



BY FACSIMILE

May 4, 1999

To: Counsel of Record

**Subject: Certain Flat Hot-Rolled Carbon and Alloy Steel Sheet Products
(Inquiry No.: NQ-98-004)**

In a letter dated April 13, 1999, Mr. Denis Gascon counsel for Sollac, Aciers D'Usinor and Aciers Francosteel Canada Inc. raised concerns regarding the participation of Mr. Joël Robichaud as counsel for IPSCO Inc. in the above-noted inquiry on the grounds of conflict of interest and a reasonable apprehension of bias.

I have been directed by the Tribunal to inform you that the request that Mr. Robichaud be disqualified from participating in the above-noted inquiry has been accepted. The Tribunal will issue the statement of reasons in support of its decision shortly.

Yours sincerely,

Michel P. Granger
Secretary



Ottawa, Friday, May 7, 1999

Inquiry No.: NQ-98-004

IN THE MATTER OF a notice of motion for an order disqualifying Mr. Joël Robichaud from acting as counsel of record for IPSCO Inc. in this inquiry;

AND IN THE MATTER OF an inquiry under section 42 of the *Special Import Measures Act* in respect of certain flat hot-rolled carbon and alloy steel sheet products originating in or exported from France, Romania, the Russian Federation and the Slovak Republic.

STATEMENT OF REASONS

BACKGROUND

On March 25, 1999, Mr. Joël Robichaud filed a notice of appearance (counsel) with the Canadian International Trade Tribunal (the Tribunal) representing IPSCO Inc. (IPSCO) in the above-noted inquiry. On April 13, 1999, Mr. Denis Gascon, counsel for Sollac, Aciers d'Usinor (Sollac) and Aciers Francosteel Canada Inc. (Francosteel), filed a letter with the Tribunal requesting that Mr. Robichaud, counsel for IPSCO, be disqualified from participating in the above-noted inquiry on the grounds that his appearance raises a conflict of interest and a reasonable apprehension of bias. On April 14, 1999, Mr. Dalton Albrecht, counsel for IPSCO, opposed the request for disqualification.

The Tribunal directed, on April 21, 1999, that submissions in support of the views expressed by Mr. Gascon be filed by April 23, 1999, and that submissions in support of the views expressed by Mr. Albrecht be filed by April 28, 1999. No submissions were made in support of the views expressed by Mr. Gascon, and one submission was made in support of the views expressed by Mr. Albrecht. On May 4, 1999, the Tribunal informed counsel that Mr. Robichaud was disqualified from participating in the above-noted inquiry and that it would issue its statement of reasons in support of its decision shortly.

ISSUE BEFORE THE TRIBUNAL

The issue is whether the participation of Mr. Robichaud, as counsel of record for IPSCO, before the Tribunal in the above-noted inquiry raises a conflict of interest or a reasonable apprehension of bias.

POSITIONS OF PARTIES

Submission by Counsel for Sollac and Francosteel

Counsel for Sollac and Francosteel bases his concerns on the fact that, until recently, Mr. Robichaud had been in-house counsel for the Tribunal and that he was still in the employ of the Tribunal when the investigation by the Deputy Minister of National Revenue (the Deputy Minister) leading to the preliminary determination of dumping in this matter was initiated and when the Tribunal would have begun preliminary work on the above-noted matter. Furthermore, as counsel for the Tribunal, Mr. Robichaud had been directly involved in steel cases which are closely related to the matter under inquiry and in which many of the current parties participated.

Given the foregoing reasons, counsel submits that a reasonable person, adequately informed of the facts, would consider that these circumstances give rise to a reasonable apprehension of bias.

Counsel also argues that the *Conflict of Interest and Post-Employment Code for the Public Service*¹ (the Guidelines) apply to Mr. Robichaud. He points to section 42 of Part III of the Guidelines which provides for a limitation period of one year after former employees at or above the Senior Management level leave office before they can make representations for or on behalf of a person or entity to any department with which they had significant official dealings or give counsel concerning the programs or policies of the department with which they were employed or with which they had a direct and substantial relationship.

Finally, counsel submits that section 17 of the *Canadian International Trade Tribunal Act*² (the CITT Act), which confers on the Tribunal all the powers, rights and privileges for the due exercise of its jurisdiction, gives the Tribunal authority to disqualify counsel if, in permitting counsel to participate in the process, counsel's participation may create an apprehension of bias.

Submission by Counsel for IPSCO

Counsel for IPSCO submits that Mr. Robichaud left the employ of the Tribunal on January 8, 1999, and began his employment with the law firm of McMillan Binch on February 1, 1999. He submits that the Tribunal was seized with jurisdiction in this inquiry on March 4, 1999, the day after the Deputy Minister issued a preliminary determination of dumping on March 3, 1999. By then, Mr. Robichaud had left the employ of the Tribunal and, therefore, could not have had prior involvement in the matter before joining the law firm. Mr. Robichaud has not previously been involved in hot-rolled steel cases, and the fact that he would have been involved in any steel case is not relevant to the present inquiry, as those were separate cases and are closed matters.

Counsel for IPSCO argues that section 42 of Part III of the Guidelines does not apply to Mr. Robichaud, as he did not hold a position at or above the Senior Management level. Further, counsel submits that Mr. Robichaud's appearance does not raise a conflict of interest, in that he does not have a previous relationship with Sollac and Francosteel or any other party to this inquiry. Moreover, Mr. Robichaud would not have been privy to confidential or other information relevant to the inquiry while employed with the Tribunal. Therefore, there is clearly no risk of prejudice to Sollac and Francosteel or to other parties to the inquiry. Mr. Robichaud is in compliance with Rule 29 of the *Rules of Professional Conduct*³ of the Law Society of Upper Canada which deals with issues of conflict arising as a result of transfer between law firms.

Further, counsel argues that, while the Tribunal does not have the inherent jurisdiction of a superior court of record, he cites Inquiry No. NQ-93-007,⁴ where the Tribunal stated that it had the jurisdiction to rule on the question of conflict of interest.

1. Canadian Government Publishing - PWGSC, ISBN 0-660-531119, Revised 1987, Reprinted 1998.

2. R.S.C. 1985, c. 47 (4th Supp.).

3. *Professional Conduct Handbook*, Law Society of Upper Canada, as amended to June 26, 1998.

4. *IN THE MATTER OF a notice of motion for an order disqualifying Mr. Daniel W. Romanko from acting as counsel of record*, Canadian International Trade Tribunal, Inquiry No. NQ-93-007, *Decision of the Tribunal and Statement of Reasons*, June 21, 1994.

With respect to the issue of bias, counsel for IPSCO notes that, where there would be bias or an apprehension of bias on the part of the Tribunal or one of its members, the result is that the Tribunal or member cannot act. There is no basis in law for asking that counsel be removed from a file because an administrative tribunal or one of its members is biased. Counsel can only be disqualified by a court from acting as counsel if there is a conflict of interest. Counsel further argues that it would be “preposterous” to say that the Tribunal would be biased simply because a former employee appeared before it. He notes that there has been one instance where a former member of the Tribunal appeared before it and where the Tribunal dismissed a motion for an order to disqualify that member from acting as counsel of record.⁵ In that case, the Tribunal was not satisfied that counsel’s participation in the inquiry raised a reasonable apprehension of bias. Counsel concludes that there is no basis to deny Mr. Robichaud the right to act as counsel for IPSCO in the present inquiry.

DECISION

The Tribunal will deal with the issue of jurisdiction first. Subsection 17(2) of the CITT Act provides that the Tribunal has all the powers, rights and privileges as are vested in a superior court of record regarding matters necessary or proper for the due exercise of its jurisdiction. In the Binational Panel’s decision in *Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported From the United States (Injury)*,⁶ the Panel considered whether the words “other matters necessary or proper for the due exercise of its jurisdiction” in subsection 17(2) of the CITT Act gave the Tribunal the jurisdiction to disqualify counsel for a reasonable apprehension of bias. The Panel stated the following :

To the extent that a statutory tribunal is not otherwise limited by its enabling statute, it has the jurisdiction to control the natural justice content of its own proceedings. This jurisdiction includes the ability to refuse to hear counsel if in hearing them a reasonable apprehension of bias would arise. In the Panel’s view, the Tribunal did have jurisdiction to deal with this issue and so does this Panel.⁷

The Tribunal is of the view that it has jurisdiction to rule on the questions of conflict of interest and reasonable apprehension of bias. Moreover, having been seized of the issue, the Tribunal has a duty to dispose of the matter.

The Tribunal has given careful consideration to the submissions of the parties.

The Tribunal is of the view that, with respect to the conflict of interest issue, section 42 of Part III of the Guidelines does not apply to this particular case. The leading authority relating to the disqualification of counsel on the basis of a conflict of interest is *MacDonald Estate v. Martin*.⁸ That case dealt with a circumstance where counsel had obtained confidential information in a former position that could be used against his former client in adversarial proceedings. The question for the Tribunal is whether the participation of Mr. Robichaud in this proceeding before the Tribunal would be adverse to the interests of the Tribunal. There is no suggestion in any submission that Mr. Robichaud possesses confidential information belonging to the Tribunal which could be used to the Tribunal’s detriment in this case. Moreover, unlike the situation in

5. *The Dumping in Canada of Refined Sugar Originating in or Exported from the United States of America, Denmark, the Federal Republic of Germany, the Netherlands, the United Kingdom and the Republic of Korea, and the Subsidizing of Refined Sugar Originating in or Exported from the European Union*, Inquiry No. NQ-95-002, Findings, November 6, 1995, Statement of Reasons, November 21, 1995.

6. Secretariat File No. CDA-93-1904-07, *Decision and Reasons of the Panel*, May 18, 1994.

7. *Ibid.* at 19.

8. [1990] 3 S.C.R. 1235.

Martin, Mr. Robichaud has not gone from acting for one party to acting for another party. The Tribunal is satisfied that, in this case, there is no adverse interest and, therefore, no basis to disqualify Mr. Robichaud on the grounds of conflict of interest.

This leaves the issue of a reasonable apprehension of bias. It is a matter of public record that, on December 3, 1998, the Deputy Minister initiated an investigation into the alleged injurious dumping in Canada of certain flat hot-rolled carbon and alloy steel sheet products originating in or exported from France, Romania, the Russian Federation and the Slovak Republic. It is that investigation which led the Deputy Minister to make a preliminary determination of dumping on March 3, 1999. It is also a matter of public record that, on December 18, 1998, pursuant to paragraph 34(1)(b) of the *Special Import Measures Act*⁹ (SIMA), counsel for a Canadian importer, Francosteel, and an exporter from France, Sollac, referred to the Tribunal the question of whether the evidence before the Deputy Minister disclosed a reasonable indication that the dumping of the subject goods originating in or exported from France had caused material injury or retardation or was threatening to cause material injury to the domestic industry. After considering the information provided by Revenue Canada, the Tribunal rendered its advice to the Deputy Minister on January 18, 1999.¹⁰ In its advice, the Tribunal concluded that it was satisfied that, for the purposes of sections 34 and 37 of SIMA, the evidence disclosed a reasonable indication that the dumping of certain flat hot-rolled carbon and alloy steel sheet products originating in or exported from France, Romania, the Russian Federation and the Slovak Republic had caused or was threatening to cause injury. In this inquiry, the Tribunal will consider, *inter alia*, whether the goods found to have been dumped have caused injury or retardation or are threatening to cause injury. In other words, in rendering its advice and in this inquiry, the Tribunal will have considered questions of injury relating to the subject goods.

In reviewing the information before it, the Tribunal notes that Mr. Robichaud was still employed by the Tribunal when the investigation by the Deputy Minister was initiated on December 3, 1998. Mr. Robichaud was employed by the Tribunal at the time that it received the reference on December 18, 1998. Mr. Robichaud did not leave the employ of the Tribunal until January 8, 1999. Therefore, Mr. Robichaud was present at, and employed by, the Tribunal during the time that it would have been reviewing the information provided by the Deputy Minister in the reference and while the Tribunal was in the midst of its deliberations before rendering its advice to the Deputy Minister on January 18, 1999.

The Tribunal is also mindful that Mr. Robichaud was legal counsel for the Tribunal for six years. Tribunal counsel work closely with Tribunal members and staff, as did Mr. Robichaud. Further, in the course of their duties, Tribunal counsel participate in seminars and training sessions for members, provide legal opinions to members and assist members in substantive legal and procedural matters before, during and after oral hearings. Counsel also represent the Tribunal in matters before the Federal Court of Appeal and Binational Panels. Mr. Robichaud worked closely on files with every current member at the Tribunal, including those members who will hear this case.

The test applied by the courts is that “the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.¹¹” The Tribunal is of the view that a reasonable person, informed with the above-noted facts,

9. R.S.C. 1985, c. S-15, as amended by S.C. 1994, c. 47, s. 164.

10. *Certain Flat Hot-rolled Carbon and Alloy Steel Sheet Products Originating in or Exported from France, Romania, the Russian Federation and the Slovak Republic*, Reference No. RE-98-002.

11. *The Committee for Justice and Liberty v. The National Energy Board*, [1978] 1 S.C.R. 369 at 394.

would consider that, if Mr. Robichaud were allowed to participate in this inquiry, these circumstances would raise a reasonable apprehension of bias.

In the Tribunal's view, the close working relationship which Mr. Robichaud had with Tribunal members, the fact that he was employed by the Tribunal when it received a reference relating to this matter and was reviewing the information provided by the Deputy Minister and his recent departure from the Tribunal are such as to raise a reasonable apprehension of bias.

The Tribunal is well aware that a reasonable apprehension of bias normally gives rise to a member of the panel having to recuse himself from the proceeding. However, the Tribunal is of the view that, in certain circumstances, it is appropriate for counsel to be disqualified from a proceeding.¹²

For all of the above reasons, the Tribunal disqualifies Mr. Robichaud from participating as counsel in the above-noted inquiry.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

12. *Bailey v. Saskatchewan Registered Nurses' Assn.*, Saskatchewan Court of Queen's Bench, [1998] S.J. No. 332, April 20, 1998.