



Ottawa, Wednesday, January 10, 2001

Preliminary Injury Inquiry No.: PI-2000-003

IN THE MATTER OF a preliminary injury inquiry under section 34(2) of the *Special Import Measures Act* respecting hot-rolled deformed carbon or low alloy steel concrete reinforcing bar in straight lengths or coils, originating in or exported from the Republic of Indonesia, Japan, the Republic of Latvia, the Republic of Moldova, the Republic of Poland, Chinese Taipei and Ukraine;

AND IN THE MATTER OF a notice of motion by Stelco Inc. on November 22, 2000, supported by Ispat Sidbec Inc. and Co-Steel Inc., for an order refusing access to the confidential record in the above-noted proceedings to William J. Clinton of White & Case, Washington, D.C., or to any person who is not ordinarily a resident in Canada.

ORDER OF THE TRIBUNAL

WHEREAS, information designated confidential has been filed with the Canadian International Trade Tribunal (the Tribunal) in the above-noted proceedings;

WHEREAS, JV CJSC Moldova Steel Works filed a notice of appearance with the Tribunal on November 17, 2000, and is represented by Mr. Richard Gottlieb of Gottlieb & Pearson, Montréal, Quebec, and Mr. William J. Clinton of White & Case, Washington, D.C.;

WHEREAS, Mr. Clinton is a person who is not ordinarily a resident of Canada;

WHEREAS, on November 17, 2000, Mr. Clinton filed a declaration and undertaking with the Tribunal for access to the confidential information in the record of the above-noted proceedings in accordance with subsection 45(3) of the *Canadian International Trade Tribunal Act*;

AND WHEREAS, the Tribunal, under subsection 45(3) of the *Canadian International Trade Tribunal Act*, may disclose confidential information filed pursuant to subsection 46(1) to counsel for any party to those proceedings or to other proceedings arising out of those proceedings, for use by counsel only in those proceedings, subject to any conditions that the Tribunal considers reasonably necessary or desirable;

AND UPON CONSIDERATION of the submissions received;

THE TRIBUNAL DISMISSES THE MOTION AND ORDERS:

THAT Mr. Clinton be granted access to the confidential record in these proceedings and in other proceedings arising out of those proceedings, subject to the terms and conditions contained in the declaration and undertaking attached as Annex I to this order and to the further condition that Canadian resident counsel, Mr. Gottlieb, agree to be responsible for Mr. Clinton's actions with respect to the use and treatment of the confidential information.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons pertaining to the above order will be issued at a later date.



SUBJECT MATTER: Concrete Reinforcing Bar

File No.: PI-2000-003

DECLARATION AND UNDERTAKING- FOREIGN COUNSEL

I, William J. Clinton, act as counsel for Moldova Steel Works.

In this capacity, I request access to the confidential information in the record of the proceedings.

DECLARATION

I hereby declare that

- (a) I am ordinarily resident in the United States;
- (b) I am not a director, servant or employee, within the meaning of subsection 45(4) of the *Canadian International Trade Tribunal Act*, of any party in this proceeding or of any other person who would gain competitive advantage through knowledge of the proprietary information sought in this Declaration and Undertaking;
- (c) I do not participate in the competitive decision-making activity of any of the parties in this proceeding or for any other person who would gain competitive advantage through knowledge of the proprietary information sought in this Declaration and Undertaking. For the purposes of this paragraph, competitive decision-making activity includes advice on production, sales, operations or investments;
- (d) I do not currently intend to enter into any of the relationships described in paragraphs (b) and (c) within 12 months after the publication of the final decision in the subject inquiry;
- (e) have read and I understand subsections 45(6) and 45(7) of the *Canadian International Trade Tribunal Act* and understand that every person who uses information disclosed to them by the Tribunal under subsection 45(3) or 45(3.1) for any purpose other than the purpose for which the information was disclosed under the subsection, or contravenes any condition imposed by the Tribunal under subsection 45(3) or 45(3.1) is liable, if found guilty of an indictable offence, to a fine of not more than \$1,000,000, or of an offence punishable by way of summary conviction to a fine of not more than \$100,000, and to such other remedies as the Tribunal considers appropriate.

UNDERTAKING

I hereby undertake

- (a) to use the information disclosed under the conditions of this Undertaking exclusively for duties performed in respect of the above-noted proceeding or proceedings arising out of those proceedings;
- (b) not to divulge information disclosed under the conditions of this Undertaking except to a person granted access to such information or to personnel of the Canadian International Trade Tribunal;
- (c) not to reproduce, in any manner, including notes, charts and memoranda, information disclosed under the conditions of this Undertaking without prior written approval by the Canadian International Trade Tribunal;
- (d) to have access to information disclosed under the terms and conditions of this Undertaking under the direction and control of Mr. Richard Gottlieb of Gottlieb & Pearson. Access to the confidential information shall be only at the Canadian offices of Mr. Gottlieb or at the offices of the Canadian International Trade Tribunal in Ottawa;
- (h) to report promptly to the Secretary of the Canadian International Trade Tribunal any violation of this Declaration and Undertaking; and
- (i) to inform the Secretary of the Canadian International Trade Tribunal immediately of any changes in the facts referred to in this Undertaking.

ACKNOWLEDGEMENT

I hereby acknowledge that unauthorized disclosure by me of some or all the information disclosed under the terms and conditions of this Declaration and Undertaking could result in economic harm to the parties who have submitted it to the Canadian International Trade Tribunal.

I hereby accept the jurisdiction of the courts of Canada or the United States to resolve any matters arising under the Declaration and Undertaking.

Dated at _____ this _____ day of _____ 20__.

Signature: _____

Name (*Print*): _____

Address: _____

ACKNOWLEDGEMENT OF RICHARD GOTTLIEB

I acknowledge that Mr. William J. Clinton will receive access to the confidential information under my direction and control in accordance with the terms and conditions set out in the above Declaration and Undertaking, and I accept to be responsible for his actions with respect to the use and treatment of the confidential information.

Dated at _____ this _____ day of _____ 20__.

Signature: _____

Name (*Print*): _____

Address: _____



Ottawa, Wednesday, January 17, 2001

Preliminary Injury Inquiry No.: PI-2000-003

IN THE MATTER OF a preliminary injury inquiry under subsection 34(2) of the *Special Import Measures Act* respecting hot-rolled deformed carbon or low alloy steel concrete reinforcing bar in straight lengths or coils, originating in or exported from the Republic of Indonesia, Japan, the Republic of Latvia, the Republic of Moldova, the Republic of Poland, Chinese Taipei and Ukraine;

AND IN THE MATTER OF a notice of motion by Stelco Inc. on November 22, 2000, supported by Ispat Sidbec Inc. and Co-Steel Inc., for an order refusing access to the confidential record in the above-noted proceedings to Mr. William J. Clinton of White & Case, Washington, D.C., or to any person who is not ordinarily a resident in Canada.

STATEMENT OF REASONS

BACKGROUND

On November 17, 2000, JV CJSC Moldova Steel Works (Moldova) filed a notice of participation with the Tribunal indicating that it was to be represented by Mr. Richard Gottlieb, of Gottlieb & Pearson, Montréal, Quebec, and Mr. William J. Clinton, of White & Case, Washington, D.C. On the same date, Mr. Clinton filed a declaration and undertaking with the Tribunal for access to the confidential information on the record in these proceedings in accordance with subsection 45(3) of the *Canadian International Trade Tribunal Act*.¹

On November 22, 2000, the Tribunal received a notice of motion from Stelco Inc. (Stelco), requesting that the Tribunal deny Mr. Clinton, or any person who is not ordinarily resident in Canada, access to the confidential information on the record. Letters supporting the motion were received from Ispat Sidbec Inc. (Sidbec) and Co-Steel Inc. (Co-Steel). On November 23, 2000, the Tribunal requested that Mr. Gottlieb and Mr. Clinton file their response to the motion before November 29, 2000. However, on or about November 29, 2000, the Tribunal was informed that neither Mr. Gottlieb nor Mr. Clinton would file a response to the motion. On January 10, 2001, the Tribunal issued an order denying the motion and granting Mr. Clinton access to the confidential information on the record, subject to the terms and conditions contained in the declaration and undertaking attached to the order and subject to the further condition that Canadian resident counsel, Mr. Gottlieb, agree to be responsible for Mr. Clinton's actions with respect to the use and treatment of the confidential information.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter Act].

ISSUE BEFORE THE TRIBUNAL

The issue brought by this motion is whether the Tribunal should allow the motion and deny access to the confidential information on the record in these proceedings to Mr. Clinton or to any person who is not ordinarily resident in Canada.

POSITION OF PARTIES

Among other things, Stelco submitted that access to confidential information is granted, at the Tribunal's discretion, under subsection 45(3) of the Act. Stelco further submitted that subrule 16(1) of the *Canadian International Trade Tribunal Rules*² precludes non-resident counsel from having access to confidential information and that subrule 16(2) must be read as giving power to the Tribunal to grant this access to a foreign party, but not to non-resident counsel. It was also argued by Stelco that the *Procedural Guidelines for the Designation and Use of Confidential Information in Canadian International Trade Tribunal Proceedings*,³ under paragraph 2(b), provide that "[u]nder no circumstances may counsel obtain access if they are . . . not resident in Canada". Therefore, submitted Stelco, the Tribunal should not arbitrarily alter the Guidelines and its practice. Stelco took the position that, as the declaration and undertaking contains the statement "I am ordinarily resident in Canada", access to the confidential record should only be allowed to counsel resident in Canada. In Stelco's view, an additional ground in support of the motion is that the Act and the Tribunal's jurisdiction are confined to Canadian territory and have no extra-territorial effect; consequently, persons not ordinarily resident in Canada are not subject to the Act, the Tribunal's Rules or the Guidelines when they leave Canada. Co-Steel raised the prospect that Mr. Clinton may be involved in other anti-dumping investigations in the United States with respect to reinforcing bar. Since Co-Steel has operations in the United States and, as evidence filed during this inquiry could be relevant in a U.S. proceeding dealing with reinforcing bar, such evidence will become part of Mr. Clinton's knowledge. Sidbec supported the motion and the submissions made by Stelco.

Moldova did not provide any submission in response to the motion.

DECISION

In the notice of motion, Stelco seeks to prevent Mr. Clinton, a non-resident counsel, from gaining access to confidential information submitted in these proceedings. The Tribunal recognizes the importance of protecting confidential information given the economic harm that could be done to the company whose business secrets are disclosed.

Sections 44 to 49 of the Act provide the legislative architecture dealing with the receipt and protection of confidential information. They also provide, as the Federal Court of Appeal has stated, "a complete code with regard to disclosure of confidential information".⁴ The Tribunal has implemented comprehensive procedures designed to ensure the protection and proper treatment of that information.⁵ While the Tribunal's focus has been on ensuring that those having access properly use the confidential

2. S.O.R./91-499 [hereinafter Tribunal's Rules].

3. 10 November 1999 [hereinafter Guidelines].

4. *Director of Investigation and Research v. Canadian International Trade Tribunal* (17 November 1993), A—584—93 (FCA).

5. *Supra* note 3.

information, the Tribunal, from time to time, has considered whether someone should even be granted access to it.

In Inquiry No. NQ-93-003,⁶ for example, the Tribunal refused to grant an attorney from Washington, D.C., access to the confidential record saying that, because she was not resident in Canada, it would “have difficulty enforcing her undertaking in the event that any of its provisions were breached”.⁷ The Tribunal went on to comment that, in the absence of “express provisions” permitting the enforcement of the terms of an undertaking in respect of a non-resident, the Tribunal could not be assured that the undertaking would be respected.⁸

In April 2000, changes were enacted with respect to the confidentiality provisions of the Act. Of relevance to this motion are the new provisions found in subsection 45(7) of the Act that provide for penalties of up to \$1,000,000 upon conviction if someone discloses confidential information without authorization. Prior to these amendments, no penalties of this nature existed. These penalty provisions are a significant change and, in the Tribunal’s view, give it added assurance that individuals, whether residents or non-residents of Canada, having access to confidential information will use and treat it properly.

Before these legislative changes, there was no provision in the Tribunal’s Rules that allowed non-resident counsel to have access to the confidential record. In fact, in a schedule to the Tribunal’s Rules, before they were amended, a declaration and undertaking was prescribed which specifically required a declaration of Canadian residency. Partly in contemplation of the legislative changes to the Act, the Tribunal amended its rules. In the recently enacted rules, this schedule was repealed. A provision dealing with non-resident counsel was added. Subrule 16(2) of the Tribunal’s Rules states:

For the purpose of section 45 of the Act, a counsel for a party who is not a resident of Canada who wishes access to confidential information provided to the Tribunal shall provide the Tribunal with a declaration and undertaking on the relevant Tribunal form in respect of the use, disclosure, reproduction, protection and storage of the confidential information in the record of a proceeding, as well as that counsel’s disposal of the confidential information at the close of the proceeding or in the event of a change of counsel. [Emphasis added]

Stelco argues that subrule 16(2) of the Tribunal’s Rules must be read as giving power to the Tribunal to grant access to confidential information to a foreign party, but not to non-resident counsel. The Tribunal disagrees with this interpretation. When reading subrule 16(1), it is clear that it is counsel “other than a counsel who is not a resident of Canada”, not the party, who is referred to as wishing access to confidential information. Consistent with the foregoing, and based on a complete reading of the rule, the Tribunal is of the view that the phrase “who is not a resident of Canada” in subrule 16(2) qualifies “counsel” rather than “party”.⁹

The existence of subrule 16(2) of the Tribunal’s Rules does not imply that any non-resident counsel seeking access to the confidential record will be granted access. In the Tribunal’s view, the discretion to grant access to confidential information has not been affected by the recent legislative and regulatory changes. The

6. *Synthetic Baler Twine, Decision of the Tribunal* (11 March 1994) (CITT).

7. *Ibid.* at 2.

8. *Ibid.*

9. In addition, the French version of subrule 16(2) makes it clear that “qui n’est pas résident du Canada” is being used to qualify the term “avocat” and not “partie”.

continuing use of the word “may” in subsection 45(3) of the Act indicates Parliament’s continued intention to confer a discretion on the Tribunal in deciding whether to grant access to the confidential record to counsel.

Counsel who want access to the confidential record must sign a declaration and undertaking provided by the Tribunal. First, however, the Tribunal must be satisfied that the person seeking access to the confidential record is one who will respect the terms and conditions of the declaration and undertaking. In deciding whether to grant (resident or non-resident) counsel access to the confidential record, the Tribunal will consider the trustworthiness of the individual, the enforceability of the declaration and undertaking and any other relevant considerations.

In this case, there are several factors which, in the Tribunal’s view, support granting access to the confidential record to Mr. Clinton and they include the following.

- The Act now contains new penalty provisions.
- Mr. Clinton is an experienced trade lawyer who is admitted to practice before the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit.
- Mr. Clinton is required, as a licensed attorney, to maintain the highest standards of ethical behaviour in accordance with the code of conduct of his professional regulating authority. Breaches of that standard, whether they occur within or outside the geographic entity of the regulating authority, can nevertheless be reviewed by that authority.
- The terms and conditions that govern Mr. Clinton’s access include:
 - Mr. Clinton to have access under the direction and control of resident counsel, Mr. Gottlieb;
 - Access to confidential information to take place at resident counsel’s Canadian offices or the Tribunal’s offices;
 - Acknowledgement by Mr. Clinton that unauthorized disclosure of confidential information could result in economic harm to the party whose information is disclosed;
 - Mr. Clinton agreeing to accept the jurisdiction of the courts of the United States or Canada in order to resolve any matters arising under his declaration and undertaking; and
 - Resident counsel, Mr. Gottlieb, to acknowledge that he is responsible for Mr. Clinton’s actions with respect to the use and treatment of the confidential information.

These factors and safeguards, if accepted by Mr. Clinton and Mr. Gottlieb, satisfy the Tribunal that there is recourse, should Mr. Clinton not treat the confidential information appropriately.

The Tribunal acknowledges, as was noted by Stelco, that the Guidelines dated November 1999 specifically indicate that non-resident counsel will not be granted access to the confidential record. However, the Tribunal is governed by legislation and regulations, not the Guidelines. The Tribunal further notes that this document predates the legislative and regulatory changes of April 2000 and, therefore, does not reflect such changes.

Regarding Co-Steel’s concerns that Mr. Clinton may become involved in U.S. anti-dumping proceedings with respect to reinforcing bar and that the confidential information presented by Co-Steel may become part of Mr. Clinton’s knowledge, the Tribunal finds this argument speculative and not supported by any substantive evidence.

For all these reasons, the motion is denied and Mr. Clinton is granted access to the confidential information in these proceedings and to other proceedings arising out of these proceedings, subject to his signing the declaration and undertaking appended as Annex I to the Tribunal's order dated January 10, 2001, and further subject to Mr. Gottlieb's signing the acknowledgement provided in Annex I to that order.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
Member