



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Interim Review No. RD-2008-001

Fasteners

*Order issued
Friday, October 24, 2008*

*Reasons issued
Friday, November 7, 2008*

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IN THE MATTER OF an interim review, under paragraph 76.01(1)(b) of the *Special Import Measures Act*, of the findings made by the Canadian International Trade Tribunal on January 7, 2005, in Inquiry No. NQ-2004-005 concerning:

**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**

ORDER

The Canadian International Trade Tribunal, under the provisions of paragraph 76.01(1)(b) of the *Special Import Measures Act*, has conducted an interim review of the above-mentioned findings.

Pursuant to paragraph 76.01(5)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby makes no amendment to its findings.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Hélène Nadeau
Hélène Nadeau
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The statement of reasons will be issued within 15 days.

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STATEMENT OF REASONS

BACKGROUND

1. On April 15, 2008, the Tribunal received a request from IJ Windows & Doors Ltd. (IJ) for an interim review under paragraph 76.01(1)(b) of the *Special Import Measures Act*¹ of the Tribunal's findings in *Certain Fasteners*² to exclude certain screws from the scope of the findings.
2. On April 16, 2008, the Tribunal requested that IJ provide additional information, including any new facts or changes in circumstances that had arisen since the findings that would warrant an interim review, and a completed Product Exclusion Request Form clarifying the products for which it was seeking an exclusion.
3. On May 1, 2008, the Tribunal received the requested information from IJ, along with a Product Exclusion Request Form seeking an exclusion for "sheet metal screws E-guard coated and colour coated".
4. The Tribunal replied to IJ on June 5, 2008, and asked it to provide further information regarding the products for which it was seeking an exclusion, including, among other things, the composition of the products and the country of origin, the importer of the goods, documentation of attempts to procure the goods from a domestic manufacturer, whether any Canadian manufacturers supported the exclusion request, any new facts or changes in circumstances that had arisen since the findings that would warrant an exclusion, and the reason why an exclusion was not requested at the time of the original inquiry.
5. IJ provided the requested information to the Tribunal on July 2, 2008. IJ clarified that the products for which it was seeking an exclusion are "Philips, flat head, sheet metal screw[s], yellow zinc plated c/w e-guard coating." originating in Taiwan. IJ indicated that it purchases these screws from Truth Hardware, of Owatonna, Minnesota. In addition, IJ had previously indicated, in its Product Exclusion Request Form, that the screws for which it was seeking an exclusion were of the following sizes: 8x1, 7x3/4, 8x3/4, 10x1, 7x1/2, 8x9/16 and 10-24x9/16.
6. After reviewing the additional information received from IJ, the Tribunal determined that the request for an interim review was properly documented. On July 17, 2008, pursuant to subrule 70(2) of the *Canadian International Trade Tribunal Rules*,³ the Tribunal informed all parties to Inquiry No. NQ-2004-005, which resulted in the findings, of its receipt of the request for an interim review and gave those parties an opportunity to make representations to the Tribunal.
7. The sole party to file a response was Leland Industries Inc. (Leland), a Canadian producer of like goods. Leland agreed to the exclusion requested by IJ, limited to the specific E-Gard® screws listed in IJ's request, imported for use by IJ in the manufacture of its own products in its Kamloops, British Columbia, facility and sourced from Truth Hardware. Leland submitted that, should the Tribunal decide to conduct an interim review, it would agree to an amendment of the findings in accordance with the specified conditions.
8. IJ replied on August 18, 2008, indicating that it was fully satisfied with the contents of the submission filed by Leland and requesting that the Tribunal amend the findings in accordance with the terms set out in Leland's letter.

1. R.S.C. 1985, c. S-15 [*SIMA*].
2. (7 January 2005) (CITT).
3. S.O.R./91-499 [*Rules*].

9. Upon receipt of submissions from IJ and Leland, the Tribunal decided that an interim review of the findings was warranted and issued a notice of commencement of interim review on August 28, 2008.⁴ In accordance with paragraph 25(c) of the *Rules*, the Tribunal decided to proceed with a hearing by way of written submissions. Submissions already filed by parties were placed on the record of the interim review. The Tribunal requested that further submissions by interested parties respecting the products for which an exclusion had been requested or their descriptions be filed not later than September 18, 2008, with reply submissions due on September 25, 2008.

10. As regards the scope of any exclusion order, the Tribunal requested an indication from Leland as to whether it would support a generic exclusion for the products for which an exclusion was requested that does not make reference to the name of the user, supplier or distributor and that does not refer to a specific end use. If not, the Tribunal further requested that Leland provide evidence that it currently produces or has the capability of producing a substitutable product and to explain how the granting of a generic exclusion would result in injury to the domestic industry.

11. Finally, the Tribunal requested an indication from IJ and Leland as to whether they would be opposed to the addition of the following phrase to the definition of the products for which an exclusion was requested: E-Gard®-painted screws “or an equivalent coating”.

SUBMISSIONS

12. On September 18, 2008, Leland submitted that, should the Tribunal broaden the definition of the products for which an exclusion was being requested, it would result in injury to the domestic industry, as Leland produces a similar coated product that would be substitutable for the fasteners imported by IJ. Leland stated that its fasteners would be substitutable in all applications where the fasteners were not required to match other window hardware produced by Truth Hardware.

13. The Tribunal also received submissions from H. Paulin & Co. Limited (Paulin) and Honor Best Co., Ltd. (Honor).

14. Paulin opposed the requested exclusion, stating that it would be injurious to Canadian fastener and coating manufacturers, would provide an advantage to one importer (Truth Hardware) and would put other window and door manufacturers at a disadvantage.

15. Honor, a producer in Taiwan, submitted that it did not oppose an exclusion for E-Gard®-coated screws, but did oppose an exclusion if the screws were subsequently colour-coated.

16. IJ replied on September 29, 2008, stating that it was in agreement with Leland’s submissions.

REASONS FOR DECISION

17. Subsection 76.01(1) of *SIMA* states that, at any time after the making of an order or finding described in any of sections 3 to 6, the Tribunal may, on its own initiative or at the request of the Minister of Finance, the President of the Canada Border Services Agency or any other person or government, conduct an interim review of (a) the order or finding, or (b) any aspect of the order or finding. Further, subsection 76.01(3) states that the Tribunal shall not conduct an interim review at the request of any person or government unless the person or government satisfies the Tribunal that the review is warranted.

4. C. Gaz. 2008.I.2569.

18. The Tribunal's first step after receiving a request for an interim review, therefore, is deciding whether the interim review is warranted. This decision is usually reached after considering whether there is a reasonable indication that sufficient new relevant facts have arisen since the issuance of the existing finding or order, or that there has been sufficient change in the circumstances that led to the finding or order in question. An interim review may also be warranted where there are sufficient relevant facts that, although in existence during the previous inquiry or review, were not put into evidence and were not discoverable by the exercise of reasonable diligence at that time.

19. After reviewing IJ's request and the subsequent information that it provided to the Tribunal in support thereof, the Tribunal was satisfied that the information provided a reasonable indication that the initiation of an interim review was warranted.

20. After deciding that an interim review is warranted, the Tribunal can then undertake the interim review to determine if the original finding or order should be amended.

21. The basis for the application of anti-dumping and/or countervailing duties on goods is established in the original finding or order. Therefore, the issue to be considered in an interim review is whether, in light of new facts or changed circumstances, there remains a continuing justification for the application of such duties to the particular goods for which an exclusion from the scope of the Tribunal's finding or order is being sought.

22. In this interim review, IJ is asking the Tribunal to amend its original findings to grant an exclusion for specific E-Gard®-coated screws listed in IJ's request (described above), imported for use by IJ in the manufacture of its own products in its Kamloops facility and sourced from Truth Hardware. The exact wording of this exclusion request has evolved throughout the interim review and was settled subsequent to an agreement between IJ and Leland.

23. When a party requests a product exclusion, it is required to indicate whether or not the domestic industry supports the exclusion. In this case, Leland and IJ have reached an agreement on the scope of the product exclusion that would be acceptable to both parties. The Tribunal notes however that an agreement between the domestic industry and a party requesting an exclusion does not compel the Tribunal to grant the agreed-upon exclusion.

24. In considering requests for product exclusion in the context of an interim review, the Tribunal follows an approach similar to that used during inquiries. This approach was summarized in *Certain Stainless Steel Wire*.⁵ The fundamental approach 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. In this context, the Tribunal considers such factors as whether there is any domestic production of identical, substitutable or competing goods, whether the domestic industry is an "active supplier" of the product, or whether it normally produces the product or has the capability of producing the product.

25. The present case involves a request for exclusion of products involving intellectual property protection. The Tribunal notes that, in *Certain Fasteners (remand)*⁶ which involved a patent, it indicated that the fact that a product is patented does not mean that the Tribunal will automatically grant an exclusion. Even though a 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

5. (30 July 2004), NQ-2004-001 (CITT) at 22.

6. (26 September 2006), NQ-2004-005R (CITT) at para. 17.

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 must still determine whether the circumstances of the case are such that granting an exclusion could cause or threaten to cause injury to the domestic industry. The Tribunal is of the view that this reasoning is equally applicable to products that benefit from trademark protection.

26. In considering product exclusions, the Tribunal is also sensitive to the need to avoid the creation of trade distortion or unfair competitive advantages for one or more parties. In that regard, the Tribunal stated the following in *Certain Flat Hot-Rolled Carbon and Alloy Steel Sheet Products*:

In determining how to define the product to be excluded, the Tribunal gave careful consideration to the views expressed by the parties. However, the Tribunal is of the view that any exclusion to a finding, whether provided at the time of the original finding or, subsequently, upon the completion of a review, should normally be defined as generically as possible to avoid potential trade distortions and unfair competitive advantages. Accordingly, the Tribunal avoided reference to restrictions relating to producers and end-users. The Tribunal has decided to leave the “Solbor” trademark in the definition of the exclusion as well as end uses. However, it has described the specifications of the trademarked product in as much detail as possible and has also added the term “or equivalent” in order to allow any other potential suppliers to benefit from this exclusion in offering this product in Canada.⁷

27. In the present case, the Tribunal is of the view that the specific exclusion agreed upon by Leland and IJ would potentially restrict competition between IJ and other end users of the E-Gard® fasteners in question, as well as between IJ and competitors using substitutable fasteners, with IJ being exempt from anti-dumping duties, while these other users would be required to pay same on the importation of the subject goods.

28. The Tribunal further considers that to grant a generic product exclusion for the requested fasteners and substitutable products could result in injurious effects on the domestic industry. To this effect, Leland submitted evidence that it produces directly substitutable products.

29. In an affidavit, Mr. Byron Nelson, President of Leland, submitted that Leland offers a type of coated screw that is very similar to the kind of screw that IJ uses, with the only difference being the E-Gard® coating, which Leland does not have a license to use. He explained that there are many kinds of platings and coatings that closely resemble or are substitutable for E-Gard® coatings.⁸

30. Mr. Nelson submitted that a generic product exclusion for flat head Philips zinc-coated and plated metal screws in the dimensions referred to in IJ’s request could lead to a flood of imports through existing Canadian importers, brokers and distribution channels. He further submitted that an exclusion limited to E-Gard®-coated screws in the dimensions requested would still allow imports that would compete directly with Leland’s own products and result in lost sales.⁹

31. The Tribunal notes that Leland agreed to IJ’s request in part because of the low volumes of imports by IJ.¹⁰ Paulin submitted that Truth Hardware has other customers that would, in principle, be entitled to the same exclusion and added that this would put its own customers at a competitive disadvantage if an

7. (17 January 2003), RD-2002-003 (CITT) at 3.

8. Tribunal Exhibit RD-2008-001-18.3, Administrative Record, Vol. 1 at 189.

9. *Ibid.* at 190-91.

10. *Ibid.* at 190.

exclusion were granted for IJ.¹¹ The Tribunal is of the view that it would be unfair to grant an exclusion that would give IJ an advantage over other importers of the goods and that such an exclusion could open the door to a multitude of requests from other importers of E-Gard®-coated products. In the circumstances, the Tribunal is of the view that it is not appropriate to grant an exclusion for a specific importer, even where the domestic industry agrees to such a request.

32. IJ argued that it was rendered less competitive in comparison with its U.S. competitors as a result of having to pay anti-dumping duties on the subject goods. While it might be an unfortunate consequence of such measures for this importer, it is not, in and of itself, a sufficient basis for an exclusion.

CONCLUSION

33. For the foregoing reasons, pursuant to paragraph 76.01(5)(b) of *SIMA*, the Tribunal hereby makes no amendment to its findings.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

11. Tribunal Exhibit RD-2008-001-18.1, Administrative Record, Vol. 1 at 171.