Date: 19990318

Docket: T-2688-97

IN THE MATTER OF an Application pursuant to section 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7 (as amended).

BETWEEN:

JOHNS MANVILLE INTERNATIONAL, INC.

Applicant

- and -

THE DEPUTY MINISTER, NATIONAL REVENUE

Respondent

REASONS FOR ORDER

EVANS J.:

A. INTRODUCTION

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Court Act* R.S.C. 1985, c. F-7 [as amended] in which Johns Manville International Inc. ("the applicant") asks the Court to review a decision dated December 2, 1997 in which Mr. St. Arnaud, an official of

Revenue Canada, refused to disclose to the applicant certain information about the assessment of anti-dumping duty imposed on goods exported by the applicant to Canada.

[2] The applicant alleges among other things that this refusal was in breach of the duty of fairness owed to the applicant by the Deputy Minister, National Revenue ("the respondent"). The relief requested includes orders compelling the disclosure of all relevant assessments, quashing assessments made without disclosure of information to which the applicant is entitled, and requiring the refund of any anti-dumping duties imposed and paid on goods that were the subject of invalid assessments.

B. BACKGROUND AND OVERVIEW

[3] The applicant manufactures and exports from the United States to Canada polyiso insulation board which is widely used in the construction industry for the insulation of roofs and walls. Following a complaint by a Canadian manufacturer that polyiso board made in the United States was being dumped in Canada, the respondent conducted an investigation. In a decision dated December 12, 1996 the respondent made a preliminary determination that polyiso insulation board originating in and exported from the United Stated had been dumped in Canada and that there was reasonable cause to

believe that this was injuring the Canadian industry. A provisional assessment of anti-dumping duties was made in accordance with subsection 38(1) of the *Special Import Measures Act* R.S.C. 1985, c. S-15 [as amended] ("*SIMA*").

[4] Pursuant to paragraph 41(1)(*a*) of *SIMA*, the Deputy Minister made a final determination in March 1997 of dumping of polyiso insulation board. The matter was referred to the Canadian International Trade Tribunal ("the CITT") for a determination of whether the dumping was causing or was likely to cause injury to the production in Canada of like goods. In a decision released on April 28, 1997 the CITT found that the dumping of polyiso board had caused material injury to Canadian producers of like goods, except in British Columbia.

[5] After the CITT has made a finding of material injury, the respondent is required by section 55 of the *SIMA* to cause an official to determine, within six months of the CITT's decision, the "normal value" and "export price" of the goods in question in order to determine the anti-dumping duties to be paid by or refunded to the importers. Put simply, dumping occurs when the value of like goods as determined in the market of origin (the "normal value") is less than that of the price at which the goods are sold to an importer in Canada (the "export price"). Exporters are asked to supply information on questionnaires sent out by the respondent to enable a determination to be

made of any anti-dumping duty payable by the importers or, if the provisional duty was set too high, the amount of any refund of anti-dumping duty paid.

[6] In a letter dated October 10, 1997 the applicant was informed by the respondent that the Department had concluded its reinvestigation of the "normal value" and "export price" of polyiso board pursuant to section 55 of *SIMA*. The applicant was advised of the “normal values” assigned to the polyiso board that it had exported, both during the provisional period and for shipments after October 10, 1997, and the methodology used to make this determination. Thus, the applicant was given notice that assessments had been made, but was not told the amount assessed in respect of the hundreds of imports of the board from its four plants in the United States. Nor was it given the information contained in the Detailed Adjustment Statement (“the DAS”) and the accompanying worksheets: these are the data from which the respondent makes its calculations. The applicant was not informed of the rate of exchange applied by the respondent to convert prices in U.S. dollars into Canadian funds.

[7] The applicant takes the position that, unless the respondent tells it the results of these assessments and discloses the information on which they are based, it is

effectively prevented from exercising its statutory rights to seek a redetermination by the respondent under paragraph 56(1.1)(*b*) of *SIMA*, and from challenging assessments before either the CITT or, since the export is from the United States, a bilateral panel under the *North American Free Trade Agreement* ("NAFTA"). Therefore, the applicant maintains, in refusing to disclose the information requested, the applicant has acted in breach of the duty of fairness.

[8] There are two principal elements of the respondent's position. First, the refusal to disclose the information sought by the applicant is prohibited by section 107 of the *Customs Act* R.S.C. 1985, c. C-1 (2nd Supp.) [as amended], and does not fall within any of the exemptions contain in section 108 of the Act. Second, if the disclosure of the information is not protected by section 107, then the respondent is not required by the duty of fairness to disclose it because the applicant is able to obtain all the information that it requires to challenge an assessment of anti-dumping duty from the importers of its goods, who are liable to pay any of the anti-dumping duties assessed against imported goods.

C. THE LEGISLATIVE FRAMEWORK

[9] *Customs Act*, R.S.C. 1985, c. C-1 (2nd Supp.) [as amended]

107. (1) Except as authorized by section 108, no official or authorized person shall
(*a*) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister for the purposes of this Act or the Customs Tariff or by an authorized person for the purpose of carrying out an agreement made under subsection 147.1(3)

107. (1) Sauf dans les cas prévus à l'article 108, il est interdit aux fonctionnaires et aux personnes autorisées_:
a) de communiquer ou laisser communiquer sciemment à quiconque des renseignements obtenus soit par le ministre ou en son nom pour l'application de la présente loi ou du Tarif des douanes, soit par une personne autorisée en vue de la mise en oeuvre d'un accord conclu en vertu du paragraphe 147.1(3);

108. (1) An officer may communicate or allow to be communicated information obtained under this Act or the Customs Tariff, or allow inspection of or access to any book, record, writing or other document obtained by or on behalf of the Minister for the purposes of this Act or the Customs Tariff, to or by

...

(c) any person otherwise legally entitled thereto.

108(3) An officer may show any book, record, writing or other document obtained for the purposes of this Act or the Customs Tariff, or permit a copy thereof to be given, to the person by or on behalf of whom the book, record, writing or other document was provided, or to any person authorized to transact business under this Act or the Customs Tariff as that person's agent, at the request of any such person and on receipt of such fee, if any, as is prescribed.

108. (1) L'agent peut communiquer ou laisser communiquer des renseignements obtenus en vertu de la présente loi ou du Tarif des douanes aux personnes suivantes, ou laisser celles-ci examiner les livres, dossiers, écrits ou autres documents obtenus par le ministre ou en son nom pour l'application de ces lois, ou y avoir accès_:

...

c) les personnes ayant, d'une façon générale, légalement qualité à cet égard.

108(3) L'agent peut présenter tout livre, dossier, écrit ou autre document obtenu pour l'application de la présente loi ou du Tarif des douanes, ou permettre d'en donner copie, soit à la personne par qui ou au nom de qui le document a été fourni, soit au mandataire autorisé par elle à accomplir les opérations visées par ces lois, à condition que l'intéressé en fasse la demande et acquitte les frais éventuellement fixés par règlement.

Special Import Measures Act, R.S.C. 1985, c. S-15 [as amended]

55. (1) Where the Deputy Minister
(a) has made a final determination of dumping or subsidizing under subsection 41(1) with respect to any goods, and
(b) has, where applicable, received from the Tribunal an order or finding described in any of sections 4 to 6 with respect to

the goods to which the final determination applies,
the Deputy Minister shall cause a designated officer to determine, not later than six months after the date of the order or finding,
(c) in respect of any goods referred to in subsection (2), whether the goods are in fact goods of the same description as goods described in the order or finding,
(d) the normal value and export price of or the amount of subsidy on the goods so released, and
(e) where section 6 or 10 applies in respect of the goods, the amount of the export subsidy on the goods.

55. (1) Après avoir_:
a) rendu la décision définitive de dumping ou de subventionnement prévue au paragraphe 41(1);
b) reçu, le cas échéant, l'ordonnance ou les conclusions du Tribunal visées à l'un des articles 4 à 6 au sujet des marchandises objet de la décision définitive,
le sous-ministre fait déterminer par un agent désigné, dans les six mois suivant la date de l'ordonnance ou des conclusions_:
c) la question de savoir si les marchandises visées au paragraphe (2) sont en fait de même description que celles désignées dans l'ordonnance ou les conclusions;
d) la valeur normale et le prix à l'exportation de ces marchandises ou le montant de subvention octroyée pour elles;
e) si les articles 6 ou 10 s'appliquent aux marchandises, le montant de la subvention à l'exportation octroyée pour elles.

56. (1) Where, subsequent to the making of an order or finding of the Tribunal or an order of the Governor in Council imposing a countervailing duty under section 7, any goods are imported into Canada, a determination by a customs officer
(a) as to whether the imported goods are goods of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies,
(b) of the normal value of or the amount, if any, of the subsidy on any imported goods that are of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies, and
(c) of the export price of or the amount, if any, of the export subsidy on any imported goods that are of the same description as goods to which the order or finding of the Tribunal applies,
made within thirty days after they were accounted for under subsection 32(1), (3) or (5) of the Customs Act is final and conclusive unless the importer, after having paid all duties owing on the imported goods, makes, within ninety days from the making of the determination, a written request in the prescribed form to a Dominion customs appraiser for a re-determination of that determination.

56. (1) Lorsque des marchandises sont importées après la date de l'ordonnance ou des conclusions du Tribunal ou celle du décret imposant des droits compensateurs, prévu à l'article 7, est définitive une décision rendue par un agent des douanes dans les trente jours après déclaration en détail des marchandises aux termes des paragraphes 32(1), (3) ou (5) de la Loi sur les douanes et qui détermine_:
a) la question de savoir si les marchandises sont de même description que des marchandises auxquelles s'applique l'ordonnance ou les conclusions, ou le décret;
b) la valeur normale des marchandises de même description que des marchandises qui font l'objet de l'ordonnance ou des conclusions, ou du décret, ou le montant de l'éventuelle subvention qui est octroyée pour elles;
c) le prix à l'exportation des marchandises de même description que des marchandises qui font l'objet de l'ordonnance ou des conclusions ou le montant de l'éventuelle subvention à l'exportation,
sauf is l'importateur, après avoir payé les droits exigibles sur ces marchandises, demande, dans les quatre-vingt-dix jours suivant la date de cette décision, à un appréciateur fédéral des douanes, par écrit et en la forme prescrite par le sous-ministre, de réviser sa décision.

(1.01) Notwithstanding subsection (1),

(a) where a determination referred to in that subsection is made in respect of any goods, including goods of a NAFTA country, the importer of the goods may, within ninety days after the making of the determination, make a written request in the prescribed form and manner and accompanied by the prescribed information to a designated officer for a re-determination, if the importer has paid all duties owing on the goods; and
(b) where a determination referred to in that subsection is made in respect of goods of a NAFTA country, the government of that NAFTA country or, if they are of that NAFTA country, the producer, manufacturer or exporter of the goods may make a request as described in paragraph (a), whether or not the importer of the goods has paid all duties owing on the goods.

(1.01) Par dérogation au paragraphe (1), l'importateur de marchandises visées par la décision peut, après avoir payé les droits exigibles sur celles-ci et dans les quatre-vingt-dix jours suivant la date de la décision, demander à un agent désigné, par écrit et selon les modalités de forme prescrites par le sous-ministre et les autres modalités réglementaires — relatives notamment aux renseignements à fournir —, de réviser celle-ci. Dans le cas de marchandises d'un pays ALÉNA, la demande peut être faite, sans égard à ce paiement, par le gouvernement du pays ALÉNA ou, s'ils sont du pays ALÉNA, le producteur, le fabricant ou l'exportateur des marchandises.

(1.1) Notwithstanding subsection (1),
(a) where a determination referred to in that subsection is made in respect of any goods, including goods of the United States, the importer of the goods may, within ninety days after the making of the determination, make a written request in the prescribed form and manner and accompanied by the prescribed information to a designated officer for a re-determination, if the importer has paid all duties owing on the goods; and
(b) where a determination referred to in that subsection is made in respect of goods of the United States, the United States government or the producer, manufacturer or exporter of the

goods may make a request as described in paragraph (a), whether or not the importer of the goods has paid all duties owing on the goods.

(1.1) Par dérogation au paragraphe (1),l'importateur de marchandises visées par la décision peut, après avoir payé les droits exigibles sur celles-ci et dans les quatre-vingt-dix jours suivant la date de la décision, demander à un agent désigné, par écrit et selon les modalités de forme prescrites par le sous-ministre et les autres modalités réglementaires — relatives notamment aux renseignements à fournir —, de réviser celle-ci. Dans le cas de marchandises des États-Unis, la demande peut être faite, sans égard à ce paiement, par le gouvernement des États-Unis ou le producteur, le fabricant ou l'exportateur des marchandises.

D. THE ISSUES

[10] In both his written submissions and oral argument, Mr. Kubrick, counsel for the applicant, challenged not only the refusal of the respondent to provide the information on which the assessments were based, but also the failure of the respondent to notify the applicant that section 55 determinations had been made. Counsel for the respondent, Ms. Turley, maintained that, since the decision under review in this proceeding is the refusal of an official of the respondent contained in a letter dated December 2, 1997 to disclose the DAS and related worksheets, the Court has no jurisdiction to consider the applicant's allegation that it had not received notice of the decisions.

ISSUE 1: Is the subject matter of this application for judicial review limited to the respondent's refusal to disclose the information requested by the applicant, namely the DAS and related worksheets, or does it include the failure of the respondent to notify

the applicant that section 55 determinations had been made in respect of goods that it had exported to Canada?

[11] The next issue concerns the applicability of section 107 of the *Customs Act* to the information contained in the DAS.

ISSUE 2: Is the information sought by the applicant "information obtained by or on behalf of the Minister for the purposes of this Act or the Customs Tariff" within the meaning of paragraph 107(1)(*a*) of the *Customs Act* so that its disclosure is prohibited?

[12] If the second issue is resolved in favour of the respondent, the next issues are whether the information may be disclosed pursuant to section 108 of the *Customs Act*, and if so, whether the statutory discretion to disclose was lawfully exercised by Mr. St. Arnaud.

ISSUE 3:Was the information on the DAS that had originally emanated from the applicant "provided by" the applicant for the purpose of subsection 108(3)?

ISSUE 4:Was the applicant "legally entitled" to the information on the DAS for the purpose of subsection 108(1)?

ISSUE 5:If the respondent had a discretion to disclose to the applicant the information that it requested was that discretion lawfully exercised by Mr. St. Arnaud on behalf of the respondent?

[13] If the disclosure of the information is not prohibited by section 107, or may be disclosed pursuant to section 108 of the *Customs Act*, the final question is whether the duty of fairness requires the discretion conferred by section 108 to be exercised in favour of the applicant.

ISSUE 6: Did the respondent's refusal to provide to the applicant copies of the DAS and worksheets that it requested deprive the applicant of procedural fairness by effectively preventing it from exercising its statutory right of appeal from the section 55 determination of the respondent?

E. ANALYSIS

Issue 1

[14] For the proposition that the Court has no jurisdiction to decide issues that were not before the decision-maker whose decision is the subject of the application for judicial review, Ms. Turley relied on the well-known case of *Tétrault-Gadoury v. Canada (Employment and Insurance Commission)*, [1991] 2 S.C.R. 22. While this, and the other cases cited, concerned decisions by administrative tribunals of an adjudicative nature, they are in my opinion equally apposite to a decision-making context where decisions are made without a hearing by officials who cannot be said to be exercising a jurisdiction. Applications for judicial review are normally proceedings of last resort, and intervention by the courts in the working of the administration should be reserved for situations in which the impugned administrative action was clearly erroneous in law.

[15] Thus, I must be satisfied that, fairly construed, the decision contained in the letter of December 2, 1997 that the applicant seeks to review in this proceeding does not constitute a refusal by the respondent to notify the applicant of the section 55 assessments that have been made with respect to goods that it has exported to Canada. Otherwise, the question of whether the respondent is legally obliged to do so is not properly before me.

[16] Ms. Turley pointed to the penultimate paragraph of that letter to support her contention. In it Mr. St. Arnaud wrote:

"... please be advised that the Department is not prepared to provide copies, in electronic or hard copy form, of detailed adjustment statements issued to importers of Johns Manville for polyiso product entered during

the provisional period. Accordingly, and as previously advised, if your client wishes to proceed with a request for redetermination, and requires additional information to do so, they should contact the importer directly."

[17] She submitted that this is not a refusal to notify the applicant of a determination of anti-dumping duty made by the respondent. Indeed, as is clear from the letter of October 10, 1997, the applicant had been informed by the respondent that the section 55 investigations respecting the imported polyiso board had been concluded.

[18] However, Mr. Kubrick submitted on behalf of the applicant that the letter should be interpreted more broadly as a refusal to disclose, not only the DAS, but also the determinations themselves. Indeed, in the first paragraph of the letter of December 2, 1997, Mr. St. Arnaud says that he is writing in response to a letter from Mr. Kubrick stating that the applicant "has been denied access to the results of the Department's section 55 review of entries of polyiso insulation board imported by customers of Johns Manville during the provisional period ..." Mr. St. Arnaud goes on to say that he has addressed some of these issues in an "earlier letter". This letter is also said to have been dated December 2, 1997, which, since this is the date of the letter under review in this application, appears to be an error. However, in the letter under review here Mr. St. Arnaud proposed to "reiterate the Department's position on these matters as well as clarify other points raised in your letter."

[19] This letter does not expressly refuse to provide the applicant with notice of any decision that has been made, and I am accordingly not satisfied that the question of whether the respondent must always give notice is properly raised by this proceeding. However, in case I am wrong on this, and in view of the submissions of counsel on the issue, I shall deal with it in these reasons.

[20] Given the fact that the liability to pay any anti-dumping duties is on the importer, not the exporter, it is not obvious to me that the respondent is obliged by the duty of fairness to notify exporters of the results of the investigations under section 55 as a matter of course. In this case, the applicant was informed that the re-investigations had been completed, and if not promptly advised by its importers about any duties imposed, it could have made inquiries of its customers.

[21] In light of the overall scheme established by the legislation, and the manner of its operation, it cannot be inferred from the fact that, as an exporter of goods found to have been dumped in Canada, the applicant has a right to seek a redetermination of a section 55 assessment, it therefore has an automatic right to be advised by the respondent of the results of the assessments. While not always congruent, the interests of the exporter and its customers, namely the importers, are sufficiently close so that *in most cases* an exporter will either be advised by the importer, or can itself ask the importer what duties have been imposed on imported goods. As the person liable to pay any anti-dumping duties, it is the importer that normally appeals.

[22] Counsel for the applicant argued that this was not necessarily sufficient to enable the exporter to exercise its statutory right to seek a redetermination of an assessment, because the request for such a redetermination must be made within 90 days of the assessment (*SIMA*, paragraph 56(1.01)(*a*), (*b*)). Unless the respondent is required automatically to notify exporters of any assessments, exporters may not learn of them until the 90 day limitation period has expired.

[23] In this case, however, the applicant was informed by the respondent that assessments had been made of the polyiso board that it had exported, although it was not advised of the results. The applicant therefore had sufficient notice to enable it to make inquiries of its customers to obtain the information that it needed to seek a redetermination.

[24] Counsel for the respondent also drew my attention to paragraph 59(1)(*e*) of *SIMA*, which confers a broad discretion on the respondent to make a redetermination under section 56 within two years of the section 55 determination period. The Court would probably characterize as unreasonable a refusal by the respondent to exercise this discretion in circumstances where, despite due diligence, an exporter was unable to discover within 90 days that a section 55 assessment had been made.

[25] Counsel for the applicant also indicated that there might be circumstances in which an exporter would not be informed by an importer of the results of a section 55 determination, and might not even know that an assessment had been made. In such circumstances it is possible that, if an exporter asked the respondent whether a determination had been made, the respondent would be obliged to give to the importer any information that it needed to exercise its right of appeal, provided, at least, that disclosure of the information was not prohibited by statute.

[26] In my view, therefore, the respondent was under no automatic statutory duty to advise the applicant of the result of the section 55 assessments. Moreover, the applicant did not allege that it was unable to obtain from importers information about the assessments of anti-dumping duty on polyiso board that had been made, although it did say that it could not always be absolutely certain which of its customers had been assessed. Accordingly, I do not think that the issue of whether, and in what circumstances, the respondent is legally required to provide this information is properly before me in this proceeding.

Issue 2

[27] In his letter of December 2, 1997 Mr. St. Arnaud clearly refused to disclose to the applicant the DAS that it had requested to enable it to decide whether the respondent had erred in the calculation of the anti-dumping duties imposed on the goods that it had exported, so that the applicant could decide whether to seek a redetermination of these duties.

[28] The respondent's position was that section 107 of the *Customs Act* prohibited the disclosure of this information. Counsel relied on the following provision of the *Customs Act*:

107. (1) Except as authorized by section 108, <u>no official or authorized person shall</u> (*a*) <u>knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister for the purposes of this Act or the Customs Tariff</u> or by an authorized person for the purpose of carrying out an agreement made under subsection 147.1(3);	107. (1) Sauf dans les cas prévus à l'article 108, il est interdit aux fonctionnaires et aux personnes autorisées_: a) de communiquer ou laisser communiquer sciemment à quiconque des renseignements obtenus soit par le ministre ou en son nom pour l'application de la présente loi ou du Tarif des douanes, soit par une personne autorisée en vue de la mise en oeuvre d'un accord conclu en vertu du paragraphe 147.1(3);

Section 160 of the *Customs Act* makes it on offence for a person to communicate or allow to be communicated information contrary to section 107(1).

[29] The applicant made two arguments as to why the DAS were not "information obtained by or on behalf of the Minister for the purpose of this Act or the *Customs Tariff*". First, he said, the DAS were not "obtained by the Minister"; rather, they were documents that had been generated by officials of the respondent.

[30] However, I agree with the submission of Ms. Turley that it is sufficient for the purpose of this section if the documents created by the respondent contain information that was obtained from either an importer or some other source. The following statement by Décary J.A. in

Diversified Holdings Ltd. v. Canada, [1991] 1 F.C. 595, 598 - 599 (F.C.A.) in respect of the identically worded subsection 241(1) of the *Income Tax Act* S.C. 1970-71-72, c. 63 [as amended] seems determinative of this issue:

"... in order to be 'obtained' within the meaning of subsection 241(1), a document must be either a document in the possession of someone else than the Minister or his officers, or a document prepared by the Minister or his officers *but on the basis of information given to them that has remained confidential*." (Emphasis added)

The italicized words would seem to be precisely applicable to the facts of this case.

[31] The applicant's second point was that the information contained in the DAS was obtained for the purpose of assessing anti-dumping duties under the *SIMA*, not the *Customs Act* or *Customs Tariff* as required by paragraph 107(1)(*a*) of the *Customs Act*. While information on the DAS is typically taken from customs forms completed when goods are brought across the border, this fact alone cannot affect the *purpose* for which the information was obtained by the respondent.

[32] In response, Ms. Turley said that the information was originally obtained by the respondent from the importers in the discharge of their statutory duty under subsection 32(1) of the *Customs Act* to account for goods that they were bringing into Canada. The fact that this information was subsequently copied onto other forms for the purposes of the *SIMA* did not change the original purpose for which it was obtained by the respondent. Hence, it fell within the prohibition on disclosure imposed by paragraph 107(1)(*a*).

> [33] In my opinion, the respondent is right in this contention. The purposes of paragraph 107(1)(*a*) are to facilitate the administration of the *Customs Act* by encouraging importers to provide information voluntarily by an assurance that it will not be disclosed to other individuals, and to ensure fairness to individuals who are legally obliged

to provide confidential information to the Government. It would undermine these purposes if the information were deprived of confidentiality as a result of being copied onto a form used for the purposes of an Act other than the *Customs Act*.

[34] Mr. Kubrick also pointed out that, since most of the information provided by importers and copied onto the DAS originated from the applicant as the exporter of the goods, there seemed little point in protecting it from disclosure to the applicant.

[35] However, even information provided by the person requesting its disclosure is protected by paragraph 107(1)(*a*). This is made clear by the fact that such information falls within one of the categories of information that may be disclosed in the discretion of an officer of the respondent. If it was not included in paragraph 107(1)(*a*) there would have been no need to permit officials to disclose it in the exercise of their discretion under subsection 108(3).

> 108(3) An officer may show any book, record, writing or other document obtained for the purposes of this Act or the Customs Tariff, or permit a copy thereof to be given, to the person by or on behalf of whom the book, record, writing or other document was provided, or to any person authorized to transact business under this Act or the Customs Tariff as that person's agent, at the request of any such person and on receipt of such fee, if any, as is prescribed.

108(3) L'agent peut présenter tout

livre, dossier, écrit ou autre document obtenu pour l'application de la présente loi ou du Tarif des douanes, ou permettre d'en donner copie, soit à la personne par qui ou au nom de qui le document a été fourni, soit au mandataire autorisé par elle à accomplir les opérations visées par ces lois, à condition que l'intéressé en fasse la demande et acquitte les frais éventuellement fixés par règlement.

Issue 3

[36] The question here is the scope of subsection 108(3). In particular, it is whether the applicant "provided" the information to the respondent that it is requesting be disclosed to it, so that it is entitled to require an officer of the respondent to consider whether to disclose it to the applicant in the exercise of the discretion conferred by the subsection.

[37] Mr. Kubrick argued that the verb "provided" should include not only the person who gave the information to the respondent, but also the person from whom that person obtained the information. In other words, the information on the DAS was "provided" both by the importer and the applicant as the exporter of the polyiso board to which the DAS related. Ms. Turley, on the other hand, maintained that the verb "provided" should be construed narrowly so as to apply only to the importer who was under a statutory duty to provide the information to the respondent.

[38] There seems much to be said in favour of the applicant's position: what public purpose can be served by always treating information as confidential *vis-à-vis* the person who was the original source of that information? To this Ms. Turley responded that it would unduly complicate the administration of the statutory scheme if the respondent had to make inquiries as

to the source of information that undoubtedly was "provided" to it by the importer. It might not always be clear which information provided by the importer had originated from the exporter. Any diminution of the level of confidentiality guaranteed by section 107 in favour of importers as those liable to pay anti-dumping duties could only increase their reluctance to be forthcoming with the information needed by the respondent in order to discharge efficiently its statutory duties.

[39] Despite the arguments advanced by Ms. Turley, I can see no good reason to limit the identity of the person who "provided" information to the respondent to the person from whom the respondent immediately obtained the information. The rationale permitting disclosure of the information to the immediate provider of the information extends also to the person who supplied it to that person. This conclusion incidentally reinforces the view that paragraph 107(1)(*a*) includes information that originated with the person who has requested its disclosure.

[40] Since the respondent has taken the view that subsection 108(3) does not oblige it to consider disclosing to the applicant the information on the DAS, then there has been no exercise of discretion at all with respect to it. The consequences of this I shall address later.

Issue 4

[41] The parties both made submissions with respect to the interpretation of another exception to section 107 of the *Customs Act* contained in section 108.

108. (1) <u>An officer may communicate or allow to be communicated information</u> obtained under this Act or the Customs Tariff, or allow inspection of or access to any book, record, writing or other document obtained by or on behalf of the Minister for the purposes of this Act or the Customs Tariff, to or by	108. (1) L'agent peut communiquer ou laisser communiquer des renseignements obtenus en vertu de la présente loi ou du Tarif des douanes aux personnes suivantes, ou laisser celles-ci examiner les livres, dossiers, écrits ou autres documents obtenus par le ministre ou en son nom pour l'application de ces lois, ou y avoir accès_:

...	...
(c) any person otherwise legally entitled thereto.	c) les personnes ayant, d'une façon générale, légalement qualité à cet égard.

[42] Mr. Kubrick argued that the applicant was "legally entitled" to the information on the DAS by virtue of the duty of procedural fairness which requires the respondent to give to the applicant the information that it needs to enable it to exercise its statutory rights of redetermination and review of the section 55 assessment.

[43] Ms. Turley, on the other hand, pointed out that the words "any person otherwise legally entitled thereto" also appear in the *Income Tax Act,* and have been given a narrow interpretation by the courts. Therefore, she argued, it was reasonable to presume that Parliament intended them to have the same meaning in the *Customs Act* that has been ascribed to them by the courts for the purposes of the *Income Tax Act*, where there is a similar concern about maintaining the confidentiality of information that individuals are statutorily obliged to provide to the Government.

[44] The leading case on the interpretation of the words "legally entitled" in the *Income Tax Act* is *Glover v. Canada (Minister of National Revenue)* (1980), 29 O.R. (2d) 392 (Ont. C.A.), *aff'd*. [1981] 2 S.C.R. 561. In this case, it was held that neither a wife who had been granted custody of her children, nor a judge of the Supreme Court of Ontario, was "legally entitled" to information in the possession of Revenue Canada that would have enabled them to locate a husband who had absconded with the parties' children in contravention of a custody order.

[45] The Ontario Court of Appeal stated in *Glover* that, when considered in the context of the other provisions of the *Income Tax Act*, the "legally entitled" exemption should be construed narrowly as referring only to the provisions in certain statutes, such as the *Statistics Act* and the *Canada Pension Plan*, that authorize government departments to obtain the information needed for the administration of the statutory schemes for which they are responsible.

[46] However, it should also be noted that the basis of the claim for disclosure made in *Glover* was different from that made by the applicant in this case. Moreover, the *Income Tax Act* also included a provision specifically prohibiting Revenue Canada from disclosing for the purpose of civil litigation information provided to it by taxpayers.

[47] Nonetheless, I conclude that the exemption in paragraph 108(1)(*c*) of the *Customs Act* should be narrowly construed, as it was in *Glover* by virtue of the similarities between the wording of the exemptions to the prohibition upon disclosure in the *Income Tax Act* and the *Customs Act*, and the importance of the principle that government must keep confidential information in its possession that it could legally have required the individual to provide.

[48] Accordingly, any right that the applicant may have under the duty of fairness to obtain the DAS and related worksheets from the respondent does not make the applicant "legally entitled" to the information for the purpose of paragraph 108(1)(*c*). This phrase should be limited in the same manner as the analogous provision in the *Income Tax Act*, so that it applies only to the statutory powers conferred by those federal statutes that authorize particular departments or officials to obtain information for administrative purposes.

Issue 5

[49] Did the respondent exercise in accordance with law any discretion conferred by section 108 to disclose information requested by the applicant?

[50] I have held that the discretion conferred on an officer by subsection 108(3) to disclose information to the person who provided it is broad enough to include an exporter, such as the applicant, who is the original source of information provided to the respondent by the importers, albeit on a different form. I have inferred from Ms. Turley's contention that subsection 108(3) only applied to the importer that the respondent and his officials have taken the view that they had no discretion to disclose the information on the DAS to the applicant.

[51] A public official unlawfully fails to exercise a discretion if, as a result of a misconstruction of the scope of the discretion conferred by Parliament, she or he concludes that no discretion is exercisable in a given situation. This is what has happened here. Subject to the question of fairness considered below, the appropriate remedy in these circumstances is an order to require the consider action according to law of the exercise of the statutory discretion, and not an order by the Court that usurps the discretion conferred by Parliament on the respondent, or a delegate, not on the Court.

[52] The applicant also raised a question as to whether Mr. St. Arnaud was an appropriate person to be making discretionary decisions under section 108 of the *Customs Act*. Neither he, nor the position that he occupied, is included in the list of those to whom the Minister has delegated the power to form an opinion whether information should be disclosed under section 108.

[53] Counsel for the respondent did not strongly contest this submission, and in my view the applicant is clearly correct. Therefore, any consideration of the exercise of discretion under section 108 undertaken as a result of these reasons should be by an officer to whom the exercise of the discretion has been delegated by the Minister.

Issue 6

[54] Does the duty of fairness require the respondent to disclose to the applicant the DAS and related worksheets?

[55] When Parliament confers a discretion on a public official it is normally presumed that the official is not thereby empowered to exercise the discretion in breach of the duty of fairness. If this presumption applies in this case, then it may in effect *require* the respondent to disclose so much of the information on the DAS that the applicant

originally provided to the importer, and is thus not subject to the statutory prohibition on disclosure imposed by section 107 of the *Customs Act*.

[56] The exporter is less directly affected by the imposition of anti-dumping duties than the importer who is liable to pay them. Moreover, the exporter will normally have access to the information, either from its own records or from the importer. Accordingly, the respondent is not required to exercise the discretion to disclose the information unless the applicant is able to establish that it cannot obtain the information in any other way, and that it would thereby be deprived of a reasonable opportunity to exercise its statutory rights of review and appeal.

[57] Since the applicant has not alleged that the failure of the respondent to disclose the information in question has prejudiced it in this case, I conclude that the duty of fairness did not require that the information in question be disclosed by the respondent.

F. CONCLUSIONS

[58] For these reasons, the application for judicial review is granted to the extent indicated, and the respondent is ordered to consider the exercise of his discretion under subsection 108(3) of the *Customs Act,* which he may, of course, do through an official other than Mr. St. Arnaud, to whom the power to make those discretionary decisions has been lawfully subdelegated.

[59] Ms. Turley submitted that the costs of this application be awarded against the applicant on the ground that in a letter of January 6, 1999 she invited the applicant to discontinue the application for judicial review in return for the respondent's remitting the matter to an officer who was authorized to exercise the statutory discretion under section 108 on behalf of the respondent. The applicant declined this offer to settle.

[60] Costs on applications for judicial review are now within the full discretion of the Court: *Federal Court Rules, 1998* SOR/98-100, Rule 400(1). One of the factors to be considered is that an offer has been made in writing: Rule 400(3)(*e*). The fact that the relief granted by the Court is no more favourable to the applicant than that offered by the respondent in an attempt to settle the proceeding may thus justify an award of costs to the respondent, even though the application is granted.

[61] However, in the circumstances of this case I have decided that it would not be appropriate to award the respondent his costs. The applicant has raised important questions of law about the administration of this statutory scheme. In addition, I have found in favour of the applicant, not only because legal authority to exercise the discretion conferred by section 108 had not been delegated to Mr. St. Arnaud, but also because I agreed with the applicant's submission on the issue of who "provided" information to the respondent for the purpose of subsection 108(3) of the *Customs Act*.

[62] Accordingly, I grant a declaratory order that information is "provided" to the respondent for the purpose of subsection 108(3) of the *Customs Act,* not only by the person who delivers it to the respondent, but also by the manufacturer or exporter from whom it originally emanated.

"John M. Evans"

J.F.C.C.

TORONTO, ONTARIO
March 18, 1999

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO: T-2688-97

STYLE OF CAUSE: JOHNS MANVILLE INTERNATIONAL, INC.

and -

THE DEPUTY MINISTER, NATIONAL REVENUE

DATE OF HEARING: TUESDAY, JANUARY 5,1999

PLACE OF HEARING: OTTAWA, ONTARIO

REASONS FOR ORDER BY: EVANS J.

DATED: THURSDAY, MARCH 18, 1999

APPEARANCES:

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FEDERAL COURT OF CANADA

Date: 19990318

Docket: T-2688-97

IN THE MATTER OF an Application pursuant to section 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7 (as amended).

JOHNS MANVILLE INTERNATIONAL, INC.

Applicant

- and -

THE DEPUTY MINISTER, NATIONAL REVENUE

Respondent

REASONS FOR ORDER