, the oil sands machinery item (Tariff Board, Report I, p.123), which did not contain an availability remission when implemented (S.C. 1985, c.42, Schedule I). The Tariff Board had concluded that there were domestic sources of supply for most goods under the item, in any case. The recommendations from Reference 157 were implemented in stages. Phase I was dealt with in S.C. 1984, c.47 and S.C. 1985, c.42. Phase II was dealt with in S.C. 1986, c.37 and S.C. 1987, c.29.

decision in the Trimont appeal: "a machine is comprised of a more or less complex combination of moving and stationary parts and does work through the production, modification or transmission of force and motion."[13] The appeal involved compressed air tubing which was used for handling wet concrete. There were valves at each end, but the equipment did not have moving parts that exerted force directly on the concrete. In deciding that the goods were not "machinery" as the appellant had claimed, the Board consulted several dictionaries for the ordinary meaning and derived the composite definition cited above. Although a pulley or a pair of pliers might be said to be simple machines, the ordinary use of the term implied a degree of complexity. In the E.T.F. Tools appeal shortly thereafter, the Exchequer Court confirmed the Board's use of ordinary meaning and stated that this would also be the common commercial sense of "machinery", as opposed to a technical or scientific usage. In that appeal, the Court cited the Trimont definition and affirmed the Board's decision that a plumber's tool for making tee joints in pipes should not be classified as a

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[13]Trimont v. DMNRCE, App. 560, Dec. 18, 1961, 2 TBR 244 at 247(T.B.). The Customs Tariff Act at the time specified in s. 2(3) that "machinery" was to be read and construed as "machines" (S.C. 1959, c.12, s.2). See Reference by DMNRCE re Logging Motor Trucks, App. 243, July 3, 1951, 1 TBR 51 (T.B.), in which the Board had previously held that a series of machines could constitute "machinery." For a forerunner of the Trimont definition, see Franklin Serum v. DMNRCE, Apps. 274, 275, 276, Jan. 9, 1953, 1 TBR 95 (T.B.).

machine.[14]

The Federal Court of Appeal affirmed the Trimont definition in 1987, in the Ingersoll-Rand appeal involving a relatively simple mechanism that was found to qualify nevertheless as a machine. The imported goods were door-exit devices consisting mainly of a horizontal cross-bar, levers and a latch. The Tariff Board had found that the goods were not machines, because they were not so identified in trade usage and they did not have a motor or other power source for continuous operation. The Federal Court of Appeal rejected this attempt to add a "continuous operation" requirement, which it said was not present in most dictionary definitions. Despite usage in that particular trade, the goods nevertheless operated mechanically and qualified as machines under the Trimont definition, which reflects ordinary meaning.[15]

Use of mechanical principles is thus crucial in machinery appeals. If the transmission of force is not

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[14]E.T.F. Tools v. DMNRCE, 3 TBR 50 (May 8, 1952, Ex.Ct., leave to appeal to S.C.C. dismissed, p.52), aff'g. E.T.F. Tools v. DMNRCE, App. 607, Dec. 29, 1961, 2 TBR 299 (T.B.). The Exchequer Court had previously approved the Board's use of ordinary meaning in a decision in which a power shovel was found to be a machine, rather than a "shovel" or "vehicle": General Supply v. DMNRCE, [1954] Ex.C.R. 340, 1 TBR 81 (Ex.Ct., May 8, 1954), aff'g. General Supply v. DMNRCE, App. 269, Sept. 16, 1952, 1 TBR 76 (T.B.).

[15]Ingersoll-Rand Door v. DMNRCE, Apps. 2361 etc., June 26, 1986, 11 TBR 276, 11 CER 374 (T.B.), rev'd. 15 CER 47 (F.C.A., Oct. 21, 1987), reheard 13 TBR 219, 16 CER 235 (March 8, 1988).

central to the functioning of the goods, then the addition of a motor would not of itself be enough.[16] The ordinary meaning of "machinery" seems to imply the operation of parts such as pulleys and levers, and if these are absent, as in the case of a large industrial furnace, goods may be "apparatus" but will not be machines.[17] Even if the principles are technically mechanical, as in the use of ultrasound vibrations, this may not be sufficiently concrete for the ordinary meaning and the goods may not qualify as mechanical.[18] As well, if too much human intervention is required to make the goods work, then they do not meet the ordinary definition. In the Bic appeal, for example, disposable lighters were not machines because there was no mechanical connection between the two basic operations required to produce a flame.[19]

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[16]Relaxacizor v. DMNRCE, App. 526, Oct. 25, 1960, 2 TBR 214 (T.B.); Provost Cartage v. DMNRCE, App. 676, April 26, 1963, 3 TBR 83 (T.B.). Compare: Vibro-Plus v. DMNRCE, App. 722, March 2, 1961, 3 TBR 140 (T.B.).

[17]Ahlstrom Canada v. DMNRCe, App. 1390, Jan. 25, 1979, 6 TBR 740, 1 CER 30 (T.B.).

[18]Electrodesign v. DMNRCE, App. 556, June 28, 1961, 2 TBR 241 (T.B.); Royal Victoria Hospital v. DMNRCE, App. 719, Nov. 4, 1963, 3 TBR 137 (T.B.).

[19]Bic v. DMNRCE, App. 2170, March 1, 1985, 10 TBR 58, 8 CER 280 (T.B.), aff'd. 13 CER 277 (F.C.A., Feb. 5, 1987); Fromageria d'Oka v. DMNRCE, App. 1410, Nov. 15, 1979, 6 TBR 945, 1 CER 309 (T.B.); Johnson-Rose v. DMNRCE, App. 2165, 10 TBR 22, 8 CER 204 (T.B.). The door exit devices in Ingersoll-Rand, supra note 15, were probably near the dividing line on this factor, but were still sufficiently complex to be machines.

Using the Trimont definition, an electromagnetic feeder for minerals and ores has been found to be a machine,[20] and a chain welder was also a machine despite the fact that the central unit, the welding head, did not operate on mechanical principles.[21] Sometimes the Tariff Board did not inquire too strictly into the mechanics of the goods in question. This may be because the answer seemed obvious, as in the case of a grain mill for agricultural feed[22] or a motor oil lubrication system for use in garages.[23] Sometimes the answer was less obvious, as in Windsor Management, where a computerized editing system was held to be a machine because it "operates as a combination of moving and station(a)ry parts, and does work through the display, editing, storage and printing of data."[24] In the Cornelius appeal, the Board used a differently-worded definition of "machinery" which is substantially the same as that in Trimont: "apparatus for

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[20]Mine Equipment v. DMNRCE, App. 948, Dec. 17, 1970, 1971 Canada Gazette Part I p.2829 (T.B.).

[21]Esco v. DMNRCE, App. 1923, April 18, 1984, 9 TBR 224, 7 CER 205 (T.B.).

[22]Agri-Feed Systems v. DMNRCE, App. 921, Oct. 2, 1969, 4 TBR 411 (T.B.).

[23]Stewart-Warner v. DMNRCE, App.1356, Jan. 31, 1979, 6 TBR 758, 1 CER 49 (T.B.). The basic pump was found to be a machine, while the overhead reels and hoses entered with it were held to be accessories and entitled to entry under 42700-1. See Sentrol Systems v. DMNRCE, App. 2881, May 17, 1988, 13 TBR 273, 16 CER 231 (T.B.).

[24]Windsor Management v. DMNRCE, App. 1294, June 5, 1978, 6 TBR 674 (T.B.).

applying mechanical power, having several parts, each with definite functions." In its decision, the Board found that a soft drink dispenser was not a machine, perhaps because of the influence of an earlier, pre-Trimont precedent.[25] In Cornelius, in any case, even if it could be argued that the dispenser actually operated on mechanical principles, it was only the pressurized storage tanks which were at issue. Even if they were considered parts or accessories of a machine, they had been imported separately and were more specifically described under an eo nomine item for storage tanks.[26]

Even if something qualifies as a machine, it could still be more specifically dealt with in another tariff item, especially if the other item referred to the purpose or function of the goods. In Dominion Bridge, for example, a machine was more specifically "electric apparatus designed for welding,"[27] and in Abbott Laboratories a vacuum pump was more specifically a diagnostic instrument than a machine.[28] Economic factors have not been particularly influential in

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[25]Pepsi-Cola v. DMNRCE, App.481, Dec. 21, 1959, 2 TBR 164 (T.B.). The definition in Cornelius was taken from the Oxford English Dictionary, also a source consulted in Trimont.

[26]Cornelius Manufacturing v. DMNRCE, App. 1824, March 25, 1983, 8 TBR 627, 5 CER 262. See further the chapter on Parts and Entities.

[27]Dominion Bridge v. DMNRCE, App. 945, Nov. 19, 1970, 1971 Canada Gazette Part I p.395 (T.B.).

[28]Abbott Laboratories v. DMNRCE, App. 1977, Sept. 6, 1984, 9 TBR 334, 7 CER 95 (T.B.) rev'd. on other grounds, 11 C.E.R. 357 (F.C.A., June 18, 1986).

machinery determinations. In Wang Laboratories, the Tariff Board rejected an argument that certain calculators should be treated as mechanical equipment because they competed directly with other calculators which were so classified.[29]

III. Remission Standards

a. Class or Kind Made/Not Made in Canada

i. Class or Kind

The wording of made/not made tariff items was not always consistent. Of the 112 items referred to the Tariff Board under Reference 157, the wording variations were as follows: "of a class or kind made in Canada"/"of a class or kind not made in Canada" - 93; "of a kind not produced in Canada" - 6; "of types or sizes not made in Canada" - 5; "of a type not made in Canada" - 3; "when not made in Canada" - 2; "of a class or kind not produced in Canada" - 1; "of a size not made in Canada" - 1; "of colours and/or textures not produced in Canada" - 1.[30] Except for the formulations which emphasized colour, texture or size, the wording probably did not make a difference in the interpretation of the items, since precise distinctions were not maintained among "class", "kind" and "type." Of the two most common terms, at times

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[29]Wang Laboratories v. DMNRCE, App. 949, May 20, 1971, 5 TBR 119 (T.B.) at 127.

[30]Tariff Board, Report I, p. 18; Tariff Board, Report II, p. 16; Tariff Board, Reference 157, Tariff Items Covering Goods Made/Not Made in Canada, Discussion Paper No. 1, Issues and Approach, Nov. 1979, p. 4.

"class" was thought to be larger than "kind"[31] and at times the reverse seemed to be the case.[32] The Board and the courts were not too concerned about possible distinctions as their attention was mainly on the question of whether the imported goods were sufficiently different from goods made in Canada to receive different treatment in the tariff. While the most common phrasing "class or kind" seems to indicate that one could sub-divide at least once in classification of the goods,[33] it did not have much further effect on the construction process. The basic question remained whether the imported goods were significantly different from goods made in Canada.

To decide this question, the focus was on differences in

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[31]Norton v. DMNRCE, App. 292, Nov. 4, 1953, 1 TBR 127 (T.B.); "Class" was synonymous with, but less precise than, "kind" in Whites Hardware v. DMNRCE, App. 206, March 17, 1950, 1 TBR 30 (T.B.).

[32]Canadian Lift Truck v. DMNRCE, App. 246, Nov. 5, 1951, 1 TBR 54 (T.B.) - drafting of customs memorandum; Dissenting judgment of Rand J. in Dominion Engineering v. DMNRCE, [1958] S.C.R. 652 at 661-62, 1 TBR 152 at 158-59 (S.C.C., Oct. 7, 1958); Sherritt-Gordon v. DMNRCE, App. 1048, Oct. 1, 1974, 6 TBR 86 at 98-99 (T.B.). On this question, as on other aspects of the class or kind not made in Canada standard, see the very complete review of case law to that point in Keith E. Eaton and Norman A. Chalmers, Canadian Law of Customs and Excise (Toronto: Canada Law Book, 1968) ("Eaton and Chalmers"), pp.85-119.

[33]Reference re Power Cranes, App. 272, March 18, 1953, 1 TBR 90 (T.B.); Dominion Engeering v. A. B. Wing, 1 TBR 143 (Ex.Ct., March 7, 1956), which decided that the subdivision was to be done not just from "machinery" (i.e. to get "power shovels"), but rather from the full item "machinery...n.o.p." which would mean "power shovels" in this case (i.e. to get "power shovels with a certain lifting capacity").

the goods themselves, and not differences in the contracts under which they were purchased. If, therefore, the import contract price covered services such as operator training which could not be had with domestic goods, this would not be a relevant factor in the decision.[34] Neither was much attention paid to details of the contracts under which domestic goods were sold. In some of the earlier cases, there is occasional mention of a now extinct provision of the Customs Tariff Act which applied to dumped and subsidized imports until 1968[35] and 1984[36] respectively. The provision, in the R.S.C. 1952 version, read as follows:

> s.6(9) For the purposes of this section, goods may be deemed to be of a class or kind not made or produced in Canada where similar goods of Canadian production are not offered for sale to the ordinary agencies of wholesale or retail distribution or are not offered to all purchasers on equal terms under like conditions, having regard to the customs and usage of the trade.

Use of this provision in tariff classification cases was not obligatory, since it applied only for dumping and subsidization and was not like s.6(1) of the same Act, the

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[34]J. M. Wright v. DMNRCE, App. 600, May 4, 1962, 2 TBR 295 (T.B.).

[35]Until implementation of the GATT Anti-dumping Code after the Kennedy Round.

[36]Until implementation of the GATT Subsidies Code after the Tokyo Round: Special Import Measures Act, S.C. 1983-84, c. 25. SIMA, in s.102, finally repealed this provision.

provision setting the substantial quantities of Canadian consumption mark, which was applicable for the purposes of the whole Act. From time to time, however, s.6(9) was quoted in classification cases, usually for its mention of "similar goods," which may have indicated that the test was not too stringent and goods could still have made in Canada status even if they were not identical to domestic goods.[37] The application of the provision, however, was quite narrow and it was not generally used to require an examination of the circumstances under which the domestic goods were sold.[38]

The search, thus, focused on the goods themselves and on criteria sufficiently precise and narrow to make sense of the

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[37]Canadian Lift Truck v. DMNRCE, 1 TBR 121 at 124 (S.C.C., Dec. 22, 1955); Akhurst v. DMNRCE, 3 TBR 155 at 159 (Ex.Ct., May 25, 1966); see also Reference re Power Cranes, App. 272, March 18, 1953, 1 TBR 90 at 94 (T.B.). The subsection was used concerning the timing of the 10% of consumption count in MacMillan & Bloedel v. DMNRCE, 3 TBR 1 (Ex.Ct., Jan. 18, 1963), but this decision was reversed on appeal in the Supreme Court of Canada, DMNRCE v. MacMillan & Bloedel [1965] S.C.R. 366, 3 TBR 9 (March 1, 1965). The subsection became s.7(3) in the Customs Tariff Act, R.S.C. 1970, c.C-41, limited by its terms to the situation of subsidization.

[38]Except perhaps, marginally, in Foresteel Products v. DMNRCE, App. 479, March 31, 1959, 2 TBR 160 (T.B.). Despite its limitation, the subsection may have had further influence in practice. The Tariff Board assumed it was part of a general definition of "not made in Canada" in Reference 157: see Tariff Board, Report I, p.16, Report II, p.15. The subsection was no longer available to be cited by the appellant in Nordican Boat v. DMNRCE, App. 2833, Sept. 26, 1988, 18 CER 19 (T.B.), in which a competing boat manufacturer made parts similar to the imported goods but used them in its own manufacturing and did not market them in Canada. The appellant was nevertheless successful and the imported goods were found to be of a separate class or kind not made in Canada.

counting process.[39] From time to time standards used in the trade or industry might help,[40] but in many of the disputed cases, these standards were non-existent or ambiguous[41] and the Supreme Court of Canada had implied that trade classification should not be followed "automatically and without regard to the other evidence."[42] Observable physical characteristics of the goods received initial attention. In a relatively early line of cases, the size or physical capacity of the imported goods was determinative. Fork lift trucks could thus be classified according to lifting

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[39]Lyman Tube v. DMNRCE, App. 383, June 28, 1960, 2 TBR 3 at 8 (T.B.). See also: Reference re Power Cranes, App. 272, March 18, 1953, 1 TBR 90 at 93 (T.B.) and Union Gas v. DMNRCE, App. 847, March 6, 1967, 4 TBR 21 (T.B.) - grouping must be sufficiently narrow and with sufficient similarity to make sense of the count.

[40]Evidence of general trade usage or standards was noted in: International Equipment v. DMNRCE, App. 692, March 3, 1964, 3 TBR 92 (T.B.); Standard Brands v. DMNRCE, App. 872, April 10, 1968, 4 TBR 136 (T.B.); Browning Arms v. DMNRCE, App. 1076, Jan. 27, 1975, 6 TBR 231 (T.B.); Unit Rig v. DMNRCE, App. 1317, Sept. 22, 1978, 6 TBR 717 (T.B.).

[41]Laurion v. DMNRCE, App. 365, Oct. 26, 1959, 2 TBR 2 (T.B.); Accessories v. DMNRCE, App. 505, June 22, 1960, 2 TBR 190 (T.B.); Moffats v. DMNRCE, App. 723, March 4, 1964, 3 TBR 142 (T.B.); Akhurst v. DMNRCE, App. 738, April 6, 1964, 3 TBR 153 (T.B.), 3 TBR 155 (Ex.Ct., May 25, 1966).

[42]Dominion Engineering v. DMNRCE, [1958] S.C.R. 652 at 656, 1 TBR 152 at 155, (S.C.C., Oct. 7, 1958); Browning v. DMNRCE, App. 1076, Jan. 27, 1975, 6 TBR 231 at 242 (T.B., Dauphinée dissent). See also Accessories v. DMNRCE, App. 242 (No. 2), Oct. 20, 1953, 1 TBR 50 (T.B.).

capacity[43] and power shovels according to nominal dipper capacity.[44] This approach was more or less halted by the Supreme Court of Canada in the Saint John Shipbuilding appeal,[45] where it was decided that a jib crane imported for use in a drydock was of the same class or kind as a crane made in Canada, even though the imported crane was much bigger. The difference, according to the court, was "dimensional rather than functional"[46] and that was not enough to indicate different tariff treatment. After that decision, size was generally seen as a less important criterion,[47] and

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[43]Canadian Lift Truck v. DMNRCE, App. 286, May 19, 1953, 1 TBR 113 (T.B.), 1 TBR 113 (Ex.Ct., June 15, 1954), 1 TBR 121 (S.C.C., Dec.22, 1955).

[44]A. B. Wing v. DMNRCE, App. 306, May 20, 1954, 1 TBR 140 (T.B.), aff'd. Dominion Engineering v. A. B. Wing, 1 TBR 143 (Ex.Ct., March 7, 1956), aff'd. Dominion Engineering v. DMNRCE, [1958] S.C.R. 652, 1 TBR 152 (S.C.C., Oct. 7, 1958). See also, to similar effect: Reference re Vertical Boring Mill, App. 317, July 5, 1954, 1 TBR 184 (T.B.), aff'd. Bertram v. Inglis, 1 TBR 185, (1957) 20 D.L.R. (2d) 577 (Ex.Ct., May 23, 1957); Accessories v. DMNRCE, App. 505, June 22, 1960, 2 TBR 190 (T.B.); Les Produits de Ciment Grandmont v. DMNRCE, App. 731, Sept. 30, 1964, 3 TBR 150 (T.B.).

[45]DMNRCE v. St. John Shipbuilding, [1966] S.C.R. 196, 3 TBR 180, 55 D.L.R. (2d) 503 (S.C.C., Dec. 20, 1965).

[46]DMNRCE v. Saint John Shipbuilding, 3 TBR 180 at 186; foll'd: Akhurst v. DMNRCE, 3 TBR 155 at 168 (Ex.Ct., May 25, 1966); Great Canadian Oil Sands v. DMNRCE, App. 1051, June 5, 1975, 6 TBR 116 at 141-44 (T.B.), rev'd. on other grounds [1976] 2 F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976). Size was also not determinative in an earlier appeal, J. M. Wright v. DMNRCE, App. 600, May 4, 1962, 2 TBR 295 (T.B.).

[47]Size was used as a criterion in Stephens-Adamson v. DMNRCE, App. 822, April 1, 1966, 3 TBR 301 (T.B.), aff'd. [1967] 1 Ex.C.R. 482, 3 TBR 303 (Ex.Ct., Dec. 13, 1966), but this was a decision about ball bearings, a product for which size may be particularly crucial.

attention focused instead on trying to decide what was meant by a "functional" difference.

In some cases, both before and after Saint John Shipbuilding, the appropriate difference was found in the fact that the goods operated on a different mechanical principle. In the Eastern Car appeal, for example, an imported machine for boring holes in railway car wheels was not in the same class or kind as a domestic machine because the imported machine had a spindle which rotated while the domestic machine moved the entire railway wheel.[48] In other cases, however, differing mechanical principles were not sufficient, because the work that was actually done was the same. Cement mixers with rotating internal blades, for example, were in the same class or kind as domestic cement mixers which had stationary blades and rotating cylinders, since in both cases the result was that cement was mixed.[49] The distinction is illustrated by the majority and dissenting opinions in the Browning appeal, concerning imported shotguns

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[48]Eastern Car v. DMNRCE, App. 285, June 15, 1953, 1 TBR 111 (T.B.). See also: Accessories v. DMNRCE, App. 242 (No. 2), Oct. 20, 1953, 1 TBR 50 (T.B.) - locomotive power for cranes; Dominion Textile v. DMNRCE, App. 865, Nov. 29, 1967, 4 TBR 78 (T.B.) - pressurized and unpressurized dye becks.

[49]Produits de Ciment Grandmont v. DMNRCE, App. 731, Sept. 30, 1964, 3 TBR 150 (T.B.). See also, to a similar effect: Laurion v. DMNRCE, App. 646, Dec. 12, 1962, 2 TBR 321 (T.B.) - rotary and reciprocating air compressors; Ames Crosta v. DMNRCE, App. 895, April 1, 1969, 4 TBR 245 (T.B.) - aerating machines for sewage and liquid waste.

and rifles.[50] The majority used the different firing actions to say that the imports were not in the same class or kind as domestic firearms; the dissent maintained that the different actions did not affect the basic function of launching ammunition.

Subsequent cases continued to emphasize the idea of looking to the use or the actual effect of various physical differences. In Anglophoto, for example, 8 mm. picture projectors with a continuous loop of film were not in the same class or kind as domestic projectors operating from reel to reel, since the loop projectors were suitable for continuous projection in education and trade displays but were not suitable for home use.[51] Similarly, in the Hydra-Gym appeal, imported exercise equipment based on hydraulics was in a different class or kind from domestic weight-based equipment, because the hydraulic equipment could exercise various muscle groups simultaneously and could also be stopped at any time during motion, to measure resistance and avoid injury.[52] Sometimes this emphasis on the effect of

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[50]Browning v. DMNRCE, App. 1076, Jan. 27, 1975, 6 TBR 231 (T.B.).

[51]Anglophoto v. DMNRCE, App. 932, June 5, 1970, 5 TBR 64 (T.B.).

[52]Hydra-Gym v. DMNRCE, App. 1847, Jan. 26, 1983, 8 TBR 514, 5 CER 135 (T.B.). For other decisions emphasizing use or application, see Union Gas v. DMNRCE, App. 847, March 6, 1967, 4 TBR 21 (T.B.) - water chilllers for air-conditioners; Golden Boy v. DMNRCE, App. 2014, April 12, 1984, 9 TBR 217, 7 CER 187 (T.B.) - wheelchair lifts; McClellan Derkoch v.

differences in application also appeared as an interest in whether or not the goods could serve the same purpose, possibly with minor modifications. In the Lyman Tube case, for example, imported ball bearings were not of the same class or kind as domestic bearings because they could not be substituted one for the other and the functions were therefore different.[53]

In part, the increased emphasis on use may have been attributable to a greater tendency to draft the made/not made items for specific end uses. After the residual made/not made item for machinery imports was replaced with the availability remission programme following the Kennedy Round, new items tended to contain end use stipulations. The question of how interpretation would be affected was addressed in the Great Canadian Oil Sands appeals, concerning tariff items 49215-1 and 49216-1 for machinery for use in mining oil sands (quoted in Part I of this chapter). Because of the saturated nature of the silt and clay topsoil to be

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DMNRCE, App. 2030, May 15, 1984, 9 TBR 249, 7 CER 237 (T.B.) - wheelchairs; Billiton-Canada v. DMNRCE, App. 2097, July 17, 1984, 9 TBR 297, 7 CER 20 (T.B.) - magnetic separators.

[53]Lyman Tube v. DMNRCE, App. 383, June 28, 1960, 2 TBR 3 (T.B.). See also: Spruce Falls v. DMNRCE, App. 501, April 29, 1959, 2 TBR 188 (T.B.) - newsprint winder; Algoma Steel v. DMNRCE, App. 517, Nov. 25, 1960, 2 TBR 204 (T.B.) - steel mill; Stephens-Adamson v. DMNRCE, App. 822, April 1, 1966, 3 TBR 301 (T.B.), 3 TBR 303 (Dec. 13, 1966, Ex. Ct.) - ball bearings; Standard Brands v. DMNRCE, App. 872, April 10, 1968, 4 TBR 136 (T.B.) - yeast filters; Ferguson v. DMNRCE, App. 911, Feb. 28, 1973, 4 TBR 379 (T.B.) - motors for trawler inches.

removed, dump trucks for use in oil sands mining must have large tires and a low ground-bearing pressure. On the first Great Canadian Oil Sands appeal, the Federal Court of Appeal reversed a decision from the Tariff Board below and held that dump trucks with the qualifications necessary for such use were of a class or kind not made in Canada. The Tariff Board, with one dissent, had reached the opposite conclusion, since "dump trucks" as a class or kind were clearly made in Canada. The Court of Appeal, however, held that the end use provision narrowed the determination of the class or kind. The imported trucks were of a class or kind not made in Canada because of their particular ability to carry heavy loads and still "float" at a low ground-bearing pressure. Quoting the dissent of Tariff Board member Dauphinée below, the Court declared that:

> Where a use provision is enacted use becomes more than a facet of the evidence as to the nature of the goods, it becomes the basis for classification under the item. This will exclude for purposes of findings of class or kind, all goods that do not meet this end use requirement, inasmuch as they will not be the goods described in the item.[54]

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[54] Great Canadian Oil Sands v. DMNRCE, [1976] 2 F.C. 281 at 287, 6 TBR 160 at 166 (F.C.A., March 4, 1976), quoting from Tariff Board level, Great Canadian Oil Sands v. DMNRCE, App. 1051, June 5, 1975, 6 TBR 116 at 151 (T.B., dissent). This general development may have been foreshadowed in earlier decisions: Reference re Fabrics, App. 197, Feb. 6, 1951, 1 TBR 26 (T.B.); Reference re Underground Mining Dump Trucks, App. 547, June 8, 1961, 2 TBR 230 (T.B.); Ferguson Industries v. DMNRCE, App. 911, Feb. 28, 1973, 4 TBR 379 (T.B.). For further discussion, see the chapter on End Use items.

To construe the items as the majority of the Tariff Board had done would be, according to the Court, "to read these items as though the reference to oil-sands operations were entirely absent therefrom," and would defeat the Legislature's intention of encouraging the development of the oil sands.[55]

The decision of the Federal Court of Appeal reflects a purposive approach to interpretation, following the legislative intent of providing a concession to particular economic sectors. If domestic sources of supply could not meet the needs of that sector, then the idea was that purchasers should not be penalized for importing. End use provisions were held to narrow the relevant class or kind in a number of subsequent appeals, mostly when domestic goods could not meet the required functions in the particular sector. In Amoco Canada, for example, reinforced cones for use in winding polypropylene yarns were a separate class or kind not made in Canada, as the domestic goods were not strong enough to resist crushing in this application.[56] In Borg Textiles, fibres for use in the manufacture of automobile accessories were of a class or kind not made in Canada since the only domestic supplier was unable to provide matches for the colours required by General Motors and the

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[55]6 TBR 160 at 167 (F.C.A.).

[56]Amoco Canada v. DMNRCE, App. 1193, May 18, 1977, 1978 Canada Gazette Part I p.829 (T.B.).

fabric manufacturer therefore had to import.[57] And in Aisco Industrial, imported wheelchairs were of a separate class or kind because they were more powerful than the domestic ones and thus able to cope with hilly terrain.[58] The same narrow approach also appeared in the Canadian Canners appeal, over seedless grapes which were of a class or kind not grown in Canada because the domestic ones were not suitable for use in canned fruit cocktail, even though the tariff item in question was not specifically an end use one.[59]

Other decisions, however, were less favourable to importers. In the Dome Petroleum appeal, for example, a floating drydock for use in oil and gas exploration in the Beaufort Sea was found to be of a class or kind made in Canada despite evidence that no Canadian supplier could provide a comparable drydock within the narrow time limits

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[57]Borg Textiles v. DMNRCE, App. 2590, March 9, 1987, 12 TBR 139, 14 CER 44 (T.B.). See also Nordican Boat v. DMNRCE, App. 2833, Sept. 26, 1988, 18 CER 19 (T.B.).

[58]Aisco Industrial v. DMNRCE, App. 2683, July 9, 1987, 12 TBR 247, 14 CER 197 (T.B.). Compare: McClellan Derkoch v. DMNRCE, Apps. 2030 etc., May 15, 1984, 9 TBR 249, 7 CER 237 (T.B.); W.J. Gauthier v. DMNRCE, App. 2663, Oct. 19, 1987, 12 TBR 384, 15 CER 4 (T.B.).

[59]Canadian Canners v. DMNRCE, App. 2715, Feb. 8, 1988, 13 TBR 104, 16 CER 64 (T.B.). See also the Department's unsuccessful argument for a narrow interpretation in Ringball Bearings v. DMNRCE, App. 2519, Oct. 7, 1986, 11 TBR 454, 12 CER 215 (T.B.).

dictated by the Arctic environment.[60] As well, in the second set of Great Canadian Oil Sands/Suncor appeals, it was decided that replacement parts for the dump trucks at issue had made in Canada status, as the parts do not follow each particular truck and sufficient Canadian production of comparable vehicles had been established since the first appeal.[61] Interpretation became more purposive and end use received extra emphasis, but importers did not actually benefit as much as might have been expected.

One aspect of the first Great Canadian Oil Sands judgment which was a particular disappointment for importers was the mention of economic factors in the determination of class or kind. In discussing the intent of the legislators in enacting the items, the Federal Court of Appeal had said:

> A reading of these tariff items makes it clear ... that the legislators, in enacting them, intended to grant an exemption for imported machinery necessary for oil sand mining operations where it was not possible to obtain competitive machinery 'made in Canada' -- that is -- competitive in the sense of being economically feasible and capable

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[60] Dome Petroleum v. DMNRCE, App. 1912, July 25, 1983, 8 TBR 736, 5 CER 508 (T.B.). See also Unit Rig v. DMNRCE, App. 1317, Sept. 22, 1978, 6 TBR 717 (T.B.).

[61] DMNRCE v. Suncor (formerly Great Canadian Oil Sands), 3 CER 340 (F.C.A., Nov. 19, 1981), rev'g. Great Canadian Oil Sands v. DMNRCE, App. 1386, Aug. 27, 1979, 6 TBR 915, 1 CER 239 (T.B.), reheard after the Court of Appeal judgment Suncor v. DMNRCE, App. 1386, March 18, 1982, 8 TBR 116, 4 CER 83 (T.B.).

of performing the same functions.[62]

In previous decisions, it had been occasionally suggested that economic factors could be used to interpret class or kind items in a protective way -- to say, in other words, that imported goods were of a class or kind made in Canada whenever they competed with domestic goods. The Tariff Board had fairly consistently rejected this approach as unworkable, however.[63] The Great Canadian Oil Sands decision appeared to open up a new approach to economic factors, one favourable to importers. Under this argument, it would not be enough for domestic goods to perform the same functions as imported goods in order to make them all of one class or kind. To benefit from this protection, the domestic goods also would have to perform these functions for about the same cost as the imported goods, so that purchasers would not suffer a

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[62]Great Canadian Oil Sands v. DMNRCE, 6 TBR 160 at 167 (March 4, 1976, F.C.A.).

[63]A. B. Wing v. DMNRCE, App. 306, May 20, 1954, 1 TBR 140 (T.B.), aff'd. Dominion Engineering v. A. B. Wing, 1 TBR 143 (Ex.Ct., March 7, 1956), aff'd. Dominion Engineering v. DMNRCE, [1958] S.C.R. 652, 1 TBR 152 (S.C.C., Oct. 7, 1956); Reference re Vertical Boring Mill, App. 317, July 5, 1954, 1 TBR 184 (T.B.), aff'd. Bertram v. Inglis, 1 TBR 185, (1957) 20 D.L.R. (2d) 577 (Ex.Ct., May 23, 1957); Akhurst v. DMNRCE, 3 TBR 155 (Ex.Ct., May 25, 1966). It has been suggested, however, that although it was not an error of law for the Tariff Board to refuse to classify according to the competition factor, this did not mean that the factor necessarily had to be ignored: DMNRCE V. Stephen-Adamson, 3 TBR 303 at 306 (Ex.Ct., Dec. 13, 1966), affirming a Tariff Board declaration which had used a test of physical interchangeability for the classification of ball bearings; Canadian Lift Truck v. DMNRCE, 1 TBR 121 (S.C.C., Dec.22, 1955).

disadvantage if obliged to buy the domestic goods. Subsequent interpretation of the economic feasibility criterion was not this generous, however. In the Cyanamid appeal, for example, the importer argued that a trilobe-shaped catalyst for use in refining petroleum was of a kind not produced in Canada because it was more efficient than the spherical or cylindrical catalysts produced domestically and was also separately patented. The Board dismissed the appeal on the grounds that all the catalysts had the same composition and performed the same function; the domestic goods met the economic feasiblity criterion because they still retained about fifty per cent of the market.[64]

Efficiency of the goods for a particular application had occasionally been considered in class or kind decisions,[65] but the simple fact of greater efficiency or higher quality was not a sufficient distinction in itself.[66] This question of

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[64]Cyanamid v. DMNRCE, App. 1696, March 22, 1982, 8 TBR 120, 4 CER 85 (T.B.), aff'd. 5 CER 463 (F.C.A., July 5, 1983). See also: dissenting opinion in Golden Boy v. DMNRCE, App. 2014, April 12, 1984, 9 TBR 217, 7 CER 187 (T.B.); Kallestad v. DMNRCE, App. 2200, April 28, 1986, 11 TBR 197, 11 CER 280 (T.B.), rev'd. on other grounds DMNRCE v. Kallestad, 14 CER 71 (F.C.A., March 25, 1987).

[65]Foresteel Products v. DMNRCE, App. 479, March 31, 1959, 2 TBR 160 (T.B.); Davison Chemical v. DMNRCE, App. 450, Sept. 12, 1960, 2 TBR 138 (T.B.).

[66]Beisinger Industries v. DMNRCE, App. 601, Oct. 26, 1962, 2 TBR 296 (T.B.); Ellett Copper and Brass v. DMNRCE, App. 648, Dec. 4, 1962, 2 TBR 323 (T.B.); Geigy Chemical v. DMNRCE, App. 806, March 23, 1966, 3 TBR 285 (T.B.); Schick v. DMNRCE, App. 900, April 22, 1969, 4 TBR 280 (T.B.); Sherritt-Gordon v. DMNRCE, App. 1048, Oct. 1, 1974, 6 TBR 86 (T.B.).

special suitablity for a particular purpose is especially difficult for custom-built items that are designed and made for only one location or operation. In these cases, it was clear that the same rule applied requiring 10% of actual Canadian consumption of the class or kind for made in Canada status; willingness on the part of domestic suppliers to make the same product was not sufficient.[67] The usual approach, therefore, was to avoid criteria which would be too narrow, since it was presumed that Parliament did not intend to have a separate class or kind for each custom-built import.[68] In the Nova Scotia Hearing and Speech appeal, for example, a specially-built mobile hearing and speech laboratory could not be in a separate class or kind of semi-trailers, since this would interpret the criteria too narrowly.[69] While it was still possible for custom-built goods to be of a class or

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[67]Bertram v. Inglis, 1 TBR 185, (1957) 20 D.L.R. (2d) 577 (Ex.Ct., May 23, 1957); MacMillan & Bloedel v. Ontario-Minnesota, 3 TBR 1 (Ex.Ct., Jan. 18, 1963), rev'd. on other grounds DMNRCE v. MacMillan & Bloedel, [1965] S.C.R. 366, 3 TBR 9 (S.C.C., March 1, 1965).

[68]Leland Electric v. DMNRCE, App. 411, Jan. 11, 1960, 2 TBR 81 (T.B.); St. John Shipbuilding v. DMNRCE, App. 742, May 1, 1964, 3 TBR 170 (T.B.), rev'd. [1965] 1 Ex.C.R. 802, 3 TBR 174 (Ex.Ct., Dec. 8, 1964), rev'd. [1966] S.C.R. 196, 3 TBR 180, 55 D.L.R. (2d) 503 (S.C.C., Dec. 20, 1965); Ames Crosta v. DMNRCE, App. 895, April 1, 1969, 4 TBR 245 (T.B.); Sherritt-Gordon v. DMNRCE, App. 1048, Oct. 1, 1974, 6 TBR 86 (T.B.); James H. Wilson v. DMNRCE, App. 480, March 17, 1960, 2 TBR 161 (T.B.).

[69]Nova Scotia Hearing and Speech Clinic v. DMNRCE, App. 1233, Aug. 29, 1977, 1979 Canada Gazette Part I p.672 (T.B.).

kind not made in Canada,[70] the usual approach in this area was somewhat more generous to domestic producers than in the case of other goods.

ii. Made/Not Made in Canada

In order to count to see if the 10% of Canadian consumption had been met, it was necessary to decide what was being counted. Once goods of the appropriate class or kind had been identified, it was necessary to determine what operations would constitute "making" or "producing" them in Canada. When all of the constituent parts were manufactured and assembled in Canada, it was simple to decide that goods were locally made. When, however, some or all of the constituent parts were imported and the goods merely assembled in Canada, it was more difficult to decide whether the concession in the tariff items really was intended for such local assembly operations. Very few reported Tariff Board decisions dealt directly with the question in the context of the made/not made tariff items. The Accessories declaration, an early appeal concerning imported truck cranes, decided that cranes were made in Canada when a superstructure of domestic manufacture was placed on a carrier of domestic manufacture and also when an imported superstructure was placed on a carrier of domestic

[70] Ferguson Industries v. DMNRCE, App. 911, Feb. 28, 1973, 4 TBR 379 (T.B.).

manufacture.[71] The Board did not determine what would have been the consequence if both the superstructure and the carrier had been imported and merely assembled in Canada, as there was no evidence that any of the relevant carriers were ever imported. As the percentage of imported content increases and the local activity becomes simply an assembly operation, the question becomes more and more difficult.

The phrasing in the section of the Customs Tariff Act refers to goods being "made or produced" in Canada and these terms are repeated in the Order which sets the 10% mark. While most of the tariff items examined in Reference 157 mentioned goods "made" in Canada, the word "produced" appeared in a few of the items. In other commodity tax statutes, the question of what constitutes "production" has received some judicial attention. In an early decision on the Special War Revenue Act of 1915, which levied tax on manufacturers or producers, the Supreme Court of Canada held that a company engaged in dyeing and dressing fur was liable for tax, since this activity was at least production even if it was not manufacturing.[72] In other cases concerning tax liability, it has been similarly found that "production" is

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[71] Accessories v. DMNRCE, App. 505, June 22, 1960, 2 TBR 190 (T.B.). The Board said it was not required, on the facts, to consider the situation of an imported carrier and a domestic superstructure. This may indicate an assumption that at least one of the major components had to be domestic (p.192).

[72] R. v. Vandeweghe, [1934] S.C.R. 244, 3 D.L.R. 57.

a wider term than "manufacturing". The Ontario High Court decided in 1950, for example, that putting watch movements into cases was not manufacturing but was production and therefore exigible.[73] The Supreme Court of Canada held in 1967 that polishing and cutting marble was manufacturing or, if there was any doubt, at least production and therefore taxable under the federal Excise Tax Act.[74] If these cases had any relevance in the construction of made/not made tariff items, they tended to indicate that domestic activity might not have to be too extensive before "made in Canada" rates would apply to competing imports.

In certain commodity tax cases, the word "manufacturing" itself received fairly wide interpretation, even when it was in the context of a taxpayer claiming the benefit of an exemption for goods used in manufacture or production.[75] In 1969, the Supreme Court of Canada held that the operation of electricity transformers qualified,[76] and the Tariff Board held in 1974 that flattening and rolling coiled steel was

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[73]Gruen Watch v. A.-G. Can., [1950] O.R. 429, [1950] C.T.C. 440, 4 D.L.R. 156.

[74]R. v. York Marble, Tile & Terrazzo, [1968] S.C.R. 140. See also the dissent in Consumers' Gas v. DMNRCE, [1976] S.C.R. 640, 6 N.R. 602 (S.C.C.).

[75]For more extensive analysis of cases relating to "manufacturing" and "production", see Chapter 5 on Processing and Packaging.

[76]Quebec Hydro v. DMNRCE, [1970] S.C.R. 30.

also manufacturing.[77] In a 5-4 decision in 1975, the Supreme Court of Canada rejected a taxpayer's claim that it was engaged in manufacturing when it used equipment to regulate the pressure in a gas pipeline,[78] but the pattern otherwise was one of wide interpretation.

In tariff classification cases for end use items which depended on goods being used in manufacturing, there is a similar record of expansive interpretation, with the exception of one Supreme Court of Canada judgment. In Research-Cottrell, the Supreme Court held in a 3-2 decision that electrostatic mining precipitators assembled from imported and domestic components were not manufactured in Canada. The Exchequer Court below had said that since the precipitators did not exist outside Canada, they had to have been manufactured inside the country; the majority of the Supreme Court rejected this view, which would find virtually any assembly operation to be manufacturing and said that while assembly might in some cases be manufacturing, it would not qualify in all cases.[79] When faced with a situation in which all the major components of a good were imported, the

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[77]Candiv v. DMNRCE, App. 1013, March 27, 1974, 5 TBR 447 (T.B.).

[78]Consumers' Gas v. DMNRCE, [1976] S.C.R. 640, 6 N.R. 602 (S.C.C.).

[79]DMNRCE v. Research-Cottrell, [1968] S.C.R. 684, 68 D.L.R. (2d) 194.

Tariff Board and Federal Court of Appeal used a somewhat more generous interpretation. In the Kipp Kelly appeals, both levels found that the applicant was engaged in manufacturing electric generating sets when it imported the engine and generator, added a base and switches, and installed the finished product.[80] In the Harry D. Shields appeal, the Tariff Board also held that the assembly of imported bicycle components was manufacturing in Canada and that the Department was not justified in using a percentage criterion for local content.[81]

In a 1982 class or kind made in Canada decision, the Deputy Minister tried unsuccessfully to argue the Kipp Kelly/Harry D. Shields approach for a made in Canada determination. The appeal, Hudson's Bay Oil and Gas,[82] involved parts imported for a compressor used in a gas well. The only evidence presented on production in Canada seems to have been from the supplier of that particular compressor, who assembled compressors from both domestic and imported

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[80]Kipp Kelly v. DMNRCE, App. 1182, July 20, 1977, 6 TBR 493 (T.B.); Kipp Kelly v. DMNRCE, App. 1479, May 21, 1980, 7 TBR 102, 2 CER 129 (T.B.), aff'd. DMNRCE v. Kipp Kelly, [1982] 1 F.C. 571, 3 CER 196 (F.C.A., June 8, 1981).

[81]Harry D. Shields v. DMNRCE, App. 1489, Jan. 3, 1980, 7 TBR 1, 2 CER 1 (T.B.). The Tariff Board did not, however, go so far as to say that the purification of water is manufacturing: City of Sherbrooke v. DMNRCE, App. 1495, June 16, 1981, 7 TBR 386, 3 CER 215 (T.B.).

[82]Hudson's Bay Oil & Gas v. DMNRCE, App. 1699, March 5, 1982, 8 TBR 98, 4 CER 73 (T.B.). See also (perhaps) Superior Brake v. DMNRCE, App. 1863, Dec. 16, 1982, 8 TBR 434, 5 CER 68 (T.B.).

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[81]Harry D. Shields v. DMNRCE, App. 1489, Jan. 3, 1980, 7 TBR 1, 2 CER 1 (T.B.). The Tariff Board did not, however, go so far as to say that the purification of water is manufacturing: City of Sherbrooke v. DMNRCE, App. 1495, June 16, 1981, 7 TBR 386, 3 CER 215 (T.B.).

[82]Hudson's Bay Oil & Gas v. DMNRCE, App. 1699, March 5, 1982, 8 TBR 98, 4 CER 73 (T.B.). See also (perhaps) Superior Brake v. DMNRCE, App. 1863, Dec. 16, 1982, 8 TBR 434, 5 CER 68 (T.B.).

parts. Witnesses testified that they did not know of any Canadian manufacturer which made similar goods. The Deputy Minister argued that assembly was sufficient within Kipp Kelly and Harry D. Shields, and that the appellant had failed to prove that the goods were not made in Canada. This argument was rejected by the Board, which found in favour of the appellant. There was, according to the Board, no clear evidence of any Canadian manufacturer and the goods therefore had not made in Canada status. This decision could mean that the expansive approach to Canadian production was rejected for the made in Canada count,[83] but it may be that the Board decided instead mainly on burden of proof grounds.

For matters relating to the details of the actual count, the allocation of the burden of proof was a contested issue, since the nature of the counting required that it normally be done by the Department. The appellant could be expected to contest the interpretation of the appropriate class or kind, the manner of the count and the sorts of activities included, but private parties are unlikely to have the required information on activities of their competitors to do a thorough survey. For this issue, it seemed inappropriate to place on the appellant the burden of proving the

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[83]The Deputy Minister may also have been using an expansive approach in an earlier appeal. See Great Canadian Oil Sands v. DMNRCE, App. 1386, Aug. 27, 1979, 6 TBR 915, 1 CER 239 (T.B.) at p.917 (TBR) where the Board refers to the Deputy Minister's evidence concerning "manufacture or assembly in Canada" of the goods in question.

incorrectness of an official act. While the Deputy Minister occasionally argued that onus should remain on the appellant, this argument usually failed. The Tariff Board normally found that imports had not made in Canada status wherever the evidence of Canadian production was unsatisfactory.[84] In the one declaration in which the appellant lost on onus grounds, the Board nevertheless presumed that the Department would be actually doing the survey, and elaborated on the Department's obligations concerning disclosure to the appellant of the results. According to the Board:

> (T)he Deputy Minister cannot be compelled to reveal to the appellant any figures of individual importers of (sic) manufacturers, nor, in some cases, the total imports or the total of domestic manufacture. However he must reveal to the appellant the nature of the enquiry he made, the description of the type, class or kind of article about which he enquired, the names of the firms from which he obtained figures, and the results, not necessarily in total

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[84] Ferguson Supply v. DMNRCE, App. 1871, Dec. 1, 1982, 8 TBR 393, 5 CER 22 (T.B.); Liebherr Canada v. DMNRCE, App. 2147, Nov. 4, 1985, 10 TBR 255, 10 CER 127 (T.B.); Hudson's Bay Oil & Gas, supra note 85; Canadian Reynolds v. DMNRCE, App. 967, Jan. 17, 1972, 1972 Canada Gazette Part I p. 1067 (T.B.). In International Imports for Competitive Shooting v. DMNRCE, App. 1361, Jan. 26, 1979, 6 TBR 749, 1 CER 36 (T.B.), the Deputy Minister argued that onus was on the appellant, but the Board allowed the appeal on the basis of the class or kind determination. The evidence provided by the Deputy Minister need not necessarily be an extensive survey if it is uncontradicted: Superior Brake v. DMNRCE, App. 1863, Dec. 16, 1982, 8 TBR 434, 5 CER 68 (T.B.); James H. Wilson v. DMNRCE, App. 480, March 17, 1960, 2 TBR 161 (T.B.). In a recent declaration, the Canadian International Trade Tribunal seemed to place the burden of proof on the appellant, but it is not clear that the question was fully argued: Nova Aqua v. DMNRCE, App. 3027, July 26, 1990, 3 TCT 2233 (C.I.T.T.).

> specified figures of any kind but at least as a percentage of normal Canadian consumption; if in certain cases the actual percentage figure should involve the Deputy Minister in a disclosure harmful to one or more competitive interests he should then restrict his disclosure to the fact that the percentage exceeds or does not exceed that laid down under the regulations published under the authority of subsection (10) of section 6 of the Customs Tariff.[85]

The Board would review the survey, including any confidential information it might contain,[86] and preserve that confidentiality carefully. In only one case did the Board conduct its own investigation to supplement the survey, and this was in an early appeal heard before practices became standardized.[87]

Challenges to the Department's surveys were possible. In North Sailing, the appellant conducted its own survey and

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[85]Leland Electric v. DMNRCE, App. 411, Jan. 11, 1960, 2 TBR 81 at 85 (T.B.). The disclosure must also be sufficient to meet the requirements of natural justice set out i.. Magnasonic v. Anti-dumping Tribunal, [1972] F.C. 1239 (F.C.A.): see Great Canadian Oil Sands v. DMNRCE, App. 1051, June 5, 1975, 6 TBR 116 at 133 (T.B.). See also St. John Shipbuilding v. DMNRCE, App. 742, May 1, 1964, 3 TBR 170 (T.B.), rev'd. [1965] 1 Ex.C.R. 802, 3 TBR 174 (Ex.Ct., Dec. 8, 1964), rev'd. DMNRCE v. St. John Shipbuilding, [1966] S.C.R. 196, 3 TBR 180, 55 D.L.R. (2d) 503 (S.C.C., Dec. 20, 1965).

[86]Laurion Equipment v. DMNRCE, App. 365, Oct. 26, 1959, 2 TBR 2 (T.B.); McDowell & Lincoln v. DMNRCE, App. 744, April 8, 1964, 3 TBR 187 (T.B.).

[87]Accessories Machinery v. DMNRCE, App. 505, June 22, 1960, 2 TBR 190 (T.B.). Eaton and Chalmers state (at p. 117) that the appeal was heard before Leland Electric (supra note 85), although decided later.

was able to show that the competitor, which claimed to have 10% of the relevant market, in fact had only a much smaller percentage. Even when the class or kind was narrowly defined, the Department had still placed too much reliance on figures from one company and had not included all major sources of supply.[88] Administration of made/not made items was inherently difficult since the Department could not be expert in every sector and would have to rely on industry sources for the surveys.

The relevant time for the made in Canada count was the date of entry of the goods, and the situation prevailing at that time governed. In the second set of Great Canadian Oil Sands/Suncor appeals,[89] for example, the replacement parts for the dump trucks had made in Canada status because sufficient Canadian production had been established by that time. It did not matter that the original dump trucks for which the parts were destined still met the end use and thus still had not made status; it also did not matter that repair and maintenance costs for each truck were expected to exceed the initial purchase price over the useful life of the vehicle.

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[88]North Sailing v. DMNRCE, Apps. 2466 etc., Dec. 12, 1986, 11 TBR 583, 13 CER 128 (T.B.). See also the comments about surveys based on unsupported evidence from a competitor in the dissenting opinion in W.J. Gauthier v. DMNRCE, App. 2663, Oct. 19, 1987, 12 TBR 384, 15 CER 4 (T.B.). See further Nordican Boat v. DMNRCE, App. 2833, Sept. 26, 1988, 18 CER 19 (T.B.).

[89]Great Canadian Oil Sands v. DMNRCE, App. 1386, Aug. 27, 1979, 6 TBR 915, 1 CER 239 (T.B.) rev'd. DMNRCE v. Suncor, 3 CER 340 (F.C.A., Nov. 19, 1981), reheard Suncor v. DMNRCE, App. 1386, March 18, 1982, 8 TBR 116, 4 CER 83 (T.B.).

According to the Federal Court of Appeal, which overturned the decision of the Tariff Board, interpretation was to be done as of the date of entry of the parts and "(t)he relevant items of the tariff...refer to parts of machinery of a certain class or kind; they do not refer to parts of machinery which was of a certain class or kind at the time of its importation."[90] Events existing up to and including the date of entry, therefore, could be considered, but it was not legitimate to look to events occurring after that date, even if it was easier to use statistics which were annual aggregates. The measurement was done for the time period prior to each date of entry.[91] The length of time for the measurement varied according to the nature of the goods. In the John Williams appeal, rubber refining mills were found to be made in Canada despite the fact that none had actually been so made for over a decade, because the mills could last almost indefinitely and many had been in use for more than forty years.[92] In the Professional Bowling appeal, on the other hand, the pinsetting machines were not nearly so

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[90]DMNRCE v. Suncor, 3 CER 340 at 341 (F.C.A., Nov. 19, 1981).

[91]Lyman Tube & Bearings v. DMNRCE, App. 383, June 28, 1960, 2 TBR 3 (T.B.); Accessories Machinery v. DMNRCE, App. 553, Jan. 31, 1962, 2 TBR 238 (T.B.).

[92]John Williams Machinery v. DMNRCE, App. 664, May 10, 1963, 3 TBR 77 (T.B.). Similarly, in Dome Petroleum v. DMNRCE, App. 1912, July 25, 1983, 8 TBR 736, 5 CER 508 (T.B.), the goods were found to be made in Canada because "at least ten per cent of existing and operating drydocks have been made in Canada." (8 TBR 736 at 745).

durable and there was evidence that they were imported and sold regularly. As they had not been produced in Canada for three years prior to the date of entry (or for a further two years up to the date of the hearing), they were found to be not made in Canada.[93]

It would assist planning, of course, to use the date of the import contract instead of the date of entry, but this possibility was firmly ruled out by the Supreme Court of Canada in the MacMillan & Bloedel appeal in 1965.[94] The import at issue in that appeal was a newsprint paper-making machine which could operate at 2500 ft./min., while most Canadian-made machines had a speed of only 2000 ft./min. MacMillan & Bloedel had committed itself to buy the imported machine on February 1, 1955, with the formal contract being dated August 25, 1955. The machine was entered in pieces starting on November 27, 1956. In the meantime, by November 29, 1956, a domestic machine with a design speed of 2500 ft./min. had been built and shipped. The Supreme Court of Canada reversed the Exchequer Court judgment which had used the date of the contract, and restored the decision of the Tariff Board that the import had made in Canada status. The

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[93]Professional Bowling v. DMNRCE, App. 903, May 26, 1969, 4 TBR 284 (T.B.). See also SF Products v. DMNRCE, App. 789, April 28, 1966, 3 TBR 245 (T.B.).

[94]DMNRCE v. MacMillan & Bloedel, [1965] S.C.R. 366, 3 TBR 9 (March 1, 1965, S.C.C., March 1, 1965), rev'g. MacMillan & Bloedel v. DMNRCE, 3 TBR 1 (Ex.Ct., Jan. 18, 1963), rev'g. App. 445, April 29, 1959, 2 TBR 127 (T.B.).

Court held that the relevant date was the date of entry, that the Board had ample evidence to justify its refusal to use design speed as the sole criterion of class or kind, and that there was also sufficient evidence that newsprint machines, being durable goods, were made in Canada. The Tariff Board below had been somewhat conciliatory on the issue of the time for classification and had said that while the appellant's argument in favour of the date of commitment "merits very serious consideration",[95] it was not relevant given the finding on class or kind. The Supreme Court, on the other hand, rejected the argument outright and stated that the Act "appears to say very clearly that the time for determining tariff classification is at the time of entry into Canada of the goods subject to duty, and ... there can be no justification for fixing any other date as the date upon which the duty, if any, is to be determined."[96]

When the count was done, only actual production was counted, according to the terms of the legislation and the Order. This was the interpretation established in Bertram v. Inglis, an early appeal dealing with a vertical boring mill that was much bigger than anything made in Canada. Although a Canadian supplier held itself out as capable of making such

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[95] 2 TBR 129.

[96] 3 TBR 11. The appellant was in a similar situation, complicated by legislative changes, in Denison-Potacan v. DMNRCE, Apps. 2787, 2789, April 18, 1990, 3 TCT 2103 (C.I.T.T.).

a mill, it had not previously done so, and the Exchequer Court held that availability or willingness to make would not be enough.[97] The question was particularly difficult in cases involving custom-built goods, where the usual approach was to focus instead on the definition of the class or kind. This tactic shielded importers somewhat from having to be too speculative about abilities of local manufacturers for goods which they had not yet produced.

The 10% of consumption requirement was firmly entrenched in class or kind cases, so much so that it was used in a one decision even though the tariff item referred to vegetables "grown in Canada", a phrase not strictly covered by the legislation.[98] The exact wording of the section prior to amendment in the new Customs Tariff Act in 1988 was as follows:

> For the purpose of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial,

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[97]Bertram v. Inglis, 1 TBR 185, 20 D.L.R. (2d) 577 (Ex.Ct., May 23, 1957), aff'g. Reference re Vertical Boring Mill, App. 317, July 5, 1954, 1 TBR 184 (T.B.). See, to the same effect: Morfoils v. DMNRCE, App. 755, Nov. 5, 1964, 3 TBR 194 (T.B.); Ferguson Industries v. DMNRCE, App. 911, Feb. 28, 1973, 4 TBR 379 (T.B.). Ocelot Industries v. DMNRCE, App. 2019, Dec. 12, 1985, 10 CER 208 (T.B.) may contain a hint to the contrary, when the declaration refers to whether "the goods would have been available in Canada if certain conditions had been met", but this may be simply too hasty wording.

[98]Caneast Foods Ltd. v. DMNRCE, App. 1779, Nov. 16, 1982, 8 TBR 344, 4 CER 412 (T.B.).

> shall be sufficient to supply a certain percentage of the normal Canadian consumption and may fix such percentages.[99]

It may be noted that the section did not say that whatever percentage the Governor in Council provided would be automatically deemed substantial.[100] This question arose in the St. John Shipbuilding appeal which went to the Supreme Court of Canada in December 1965.[101] The Tariff Board found that the imported crane at issue was in a class or kind of heavy cranes which had only two members, the import and a domestically-made one. The Supreme Court of Canada, in reversing the Exchequer Court and restoring the decision of the Tariff Board, found that this was enough to give the crane made in Canada status. The Exchequer Court had decided that s.6 imposed two tests, one numerical and the other a

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[99]Customs Tariff Act, R.S.C. 1970, c. C-41, s.6, reworded to become s.12 of the Customs Tariff Act, S.C. 1987, c.49 (R.S.C. 1985, c.41, (3rd Supp.)).

[100]Neither did it say that the quantity produced had to actually enter into Canadian consumption, rather than being exported. Although it does not appear from the Tariff Board declaration, all of the Vitamin A palmitate suggested for the local class or kind in the Ralston Purina appeal was apparently exported. Eaton and Chalmers (at p.109) state it was nevertheless argued that the requirement had been met. The Board actually used a wider measurement for the class or kind and referred the matter back to the Deputy Minister for the count. See Ralston Purina v. DMNRCE, App. 440, March 31, 1959, 2 TBR 109 (T.B.).

[101]St. John Shipbuilding v. DMNRCE, App. 742, May 1, 1964, 3 TBR 171 (T.B.), rev'd. [1965] 1 Ex.C.R. 802, 3 TBR 174 (Ex.Ct., Dec. 8, 1964), rev'd. DMNRCE v. St. John Shipbuilding, [1966] S.C.R. 196, 3 TBR 180, 55 D.L.R. (2d) 503 (S.C.C., Dec. 20, 1965).

qualitative one of whether the production was actually substantial; while one crane out of two would meet the 10% numerical test, it would not be substantial, according to the Exchequer Court. In reversing this judgment, the Supreme Court stated that the "substantial quantities" determination was a finding of fact and, even if it were considered a question of law, the Tariff Board did not err, since one is a substantial portion of two. Concerning the effect of s.6 supplemented by the Order in Council, the Court stated:

> It does not provide that if more than ten per centum is so made the goods shall of necessity be deemed to be of a class made in Canada. It might perhaps be error in law if the Board was of opinion that in the present case the production in Canada of one of the two cranes making up the class was not substantial production but considered itself bound by law to decide that it was; but I do not read the reasons of the Board as holding this.[102]

The Court maintained the idea of the two tests, at least nominally, but actually ran them together by reading the qualitative one comparatively. In the Court's decision, it was not a question of whether production of one was production in substantial quantities; rather, the Court considered whether one was a substantial portion of Canadian consumption. When this comparative reading is given, it is difficult to imagine a situation in which production could meet the 10% mark but still not be found to be a substantial

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[102] 3 TBR 185.

portion of a small market.[103] The question was a significant one for specialized products. In effect, the decision meant that there was really only one test -- the 10% mark.

b. Availability

In 1968, the made/not made distinction for general machinery imports was replaced with duty remission based on availability. Prior to the change, machines made in Canada were subject to duty at rates of 10% (British preference) and 22 1/2% (MFN), while machines not made in Canada were either free (British preference) or dutiable at 7 1/2% (MFN). Our major trading partners had complained that the rates for not made tariff items were unreliable and could move to the much higher rates unpredictably.[104] In the case of U.S. exporters, paying the MFN rate, this could mean an increase of 15% in the tariff.

With this programme, the rather significant item for general machinery imports no longer depended on whether domestic production supplied 10% of Canadian consumption. Remissions were at the discretion of the Governor in Council "on the recommendation of the Minister of Industry ...

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[103]In Algoma Steel v. DMNRCE, App. 517, Nov. 25, 1960, 2 TBR 204 (T.B.), production of one cut of a class or kind of two was also held to be sufficient for a made in Canada finding.

[104]Speech by Finance Minister Drury on introducing the change, House of Commons, Debates, Dec. 12, 1967, pp. 5329, 5331.

whenever he considers that it is in the public interest and that the goods are not available from production in Canada".[105] Importers would submit remission applications to the Minister, who would be assisted in the decision by the Machinery and Equipment Advisory Board. It was intended that the changes would remove the whole process from Tariff Board review and the court system. Decisions were to be made "on a practical basis rather than the present legalistic and formal approach."[106] The removal of the 10% threshold also meant that Canadian producers could be protected even before they had gained an established share in the market.

Administration of the programme underwent a significant change in 1986 with adoption of the Duties Relief Act,[107] which has now become part of the Customs Tariff Act. In the new system, imports are duty-free if they are on a list of machinery not available from Canada which is established by the Minister of National Revenue. In preparing the list, the Minister is to "have regard to" the following criteria:

> (a) whether a manufacturer has, within his normal operational framework, the full range of technical and physical capabilities necessary for production in Canada of machinery and equipment reasonably equivalent to the relevant machinery and equipment; and

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[105]Item 42700-1, as adopted in S.C. 1968, c.12, Schedule B.

[106]Finance Minister Drury, House of Commons, Debates, Dec. 12, 1967, p.5331.

[107]Duties Relief Act, S.C. 1986, c.29, rep. S.C. 1987, c.49 (R.S.C. 1985, c.41 (3rd Supp.)).

> (b) whether a Canadian manufacturer has so produced machinery and equipment as to demonstrate a production competence reasonably equivalent to that required to produce the relevant machinery and equipment.[108]

For goods which are not on the list, an importer can still apply for remission under s.76 of the Customs Tariff Act, submitting evidence "satisfactory to the Minister" that the goods are not available from production in Canada according to the same criteria.

The statutory criteria omit several aspects of the previous class or kind not made in Canada standard. There is no elaboration of what would make goods "reasonably equivalent" to imported goods. It is not clear whether the suitability of goods for their particular end use will affect the determination of equivalence. There is no measurement against the domestic market; one manufacturer is sufficient. It is not clear how extensive local activity must be to count as manufacturing or production. For goods which are not on the Minister's list, the burden of proof seems to be on the applicant. Even if the importer wanted to challenge the Department's count, the remedy would be only in administrative law for improper exercise of discretion. It would be difficult to obtain the same full discussion of criteria that the appellant was able to initiate before the Tariff Board in

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[108]Customs Tariff Act, S.C. 1987, c.49 (R.S.C. 1985, c.41 (3rd Supp.)), s.75(3).

the North Sailing appeal.[109]

The statutory criteria are supplemented by administrative guidelines in Customs Memorandum D8-5-1, Machinery Program, April 1, 1991. Paragraph 5 of the Memorandum repeats the statutory criteria which show "proven capability" of a manufacturer, and states that goods are deemed available if one manufacturer has such proven capability for goods which are reasonably equivalent "insofar as their range of physical qualities, operational characteristics and efficiency are concerned." With these added details, the statutory criteria and administrative guidelines taken together are a slightly amended version of the administrative definition of "availability" in use since 1968.[110] There is thus a long administrative history of interpretation of the standard but it has not produced precedents in the public domain. The list of goods not available in Canada helps to resolve uncertainty and facilitates administration for many import transactions.

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[109]North Sailing v. DMNRCE, Apps. 2466 etc., Dec. 12, 1986, 11 TBR 583, 13 CER 128 (T.B.). In Terochem v DMNRCE, App. 2401, May 28, 1986, 11 TBR 223, 11 CER 319 (T.B.) and in Fisher Scientific v. DMNRCE, App. 2650, Nov. 2, 1987, 12 TBR 457, 15 CER 114 (T.B.), the Deputy Minister had agreed that goods were not available from production in Canada. Without that agreement, it is unlikely that the appellant would have succeeded in either appeal.

[110]Department of Industry, Trade and Commerce, Machinery Program, Supply and Services, 1976, pp.2-3; Departments of Regional Industrial Expansion, Revenue Canada, Finance, Machinery Program, undated (mid 1980's), p.1. The definition is drawn from the speech of Finance Minister Drury when the machinery remission programme was introduced: House of Commons, Debates, Dec. 12, 1967, p.5331.

For anyone wanting more detail on application of the standard, however, the situation is less clear than under the previous class or kind not made in Canada standard.

IV. Harmonized System

Duty remission based on availability in Canada applies to the general machinery programme under s.73 ff. of the Customs Tariff Act, to the automotive machinery programme under s.79.1 ff., to machinery on the Free Trade list under s.75.1 and to the statutory concession for scientific apparatus to be employed in education and research under Code 1760. The availability standard for the general machinery programme is outlined in the previous section. The standard for automotive machinery is similar, with the addition of a further criterion: "whether an order ... if placed with a Canadian manufacturer at the earliest practicable time, could reasonably be or have been met within the required or actual delivery time" (s.79.3(c)).[111] The list for machinery and equipment entitled to the U.S. Tariff is established pursuant to Annex 401.6 of the Free Trade Agreement.[112] The standard for scientific apparatus under Code 1760 is much like the

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[111]This is also a long-established programme, previously under Order in Council P.C. 1973-1744. See Tariff Board, Reference 157, Tariff Items Covering Goods Made/Not Made in Canada, Phase II, Appraisals by the Staff, December 1984, pp.272-74.

[112]See Revenue Canada, Customs and Excise, Relief for Machinery and Equipment Entitled to the Benefit of the United States Tariff, Memorandum D8-5-2, June 29, 1990.

standard in s.75(3), except that it requires actual production of the reasonably equivalent goods.[113]

These are not the only customs duty reduction programmes in effect. There are several other significant programmes -- for goods used as materials in Canadian manufactures (s.68(1)(a), s.69(c)), for chemicals and plastics (s.68(1)(b)), for motor vehicles (s.62), for parts of certain machinery and equipment (s.101).[114] As well, there are duty

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[113] Apparatus, utensils and instruments are not available if "no manufacturer (a) has, within his normal operational framework, the full range of technical and physical capabilities necessary for production in Canada of apparatus, utensils or instruments reasonably equivalent to those for which entry ... is sought, and (b) has produced in Canada apparatus, utensils or instruments reasonably equivalent to those for which entry ... is sought." This concession is based on previous tariff item 69605-1, which was moved to an availability standard in 1981 following Tariff Board, Reference 155, Exemption for Duties for Certain Institutions and Goods, 1978 (see Tariff Board, Report I, p.14). The EEC has had a similar remission programme for scientific apparatus in the absence of Community production of equivalent scientific value. See: Universität Stuttgart, Case 303/87, [1989] E.C.R. 705; Nicolet Instrument, Case 43/87, [1988] E.C.R. 1557; Nicolet Instrument, Case 232/86, [1987] E.C.R. 5025; Universität Bielefeld, Case 164/86, [1987] E.C.R. 4973; Control Data Belgium, Case 13/84, [1987] E.C.R. 275; Nicolet Instrument, Case 203/85, [1986] E.C.R. 2049; Land Niedersachsen, Case 51/84, [1985] E.C.R. 2191; Deutsche Forschungs- und Versuchsanstalt für Luft- und Raumfahrt, Case 81/84, [1985] E.C.R. 1277; Goethe-Universität, Case 4/84, [1985] E.C.R. 991; Nicolet Instrument, Case 30/84, [1985] E.C.R. 771; Nicolet Instrument, Case 6/84, [1985] E.C.R. 759; Gesamthochschule Duisburg, Case 234/83, [1985] E.C.R. 327. See also United States Tariff Schedule, Chapter 98, subheading 9810.00.60.00.

[114] Customs Duties Reduction or Removal Order, 1988, SOR/88-73, P.C. 1987-2738 of Dec. 31, 1987, 1988 Canada Gazette Part II p.631; Codes 2000 to 2019 Drawback Regulations, SOR/88-494, P.C. 1988-2157 of Sept. 22, 1988, 1988 Canada Gazette Part II p.4184; Chemicals and Plastics Duties Reduction or Removal Order, 1988, SOR/88-74, P.C. 1987-

reduction orders which are time-and region-specific for imports of fruit and vegetables pursuant to Supplementary Note 2(a) to Chapter 7 and Supplementary Note 4(a) to Chapter 8 of the tariff.[115]

The presence of these varied remission programmes indicates that Canadian customs administration has not been limited to factors apparent on physical observation of goods at the time of entry. There is a tradition of close attention to the domestic commercial context, mostly from a time when tariff rates were higher than their current levels and the tariff a more significant element of economic policy. The machinery remission programme is a good example of this administrative effort. Memorandum D8-5-1 contains very specific lists of machinery and equipment available or not available in Canada, as well as named Canadian manufacturers capable of producing it. Management at this level of detail is itself a formidable bureaucratic task.

The machinery programme thus involves detailed

2737 of Dec. 31, 1987, 1988 Canada Gazette Part II p.750; Motor Vehicles Tariff Order, 1988, SOR/88-71, P.C. 1987-2733 of Dec. 31, 1987, 1988 Canada Gazette Part II p.615; Automotive Parts Tariff Removal Order, 1988, SOR/89-36, P.C. 1988-2804 of Dec. 22, 1988, 1989 Canada Gazette Part II p.262; Machinery and Equipment Parts Remission Order, SOR/88-82, P.C. 1987-2746 of Dec. 31, 1987, 1988 Canada Gazette Part II p.844.

[115]These appear in Revenue Canada, Customs and Excise, B-Memoranda Series. Duties may also be remitted under s.23 of the Financial Administration Act, R.S.C. 1985, C.F-11. See, for example, Automotive Machinery and Equipment Remission Order, 1990, S1/90-85, P.C. 1900-1366 of June 28, 1990, 1990 Canada Gazette Part II p.3067.

information on the Canadian economy, but it is not reliable as a statistical survey. There can be many reasons why a Canadian manufacturer would not register its machinery production capability. The customs duty protection may not be significant. The manufacturer may not want to risk annoying potential customers by forcing them to pay increased duties.[116] The programme generates a great deal of information, but the information is not necessarily complete.

The machinery remission programme can be criticized for its lack of predictability and transparency. With current levels of tariff protection, however, our major trading partners are not likely to have much interest in negotiating for changes. The greatest pressure for reform is likely to be domestic. It is worthwhile asking whether the administrative effort is currently justified and whether this is the best way to provide assistance to selected economic sectors.

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[116]Manufacturers applying for duty remission on production parts not otherwise exempt are required to register as Canadian manufacturers for the end product: Revenue Canada, Customs and Excise, Machinery Program, Memorandum D8-5-1, April 1, 1991, paragraph 19(b).

CHAPTER 8

Interpretation

I. Literal Method

II. Systematic Method

III. Purposive or Teleological Method

IV. Time

V. Other interpretations

VI. Bilingual interpretation

This chapter examines general rules of statutory interpretation and their application to the customs tariff. The organization of chapter headings is based on Professor Pierre-André Côté's text, Interprétation des lois.[1]

I. Literal Method

The literal or grammatical method of interpretation concentrates on the surface meaning and syntax of words viewed in isolation from surrounding words and from other provisions. Emphasis is on the exact language used and on any specific definitions that may be given. The interpreter is to look for

[1]Pierre-André Côté, Interprétation des lois, 2nd ed. (Cowansville, Quebec: Yvon Blais, 1990) ("Côté"). The first edition of this work, published in 1982, has been translated into English: Pierre-André Côté, The Interpretation of Legislation in Canada, trans. K.Lippel, J.Philpot, B.Schabas (Cowansville: Yvon Blais, 1984).

the clear or plain meaning of the words, without additions or deletions. If a tariff item says, for example, that it excludes woven fabrics containing 5% or less, by weight, of synthetic textile yarns or filaments, then the item excludes woven fabrics which have absolutely no synthetic textile yarns or filaments, since 0% is less than 5%.[2]

The method cannot be pushed to extremes. In the Bates appeal, for example, the Tariff Board held that a manual office numbering stamp was not a "printing press" even though it might come within certain dictionary definitions of that term.[3] In Holdsworth, an early appeal, the Board determined that goods were "grinding ... stones ... manufactured by the bonding together of either natural or artificial abrasives" even though the stones in question contained only one abrasive, an aluminum oxide; there was evidence to show that grinding stones seldom if ever contained more than one abrasive.[4]

As applied to customs tariff classification, the literal method manifests itself mainly as the eo nomine or naming

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[2]Federal Belting and Asbestos v. DMNRCE, App. 310, Feb. 2, 1954, 1 TBR 167 (T.B.).

[3]Bates Manufacturing v. DMNRCE, App. 1567, Aug. 27, 1980, 7 TBR 142, 2 CER 220 (T.B.).

[4]T.M. Holdsworth v. DMNRCE, App. 615, Nov. 27, 1961, 2 TBR 311 (T.B.). The question could also have been solved by reference to the Interpretation Act, R.S.C. 1952, c. 158, s.31(1)(j): "words in the singular include the plural, and words in the plural include the singular" (now Interpretation Act, R.S.C. 1985, c.I-21, s.33(2)).

principle, which is examined at some length in a separate chapter. This section deals with two additional questions not discussed in that chapter: punctuation and the treatment of statutory definitions.

The traditional British approach to punctuation was that it should be disregarded since it was not usually part of the statute when enacted.[5] The more modern view, particularly in Canada, is that punctuation forms part of the official statutory text and can be considered in interpretation.[6] The use of punctuation seems to be generally presumed in the legal profession,[7] although it would likely be less significant than the actual wording.

The use of punctuation in tariff classification decisions is discussed in the Exchequer Court judgment in the Metropolitan Life appeal, but is not entirely endorsed in that

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[5]Maxwell on the Interpretation of Statutes, 12th ed., by P.St.J.Langan (London: Sweet & Maxwell, 1969), pp.13-14; Craies on Statute Law, 7th ed., by S.G.G. Edgar (London: Sweet & Maxwell, 1971) ("Craies"), pp.197-99.

[6]Cross on Statutory Interpretation, 2nd ed., by J.Bell and G.Engle (London: Butterworths, 1987), pp.130-31; Côté, pp.67-69; E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) ("Driedger"), pp.134-38.

[7]Professor Cameron Harvey reports that he sent a questionnaire to about 280 superior court judges, legislative counsel and legislative clerks across Canada. On the questionnaires returned, 82 answered "Yes" and 9 answered "No" to the following question: "Is it your understanding that judges currently can base a judicial interpretation of a statute on, inter alia, the way in which the statute is punctuated?". Cameron Harvey, "The Significance of Punctuation in Statutory Interpretation," (1971) 4 Manitoba L.J. 354 at 357.

judgment.[8] The appeal concerned classification of rate books for insurance agents. The appellant said they should be "books... n.o.p." for the English version and "books...in any other than the English language" for the French version. The Department argued successfully before both the Board and the Exchequer Court that the goods should be classified instead as "price books, catalogues and price lists" since they were largely devoted to setting out premium rates for various types of insurance. Part of the appellant's argument concerning the French version of the book was that the item suggested by the Department was actually an n.o.p. one. The full paragraph of that item was as follows:

> Advertising and printed matter, viz.: --
> Advertising pamphlets, advertising show cards, illustrated advertising periodicals; price books, catalogues and price lists; advertising almanacs and calendars; patent medicine or other advertising circulars, fly sheets or pamphlets; advertising chromos, chromotypes, oleographs or like work produced by any process other than hand painting or drawing, and having any advertisement or advertising matter printed, lithographed or stamped thereon, or attached thereto, including advertising bills, folders and posters, or other similar artistic work, lithographed, printed or stamped on paper or cardboard for business or advertisement purposes, n.o.p.

The appellant argued that "n.o.p." should apply to the whole item, including "price books, catalogues and price lists," thus making this subordinate to "books... in any other than

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[8] Metropolitan Life Insurance v. DMNRCE, Apps. 765, 782, March 23, 1965, 3 TBR 213 (T.B.), aff'd. [1966] Ex.C.R. 1112, 3 TBR 216 (Ex.Ct., Jan. 25, 1966).

the English language," which was not qualified by n.o.p. The Department's reply was that the effect of the n.o.p. stopped at the last semicolon and applied only to "advertising chromos, chromotypes ..." and everything after that in the paragraph.

Mr. Justice Jackett decided in favour of the Department, mainly because of the historical development of the items in question. Concerning the argument based on punctuation, he stated that the Department's analysis received some support from other tariff items in which "n.o.p." was repeated where it was to apply to successive named goods, but that usage throughout the tariff was not constant:

> It is, I think, possible to find many quite inconsistent formulae followed in the construction and punctuation of the various items in that Schedule. This is not surprising when the history of this document is examined and it is appreciated that it is the product of many many different brands of draftsmanship over a period of many decades. In these circumstances, I doubt the soundness of drawing conclusions from a minute examination of the form of an item and a comparison of it with other items without regard to the relevant history of the amendment of the Schedule.[9]

The item which was cited by the Department to show n.o.p. being repeated to apply to successive named things did not actually use semicolons for its divisions, but was as follows:

> Photographs, chromos, chromotypes, artotypes, oleographs, paintings, drawings, pictures, decalcomania transfers of all kinds, n.o.p., engravings or prints or proofs therefrom and similar works of art, n.o.p., blue prints, building plans,

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[9] 3 TBR at 223-24

maps and charts, n.o.p.

With drafting this inconsistent, it is no wonder Mr. Justice Jackett did not want to place too much reliance on punctuation.[10] Drafting practice has become much more consistent since that time, however, and punctuation is now likely to be a more secure guide.[11]

Punctuation affected the classification of sewing patterns in the McCall Pattern appeal, in which the Board used an ejusdem generis analysis to limit general words at the end of a list: "other printed matter, n.o.p.". The Board reasoned that this should be restricted to other printed matter of the sort described by previous words on the list (bank notes and commercial forms) since it was separated from the list by only a comma, rather than a semicolon. The patterns, therefore, were not classified under this item but rather as manufactures of paper in an item which covered "papeteries, envelopes, and

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[10]For a more modern decision, which does not treat the catalogues and price lists phrase as n.o.p., see Cartanna International v. DMNRCE, App. 2122, Jan. 23, 1986, 11 TBR 54, 11 CER 1 (T.B.). In a declaration in 1978, however, the Board seems to have accepted that the whole item was "n.o.p.": Les Publications Etrangères v. DMNRCE, App. 1306, 1320, June 26, 1978, 1978 Canada Gazette Part I p.5375 (T.B.) at 5380.

[11]Punctuation was part of the reasoning of the Federal Court of Appeal in Gallery Alberta v. DMNRCE, 18 CER 69 (F.C.A., Oct. 7, 1988), aff'g. App. 2243, Jan. 30, 1986, 11 TBR 71, 11 CER 14 (T.B.). See also: Benson & Hedges v. DMNRCE, App. 491, Jan. 2, 1959, 2 TBR 173 (T.B.); Denbyware v. DMNRCE, App. 1304, April 5, 1978, 6 TBR 620 (T.B.) at 631-32, aff'd. F.C.A., May 15, 1979 (see 8 TBR 158), leave to appeal to S.C.C. denied 31 N.R. 172; Ener-Gard v. DMNRCE, App. 2524, Dec. 2, 1987, 12 TBR 531, 15 CER 180 (T.B.); General Printing v. DMNRCE, Apps. 2826 etc., Sept. 8, 1988, 17 CER 237 (T.B.).

all manufactures of paper, n.o.p.".[12] Practice is not entirely uniform, and punctuation occasionally seems to be ignored.[13] The better approach, however, would be to give it some weight in interpretation, particularly after adoption of the Harmonized System in which drafting is quite careful and consistent.

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[12]McCall Pattern v. DMNRCE, App. 1093, July 29, 1975, 1976 Canada Gazette Part I p.2085 at 2089 (T.B.). Even if punctuation is used as a guide, the scope of "n.o.p." qualifiers can be problematic. In Canado Industrial v. DMNRCE, App. 1587, Aug. 10, 1981, 7 TBR 415, 3 CER 253 (T.B.), the Board treated the "n.o.p." in this item as applying only to the last words rather than the whole item, so that the choices were: "papeteries" / "envelopes" / "all manufactures of paper, n.o.p.". While this approach may seem logical when this is the complete item (as it was here), the interpretation could easily be different if the same words were only part of a longer tariff item, separated from the rest of the item by semicolons. In that case, it would be just as likely that the "n.o.p." was intended to apply to papeteries and envelopes as well.

Similar problems of scope are, of course, inherent in language and do not depend solely on punctuation. The notorious pair "and/or" made an appearance in East West Fur v. DMNRCE, App. 1484, Oct. 24, 1980, 7 TBR 194, 2 CER 288 (T.B.). The Board interpreted an item for "degras and grease for stuffing or dressing leather" as if it covered "degras" / "grease for stuffing or dressing leather." See Driedger, pp.15-18.

[13]Harold Griffin v. DMNRCE, App. 2118, July 23, 1984, 9 TBR 305, 7 CER 25 (T.B.), dealing with the classification of dehydrated green peppers. The Board confirmed their classification under an item which covered "vegetables, whole, cut or otherwise reduced, when dried, desiccated or dehydrated; dried, desiccated or dehydrated potatoes or mushrooms, ... for use in the manufacture of soups or soup mixes; ...". The Board skipped over the first semicolon in its declaration and stated that the goods were "vegetables cut and dried, for use in the manufacture of soup or soup mixes."

Concerning definitions, the federal Interpretation Act[14] sets out the following provisions:

> 15.(1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.
>
> (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
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> (a) as being applicable only if a contrary intention does not appear; and
>
> (b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

Repeating the substance of s.15(2)(b), the Customs Tariff[15] confirms the link between it and the Customs Act:

> 3.Unless otherwise provided, words and expressions used in this Act and defined in subsection 2(1) of the Customs Act have the meanings assigned to them by that subsection.

It will be noted that both sections, and especially the Interpretation Act, assume that a definition might not be mandatory, but might be varied or set aside by a contrary intention or some other provision. Professor Côté confirms that this is the normal situation for statutory definitions.[16] Although the definition is usually applicable, there may be indications to show that it is sometimes not mandatory.

In tariff classification decisions, the definition which raised this problem on a number of occasions was the

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[14]R.S.C. 1985, c.I-21.

[15]R.S.C. 1985, c.41 (3rd Supp.). The Customs Act is R.S.C. 1985, c.1 (2nd Supp.).

[16]Côté p.62; to the same effect, see Craies p.216.

definition of "vehicle" which appeared in the Customs Act until its amendment in 1986. The definition was as follows:

> "vehicle" means any cart, car, wagon, carriage, barrow, sleigh, aircraft or other conveyance of any kind whatever, whether drawn or propelled by steam, by animals, or by hand or other power, and includes the harness or tackle of the animals, and the fittings, furnishings and appurtenances of the vehicle[17]

In Prairie Equipment, an early appeal, the Tariff Board reluctantly found excavating equipment to be a vehicle within the definition and recommended that the government restrict its wide application.[18] When no amendment was forthcoming, the Board decided in General Supply that a power shovel was machinery rather than a motor vehicle, and the Exchequer Court confirmed that the "vehicle" definition did not apply.[19] The Court said that the motor vehicle item did not cover everything capable of moving from one location to another, but only "conveyances" designed for the purpose of carrying goods or passengers. The definition was still causing problems in 1975, in the J.H. Ryder appeal concerning large cranes used for handling bulky machinery, pipes and pre-fabricated

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[17]Customs Act, R.S.C. 1970, c.C-40, s.2(1), rep. S.C. 1986, c.1.

[18]Prairie Equipment v. DMNRCE, App. 247, Jan. 9, 1952, 1 TBR 56 (T.B.).

[19]General Supply v. DMNRCE, App. 269, Sept. 16, 1952, 1 TBR 76 (T.B.), aff'd. [1954] Ex.C.R. 340, 1 TBR 81 (Ex.Ct., May 8, 1954). The decision was fore-shadowed by an excise tax decision: J.H.Ryder v. DMNRCE, App. 262, June 24, 1952, 1 TBR 75 (T.B.).

housing. The Board in that decision allowed the appeal and determined that the cranes were machinery rather than motor vehicles as the Department had maintained. The Board commented on the wide definition of "vehicle" which could be traced back in the Customs Act at least as far as 1883. The definition was wide apparently to cover any possible means of smuggling goods across the border; it was not intended as a definition of what the tariff item for motor vehicles would include.[20] There were thus sufficient indications in the context to show that the ordinary understanding of those words should apply and that the definition was not mandatory.

In Ontario Metal, the appellant also tried to maintain that a statutory definition was not mandatory, but the argument failed at the Federal Court of Appeal level. The definition in question was as follows:

> "wire"
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> (a) when applied to copper or copper alloys containing fifty per cent or more by weight of copper means

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[20] J.H. Ryder v. DMNRCE, App. 1095, July 28, 1975, 6 TBR 278 (T.B.). See also: Burrard Amusements v. DMNRCE, App. 524, Nov. 1, 1960, 2 TBR 210 (T.B.); Canadian Reynolds v. DMNRCE, App. 967, Jan. 17, 1972, 1972 Canada Gazette Part I p.1067 (T.B.); Mont Sutton v. DMNRCE, App. 983, Feb. 29, 1972, 1972 Canada Gazette Part I p.1927 (T.B.); Massot Nurseries v. DMNRCE, App. 1073, July 17, 1974, 1975 Canada Gazette Part I p.335 (T.B.); J.R. Macdonald v. DMNRCE, App. 1493, Sept. 17, 1980, 7 TBR 156, 2 CER 228 (T.B.); Universal Go-Tract v. DMNRCE, App. 1683, July 20, 1981, 7 TBR 392, 3 CER 239 (T.B.), aff'd. DMNRCE v. Universal Go-Tract, 4 CER 381 (F.C.A., Oct. 29, 1982); AG Marketing v. DMNRCE, App. 2309, Oct. 22, 1985, 10 TBR 228, 10 CER 105 (T.B.); Magnatrim v. DMNRCE, App. 2841, Sept. 22, 1988, 18 CER 13 (T.B.).

> (i) a drawn, non-tubular product of any cross-sectional shape, in coils or cut to length and not over 0.50 inch in maximum cross-sectional dimension ...[21]

The goods were 62% copper and were less than one-half inch in diameter, but in the trade they were known as rods, rather than wire. By a majority, the Board followed trade usage and classified the goods as brass rods, stating that the definition only set minimum conditions for goods to qualify as wire, but did not mean that all goods which qualified were necessarily wire. The Federal Court of Appeal disagreed, however, and found the definition to be mandatory.[22] The distinction between this case and the vehicle definition is not straightforward, but may have something to do with the presence of ambiguity in the ordinary meanings of terms. The goods in question in Ontario Metal could be either wire or rods in ordinary usage, while it is unlikely that anyone would automatically call a huge crane a motor vehicle. The vehicle definition also had its primary application in the prosecution of smuggling. It is difficult to see another purpose for the definition of copper wire in the Customs Tariff.

Shortly after the Tariff Board decision in Ontario Metal,

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[21]Customs Tariff Act, R.S.C. 1985, c.C-54, s. 2; rep. Customs Tariff, R.S.C. 1985, c.41 (3rd Supp.).

[22]Ontario Metal v. DMNRCE, Apps. 2076 etc., July 5, 1984, 9 TBR 284, 7 CER 10 (T.B.), rev'd. DMNRCE v. Ontario Metal, 10 CER 213, 65 N.R. 66 (F.C.A, Dec. 13, 1985), leave to appeal denied 65 N.R. 244 (S.C.C., Feb. 24, 1986). The Tariff Board had followed one of its earlier decisions: Pronto Precision v. DMNRCE, App. 694, Sept. 30, 1963, 3 TBR 103 (T.B.).

the Board again followed trade usage which contradicted a statutory definition. The goods in Craftsmen Distributors were classified as "rovings" of yarn despite the appellant's argument that they met the statutory definition of "slivers." The Board reasoned that the goods were described in both tariff items and that the "rovings" item was more specific.[23] After the Court of Appeal decision in Ontario Metal, this decision may be open to some question. It is quite possible for trade usage to supplement or refine a statutory definition, especially if the tariff item is directed toward a particular industry.[24] When, however, trade usage contradicts the definition, the approach taken in Craftsmen is at variance with the views of the Federal Court of Appeal.

The relationship between trade or ordinary meaning and the meaning of a statutory definition can also involve the question of whether the definition was intended to be exhaustive. An exhaustive definition, normally indicated in English by the word "means", is complete in itself and replaces any other understanding of the terms. A non-exhaustive definition, normally indicated in English by the word "includes", relies on outside meaning in trade or ordinary vocabulary and merely adds to or clarifies that

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[23]Craftsmen Distributors v. DMNRCE, App. 1997, July 11, 1984, 9 TBR 289, 7 CER 13 (T.B.).

[24]Graphic Controls v. DMNRCE, Apps. 2272, 2273, Nov. 12, 1985, 10 TBR 262, 10 CER 131 (T.B.).

outside meaning.[25] The issue arose in the Sonolab classification appeal, where a tariff item covering "motion picture editing equipment, namely: film editing machines, film splicers, film synchronizers, film viewers, rewinds" was seen as providing an exhaustive list which could not be expanded to cover other types of motion picture editing equipment not already named.[26] A definition was also seen as exhaustive in the Uddeholm Steels appeal, despite the fact that it used the word "includes." The definition was for the term "hot-rolled" when applied to steel bars and rods. It provided that "hot-rolled ... includes ... bars, rods, ... that have been annealed, tempered, pickled, limed or polished." The Tariff Board interpreted the list of processes as complete and classified the goods in issue, which had also been rough-machined, under an item for bars and rods further processed than hot-rolled.[27]

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[25]Côté pp.62-63; Driedger pp.18-22; Craies pp.212-16; Maxwell pp.270-71; Cross pp.117-19; Louis-Philippe Pigeon, Rédaction et interprétation des lois, 3ième éd., Gouvernement du Québec, 1986, ("Pigeon") pp.61-62 (published in English as Louis-Philippe Pigeon, Drafting and Interpreting Legislation, trans. R.C. Meredith et al, Carswell, 1988).

[26]Sonolab v. DMNRCE, Apps. 954, 971, May 27, 1971, 1971 Canada Gazette Part I p.2994 (T.B.). See further: Norgay v. DMNRCE, App. 1805, Dec. 20, 1982, 8 TBR 442, 5 CER 72 (T.B.); Pelorus v. DMNRCE, App. 2618, Oct. 15, 1987, 12 TBR 343, 15 CER 1 (T.B.).

[27]Uddeholm Steel v. DMNRCE, App. 1290, June 8, 1978, 6 TBR 680 (T.B.)

II. Systematic Method

The systematic method of interpretation examines the statutory provision in the context of surrounding words, in the same or other statutes, on the presumption of coherence in the total legislative message. It presumes that usage is consistent in each statute and also as between related statutes. Concerning other statutes, this method is an expansion of s.15(2)(b) of the Interpretation Act[28] beyond statutory definitions. The connection to other enactments concerning the same subject-matter is not limited to definitions, but is presumed to have relevance for all provisions.

This method of interpretation is still literal in the sense that it operates at the level of the words used. The context is still that of the statutory provisions. This is not yet the approach advocated in other chapters, in which interpretation is to reflect the commercial context in which the tariff is applied. It is argued in those chapters that matters of application and, in particular, the use of goods, are important factors deserving attention in classification decisions. The systematic or contextual method discussed in this part does not extend that far, but deals only with the context of statutory language itself.

This part first examines the application of the ejusdem

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[28]R.S.C. 1985, c.I-21.

generis principle under which words are interpreted as part of a kind or group. Ejusdem generis can be seen as an expression of the more general noscitur a sociis idea, which says that words are known in the context of associated words. Further classification decisions are then examined, dealing with the context of other words in the same item, the influence of other tariff items, and finally the use of other statutes.

The ejusdem generis principle is normally used to restrict the meaning of general words at the end of a list. If the list, for example, is "automobiles, vans, trucks and other vehicles", the principle could apply to say that airplanes are not included as "other vehicles" since the list covers surface vehicles only.[29] Ejusdem generis was the basis of the Department's unsuccessful argument in the Ersco appeal over the classification of firebricks. The Department said that the bricks did not qualify as "for use exclusively in the construction or repair of a furnace, kiln, or other equipment of a manufacturing establishment" since they were to be used as a lining for abrasion resistance rather than for heat resistance. The Department argued that "other equipment" should be interpreted ejusdem generis with "furnace" and "kiln" to refer only to equipment involving high temperatures. The Tariff Board, however, decided that the list did not

[29]Côté p.295.

actually establish this narrow group or genus, since the Department was unable to suggest anything other than furnaces and kilns which could belong to the group. "Other equipment" therefore had to have a wider interpretation. The goods in issue thus qualified under the item and the appeal was allowed.[30]

In other classification decisions, ejusdem generis applied in the Vaco-Lynn appeal to restrict "other shapes or sections" to primary shapes not committed to a particular end use; moulded plastic screw-driver handles therefore did not qualify.[31] It was used in the J.F. Merrall appeal to determine that cuttlefish and octopus did not qualify as "mackerel, herring, salmon and all other fish" since they were not the same kind of fish as those listed.[32] It applied as well in the Rose Country appeal which decided that packaging was not covered under an item which referred to nuts "preserved in salt, brine, oil, or any other manner."[33]

The principle is not a hard-and-fast rule which applies

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[30]Ersco Canada v. DMNRCE, App. 1571, Aug. 11, 1981, 7 TBR 432, 3 CER 263 (T.B.).

[31]Vaco-Lynn v. DMNRCE, App. 230, March 16, 1951, 1 TBR 43 (T.B.).

[32]J.F. Merrall v. DMNRCE, App. 539, May 1, 1961, 2 TBR 227 (T.B.).

[33]Rose Country Snack Foods v. DMNRCE, App. 1413, June 28, 1979, 8 TBR 871, 1 CER 203 (T.B.). Concerning the same tariff item, see Douglas Hoy Vending v. DMNRCE, App. 1178, March 28, 1977, 6 TBR 435 (T.B.).

to every list terminating in general words, but only a technique or clue to possible meaning. In Timmins Aviation, for example, the Board declined to make an ejusdem generis interpretation of "baths, bathtubs, basins, closets, closet seats and covers, closet tanks, lavatories, urinals, sinks and laundry tubs of earthenware, stone, cement, clay or other material, n.o.p." to exclude airplane toilets made of aluminum and plastic. The context of the rest of the item was sufficient to show that it was more specific than the competing item for "parts of aircraft". "Other material" therefore did not have to be interpreted narrowly, but could cover the goods in issue.[34]

The words of an item may be interpreted together as a group even when it is not a question of restricting the scope of general words in the classic ejusdem generis formulation. In the McCall Pattern appeal, printed dressmaker patterns were classified as manufactures of paper rather than under an item which listed "drawings" since that item was mainly for works of art.[35] In Lewis Specialties, "coated paper" was interpreted in a narrow trade sense because the rest of the

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[34]Timmins Aviation v. DMNRCE, App. 764, April 2, 1965, 3 TBR 212 (T.B.). It was pointed out as well as closet seats and covers are seldom made of earthenware, stone, cement or clay.

[35]McCall Pattern v. DMNRCE, App. 1093, July 29, 1975, 1976 Canada Gazette Part I p.2085 (T.B.).

item listed similar trade terminology covering fine papers.[36] The decisions may refer to this approach as an application of the ejusdem generis principle. In more strict terminology, this may be treated instead as the noscitur a sociis principle applied in one tariff item.[37]

The noscitur a sociis idea of meaning being drawn from a word's surroundings can function for related tariff items, especially if they appear in a group in the customs tariff. This was the approach taken by the Federal Court of Appeal in the Adams Brand appeal, concerning the classification of chewing gum compounds. At the Tariff Board, the appellant was successful in having the goods classified as "blends consisting wholly or in chief part of gums" rather than as a

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[36] Lewis Specialties v. DMNRCE, App. 469, March 19, 1958, 2 TBR 151 (T.B.). See also Cloudfoam v. DMNRCE, App. 636, Jan. 30, 1963, 3 TBR 54 (T.B.). Context may not, of course, always be strong enough to affect interpretation. See the following, in which the words "textile manufactures" were given wide interpretation despite the presence of other provisions in the same item referring to "clothing, wearing apparel and articles made from woven fabrics": Imperial Tobacco v. DMNRCE, App. 1315, Jan. 19, 1979, 6 TBR 729, 1 CER 22, aff'd. [1980] 2 F.C. 164, 2 CER 75 (F.C.A., March 20, 1980); Feather Industries v. DMNRCE, App. 721, Jan. 14, 1964, 3 TBR 138 (T.B.).

[37] This is the usage followed by Professor Frederick Bowers in his text Linguistic Aspects of Legislative Expression (Vancouver: University of British Columbia Press, 1989), at pp.119-29, where he discusses examples of words attracting semantic features from their immediate surroundings. In one case, "floors" in the list "floors, steps, stairs, passages and gang ways" attracted the semantic feature "+ for passage" so that the statute in question prohibited obstructions only on that part of the floor where workers would walk back and forth: Bowers, p.120, discussing Pengelly v. Bell Punch [1964] 2 All E.R. 945.

chemical preparation.[38] The Federal Court of Appeal reversed, however, since the surrounding tariff items, all listed under the general category "gums",[39] referred only to natural vegetable or animal products, not to synthetic products. "Gums" therefore was not intended to have its ordinary meaning of chewing gum, particularly when the goods in question were composed of synthetic compounds to the extent of well over 50%.[40] Interpretation in this case used the meaning drawn from surrounding items.[41]

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[38]Adams Brands v. DMNRCE, Apps. 1485 etc., Feb. 26, 1981, 7 TBR 288, 3 CER 71(T.B.).

[39]Statutory headings are normally part of the legislative enactment. A general group title ("spirits, wines and other beverages") was considered in Canada Dry v. DMNRCE, App. 972, Nov. 15, 1971, 1972 Canada Gazette Part I p.577, but was not determinative. These titles should be distinguished from marginal notes, which are not officially part of the statute (Interpretation Act, R.S.C. 1985, c.I-21, s. 14.) For interpretation of the Harmonized System, it should be noted that the titles of Sections, Chapters and Sub-Chapters are not binding but are for ease of reference only (General Rule for Interpretation #1).

[40]DMNRCE v. Adams Brands, 7 CER 153 (F.C.A., April 6, 1984). On a preliminary procedural matter, see DMNRCE v. Adams Brands, 5 CER 344 (F.C.A., April 15, 1983). On reference back to the Tariff Board, the goods were classified under the item for chemical products and preparations: Adams Brands v. DMNRCE, Apps. 1485 etc., July 3, 1984, 9 TBR 280, 7 CER 7 (T.B.). See further: Kelco Specialty v. DMNRCE, App. 2129, Jan. 21, 1985, 10 TBR 10, 8 CER 191 (T.B.), rev'd. 13 CER 345 (F.C.A., March 2, 1987).

[41]See also the dissent in Camco v. DMNRCE, App. 2594, March 9, 1987, 12 TBR 149, 14 CER 51 (T.B.), aff'd. DMNRCE v. Camco, 18 CER 160 (F.C.A., Dec. 7, 1988). Presumed relationships of items cannot be pushed too far. In Stokes Seeds v. DMNRCE, App. 551, April 20, 1951, 2 TBR 236 (T.B.), the Tariff Board refused to adopt a reading which would have restricted the upper limit of an item for "field and garden

Sometimes meaning can depend on surrounding items through relationships of contrast and comparison. A comparison to other tariff items may show that the legislators were aware of another possible interpretation and intended to include it. On the other hand, the other items may show that the legislators were using words in a very precise sense and intended to cover only those interpretations specifically mentioned.

An example of narrow interpretation appeared in V.G.H. Fitzer Lumber, where lumber which had been tongued and grooved was not classified under an item for lumber "planed, dressed or jointed" because another nearby item referred to lumber "planed, dressed, jointed, tongued or grooved." The other item showed that the legislator intended each word to have a distinct meaning.[42] Narrow interpretation was also used in Accessories Machinery to exclude a limestone quarry from the term "mining operations", since a nearby item referred

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seeds ... in packages weighing not less than one ounce each" because of surrounding items which seemed to cover all field and garden seeds when in packages of more than one pound each. Such an interpretation would have assumed a certain logical plan in the elaboration of the items, but it would have involved adding words to the item in contravention of the literal principle.

[42]V.G.H. Fitzer Lumber v. DMNRCE, App. 417, May 9, 1957, 2 TBR 98 (T.B.).

separately to "mines, quarries, gravel and sand pits."[43] Wide interpretation was the result of comparison to another item in the Delf appeal, in which it was determined that "canned pork" included canned ham.[44] The Donald J. Norris appeal also involved a wide comparative interpretation, in which the word "guns" was held to cover pistols, and not just shotguns.[45]

A comparative interpretation involving other tariff items can also involve the maxim generalia specialibus non derogant, general provisions do not derogate from special provisions.[46] This idea of giving a priority place to the special provision was illustrated in a pair of appeals by the Underwood company, dealing with the fit between two items - one for "adding machines" and the other for "calculating machines." In the first appeal, a machine which could add and subtract was

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[43]Accessories Machinery v. DMNRCE, App. 525, July 12, 1961, 2 TBR 212 (T.B.). See also: Grinnell v. DMNRCE, App. 715, Oct. 30, 1963, 3 TBR 129 (T.B.). This approach was argued unsuccessfully by the Department in Imported Delicacies v. DMNRCE, App. 1541, Nov. 14, 1980, 7 TBR 207, 2 CER 302 (T.B.) at 212.

[44]J.P.Delf v. DMNRCE, App. 1061, Aug. 2, 1974, 1975 Canada Gazette Part I p.338 (T.B.).

[45]Donald J. Norris v. DMNRCE, App. 1432, Feb. 16, 1981, 7 TBR 272, 3 CER 62 (T.B.). See also: Tilechem v. DMNRCE, App. 1102, March 30, 1976, 1977 Canada Gazette Part I p.2810 (T.B.); Access Corrosion v. DMNRCE, App. 1965, March 23, 1984, 9 TBR 184, 6 CER 228 (T.B.); Garant v. DMNRCE, App. 2085, March 27, 1984, 9 TBR 190, 6 CER 223 (T.B.); Abitibi-Price v. DMNRCE, App. 2025, March 30, 1984, 9 TBR 199, 6 CER 244 (T.B.), aff'd. DMNRCE v. Abitibi-Price, 9 CER 204 (F.C.A., June 18, 1985).

[46]Côté p.338 ff.

classified under the item for adding machines, which was held to be specific; in the second appeal, a machine which could add, subtract and multiply was classified under the item for calculating machines. Without the principle that special items had priority over general items, both machines could have been "calculating machines" and the item for adding machines would have been left without content.[47]

Contextual interpretation can involve the relationship of tariff items to sections of the Customs Tariff Act and the Customs Act. In the Cargill Grain appeal, for example, a section of the Customs Act was cited in support of a determination that the word "syrups" in a tariff item referred only to the first stage of processing and not to a further product in which syrup was a component.[48] The link to the Excise Tax Act was also quite close, perhaps in part because the Tariff Board also dealt with those appeals. In some cases, the legislation could make a very direct connection, such as in the Delage appeal, where the goods would have been exempt from excise tax if they had been classified under

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[47]Underwood v. DMNRCE, App. 799, May 7, 1965, 3 TBR 275 (T.B.); Underwood v. DMNRCE, App. 831, June 30, 1966, 3 TBR 310 (T.B.).

[48]Cargill Grain v. DMNRCE, App. 1299, Feb. 28, 1978, 1978 Canada Gazette Part I p.3954 (T.B.).

certain listed tariff items.[49] Such direct references across statutes are provided for under s.41 of the Interpretation Act. They are usually interpreted quite strictly, as references to only the sections or parts of sections mentioned.[50]

Without such a direct reference, contextual interpretation involving other statutes should depend on a decision that those other statutes are in pari materia, relating to the same subject matter. The question has not been raised often in tariff classification appeals. The Department argued in the Degussa appeal that the Precious Metals Marketing Act, cited by the appellant, was not in pari materia, but the argument was unsuccessful and the alloys in

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[49]Albert Delage v. DMNRCE, App. 757, Sept. 28, 1964, 3 TBR 197 (T.B.). On the same provision, see R. v. Specialties Distributors, [1954] Ex.C.R. 535. The link to the Excise Tax Act was mentioned a number of times, both by litigants and by Tariff Board members. See: Benson & Hedges v. DMNRCE, App. 491, Jan. 2, 1959, 2 TBR 173 (T.B.); Tri-Hawk v. DMNRCE, App. 1213, April 26, 1977, 1978 Canada Gazette Part I p.837 (T.B.); Amarc Jewellery v. DMNRCE, App. 1191, April 27, 1977, 1978 Canada Gazette Part I p.652 (T.B.); Jutan International v. DMNRCE, App.2098, Aug. 14, 1984, 9 TBR 326, 7 CER 70 (T.B.)(Gorman dissent). A suggested link to excise tax was strongly rejected by the Canadian International Trade Tribunal in Sealand v. DMNRCE, App. 3042, July 11, 1989, 2 TCT 1149 (C.I.T.T.). A link to the income tax system, administered by the other division of the Department of National Revenue, was less common but sometimes mentioned: Muffin House v. DMNRCE, App. 2396, July 17, 1986, 11 TBR 315, 12 CER 43 (T.B.).

[50]In Graco Childrens Products v. DMNRCE, App. 1785, Nov. 29, 1982, 8 TBR 375, 5 CER 13 (T.B.), aff'd. 8 CER 44 (F.C.A., Oct. 1, 1984) however, the Tariff Board decided that a reference in the Anti-dumping Act to s.251(1) of the Income Tax Act also had to include s.251(2), in order to make sense of the definition of related persons.

question were classified as "gold" and "platinum" as the appellant had maintained.[51] When another statute is cited, it is often in connection with a decision about trade meaning, as was the case in Degussa. If the same trade is regulated by other federal legislation, it is difficult to see how that legislation would not be relevant. As well, it can also help an appellant to be in compliance with other legislation, such as the Motor Vehicle Safety Act, mentioned by the appellant in the Canadian Honda appeal.[52]

As with other tariff items, other statutes can be used as a source from which meaning is drawn.[53] As well, they can provide interpretations through relations of comparison and contrast. The Feeding Stuffs Act was used to support a wide interpretation of an item for dried grasses in the Reference .. as to Classification of Dehydrated Grasses.[54] In Antique

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[51]Degussa Canada v. DMNRCE, App. 2545, July 28, 1987, 12 TBR 279, 14 CER 235 (T.B.). See also Royal Canadian Mint v. DMNRCE, App. 2694, Dec. 30, 1987, 12 TBR 628, 15 CER 307 (T.B.).

[52]Canadian Honda v. DMNRCE, App. 1321, May 24, 1978, 6 TBR 666 (T.B.). The legislation in question was federal: Motor Vehicle Safety Act, R.S.C. 1970, Chap. 26 (1st Supp.).

[53]Jan K. Overwheel v. DMNRCE, App. 1254, Nov. 22, 1977, 6 TBR 561 (T.B.) at 570, where the Board referred to the Fish Inspection Regulations, even though it said they were not in pari materia. See also Concentrated Foods v. DMNRCE, App.2552, Sept. 15, 1987, 12 TBR 321, 14 CER 276 (T.B.).

[54]App. 493, Dec. 4, 1958, 2 TBR 175 (T.B.). See also: Philco Corp v. DMNRCE, App. 248, Nov. 3, 1951, 1 TBR 57 (T.B.); Jossal Trading v. DMNRCE, App. 1243, Oct. 25, 1977, 1978 Canada Gazette Part I p.7547 (T.B.); General Mills v. DMNRCE, Apps. 2457 etc., July 14, 1987, 12 TBR 256, 14 CER

Automobile Museum, the Tariff Board, by a majority, even read in a definition from Ontario legislation which provided a narrow interpretation of "public museums", excluding museums operated on a commercial basis.[55]

III. Purposive or Teleological Method

The teleological method of interpretation looks for meaning beyond pure textual analysis and assumes that the legislators had some purpose in mind. The text is interpreted in light of that purpose, on the understanding that the legislators and the courts or other interpreters are engaged in a co-operative effort to send and receive a meaning. A statute without a purpose is quite unlikely. It would have to be something like the example of an imaginary sign in the middle of a lake which reads "Do not tie boats to this sign".[56] Such a situation would be quite unusual. Legislators are assumed to have had some goal in mind. The teleological method interprets the text in the light of that goal.

The teleological method of interpretation is sometimes seen as the "mischief rule" from Heydon's Case, a decision of

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209 (T.B.), aff'd. 18 CER 161 (F.C.A., Dec. 6, 1988).

[55]Antique Automobile Museum v. DMNRCE, App. 704, Dec. 3, 1963, 3 TBR 117 (T.B.).

[56]Côté p.353, citing G. Gottlieb, The Logic of Choice (New York: Macmillan, 1968) p.111.

the Exchequer Court in 1584:

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:
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> > 1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.[57]

This formulation of the rule bears the marks of 16th century England, a time when the exact words of statutes were not given the significance they are accorded now. It was only under the Tudor monarchs of the late 15th century that the practice had been settled of having bills drafted before deliberation by Parliament rather than written up afterwards like minutes of a meeting.[58] With Parliament's gradual emergence as the source of legitimate authority, its law-creating function received greater prominence and the split between legislation and adjudication became sharper. The

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[57](1584) 3 Co. Rep. 7a, 7b, 76 E.R. 637, 638.

[58]J.H. Baker, An Introduction to English Legal History, 3rd ed. (London: Butterworths, 1990), pp.235-37.

16th century judges in Lord Coke's report would not have had a 20th century reticence about policy-making. For them, statutes were as described in Heydon's Case, mere supplements to the common law and not binding in strict detail so long as the general, "true" intent was honoured.[59]

Modern 20th century society is more literate and modern judges are more likely to feel bound by the legislative text. An up-dated version of the teleological method would give judges less leeway and would involve use of the statute's purpose to find what is implicit in its words. The extent to which even reticent 20th century judges legislate has been debated in modern legal theory since the realist attack on positivism in the 1920's and 1930's. Then, the criticism was that judges were involved in policy-making in which they substituted their own policies for those of the legislators. Current analysis, influenced by hermeneutics and literary theory, questions whether it is possible to interpret a text without re-creating it as something which differs from the author's original version.[60]

Language is never a completely independent means of

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[59]See Côté pp.365-66. For an overview of the competing interpretive theories of Hobbes, Coke and Hale, see Eric Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's" (1985) 35 U.T.L.J. 113.

[60]For a summary of the current debates, see Rosemary J. Coombe, "'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 McGill L.J. 603.

human communication, free of reliance on the implicit. Writing may be more abstract and isolated from particular situations than speech, but both draw meaning from factors other than dictionary definitions of words. It is quite difficult to read most statutes (except perhaps the Income Tax Act) without forming some impression of what the legislators were trying to accomplish. In the teleological method of interpretation, judges keep that purpose in mind when they construct the meaning of a statutory provision to apply in a particular situation. Use of this method is simply an acknowledgement of the way in which ordinary human communication works, and does not mean that judges are usurping the role of the legislators. On the contrary, a very literal interpretation which flies in the face of the statute's obvious goal could involve judges in just such a display of insubordination. The purposive or teleological approach to interpretation does not require judges to go beyond their proper role in the application of legal rules to particular circumstances.

The study of interpretation in the Harmonized System will undoubtedly be influenced by theories about the role of courts and judges in relation to the legislative branch of government, but should not be over-whelmed by legal and political philosophy. For the vast majority of classification decisions under the Harmonized System, the involvement of judges is quite minimal. Even the majority of

disputes in the system of customs tariff appeals are unlikely to proceed past the Canadian International Trade Tribunal, whose members are not necessarily jurists. There is no reason to avoid teleological interpretation, but neither is there any reason to assume that it is the preferred modern method of statutory interpretation which should always be followed.

The application of a teleological approach to the Harmonized System could indeed cause problems, especially if it is taken to require analysis of the socio-economic consequences of decisions. The HS is not restricted to customs tariff matters, but is intended for a wide variety of uses, including statistics, transportation, product safety standards, inventory control and general industrial and commercial applications. It would be wrong to distort classification in these other fields with the presumed intention of Parliament to give certain economic sectors a break from customs duty. The potential scope of the Harmonized System is too wide to make the determination of purpose a simple matter. The approach advocated in other chapters of this study is very much an approach in application and one that goes beyond textual analysis, but it is not "purposive", unless the purpose can be stated very broadly as the establishment of a workable system of classification for goods. It is argued in other chapters that classification decisions should take into account the

use of goods in their full commercial context and should not be limited to isolated moments of observation. While this implies some knowledge of the economic situation of a given industry, it does not mean that interpretation is dictated by government policy on the level and distribution of customs duties.

The Tariff Board normally avoided analysis of the economic effects of its classification decisions, despite the Board's own expertise in economic research. The function of the Board on appeals was seen as related to specific instances rather than involving the wider analysis which the Board undertook for references.[61] The interpretation of end use items, especially the priority accorded to them after the Great Canadian Oil Sands decision by the Federal Court of Appeal,[62] was the one major exception in which the Board interpreted according to an economic policy expressed in the legislation. There were as well a few other instances of teleological interpretation, meaning interpretation which took into account the presumed legislative intent concerning

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[61]For critical comments on the relationship between these two functions, see Philip Slayton & John J. Quinn, The Tariff Board: A Study Prepared for the Law Reform Commission of Canada, with the assistance of James Cassels (Ottawa: Supply and Services Canada, 1981), pp.111-14.

[62]Great Canadian Oil Sands v. DMNRCE, [1976] F.C. 281, 6 TBR 160 (F.C.A., March 4, 1976). See also: DMNRCE v. Fleetwood Logging, [1954] Ex.C.R. 695, 1 TBR 162 (Ex.Ct., Oct. 9, 1954) at 165; Diatech v. DMNRCE, App. 2443, Oct. 16, 1987, 12 TBR 347, 14 CER 341 (T.B.), dissenting opinion; DMNRCE v. Coopérative Fédéréé, 13 CER 338 (F.C.A., Feb. 24, 1987).

the consequences of a decision in application. As discussed in the Eo Nomine chapter, eo nomine decisions occasionally mentioned tariff rate differences, and in the Supreme Plating appeal, the Board used the lack of threat to the Canadian automobile market to decide that a particular vehicle was not caught by the prohibition against importation of "used or secondhand" cars.[63] The Boehringer appeal also involved teleological reasoning. The Department was arguing that the inclusion of an inexpensive pair of plastic tweezers in a medical kit meant that the kit was not eligible for a particular tariff item. The result would have been an additional duty of 1,000 times the cost of the tweezers. The Tariff Board rejected this argument. The Board did not believe that "the legislator intended importers to strain at a gnat because of such a possible interpretation that would pick at a nit."[64]

The Board's teleological interpretations occurred within constraints, however. There was no general discretion to waive provisions of the tariff legislation in what the Board considered deserving cases. The issue of clemency came up most often in appeals involving the tariff concessions for goods imported by a settler or a returning resident. If the

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[63]Supreme Plating v. DMNRCE, App. 220, Sept. 3, 1985, 10 TBR 205, 9 CER 255 (T.B.).

[64]Boehringer v. DMNRCE, App. 2201, Feb. 7, 1986, 11 TBR 98, 11 CER 51 (T.B.) at 106 TBR.

returning resident has not had the goods in his or her use for the required length of time prior to importation (6 months), then the benefit of the concession is not available. The Board ruled that it could not waive the requirement even in cases where an automobile had to be replaced just prior to importation due to fire or damage in an accident. All the Board could do was to recommend that the administrative authorities consider a waiver.[65] In one particularly egregious case, the returning resident was 18 days short of the 6 months on his automobile when he arrived at the border. When informed of the problem, he explained he could remain in the United States visiting for the extra few days. The supervisor on duty waived the requirement and the goods were entered. The supervisor's decision, however, was later reversed by more senior officials and tne importer received a demand for an additional $2,887 in duty. Despite its obvious sympathy for the appellant's predicament, the Board

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[65] B. Tremblay v. DMNRCE, App. 2644, April 8, 1987, 12 TBR 169, 14 CER 85 (T.B.); B. McCarthy v. DMNRCE, App. 2554, April 10, 1987, 12 TBR 175, 14 CER 89 (T.B.). See further: Swiss Club v. DMNRCE, App. 1688, March 4, 1982, 8 TBR 95, 4 CER 71 (T.B.); Donald Tutt v. DMNRCE, App. 2975, Jan. 31, 1991, 4 TCT 3098 (C.I.T.T.). For additional appeals concerning settlers and returning residents, see: H. Lang v. DMNRCE, App. 1982, Nov. 21, 1983, 9 TBR 12, 6 CER 112 (T.B.); J. Bridgeman v. DMNRCE, App. 2740, July 13, 1987, 12 TBR 252, 14 CER 206 (T.B.); A.Boiridy v. DMNRCE, App. 2916. April 28, 1989, 2 TCT 1071 (C.I.T.T.); K. Raju v. DMNRCE, App. AP-89-026, Oct. 18, 1989, 2 TCT 1221 (C.I.T.T.); H.E. Wakelin v. DMNRCE, App. AP-89-030, Sept. 20, 1990, 3 TCT 2341 (C.I.T.T.). See also Maclennan v. R., [1979] 1 F.C.205 (T.D.)

ruled that it could do no more than recommend a remission.[66] The teleological approach could be used to discern what was implicit in the legislation but could not be taken so far as to contradict what was explicit.

It is hard to avoid some general notion of legislative purpose, even if at a very basic level of presuming that provisions were intended to have some useful effect. In the Mansoor appeal, for example, the Board had to choose between two tariff items which both listed "radio receiving sets for motor vehicles." The Board distinguished between the two by deciding that one was for sets all in one chassis or cabinet while the other was for combinations involving separate components. Some distinction had to be made, since otherwise one or other of the items would be redundant and it could not be presumed that Parliament had legislated for no purpose at all.[67] A similar problem arises when Parliment seems to have

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[66] R.C.Cornes v. DMNRCE, App. 2730, Aug. 25, 1987, 12 TBR 293, 14 CER 256 (T.B.). See also F. Abtahi v. DMNRCE, App. 2746, Dec. 22, 1987, 12 TBR 600, 15 CER 269 (T.B.).

[67] Mansoor Electronics v. DMNRCE, Apps. 2514,2515, March 24, 1987, 12 TBR 157, 14 CER 120 (T.B.). See also the (unsuccessful) argument by the appellant in J.P.Delf v. DMNRCE, App. 1061, Aug. 2, 1974, 1975 Canada Gazette Part I p.338 (T.B.). In Accessories v. DMNRCE, App. 331, March 1, 1955, 1 TBR 221 (T.B.), aff'd. [1956] Ex.C.R. 289, 1 TBR 223 (Ex.Ct., March 6, 1956), aff'd. [1957] S.C.R. 358, 1 TBR 229 (S.C.C., April 12, 1957), the Board and the Exchequer Court both applied the presumption of useful effect in deciding in favour of the tariff item for motors, since otherwise the item would have no content (pp.223, 228 TBR). The Supreme Court of Canada also mentioned that Parliment must have singled out motors in order to provide special protection to competing manufacturers of them (p.231 TBR).

made a minor mistake and a provision is inconsistent with the overall purpose. In the Fahn Products and Mitsui appeals, the Board interpreted an item for "fish preserved in oil" as if it read "fish packaged in oil", since the evidence showed that oil did not preserve fish.[68] This approach to interpretation is broadly teleological since it assumes an overall purpose. It provides an example, as well, of how automatic a general teleological, purposive approach is, since for the Board to have taken a very literal view of what "preserved" meant in the above appeals would have constituted a failure to understand the legislative message. At this level, an interpreter who takes a teleological approach is not attempting to change the statutory material, but, in Lord Denning's analogy, simply ironing out the wrinkles.[69]

The Tariff Board's approach to interpretation was not notably purposive in the narrow sense of looking to the broad economic consequences of particular classification decisions. It was, however, more aggressive when the customs tariff was

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[68]Fahn Products v. DMNRCE, App. 1066, Oct. 3, 1974, 1975 Canada Gazette Part I p.448 (T.B.); Mitsui v. DMNRCE, App. 1641, Jan. 12, 1981, 7 TBR 241, 3 CER 10 (T.B.). For a contrary interpretation involving a tariff item for "nuts ... preserved in salt", see Douglas Hoy Vending v. DMNRCE, App. 1178, March 28, 1977, 6 TBR 435 (T.B.).

[69]Seaford Court Estates v. Asher, [1949] 2 K.B. 481 (C.A.) at 499, cited in Côté p.366. See also Toshiba International v. DMNRCE, App. 2467, Feb. 20, 1987, 12 TBR 116, 13 CER 322 (T.B.), an anti-dumping case, in which the Board said that its approach was "literal in the over-all context of the object or purpose of the statute." (p.131 TBR).

treated as a tax on the importer and when the Board used traditional common law presumptions about the interpretation of tax legislation. The traditional approach to tax laws was to interpret both literally and restrictively, so that the taxpayer would have to be either caught or missed by the exact words of the statute and the presumption was in favour of a miss. This approach is presumably a legacy of interpretation in the 18th century, when statutes were divided into two groups - those strictly construed (penal statutes, laws interfering with property rights) and those liberally construed (remedial statutes such as laws in favour of the advancement of religion).[70] The usual citations which express the traditional approach are from Partington v. Attorney-General and Inland Revenue Commissioners v. Duke of Westminster:

> As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words

[70]See Eric Tucker,"The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's" (1985) 35 U.T.L.J. 113 at 123.

of the statute.[71]

> Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.[72]

The very literal approach is probably on the wane, in part because, as Professor Côté notes, taxation now is used for general distributive and financial purposes and can no longer be said to be only for the raising of revenue.[73] It is thus not solely penal or confiscatory but also remedial. There is still a lingering restrictive presumption, however, in that a serious ambiguity is likely to be interpreted in favour of the taxpayer. A number of tariff classification decisions cited this idea that any doubt goes to the

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[71] Partington v. Attorney General (1869), L.R. 4 H.L. 100 at 122 (Lord Cairns). For rejection of equitable interpretation see Naramata Co-operative v. DMNRCE, App. 726, March 10, 1964, 3 TBR 144 (T.B.).

[72] Inland Revenue Commissioners v. Duke of Westminster, [1936] A.C. 1 at 19, [1935] All E.R. 259 at 267 (H.L., Lord Tomlin).

[73] Côté pp.466-70. See Stubart Investments v. The Queen, [1984] 1 S.C.R. 536; Wakelin v. DMNRCE, App. AP-89-030, Sept. 20, 1990, 3 TCT 2341 (C.I.T.T.). There always had been a minor line of authority which rejected strict interpretation: R. v. Algoma Central Railway (1902), 32 S.C.R. 277, aff'd. [1903] A.C. 478 - a customs tariff decision citing the "liberal interpretation" sections from both the Interpretation Act and the Customs Act which are discussed below.

importer.[74] There was also a minor line of conflicting authority which placed the onus on the appellant-importer, mostly to satisfy a procedural burden of presenting evidence, but also occasionally to rebut a presumption that the Department's classification was correct in substance.[75]

The continued existence of strict interpretation of taxation laws is problematic, since, as Professor Driedger points out, the Interpretation Act provides specific legislative direction to the contrary:

> s.12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment

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[74] Canadian Housewares v. DMNRCE, App. 179, June 9, 1949, 1 TBR 8 (T.B.); Reference ... (re) Administration of Tariff Item 326e (cut glass item), App. 322, Dec. 8, 1954, 1 TBR 192 (T.B.); Weil Dental v. DMNRCE, App.856, Nov. 7, 1967, 4 TBR 41 (T.B.) - dissent; D.J. Norris v. DMNRCE, App. 1432, Feb. 16, 1981, 7 TBR 272, 3 CER 62 (T.B.); Olympia Floor v. DMNRCE, Apps. 2548, 2642, Nov. 10, 1987, 12 TBR 479, 15 CER 137 (T.B.).

[75] Denbyware v. DMNRCE, F.C.A., May 15, 1979, unreported, aff'g. App. 1304, April 5, 1978, 6 TBR 620 (T.B.), leave to appeal denied, 31 N.R. 1972 (S.C.C., Dec. 3, 1979); Olympia Floor and Wall v. DMNRCE, App. 1526, Jan. 6, 1982, 8 TBR 31, 4 CER 10 (T.B.), rev'd., 5 CER 562, 49 N.R. 66 (F.C.A., Sept 14, 1983), reheard 9 TBR 169, 6 CER 218; Swiss Club v. DMNRCE, App. 1688, March 4, 1982, 8 TBR 95, 4 CER 71 (T.B.); Superior Brake v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.). The traditional literal approach also put the burden on a taxpayer caught by the statute who was claiming the benefit of an exemption - see: Art Candles v. DMNRCE, App. 2311, Nov. 28, 1985, 10 TBR 270, 10 CER 156 (T.B.), aff'd. 13 CER 205 (F.C.A., Jan. 15, 1987) - excise tax; Boiridy v. DMNRCE, App. 2916, April 28, 1989, 2 TCT 1071 (C.I.T.T.).

of its objects.[76]

This section is based on pre-Confederation legislation in Canada West that may have been motivated by Reform government suspicions about the attitudes of Tory judges.[77] It has not been particularly influential in the case law, perhaps because of its generality. A direction to follow the purpose of the legislation begs the question of how that purpose is to be ascertained. And it is quite possible that for some legislation, such as a very detailed and specific customs tariff, restrictive interpretation could be what the legislators intended.[78] It is possible to adopt a general teleological approach and yet still give the taxpayer the benefit of the doubt.

In the Customs Act prior to its amendment in 1986, Parliament tried to give a somewhat more direct order. The section was as follows:

> s.2(3) All the expressions and provisions of this Act, or of any law relating to the customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to

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[76]Interpretation Act, R.S.C. 1985, c.I-21, s.12. See Driedger, pp.203-07.

[77]Eric Tucker, supra note 70, pp.124-26.

[78]English Law Commission and Scottish Law Commission, The Interpretation of Statutes, Law Com. No. 21, Scot. Law Com. No.11, 1969, para. 33, concerning similar legislation in New Zealand which dates back to 1888.

its true intent, meaning and spirit.[79]

This goes further than the Interpretation Act in giving weight to the protection of the revenue and thus, presumably, counter-acting restrictive interpretation. The section, however, was not much more successful. It was mentioned in a few appeals,[80] but did not seem to change the decisions. In the Muffin House appeal, the Tariff Board took a liberal approach to the interpretation of a time delay but did not mention either the Interpretation Act or the Customs Act as authority for this approach.[81] The section might perhaps have had some marginal influence on practice outside the appeal system, but its repeal is not likely to have a major effect on official interpretation of the customs tariff.

Parliament also gave an even more direct order in customs legislation prior to recent amendments. The provision was as follows:

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[79]Customs Act, R.S.C. 1970, c. C-40, s.2(3), rep. S.C. 1986, c.1.

[80]R. v. Ayer (1887) 1 Ex.C.R. 232; Foss Lumber v. R. [1913] S.C.R. 130, 8 D.L.R. 437 (S.C.C.); Dominion Engineering v. DMNRCE, [1958] S.C.R. 652, 1 TBR 152; DMNRCE v. Fleetwood Logging, [1954] Ex.C.R. 695, 1 TBR 162 (Ex.Ct., Oct. 9, 1954); Accessories Machinery v. DMNRCE, [1956] Ex.C.R. 289, 1 TBR 223 (Ex.Ct., March 6, 1956), aff'd. [1957] S.C.R. 358, 1 TBR 229 (S.C.C. , April 12, 1957); Metropolitan Life v. DMNRCE, [1966] Ex.C.R. 45, 3 TBR 216 (Ex.Ct, Jan. 25, 1966).

[81]Muffin House v. DMNRCE, App. 2396, July 17, 1986, 11 TBR 315, 12 CER 43 (T.B.) - decided under the Customs Act prior to amendment. See also the dissent of Board member Gorman in Gallery Alberta v. DMNRCE, App. 2243, Jan. 30, 1986, 11 TBR 71, 11 CER 14 (T.B.), aff'd. 18 CER 69 (F.C.A., Oct. 7, 1988).

> s.54. If an article is enumerated in the tariff under two or more names or descriptions, and there is a difference of duty, the highest duty provided shall be charged and collected thereon.[82]

The section was cited unsuccessfully by the Department in four Tariff Board appeals,[83] and cited in three other appeals which were decided in favour of the Department.[84] Of these last three, the section was the main reason for the Board's decision in only one decision, the Federal Belting case. Its repeal thus is not likely to have a significant effect on interpretation. It could not be expected that such a direct order would be interpreted widely and lead to decisions in favour of the Department in most cases. The section did not purport to abolish appeals or replace the role of the Tariff Board. The Board still was required to interpret the items

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[82]Customs Act, R.S.C. 1970, c. C-40, s.54. In the 1986 revision of the Customs Act this section was transferred temporarily to the Customs Tariff Act: S.C. 1986, c.1, s.178 (R.S.C. 1985, c.1 (2nd Supp.), s.180). It was then repealed when the Customs Tariff was revised in 1987 to implement the Harmonized System: S.C. 1987, c.49 (R.S.C. 1985, c.41 (3rd Supp.)).

[83]Dress Manufacturers v. DMNRCE, App. 160, May 11, 1949, 1 TBR 2 (T.B.); Reed Decorative v. DMNRCE, App. 1375, Oct. 3, 1980, 7 TBR 177, 2 CER 261 (T.B.); Mutual Materials v. DMNRCE, Apps. 1684,1685, Jan. 21, 1982, 8 TBR 66, 4 CER 35 (T.B.); Stewart-Warner v. DMNRCE, App. 2838, Aug. 10, 1988, 17 CER 188 (T.B.). It was also cited unsuccessfully by an intervenant in Anglophoto v. DMNRCE, App. 932, June 5, 1970, 5 TBR 64 (T.B.).

[84]Federal Belting & Asbestos v. DMNRCE, App. 345, May 5, 1955, 1 TBR 239 (T.B.); Imperial Feather v. DMNRCe, Apps. 1668,1709, Jan. 27, 1982, 8 TBR 80, 4 CER 43 (T.B.); Craftsmen v. DMNRCE, App. 1997, July 11, 1984, 9 TBR 289, 7 CER 13 (T.B.).

in question to see if the section applied. At most, the section could have reduced the presumption in favour of the taxpayer in cases of serious doubt. The Board only seems to have used it to resolve a direct tie.

For interpretation of the Harmonized System, presumptions concerning the tariff as taxation are subject to the same criticism that applies to other strong purposive approaches. The fields of application of the HS are simply too wide to allow such approaches to govern interpretation. A bias in favour of the importer or the Department might lead to the classification of goods in an item which has little to do with their function in ordinary commerce. There is the same risk that such classification will be artificial and unworkable for purposes of transport, product standards, inventory control, statistics and any other field in which the HS is applied.

IV. Time

The treatment of time in the interpretation of statutes raises questions of communication between legislators and interpreters, who can be separated by significant gaps of time. Legislators adopt a statute with a certain meaning, part of which will be implicit from their situation and language conventions. Interpreters read a statute and find a certain meaning, part of which will depend on their own situation and language conventions. The challenge for statutory interpretation is to decide how much should be taken

as frozen by the written text and how much can vary with each fresh interpretation.

On some matters, it is necessary to understand the point of view of the legislators in order to appreciate the meaning. The history of a particular provision up to that point and its relationship to other statutory provisions may be relevant, as well as the existing state of trade and commercial practices. It is clear that the physical world to which a statute applies cannot be frozen in time, since legislation has future effect. The customs tariff, for example, is intended to apply to goods manufactured and imported in the future. It will therefore be used to classify goods in a world that is not quite the same as the world in which the tariff was adopted. The controversial question is whether it is possible to interpret as if the mental element were frozen, as if interpreters could simply find meaning in the statute exactly where the legislators put it.

As the world changes, so do ideas. Interpreters will automatically view things from their own perspective. Jurists disagree about the extent to which the use of new philosophies and "new social facts"[85] is legitimate. Professor Dworkin, for example, argues that judges should be able to consider the policies of current legislators in interpreting a statute, since those legislators refrain from passing amendments and

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[85]See the dissent of Laskin J. in Harrison v. Carwell, [1976] 2 S.C.R. 200. See generally Côté, pp.249-57.

thus take current and ongoing responsibility.[86] Legislation is, after all, more than an historical event. It is intended to apply in the world of those currently governed by it, who may not know exactly when each section was passed and who may not be aware of changes in perceptions since that time. The perpetual nature of legislation is expressed in s.10 of the Interpretation Act:

> 10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.[87]

A customs tariff which is "always speaking" requires at least a certain amount of up-dating of assumptions. It is hard to apply an old law about carriages to dune buggies and all-terrain vehicles, no matter how much effort interpreters are willing to spend searching for constant, abstract meanings. It is difficult to imagine what legislators might have intended if faced with the new circumstances when clearly they were not faced with those circumstances. Language can become obsolete and the physical world can change so much that the old words simply no longer describe it.

Classification decisions examined in this part deal first with the point of view of legislators and the influence of

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[86]Ronald Dworkin, Law's Empire, Harvard University Press, 1986, chapter 9.

[87]Interpretation Act, R.S.C. 1985, c.I-21, s.10.

circumstances existing when the tariff item was adopted. The influence of changed circumstances for subsequent interpretation is then discussed.

Trade developments at the time of adoption of a tariff item were mentioned by the Board in the Alta-Fresh Produce appeal. The appellant argued that the imported machinery, which was used for handling loose fruit and vegetables, should be classified as a "highpiler" in the item in question. The Board rejected this argument, since machines known as "hi-pilers" had been developed in the United States a few years prior to the addition of the term to the tariff and trade evidence was to the effect that these hi-pilers were used exclusively for the handling of boxes and packages. The Board concluded that this was what the legislators meant when they added the term to the item.[88]

The relationship to other contemporaneous tariff items was a factor in a number of appeals. In Canadian Wine Institute, the Board held that sherry could not be classified as a "cordial wine" since this item had been derived from a larger one for medicinal or medicated wines which did not cover sherry.[89] In Metropolitan Life, the Exchequer Court based part of its reasoning on the idea that a tariff item for

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[88]Alta-Fresh Produce v. DMNRCE, App. 873, April 18, 1968, 4 TBR 145 (T.B.).

[89]Canadian Wine Institute v. DMNRCE, App. 199, March 16, 1950, 1 TBR 27 (T.B.).

books in languages other than English had been derived from an item for books in general and thus should be limited to goods which would have been included in the general item.[90]

The history of a tariff item could also show that the legislators adopted a consistent view of what it covered. In the Denbyware appeal, the Board distinguished between two items on the basis that, through several amendments, Parliament had consistently used one for white-based tableware while the other was for tableware which was brown or beige.[91] The Board also used history in the Canadian Honda appeal to decide that an item which had covered three-wheeled motor cycles in the past still covered the modern version, three-wheeled all-terrain vehicles.[92]

While this idea of continuity in legislative behaviour is part of the assumption of coherence, there is one major limitation on the use of such material. When Parliament makes an amendment, that amendment can be either to change something in the previous provisions or to confirm an interpretation of

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[90]Metropolitan Life v. DMNRCE, 3 TBR 216 (Ex.Ct., Jan. 25, 1966), aff'g. Apps. 765, 782, March 23, 1965, 3 TBR 213 (T.B.).

[91]Denbyware v. DMNRCE, App. 1304, April 5, 1978, 6 TBR 620, aff'd. F.C.A., May 15, 1979, unreported (see 5 CER 566), leave to appeal denied, 31 N.R. 1972, (S.C.C., Dec.3, 1979).

[92]Canadian Honda v. DMNRCE, App. 1321, May 24, 1978, 6 TBR 666 (T.B.). For other references to the history of a tariff item, see: Harnischfeger v. DMNRCE, App. 367, Jan. 27, 1956, 1 TBR 237 (T.B.); Pyrotronics v. DMNRCE, App. 1414, March 21, 1980, 7 TBR 55, 2 CER 78 (T.B.).

the previous provisions. The Interpretation Act states that there is to be no presumption one way or the other:

> 45.(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.
>
> (3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.[93]

The predecessor to this section was applied by the Exchequer Court in the Specialties Distributors decision, in which the court decided that a subsequent amendment to exempt goods from excise tax did not mean that the goods would have been previously taxable. The amendment simply clarified, but did not change the result.[94]

Use of the historical viewpoint can cause problems for those who must interpret and apply the law. When a tariff item contains language which has become obsolete, current interpreters are at least aware of the gap and can adjust their thinking accordingly. The old term might still be

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[93] Interpretation Act, R.S.C. 1985, c.I-21, s. 45(2),(3).

[94] R. v. Specialties Distributors, [1954] Ex.C.R. 535. An amendment similarly confirmed the previous situation in Grinnell v. DMNRCE, App. 715, Oct. 30, 1963, 3 TBR 129 (T.B.), but there, the Board seems to have relied on the amendment - even though it was passed after the goods were imported. See also: DMNRCE v. Parke Davis, [1954] Ex.C.R. 1, 1 TBR 13 (Ex.Ct., Dec. 23, 1953), aff'g. Parke Davis v. DMNRCE, App.195, Nov. 29, 1949, 1 TBR 10 (T.B.); Canadian General Electric v. DMNRCE, App. 2878, Jan. 26, 1988, 13 TBR 15, 15 CER 345 (T.B.); Sealand v. DMNRCE, App. 3042, July 11, 1989, 2 TCT 1149 (C.I.T.T.).

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[93] Interpretation Act, R.S.C. 1985, c.I-21, s. 45(2),(3).

[94] R. v. Specialties Distributors, [1954] Ex.C.R. 535. An amendment similarly confirmed the previous situation in Grinnell v. DMNRCE, App. 715, Oct. 30, 1963, 3 TBR 129 (T.B.), but there, the Board seems to have relied on the amendment - even though it was passed after the goods were imported. See also: DMNRCE v. Parke Davis, [1954] Ex.C.R. 1, 1 TBR 13 (Ex.Ct., Dec. 23, 1953), aff'g. Parke Davis v. DMNRCE, App.195, Nov. 29, 1949, 1 TBR 10 (T.B.); Canadian General Electric v. DMNRCE, App. 2878, Jan. 26, 1988, 13 TBR 15, 15 CER 345 (T.B.); Sealand v. DMNRCE, App. 3042, July 11, 1989, 2 TCT 1149 (C.I.T.T.).

applied; the term "hollow-ware" was held to cover certain kitchen articles in the Canadian Housewares appeal despite the fact that the word had become out-dated since the item was adopted in 1897.[95] In other cases, it might be determined that the vocabulary no longer applies; the pinball machines at issue in New Way Sales were not classified as games of Bagatelle, although this was an ancestor of pinball, since the modern game was substantially different from the earlier version.[96] An attempt to expand historical meaning could hold some surprises for importers. In the Peate Musical Supplies appeal, the Board had to interpret the words "bass violas" in an item covering "bass violas, violas, violins, violoncellos." The evidence was that the early instrument known as a "bass viola" had become obsolete. The Department was arguing in this appeal that the words now applied to a Fender electric bass, a contention that the Board rejected.[97] In obiter, however, the Board stated that the words presumably would cover modern double basses. The risk of confusion with such an approach is quite apparent. Many importers of double

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[95]Canadian Housewares v. DMNRCE, App. 179, June 9, 1940, 1 TBR 8 (T.B.). See also George Perley-Robertson v. DMNRCE, App. 586, Jan. 25, 1962, 2 TBR 274 (T.B.), in which instant coffee was classified as coffee extract, despite the fact that this terminology was no longer in current use.

[96]New Way Sales v. DMNRCE, Apps. 1288, 1289, Dec. 27, 1978, 1979 Canada Gazette Part I p.1645 (T.B.).

[97]Peate Musical Supplies v. DMNRCE, App. 531, March 27, 1961, 2 TBR 222 (T.B.).

basses could be expected to know the historical terminology and know that it referred to something other than the goods being imported.

When the law is "always speaking", it is preferable for interpreters that it use modern terminology. In the Parke Davis appeal, the Exchequer Court decided that penicillin was covered under the modern meaning of "biological products" even though it was not commercially known at the time the tariff item was adopted.[98] Similarly, polyethylene bags were "usual coverings" in the Essex Hybrid Seed appeal, even though they had not been developed when the item was passed,[99] and boots with skates attached were included in the modern meaning of "roller skates" in the Tarud Hosiery appeal even though roller skates had been of the clamp-on variety when the item was adopted.[100] Some change can thus be accommodated in the modern

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[98]DMNRCE v. Parke Davis, [1954] 1 Ex.C.R. 1, 1 TBR 13 (Ex.Ct., Dec. 23, 1953), aff'g. Parke Davis v. DMNRCE, App.195, Nov. 29, 1949, 1 TBR 10 (T.B.).

[99]Essex Hybrid Seed v. DMNRCE, App. 566, Dec. 13, 1961, 2 TBR 254 (T.B.).

[100]Tarud Hosiery v. DMNRCE, App. 1885, Dec. 31, 1982, 8 TBR 452, 5 CER 96 (T.B.). See also: Film Technique v. DMNRCE, App. 977, Jan. 19, 1972, 5 TBR 267 (T.B.), rev'd on other grounds DMNRCE v. Film Technique, [1973] F.C. 75, 5 TBR 274 (F.C.A., Jan. 31, 1973); Maurice Hughes v. DMNRCE, App. 1077, April 28, 1975, 1976 Canada Gazette Part I p.1721 (T.B.); Canado Industrial v. DMNRCE, App. 1587, Aug. 10, 1981, 7 TBR 415, 3 CER 253 (T.B.); Petrofina v. DMNRCE, App. 1669, Sept. 2, 1981, 7 TBR 452, 3 CER 277 (T.B.); Robert Bosch v. DMNRCE, App. 2089, April 16, 1985, 10 TBR 110, 9 CER 62 (T.B.); Applied Electronics v. DMNRCE, App. 2661, Feb. 5, 1988, 13 TBR 98, 16 CER 60 (T.B.); Burroughs Wellcome v. DMNRCE, App. 2673, March 10, 1989, 2 TCT 1054 (C.I.T.T.).

meaning of an old word, so long as it still describes the goods in question. In the Sears appeal, a machine which used a new form of type-setting was still a type-setting machine,[101] but when the technology moved to perforated tape not justified by the operator, the machines could no longer qualify.[102] The danger of following historical rather than modern terminology is illustrated in the Norton Company appeal, in which imported ceramics were classified as stoneware despite the fact that they were acknowledged to be "chemical porcelain" in current trade usage, which distinguished these improved products from products of the older technology which were still called stoneware. The Board decided to apply the meaning of terms in 1936, when the tariff item in question was adopted.[103] Although the Board said it was treating the law as always speaking, this conclusion seems the very antithesis of law having perpetual effect. The commercial world had obviously changed and the attempt to freeze meaning in the statute was both artificial and misleading.

Technological change can involve introduction of new products, as well as improvements on old ones. In the Clorox appeal, the recently-developed charcoal briquets could not be

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[101]Sears v. DMNRCE, App. 666, April 8, 1963, 3 TBR 78 (T.B.).

[102]Canadian Linotype v. DMNRCE, Apps. 811, 816, March 21, 1966, 3 TBR 290 (T.B.).

[103]Norton Company v. DMNRCe, App. 936, Feb. 2, 1971, 1971 Canada Gazette Part I p.1130 (T.B.).

classified as "charcoal made from wood" since they were blends substantially different from the lump charcoal in use when the item was adopted in 1931. The facts were a bit unusual in that the new product had not entirely replaced the old and lump charcoal of the 1931 type was still being imported, although in reduced quantities. The old vocabulary was still in use, therefore, and could not be expanded to cover the new product with a different composition.[104] A change in composition is, in fact, a likely indication that the technology has created a new product which will not be covered by old vocabulary.[105] Sometimes, of course, the new product simply looks so different that it cannot be classified under items for the old goods.[106] When that occurs, the goods will be seen as a new product requiring new vocabulary even if they perform the same function as the previous products. The new

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[104]Clorox v. DMNRCE, App. 1246, Oct. 28, 1977, 6 TBR 544 (T.B.). The old product was also still around in Carl Zeiss v. DMNRCE, App. 849, April 27, 1967, 4 TBR 31 (T.B.) concerning electronic flashes for cameras which could not therefore be classified as "flash-guns". See further: Ascor of Canada v. DMNRCE, App. 798, May 17, 1965, 3 TBR 273 (T.B.).

[105]Dow Chemical v. DMNRCE, App. 284, March 12, 1953, 1 TBR 109 (T.B.); Frito-lay v. DMNRCE, Apps. 1241 etc., April 10, 1978, 6 TBR 634 (T.B.), aff'd. 2 CER 143 (F.C.A., June 9, 1980); G.B. Fermentation v. DMNRCE, App. 1591, March 6, 1981, 7 TBR 303, 3 CER 87 (T.B.);

[106]P.C. O'Driscoll v. DMNRCE, App. 748, Sept. 17, 1964, 3 TBR 189 (T.B.) concerning dried yeast which replaced yeast cakes on the market but could not be classified under the same item. See also Bowes v. DMNRCE, App. 952, April 26, 1971, 5 TBR 151 (T.B.), aff'd. sub nom. Standard Brands v. Bowes, F.C.A. (see 5 TBR 161), leave to appeal refused [1972] S.C.R. xiv (Feb. 7, 1972).

chemical adhesives at issue in the Tri-Hawk appeal, for example, could not be classified as surgical sutures even though they had the same function of closing wounds;[107] as well, the flexible hydroactive dressings in Squibb Canada were medicinal preparations rather than surgical dressings even though they served the same basic purpose as more traditional bandages.[108]

V. Other Sources and Interpretations

This part examines the extent to which other authoritative interpretations influence tariff classification appeals. Interpretations from outside the domestic system are discussed first, including the use of standards established by trade associations and the influence of decisions taken by international agencies and institutions in other countries. Use of this material presents some problems but is less difficult than the question of interpretations from inside the Canadian system such as those reported in Parliamentary debates or those taken from Departmental practice. Use of these inside interpretations seems to conflict with the idea

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[107] Tri-Hawk International v. DMNRCE, App. 1213, April 26, 1977, 1978 Canada Gazette Part I p.837 (T.B.).

[108] Squibb Canada v. DMNRCE, App. 2261, Oct. 16, 1986, 11 TBR 488, 12 CER 255 (T.B.). See also: F.Walter Perkin v. DMNRCE, App. 251, Dec. 21, 1951, 1 TBR 61 (T.B.); Canada Veneers v. DMNRCE, App. 800, Oct. 28, 1965, 3 TBR 276 (T.B.); Richard Vanee v. DMNRCE, App. 1710, Dec. 3, 1982, 8 TBR 397, 5 CER 28 (T.B.).

that the Canadian International Trade Tribunal (formerly the Tariff Board for classification matters) and the court system should be isolated from other government processes in order to produce independent judicial or quasi-judicial decisions. The section on inside interpretations looks first at those from the "authors'" side of the customs tariff, including the use of previous C.I.T.T. (or Tariff Board) Ministerial references and the use of legislative materials. Inside interpretations from the "interpreters'" side are then examined, covering the use of previous C.I.T.T. (or Tariff Board) decisions on appeals and the effect of administrative interpretations by the Department.

The use of commercial standards established by bodies outside the Canadian governmental system is part of the recognition of specialized trade vocabulary throughout the tariff. Such standards, set by the Canadian Standards Association, the American Society for Testing and Materials or other similar groups, are normally put into evidence through the testimony of expert witnesses concerning trade usage.[109] There may be some difficulties when Canadian and

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[109] Equipment Sales and Service v. DMNRCE, App. 510, Nov. 22, 1960, 2 TBR 199 (T.B.); Mutual Materials v. DMNRCE, Apps. 1684, 1685, Jan. 21, 1982, 8 TBR 66, 4 CER 35 (T.B.); British Steel v. DMNRCE, App. 2067, May 11, 1984, 9 TBR 240, 7 CER 230 (T.B.); Hunt-Wesson v. DMNRCE, App. 2527, Aug. 22, 1988, 17 CER 212 (T.B.); Ipsco v. DMNRCE, App. 2982, Jan. 3, 1989, 18 CER 191 (T.B.); Cassidy's v. DMNRCE, Apps. 2914 etc., March 12, 1989, 2 TCT 1043 (C.I.T.T.). See also the discussion of trade meaning in the chapter on the Eo Nomine Principle.

U.S. standards differ,[110] but the overall issue is establishment of vocabulary in trade usage.[111] Trade standards were rejected in the Norton appeal when the Tariff Board opted for historical meaning over trade meaning.[112] Trade standards were initially rejected by the Board in the Olympia Floor appeal but restored when the Federal Court of Appeal decided that the Board erred in applying common meaning when there was evidence of a distinct trade meaning.[113] Trade standards, of course, can only serve to interpret the words of the particular tariff item and it is the words of the item which govern. In Pyrotronics, the Tariff Board rejected trade standards for gas detectors which excluded the smoke alarms in question, since the tariff item referred to "... equipment for detecting or indicating noxious gases or noxious vapours,"

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[110]Petrofina v. DMNRCE, App. 1669, Sept. 2, 1981, 7 TBR 452, 3 CER 277 (T.B.) at 457 TBR.

[111]In Underwood v. DMNRCE, App. 831, June 30, 1966, 3 TBR 310 (T.B.), the relevant Canadian trade association had not officially adopted the U.S. terminology but there was evidence that it was generally accepted in the Canadian industry.

[112]Norton Company v. DMNRCE, App. 936, Feb. 2, 1971, 1971 Canada Gazette Part I p.1130 (T.B.).

[113]Olympia Floor and Wall v. DMNRCE, Apps. 1526 etc., Jan. 6, 1982, 8 TBR 31, 4 CER 10 (T.B.), rev'd. 49 N.R. 66, 5 CER 562 (F.C.A., Sept. 14, 1983), reheard 9 TBR 169, 6 CER 218 (T.B., March 9, 1984). See also: Olympia Floor and Wall v. DMNRCE, Apps. 1617 etc., July 23, 1984, 9 TBR 308, 7 CER 27 (T.B.); Olympia Floor and Wall v. DMNRCE, Apps. 2548, 2642, Nov. 10, 1987, 12 TBR 479, 15 CER 137 (T.B.). This line of authority presumably replaces Tilechem v. DMNRCE, App. 1102, March 30, 1976, 1977 Canada Gazette Part I p. 2810 (T.B.), in which, in any case, there was some question whether full testing procedures had been used by the expert witnesses.

wording wide enough to cover the alarms.[114] Use of established commercial standards is simply part of proving trade vocabulary and is not seen as giving up authority to outside bodies.

Prior to adoption of the Harmonized System, reference to the Customs Co-operation Council Nomenclature was on a similar basis, as "evidence of usage prevailing among the many countries which have adopted the Brussels Nomenclature."[115] On occasion, the Board even considered the Explanatory Notes to the BTN/CCCN.[116] The Nomenclature might not be followed when it differed from the Canadian tariff,[117] but otherwise reference to this source was no more problematic than reference to the decision of the European Court of Justice

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[114]Pyrotronics v. DMNRCE, App. 1414, March 21, 1980, 7 TBR 55, 2 CER 78 (T.B.).

[115]General Fabrics v. DMNRCE, App. 891, June 2, 1969, 4 TBR 200 (T.B.) at 206. See also: Reference re Internal Combustion Tractors, App. 795, Sept. 20, 1966, 3 TBR 259 (T.B.) at 263; Straker Gross v. DMNRCE, App. 797, Dec. 15, 1965, 3 TBR 273 (T.B.); Hudson's Bay v. DMNRCE, App. 1197, Feb. 7, 1977, 1977 Canada Gazette Part I p.2827 (T.B.); International Cordage v. DMNRCE, App. 3085, Sept. 19, 1989, 2 TCT 1193 (C.I.T.T.).

[116]BASF Canada v. DMNRCE, App. 1042, May 27, 1974, 6 TBR 41 (T.B.); BASF Canada v. DMNRCE, App. 1160, June 11, 1976, 1977 Canada Gazette Part I p.2612 (T.B.); Dowell Schlumberger v. DMNRCE, App. 2640, Nov. 24, 1987, 12 TBR 499, 15 CER 161 (T.B.).

[117]Les Explosifs v. DMNRCE, App. 1480, April 1, 1980, 7 TBR 69, 2 CER 86 (T.B.); G.B. Fermentation v. DMNRCE, App. 1591, March 6, 1981, 7 TBR 303, 3 CER 87 (T.B.); Omya v. DMNRCE, App. 2017, Nov. 21, 1986, 11 TBR 550, 13 CER 72 (T.B.); Dowell Schlumberger v. DMNRCE, App. 2640, Nov. 24, 1987, 12 TBR 499, 15 CER 161 (T.B.).

cited in the Kelco appeal.[118]

All that changed when Canada adopted the Harmonized System, the successor to the CCCN, and it was no longer an outside source. Reference to Brussels sources now involves considerations of how Canada's international obligations influence the domestic legal system, given our traditional dualist presumption of a split between the two spheres concerning treaty obligations. In our case law, treaties do not apply directly in domestic courts but must be incorporated into the system through implementing legislation. The legislation, and not the treaty, will apply in proceedings before domestic tribunals. There is some controversy over the extent to which international treaty sources can be used to assist in interpretation of domestic implementing legislation. It is preferable that the domestic legislation specifically mention that it implements an international obligation, so that courts do not have to make this determination by implication. Once the link between the treaty and the legislation has been established, it is still not clear when courts may refer to the treaty: -- only if there is an ambiguity on the face of the legislation?

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[118]Kelco Specialty v. DMNRCE, App. 2129, Jan. 21, 1985, 10 TBR 10, 8 CER 191 (T.B.), rev'd. on other grounds 13 CER 345 (F.C.A., March 2, 1987). See also the use of U.S. practice in Cassidy's v. DMNRCE, Apps. 2914 etc., March 2, 1989, 2 TCT 1043 (C.I.T.T.) under the previous tariff, and the evidence on U.S. and EEC practice in Royal Telecom v. DMNRCE, App. AP-90-027, April 5, 1991, 4 TCT 3175 (C.I.T.T.) under the current HS tariff.

whenever the legislation and treaty read together point out a mistranslation or other ambiguity? whenever the treaty provisions would fill a gap in the legislation? Even if it is determined that the treaty can be used, there may still be problems concerning interpretations from bodies set up under the treaty, such as the Harmonized System Committee, since these interpretations would be produced after the legislation was passed and can hardly be said to have been in the minds of the legislators at the time.[119]

When Canada adopted the Harmonized System, Parliament specifically mentioned the international treaty. Part of the long title of the statute says that it is an Act "to give effect to the International Convention on the Harmonized Commodity Description and Coding System." As well, Parliament adopted the HS Rules of Interpretation and provided a direct link to determinations from the Customs Co-operation Council:

> 10. The classification of imported goods under a tariff item in Schedule I shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in that Schedule.
>
> 11. In interpreting the headings and sub-headings in Schedule I, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the

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[119]On the use of treaties in statutory interpretation, see American Farm Bureau v. Canadian Import Tribunal, [1990] 2 S.C.R. 1324. See further M. Irish, Customs Valuation in Canada (Don Mills: CCH Canadian, 1985) pp.158-60 for general discussion in relation to implementation of the GATT Customs Valuation Code.

> Explanatory Notes to the Harmonized Commodity Description and Coding System, as amended from time to time, published by the Customs Co-operation Council, established by the Convention establishing a Customs Co-operation Council, done at Brussels on December 15, 1950 and to which Canada is a party.[120]

Courts, thus, should have no difficulty in using international sources to ensure that Canadian practice is as consistent as possible with interpretation at the Customs Co-operation Council. For application of the Harmonized System, the section essentially rejects the dualist approach and makes international developments directly relevant to Canadian legislation. For interpretation of headings and subheadings in the Canadian customs tariff, there should be no difficulty in referring to the Harmonized System Convention, and there is no need for ambiguity or other pre-condition before courts can look to the Classification Opinions and Explanatory Notes. The Opinions and Explanatory Notes are always relevant and to be taken into account, according to the section. That does not mean, of course, that they are binding on domestic courts. They are not binding within the Convention itself, but are only guides to interpretation from the Harmonized System Committee (Article 7.1(b)).[121] The fact that they have been made relevant, however, means that Canada will be able to

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[120]Customs Tariff, R.S.C. 1985, c.41 (3rd Supp.), s. 10, 11.

[121]Under Article 3 of the Convention, parties are obligated only to apply the headings, subheadings, General Rules for interpretation, and Section, Chapter and Subheading Notes (Article 3.1(a)).

benefit from the enhanced international uniformity that was one of the reasons for establishing the Harmonized System.[122]

The use of interpretations which originate within the Canadian domestic system raises questions about the nature of the Canadian International Trade Tribunal (and its predecessor, the Tariff Board). These interpretations could include Board or Tribunal references and other extrinsic evidence surrounding the creation of the particular statutory provision. They could also include Board or Tribunal decisions on appeals and evidence of Departmental practice in which the provision has been applied.

On appeals, the Tribunal is expected to act in a judicial manner and adhere to court-like rules of evidence. This role may conflict with the Tribunal's other main function as a specialized advisory body to conduct inquiries on matters referred to it by the Governor in Council or the Minister. In addition to specific inquiries relating to anti-dumping, countervail and safeguard actions, the Tribunal can be asked by the Governor in Council to inquire into "any matter in relation to the economic, trade or commercial interests of Canada with respect to any goods or services or any class

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[122]See Royal Telecom v. DMNRCE, App. AP-90-027, April 5, 1991, 4 TCT 3175 (C.I.T.T.). Section 11 has not been given retroactive effect: Stochem v. DMNRCE, Apps. 2957, 2989, Jan. 29, 1990, 3 TCT 2019 (C.I.T.T.). See discussion in the chapter on Implementation and Procedures.

thereof"[123] and the Tribunal can be asked by the Minister to inquire into "any tariff-related matter, including any matter concerning the international rights or obligations of Canada."[124] If the Tribunal recommends adoption of a particular tariff item and the government agrees, can the Tribunal's view as one of the "authors" of the legislation be cited on a subsequent appeal involving that item?

The parties to an appeal conducted in a judicial manner expect to know the case against them and have an opportunity to counter unfavourable evidence. If the Tribunal bases its appeal decision on evidence presented at a previous inquiry, it is not meeting these expectations.[125] In a few appeals before the Board and Tribunal, nevertheless, previous Ministerial references have been mentioned.[126] In the Hudson's

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[123]Canadian International Trade Tribunal Act, S.C. 1988, c.56, s.18.

[124]Ibid., s. 19.

[125]Concerning legislation in a slightly different form, see DMNRCE v. Parke Davis, 1 TBR 12 (Ex.Ct., Dec. 23, 1953), dismissing an appeal from Parke Davis v. DMNRCE, App. 195, Nov. 29, 1949, 1 TBR 10 (T.B.). This was the first customs appeal to go to the Exchequer Court. Mr. Justice Thorson in his decision affirmed the split between the two functions and said that the Board was correct in limiting the evidence and parties it would hear on an appeal.

[126]Practice was not completely consistent. In DMNRCE v. GTE Sylvania, App. 1061, Feb. 5, 1975, 6 TBR 210 (T.B.), the Tariff Board refused to consider a previous reference report, as "such reports are not to be used in the interpretation of statutes" (p.224). The Board also stated it would not be authorized to use a previous Departmental ruling in interpretation, although it did actually refer to the ruling.

Bay appeal concerning lace cloths, the respondent cited a previous Ministerial reference as evidence of trade usage; the intervenant drew attention to the fact that Parliament had enacted the wording which the Board had recommended.[127] In the Mineral Wax Reference, the Board stated that Parliament had adopted two items recommended in a previous Ministerial reference and that "it seems a fair inference that the division the legislators had in mind between these two items was that contemplated in the report of the Tariff Board."[128] In the Geo-X Surveys appeal, on navigation systems for aircraft, the Board made use of expert testimony from a previous reference on the tariff item in question to establish a

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[127]Hudson's Bay v. DMNRCE, App. 1197, Feb. 7, 1977, 1977 Canada Gazette Part I p.2827 (T.B). See also: Central Electric v. DMNRCE, App. 820, Dec. 2, 1966, 3 TBR 294 (T.B.), rev'd. 3 TBR 296 (Ex.Ct., April 28, 1967); Grant v. DMNRCE, App. 2395, Jan. 30, 1987, 12 TBR 104, 13 CER 268 (T.B.); Ener-Gard v. DMNRCE, App. 2524, Dec. 2, 1987, 12 TBR 531, 15 CER 180 (T.B.); Stochem v. DMNRCE, Apps. 2957, 2989, Jan. 29, 1990, 3 TCT 2019 (C.I.T.T.); Schlumberger v. DMNRCE, App. 2898, Sept. 10, 1990, 3 TCT 2302 (C.I.T.T.).

[128]Reference by Deputy Minister of National Revenue for Customs and Excise: Reclassification of Mineral Wax, App. 223, Dec. 4, 1950, 1 TBR 38 (T.B.) at 38. References by the Deputy Minister are like private appeals in that they concern specific imports about which there is some dispute. They do not involve the wider economic analysis of a reference by the Governor in Council or the Minister. The current legislation permits references by the Deputy Minister on "any question relating to the tariff classification or value for duty of any goods or class of goods."(Customs Act, R.S.C. 1985, c.1 (2nd Supp.), s.70(1)).

definition of "geophysical instrument."[129]

In a study of the Tariff Board prepared for the Law Reform Commission of Canada, Philip Slayton and John J. Quinn argued in favour of a split between the appeal and inquiry functions, since the appeal process required a "fresh and impartial perspective in the interpretation of detailed and technical statutory provisions."[130] In recent amendments, the two functions were not assigned to separate institutions, but the procedural distinction between them was strengthened somewhat. For the inquiry function, the Canadian International Trade Tribunal and its predecessors have not been limited by the strict rules of evidence. The current legislation provides as follows:

> 34. For the purpose of any inquiry under this Act or the Special Import Measures Act, the Tribunal may obtain information that in its judgment is authentic, otherwise than under the sanction of an

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[129]Geo-X Surveys v. DMNRCE, App. 991, April 10, 1972, 1972 Canada Gazette Part I p.2148 (T.B.); also, to a similar effect Plaques Lithographiques v. DMNRCE, App. 1398, April 2, 1979, 6 TBR 800, 1 CER 125 (T.B.). See further Philip Slayton & John J. Quinn, The Tariff Board: A Study Prepared for the Law Reform Commission of Canada, with the assistance of James Cassels (Ottawa: Supply and Services Canada, 1981) ("Slayton & Quinn") p.51, where the authors mention that the appeal record to the Federal Court of Appeal from Frito-Lay v. DMNRCE, Apps. 1241 etc., April 10, 1978, 6 TBR 634 (T.B.) contains a note from the Chairman of the Tariff Board referring other Board members to the briefing volumes for a previous Ministerial reference. The appeal to the Federal Court of Appeal was dismissed, as the court determined that there was nothing in the briefing books which the appellants should have had the opportunity to refute: Frito-Lay v. DMNRCE, [1981] 1 F.C. 177, 2 CER 143 (F.C.A., June 11, 1980).

[130]Slayton & Quinn, p.113.

> oath or affirmation, and use and act on the information.[131]

In previous legislation, the same discretion was also potentially available on appeals, since the statute simply applied most of the Board's inquiry powers to appeals.[132] This is no longer the case and the section quoted above does not, by its terms, apply to classification appeals under the Customs Act. For those appeals, the Tribunal will be subject to the ordinary rules of evidence appropriate to its judicial (or quasi-judicial) role.

While it is sensible to protect the position of parties to an appeal and make sure they have an opportunity to test all relevant evidence, it is also somewhat unrealistic to expect Tribunal members to pretend they have forgotten advice they previously gave the government. When all parties to an appeal know about a previous inquiry, have read the report and are making arguments based on it, it seems foolish to place elaborate taboo markers around any mention of it. The Tribunal's interpretation of a recommended item might not necessarily be that intended by the legislators, but a link is at least likely. So long as the interpretation can be

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[131] Canadian International Trade Tribunal Act, S.C. 1988, c. 56, s.34.

[132] Tariff Board Act, R.S.C. 1985, c.T-1, s.12, rep. S.C. 1988, c.56. The section was not extensively used and, in any case, was unlikely to justify a denial of natural justice. See discussion in the chapter on Implementation and Procedures.

challenged and is not seen as binding, the report could be admissible without damaging the interests of the litigants. The use of evidence obtained during the inquiry is another matter, however, since procedural safeguards could be quite different. The duty of procedural fairness for all parties on an appeal will presumably require that all evidence of trade usage be re-submitted in order to give everyone a full opportunity to challenge. Previous Tribunal reports would thus be no proof, or only very weak proof, of trade usage -- usage which is subject to change in any case.

The Tribunal's appeal function cannot be completely isolated from its role in general inquiries or from potential spillover of information from safeguard, anti-dumping and countervail matters. If one specialized agency is used for all of these trade-related questions, there will be certain risks for the fairness of appeal procedures. It is as if the Tribunal is asked to be the perfect impartial arbitrator -- one with a great deal of specialized knowledge but absolutely no opinions. This is especially difficult if the Tribunal is asked to interpret tariff items which it drafted. For evidence on trade usage in customs appeals, it is not unlikely that some of the experts called to testify were also consulted when the tariff item was drafted.[133] Their evidence is nevertheless admissible. It should be possible to treat

[133]As happened in Naramata Co-operative v. DMNRCE, App. 726, March 10, 1964, 3 TBR 144 (T.B.).

previous Tribunal inquiries in a similar manner, and make the evidence admissible without depriving parties of the opportunity to challenge.

Tribunal inquiry reports are similar to reports of various Commissions and law reform bodies which are increasingly being treated as admissible in statutory interpretation. Such reports have traditionally been seen as admissible only for information on the mischief to be remedied and not for the content of the recommendations.[134] This distinction is quite difficult to maintain and probably would not work well in the context of Tribunal inquiries, when it is the Tribunal that has made the recommendations.

Canadian case law is becoming generally more receptive to the use of extrinsic evidence of the authors' intent in statutory interpretation. Parliamentary Debates are still not freely admissible, but they may be accepted for some purposes, at least in constitutional cases.[135] In classification appeals concerning specific tariff items, it is unlikely that there would be much relevant information in the Debates, but there may be confirmation of basic purposes or links to international developments.[136] For tariff classification

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[134]Côté pp.393-97; Driedger pp.153 ff.

[135]Côté pp.402-18; Driedger pp.156 ff.

[136]Or to a Tribunal inquiry: see Reference by Deputy Minister of National Revenue for Customs and Excise: Reclassification of Mineral Wax, App. 223, Dec. 4, 1950, 1 TBR 38 (T.B.).

matters, the main issue on the "author" side of the statute is likely to be the treatment of Tribunal inquiry reports, where the Tribunal is in the unique position of participating as both judicial interpreter and creator (to the extent possible within the Harmonized System) of tariff provisions.

The use of extrinsic evidence of authors' intention is a controversial topic in statutory interpretation. If extrinsic evidence is permitted, there is a risk of creating barriers for those governed by the statute who must consult all the extra material in order to know what the statute means. The ideal of law speaking clearly and in ordinary language to the general populace is compromised.[137] When, however, the particular ambiguity could be resolved by consulting material such as a Commission report available to all interested parties, it seems foolish to avoid looking. In Lord Simon of Glaisdale's analogy, this is like gazing into a crystal ball when you can read the book.[138]

Some extrinsic sources such as Parliamentary Debates present the problem of identifying which speakers count as authors. For other sources such as Commission or Tribunal reports, this problem does not arise. Once the appropriate authors have been identified, a more fundamental question

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[137]Frederick Bowers, Linguistic Aspects of Legislative Expression (Vancouver; U.B.C. Press, 1989), pp.68,81,358.

[138]Black-Clawson International v. Papierwerke Waldhof-Aschaffenburg [1975] A.C. 591 at 652 (phrase attributed to Aneurin Bevan).

arises of deciding to what extent their intentions should govern. This is the issue of the need for a fresh perspective mentioned by Slayton and Quinn. If law is to have perpetual effect and be "always speaking", some distance must be established between the text and the author. The importance of this distance was noted by Mr. Justice (now Chief Justice) Lamer in Reference re s.94(2) of The Motor Vehicle Act, where he emphasized that the drafters' intent should not be binding for interpretation of the Charter of Rights and Freedoms, since otherwise the Charter would be frozen in time and the "living tree" would not be allowed to grow.[139] A certain textual independence is needed for all statutes in order to give them ongoing application. On tariff appeals, inquiry reports from the Canadian International Trade Tribunal could be admissible without compromising the procedural rights of parties, so long as trade usage is subject to separate proof and so long as the recommendations are seen as relevant but not binding.

Interpretations produced inside the Canadian system can also involve those from the "interpreters'" point of view -- those from the Canadian International Trade Tribunal (or Tariff Board) on previous appeals and those which appear in prior Departmental practice. The use of these interpretations raises similar questions of the need for isolation of the

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[139][1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 (S.C.C.) at 554-55 D.L.R.

appeal process to maintain judicial independence and fairness for all parties. While some overall coherence is expected, it cannot be so complete as to compromise the right to an appeal.

In the Javex appeal, the Supreme Court of Canada ruled that the Tariff Board did not have authority to issue decisions which would be binding as res judicata. The Tariff Board had classified Clorox bleach by its secondary purpose for disinfecting, contrary to a previous Tariff Board declaration concerning the product on a reference by the Deputy Minister. Both the Exchequer Court and the Supreme Court of Canada rejected the Department's argument that the first declaration was binding. The Tariff Board did not have jurisdiction to decide anything other than the appeal before it and could not bind persons who had not been parties. The Exchequer Court did not go so far as to say that each importation could be a completely new matter; presumably, at some point, imports would involve the same issues and the same parties. In the Javex appeal, at least, it was clear that different parties were involved, since Oppenheimer, the importer, had not known about the earlier reference and had not participated in it.[140]

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[140]Oppenheimer v. DMNRCE, App. 398, June 7, 1957, 2 TBR 21 (T.B.), aff'd. Javex v. Oppenheimer and DMNRCE, 2 TBR 29 (Ex.Ct., Oct. 21, 1959), aff'd. [1961] S.C.R. 170, 2 TBR 35 (S.C.C., Jan. 24, 1960). The earlier reference was Reference .. as to Classification of Sodium Hypochlorite in Solution, App. 363, Dec. 19, 1965, 1 TBR 246 (T.B.). See Slayton &

Even though the Tariff Board lacked jurisdiction to bind future imports and future parties, past decisions were generally followed as a matter of good practice, particularly if it appeared that the new appeal involved goods which were virtually the same as those previously dealt with.[141] For some items, a fairly consistent line of decisions developed, such as those interpreting items for hats and other headwear.[142]

Quinn, p.44. The Javex appeal should also apply in the case of the Canadian International Trade Tribunal on tariff classification matters. Like the Tariff Board, it is a court of record (Canadian International Trade Tribunal Act, S.C. 1988, c.56, s.17(1)) and its decisions are treated as final except for the prescribed rights of judicial appeal (Customs Act, R.S.C. 1985, c.1 (2nd Supp.), s.67(3)).

[141]Gladstone v. DMNRCE, App. 596, March 12, 1962, 2 TBR 291 (T.B.); E.T.F. Tools v. DMNRCE, App. 718, Feb. 10, 1964, 3 TBR 132 (T.B.); W.J. Elliott v. DMNRCE, App. 792, Nov. 8, 1965, 3 TBR 256 (T.B.), aff'd. Ex.Ct. (see 3 TBR 258); Plaques Lithographiques v. DMNRCE, App. 1729, Nov. 8, 1982, 8 TBR 330, 4 CER 389 (T.B.); Eddie Black's v. DMNRCE, App. 1921, April 29, 1983, 8 TBR 654, 5 CER 376 (T.B.); Splendid Chocolates v. DMNRCE, Apps. 1998 etc., March 16, 1984, 9 TBR 179, 6 CER 225 (T.B.). A Deputy Minister's reference was followed as a precedent in Accessories v. DMNRCE, App. 331, March 1, 1955, 1 TBR 221 (T.B.), aff'd. [1956] Ex.C.R. 289, 1 TBR 223 (Ex.Ct., March 6, 1956), aff'd. [1957] S.C.R. 358, 1 TBR 229 (S.C.C., April 12, 1957); the reference was Reference ... regarding the customs tariff classification ... of "attached" electric motors ..., App. 283, July 6, 1953, 1953 Canada Gazette Part I p.2092 (T.B.). Sometimes evidence from a previous appeal could be adopted for reasons of convenience: Sherritt Gordon v. DMNRCE, App. 548, Aug. 2, 1961, 2 TBR 231 (T.B.); Sherritt Gordon v. DMNRCE, App. 549, Sept. 7, 1961, 2 TBR 234 (T.B.).

[142]Greisman v. DMNRCE, App. 439, May 27, 1957, 2 TBR 107 (T.B.); Midway v. DMNRCE, App. 486, June 10, 1959, 2 TBR 167 (T.B.); Neckwear v. DMNRCE, App. 582, May 4, 1962, 2 TBR 272 (T.B.); Beco Industries v. DMNRCE, App. 1540, Dec. 5, 1980, 7 TBR 220, 2 CER 318 (T.B.); Kates Millinery v. DMNRCE, App. 1660, March 10, 1982, 8 TBR 103, 4 CER 76 (T.B.), aff'd. F.C.A. (see [1984] 1 F.C. 1157). See also: Reference by the

Precedent does not always simplify matters, of course. In the Burrard Amusements appeal, both sides relied on the same previous judgement - a situation which inspired the Board to quote Shakespeare ("Mark you this, Bassanio, the devil can cite scripture for his purpose") before deciding in favour of the appellant.[143] When precedents are used as proof of trade vocabulary before the Canadian International Trade Tribunal, attention should be paid to the same considerations of fairness that were mentioned in the case of inquiry reports, as the second appeal will involve different parties and different evidence. The Tariff Board confronted this issue in the Promowear appeal, where it applied a past decision concerning tips and sides for caps. Evidence showed that the manufacturing of caps had changed in the interval, but not so much as to make the previous decision obsolete.[144] In Olympia Floor, the Tariff Board followed a precedent but was reversed by the Federal Court of Appeal for failing to give proper weight to the evidence of trade usage which the appellant put

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Deputy Minister... on Cotton and Plastic Combination Materials, App. 362, Jan. 10, 1956, 1 TBR 243 (T.B.); Wm.Gladstone v. DMNRCE, App. 596, March 12, 1962, 2 TBR 291 (T.B.); Crown Wallpaper v. DMNRCE, App. 825, April 27, 1967, 4 TBR 3 (T.B.).

[143]Burrard Amusements v. DMNRCE, App. 524, Nov. 1, 1960, 2 TBR 210 (T.B.) (both sides citing a previous Exchequer Court judgment).

[144]Promo-wear v. DMNRCE, App. 1568, Jan. 30, 1981, 7 TBR 267, 3 CER 32 (T.B.); see Hamilton Uniform v. DMNRCE, App. 504, March 3, 1959, 2 TBR 189 (T.B.).

forward.[145] Previous interpretations can help to clarify the meaning of an item, but they should not be seen as binding and parties must not be deprived of a full opportunity to present a subsequent appeal.

As Professor Côté points out, a strict approach to stare decisis may be out of place in statutory interpretation in general.[146] The common law rules of precedent were developed primarily to provide order in a legal system built on case law. When the legal principles are set out in a statute, it is the statute which should have priority. There is no need to give full binding effect to every word of a subsequent judicial interpretation, so that it receives more attention than the words of the legislation. The Mitsui appeal illustrates the danger of placing too great a reliance on precedent. The imported goods were canned tuna packed in a mixture of vegetable broth, water, salt and oil. The Deputy Minister classified them as "fish preserved in oil", following a precedent which decided that the item in question covered fish packed in oil even though oil did not actually preserve fish. The Tariff Board allowed the appeal, since oil was

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[145]Olympia Floor v. DMNRCE, App. 1526, Jan. 6, 1982, 8 TBR 31, 4 CER 10 (T.B.), rev'd. 5 CER 562, 49 N.R. 66 (F.C.A., Sept. 14, 1983), reheard App. 1526, March 9, 1984, 9 TBR 169, 6 CER 218 (T.B.). For further developments, see: Olympia Floor v. DMNRCE, Apps. 1617 etc., July 23, 1984, 9 TBR 308, 7 CER 27 (T.B.); Olympia Floor v. DMNRCE, Apps. 2548, 2642, Nov. 10, 1987, 12 TBR 479, 15 CER 137 (T.B.).

[146]Côté pp.517-20.

actually only about 5% of the contents of the goods in question and the goods thus were not packed "in oil" as the item required. It is at least arguable that the precedent drew emphasis to the word "preserved" in the item and gave the impression that it applied to all canned fish. Without the precedent, the appeal might not have been necessary.[147]

The other inside source of interpretations - and the most important source of interpretations - is the Department of National Revenue, Customs and Excise, which must interpret the tariff in order to apply it. The Department publishes a voluminous series of D-Memoranda to explain its policy on classification and other topics of customs administration. The Memoranda are intended both for Departmental use and for the information of the importing public. The Memoranda provide very helpful details on the administration of particular items and are virtually essential for the smooth operation of the system. Their characterization in law, however, is not entirely clear.

The D-Memoranda are not regulations under the general regulation-making power given to the Governor in Council in s.164(1)(j) of the Customs Act. Some may contain extracts from regulations issued under specific regulation-making

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[147]Mitsui v. DMNRCE, App. 1641, Jan. 12, 1981, 7 TBR 241, 3 CER 10 (T.B.). See Fahn Products v. DMNRCE, App. 1066, Oct. 3, 1974, 1975 Canada Gazette Part I p.448 (T.B.).

authority.[148] Most of the material in the D-Memoranda, however, does not have this status, but is simply in the category of "guidelines" issued pursuant to the implied authority of the Department to fulfill its responsibilities in administering the tariff.[149]

The characterization of such "guidelines" in law is problematic.[150] In classification appeals in the past, the Tariff Board has treated them as admissible evidence, which it has sometimes followed and sometimes not followed.[151] The leading case from the Supreme Court of Canada on the topic, which dealt with an Interpretation Bulletin on income taxation, stated that "administrative policy and

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[148]Specific regulation-making authority has sometimes been contained in particular tariff items: J.S. Mason v. DMNRCE, App. 305, Dec. 17, 1953, 1 TBR 139 (T.B.); M.I. Griesman v. DMNRCE, App. 439, May 27, 1957, 2 TBR 107 (T.B.). Regulations and Orders made under specific authority have full legal force and can be cited without difficulty. The Remission Order in University of Winnipeg v. DMNRCE, App. 2522, Jan. 28, 1988, 13 TBR 58, 16 CER 14 (T.B.), for example, should have been in this category.

[149]See Interpretation Act, R.S.C. 1985, c.I-21, s.31(2).

[150]Côté pp.521-25. See, generally, M. Irish, Customs Valuation in Canada, Don Mills, CCH Canadian, 1985, pp.64-91.

[151]Reference ... re Classification of Mineral Wax, App. 223, Dec. 4, 1950, 1 TBR 38 (T.B.); Weil Dental v. DMNRCE, App. 856, Nov. 7, 1967, 4 TBR 41 (T.B.); Fromagerie d'Oka v. DMNRCE, App. 1410, Nov. 15, 1979, 6 TBR 945, 1 CER 309 (T.B.); AG Marketing v. DMNRCE, pp. 2309, Oct. 22, 1985, 10 TBR 228, 10 CER 105 (T.B.); General Bearing v. DMNRCE, App. 2349, March 10, 1986, 11 TBR 150, 11 CER 122 (T.B.); Akhurst Machinery v. DMNRCE, App. 2630, May 1, 1987, 12 TBR 181, 14 CER 98 (T.B.); Novocol v. DMNRCE, App. 2731, Feb. 26, 1988, 13 TBR 183, 16 CER 132 (T.B.); Gillanders v. DMNRCE, App. 3077, Sept. 12, 1990, 3 TCT 2329 (C.I.T.T.).

interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation."[152]

The guidelines are really part of Departmental practice, which would be admissible evidence on appeals but would not be binding. As the Department is not given authority in the legislation to issue binding advance rulings or to make general regulations, practice would not normally set up an estoppel. Prior practice can be cited on an appeal, although it will not be treated as binding.[153] If it is not expressed

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[152]Nowegijick v. R., [1983] 1 S.C.R. 29 at 37, referring to Harel v. Deputy Minister of Revenue of Quebec, [1978] 1 S.C.R. 851. See further: K.Field v. DMNRCE, App. 2066, Feb. 22, 1985, 10 TBR 39, 8 CER 252 (T.B.); Digital Equipment v. DMNRCE, App.2262, Jan. 28, 1986, 11 TBR 58, 11 CER 5 (T.B.), aff'd. 13 CER 343 (F.C.A., Feb. 26, 1987); Cavalier Luggage, App. 2573, Jan. 30, 1987, 12 TBR 69, 13 CER 243 (T.B.); Ener-Gard v. DMNRCE, App. 2524, Dec. 2, 1987, 12 TBR 531, 15 CER 180 (T.B.); Jagenberg v. DMNRCE, App. 2686, Oct. 7, 1988, 17 CER 296 (T.B.); Cassidy's v. DMNRCE, Apps. 2914 etc., March 2, 1989, 2 TCT 1043 (C.I.T.T.); Boiridy v. DMNRCE, App. 2916, April 28, 1989, 2 TCT 1071 (C.I.T.T.); Stochem v. DMNRCE, Apps. 2957, 2989, Jan. 29, 1990, 3 TCT 2019 (C.I.T.T.). On excise tax, see also Art Candles v. DMNRCE, App. 2311, Nov. 28, 1985, 10 CER 156 (T.B.), aff'd. 13 CER 205 (F.C.A., Jan. 15, 1987).

[153]General Supply v. DMNRCE, App. 269, Sept. 16, 1952, 1 TBR 76 (T.B.), aff'd. [1954] Ex.C.R. 340, 1 TBR 81 (Ex.Ct., May 8, 1954); Reference ...(re Cut Glass), App. 322, Dec. 8, 1954, 1 TBR 192 (T.B.); Beisinger v. DMNRCE, App. 601, Oct. 26, 1962, 2 TBR 296 (T.B.); Moffats v. DMNRCE, App. 723, March 4, 1964, 3 TBR 142 (T.B.); F.Marie v. DMNRCE, App. 1105, Feb. 16, 1976, 1976 Canada Gazette Part I p.3203 (T.B.); Auto Radiator v. DMNRCE, App. 1424, June 12, 1979, 6 TBR 857, 1 CER 194 (T.B.). In Kipp Kelly v. DMNRCE, App. 1479, May 21, 1980, 7 TBR 102, 2 CER 129 (T.B.), the Board seems to have rejected evidence of certain rulings which it did not consider relevant to the issues in appeal.

in a D-Memorandum, it can be presented in oral testimony, as was the case for evidence of Departmental procedures for end use items in the Superior Brake appeal.[154] Practice might also, rarely, be used as evidence of evolving trade usage, as the Department adapts its administration to changing vocabulary.[155] The crucial limitation on practice is the official absence of estoppel, so that even long periods of consistent interpretation will not create a situation on which the importer can rely. In the Home Evangel appeal, even 23 years of practice did not set up an estoppel against the Department, although the Tariff Board did actually decide in favour of the appellant.[156]

Guidelines and departmental precedents share this defect of unreliability. Guidelines in some form are necessary for coherent administration. It is reasonable to expect that like cases will receive like treatment. When an importer relies on a guideline or previous ruling, however, the Department is not estopped from changing its mind. In two early appeals, Consolidated Mining and Falcon Equipment, the unsuccessful

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[154]The Tariff Board apparently requested a customs official present at the hearing to provide this testimony. Superior Brake & Hydraulic v. DMNRCE, Apps. 2245, 2254, Jan. 13, 1986, 11 TBR 13, 10 CER 271 (T.B.).

[155]Canadian Housewares v. DMNRCE, App. 179, June 9, 1949, 1 TBR 8 (T.B.). See Slayton & Quinn, pp.73-74.

[156]Home Evangel v. DMNRCE, App. 1185, Feb. 3, 1977, 1977 Canada Gazette Part I p.2629 (T.B.). See: R. v. Sun Parlor, [1973] F.C. 1055 (T.D.); R. v. Confection Alapo, 2 CER 249 (F.C.T.D., April 28, 1980).

appellant had reasonably relied on a ruling and all the Tariff Board could do was to recommend that the Deputy Minister consider granting a refund.[157] The problem is really one of inadequate development of administrative law on the topic. When the government does its best to use open procedures and provide as much information as possible to the public, communication should not be impeded by the idea that every last detail is binding. Once policy is established, however, and reliance is both expected and encouraged, the guidelines are serving as quasi-regulations and should be seen as having something close to binding force. Modern appellants and their legal counsel are unlikely to be as shy as those in the Consolidated Mining and Falcon Equipment appeals. The possibility may now exist for future developments in this area, based on the Charter of Rights and Freedoms, the duty of procedural fairness or a general tort action for damages.

Interpretations from Departmental practice are admissible in evidence on appeal and are entitled to serious consideration. In some cases, there might be reason to treat them as binding on appeal. In particular, interpretations made

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[157] Consolidated Mining v. DMNRCE, App. 191, Sept. 21, 1949, 1 TBR 9 (T.B.); Falcon Equipment v. DMNRCE, App. 257, March 10, 1952, 1 TBR 67 (T.B.). See also Aetna Biscuit v. DMNRCE, App. 166, Aug. 26, 1949, 1 TBR 5 (T.B.), and discussion supra under "Purposive or Teleological Method". In V.W.V. Enterprises v. DMNRCE, Apps. 2275, 2368, April 21, 1986, 11 TBR 180, 11 CER 258 (T.B.), the unsuccessful appellant had relied on a D-Memorandum, but the memorandum was directed toward the administration of import quotas on footwear, rather than their tariff classification.

available in a manner likely to encourage public reliance should receive significant weight. Of all the sources of interpretation, these are the most important.

VI. Bilingual Interpretation

Under s.6 of the Official Languages Act, federal legislation in Canada is enacted, printed and published in both English and French.[158] Both versions of the Customs Tariff are thus equally authentic and interpretation must take the bilingual context into account.

From September 7, 1969 to September 15, 1988, the official languages legislation then in force gave specific directions on how bilingual interpretation was to be done. The relevant section, now repealed, was as follows:

> s.9.(1) In construing an enactment, both its versions in the official languages are equally authentic.
>
> (2) In applying subsection (1) to the construction of an enactment,
>
> (a) where it is alleged or appears that the two versions of the enactment differ in their meaning, regard shall be had to both its versions so that, subject to paragraph (c), the like effect is given to the enactment in every part of Canada in which the enactment is intended to apply, unless a contrary intent is explicitly or implicitly evident;
>
> (b) subject to paragraph (c), where in the enactment there is a reference to a concept, matter or thing, the reference shall, in its expression in each version of the enactment, be construed as a reference to the concept, matter or thing to which in its expression in both versions of the enactment the reference is apt;
>
> (c) where a concept, matter or thing in its

[158] Official Languages Act, R.S.C. 1985, c.31 (4th Supp.).

> expression in one version of the enactment is incompatible with the legal system or institutions of a part of Canada in which the enactment is intended to apply but in its expression in the other version of the enactment is compatible therewith, a reference in the enactment to the concept, matter or thing shall, as the enactment applies to that part of Canada, be construed as a reference to the concept, matter or thing in its expression in that version of the enactment that is compatible therewith; and
>
> (d) if the two versions of the enactment differ in a manner not coming within paragraph (c), preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects.[159]

Taken literally, the direction in s.9(2)(b) seemed to say that bilingual interpretation always required application of the common meaning in cases of ambiguity, regardless of whether this fit with the rest of the context of the statute.[160] The Supreme Court of Canada rejected this view in the R. v. Compagnie Immobilière BCN Ltée decision, in which it held that the narrow literal meaning shared between the two versions of an Income Tax regulation did not apply since it was not in accordance with the rest of the legislation. In effect, the Supreme Court gave priority to s.9(2)(d), so that the usual canons of interpretation would still be used to show

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[159] Official Languages Act, R.S.C. 1985, c.O-3, rep. by R.S.C. 1985, c.31 (4th Supp.), in force Sept. 15, 1988, except for s.95 concerning criminal trials which was in force Feb. 1, 1989.

[160] The subsection was perhaps more explicit on this in the French version, which was as follows: "sous réserve de l'alinéa c), l'interprétation à donner à chaque version d'un passage donné est celle qui est compatible avec leur teneur commune".

the true "spirit, intent and meaning" of the enactment.[161]

The Supreme Court had previously applied s.9(2)(b) in a tariff classification case, the Pfizer decision, in which the court had opted for the narrow, literal meaning of "derivatives" of tetracycline which was common to both languages.[162] The Federal Court of Appeal and the Tariff Board had also used the subsection to find for the common meaning as reflecting legislative intent in a number of appeals.[163] In other cases, they rejected the narrow, common meaning, relying on s.9(2)(d) to interpret in accordance with the spirit and intent - even, in one instance, before the Supreme Court's

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[161]R. v. Compagnie Immobilière BCN Ltée, [1979] 1 S.C.R. 865. See: Michael Beaupré, Interpreting Bilingual Legislation, 2nd ed., Toronto, Calgary, Vancouver: Carswell, 1986, pp.51 ff; Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.

[162]Pfizer v. DMNRCE, [1977] 1 S.C.R. 456, 5 TBR 257.

[163]Norton v. DMNRCE, App. 936, Feb. 2, 1971, 1971 Canada Gazette Part I p.1130 (T.B.); DMNRCE v. Film Technique, [1973] F.C. 75, 5 TBR 274 (F.C.A.), rev'g. Film Technique v. DMNRCE, App. 927, Jan. 19, 1972, 5 TBR 267 (T.B.); Caribex Seafoods v. DMNRCE, App. 1229, Jan. 31, 1978, 6 TBR 578 (T.B.), aff'd. F.C.A. (see 17 CER 29); Frito-Lay v. DMNRCE, Apps. 1241 etc., April 10, 1978, 6 TBR 634 (T.B.), aff'd. [1981] 1 F.C. 177, 2 CER 143 (F.C.A., June 11, 1980) (contra: Entreprises Mair Fried v. DMNRCE, App. 1220, March 22, 1978, 1979 Canada Gazette Part I p.3048 (T.B.)); C. Itoh, General Footwear v. DMNRCE, Apps. 1308 etc., June 1, 1979, 6 TBR 847, 1 CER 187 (T.B.); Camstat Graphique v. DMNRCE, App. 1790, Dec. 15, 1982, 8 TBR 415, 5 CER 62 (T.B.); Kenneth Field v. DMNRCE, App. 2066, Feb. 22, 1985, 10 TBR 39, 8 CER 252 (T.B.); Ener-Gard v. DMNRCE, App. 2524, Dec. 2, 1987, 12 TBR 531, 15 CER 180 (T.B.); R. Mabit v. DMNRCE, App. 2622, Jan. 20, 1988, 13 TBR 1, 15 CER 329 (T.B.); Deltonic v. DMNRCE, App. 2562, July 15, 1988, 17 CER 29 (T.B.), aff'd. 3 TCT 5173, 113 N.R. 7 (F.C.A., June 8, 1990).

decision in BCN.[164] Section 9 as a whole was open to criticism on the ground that it seemed to favour a very literal approach to interpretation. After the BCN decision, this criticism was no longer valid, but the section ceased to have much meaning since the ordinary rules would apply, taking into account the bilingual context.

The Tariff Board dealt with bilingual interpretation in a number of appeals without reference to specific statutory directions, even during the nearly 20 years when section 9 was in force. Interpretation normally would require a reconciliation of meanings, with each version having an independent, slightly different meaning. The ambiguity could be resolved by choosing a narrow common meaning or by opting instead for some wider meaning which would be applied to both. If the discrepancy could not be resolved, one version would have to be chosen over the other.

Occasionally, the problem was an easy, grammatical one. In the Grand Specialties appeal, for example, flavoured mineral water was classified under an item for "prepared food and beverages" because the French version, which read "aliments préparés et breuvages," made it clear that the adjective "prepared" in English did not modify the word

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[164] Canada Music v. DMNRCE, App. 1166, June 9, 1976, 1977 Canada Gazette Part I p.2624 (T.B.). See also: Nitrochem v. DMNRCE, 8 CER 58, 53 N.R. 394 (F.C.A., Oct. 30, 1984), rev'g. App. 1780, March 8, 1983, 8 TBR 616, 5 CER 228 (T.B.); Muffin House v. DMNRCE, App. 2396, July 17, 1986, 11 TBR 315, 12 CER 43 (T.B.).

"beverages."[165] Most appeals, however, involved more complicated questions of the meaning of words and their differing connotations in the two languages.

The narrower, more precise meaning was chosen in a number of appeals. In the early Rosen decision, for example, the Tariff Board decided that a Canadian citizen who had lived outside the country for some time could not claim the exemption for "settler's" effects since the item in French used the word "immigrant", which did not cover the appellant.[166] In Crabtree, goods which could qualify as "plates for printing" in English were not included in the French version "clichés pour impression" since they did not yet have the imprint of an image or outline; the Board concluded that "(s)ince the broader meaning is inconsistent with the French version ... it is not the meaning intended by Parliament."[167] In Tri-Hawk, a surgical glue which could qualify in English as "prepared surgical sutures" was held not to qualify in French as "ligatures pour sutures chirurgicales"

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[165]Grand Specialties v. DMNRCE, App. 2565, Jan. 28, 1987, 12 TBR 60, 13 CER 233 (T.B.). See also: Reference ... as to Classification of Sodium Propionate, App. 361, Oct. 31, 1955, 1 TBR 241 (T.B.).

[166]Rosen v. DMNRCE, App. 335, Feb. 1, 1955, 1 TBR 233 (T.B.). For the up-dated version of this item, see: Hana Lang v. DMNRCE, App. 1982, Nov. 21, 1983, 9 TBR 12, 6 CER 112 (T.B.); H.E. Wakelin v. DMNRCE, App. AP-89-030, Sept. 20, 1990, 3 TCT 2341 (C.I.T.T.).

[167]R.W. Crabtree v. DMNRCE, App. 485, Dec. 4, 1958, 2 TBR 165 (T.B.) at 166. See also Plaques Lithographiques v. DMNRCE, App. 1398, April 2, 1979, 6 TBR 800, 1 CER 125 (T.B.).

since the French version referred more specifically to thread and sewing.[168]

The second version of a tariff item could be consulted simply to confirm an interpretation, as was the case in AMC Construction, where "mine wall support systems" was given a wide interpretation in line with the wide meaning of the French text "cadres pour le soutènement des murs."[169] A wide meaning could also result when one item clarified and enlarged the interpretation of the other. In the Fahn Products appeal, for example, a tariff item for "fish, preserved in oil" was interpreted as covering fish packed in oil, since the French text used the same word "conservé" for both "preserved" and "packed" in English.[170]

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[168]Tri-Hawk International v. DMNRCE, App. 1213, April 26, 1977, 1978 Canada Gazette Part I p.837 (T.B.). For further examples of application of the narrow common meaning, see General Supply v. DMNRCE, [1954] Ex.C.R. 340, 1 TBR 81 (Ex.Ct., May 8, 1954); Lewis Specialties v. DMNRCE, App. 469, March 19, 1958, 2 TBR 151 (T.B.); Jan Overwheel v. DMNRCE, App. 1254, Nov. 22, 1977, 6 TBR 561 (T.B.); Skega v. DMNRCE, App. 2006, Dec. 13, 1983, 9 TBR 50, 6 CER 139 (T.B.), aff'd. DMNRCE v. Skega, 12 CER 204, 72 N.R. 280 (F.C.A., Oct. 7, 1986); Association Récréative Montréalaise v. DMNRCE, App. 2048, Feb. 7, 1984, 9 TBR 126, 6 CER 186 (T.B.); Woolrest v. DMNRCE, App. 2822, July 27, 1988, 17 CER 117 (T.B.).

[169]AMC Construction v. DMNRCE, App. 937, Feb. 4, 1971, 1971 Canada Gazette Part I p.1432 (T.B.). See also: Harnischfeger v. DMNRCE, App. 367, Jan. 27, 1956, 1 TBR 247 (T.B.); Timmins Aviation v. DMNRCE, App. 764, April 2, 1965, 3 TBR 212 (T.B.); Young Israel v. DMNRCE, App. 2317, March 4, 1986, 11 TBR 144, 11 CER 111 (T.B.).

[170]Fahn Products v. DMNRCE, App. 1066, Oct. 3, 1974, 1975 Canada Gazette Part I p.448 (T.B.). See also: Federal Wire and Cable v. DMNRCE, App. 554, June 7, 1961, 2 TBR 240 (T.B.); Concentrated Foods v. DMNRCE, App. 2552, Sept. 15, 1987, 12

It appears that the Board was not opting each time for the narrow common meaning, but doing an interpretation in context, similar to the approach taken by the Supreme Court in BCN. Trade meaning, for example, could have priority over any argument about compatibility between the two language versions.[171] Occasionally the two versions could not be made to match and the Board had to chose between them.[172]

Bilingual interpretation resembles the contextual method of interpretation, a sort of reading together of the two versions, almost in an application of the noscitur a sociis idea. The relationship between two authentic versions of the same provision, however, is closer than the relationship to other provisions in the same or related statutes. This is not an associated tariff item, but the same item expressed differently. With implementation of the Harmonized System, interpreters of the customs tariff can now be assured that it has been very carefully and precisely drafted in both English

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TBR 321, 14 CER 276 (T.B.); dissenting opinion of Tribunal member Trudeau in Schlumberger v. DMNRCE, App. 2898, Sept. 10, 1990, 3 TCT 2302 (C.I.T.T.).

[171]Beloit Sorel v. DMNRCE, App. 839, Nov. 25, 1966, 3 TBR 321 (T.B.); DMNRCE v. Sefer, App. 927, April 21, 1970, 5 TBR 48 (T.B.), aff'd. Sefer v. DMNRCE, 5 TBR 52 (Ex.Ct., Nov. 16, 1970); Canadian Titanium v. DMNRCE, App. 1047, July 28, 1975, 1976 Canada Gazette Part I p.1558 (T.B.). This approach may risk giving priority to one language or the other, unless it can be shown that trade usage in both languages is the same.

[172]Tiefenbach Tool v. DMNRCE, App. 1553, Jan. 15, 1981, 7 TBR 247, 3 CER 15 (T.B.). See also New Way Sales v. DMNRCE, Apps. 1288, 1289, Dec. 27, 1978, 1979 Canada Gazette Part I p.1645 (T.B.).

and French. Canadian importers and officials may find material from the Customs Co-operation Council particularly helpful in this regard, as the Council operates in both languages.

Chapter 9

Conclusion

The Harmonized System has brought greater precision and detail to the Canadian customs tariff. The whole tariff has been revised and up-dated. The provisions are reliably and carefully drafted in both their English and French versions. Participation in the accepted international commodity code will facilitate international negotiations and provide better statistics for all users. Private traders will not have to reclassify goods several times in an international transaction. If the Harmonized System is accepted as a general multipurpose commodity code, it will simplify identification of goods across a number of different contexts for both public and private interests. A multipurpose code will also be compatible with modern techniques for the electronic management of data.

The General Rules for Interpretation of the Harmonized System, however, concentrate too heavily on material composition of goods, in an effort to encourage uniformity. It is argued throughout this study that a more contextual model is needed, in which classification can also take account of use in commercial context. Empirical observation of physical characteristics is no guarantee of certainty or uniformity, since naming which ignores use is artificial.

Especially for products of complex manufacturing and technology, there is a greater chance of attracting a consensus if interpretation can look to all factors which are common, including commercial application. The use criterion would refer to goods in their condition as imported but there is no reason to require special physical characteristics in order to trigger contextual interpretation. Testing and further inquiries can often be necessary to establish material composition. There is no reason why inquiries cannot also look to the use of goods in their ordinary application.

It would be unrealistic to expect to express all principles of interpretation for the Harmonized System in one set of rules. The System is intended to be adopted as legislation in many countries, and separate legal cultures will inevitably apply their own statutory principles. The Harmonized System can still operate effectively as the "Esperanto of trade"[1] so long as interpreters are encouraged to follow Customs Co-operation Council guidance. For the Harmonized System to be successful as a multipurpose commodity code, interpretation should be as open as possible to the viewpoints of all potential users - in government, commerce and industry in all parts of the globe.

For Canadian tariff interpretation in the future, principles of statutory interpretation will remain the same,

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[1]Peggy Chaplin, "An Introduction to the Harmonized System" (1987) 12 North Carolina J. Int'l L. & Comm. Reg. 417 at 432.

as well as certain approaches to classification such as recognition of trade usage and assumptions about evidence and procedures. Habits of thought will also remain somewhat the same, even after all disputes from the previous system have worked their way through the appeal process. Tariff classification in the past has been quite contextual - for administration of end use items and for general approaches to interpretation. There is also a long history of close administrative attention to the details of Canadian production, as illustrated in the management of the machinery remission programme. These habits of contextual interpretation should not be abandoned with implementation of the Harmonized System. The observation model is no guarantee of certainty or uniformity.

In actual application of the Harmonized System, many of the decisions may follow a contextual model, taking account of the use of goods in application. This could occur pursuant to certain Legal Notes which make use directly relevant, such as Section Notes 3 and 4 in Section XVI for complex machinery. Contextual interpretation could also appear in decisions on the General Rules for Interpretation, especially concerning the "essential character" of goods. It could be that interpretation under the Customs Co-operation Council Nomenclature in the past has already outgrown the observation model and it is simply a question of up-dating the General Rules of Interpretation. Revision would be particularly

helpful for the classification of products of new technology and for acceptance of the Harmonized System as a truly multipurpose code. Use is a fundamental part of the naming of goods. To encourage consensus, customs tariff interpretation should be contextual.

APPENDIX

GENERAL RULES FOR THE INTERPRETATION

OF THE HARMONIZED SYSTEM

Classification of goods in the Nomenclature shall be governed by the following principles:

1. **The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:**

2. **(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.**

   (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. **When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:**

   (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

   (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

   (c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. **Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.**

5. **In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:**

   (a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;

   (b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. **For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis* to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.**

CANADIAN RULES

1. For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

2. Where both a Canadian term and an international term are presented in this Nomenclature, the commonly accepted meaning and scope of the international term shall take precedence.

3. Unless the context otherwise requires, the provisions of Rule 6 of the General Rules for the Interpretation of the Harmonized System shall apply, *mutatis mutandis*, to the classification numbers within any one tariff item.
(NB This rule does not form part of the Customs Tariff legislation.)

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