Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Preliminary Injury Inquiry
No. PI-2021-002

Certain Container Chassis

Order issued
Wednesday, August 4, 2021

Reasons issued
Tuesday, August 24, 2021

Canada

IN THE MATTER OF a preliminary injury inquiry, pursuant to subsection 34(2) of the *Special Import Measures Act*, respecting the alleged injurious dumping and subsidizing of container chassis and container chassis frames, whether finished or unfinished, assembled or unassembled, regardless of the number of axles, for the carriage of containers, or other payloads (including self-supporting payloads) for road, marine roll-on/roll-off and/or rail transport, and certain subassemblies of container chassis originating in or exported from the People's Republic of China;

AND IN THE MATTER OF a request, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*, filed on July 19, 2021, by Ocean Trailer/C Keay Investments, CIE Manufacturing, Groupe St-Henri and Dongguan CIMC Vehicle Co., Ltd., that the Tribunal issue an order that Mr. Peter Jarosz, counsel for Max-Atlas Équipement International Inc., withdraw his notice of representation in the present preliminary injury inquiry.

ORDER

The request is denied.

Frédéric Seppey
Frédéric Seppey
Presiding Member

Susan D. Beaubien
Susan D. Beaubien
Member

Randolph W. Heggart
Randolph W. Heggart
Member

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

INTRODUCTION

[1] On June 11, 2021, the Canadian International Trade Tribunal initiated a preliminary injury inquiry, pursuant to subsection 34(2) of the *Special Import Measures Act*,[1] respecting the alleged injurious dumping and subsidizing of container chassis and container chassis frames originating in or exported from the People's Republic of China.

[2] The complainant, Max-Atlas Équipement International Inc. (Max-Atlas), is represented by the law firm of McMillan LLP (McMillan). One of the McMillan lawyers acting for Max-Atlas is Mr. Peter Jarosz, who was previously employed by the Secretariat to the Canadian International Trade Tribunal of the Administrative Tribunals Support Service of Canada (ATSSC) and had the role of legal counsel to the Tribunal. Mr. Jarosz left the ATSSC on April 1, 2021, to join McMillan. At the time of his departure, these proceedings had not yet been commenced before the Tribunal.

[3] Ocean Trailer/C Keay Investments, CIE Manufacturing, Groupe St-Henri and Dongguan CIMC Vehicle Co., Ltd. oppose the complaint that has been brought by Max-Atlas. The opposing parties are represented by the law firm of Borden Ladner Gervais LLP (BLG).

[4] On July 19, 2021, BLG requested, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,[2] that the Tribunal issue an order directing Mr. Jarosz to withdraw his notice of representation in this preliminary injury inquiry.

[5] It is not clear whether this request, given the nature of the issues being raised, is being brought by all or some of the parties opposed to the complaint, or by BLG itself. Although the request is signed by counsel who did not file a notice of representation with the Tribunal in respect of these proceedings, the parties bringing the request, pursuant to rule 23.1 of the *Rules*, will be consequently referred to collectively as "BLG" in these reasons, for ease of reference.

[6] On August 4, 2021, the Tribunal issued its order denying the request. The reasons for that decision follow.

POSITIONS OF THE PARTIES

[7] BLG asserts that Mr. Jarosz's representation of Max-Atlas gives rise to a reasonable apprehension of bias, due to his recent employment as counsel to the Tribunal. It submits that Mr. Jarosz should not be making representations to the Tribunal until a reasonable "cooling off period" has elapsed since his departure. BLG suggests that the "cooling off period" should be a period of one year having regard to ethics and conflict of interest guidelines which are said to be relevant to this case.

[8] In support of its request, pursuant to rule 23.1 of the *Rules*, BLG relies upon the Tribunal's decision in *Flat Hot-rolled Carbon and Alloy Steel Sheet Products*.[3] In that case, the Tribunal

1 R.S.C., 1985, c. S-15 [*SIMA*].
2 SOR/91-499 [*Rules*].
3 (4 May 1999), NQ-98-004 (CITT) [*Flat Hot-rolled Steel*].

disqualified a former Tribunal counsel from participating in the inquiry on the basis of a reasonable apprehension of bias.

[9] BLG argued that the outcome in *Flat Hot-rolled Steel* was underpinned by the close working relationship between Tribunal counsel and the Tribunal members which consequently gave rise to a reasonable apprehension of bias. Further, BLG alleges that Mr. Jarosz has recent knowledge of the Tribunal's decision-making process, its methods of analysis and other institutional aspects of its decision-making, which is not available to other counsel.

[10] In addition, BLG contends that Government of Canada conflict of interest policies generally impose a one-year cooling-off period on senior government officials leaving the public service. These policies apply to former public servants occupying certain designated positions and prevent them from making representations on behalf of non-governmental entities to their former employers, without the consent of their former department. Regardless of whether Mr. Jarosz is actually subject to these policies, BLG argues that imposing a cooling-off period would be in the public interest, as it would serve to diminish the reasonable apprehension of bias and preserve the impartiality and independence of the Tribunal.

[11] McMillan argues that BLG's submissions conflate the issues of reasonable apprehension of bias and conflict of interest. McMillan further submits that the imposition of a blanket cooling-off period on all persons who have worked in the public service, even when the government policies do not explicitly apply to them, on the pretext of minimizing a reasonable apprehension of bias would place an undue burden on government.

[12] With respect to reasonable apprehension of bias, McMillan asserts that there is no reasonable apprehension of bias arising solely from Mr. Jarosz's former employment as counsel to the Tribunal. McMillan notes that BLG did not expressly articulate how a reasonable person would view the Tribunal's preliminary injury decision as being biased if Mr. Jarosz is not disqualified.

[13] McMillan submits that there is no precedent for disqualifying counsel from appearing before the Tribunal solely due to past employment as Tribunal counsel. It distinguishes the *Flat Hot-rolled Steel* decision relied on by BLG on the basis that other factors underpinned the Tribunal's decision in that case. Notably, the counsel at issue in *Flat Hot-rolled Steel* was still employed by the Tribunal when it received the reference that led to the commencement of the inquiry. As such, the Tribunal's decision in *Flat Hot-rolled Steel* was focused on the specific information to which the former counsel was privy in these proceedings, as opposed to counsel's relationship with the Tribunal members.

[14] McMillan also refers to a decision in *Black Granite Memorials*[4] where a former Tribunal counsel was not disqualified from appearing before the Tribunal. In that case, the Tribunal's focus was again on whether the counsel had access to any confidential information particular to the inquiry at issue, and not upon the working relationship between counsel and the Tribunal members. In addition, McMillan argues that closer working relationships between Tribunal counsel and members, in the context of other tribunals, have not resulted in disqualification of former tribunal counsel from appearing before those other tribunals.

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4 *Black Granite Memorials and Black Granite Slabs* (18 May 1999), RR-98-006 (CITT) [*Black Granite Memorials*].

[15] With respect to conflict of interest guidelines, McMillan contends that Mr. Jarosz did not occupy a designated position within the meaning of the Government of Canada Treasury Board's *Directive on Conflict of Interest* or the *Values and Ethics Code of the Department of Justice*, and is accordingly not subject to cooling-off periods imposed by those policies.

[16] McMillan advises that it has taken internal steps within the firm to ensure that Mr. Jarosz is not placed in a conflict of interest situation. As Mr. Jarosz has no confidential information pertaining to this matter, McMillan submits that Mr. Jarosz is not in a position of conflict of interest as he is not acting against a former client. Finally, McMillan refers to a letter sent by the Tribunal to counsel of record on June 29, 2021, as being indicative that the Tribunal does not perceive a conflict of interest.

ANALYSIS

[17] Motions to remove, or to disqualify, counsel from acting are typically brought in circumstances where a lawyer is alleged to have acquired confidential information from a client such that there is a risk, or appears to be a risk, of that information later being used against the client's interest when the lawyer changes job.[5] Such motions may also arise where members of the same firm act concurrently for, or have conflicting duties of loyalty to, parties that are adverse in interest.[6]

[18] In this case, BLG concedes that the possible misuse of confidential client information is not an issue. Instead, it asserts that Mr. Jarosz's continued representation of Max-Atlas creates a reasonable apprehension of bias.

[19] Allegations of bias are made against adjudicators, not counsel, in circumstances where the moving party asks for recusal of the adjudicator.

[20] However, the circumstances that are alleged to create a reasonable apprehension of bias arise here from the existence of a prior solicitor-client relationship between Mr. Jarosz and the Tribunal. As such, BLG's request essentially merges conventional grounds for removal of counsel with allegations of a reasonable apprehension of bias on the part of an adjudicator. Having regard to the foregoing, the Tribunal will consider and apply relevant legal principles that are relevant to both removal of counsel and to a determination of reasonable apprehension of bias.

Analytical context: the disqualification of counsel

[21] The leading case for removal of counsel is *MacDonald Estate*. It identifies three competing values for consideration as follows:

> (1) The concern to maintain the high standards of the legal profession and the integrity of the justice system;
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> (2) The countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and

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5 For example, *MacDonald Estate v. Martin*, [1990] 3 SCR 1235 [*MacDonald Estate*]; *Betser-Zilevitch v. Nexen Inc.*, 2017 FC 874.

6 For example, *R. v. Neil*, 2002 SCC 70 [*R. v. Neil*]; *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39; *Groupe-Tremca Inc. v. Techno-Bloc Inc.*, [1999] F.C.J. No. 1813, 1999 CanLII 9113 (FCA).

(3) The desirability of permitting reasonable mobility in the legal profession.[7]

[22] The Tribunal has considered each of these factors in considering BLG's request that Mr. Jarosz be directed to withdraw as counsel for Max-Atlas in these proceedings.

[23] The first issue is underpinned by the acquisition of confidential information in the context of a solicitor-client relationship. In turn, this requires a consideration of the two following questions:

(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 the information will be used to the prejudice of the client?[8]

[24] Once a solicitor-client relationship which is sufficiently related to the matter at hand is shown to have existed, there is a strong presumption that the lawyer acquired confidential information. The burden rests on the lawyer to rebut that presumption by showing that he/she received no information from the client that is relevant to the matter at hand. In assessing this factor, the standard to be applied is the perception of a reasonably informed member of the public.[9]

[25] In this case, there was a solicitor-client relationship between the Tribunal and Mr. Jarosz. However, BLG concedes that Mr. Jarosz could not have obtained any confidential information pertaining to, or relevant to, these proceedings under *SIMA*.

[26] For completeness, the following can be remarked. The subject matter of this particular trade remedy case is novel as before the Tribunal. Max-Atlas's complaint had not yet been filed with the Canada Border Services Agency (CBSA) at the time that Mr. Jarosz joined McMillan. As such, the Tribunal had no open file and had received no information concerning this complaint that Mr. Jarosz could have seen or had access to while working at the Tribunal.

[27] Mr. Jarosz thus had no opportunity to acquire information concerning the container chassis industry or the parties to these proceedings, by virtue of the position that he then held with the Tribunal. BLG admits that such information was only submitted to the Tribunal by the CBSA some time after Mr. Jarosz's departure. Moreover, the Tribunal is not a party to these proceedings. It is the adjudicator. As a statutory decision-maker, it is impartial and has no interest or stake in the outcome of the proceedings.

[28] The circumstances here are thus not comparable to those of a client whose lawyer moves to another firm and begins to act for a commercial rival or a person that is adverse in interest to the former client.

[29] For the same reasons, this is not a situation where a lawyer's more generalized knowledge about a client would infringe the duty of loyalty that a lawyer has to his/her client. Mr. Jarosz owes no "duty of loyalty" to the Tribunal in the same sense that a lawyer would owe to a private client,

7 *MacDonald Estate* at 1243.
8 *MacDonald Estate* at 1260.
9 *MacDonald Estate* at 1259-1260.

because the Tribunal is not adverse in interest to the parties who appear before it.[10] This arises from the Tribunal's role and function as a statutory decision-maker.

[30] BLG asserts that the allegedly prejudicial information acquired by Mr. Jarosz relates to his knowledge of the Tribunal's internal operations, decision-making processes and its personalities. But *MacDonald Estate* (and later cases which apply it) are concerned with information confided to a solicitor which is later placed at risk of being used against that same client or its interests. That goes to the heart of the solicitor-client relationship.

[31] As noted above, even this type of knowledge allegedly held by Mr. Jarosz is not at risk of being used against his former client. The Tribunal performs a quasi-judicial function and is thus not adverse in interest to any party in these proceedings or to their counsel. Moreover, there is no evidence that Mr. Jarosz has ever had a solicitor-client relationship with any of the entities represented by BLG in these proceedings.

(1) Integrity of the justice system – reasonable apprehension of bias on the part of the Tribunal

[32] BLG argues that the Tribunal should direct Mr. Jarosz to withdraw from representing Max-Atlas because a reasonable apprehension of bias is created by his representation of Max-Atlas. The Tribunal will assess this argument in the context of the first aspect of the values identified in *MacDonald Estate*, which touches on maintaining the integrity of the justice system.

[33] Allegations of bias (and consequent motions for recusal) are brought against judges or adjudicators. But Mr. Jarosz is not the adjudicator or "decider" of issues in these proceedings. This is not a situation where a lawyer, having been appointed to judicial or quasi-judicial office, is faced with having to decide a matter where his or her former client is a party or his/her former law firm is appearing as counsel. Rather, Mr. Jarosz appears as counsel for a party to proceedings before the Tribunal.

[34] As such, BLG's request, pursuant to rule 23.1 of the *Rules*, can only be taken as a challenge to the Tribunal's own impartiality. Indeed, BLG has explicitly stated the following:

> We have reviewed Mr. Jarosz's representation of the complainant in this matter with our clients. They have expressed alarm about the potential for partiality in the Tribunal's decision-making in the event that Mr. Jarosz appears before the Tribunal for your clients in any capacity.[11]

[35] By extension, this amounts to an allegation that each of the Tribunal members assigned to this matter will be biased, or will be seen as biased, in favour of Max-Atlas, simply because Mr. Jarosz is a member of the five-lawyer team acting for Max-Atlas.

[36] As stated in subsection 3(1) of the *Canadian International Trade Tribunal Act*,[12] the Tribunal is established as follows:

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10 See *R. v. Neil*.
11 Letter from BLG to the Tribunal requesting the removal of P. Jarosz, dated July 19, 2021, at 8.
12 R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

> There is established a tribunal, to be known as the Canadian International Trade Tribunal, consisting of up to seven permanent members, including a Chairperson and a Vice-chairperson, to be appointed by the Governor in Council.

[37] Section 17 of the *CITT Act* deems the Tribunal to be a "court of record" as follows:

> (1) The Tribunal is a court of record and shall have an official seal, which shall be judicially noticed.
>
> (2) The Tribunal has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

[38] There is a strong presumption that adjudicators carry out their duties impartially.[13] This presumption applies to members of both courts and administrative tribunals.[14] Where the adjudicators form a panel, the presumption is that each and every adjudicator will act impartially.[15]

[39] As the Tribunal is deemed to be a court of record, its members take an oath upon assuming office. The jurisprudence recognizes the solemnity of taking an oath as reinforcing the presumption of impartiality.[16]

[40] According to BLG, Mr. Jarosz's former position creates the perception of bias or a reasonable apprehension of bias, in the mind of a reasonable person. However, BLG's starting point for this argument is premised on an incomplete, if not incorrect, recitation of the applicable legal test.

[41] The test for apprehension of bias is whether a reasonably informed person, having knowledge of all relevant circumstances, would think that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly.[17] In doing so, the person must view the situation from a realistic and practical standpoint. As stated by the Supreme Court of Canada in *R. v. S. (R.D.)*:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
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> > [T]he 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. . . . [The] test is "what would an informed person, viewing the

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13 *Gulia v. Canada (Attorney General)*, 2021 FCA 106 [*Gulia*] at para. 23*; Zündel v. Citron*, [2000] 4 F.C. 225 [*Zündel*] at paras. 36-37.

14 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 32 [*R. v. S. (R.D.)*]; *Zündel* at para. 37; *Sandhu v. Canada (Public Safety and Emergency Preparedness),* 2019 FC 889 at para. 61.

15 *Zündel* at para. 37; *E.A. Manning Ltd. v. Ontario (Securities Commission),* [1995] O.J. No. 1305 at para. 28; *Finch v. Assn. of Professional Engineers and Geoscientists of British Columbia,* [1996] B.C.J. No. 743 at para. 26.

16 *R. v. S. (R.D.)* at paras. 116-117; *Lee v. Canada (Citizenship and Immigration)*, 2011 FC 617 at para. 14; *Sanofi-Aventis Canada Inc. v. Novopharm Limited*, 2006 FC 1473 at para. 24.

17 *Wewaykum Indian Band v. Canada*, 2003 SCC 45 [*Wewaykum*] at para. 60.

> matter realistically and practically -- and having thought the matter through -- conclude. . . ."

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.[18]

[42] A party alleging apprehension of bias bears the burden of rebutting the presumption that the adjudicator will act impartially. The presumption is not rebutted by suspicions, insinuations, conjecture, impressions or opinions.[19] The challenge must rest on serious and substantial grounds and be supported by cogent evidence.[20]

[43] Bias has been judicially defined as follows:

> . . . a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.[21]

[44] Recently, the Federal Court of Appeal reiterated that "bias" is personal to an individual as follows:

> Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario Securities Commission*, 1995 CanLII 1706 (ON CA), 23 O.R. (3d) 257, 32 Admin. L.R. (2d) 1 (C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 1992 CanLII 1527 (BC CA), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (C.A.).[22]

[45] The "reasonable person" as the barometer for the detection of a reasonable apprehension of bias signals that the legal test is an objective one and takes into account the presumption of

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18 *R. v. S. (R.D.)* at para. 111.
19 *Agnaou v. Canada (Attorney General)*, 2014 FC 850 at para. 47.
20 *Gulia* at para. 23.
21 *Wewaykum* at para. 58. Also see *R. v. S. (R.D.)* at para. 106.
22 *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 (CanLII) at para. 33.

impartiality.[23] Within that framework, apprehension of bias does not arise from a reflexive, superficial or hurried assessment. Nor is it assessed from the standpoint of the "very sensitive or scrupulous conscience".[24] The reasonable person is "reasonably informed" and has "knowledge of all relevant circumstances". As such, there is a presumption that a reasonably informed person would have sufficient information to assess the risk of bias, for practical purposes, having regard to the overall context.[25]

[46] In the present circumstances, the knowledge of the reasonably informed person includes some familiarity with the Tribunal's mandate, its operational structure and the procedures used by the Tribunal to conduct proceedings under *SIMA*.

[47] When conducting proceedings under *SIMA*, the Tribunal performs both an adjudicative and investigatory function. The Tribunal members are supported by specialized staff, employed by the ATSSC, with expertise in the economic issues relevant to trade remedies, who collect and analyze relevant market data and information and who prepare an investigation report which is distributed to the parties and forms part of the Tribunal's record in proceedings under *SIMA*. The Tribunal is also supported by legal staff. In addition to the panel of three adjudicators, the overall team assigned to particular proceedings under *SIMA* may comprise at least three to six other persons, all public servants employed in some capacity by the ATSSC, including legal counsel, analysts and registry staff.[26]

[48] Notwithstanding the institutional support provided to Tribunal members by legal and non-legal staff, the conduct of Tribunal inquiries and the decision-making function under *SIMA* are reserved to the panel of Tribunal members assigned to hear the case and to them alone.

[49] BLG has advanced no grounds, much less evidence, demonstrating that any member of the panel assigned to decide this case is unable to bring an impartial mind to the proceedings. The argument is entirely speculative.

[50] Other than acting as an advocate for Max-Atlas, Mr. Jarosz has no capacity to control, influence, or induce the panel members, whether individually or collectively, to judge this case unfairly. He is not in a position to reward or withhold advantages or employment to any Tribunal member. Nor is any particular personal or familial relationship being alleged that may be construed as an instrument of influence.[27]

[51] Implicit in BLG's argument is the premise that one individual (Mr. Jarosz) would be able to exercise a disproportionate influence over the panel members, either individually or collectively, such that they would be unable to exercise their own independent judgment. Moreover, it further presumes that he would be able to do so at a distance while working as part of a litigation team at a private law firm. In the Tribunal's view, this premise is purely speculative and unrealistic, and would be so viewed by a reasonable person.

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23 *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 SCR 851 at para. 2.

24 *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 395; *Wewaykum* at para. 76.

25 *Wewaykum* at paras. 74-77.

26 The names of Tribunal personnel working on a case are listed in the Tribunal's Determination and Reasons in each case.

27 See, for example, *Ahumada v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 97; *Canada (Attorney General) v. Fetherston*, 2005 FCA 111.

[52] The professional experience obtained by Mr. Jarosz as counsel to the Tribunal may provide McMillan's client with a tactical litigation advantage, but that does not amount to creation of "bias", in the sense of causing a reasonable person to believe that the Tribunal members are incapable of judging this case fairly. Nor does it create procedural unfairness or an uneven playing field that the Tribunal is required to level.

[53] In the context of litigation, tactical advantage can take many forms. Counsel who devote more time to research and preparation are better placed, in terms of tactical advantage, than one who is less prepared. Viewed through the eyes of an adverse party, a party with greater resources or more experienced counsel may be perceived as possessing a form of "advantage". However, that view cannot be extrapolated as being reflective of the mindset of an impartial adjudicator by presuming that the adjudicator will be inherently biased in favour of a party who is represented by a particular lawyer or law firm.

[54] In conveying its objection concerning Mr. Jarosz to McMillan, BLG submitted that Mr. Jarosz should be subjected to a one year "cooling off period" with respect to "appearing" before the Tribunal, but stated the following:

> During the cooling off period he can counsel clients and perform other activities in the normal course of being a lawyer.[28]

[55] If the alleged prejudice to BLG's client is the "insider knowledge" concerning the Tribunal that Mr. Jarosz will supposedly bring to the representation of McMillan's clients, it is difficult to see how that knowledge would not also be usable with respect to other aspects of practising trade law that BLG contends would be permissible for Mr. Jarosz to undertake,[29] so long as a notice of representation is not filed with the Tribunal.

[56] The Tribunal has previously commented that the fact that a lawyer "took with him his know-how, experience and expertise of the Tribunal's practice and trade law" when he left the Tribunal did not in and of itself prevent him from appearing before the Tribunal.[30] This is also consistent with the distinction drawn between "general know-how" and confidential information specific to a given case, where a lawyer would not be prevented from providing advice based on the former, even in a situation where the current client's interests are adverse to those of a former client (which is not the case here).[31]

[57] Accordingly, it appears that the substance of BLG's complaint lies not with Mr. Jarosz's use of work experience gleaned as counsel for the Tribunal, but rather the explicit association of his name with any submissions, whether written or oral, that are advanced on behalf of Max-Atlas. This amounts to an allegation, albeit implicit, that Mr. Jarosz's name alone would sway the Tribunal, add credibility to the submissions in the eyes of the Tribunal, all regardless of the underlying evidence and substantive merit of Max-Atlas's case.

[58] The Tribunal categorically rejects such a premise.

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28 Letter from BLG to the Tribunal requesting the removal of P. Jarosz, dated July 19, 2021, at 8.

29 Which could conceivably encompass tasks such as litigation strategy, preparation of witness statements, etc.

30 *Black Granite Memorials* at 5.

31 *Greater Vancouver Regional District v. Melville*, 2007 BCCA 410 (CanLII) at paras. 29-30; see also the interpretative note to rules 3.4-17 to 3.4-23 of the Law Society of Ontario Rules of Professional Conduct.

[59] The jurisprudence clearly establishes that adjudicators, both judicial and quasi-judicial, are presumed to be impartial. The argument that Mr. Jarosz's representation of Max-Atlas creates a reasonable apprehension of bias rests on the slender perch that an apprehension of bias may arise from a presumption of institutional familiarity alone. By extension, this would suggest that the same conclusion may flow from the fact that more experienced counsel will possess greater familiarity with the Tribunal due to more frequent appearances, in contrast to more junior counsel or those having a less active practice before the Tribunal.

[60] The identity of a party's counsel is a wholly irrelevant consideration to the determination of proceedings on its evidential and substantive merits. The fact that counsel may be known to the Tribunal does not operate to create favouritism, much less bias, operating to the detriment of other parties or their counsel. Cases are heard and decided by the Tribunal having regard to their substantive merit and the evidence and the arguments presented.

[61] Cogent evidence of a higher degree of familiarity or additional circumstances than the sole fact of a past professional relationship between counsel and Tribunal members would be required to raise a reasonable apprehension of bias.[32]

[62] As noted above, BLG cites *Flat Hot-rolled Sheet*, a prior decision of the Tribunal wherein a former in-house counsel to the Tribunal was disqualified from acting before the Tribunal in an inquiry under *SIMA*. However, *Flat Hot-rolled Sheet* is readily distinguishable on its facts.

[63] In *Flat Hot-rolled Sheet*, the counsel who was disqualified had been employed directly by the Tribunal as counsel to the Tribunal when the anti-dumping investigation at issue was commenced. He remained in that position while the inquiry was pending before the Tribunal, up to and including its deliberations. In those circumstances, even when not assigned to the specific case, counsel for the Tribunal could have had access to information[33] filed with the Tribunal at the preliminary inquiry stage. Such information would have remained relevant to the subsequent inquiry where the Tribunal counsel sought to represent a party. Those circumstances do not preclude the possibility that the Tribunal counsel may also have provided advice to the Tribunal during the course of the preliminary inquiry.

[64] Those circumstances do not exist here. It is undisputed that these proceedings had not been commenced or referred to the Tribunal until *after* Mr. Jarosz had left as counsel to the Tribunal.

[65] Moreover, the decision in *Flat Hot-rolled Sheet* was rendered in 1999, and thus predates some of the jurisprudence that is now relevant to disposition of this motion, nearly 22 years following the decision in *Flat Hot-rolled Sheet*. In particular, the Tribunal notes that the brief reasons in *Flat Hot-rolled Sheet* do not address the presumption of impartiality that attaches to judicial and quasi-judicial decision-makers, nor the jurisprudence which holds that a finding of apprehension of bias should not be made without cogent justification.

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32 *Bailey v. Saskatchewan Registered Nurses' Assn.*, [1996] S.J. No. 312, (affirmed on this point in *Bailey v. Saskatchewan Registered Nurses' Assn.*, [1998] S.J. No. 332 at paras. 184-185); *Pierro v. Drake Medox Health Services (Vancouver) Ltd.*, 2003 BCHRT 34.

33 Including information that may have been designated as confidential.

[66] Findings of apprehension of bias should not be made lightly, as this is susceptible of creating significant disruption to the orderly and efficient administration of justice.[34]

[67] For the reasons given above, BLG has not advanced any evidence, other than unsupported allegations, which would tend to show that members of the Tribunal are unable to decide these proceedings fairly, on its substantive merits. Accordingly, BLG has not demonstrated that a reasonable person would consider that a reasonable apprehension of bias exists in this case.

(2) A litigant should not be deprived of his or her choice of counsel without good cause

[68] As set out above, the Tribunal finds that Mr. Jarosz's appearance creates neither a conflict of interest, nor a reasonable apprehension of bias on the part of Tribunal members. The Tribunal nevertheless turns to a consideration of the second principle identified in *MacDonald Estate*; this further supports the view that there is no basis to justify Mr. Jarosz's disqualification in these proceedings.

[69] In deciding whether Mr. Jarosz should be disqualified from acting, the interests of Max-Atlas must also be considered. A litigant should not be deprived of its choice of counsel without good cause.

[70] Although Mr. Jarosz is a member of a team of McMillan lawyers acting for Max-Atlas, that team is presumably organized in a manner so as to distribute the work that needs to be done in order to prepare Max-Atlas's case. As proceedings under *SIMA* are conducted on relatively brief statutory timelines, the forced withdrawal of one member of the litigation team may prejudice the ability of Max-Atlas's case to be fully prepared on a timely basis. In considering the possible prejudice to Max-Atlas, the timeliness of the objection to the composition of its litigation team is a significant factor.

[71] The Tribunal issued a notice of preliminary injury inquiry on June 11, 2021. That notice fixed deadlines for the completion of next steps, including the filing of notices of representation, which were due by June 23, 2021.

[72] On behalf of Max-Atlas, McMillan filed notices of representation for five counsel, including Mr. Jarosz, on June 14, 2021.

[73] On June 21, 2021, BLG filed notices of representation for CIE Manufacturing and Ocean Trailer/C Keay Investments. BLG filed additional notices of representation for Groupe St-Henri on June 22, 2021, and Dongguan CIMC Vehicle Co. Ltd. on June 23, 2021.

[74] The filing of notices of representation, and the accompanying undertaking of counsel, enables counsel to have access to the Tribunal's file. The list of participants in these proceedings, including the names of counsel for each party, was circulated to parties on June 28, 2021. As such, BLG had constructive knowledge, at least as early as June 28, 2021, that Mr. Jarosz was one of the counsel acting for Max-Atlas.

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34 *R. v. Neil* at para. 14; *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.*, 1992 CanLII 934 (BC CA) at para. 13; *Samson Indian Nation and Band v. Canada*, [1998] 3 FC 3; *Bruzzese v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1119 at para. 36.

[75] For the most part, counsel appearing before the Tribunal in trade remedy cases comprise a relatively small and specialized segment of the bar. The Tribunal finds it implausible that BLG would not have recognized Mr. Jarosz as a former counsel to the Tribunal upon receipt of the list of participants.

[76] The Tribunal advised parties on June 29, 2021, that commencement of these proceedings post-dated Mr. Jarosz's departure as counsel to the Tribunal and that consequently Mr. Jarosz had no access to any information entrusted to the Tribunal referable to these proceedings.

[77] It was not until eight (8) days after having constructive, if not actual, knowledge of Mr. Jarosz's representation of Max-Atlas and seven (7) days after the Tribunal had confirmed that these proceedings post-dated Mr. Jarosz's departure as counsel to the Tribunal that BLG objected to the notice of representation filed by Mr. Jarosz. That objection was conveyed to McMillan by way of letter dated July 6, 2021.[35]

[78] The following day, McMillan replied by way of succinct email advising that Mr. Jarosz's notice of representation would not be withdrawn.

[79] Twelve (12) days later, on July 19, 2021, BLG wrote to the Tribunal seeking an order that Mr. Jarosz be directed to withdraw his notice of representation. McMillan filed responding submissions on July 22, 2021. BLG filed no reply.

[80] The Tribunal dismissed BLG's request to remove Mr. Jarosz on August 4, 2021, and issued its preliminary determination of injury on August 9, 2021, in accordance with the statutory deadline prescribed by *SIMA*.

[81] The jurisprudence makes it clear that objections raising an apprehension of bias must be raised at the earliest possible opportunity.[36] Indeed, the British Columbia Court of Appeal has observed that "the genuineness of the apprehension becomes suspect when it is not acted on right away."[37]

[82] The timeline for a preliminary injury inquiry pursuant to *SIMA* is 60 days. BLG's objection to Mr. Jarosz's notice of representation was made to the Tribunal on July 19, 2021, or approximately 21 days after BLG obtained access, on June 28, 2021, to documents filed with the Tribunal, and 39 days, or approximately 2/3 of the way through the 60-day timeline for a preliminary injury inquiry. The delay in raising this objection with the Tribunal has not been addressed or explained, notwithstanding that the crux of the objection is that the Tribunal's capacity to fairly decide these proceedings is in doubt because of an apprehension of bias.[38]

[83] In these circumstances, the Tribunal finds that the second factor set out in *MacDonald Estate* favours Max-Atlas. With the inquiry under *SIMA* is well under way, there is greater prejudice to

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35 The Tribunal was not copied on this correspondence.

36 *Health Genetic Centre Corp. (Health Genetic Center) v. New Scientist Magazine,* 2019 ONCA 977 at para. 11; *Gardaworld Cash Services Canada Corporation v. Smith*, 2020 FC 1108 at para. 80.

37 *Eckervogt v. British Columbia*, 2004 BCCA 398, 30 B.C.L.R. (4th) 291 at para. 48.

38 *Hennessey v. Canada*, 2016 FCA 180 at para. 21; *Chrétien v. Canada (Attorney General),* 2005 FC 925 at para. 44.

Max-Atlas in having its legal team disrupted when this is weighed against the alleged prejudice to adverse parties underpinned by unsupported allegations of potential bias.

(3) The desirability of permitting reasonable mobility in the legal profession

[84] The third consideration identified in *MacDonald Estate* recognizes the desirability of permitting reasonable mobility in the legal profession.

[85] The following has been noted by the Supreme Court of Canada in *R. v. Neil*:

> If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other "ethical" relief using "the integrity of the administration of justice" merely as a flag of convenience, fairness of the process would be undermined. . . .
>
> Sopinka J. in *MacDonald Estate*, *supra*, also mentioned as an objective the "reasonable mobility in the legal profession" (p. 1243). In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around. Yet 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.[39]

[86] BLG argues that Mr. Jarosz should be subject to a "cooling off period" of at least one year before being able to "appear" before the Tribunal. In this regard, it cites numerous ethical directives that apply to subsequent employment obtained by members of the public service, as follows:

> The underlying premise of these guidelines is to reinforce the integrity of the public service by preventing public servants from improperly benefiting themselves or others after they leave their positions with government (see *Introduction to the Application Guide for Post-Employment under the Policy on People Management and the Directive on Conflict of Interes*t). This Guide provides that "all public servants have a responsibility to minimize the possibility of real, apparent or potential conflict of interest between their responsibilities within the federal public service and their subsequent employment outside the public service." The Guide limits what public servants can do post employment. It specifically states that public servants may not:
>
> - make representations on behalf of entities or individuals outside of the public service to any government organization with which they had significant official dealings,

[39] *R. v. Neil* at paras. 14-15.

> either directly or through their subordinates, in the year immediately prior to leaving their employment in the public service.
>
> - Making representations may consist of many different activities, such as intervening on behalf of the external person or entity, lobbying as defined by the Office of the Commissioner of Lobbying of Canada, making sales calls, or acting as an official agent or advocate. . . .[40]

[87] BLG further quotes the following from sections 4.2.19 and 4.2.20 of the Government of Canada Treasury Board's *Directive on Conflict of Interest*:

> 4.2 Persons employed are responsible for the following:
>
> . . .
>
> 4.2.19 Before leaving the public service, reporting in writing to their deputy head all intended future employment and activities that might give rise to a real, apparent or potential conflict of interest in relation to their most recent duties and responsibilities;
>
> 4.2.20 If occupying a position designated as a risk for post-employment conflict of interest, before leaving the public service and during the one-year post-employment limitation period:
>
> > 4.2.20.1 Reporting in writing to their deputy head all firm offers of employment and activities that might give rise to a real, apparent or potential conflict of interest in relation to their most recent duties and responsibilities;
> >
> > 4.2.20.2 Seeking the deputy head's written approval before:
> >
> > > 4.2.20.2.1 Accepting an appointment to a board of directors of, or employment with, outside entities or individuals with which they had significant official dealings, either directly or through their subordinates, in the year immediately prior to leaving their employment in the public service;
> > >
> > > 4.2.20.2.2 Making representations on behalf of entities or individuals outside the public service to any government organization with which they had significant official dealings, either directly or through their subordinates, in the year immediately prior to leaving their employment in the public service; . . .[41]

[88] A contextual reading of the guidelines relied upon by BLG reveals that they are directed to the prevention of real or apparent *conflict of interest* as between an individual's duties while employed in the public service and interests arising from subsequent employment in the private sector.

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40 Letter from BLG to the Tribunal requesting the removal of P. Jarosz, dated July 19, 2021, at 3.

41 Online at: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32627>.

[89] Even when viewed in the context of the ethical obligations arising from a solicitor-client relationship,[42] this situation creates no *conflict of interest* as between Mr. Jarosz's former role as counsel to the Tribunal and his representation of Max-Atlas.

[90] A conflict of interest arises where a lawyer is placed in the position of having irreconcilable duties or interests.[43] On the facts of this case, no conflict of interest exists. Mr. Jarosz owes no duty to the Tribunal with respect to information relevant to these proceedings that was entrusted to him. Such information never existed while he was counsel to the Tribunal. There is no allegation, much less any evidence, that he owes any duty to BLG or the clients that it represents in these proceedings.

[91] Although the respective clients of BLG and McMillan have interests that are adverse, the Tribunal is not adverse in interest to any of the parties to these proceedings or to their counsel.

[92] Moreover, a lawyer's representation of a client before an administrative tribunal making a quasi-judicial determination is not analogous to, and is readily distinguishable from, a situation where a former public servant engages in lobbying, or seeks to influence a government department with respect to policy, or to otherwise secure some advantage or benefit for the benefit of a private sector interest. The Tribunal does not make policy or confer benefits on private entities as a result of lobbying—it is an impartial decision-maker with a statutory mandate whose proceedings are quasi-judicial, transparent and a matter of public record.

[93] BLG then analogizes the position of Mr. Jarosz at the Tribunal to that of a clerk at the Supreme Court of Canada. In doing so, it quotes unpublished guidelines pertaining to Supreme Court of Canada clerks that are reproduced in an academic article by Professor Andrew Flavelle Martin entitled *Legal Ethics And Judicial Law Clerks: A New Doctrinal Account*.[44]

[94] In discussing post-service employment restrictions that may apply to judicial clerks at the Supreme Court of Canada, Professor Martin compares their circumstances to that of judges returning to private law practice, including limitations applicable to judges appearing before their former court:

> Of course, the general rule on appearing in front of judges with whom a lawyer has a close relationship will apply to former law clerks:
>
> When acting as an advocate, a lawyer must not: . . . appear before a judicial officer when the lawyer, the lawyers associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice.

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42 Which are more stringent than the directives relied upon by BLG, at least arguably, having regard to the fiduciary and common law duties owed by a solicitor to his or her client. These duties and responsibilities are distinguishable from an employment relationship, i.e. as between a person who is not employed as a solicitor by the Government of Canada.

43 *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 [*Strother*] at para. 132.

44 *Legal Ethics and Judicial Law Clerks: A New Doctrinal Account*, (2020) 71 UNB LJ 248.

> The application of this rule turns on the nature of the relationship between the judge and the law clerk.[45]
>
> [Footnotes omitted]

[95] Professor Martin's article thus underscores that these types of situations must be considered in their specific contexts. This essentially gives rise to the type of analysis undertaken to discern whether there is a reasonable apprehension of bias. For the reasons given above, those factors are not present here.

[96] Further, Professor Martin recognizes the potential problems that may be created by "cooling-off periods", including the risk of making individuals unemployable, for practical purposes. Noting that judicial clerks serve for a limited period at the beginning of their legal career and unlike a judge, do not receive a pension, Professor Martin discusses the following merits and disadvantages of "cooling-off periods":

> In contrast, prohibitions on soliciting post-service practice opportunities are equally warranted—though not equally feasible—for law clerks as they are for judges. As Pitel & Bortolin note, there is nothing specific in Ethical Principles for Judges that "would prohibit judges from negotiating employment with parties to a dispute or their lawyers . . . [a]lthough this is already an obvious violation of judicial ethics principles." As Wilner notes, law clerks doing the same creates "possible conflicts of interests and the appearance of impropriety." While Wilner does not advocate an absolute prohibition, he suggests that "[w]hen in doubt, during their employment it would be prudent for clerks to inform their judges about any potential conflicts of interest raised by their job hunting." Here too a cooling-off period would promote public confidence in the administration of justice. But in the age of the megafirm, a law clerk serving for a single year would be de facto prevented from seeking employment. While I appreciate the concurrence by Cory J in *MacDonald Estate v. Martin* that "[n]either the merger of law firms nor the mobility of lawyers can be permitted to affect adversely the public's confidence in the judicial system." I acknowledge that such a cooling-off period for law clerks would be impractical in practice and destructive to the institution of clerking.[46]
>
> [Footnotes omitted]

[97] The Tribunal does not find the analogy between Mr. Jarosz's prior role with the Tribunal and the role of a Supreme Court of Canada clerk to be a relevant comparison. Notwithstanding, the issues raised by this comparison are generally consistent with the applicable principles for apprehension of bias and having regard to the first of the competing values discussed in *MacDonald Estate*. The Tribunal reaches the same conclusions as above with respect to this aspect of BLG's argument.

[98] Given the specialized nature of trade remedy law, the limitations that BLG suggests being imposed upon Mr. Jarosz for a period of one year are highly and unduly restrictive.

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45 *Ibid.* at 263.
46 *Ibid.* at 264-265.

[99] In the absence of potential misuse of information arising from a solicitor-client relationship, or other compelling justification, such as the absence of a reasonable apprehension of bias, which are not present here,[47] the Tribunal finds that removal of Mr. Jarosz on the basis of a retroactively applied "cooling off" period, would be detrimental to the public interest in the reasonable mobility of the legal profession.

SUMMARY

[100] BLG's request for an order directing Mr. Jarosz to withdraw his notice of representation is contingent on a finding of reasonable apprehension of bias on the part of the Tribunal. Such a finding can only be made if the strong presumption of the Tribunal's impartiality is rebutted. In turn, this requires a clear and demonstrable showing that a reasonable and informed person would conclude that it is more likely than not that the members of the Tribunal assigned to hear this case, whether consciously or unconsciously, would not decide this matter fairly. The jurisprudence requires a high threshold for such a finding. Mere conjecture, hypothesis and speculation are insufficient. The Tribunal finds that BLG's request fails to meet the applicable evidential threshold and legal tests.

[101] Accordingly, the request is denied.

Frédéric Seppey
Frédéric Seppey
Presiding Member

Susan D. Beaubien
Susan D. Beaubien
Member

Randolph W. Heggart
Randolph W. Heggart
Member

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47 *Strother* at para. 51.