

Why We Were Right and They Were Wrong

adhered to the proper standard of review, legal counsel to the ITC was certain that the panel could have reached the same conclusions about the injury determination and avoided the request for an Extraordinary Challenge Committee.³²

Perhaps the most scathing attack on a binational panel's application of the American standard of review was offered by retired Judge Malcolm Wilkey in his dissenting opinion in the ECC's examination of the softwood lumber dispute. Wilkey had become a figurehead for protectionism in the American judicial system, and brought his own biases into the ECC hearing. Observers lamented that Wilkey came to the hearing with his mind set to protect U.S. producers, and did not make any effort to listen to the arguments of Canadian counsel.³³ Reflecting the views of nationalistic producer groups, Wilkey rejected the panel's use of the standard of review when it examined the DOC's CVD determination of Canadian softwood lumber. He stressed that the panel overstepped its jurisdiction by instructing Commerce to develop an alternative means of determining specificity. He maintained that when there was a "gap" or ambiguity in a statute, it was the agency and not the reviewing court that was authorized by Congress to fill it. In other words, deference to the administrative agency was the most important consideration that reviewing courts or binational panels had to account for.

In contrast to the other two members of the ECC, Wilkey insisted that the DOC's determination was reasonable, substantiated, and in conformity with U.S. laws and administrative practice. Not surprisingly, the DOC had found in favour of American softwood lumber producers and concluded that Canadian stumpage fees were "unfair" countervailable subsidies. Wilkey argued that "the panel proceeded to violate almost every one of the canons of review of an agency action." In particular, the panel attempted to redo and re-evaluate the evidence, redetermine the technical issues before the DOC, and insist on its own methods. Consequently, he suggested that the ECC must affirm the DOC's determination and reject the panel's decision for going beyond its authority.

Wilkey noted that the only members of the panel who truly understood and applied U.S. law correctly were the two dissenting members that issued a minority decision in the panel's remand opinion on December 17, 1993.³⁴ He criticized the majority of the panel for not complying with American law and practice. He reprimanded the majority for not employing the legislative history of the law dealing with specificity of subsidies. Wilkey held that, "while ignoring the

³² Confidential telephone interview with a member of ITC's legal counsel, July 9, 1996.

³³ Interview with Christianne Laizner, Legal Counsel (JLT), Department of Foreign Affairs and International Trade, September 23, 1996.

³⁴ Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada, Opinion of the Determination on Remand*, USA-92-1904-01.