HOUSE OF COMMONS
CANADA

CUSTOMS ACT

The Report of the Special Committee to
Review the Provisions and Operation of the Act

CLÉMENT COUTURE, M.P.
Chairman

February 1992

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HOUSE OF COMMONS

Issue No. 5

Wednesday, February 5, 1992
Tuesday, February 11, 1992
Tuesday, February 18, 1992

Chairman: Clément Couture

CHAMBRE DES COMMUNES

Fascicule nº 5

Le mercredi 5 février 1992
Le mardi 11 février 1992
Le mardi 18 février 1992

Président: Clément Couture

Minutes of Proceedings and Evidence of the Special Committee on the

Act Respecting Customs

Procès-verbaux et témoignages du Comité spécial chargé de l'examen de la

Loi concernant les Douanes

RESPECTING:

Order of Reference from the House of Commons dated Wednesday, September 18, 1991—Comprehensive review of the provisions and operation of *An Act respecting Customs* (Chapter 1, 2nd Supplement, Revised Statutes of Canada 1985)

INCLUDING:

The Report to the House

CONCERNANT:

Ordre de renvoi de la Chambre des communes en date du mercredi 18 septembre 1991—Examen complet des dispositions et de l'application de la *Loi concernant les douanes* (Lois révisées du Canada 1985, 2e supplément, Chapitre 1)

Y COMPRIS:

Le rapport à la Chambre

Third Session of the Thirty-fourth Parliament, 1991-92

Troisième session de la trente-quatrième législature, 1991-1992

SPECIAL COMMITTEE ON THE ACT RESPECTING CUSTOMS

Chairman: Clément Couture

Vice–Chairmen: Louise Feltham
George Rideout

Members

Ross Belsher
Steve Butland
Girve Fretz
Barry Moore
Joseph Volpe—(8)

(Quorum 5)

Marie Carrière

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COMITÉ SPÉCIAL CHARGÉ DE L'EXAMEN DE LA LOI CONCERNANT LES DOUANES

Président: Clément Couture

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Joseph Volpe—(8)

(Quorum 5)

Les greffières du Comité

Marie Carrière

Diane Diotte

De la Bibliothèque du Parlement:

Monique Hébert, attachée de recherche

In accordance with the Order adopted by the House of Commons on October 7, 1991

On Wednesday, February 5, 1992:

Guy Ricard replaced Barry Moore.

On Tuesday, February 18, 1992:

Barry Moore replaced Guy Ricard.

Conformément à l'Ordre adopté par la Chambre des communes le 7 octobre 1991

Le mercredi 5 février 1992:

Guy Ricard remplace Barry Moore.

Le mardi 18 février 1992:

Barry Moore remplace Guy Ricard.

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ORDER OF REFERENCE

Extract from the Votes and Proceedings of the House of Commons of Wednesday, September 18, 1991

By unanimous consent, it was ordered, – That, pursuant to Section 168 of An Act respecting Customs, Chapter 1, 2nd Supplement, Revised Statutes of Canada 1985, a Special Committee of the House undertake a comprehensive review of the provisions and operation of this Act and submit a report no later than March 1, 1992;

That this Special Committee be appointed at the latest 5 sitting days after the adoption of this motion and that the membership be composed of 8 members; and

That the said Special Committee shall have the powers of a Standing Committee as per Standing Order 108(1).

ATTEST

ROBERT MARLEAU
The Clerk of the House of Commons

REPORT TO THE HOUSE

The Special Committee on the Act Respecting Customs

has the honour to present its

FIRST REPORT

In accordance with the Order of Reference from the House of Commons dated Wednesday, September 18, 1991, your Committee proceeded to the comprehensive review of the provisions and operation of *An Act respecting Customs*, Chapter 1, 2nd Supplement, Revised Statutes of Canada 1985, and has agreed to report the following:

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INTRODUCTION

The current *Customs Act* received Royal Assent on 13 February 1986. Under section 168 of this Act, Parliament was required to undertake a comprehensive review of the legislation's provisions and operation within five years of its adoption. This report is presented in response to that statutory obligation.

The Special Committee on the Act respecting Customs (hereinafter "the Committee") was created pursuant to an Order of Reference that was adopted unanimously by the House of Commons on 18 September 1991. Comprising eight members, the Committee held public hearings during the months of October and December 1991, and again in February 1992. In the course of these hearings, submissions were made to the Committee by officials from the Department of National Revenue, Customs and Excise, and by representatives from the following three organizations: the Canadian Society of Customs Brokers, the Canadian Importers Association and the Canadian Highway Sufferance Warehouse Association. A number of organizations representing consumer, business and labour interests were also invited to appear before the Committee, but all declined.

Apart from the written briefs provided by the witnesses who appeared before the Committee, and a letter forwarded by the Canadian Exporters' Association, the Committee did not receive any other submissions.

The Members of the Committee wish to extend their gratitude to the three organizations that appeared before us. This report would not have been possible without their contribution. We would also like to thank the Department officials who, in addition to appearing before the Committee on two occasions, were most cooperative in providing additional information on request.

This report is divided into two parts. The first part provides background information on the *Customs Act* of 1986 and makes a number of observations about the legislation and the Committee's mandate. The second part outlines the various concerns that were raised by the witnesses who appeared before the Committee, and sets out the corresponding recommendations.

PART 1:

The *Customs Act* of 1986

A. A BRIEF HISTORY

The new *Customs Act* of 1986 was introduced as Bill C-59 on 25 June 1985 by the former Minister of National Revenue, the Honourable Elmer MacKay. This Act constituted the first major overhaul of the customs law in over a century. Indeed the predecessor legislation which this statute replaced had not been systematically revised since its enactment some twenty years before Confederation.

Bill C-59 was the culmination of many years of study and failed legislative action. Several proposals aimed at modernizing the customs law had been introduced by the previous Liberal government, notably: Bill C-44, which was tabled in April 1978; Bill C-162, which was tabled in June 1983 ; and Bill C-6, which was tabled in January 1984. All these bills died on the Order Paper. Their tabling, however, had given interested parties the opportunity to comment on the proposed measures. Consequently, by the time Bill C-59 was tabled in 1985, many concerns had already been expressed and remedied where possible.

On balance, Bill C-59 was well received. It was given expeditious consideration by Parliament. In fact, apart from the Minister and departmental officials, only three groups appeared before the House of Commons Legislative Committee that studied the bill. They were: the Canadian Importers Association, the Customs and Excise Union of the Public Service Alliance of Canada and the Canadian Association of Customs Brokers (since renamed the Canadian Society of Customs Brokers). Of these groups, only the latter appeared before the Standing Senate Committee on Banking, Trade and Commerce, which also studied the bill.

Although concerned about specific provisions in the bill, these witnesses expressed general support for the proposed legislation, and except for several amendments of a relatively minor nature, the bill was adopted as originally framed.

B. THE NEW ACT

The new *Customs Act* was designed to provide the Department of Revenue Canada, Customs and Excise (hereinafter the "Department") with a modern legislative base aligned with the needs of the business community and the travelling public. Among other things, the Act made the following changes:

- It eliminated a number of provisions that were obsolete or inconsistent, such as the Governor in Council's time-honoured authority to establish "uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into Canada".

- It restructured the legislation into a logical sequence, and simplified the various customs procedures. In this regard, it facilitated and expedited the delivery of goods across the border by providing for their quick release, followed by a post-release audit, and it allowed for the use of automated technology in dealings with commercial importers.

- It implemented new valuation procedures necessitated by Canada's adoption of the customs valuation code under the *General Agreement on Tariffs and Trade* (the GATT).

- It established clearer and more transparent dispute settlement and judicial review mechanisms, and allowed for the posting of a security in lieu of payment in the case of disputed duties. It also made provision for the payment of interest on refunds.

- It reduced the threshold for mail openings from 500 grams to 30 grams to facilitate the detection of contraband. It abolished writs of assistance and revised the enforcement provisions to bring them into line with the *Canadian Charter of Rights and Freedoms*.

- Finally, it gave a greater role to the Governor in Council and the Minister to respond to the changing business environment.

The *Customs Act* of 1986 comprises 168 operative sections. It is divided into seven parts which deal with the following matters:

- Part I (sections 3 to 10) generally deals with the application of the Act and sets out a number of provisions with respect to customs offices and facilities, and the licensing of customs brokers and agents.

- Part II (sections 11 to 43) regulates the entry of goods and persons into Canada by prescribing the various responsibilities and liabilities of those who are coming into the country, and of those who are involved with the importation, transportation and/or storage of goods from abroad.

- Part III (sections 44 to 72.1) deals with the valuation of goods and the calculation of duty. It sets out how to appraise the value of goods for the purposes of duty, and how to determine the tariff classication for these goods, as well as their place of origin. It also prescribes the time frame for making appraisals and determinations, and sets out measures for administrative re-determinations and re-appraisals and judicial review.

- Part IV (sections 73 to 94) governs duty abatements, refunds, drawbacks and remissions.

- Part V (sections 95 to 97.2) contains measures respecting exportations.

- Part VI (sections 98 to 163) sets out the enforcement and collection provisions.

- Part VII (sections 164 to 168) defines the regulatory authority of the Governor in Council and sets outs the provisions respecting Parliamentary review.

It bears stressing that the *Customs Act* is not a taxing statute. Rather, it provides the legislative authority to administer and enforce the collection of duties and taxes that are imposed under separate taxing legislation, such as the *Customs Tariff*, the *Excise Tax Act*, the *Excise Act* and the *Special Import Measures Act*. It also controls the movement of persons, goods and conveyances across the border to ensure compliance with the laws of Canada. At present, the Department administers over 70 pieces of legislation on behalf of other government departments. These laws range from the most obvious, such as the *Immigration Act*, the *Export and Import Permits Act*, the *Narcotic Control Act* and the *Food and Drugs Act*, to the less well known, such as the *Hamilton Harbour Commissioners' Act*, the *Privileges and Immunities (North Atlantic Treaty Organization) Act* and the *United States Wreckers Act*.

The Customs Branch of Revenue Canada employs approximately 7,700 persons. Past figures indicate that, on average, Customs officials process in excess of 80 million travellers, 30 million conveyances and 11 million commercial importations each year. They collect revenues of more than $5 billion on imported goods; and they undertake some 20,000 enforcement actions under the Act, about 5,000 of which are appealed.

At her appearance before the Committee on 8 October 1991, Ms. Sheila Batchelor, Assistant Deputy Minister, Customs Program Branch, indicated that the implementation of the new Act went more smoothly than anticipated. Attributing this, at least in part, to the fact that the tabling of previous bills in Parliament had provided interested parties with the opportunity to refine the concepts to be included in the new legislation, and noting also that the Department undertook an extensive public education campaign on the revised law, Ms. Batchelor stated that some "minor tidying up" of the legislation might be desirable, but in the main the new Act was working well. Adding that no significant problems had been brought to the attention of the Minister of National Revenue or of his officials, she observed that, by adopting Bill C-59, Parliament had apparently struck an effective balance.

The fact that so few groups expressed an interest in appearing before the Committee would seem to bear witness to the Assistant Deputy Minister's observation that, by adopting Bill C-59, Parliament had apparently struck an effective balance. Based on the submissions that were received, however, the Committee does not entirely agree that only "minor tidying up" is called for. A number of concerns were raised that, in our view, are more substantial in nature than that. Admittedly, these concerns related primarily to the application of the Act and how the legislation might be improved in terms of efficiency and fairness. None were so fundamental, however, as to require major changes in the legislation.

Given the large volume of travellers and goods that are processed each year, and the limited resources at hand to deal with this task, the Committee believes that, on balance, the Department has been doing a good job in applying and enforcing the law. Mistakes may have been made that might have been avoided if a bit more care and consideration had been given. To a certain extent, however, errors in judgment are inevitable. Based on the evidence before it, the Committee has no reason to believe that these are but infrequent occurences. In fact, several witnesses commented on the positive working relationship that existed between the Department and themselves. The Committee commends the Department on this score and can only urge that it continue in this vein.

The remainder of this report sets out the concerns that were raised by the witnesses who gave evidence and the changes the Committee believes should be implemented in answer to these concerns. It should be noted that it was beyond the scope of the Committee's mandate to study problems, such as cross-border shopping. Issues like this one raise policy considerations that far exceed the legislative parameters of the *Customs Act*. This statute is administrative in nature. As such, it does not set financial, trade or immigration policy, to name but a few. It merely applies these policies once they have been implemented by the appropriate decision-makers.

The Committee's mandate was in fact quite narrow. It was limited to a review of the provisions and operation of the Act itself, and not of the underlying legislation or programs which this statute was designed to administer.

In formulating its recommendations, the Committee sought to achieve the following objectives: to the extent possible, there should be certainty in the law; the law should be applied fairly and evenly; and, finally, the dispute settlement process should be made as efficient as possible to ensure that business decisions can be made in a timely manner. These objectives, in the Committee's view, would be met if our recommendations were acted upon.

PART 2:

Concerns and Specific Recommendations

A. DEFINITIONS

Although the *Customs Act* is largely concerned with imports, it does not define the term "importer". The Canadian Association of Importers urged that this term be defined in order to eliminate the existing state of uncertainty and to ensure that the Act is applied evenly.

Admitting that the lack of a statutory definition could cause some problems in practice, the Department stated in response that it had attempted on several occasions to formulate a satisfactory definition, but had failed every time. It noted that the term was not clearly defined in other jurisdictions, and observed that, given the growing complexity of commercial transactions, it might be preferable and sufficient if the term were left undefined and its meaning determined in accordance with the circumstances of the particular importation.

To the extent possible, the Committee believes that there should be certainty in the law, specially since the Act expressly refers to "importers" on several occasions and sets out certain related liabilities. The Committee recognizes, however, that finding a workable definition might not be an easy task. For this reason, it recommends that the Department work together with interested parties, in particular the Canadian Importers Association, to see if a suitable definition can be found. If this proves to be impossible, at least a collective effort will have been made. Therefore, the Committee recommends:

1. **That the Department should work together with interested parties, in particular the Canadian Importers Association, to see if a suitable definition can be found for the term "importer".**

B. RE-APPRAISALS AND RE-DETERMINATIONS

1. Time-Limit for Making and Requesting a Re-Appraisal and Re-Determination

When goods are imported into the country, an initial appraisal is made with respect to their value for duty, and an initial determination is made with respect to their place of origin and tariff classification. If dissatisfied with this initial assessment, importers have a 90-day time limit within which to request a re-determination or re-appraisal, although this time limit may be extended to two years at the Minister's discretion. The Department, in turn, is generally afforded a two year time limit within which to review the initial assessments and make a re-determination or re-appraisal on its own initiative.

Both the Canadian Importers Association and the Canadian Society of Customs Brokers asked that the importers' 90-day time limit be increased to two years as of right, the former on the ground that the current deadline was inadequate, and the latter on the ground that the interests of fairness and equity would be better served if the rights of the Crown and of the taxpayer were placed on an equal footing.

The Committee believes that the existing time limits should be modified, but not for the reason advanced by the customs brokers. In the Committee's view, the scope of the Department's responsibilities differs materially from those of the importing community. Importers need only review their own entries, whereas the Department has the responsibility for reviewing the entries of all importers. These are significantly different burdens, such that calls for an "equal playing field" would seem unjustified under the circumstances.

What is important, in the Committee's view, is that the review process be completed as expeditiously as possible. Importers should know what their liabilities are at the earliest opportunity in order that they may plan effectively and pass on their costs to their customers. The Committee therefore recommends that the Department's time limit for making a re-determination or re-appraisal be reduced from the current two year period to one year.

The Committee acknowledges that placing a one year time limit on the Department may be unrealistic in some cases. Accordingly, the Minister should have an overriding discretion to grant an extension of up to one year in selected cases. Such discretion, however, should not be open-ended. Criteria should be set out in the legislation defining when it would be appropriate for the Minister to grant an extension. In the Committee's opinion, an extension could be justified on a number of grounds, including the following: (a) where the case is of exceptional difficulty; (b) where the taxpayer has failed to comply with a request for relevant information within a reasonable time; and (c) where the taxpayer consents to an extension. These criteria should not be regarded as exhaustive. If there are other valid grounds for granting an extension, these too should be considered. Therefore, the Committee recommends:

2. **That the Act should be amended to provide the Department with a one-year time limit for making a re-determination and re-appraisal.**

3. **That the Act should be further amended to allow the Minister to grant to the Department an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria, including, but not limited to, the following: (a) in cases of exceptional difficulty; (b) where the taxpayer has failed to comply with a request for relevant information within a reasonable time; and (c) where the taxpayer consents to an extension.**

Although importers are entitled to only 90 days within which to request a re-determination or re-appraisal, the Committee notes that, as a matter of written policy, the Department accepts all requests for review, if submitted within one year from the date of initial assessment. The Department indicated that this one-year time limit corresponded with current commercial realities of just-in-time purchasing and rapid pricing decisions, and provided importers with a sufficient period of time within which to audit their records and reach a decision on whether or not to seek a review.

The Committee agrees that providing the taxpayer with a one year time-limit for requesting a re-determination or re-appraisal would be sufficient in most cases. Again, however, it might be inadequate in some instances, such that provision should also be made allowing the Minister to grant an extension of up to one year in accordance with criteria set out in the legislation. The Committee makes no recommendation on what such criteria should be, other than to state that they should be narrowly defined. In the Committee's view, it should be left to the Department, in consultation with interested parties, to determine what criteria would be appropriate under the circumstances. Therefore, the Committee recommends:

4. **That the Act should be amended to provide importers and other relevant parties with a one-year time limit for requesting a re-determination and re-appraisal.**

5. **That the Act should be further amended to allow the Minister to grant an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria that should be developed by the Department in consultation with interested parties.**

2. Time-Limit for Rendering Decisions

At present, there is no time limit within which the Department must render a decision in response to a request for a re-determination or re-appraisal. The Act merely stipulates that a decision must be made "with all due dispatch".

Stating that it is not unusual for the Department to hand down its decision more than 18 months after a request for review has been made, the Canadian Importers Association argued that a firm deadline should be set out in the legislation, for the costs associated with such delays could be significant, particularly as regards resale pricing decisions and cash flow interruptions. It recommended that a 180-day time limit for rendering decisions should be enacted, and if this deadline were not met, the request should be deemed to have been allowed.

While sympathetic to the importers' position, the Department argued against a firm deadline. Noting the increasing volumes of requests for re-determinations and re-appraisals, which grew from approximately 2,500 to about 11,000 between April 1989 and November 1991, and, also pointing out that information supplied in support of a request for review was frequently inadequate, the Department stated that a 180-day statutory deadline could lead to unreasoned and potentially conflicting decisions which would not allow for the formation of a reliable basis for the consistent and subsequent treatment of similar issues.

In keeping with its belief that the review process should not be unduly prolonged, the Committee concludes that a statutory deadline of 180 days for rendering decisions should be prescribed in the legislation. However, it does not agree with the Canadian Importers Association that, once this deadline has expired, the taxpayer's assessment respecting its liability for duty should automatically be allowed. The Committee recognizes the dilemma this could represent for the Department and, accordingly, is not prepared to go that far. In an effort to strike a fair balance between the needs of the importing community to have timely decisions, and the needs of the Department to have some flexibility in discharging its decision-making responsibilities, the Committee believes that, in this instance also, the Minister should have the discretion to grant an extension of up to one year in appropriate cases. Again, statutory criteria should be developed, defining the circumstances under which an extension should be granted. In the Committee's view, the criteria mentioned under an earlier recommendation would be equally suitable with respect to this issue. Therefore, the Committee recommends:

6. **That the Act should be amended to require the Department to render its decision pursuant to a request for a re-determination or re-appraisal within 180 days from the date upon which the request was received.**

7. **That the Act should be further amended to allow the Minister to grant an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria, including, but not limited to, the following: (a) in**

cases of exceptional difficulty; (b) where the taxpayer has failed to comply with a request for relevant information within a reasonable time; and (c) where the taxpayer consents to an extension.

C. ENFORCEMENT ACTION: SEIZURES AND ASCERTAINED FORFEITURES

Of the provisions under the Act, those dealing with civil enforcement gave rise to the largest number of concerns. This is not surprising in light of the significant civil penalties that can be imposed in cases of contravention.

The Act provides that where there is reason to believe that a contravention has occurred, the goods can be seized and, when this happens, they are automatically forfeited to the Crown. If a seizure is impractical, an ascertained forfeiture can be effected instead. In either case, the offender is civilly liable for the full duty paid value of the goods. An application for review can be made to the Minister, however, and if the contravention is confirmed upon review, the Minister usually remits a part of the amount forfeited. The maximum civil penalty of the duty paid value of the goods is therefore rarely imposed in practice, but it is not uncommon for a penalty equal to three to four times the amount of duty and taxes owing to be prescribed. As this can run into the millions of dollars in some cases, the enforcement provisions are understandably of considerable interest to the importing community.

1. Statutory Criteria for Enforcement Actions

The Canadian Importers Association stated that, in cases of tariff misclassification or under-evaluation of goods, the Department tended to invoke the seizure or ascertained forfeiture provisions under the Act, instead of conducting a re-determination or re-appraisal. Of the view that the Department's decision to proceed under the former, rather than the latter, seemed frequently to be accidental, with the result that there was uncertainty as well as advertent or inadvertent differential treatment of importers in essentially similar circumstances, it recommended that criteria should be set out in the Act or the regulations specifying the conditions under which enforcement action could be taken, as opposed to proceeding by means of a re-determination or re-appraisal.

Based on figures supplied by the Department, the Committee questions whether enforcement action is in fact taken in preference to administrative review, as seemed to be suggested. These figures indicate that, of the near 12 million commercial entries for fiscal year 1990-1991, roughly 10,500 seizures were effected within this period of time, about 4,100 of which were commercial seizures, with the remainder being technical in nature. Furthermore, of the approximately 4,100 commercial seizures that were effected, only 199 were made as a result of an investigative audit conducted under the authority of a search warrant. In contrast to these figures, the Department initiated over 130,000 re-determinations and re-appraisals, as compared with the roughly 412,000 initiated by taxpayers.

Given these data, it seems clear to the Committee that, in overall terms, the Department's enforcement practices have not been excessive. Commercial seizures were effected in about only .0005 per cent of the cases, or 5 cases per 10,000 commercial entries; investigative audits were, in turn, conducted in about only .00002 per cent of cases, or 2 cases per 100,000 commercial entries.

These data notwithstanding, the Committee believes in any event that it would be highly irregular for statutory criteria to be set out prescribing the circumstances under which enforcement action could be taken. To do so, in the Committee's view, would unduly restrict the Department's

discretion in enforcing the law. There is the added risk that, if such criteria were enacted, the focus of attention might shift away from a consideration of the alleged contravention in favour of a discussion on whether or not the enforcement action was justified under the circumstances.

For these and other reasons, the Committee cannot accede to the Association's recommendation regarding statutory criteria.

2. Reasons for Action

As mentioned earlier, when a seizure or ascertained forfeiture is made, the goods (or an amount equal to their duty-paid value) are forfeited to the Crown, but a request for review can be made to the Minister. If, following a review of the case, the Minister agrees that there has been a contravention, he or she is empowered to make a final decision on the corresponding penalty.

Both the Canadian Importers Association and the Canadian Society of Customs Brokers complained that insufficient information was being provided to the taxpayer, both as regards the seizure or ascertained forfeiture, and the final decision respecting the contravention and penalty. Noting that bare reasons were usually given in this regard and that, if further particulars were needed, a request frequently had to be made under the *Access to Information Act*, both asked that the Act be amended to require the Department to provide detailed reasons for its actions and decisions.

The Committee disagrees with the Department that providing the taxpayer with a summary of the reasons in such cases is sufficient. As mentioned earlier, the civil penalties in the case of a seizure or ascertained forfeiture can be significant. It seems only fair and just that, under the circumstances, the taxpayer should be provided with detailed written reasons for both the seizure and related penalty. Therefore, the Committee recommends:

8. That the Act should be amended to require the Department to provide a detailed written notice of the reasons for seizure or ascertained forfeiture, and of the reasons for the final decision regarding the contravention and related penalty.

3. Time-Limit for Rendering Final Decisions

When a request for review is made in the case of a seizure or ascertained forfeiture, there are no restrictions on the length of time the Minister can take to render a decision respecting the contravention and related penalty.

Pointing out that, in some cases, importers had to wait for as long as 35 months before obtaining the Minister's final decision, the Canadian Society of Customs Brokers recommended that a one-year deadline for rendering a decision should be provided under the Act.

The Committee agrees with this submission. Again, however, the Minister should be empowered to grant an extension in appropriate cases in accordance with statutory guidelines developed to this end. Therefore, the Committee recommends:

9. That the Act should be amended to provide the Minister with a one-year time-limit for making a final decision with respect to a seizure or ascertained forfeiture, and related penalty.

10. That the Act should be further amended to allow the Minister to grant an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria that should be developed by the Department in consultation with interested parties.

4. Liability and Process

When a final decision is rendered with respect to a seizure or ascertained forfeiture and related penalty, this decision may be appealed to the Federal Court of Canada. That Court, however, is only empowered to rule on whether a contravention did in fact occur; it has no jurisdiction to alter the related civil penalty that was imposed.

Both the Canadian Society of Customs Brokers and the Importers Association of Canada argued that the substantive offences giving rise to action by seizure or ascertained forfeiture should be reframed, for, at present, alleged violators could be held liable even though they did everything reasonably within their power to comply with the law. The former recommended that the term "knowingly" should be added under the relevant offence sections. The latter argued that the Act should be amended to provide for the defence of due diligence and mistake of fact. This group also advocated the adoption of measures similar to those prescribed under the U.S. customs legislation, which recognizes three levels of misconduct (i.e., negligence, gross negligence and fraud), and which gauges the penalties accordingly.

In addition to its concerns regarding the substantive offences, the Canadian Importers Association was highly critical of the whole civil enforcement process. Stating that the Department acted as both the "accuser" and "judge" in carrying out its enforcement duties, it argued that the Act should be revised in order to provide greater transparency and procedural safeguards. It made a number of recommendations in this regard, including the following: (a) the appeal mechanism currently in place for re-determinations and re-appraisals should be made available in cases of seizure and ascertained forfeiture; (b) alleged offenders should be provided with automatic access to all relevant allegations and reports regarding their contravention, and they should have the right to cross-examine those giving evidence against them; and (c) the Federal Court of Canada should be empowered to review the Minister's final decision with respect to the penalty.

While the Committee acknowledges that the civil penalties under the Act can be significant, it does not believe that legislative change to the extent recommended above would be justified. It must be stressed that what is at issue here are civil sanctions, and not criminal prosecutions. There are material differences between the two that have long been recognized by the courts in deciding on issues of fairness. In the Committee's view, to implement the full range of changes suggested above would be excessive under the circumstances.

Furthermore, the Committee does not believe that it would be appropriate to open up the existing appeal mechanism respecting administrative re-determinations and re-appraisals to matters of enforcement. This would constitute a duplication of process. It is also questionable whether a body such as the Canadian International Trade Tribunal should be called upon to rule on what are essentially issues of wrongful conduct and non-compliance.

On the other hand, the Committee agrees that it would be appropriate if a defence of due diligence and mistake of fact were enacted. If an individual can show that he or she did everything reasonably possible to comply with the law or that a honest mistake was made, it does not seem right that he or she should be held liable under the circumstances, even though the proceedings

are merely civil in nature, rather than criminal. That this individual should be made to pay any outstanding duties is a given. However, to require that he or she also pay a civil penalty in the absence of any wrong-doing or negligence is hard to defend. The Committee notes that the defence of due diligence was accepted by the Federal Court of Canada in the case of *Roblin Textiles Inc.* v. *Minister of National Revenue*, which was handed down on 24 May 1991. The Committee agrees with this decision and believes that, for greater certainty, the defence of due diligence and mistake of fact should be expressly set out under the Act. Therefore, the Committee recommends:

11. That the Act should be amended in order expressly to provide for the defence of due diligence and mistake of fact in the case of a civil contravention.

The Committee is also of the opinion that the Federal Court of Canada should be able to review the Minister's final decision respecting civil penalties. Given how significant these penalties can be, it would seem desirable that they should be subject to independent judicial review, if the taxpayer so requests. In the Committee's view, if the Minister is able to decide what penalty would be appropriate under the circumstances, he or she should also be in a position to defend that decision before the Federal Court. Therefore, the Committee recommends:

12. That the Act should be amended to enable the Federal Court of Canada to review and modify the Minister's final decision respecting civil penalties.

D. DIVERSIONS

Under the Annex Codes of the *Customs Tariff*, selected goods may be imported, either free of duty or at a reduced rate of duty, if they are intended to be used for a prescribed purpose ("end use"), or by a prescribed person ("end user"). Where the "end use" or "end user" condition under which the goods were allowed entry at the concessionary rate of duty is breached, a "diversion" occurs. In such cases, sections 88 and 89 of the *Customs Act* require that a report be made to Customs within 90 days of the diversion, that the goods be accounted for and that any additional duty be paid.

If a diversion is not reported within the 90-day time limit, the goods may be subject to seizure, or where seizure is impracticable, an ascertained forfeiture may be effected. Criminal charges under section 161 may also be laid against the offender. These sanctions are not always invoked, however, for in some instances the Department will choose to proceed administratively by means of retroactive assessment. Where a retroactive assessment is made, the taxpayer must either pay the additional amount of duty assessed, or appeal the assessment to the Federal Court of Canada under section 144.

The Canadian Importers Association alleged that since the implementation in 1987 of the *Canadian Harmonized System Tariff* (the CHST), the Department no longer seemed to view errors in the use of the "end use" and "end user" tariff provisions upon importation as errors in tariff classification, as it had under the previous system; instead, it now seemed to regard such errors as constituting a diversion within the meaning of sections 88 and 89 of the Act. Appearing to attribute this change in departmental practice to the fact that, with the implementation of the CHST, the "end use" and "end user" tariff provisions were removed from Schedule 1 of the *Customs Tariff* and placed in Annex Codes under the revised legislation, the Association expressed concern about the way the Department had been interpreting the legislation of late in favour of action under the diversion measures, given that action under these sections did not provide the taxpayer with the same procedural safeguards and levels of review prescribed under the Act for tariff classification re-determinations.

Of the view that the Department should be expressly precluded from invoking the diversion provisions in cases involving errors in tariff classification, the Association recommended that the *Customs Act* be revised clearly to stipulate that errors in use of the Annex Codes at the time of importation are matters of tariff classification that must be dealt with under the re-determination provisions. It also recommended that sections 88 and 89 of the Act be reviewed to ensure that they are applied only in cases of actual diversion. It added that, under no circumstances, should the Department be able to claim that monies are owing as a result of diversion without effecting a seizure or ascertained forfeiture, or an assessment, through appropriate channels.

The Department stated in response that, for the past nine years, an end-use audit program had been put into place to verify compliance by those who claimed the end-use or end-user benefits. Questioning the Association's apparent assumption that the use of the wrong Annex Code tariff was the result of an error, it observed that such mistaken use could be as consistent with the possibility of misrepresentation as it was with the possibility of error. Pointing out that, in the absence of proof to the contrary, the end-use audits proceeded on the basis that the importer was aware of the intended use of the goods at the time of importation and that the declared use – as indicated by the Annex Code – was consistent with that use, the Department stated that where the actual use was found to be different from the declared use, a diversion was generally found to have occurred and was accordingly treated as such. It indicated, however, that where the consequences of the diversion were relatively minor or the causes of the diversion were entirely innocent, the assessment process could be used, as opposed to the seizure or ascertained forfeiture measures or, indeed, criminal prosecution.

No evidence was presented to the Committee on the extent to which the diversion provisions were in fact being improperly invoked in cases of alleged error in tariff classification. The Committee, therefore, is not in a position to comment one way or the other on whether or not a real problem exists in this area. In the Committee's view, however, it is not necessary that any conclusions be reached on this score, for what is important is to ensure that the diversion provisions are applied only in appropriate cases, in keeping with their intended purpose.

Since there appears to be some question as to whether the diversion provisions are being applied properly, the Committee believes that a clarification is in order. This could be done in many ways. As suggested by the Canadian Importers Association, the definition section at the beginning of the Act could be amended to indicate clearly that errors in the use of the Annex Codes at the time of importation are to be regarded as tariff classification errors, and not as diversions. Sections 88 and 89 could also be reworded to preclude their application in cases of erroneous tariff classification. The Committee is not wedded to any particular formula. What is important is that it be made clear in the legislation that the diversion provisions are not to be applied in cases involving errors in tariff classification, irrespective of where such tariffs are set out under the *Customs Tariff*. Therefore, the Committee recommends:

13. That the *Customs Act* should be amended to ensure that the diversion provisions under sections 88 and 89 are applied only in cases where goods have been properly classified at the time of importation and, subsequent to importation, are diverted in violation of the end-use or end-user condition under which they were released.

If the legislation is amended in this way, the concerns of the Canadian Importers Association should be obviated. There was the further suggestion, however, that the Department should not be allowed to collect any additional duties assessed against the taxpayer under the diversion sections without first going through the "appropriate channels." The Committee understands this to mean

that the Department should not be allowed to claim additional duties on the strength of a retroactive assessment, but must instead proceed by means of a re-determination or by means of a seizure or ascertained forfeiture.

The Committee recognizes that there are greater procedural safeguards for the taxpayer under the latter mechanisms than there are in the case of retroactive assessments. This being said, however, the Committee does not believe that it would necessarily be to the taxpayer's advantage if the Department were precluded from proceeding on the basis of a retroactive assessment.

Where retroactive assessments are made under sections 88 and 89, it is ostensibly because the goods have been diverted and, therefore, no longer qualify for the preferential rate of duty under which they were admitted into the country. The taxpayer is accordingly required to make up the difference, and if he or she disagrees with the assessment, an appeal can be taken to the Federal Court of Canada. If this assessment option were eliminated, and assuming that the diversion provisions were restricted to cases of actual diversion, as we have recommended, the Department, in such a situation, would have no choice but to effect a seizure or ascertained forfeiture, with the result that the taxpayer would not only be liable to pay the amount of outstanding duties; he or she could also face a stiff fine and, indeed, possible imprisonment.

The Department stated in evidence that the assessment process might be used where the consequences of a diversion were relatively minor, or where the causes of the diversion were entirely innocent. On the other hand, the Canadian Importers Association did not specifically single out retroactive assessments as being particularly problematic. Its foremost concern was to ensure that errors in tariff classification not be dealt with under the diversion provisions, a position with which the Committee fully agrees.

Based on the evidence before it, the Committee is not prepared to make any recommendations with regards to the use of retroactive assessments in the case of diversions. This administrative procedure would appear to have some merit, as it seeks only to recover outstanding duties without penalizing the taxpayer. In the absence of clearer evidence to the contrary, the Committee is satisfied that the Department should continue to have this option at its disposal in appropriate cases.

E. HIGHWAY SUFFERANCE WAREHOUSES

Outlining some of difficulties commonly experienced by highway sufferance warehouse operators in carrying on business, the Canadian Highway Sufferance Warehouse Association recommended that a number of protective measures be enacted for the benefit of this industry. Among other things, it asked that a standard of care for highway sufferance warehouse operators be set out in the legislation, that a statutory limit on their liability be prescribed, and that they be granted statutory storage lien rights.

While sympathetic to the industry's plight, the Committee does not believe that the suggested changes should be made under the customs legislation. These issues, in the Committee's view, are largely matters of contract law that should be resolved privately by the warehouse operators and their customers. Except in one material respect, the *Customs Act* is not the appropriate vehicle for effecting the proposed changes.

The Committee notes that under section 25 of the Act, sufferance warehouse operators are required by law to receive goods brought to their door. They cannot refuse to store the goods covered by their licence, even though such goods may be brought in by defaulting customers who

still have outstanding accounts at the warehouse. Provided the storage fees are paid with respect to the current shipment, the warehouse operator is obliged to release this shipment, even though substantial sums might still be owing in relation to previous shipments.

The Committee questions whether sufferance warehouse operators should be required to accept goods from defaulting customers. Section 30(i) allows for regulations to be passed prescribing the circumstances under which sufferance warehouse operators may refuse goods. This regulatory authority, in the Committee's view, should be used to enact measures that would enable sufferance warehouse operators, at their option, to refuse goods from defaulting customers. Admittedly, this proposed remedy falls short of the kind of statutory protection that the Association advocated should be implemented. It should be stressed, however, that the purpose of the *Customs Act* is not to resolve contractual disputes between private parties. Rather, this legislation is intended to regulate the movement of persons and goods across the border, and to administer and enforce the collection of duties and other taxes. Under the circumstances, the Committee does not believe that it can or should go any farther than making the following recommendation:

14. That a regulation should be passed under section 30(i) of the *Customs Act* entitling sufferance warehouse operators, at their option, to refuse goods from defaulting customers.

The Association also recommended that a number of changes be made with respect to the issuance and cancellation of highway sufferance warehouse licences. In particular, it asked that greater notice be provided in the case of a cancellation and that more consultation take place before a decision is taken on whether a new licence should be issued.

The Department described in some detail its current practices respecting the issuance and cancellation of licences. Based on these representations, the Committee believes that the current system is both fair and adequate, and does not need to be modified at this time.

F. BINDING RULINGS

The Canadian Society of Customs Brokers expressed interest in the implementation of a binding ruling system similar in kind to the one currently employed under the *Income Tax Act.* It argued that such a system would be highly beneficial to the competitive position of Canadian businesses that are now operating in a climate of relative uncertainty. If such a system were in place, it felt that business decisions directly related to tariff classification rulings would be rendered far more confidently.

The Committee has received little evidence on this issue and is therefore not in a position to comment on the advisability of implementing such a scheme. However, as it may provide material benefits to the business community, it is a question that, in the Committee's view, should be explored further by the Department. Therefore, the Committee recommends:

15. That the Minister should consider implementing a binding ruling system in connection with the *Customs Act.*

G. FREE TRADE ZONES

The last issue raised before the Committee concerns the establishment in Canada of free trade zones. The Canadian Importers Association argued in favour of the creation of such zones on the grounds that it would reduce the amount of paperwork required, and the cash flow problems encountered, under the current system of duty drawbacks and inward processing remissions for imported goods destined for the export market.

Again, this is an issue in relation to which the Committee received little evidence. The Department simply indicated that it was not in a position to comment, as this was a matter that came under the jurisdiction of the Minister of Finance.

The Committee notes that over the years, and particularly since the implementation of the *Canada United States Free Trade Agreement*, there has been considerable interest in whether or not it would be worthwhile for Canada to create free trade zones. The Committee is not aware of any recently published study prepared by the Canadian government on this question. Given the emphasis that is now being placed on competitiveness and trade globalization, the Committee believes that such a study should be undertaken. In recognition of the Minister of Finance's primary responsibility in this area, the Committee recommends that both this Minister and the Minister of National Revenue study this issue jointly and that their findings be tabled in the House of Commons. The Committee also believes that it would be worthwhile if this study were referred to the House of Commons Standing Committee on Finance, for consideration by that Committee. Therefore, the Committee recommends:

16. That the Department of National Revenue and the Department of Finance should undertake a joint study to determine whether free trade zones should be established in Canada, and the Minister of National Revenue should be required to table this study in the House of Commons by no later than 30 September 1992 for referral to the House of Commons Standing Committee on Finance.

LIST OF RECOMMENDATIONS

1. That the Department should work together with interested parties, in particular the Canadian Importers Association, to see if a suitable definition can be found for the term "importer".

2. That the Act should be amended to provide the Department with a one-year time limit for making a re-determination and re-appraisal.

3. That the Act should be further amended to allow the Minister to grant to the Department an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria, including, but not limited to, the following: (a) in cases of exceptional difficulty; (b) where the taxpayer has failed to comply with a request for relevant information within a reasonable time; and (c) where the taxpayer consents to an extension.

4. That the Act should be amended to provide importers and other relevant parties with a one-year time limit for requesting a re-determination and re-appraisal.

5. That the Act should be further amended to allow the Minister to grant an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria that should be developed by the Department in consultation with interested parties.

6. That the Act should be amended to require the Department to render its decision pursuant to a request for a re-determination or re-appraisal within 180 days from the date upon which the request was received.

7. That the Act should be further amended to allow the Minister to grant an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria,including, but not limited to, the following: (a) in cases of exceptional difficulty; (b) where the taxpayer has failed to comply with a request for relevant information within a reasonable time; and (c) where the taxpayer consents to an extension.

8. That the Act should be amended to require the Department to provide a detailed written notice of the reasons for seizure or ascertained forfeiture, and of the reasons for the final decision regarding the contravention and related penalty.

9. That the Act should be amended to provide the Minister with a one-year time limit for making a final decision with respect to a seizure or ascertained forfeiture, and related penalty.

10. That the Act should be further amended to allow the Minister to grant an extension of up to one year in appropriate cases, in accordance with statutorily-defined criteria that should be developed by the Department in consultation with interested parties.

11. That the Act should be amended in order expressly to provide for the defence of due diligence and mistake of fact in the case of a civil contravention.

12. That the Act should be amended to enable the Federal Court of Canada to review and modify the Minister's final decision respecting civil penalties.

13. That the *Customs Act* should be amended to ensure that the diversion provisions under sections 88 and 89 are applied only in cases where goods have been properly classified at the time of importation and, subsequent to importation, are diverted in violation of the end-use or end-user condition under which they were released.

14. That a regulation should be passed under section 30(i) of the *Customs Act* entitling sufferance warehouse operators, at their option, to refuse goods from defaulting customers.

15. That the Minister should consider implementing a binding ruling system in connection with the *Customs Act.*

16. That the Department of National Revenue and the Department of Finance should undertake a joint study to determine whether free trade zones should be established in Canada, and the Minister of National Revenue should be required to table this study in the House of Commons by no later than 30 September 1992 for referral to the House of Commons Standing Committee on Finance.

REQUEST FOR GOVERNMENT RESPONSE

Your Committee recommends that the Government table a comprehensive response to this Report in accordance with the provisions of Standing Order 109.

A copy of the relevant Minutes of Proceedings and Evidence (*Issues Nos. 1 to 5, which includes this Report*) is tabled.

Respectfully submitted,

CLÉMENT COUTURE,

Chairman.

Minutes of Proceedings

WEDNESDAY, FEBRUARY 5, 1992
(8)

[Text]

The Special Committee on the Act respecting Customs met *in camera* at 3:38 o'clock p.m., this day, in Room 112-N, Centre Block, the Chairman, Clément Couture, presiding.

Members of the Committee present: Ross Belsher, Clément Couture, Louise Feltham, Girve Fretz, Guy Ricard, George Rideout and Joseph Volpe.

In attendance: From the Research Branch of the Library of Parliament: Monique Hébert, Research Officer.

The Committee resumed consideration of its Order of Reference dated Wednesday, September 18, 1991, relating to the comprehensive review of the Act respecting Customs (Chapter 1, 2nd Supplement, Revised Statutes of Canada, 1985, section 168). (*See Minutes of Proceedings, Wednesday, October 2, 1991, Issue No. 1*).

The Committee proceeded to the consideration of guidelines for a Draft Report to the House.

At 3:50 o'clock p.m., Ross Belsher took the Chair.

At 4:25 o'clock p.m., the Chairman took the Chair.

At 6:02 o'clock p.m., the Committee adjourned to the call of the Chair.

TUESDAY, FEBRUARY 11, 1992
(9)

The Special Committee on the Act respecting Customs met *in camera* at 3:38 o'clock p.m., this day, in Room 307, West Block, the Chairman, Clément Couture, presiding.

Members of the Committee present: Ross Belsher, Clément Couture, Girve Fretz, Guy Ricard and Joseph Volpe.

In attendance: From the Research Branch of the Library of Parliament: Monique Hébert, Research Officer.

The Committee resumed consideration of its Order of Reference dated Wednesday, September 18, 1991, relating to the comprehensive review of the Act respecting Customs (Chapter 1, 2nd Supplement, Revised Statutes of Canada, 1985, section 168). (*See Minutes of Proceedings, Wednesday, October 2, 1991, Issue No. 1*).

The Committee proceeded to the consideration of a Draft Report.

At 4:40 o'clock p.m., the Committee adjourned to the call of the Chair.

TUESDAY, FEBRUARY 18, 1992
(10)

The Special Committee on the Act respecting Customs met *in camera* at 10:10 o'clock a.m., this day, in Room 306, West Block, the Chairman, Clément Couture, presiding.

Members of the Committee present: Ross Belsher, Steve Butland, Clément Couture, Louise Feltham, Girve Fretz, Barry Moore, George Rideout and Joseph Volpe.

In attendance: From the Research Branch of the Library of Parliament: Monique Hébert, Research Officer.

The Committee resumed consideration of its Order of Reference dated Wednesday, September 18, 1991, relating to the comprehensive review of the Act respecting Customs (Chapter 1, 2nd Supplement, Revised Statutes of Canada, 1985, section 168). (*See Minutes of Proceedings, Wednesday, October 2, 1991, Issue No. 1*).

The Committee resumed consideration of the Draft Report.

It was agreed, – That, the Draft Report as amended, be adopted as the Committee's Report to the House and that the Chairman (or another Member of the Committee) be instructed to present it to the House.

It was agreed, – That, the transcripts of all *in camera* meetings be destroyed by the Clerk of the Committee after the Committee's Report has been tabled.

It was agreed, – That, the Chairman be authorized to make such typographical and editorial changes as may be necessary without changing the substance of the Report.

It was agreed, – That, the Report be printed in tumble bilingual format with a distinctive cover.

It was agreed, – That, the Committee request a comprehensive response from the Government in accordance with Standing Order 109.

At 10:42 o'clock a.m., the Committee adjourned to the call of the Chair.

Diane Diotte
Clerk of the Committee