



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Expiry No. LE-2008-001

Wood Slats

*Order issued
Thursday, September 25, 2008*

*Reasons issued
Friday, October 17, 2008*

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IN THE MATTER OF a notice of expiry, pursuant to subsection 76.03(2) of the *Special Import Measures Act*, of the findings of the Canadian International Trade Tribunal made on June 18, 2004, in Inquiry No. NQ-2003-003, concerning wood slats originating in or exported from Mexico and the People's Republic of China;

AND FURTHER TO a notice of motion filed by counsel for SBM Wood Industries on September 12, 2008, under subsection 24(1) of the *Canadian International Trade Tribunal Rules*, for an order disqualifying all counsel of the firm Gottlieb & Associates from acting as counsel of record for Blinds to Go Inc. in these proceedings.

ORDER

The Canadian International Trade Tribunal hereby grants the motion.

Diane Vincent
Diane Vincent
Presiding Member

André F. Scott
André F. Scott
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

MOTION

1. On September 12, 2008, SBM Wood Industries (SBM) filed a notice of motion with the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 24(1) of the *Canadian International Trade Tribunal Rules*,¹ requesting an order disqualifying all counsel of the firm Gottlieb & Associates (G&A), by reason of conflict of interest, from representing any party that is opposed in interest to SBM in these expiry proceedings or any subsequent expiry review. SBM filed affidavit evidence in support of its motion.

BACKGROUND

2. This motion arises in the context of the proceedings that followed the issuance of a notice of expiry by the Tribunal on August 12, 2008, pursuant to subsection 76.03(2) of the *Special Import Measures Act*,² relative to the findings made by the Tribunal on June 18, 2004, in Inquiry No. NQ-2003-003 (the Inquiry), concerning wood slats originating in or exported from Mexico and the People's Republic of China.

3. On September 2, 2008, SBM and Blinds To Go Inc. (BTG) filed notices of participation in these expiry proceedings.

4. On September 2, 2008, Mr. Peter Kirby, of Fasken Martineau DuMoulin LLP (FMD), filed a notice of representation as counsel for SBM and Messrs. Richard S. Gottlieb and Vincent Routhier, of G&A, filed notices of representation as counsel for BTG. On September 5, 2008, Mr. Routhier withdrew his notice of representation.

5. At the time of the Inquiry, SBM was represented by Messrs. Kirby and Routhier, and BTG was represented by Mr. Gottlieb. Mr. Routhier left FMD on August 31, 2006, and joined G&A some time in early 2007. At the time of the Inquiry, SBM and BTG had opposing interests and still do.

6. In its motion, SBM alleged that Mr. Routhier and G&A are now in a situation of conflict by reason of Mr. Routhier's prior involvement as counsel for SBM in the Inquiry and G&A's retainer by BTG in these expiry proceedings. In this regard, SBM alleged that Mr. Routhier received information confidential to SBM at the time of the Inquiry, that the Inquiry and these expiry proceedings are directly related and that G&A failed to take measures to isolate Mr. Routhier from any involvement with BTG's retainer. SBM based its motion on the test set out by Sopinka J. in *Macdonald estate v. Martin*.³ SBM also cited the *Code of ethics of advocates*⁴ of the Barreau du Québec. In support of its motion, SBM filed an affidavit of Ms. Elise Saint-Jacques, of FMD, attesting to various occasions when information confidential to SBM was imparted to Mr. Routhier as counsel for SMB at the time of the Inquiry.

7. On September 16, 2008, the Tribunal received submissions from G&A, as well as an affidavit from Mr. Gottlieb dated September 15, 2008. Mr. Gottlieb stated, *inter alia*, that he opposed the motion and that Mr. Routhier would not be acting as counsel for BTG. He argued that any information that Mr. Routhier

1. S.O.R./91-499.

2. R.S.C. 1985, c. S-15 [*SIMA*].

3. [1990] 3 S.C.R. 1235 [*Macdonald estate*].

4. R.Q. B-1, r.1.

may have received at the time of the Inquiry would be of no consequence to these expiry proceedings. He argued that he did not receive nor solicit any information relating to SBM from Mr. Routhier and that he had taken steps to isolate Mr. Routhier from G&A's work on this retainer. Mr. Gottlieb pointed to the time that had lapsed between the Inquiry and these expiry proceedings. He stressed BTG's right to be represented by its counsel of choice, namely, G&A, which has represented BTG's interest for several years. In addition, he referred to the jurisprudence in *Bicycles and Frames*⁵ and *Grain Corn*⁶ where the Tribunal allowed certain individuals to continue to represent parties opposed in interest to those individuals' former clients.

8. SBM filed a reply on September 17, 2008, in which it submitted, *inter alia*, that to deny the motion would put the Tribunal in the impossible position of having to decide which counsel are to be trusted and which are not and would set a dangerous precedent. SBM reiterated that the situation in which G&A finds itself could have been avoided if it had followed the guidance of the Supreme Court of Canada (the Court) in *Macdonald estate* and the guidelines set by the Barreau du Québec. SBM submitted that any measures taken by G&A to isolate Mr. Routhier fell short of what is required to avoid a firm-wide conflict. SBM argued that any reasonable person would consider that there was a possibility of confidential information having been advertently or inadvertently disclosed. SBM also argued that no reasonable argument can be made that these expiry proceedings are not significantly related to the Inquiry.

9. On September 19, 2008, the Tribunal directed that no submissions were to be filed relative to the merits of the expiry proceedings pending the Tribunal's decision on this motion.

10. In a letter dated September 19, 2008, the Tribunal asked Mr. Gottlieb for additional information and clarifications in the form of an affidavit with respect to the following:

- The circumstances that led to Mr. Routhier filing a notice of representation to represent BTG in this matter;
- The date, the precise description and the specific nature of any measures that were taken to isolate Mr. Routhier from this matter during the period between the date on which BTG retained G&A and the date of the filing by Mr. Routhier of a notice of representation;
- The date, the precise description and the specific nature of any measures that were taken to isolate Mr. Routhier from this matter during the period between the date on which Mr. Routhier filed his notice of representation and the date on which Mr. Gottlieb first heard from Mr. Peter Kirby of his concerns about Mr. Routhier's involvement in this matter (without giving a date, Mr. Gottlieb referred to a point in time at paragraph 3 of his affidavit of September 15, 2008); and
- A precise description of any specific steps that were taken to implement the isolation measures referred to by Mr. Gottlieb at paragraph 4 of his affidavit of September 15, 2008, and clarification with respect to the dates on which these steps were taken.

11. On September 23, 2008, Mr. Gottlieb responded to the Tribunal's request with an affidavit in which he stated, *inter alia*, that Mr. Routhier had filed a notice of representation as a matter of standard practice by all counsel with G&A who might be potentially involved in a new retainer, but that Mr. Routhier had not

5. *Bicycles and Finished Painted Bicycle Frames* (September 2005), GS-2004-001 and GS-2004-002 (CITT) [*Bicycles and Frames*].

6. *Grain Corn* (15 November 2005), PI-2005-001 (CITT).

worked on the BTG file nor assisted Mr. Gottlieb in any manner whatsoever in respect thereof. Mr. Gottlieb reiterated that Mr. Routhier had been isolated from any files concerning BTG, had been instructed not to discuss the case with anyone at G&A and had withdrawn his notice of representation. In this regard, Mr. Gottlieb stated that he had had exclusive contact with BTG.

12. On September 24, 2008, SBM filed comments on Mr. Gottlieb's affidavit of September 23, 2008. SBM submitted that Mr. Gottlieb's affidavit confirms that no measures designed to isolate Mr. Routhier from the file had been taken until, at the earliest, the withdrawal of his notice of representation. SBM submitted that the fundamental issue before the Tribunal is the protection of its process by ensuring that counsel who appear before it are demonstrably seen to be acting in a way that protects their clients' confidential information. SBM submitted that the courts and professional associations have concluded that only demonstrably verifiable institutional mechanisms will overcome the inference that tainted counsel taint the entire firm. SBM submitted that G&A has not discharged that burden.

ANALYSIS

13. In disposing of the motion, the Tribunal must address the following questions: (1) Is there a disqualifying conflict of interest for Mr. Routhier by reason of his representation of SBM in the Inquiry? and, if so, (2) Does this conflict extend to G&A and its counsel?

Mr. Routhier

14. As it has stated in the past,⁷ the Tribunal considers it very important that counsel who appear before it be free from conflicts of interest.⁸ In assessing whether a conflict of interest exists in the present circumstance, the Tribunal is bound by the following classic statement of the conflict of interest principle set out by Sopinka J. in *Macdonald estate*:

... In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. ...

... A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. ...⁹

7. *Bicycles and Frames and Grain Corn*.

8. In *Grain Corn*, the Tribunal stated the following at paragraph 23: "A lawyer's duty to avoid conflicts of interest includes, notably, a general duty of loyalty and a duty of confidentiality. With respect to the duty of loyalty, it is recognized that lawyers must act in the best interest of their clients by avoiding conflict situations. Pursuant to that duty, a lawyer who has acted for a client in a previous matter must not act against that client in a related matter. With respect to the duty of confidentiality, a lawyer who has acted for a client must not thereafter act against that client in a new matter, if the confidential information received during the previous relationship is relevant to the matter at hand."

9. At 1260-61.

15. Accordingly, the Tribunal must examine whether Mr. Routhier was likely privy to confidential information relevant to the matter at hand as a result of a prior solicitor-client relationship. To answer that question, the Tribunal must ask itself whether the Inquiry is relevant to the present expiry proceedings. The Tribunal finds that the proceedings are related.

16. Indeed, in both *Bicycles and Frames* and *Grain Corn*, the Tribunal indicated that expiry reviews are proceedings that are directly related to initial inquiries. In an expiry review, the Tribunal examines the case for continuing, with or without amendment, or rescinding a previous order or a finding relating to the same goods. As is often the case in proceedings before the Tribunal, in the Inquiry and these expiry proceedings, SBM was and continues to be the party that is seeking the protection afforded under *SIMA*. BTG continues to be an important market player opposed to such protection being granted. Indeed, in these proceedings, BTG is the only party other than SBM to have filed a notice of participation and the only party opposed to SBM's request. The Tribunal also notes that, as always, the Tribunal's public and protected staff reports from the Inquiry will be transferred to the file in the expiry review proceedings should the Tribunal decide that such a review is warranted. Such proceedings are therefore necessarily related, and the Tribunal believes that a reasonably informed member of the public would come to the same conclusion.

17. Based on affidavit evidence and supporting documentation submitted by SBM, the Tribunal concludes that confidential information was imparted to its counsel, including Mr. Routhier, in the context of the Inquiry.

18. The Tribunal also notes that the circumstances surrounding this matter differ from those that arose in the context of *Bicycles and Frames* and *Grain Corn*, chief among them being the Tribunal's conclusions in those cases that the proceedings were not directly related to previous Tribunal proceedings.

19. Therefore, having regard to the fact that these expiry proceedings are directly related to the Inquiry, that the current expiry proceedings concern products that were the subject of the Inquiry and that, most importantly, in the Tribunal's view, neither Mr. Routhier nor G&A have presented sufficient evidence to discharge the "very difficult burden" identified by the Court to demonstrate that no relevant information was imparted in the past, the Tribunal must assume that Mr. Routhier was indeed privy to confidential information while acting as counsel for SBM. Given that Mr. Routhier was privy to relevant and confidential information in directly related proceedings, he would have been precluded from representing BTG in these expiry proceedings, had he maintained his notice of representation beyond September 5, 2008.

20. There remains the issue of whether G&A is itself tainted.

G&A

21. With respect to the issue of whether G&A is tainted, the Tribunal considers itself bound by the following additional pronouncements of Sopinka J. in *Macdonald estate*:

... There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. . . .

A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying “trust me”. This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement . . . that affidavits of lawyers difficult to verify objectively will fail to assure the public.¹⁰

...

22. The Tribunal is of the view that the alleged conflict of interest attributed to G&A was not removed by Mr. Routhier having withdrawn his notice of representation on September 5, 2008.

23. The Tribunal afforded Mr. Gottlieb two opportunities to demonstrate that all reasonable and objectively verifiable measures had been taken to prevent G&A from being tainted by Mr. Routhier’s conflict of interest in this matter. In neither instance was the Tribunal provided with the “clear and convincing evidence” called for by the Court in *Macdonald estate* to demonstrate that a tainting of the firm had not occurred. Indeed, affidavits filed by Mr. Gottlieb reveal that no objectively verifiable measures whatsoever had been put in place at G&A to effectively isolate Mr. Routhier from the file until, at the earliest, the date on which counsel of FMD and G&A first discussed the allegations of conflict of interest, which the Tribunal understands to have been September 4, 2008.

24. The Tribunal has not found in Mr Gottlieb’s affidavit that such objectively verifiable measures as those referred to by the Court were demonstrated to have been put in place as of that date either. In any event, the Tribunal believes that the perception of a tainting conflict of interest would have been unmistakably ingrained in the mind of the reasonably well-informed member of the public due to the failure of G&A to clearly establish the implementation of any objectively verifiable “taint” prevention measures as of the date of arrival of SBM’s former counsel at the firm. In light of the foregoing circumstances, the Tribunal is of the view that it is bound to disqualify all counsel at G&A from acting in these expiry proceedings and in a subsequent expiry review, if any, for any party opposed in interest to SBM, most notably, BTG.

25. Indeed, to decide otherwise, the Tribunal would have had to rely solely on Mr. Gottlieb’s sworn assurances to the effect that tainting did not occur. But to do so would have placed the Tribunal in the “invidious position of deciding which lawyers are to be trusted and which are not”, the precise situation that the Court sought to avoid. The Court has clearly directed that, in such matters, “undertakings and conclusory statements in affidavits without more are not acceptable.” Such is the state of the evidence before the Tribunal, which must decide such matters on a case-by-case basis.

26. Finally, the Tribunal also recognizes that its decision on this motion will have an effect on BTG’s ability to file a submission on the merits of proceeding with an expiry review in accordance with the published calendar of proceedings. Nevertheless, in light of the conflict in which G&A finds itself, the Tribunal is of the view that preservation of the integrity of its process must supersede BTG’s right to counsel of its choice. In an effort to accommodate BTG, the Secretary of the Tribunal already communicated to the parties, on September 25, 2008, that the filing date for submissions has been extended to October 17, 2008, and other dates relative to these expiry proceedings have been modified accordingly. In this regard, a revised notice of expiry has been published on the Tribunal’s Web site.

10. At 1262, 1263.

DECISION

27. For the reasons stated above, the Tribunal hereby grants the motion.

Diane Vincent
Diane Vincent
Presiding Member

André F. Scott
André F. Scott
Member

Pasquale Michael Saroli
Pasquale Michael Saroli
Member