

Why We Were Right and They Were Wrong

of an agency for issues within its jurisdiction.⁸

It should be noted that Canadian courts have never reviewed a Revenue Canada determination. However, based on court decisions, panel decisions thus far, and administrative laws and practices, it could be expected that Revenue Canada would be subjected to both the "correctness test" and the "reasonableness test" because it has not been protected by a privative clause. Under the "reasonableness" test, Canadian courts could hold that Revenue Canada determinations would not be overturned unless they were unreasonable. If there was more than one reasonable interpretation of an aspect of the SIMA, the agency's determination could be upheld in so far as it was reasonably based on fact and law.

In summary, the American and Canadian standards of review are based on the principle of deference to the administrative agency. Final determinations are to be upheld unless a court can find that they were outside of the agency's jurisdiction, an agency was guilty of an error of law, or a determination was unsubstantiated by reasonable evidence.

Critics of the Chapter 19 process have argued that panels do not adhere to the appropriate standards of review because they do not show enough deference to administrative agencies. For example, retired Judge Malcolm Wilkey criticized binational panels for "lacking in tradition and experience in judicial review of administrative agency action" when testifying before the House Ways and Means Subcommittee on Trade. Wilkey accused binational panels of not being compatible with the American process of review. He argued that Canadian and Mexican panelists were unfit to review American agencies because they could not understand or appreciate the degree of deference that had developed in American jurisprudence.⁹ Similarly, a coalition of 45 "protectionist" companies and associations sent a letter to Congress on May 15, 1996 to convey their dissatisfaction with the Chapter 19 process. The letter suggested that binational panels had routinely disregarded the American standard of review because panelists did not defer to the DOC and ITC. In the event that panels had properly adhered to the American standard of review in accordance with Article 1904 (3) of the FTA/NAFTA, "panels would be very deferential to DOC and ITC trade determinations. In particular, they would sustain the agency's findings unless they had not reasonable or factual basis or were grounded on a legal

⁸ John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Business*, Vol. 15, No. 3 (Spring, 1995), 554-568.

⁹ Testimony of Malcolm R. Wilkey before the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives (June 21, 1995), 2-4; Opinion of Judge Wilkey, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding in the Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 56-57.