



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

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## DETERMINATION AND REASONS

Inquiry No. NQ-2004-005R

Certain Fasteners

*Determination and reasons issued  
Tuesday, September 26, 2006*

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IN THE MATTER OF an inquiry, under section 42 of the *Special Import Measures Act*, respecting the dumping of fasteners originating in or exported from the People's Republic of China and Chinese Taipei and the subsidizing of such products originating in or exported from the People's Republic of China;

AND FURTHER TO a decision of the Federal Court of Appeal dated March 21, 2006, which set aside the decision of the Canadian International Trade Tribunal in Inquiry No. NQ-2004-005, dated January 7, 2005, with respect to the requests for product exclusions for certain patented products filed by GRK Fasteners, and remitted the matter to the Canadian International Trade Tribunal for re-determination in accordance with the directions of the Federal Court of Appeal.

**THE DUMPING OF CERTAIN FASTENERS ORIGINATING IN OR  
EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA AND CHINESE  
TAIPEI AND THE SUBSIDIZING OF SUCH PRODUCTS ORIGINATING IN OR  
EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA**

**DETERMINATION**

The Canadian International Trade Tribunal denies the requests for product exclusions that were filed by GRK Fasteners for certain patented stainless steel screws.

Pierre Gosselin

Pierre Gosselin  
Presiding Member

James A. Ogilvy

James A. Ogilvy  
Member

Ellen Fry

Ellen Fry  
Member

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## STATEMENT OF REASONS

### BACKGROUND

1. The Canadian International Trade Tribunal (the Tribunal), further to the judgement of the Federal Court of Appeal (the Court) dated March 21, 2006,<sup>1</sup> remanding the Tribunal's decision to deny the requests for product exclusions for certain patented products submitted by GRK Fasteners (GRK) in Inquiry No. NQ-2004-005,<sup>2</sup> has re-determined the matter in accordance with the directions of the Court.

2. In *Fasteners*, the Tribunal found that the dumping in Canada of certain carbon steel screws originating in or exported from the People's Republic of China (China) and Chinese Taipei and the subsidizing of such products originating in or exported from China had caused injury to the domestic industry. In addition, the Tribunal found that the dumping in Canada of certain stainless steel screws originating in or exported from Chinese Taipei was threatening to cause injury to the domestic industry. In light of these findings, the Tribunal addressed the requests for product exclusions filed by parties that related to these two classes of goods. In doing so, the Tribunal denied all the requests for product exclusions that had been filed by GRK, which covered both patented carbon steel and patented stainless steel screws.

3. In its reasons for judgement, as corrected on May 2, 2006,<sup>3</sup> the Court stated that the Tribunal had failed to consider adequately the material before it relating to GRK's requests for product exclusions and that it had not addressed GRK's argument that no one in Canada had the right to manufacture the patented products. The Court also stated that the Tribunal's conclusion with regard to GRK's exclusion requests was not in accordance with reason, was patently unreasonable and should be quashed.

4. Paragraph 29 of the Court's reasons reads as follows: "... The application of [GRK] Fasteners should be allowed in part, the decision of the Tribunal relative to GRK's exclusion request for certain patented stainless steel screws should be set aside and the matter remitted to the Tribunal for re-determination with the existing record ... ."

5. In view of the clear directive, in paragraph 29 of the Court's reasons, that the Tribunal's re-determination be made on the basis of the existing record, the Tribunal did not seek additional submissions from the parties and proceeded on the basis of the evidence and submissions that were before the Tribunal at the time of its initial decision.

### Overview of the Product Exclusion Procedures in *Fasteners*

6. On September 13, 2004, the Tribunal issued preliminary directions in its notice of commencement of inquiry with respect to requests for product exclusions. The Tribunal stated that it intended to proceed by way of written submissions and did not anticipate hearing oral testimony on product exclusions unless, in its opinion, it was required. Requests for exclusions were to be submitted by October 18, 2004, responses to the requests by November 9, 2004, and replies to the responses to the requests by November 17, 2004.

7. On October 8, 2004, the Tribunal issued a notice with modified directions with regard to product exclusions. The Tribunal noted that, on October 4, 2004, Leland Industries Inc. (Leland), after consultation with certain members of the Canadian fastener industry, provided the Tribunal with categories of products

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1. Tribunal Exhibit NQ-2004-005R-1, Administrative Record, Vol. 1 at 3.

2. (7 January 2005) (CITT) [*Fasteners*].

3. Tribunal Exhibit NQ-2004-005R-1A, Administrative Record, Vol. 1 at 17.2.

that the Canadian industry produced or was capable of producing. Leland also provided the Tribunal with a list of products that it did not produce or was not capable of producing or that were outside the scope of the injury claim. The Tribunal encouraged parties to submit their exclusion requests on the basis of the product categories appearing on lists in the notice. In addition, the Tribunal issued a modified product exclusion request form along these same lines. The Tribunal also modified the dates for the product exclusion process: requests were due by October 25, 2004, domestic producer responses by November 15, 2004, and replies to the responses by November 22, 2004.

8. In a letter to parties dated November 3, 2004, the Tribunal put back the dates for domestic producer responses and replies to November 22, 2004, and November 29, 2004, respectively.

### GRK'S PRODUCT EXCLUSION REQUESTS

9. On October 25, 2004, GRK submitted requests for 11 product exclusions, 5 of which concerned stainless steel screws. Under the product categories that had been established for the product exclusion process, GRK described the stainless steel screws as wood screws. The stainless steel screws range in diameter from 4 mm to 7 mm and in length from 20 mm to 150 mm,<sup>4</sup> and incorporate a variety of head types, including flat, pan (round) and washer.<sup>5</sup>

10. The five stainless steel screws are all subject to one or more Canadian patents owned by GRK. Copies of extracts from three patents, including the patent number and some or all of the patent abstract, were provided by GRK with its product exclusion request forms. According to product literature submitted by GRK, the key attributes of the patented products are as follows:

... The W-Cut is a patented thread design which acts like a saw blade, cutting through any fibrous material with ease. This unique design reduces the amount of torque required to install the screw, and maintains a high pull out strength. By cutting through rather than pressing fibers aside, the W-Cut also reduces material splitting.

... [The] Zip Tip is designed for fast starts in any fibrous materials.<sup>6</sup>

A ... [s]elf-[c]ountersinking design has six self-contained cutting pockets which act like a router and transport 'drill dust' away from the edge of the screw hole ...<sup>7</sup>

A ... round head with built-in shield (washer type head) ... The added shoulder ... underneath the washer has the ability to center the screws in pre-drilled hardware like hinges and connector plates ...<sup>8</sup>

11. GRK submitted that it had approached a domestic producer, Arrow Fasteners Ltd. (Arrow),<sup>9</sup> to produce one of the patented products, but that the transaction did not occur because Arrow could not produce the quantities or quality of product required.<sup>10</sup>

12. On November 19, 2004, Leland responded that it objected to GRK's product exclusion requests.<sup>11</sup> As part of its response to the product exclusion requests that had been filed by all parties, Leland submitted

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4. GRK states that its response to question 2 of the product exclusion request form on the diameter and length of the products "will be done in metric". Tribunal Exhibit NQ-2004-005R-25.56, Administrative Record, Vol. 1 at 253.

5. Tribunal Exhibit NQ-2004-005R-25.56, Administrative Record, Vol. 1 at 252-79.

6. Tribunal Exhibit NQ-2004-005R-25.56, Administrative Record, Vol. 1 at 276.1.

7. Tribunal Exhibit NQ-2004-005R-25.56, Administrative Record, Vol. 1 at 274.

8. Tribunal Exhibit NQ-2004-005R-25.56, Administrative Record, Vol. 1 at 274.

9. In *Fasteners*, the Tribunal determined that Arrow was part of the domestic stainless steel screw industry.

10. Tribunal Exhibit NQ-2004-005R-25.56, Administrative Record, Vol. 1 at 263.

lists that showed which product categories it produced or was capable of producing, sample invoices, sample bills of materials and lists of its machinery and tools and dies that produced or were capable of producing the fasteners subject to the inquiry.<sup>12</sup> Further, Leland claimed that producing additional products was a simple matter of acquiring the dies and inserting them on the existing machinery.

13. On November 29, 2004, the Canadian Fasteners Importers Coalition (the Coalition), on behalf of GRK, replied that Leland did not at that time produce screws with the properties of GRK's patented fasteners and that, moreover, even if it did, it would be infringing on GRK's intellectual property rights.<sup>13</sup>

14. On December 7 and 10, 2004, Leland and the Coalition made further submissions on product exclusions as a whole without referring to GRK's requests.<sup>14</sup>

## ANALYSIS

15. The Tribunal's practice with regard to granting product exclusions was summarized in *Stainless Steel Wire* as follows:<sup>15</sup>

It is well established that the Tribunal has the discretion to grant product exclusions under subsection 43(1) of *SIMA*. *The fundamental principle is that the Tribunal will grant product exclusions only when it is of the view that such exclusions will not cause injury to the domestic industry.* The Tribunal has granted product exclusions for particular products in circumstances when, for instance, the domestic industry does not produce those particular products. *The Tribunal also considers factors such as whether there is any domestic production of substitutable or competing goods, whether the domestic industry is an "active supplier" of the product or whether it normally produces the product or whether the domestic industry has the capability of producing the product.*

[Footnotes omitted, emphasis added]

16. The Tribunal does not dispute that GRK has the exclusive right to manufacture the patented products in question and that, accordingly, the domestic industry cannot legally manufacture identical stainless steel screws in the absence of licensing arrangements with the patent holder.

17. However, the fact that a product is patented does not mean that the Tribunal will automatically grant an exclusion. Even though an imported patented product may have certain features or physical attributes that make it distinct under patent law, a domestically manufactured product may have the same end uses, fulfil most of the same customer needs and compete in the marketplace with the patented product. Therefore, even if a request for a product exclusion concerns a patented product, the Tribunal still needs to determine whether the circumstances of the case are such that granting the exclusion could cause or threaten to cause injury to the domestic industry. If the fact that a domestic industry cannot produce a specific product because it is patented were to lead automatically to an exclusion from an injury determination, the exclusion would, in the Tribunal's view, undermine the purpose of *SIMA* and the protection associated with it in cases where the domestic industry produces substitutable products that are being injured by dumped or subsidized patented products.

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11. Leland characterized the 11 screws as falling under three product categories: wood screws, tapping screws and self-drilling tapping screws. Tribunal Exhibit NQ-2004-005R-27.01, Administrative Record, Vol. 1A at 7.

12. Tribunal Exhibit NQ-2004-005R-26.56 (protected), Administrative Record, Vol. 2 at 206-338.

13. Tribunal Exhibit NQ-2004-005R-24, Administrative Record, Vol. 1 at 146-47.

14. Tribunal Exhibit NQ-2004-005R-27.01D, Administrative Record, Vol. 1A at 84-95, 185-89.

15. (30 July 2001), NQ-2004-001 (CITT) at para. 96.

18. Accordingly, the key question that must be answered by the Tribunal in deciding whether to grant a product exclusion in the case of a patented product is not whether the patented product is unique or if the domestic industry can, without infringing patent law, manufacture this product. Rather, it is whether the domestic industry manufactures or is capable of manufacturing a substitutable product that, while it may not have all the attributes of the patented product, still competes with the patented product and fulfils most of the same customer needs. If these conditions are met, the Tribunal should deny the request for product exclusion, as granting it is likely to lead to injury or threat of injury to the domestic industry.

19. In this case, the Tribunal considered whether the domestic industry produces or is capable of producing substitutable or competing stainless steel screws that would be threatened with injury by imports of GRK's patented stainless steel screws.

20. In this regard, the Tribunal notes that the domestic industry submitted evidence that it produces or is capable of producing stainless steel screws in the same size ranges as GRK's patented products, in a wide variety of head styles and in both metric and imperial sizes.<sup>16</sup> The Tribunal wishes to emphasize that the evidence did not indicate that the products for which GRK is seeking exclusions were so specialized or served such distinct markets that they did not compete with the products offered by the domestic producers. In the Tribunal's opinion, based on the evidence on the record, the patented stainless steel screws imported by GRK would likely compete with the screws that the domestic industry currently produces or is capable of producing.

21. The product literature submitted by GRK indicates that the stainless steel screws in question are intended for a wide variety of commonplace end uses, including the manufacture of decks, fine carpentry applications and cabinet construction.<sup>17</sup> Therefore, while the patented features of GRK's stainless steel screws, such as the "W-Cut", the "self-countersinking design" and the "round head with built-in shield (washer type head)", are unique from the perspective of patent law, the Tribunal is not convinced that the screws are so unique or meet such specific applications that they are not interchangeable with other types of stainless steel screws that are, or can be, manufactured by the domestic industry and that have similar features and end uses.

22. This is consistent with the approach taken by the Tribunal in previous cases concerning patented products.

23. In *Machine Tufted Carpeting*,<sup>18</sup> the Tribunal denied various requests to exclude from an injury finding "... custom carpeting or carpeting produced with patented technologies and designs ...".<sup>19</sup> The Tribunal found that, although carpeting produced using patented technologies and designs did have some differentiating characteristics from domestically manufactured carpeting, these variations did not create "... carpet so unique that it [did] not compete with, nor [was not] substitutable [for] carpeting produced by Canadian mills ...".<sup>20</sup>

24. In *Stainless Steel Wire*, the Tribunal granted an exclusion for "type 27-7MO (trade name) stainless steel wire", noting that "... [t]his type of wire is a specialized, niche product that provides very good

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16. Tribunal Exhibit NQ-2004-005R-27.01, Administrative Record, Vol. 1A at 23-28.

17. Tribunal Exhibit NQ-2004-005R-25.26, Administrative Record, Vol. 1 at 272-79.

18. (21 April 1992), NQ-91-006 (CITT).

19. *Ibid.* at 33.

20. *Ibid.*



corrosion-resistance for its use in the petroleum industry . . . .”<sup>21</sup> Based on the evidence, the Tribunal was not convinced that the product manufactured by the domestic producer was fully substitutable.

25. With respect to GRK’s submissions regarding its initiative to have Arrow produce one of its products, the Tribunal reiterates its view that the main issue in this case is not whether the domestic industry produces or is capable of producing products that are identical to GRK’s patented products, but rather whether imports of GRK’s patented products would threaten to cause injury to the domestic industry.

## CONCLUSION

26. For the foregoing reasons, the Tribunal concludes that granting exclusions for GRK’s patented stainless steel screws would threaten to cause injury to the domestic industry and, therefore, denies the requests for product exclusions that were filed by GRK for certain patented stainless steel screws.

Pierre Gosselin  
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Presiding Member

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Member

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21. *Supra* note 15 at para 108.