CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

BY FACSIMILE

April 23,1999

Mr. James P. McIlroy
McIlroy & McIlroy
Commerce Court North
25 King Street West
Suite 2725
Toronto, Ontario
M5L 1E8

Dear Mr. McIlroy:

Subject: Black Granite Memorials
Review Number RR-98-006

In letters dated April 21 and 23, 1999, addressed to the Tribunal, you raise concerns regarding the participation of Mr. David Attwater as counsel for the Government of India in the above-referenced review. In your letter of April 23, 1999, you state that it would not be proper for Mr. Attwater to participate in this review.

I have been instructed by the Tribunal to inform you that your submission to deny the paticipation of Mr. Attwater in the above-referenced review has been rejected. The statement of reasons in support of the Tribunal decision will be issued shortly.

Please note that the Tribunal has extended to close of business on May 5, 1999, the deadline for the submission of the case of the Government of India. The deadline for the submission of the manufacturer's/producer's reply submission has also been extended to May 11, 1999.

Yours sincerely,

Michel P. Granger
Secretary

cc: Parties of Record
David Attwater

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Ottawa, Tuesday, May 18, 1999

Review No.: RR-98-006

IN THE MATTER OF a notice of appearance (counsel) and a declaration and undertaking filed by Mr. David Attwater on April 19, 1999, as counsel for the High Commission of India, on behalf of the Ministry of Commerce, Government of India;

AND IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, with respect to black granite memorials and black granite slabs originating in or exported from India.

STATEMENT OF REASONS

BACKGROUND

On April 19, 1999, Mr. David Attwater filed with the Canadian International Trade Tribunal (the Tribunal) a notice of appearance (counsel) and a declaration and undertaking as counsel for the High Commission of India, on behalf of the Ministry of Commerce, Government of India, a party before the Tribunal in this review.

On April 20, 1999, the Secretary of the Tribunal sent a letter informing participants in the review of the fact that Mr. Attwater had been in-house counsel for the Tribunal in Inquiry No. NQ-93-006,[1] the finding of which is under review. The Secretary asked that views on Mr. Attwater's participation in the review be filed with the Tribunal no later than 5:00 p.m. on April 20, 1999. On the same day, Mr. James P. McIlroy, counsel for the Canadian Granite Association (CGA), left a voice message with the Tribunal's Assistant Secretary and Registrar expressing his concerns about the prospect of Mr. Attwater acting for the Government of India and requesting additional time to consult with his client in order to provide the Tribunal with more comments.

On April 21, 1999, Mr. Attwater commented on the Tribunal's letter of April 20, 1999, by expressing, among other things, his dismay that the Tribunal would raise, on its own, "the legitimacy of [his] role as counsel for the Government of India" and requesting the right to respond to adverse views, if any.

On April 21, 1999, the Tribunal received a letter from Mr. McIlroy, in which he stressed that he and his client wished to ensure that participation in the review by the Tribunal's former in-house counsel would not result in Mr. Attwater having any real or perceived advantage over other counsel, hence depriving his client of the right to a fair hearing. In addition, Mr. McIlroy asked two specific questions regarding Mr. Attwater's participation as counsel in the inquiry:

1. did [Mr. Attwater] have access to any internal Tribunal memoranda, documents, discussions, or any other information that was not available to other Counsel in this case?

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1. *Black Granite Memorials of All Sizes and Shapes and Black Granite Slabs in Thicknesses Equal to or Greater Than Three Inches, Originating in or Exported from India*, Canadian International Trade Tribunal, *Finding*, July 20, 1994, *Statement of Reasons*, August 4, 1994.

2. did [Mr. Attwater] participate in the Tribunal's internal decision-making process or in any other discussions that could provide him with any information or insight not available to other Counsel in this case?

The Tribunal forwarded a copy of Mr. McIlroy's letter to Mr. Attwater.

On April 22, 1999, the Tribunal responded, by letter, in the affirmative to Mr. McIlroy's two questions.

On April 23, 1999, the Tribunal informed the participants in this review that the submission made by counsel for the CGA to deny the participation of Mr. Attwater had been rejected and that a statement of reasons would be issued shortly by the Tribunal.

ISSUE BEFORE THE TRIBUNAL

The issue is whether the participation of Mr. Attwater as counsel of record for the Government of India in this review is appropriate, given the fact that he was in-house counsel for the Tribunal during the original inquiry in 1994. Among other things, this requires that the Tribunal consider whether this situation could raise a reasonable apprehension of bias.

POSITION OF PARTIES

On April 23, 1999, Mr. McIlroy responded to the Tribunal's letters of April 20 and 22, 1999, by submitting that, as a result of Mr. Attwater's access to internal Tribunal information not available to other counsel, Mr. Attwater would have, or would be perceived to have, an advantage over other counsel and that an uneven playing field would deprive his client of its right to a fair hearing. Mr. McIlroy, therefore, submitted that it would not be proper for Mr. Attwater to participate in the review as counsel for the Government of India.

Mr. Attwater did not respond to the submissions made by counsel for the CGA.

DECISION

The Tribunal will deal, first, with its jurisdiction to disqualify counsel of record, then with Mr. Attwater's concerns as to the Tribunal informing the participants in this review that he was formerly in-house counsel for the Tribunal in the original inquiry, the finding of which is under review, and, finally, with the submissions made by counsel for the CGA in support of the disqualification of Mr. Attwater as counsel for the Government of India.

With respect to its jurisdiction in this matter, the Tribunal considered, in a recent decision, whether a person who was formerly in-house counsel for the Tribunal should be disqualified from appearing as counsel of record in a Tribunal inquiry.[2] In addressing this issue, the Tribunal relied on subsection 17(2) of the *Canadian International Trade Tribunal Act*[3] (the CITT Act) which provides the Tribunal with 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. The Tribunal referred, in this regard, to the Binational Panel's decision in

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2. *Notice of motion for an order disqualifying Mr. Joël Robichaud from acting as counsel of record for IPSCO Inc.*, Inquiry No. NQ-98-004, *Statement of Reasons*, May 7, 1999.
3. R.S.C. 1985, c. 47 (4th Supp.).

Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported From the United States (Injury),[4] in which the Binational 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 conferred the power to disqualify counsel of record for a reasonable apprehension of bias. In that case, the Binational Panel stated:

> 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.[5]

The Tribunal, in dealing with this recent matter, adopted the Binational Panel's comments and carried on by noting that, while a reasonable apprehension of bias would normally give rise to a member of the panel having to disqualify himself from the proceeding, it is appropriate for counsel of record, in certain circumstances, to be disqualified from a proceeding.[6]

It is a well-established principle of law that administrative boards and tribunals, such as the Tribunal, are masters of their own procedure. The only limitations to this principle are those contained in the enabling statutes of such boards and tribunals and the requirements of procedural fairness and natural justice.[7]

Being the master of its own procedure and having the jurisdiction to rule on the question of reasonable apprehension of bias resulting from the participation of counsel of record in a proceeding demand that issues, which indicate that there may be a problem, be raised, if not by the parties, then by the Tribunal. In this case, the Tribunal decided that it was appropriate to note Mr. Attwater's participation as in-house counsel for the Tribunal in the original inquiry. In the Tribunal's view, Mr. Attwater is incorrect in suggesting that the Tribunal should not have done so.

Having said that, the Tribunal now turns to the issue of reasonable apprehension of bias. The rule against bias was well expressed in *Old St. Boniface Residents Assn. Inc.* v. *Winnipeg (City)*,[8] where Sopinka J. wrote that "[t]he party alleging disqualifying prejudgment must establish that any representations at variance with the adopted view would be futile.[9]" Again, the test to be applied 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.[10]" In other words, the "question is whether a reasonable person, adequately informed of the facts, would consider that the circumstances raised an apprehension of bias.[11]" This clearly requires a case-by-case analysis of all the circumstances surrounding the matter. It also means that similar circumstances could lead to different conclusions, depending on the context.

In this matter, the general circumstances regarding Mr. Attwater are as follows. Mr. Attwater was in-house counsel for the Tribunal during the period from February 1, 1991, to August 2, 1997. As described

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4. Secretariat File No. CDA-93-1904-07, *Decision and Reasons of the Panel*, May 18, 1994.
5. *Ibid.* at 19.
6. *Supra* note 2 at 5. See also *Bailey* v. *Saskatchewan Registered Nurses' Assn.*, Saskatchewan Court of Queen's Bench, [1998] S.J. No. 332, April 20, 1998.
7. *Cannon* v. *Canada (Assistant Commissioner, RCMP) (T.D.)*, [1998] 2 F.C. 104 at 117-18.
8. [1990] 3 S.C.R. 1170.
9. *Ibid.* at 1172.
10. The *Committee for Justice and Liberty* v. *The National Energy Board*, [1978] 1 S.C.R. 369 at 394.
11. *Supra* note 4 at 20.

in a recent decision, counsel for the Tribunal work closely with Tribunal members and staff.[12] They participate in seminars and training sessions for members, provide legal advice to members and assist them in substantive, as well as 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. Attwater has, thus, worked on a certain number of files with members of the Tribunal who are hearing this review. More significantly, Mr. Attwater was in-house counsel for the Tribunal in the inquiry, the finding of which is under review.

Those are the general circumstances which, at first sight, could well support allegations of a reasonable apprehension of bias. However, this does not represent the full picture.

In fact, Mr. Attwater left the Tribunal for private practice some 20 months ago. He did not appear as counsel of record before the Tribunal on any matter for some 10 months following his departure. The members assigned to this review are not those to whom Mr. Attwater provided legal advice as part of the legal team in the original inquiry. In fact, two of the members assigned to this review were appointed to the Tribunal in 1997, only a few months before Mr. Attwater's departure from the Tribunal, and one was appointed in 1995. In any case, none of these members were with the Tribunal at the time of the original inquiry in 1994. Furthermore, the issues in a review under subsections 76(2) and (5) of the *Special Import Measures Act*[13] (SIMA) are, generally, substantially different from those in an inquiry under section 42 of SIMA. Also, the record in the review is not the same as the record in the inquiry. More importantly, the facts at play in this review are not the same as those in the inquiry.

As to the specific grounds on which counsel for the CGA relied, i.e. Mr. Attwater's access to internal memoranda, documents, discussions or any other information with respect to the inquiry and his participation in the internal decision-making process for that inquiry, the Tribunal again notes that the record in this review is different from the one in the inquiry, that the facts (and significant portions of SIMA[14]) have changed since the issuance of the Tribunal's finding and that the members in this review are not the same as those in the original inquiry.

In light of all these facts and circumstances, the Tribunal is of the view that a reasonably informed person, adequately informed of all these facts, would not consider that the circumstances in this matter raise an apprehension of bias. Moreover, in the Tribunal's view, there are no grounds on which to sustain that there could be a "prejudgment" of the matter or that any representations made to oppose Mr. Attwater's arguments in the review "would be futile," to use the words of Sopinka J. in *Old St. Boniface*.[15]

On a more general basis, the Tribunal finally notes that, as in-house counsel for the Tribunal for more than six years, Mr. Attwater, when he left the Tribunal, took with him his know-how, experience and expertise of the Tribunal's practice and trade law. While this, *per se*, does not prevent Mr. Attwater in any way from appearing before the Tribunal,[16] the Tribunal notes that former counsel are under a professional responsibility, pursuant to the *Rules of Professional Conduct* of the Law Society of Upper Canada, not to divulge information to which they were privy while acting as counsel for the Tribunal. Moreover, former

12. *Supra* note 2 at 4.
13. R.S.C. 1985, c. S-15.
14. *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47.
15. *Supra* note 8 at 1172.
16. *Ontario New Home Warranty Program* v. *Campbell*, Ontario Court of Justice (General Division), [1999] O.J. No. 366 at para. 45.

public servants, as in the case of Mr. Attwater, generally are prohibited, both during and after service to the Government of Canada, from revealing information, which they obtained while engaged as public servants, under such acts as the *Official Secrets Act*,[17] the *Access to Information Act*,[18] the *Privacy Act*[19] or other acts of Parliament. These are, in the Tribunal's view, adequate safeguards to ensure that former counsel/public servants do not, without proper authorization, use information obtained either in a solicitor/client relationship or in carrying out their responsibilities as public servants.

Patricia M. Close
Patricia M. Close
Presiding Member

Anita Szlazak
Anita Szlazak
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

17. R.S.C. 1985, c. O-5.
18. R.S.C. 1985, c. A-1.
19. R.S.C. 1985, c. P-21.