Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Inquiry No. NQ-2012-002

Steel Piling Pipe

Order issued
Tuesday, September 18, 2012

Reasons issued
Thursday, October 4, 2012

Canada

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IN THE MATTER OF an inquiry, pursuant to section 42 of the *Special Import Measures Act*, respecting the dumping and subsidizing of carbon and alloy steel pipe piles, commonly identified as piling pipe, in outside diameter ranging from 3 1/2 inches up to and including 16 inches (8.9 cm to 40.6 cm) inclusive, in commercial quality and in various forms and finishes, usually supplied to meet ASTM A252, ASTM A500, CSA G.40.21 or comparable specifications or standards, whether single, dual or multiple certified, originating in or exported from the People's Republic of China, excluding carbon steel welded pipe, in the nominal size range of 3 1/2 inches up to and including 6 inches (89 mm to 168.3 mm) in outside diameter, in various forms and finishes, usually supplied to meet ASTM A252 or equivalent specifications, other than carbon steel welded pipe in the nominal size range of 3 1/2 inches up to and including 6 inches, dual-stencilled to meet the requirements of both specification ASTM A252, Grades 1 to 3, and specification API 5L, with bevelled ends and in random lengths, for use as foundation piles;

AND FURTHER TO a notice of motion filed on behalf of Pipe & Piling Supplies Ltd. on August 31, 2012, under subrule 24(1) of the *Canadian International Trade Tribunal Rules*, for an order disqualifying all counsel of the firm Miller Thomson LLP from acting as counsel of record for DFI Corporation in these proceedings.

ORDER

The Canadian International Trade Tribunal hereby dismisses the motion.

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Jason W. Downey
Jason W. Downey
Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

BACKGROUND

1. On August 31, 2012, Pipe & Piling Supplies Ltd. (P&P) 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 Miller Thomson LLP (MT), by reason of conflict of interest, from representing DFI Corporation (DFI) or any party that is opposed in interest to P&P in these proceedings.

2. This motion arises in the context of the proceedings that followed the issuance of a notice of commencement of inquiry by the Tribunal on August 3, 2012, pursuant to section 42 of the *Special Import Measures Act*.[2]

3. On August 13, 2012, DFI, a domestic producer of steel piling pipe, filed a notice of participation in these proceedings. Also on August 13, 2012, Mr. Dalton J. Albrecht, of MT, filed a notice of representation as counsel for DFI.

4. In its motion, P&P alleged that Mr. Albrecht and MT are in a situation of conflict of interest because of MT's representation of P&P on various litigation, corporate and commercial matters relating to its operations in Alberta and British Columbia over approximately a 28-year period. P&P alleged that, over the course of this relationship, MT had access to P&P's confidential information, including information that may be relevant to these proceedings. P&P referred, in particular, to MT's representation of P&P in a matter involving a shipping company transporting piling pipe from China to Canada. P&P submitted that, as an importer of steel piling pipe opposed to a finding of injury in this inquiry, its interests are directly adverse to those of DFI, who supports a finding of injury in these proceedings. P&P based its motion on the tests set out in *MacDonald Estate v. Martin*[3] and *R v. Neil*,[4] as well as the *Rules of Professional Conduct* of the Law Society of Upper Canada.

5. On September 4, 2012, the Tribunal wrote to Mr. Albrecht, requesting that a response to the notice of motion be filed no later than September 6, 2012.

6. On September 4, 2012, the Tribunal received a letter from Mr. Albrecht, informing the Tribunal that DFI was in the process of retaining counsel to represent it on the motion and asking the Tribunal, on behalf of DFI, for an extension of time until September 7, 2012, for DFI to file a response. In his letter, Mr. Albrecht indicated that he had been working with DFI on this matter for over 12 months, that he did not agree that DFI is a party directly adverse in interest to P&P in these proceedings, that MT had conducted conflict checks when retained by DFI and that no record of any conflicts with P&P existed, that he personally had no knowledge that P&P was a client of MT when he was retained by DFI, and that MT offered to put ethical screen arrangements in place once it learned of P&P's interest in this inquiry and P&P's objection to MT's involvement with DFI.

7. On September 5, 2012, the Tribunal granted the request for an extension of time for DFI to file a response.

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1. S.O.R./91-499.
2. R.S.C. 1985, c. S-15.
3. [1990] 3 S.C.R. 1235 [*MacDonald Estate*].
4. 2002 SCC 70 [*Neil*].

8. On September 7, 2012, the Tribunal received submissions from DFI. In its response, DFI questioned whether P&P has standing to bring the motion, as it is not clear whether the confidential information referred to by P&P relates directly to P&P or one of its affiliates. DFI argued that P&P failed to demonstrate that the confidential information in MT's possession is relevant to the current proceedings or that its use could be prejudicial.

9. DFI further submitted that although DFI and P&P have competing interests, they are not directly adverse in the sense of one seeking relief against the other. DFI referred to the tests articulated in *MacDonald Estate* and *Neil*, and also referred to *Strother v. 3464920 Canada Inc.*,[5] which, DFI argued, modifies the test articulated in *Neil*. DFI also stressed its right to be represented by its chosen counsel.

10. P&P filed a reply on September 12, 2012, in which it submitted, *inter alia*, that P&P is a current client of MT, and referred to a recent and continuing matter in which MT represented P&P on a commercial agreement for the supply of relevant imports by one of the major exporters identified in the complaint filed by Atlas Tube Canada Inc. With respect to the issue of standing, P&P submitted that, because of the close relationship between P&P and its affiliates, P&P did not find it necessary to file notices of participation for each of the regional affiliates in this case.

11. P&P also submitted that there are numerous examples where courts and tribunals have prohibited law firms from acting against companies affiliated with a client or former client. P&P emphasized that it and its affiliates are current clients of MT and that in none of the previous Tribunal decisions dealing with conflict of interest had the party claiming a conflict had such an extensive and close-knit relationship with the counsel they were seeking to disqualify.

12. On September 13, 2012, DFI filed a letter in response to P&P's reply, arguing that the reference in P&P's reply to MT's work on a commercial agreement for the supply of relevant imports introduced new evidence that should have been raised in the notice of motion. DFI also restated its concern that P&P has failed to properly substantiate the grounds of its motion or to demonstrate how confidential information relating to the commercial agreement is relevant and prejudicial to P&P in these proceedings.

13. On September 14, 2012, P&P filed a letter in response to DFI's letter.

PRELIMINARY MATTERS

14. As a preliminary matter, the Tribunal must address the issue of standing. The Tribunal finds that the existence of separate legal entities is not, in and of itself, sufficient to constitute a barrier to raising arguments alleging a conflict of interest. If a party is concerned that its interests are being affected by the existence of a real or potential conflict, the Tribunal considers that this is a sufficient basis to allow that party to raise the issue, for example, by bringing a motion such as this one. In any event, the Tribunal is of the view that the additional information raised in P&P's reply (namely, the commercial agreement relating to the importation of steel pipe) appears to relate to P&P directly, not one of its affiliates. Therefore, the Tribunal finds that P&P has standing to raise this matter with the Tribunal.

15. The Tribunal also agrees with P&P's submission that, in the present inquiry, DFI's position is adverse in interest to P&P's. Even if this inquiry is not a litigation opposing P&P and DFI *per se*, the fact remains that DFI is supporting the imposition of anti-dumping and countervailing duties against imports of steel piling pipe from China, a result which is adverse to P&P's commercial interest. Indeed, P&P is an

5. [2007] 2 S.C.R. 177 [*Strother*].

importer of steel piling pipe from China and, as such, is one of DFI's competitors in the marketplace. It is clear that the cost of P&P's imports could increase significantly, should the Tribunal make a positive injury finding as is requested by DFI. Thus, the motion cannot be dismissed on the grounds that there is no "adversity" in the interest of P&P and DFI in this inquiry.

16. The existence of a long-standing relationship between MT, as legal counsel, and P&P, as its client, in respect of other matters is admitted. The Tribunal will examine whether MT's representation of DFI in this inquiry gives rise to a real or reasonably perceived conflict of interest in view of its previous or current representation of P&P in respect of other matters.

ANALYSIS

17. In determining whether a conflict of interest exists in the present circumstance, the Tribunal is bound by three decisions of the Supreme Court of Canada: *MacDonald Estate*, *Neil* and *Strother*. These decisions establish that a lawyer's duty to avoid conflicts of interest includes, notably, a general duty of loyalty and a duty of confidentiality.

18. In *MacDonald Estate*, the Supreme Court set out the appropriate test for determining if a disqualifying conflict of interest exists, where confidential information is involved:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?[6]

19. On the first question, the Supreme Court indicated that ". . . 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" [emphasis added]. On the second question, the Supreme Court determined that a lawyer who has relevant confidential information is automatically disqualified from acting against a client or former client.[7]

20. Accordingly, with respect to the duty of confidentiality, the Tribunal must examine whether Mr. Albrecht was likely privy to confidential information relevant to the matter at hand as a result of a solicitor-client relationship between MT and P&P. To answer that question, the Tribunal must ask itself whether MT's retainers with P&P are relevant to the present proceedings.

21. In *Neil*, the Supreme Court addressed a lawyer's fiduciary duties more broadly and referred to the following bright-line test, which speaks of a lawyer's ability to represent a client whose immediate interests are directly adverse to the immediate interests of another current client and is relevant to assess whether a lawyer's duty of loyalty has been breached:

> 29 . . . Nevertheless it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.
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> [Emphasis in original]

6. *MacDonald Estate* at para. 45.
7. *MacDonald Estate* at paras. 46-47.

22. However, in *Neil*, the Supreme Court also recognized the need to balance the importance of a lawyer's duty of loyalty against the realities of the legal system:

> 15 . . . it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.

23. Although the bright-line test in *Neil* suggests that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client, even if the two retainers are unrelated, the Tribunal notes that the Supreme Court was not dealing with unrelated matters. The decision in *Neil* considered two conflict situations, one involving the same matter and a second involving a strategically related matter.

24. Finally, in *Strother*, the Supreme Court provided useful guidance on the meaning and application of the bright-line test expressed in *Neil*:

> 58 Exceptional cases should not obscure the primary function of the "bright line" rule, however, which has to do with the lawyer's duty to avoid conflicts that impair the respective representation of the interest of his or her concurrent clients whether in litigation or in other matters, e.g., *Waxman v. Waxman* 2004 CanLII 39040 (ON CA), (2004), 186 O.A.C. 201 (C.A.).
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> . . .
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> 59 The spectre is flourished of long-dormant files mouldering away in a lawyer's filing cabinet that are suddenly brought to life for purposes of enabling a strategically minded client to assert a conflict for tactical reasons. But a court is well able to withhold relief from a claim clearly brought for tactical reasons. Conflict between concurrent clients where no confidential information is at risk can be handled more flexibly than *MacDonald Estate* situations because different options exist at the level of remedy, ranging from disqualification to lesser measures to protect the interest of the complaining client. In each case where no issue of confidential information arises, the court should evaluate whether there is a serious risk that the lawyer's ability to properly represent the complaining client may be adversely affected, and if so, what steps short of disqualification (if any) can be taken to provide an adequate remedy to avoid this result.

25. Based on its review of the relevant jurisprudence, the Tribunal is of the view that the appropriate question to pose in cases where no issue of confidential information arises is whether there is a substantial risk that the purported conflict will impair the respective representation of concurrent clients.

26. In assessing whether a disqualifying conflict of interest exists in this case, the Tribunal is mindful of the competing values articulated in *MacDonald Estate*, which must underline its analysis: maintain the high standard of the legal profession; the importance of a litigant's choice of counsel; and permitting reasonable mobility within the legal profession.[8] A party's choice of counsel is a particularly important consideration in the context of these proceedings, given the short time frame within which the Tribunal must make its finding and the advanced stage of the inquiry process when this motion was brought. The Tribunal is of the view that depriving DFI of its counsel of choice at this stage of the proceedings would significantly impair its ability to participate in the inquiry process.

8. *MacDonald Estate* at para. 13.

27. Consistent with the approach taken by Sopinka J. in *MacDonald Estate*,[9] the Tribunal considers that it is the party alleging the existence of a real or reasonably perceived conflict that bears the onus of showing that the two retainers are sufficiently related.[10] The party alleging the conflict must also provide sufficient evidence from which the Tribunal can reach a conclusion on these matters.

28. To summarize, in disposing of the motion, the Tribunal must first determine whether P&P has established that this inquiry is sufficiently related to other MT retainers with P&P such that the Tribunal should infer that relevant confidential information was imparted and disqualify MT on that basis. If the Tribunal finds that the matters are not sufficiently related and that there is no risk of relevant confidential information being used to prejudice P&P, the Tribunal must then assess whether there is a substantial risk that MT's representation of DFI will impair its ability to represent P&P in respect of other matters.

29. Turning now to the question of whether these proceedings are sufficiently related to MT's previous and ongoing representation of P&P, the Tribunal notes that P&P has referred generally to MT's representation on litigation matters, corporate filings and commercial contracts, but has only made specific reference to two matters. The first is a matter involving a shipping company transporting piling pipe from China to Canada and the second is a commercial agreement for the supply of relevant imports with one of the exporters identified in the complaint filed by Atlas Tube Canada Inc. In its reply P&P also provided a list of invoices for legal services provided by MT within the past 12 months and submitted that these matters may also involve the transmission of confidential information which may be relevant to this inquiry.

30. The first matter appears to be a reference to a claim in small claims court for the recovery of an amount associated with the shipping of piling pipe. The second matter was referred to as ". . . a recent and continuing mandate to advise [P&P] on a commercial agreement for the supply of relevant imports with one of the major exporters identified in the complaint",[11] which P&P submits is directly related to the present inquiry. P&P also submitted a series of redacted e-mails that refer to this transaction and the draft agreement.

31. The Tribunal finds that the evidence provided with respect to these matters is insufficient for the Tribunal to conclude that they are related to the present inquiry. In particular, a small claims action for the recovery of money against a shipping agent (regardless of the goods being shipped) is not sufficient to establish a relationship that would raise a concern in this case. Likewise, the list of invoices does not provide the Tribunal with any information on the nature of the work done by MT or the relevance of the work to the present inquiry.

32. With respect to the second matter referred to by P&P, the evidence provided makes no mention of the parties involved, the product specifications of the steel pipe or its country of origin. As such, the Tribunal is not persuaded that MT is in possession of relevant confidential information relating to P&P or that there is a risk of any confidential information being used to the prejudice of P&P.

33. In view of the limited evidence before it, the Tribunal is also not persuaded that there is a serious risk that MT's representation of DFI in these proceedings will materially or adversely affect its ongoing representation of P&P in respect of other matters. In this regard, the Tribunal notes that P&P has not explained how MT's representation of DFI in these proceedings would impair its representation of P&P in other current matters. In these circumstances, the Tribunal is unable to find that MT's representation of DFI

9. *MacDonald Estate* at para. 46.
10. *Chapters Inc. v. Davies, Ward & Beck LLP, 2001 CanLII* 24189 (ON CA) at paras. 29-30.
11. Tribunal Exhibit NQ-2012-002-52, Administrative Record, Vol. 1A at 140.

in this inquiry impairs its ability to properly represent P&P in other matters. Thus, the Tribunal finds that there is insufficient evidence to establish the existence of a breach of MT's duty of loyalty towards P&P.

34. The Tribunal further notes that, in *Neil*, the Supreme Court observed that an unnecessary expansion of the duty of loyalty may be inimical to the proper functioning of the legal system. The issue is always to achieve an appropriate balance among the competing interests. For this reason, a stringent application of the bright-line test in situations where the same law firm is concurrently acting for two parties with adverse interests, but in unrelated matters, would pose significant problems for clients seeking to be represented by the counsel of their choice. This is particularly true in a situation such as this case, where MT's representation of both DFI and P&P is handled by different lawyers, in different practice areas and in different cities. In such circumstances, the Tribunal considers that each client's confidential information or right to proper representation is not necessarily compromised.

35. Accordingly, in the absence of clear evidence to that effect, the Tribunal cannot conclude that MT has violated its fiduciary obligations of loyalty and the protection of confidential information belonging to P&P.

DECISION

36. For the reasons stated above, the Tribunal hereby dismisses the motion.

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Jason W. Downey
Jason W. Downey
Member