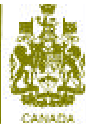
CANADIAN INTERNATIONAL TRADE TRIBUNAL


TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, June 9, 1998

Review No.: RR-97-008

IN THE MATTER OF a review, under section 76 of the *Special Import Measures Act*, concerning the dumping in Canada of certain solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, in diameters up to 6 in. and the metric equivalent, for use in heating and plumbing applications, originating in or exported from the United States of America and produced by or on behalf of Elkhart Products Corporation, Elkhart, Indiana, Nibco Inc., Elkhart, Indiana, and Mueller Industries, Inc., Wichita, Kansas, their successors and assigns;

AND IN THE MATTER OF a motion by Cello Products Inc. for an order disqualifying Professor G. Franklin Mathewson from acting as counsel of record for Amcast Industrial Limited and Elkhart Products Corporation in this review and denying him access to the confidential information on the record of the proceedings in this review.

DECISION OF THE TRIBUNAL

HAVING considered the submissions of Mr. Jeffery Jenkins for Cello Products Inc. and Ms. Georgina Starkman Danzig for Amcast Industrial Limited and Elkhart Products Corporation;

IT IS HEREBY ordered that the motion for an order disqualifying Professor G. Franklin Mathewson from acting as counsel of record for Amcast Industrial Limited and Elkhart Products Corporation and for a further order denying him access to the confidential information on the record of the proceedings in this review be dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
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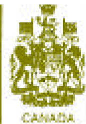

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AND IN THE MATTER OF a motion by Cello Products Inc. for an order disqualifying Professor G. Franklin Mathewson from acting as counsel of record for Amcast Industrial Limited and Elkhart Products Corporation in this review and denying him access to the confidential information on the record of the proceedings in this review.

REASONS FOR DECISION

Amcast Industrial Limited (Amcast) and Elkhart Products Corporation (Elkhart) filed notices of appearance as parties in which they identified as counsel who will represent them, Professor G. Franklin Mathewson, Professor of Economics and Director of the Institute for Policy Analysis at the University of Toronto. Professor Mathewson filed notices of appearance to act as counsel, as well as declarations and undertakings requesting access to confidential information on the record of the proceedings in this review.

On May 4, 1998, the Canadian International Trade Tribunal (the Tribunal) sent a letter to counsel of record in this review regarding disclosure of confidential information to Professor Mathewson, as counsel for Amcast and Elkhart, and enclosing his curriculum vitae. The Tribunal stated, in part, that, in the absence of evidence that he does not meet the requirements of his Declaration and Undertaking, the Tribunal would issue the order permitting the disclosure of confidential information in this review to him and indicated the deadline for submissions.

By letter dated May 7, 1998, counsel for Cello Products Inc. (Cello) objected to Professor Mathewson acting as counsel and being given disclosure of confidential information in the above-referenced review. In his letter, counsel challenged the approach taken by the Tribunal in its letter dated May 4, 1998, which, he submitted, presumes that persons are counsel of record. In counsel's view, this approach is inconsistent with the ordinary meaning of the word "counsel" and the goals of the *Canadian International Trade Tribunal Act*[1] (the CITT Act).

Counsel for Cello referred to the definition of "counsel" in subsection 45(4) of the CITT Act as "any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party." He submitted that Professor Mathewson does not appear "on the party's behalf" and was "retained by Amsterdam & Peroff." In his view, Amcast and Elkhart already retained counsel, Amsterdam & Peroff, and Professor Mathewson is, therefore, ineligible to act as counsel.

1. R.S.C. 1985, c. 47 (4th Supp.).

It was submitted by counsel for Cello that Professor Mathewson cannot "act" before "this Court." In support of his submission, counsel referred to *MacDougall* v. *Law Society of Upper Canada*[2] as an example of a case that defines the duties performed by counsel before a court. Counsel argued that Professor Mathewson has not indicated any experience as counsel or advocate before the Tribunal or other courts and that his credentials are best suited to the role of witness. Counsel referenced the Canadian Bar Association's Code of Professional Conduct and, more particularly, the provision covering "Practise by Unauthorized Persons." Counsel also referenced the Tribunal's decision in *Romanko*[3] in which, he submitted, the Tribunal said that, despite Mr. Romanko's training and experience, he was denied access to confidential information because he was not a lawyer and was not bound by any code of professional conduct applicable to lawyers. In counsel's view, the concern with the lack of guarantee must go not only to the question of confidential information but also to the granting of status of "counsel."

Counsel for Cello submitted that Amcast and Elkhart are not restricted in their choice of Amsterdam & Peroff as counsel. Professor Mathewson may assist counsel and the parties without reviewing the confidential record or appearing in the proceedings, and Amcast and Elkhart will not suffer any prejudice or harm due to lack of experienced counsel or lack of access to confidential information. Counsel submitted that the assumption that any person who is not a director, servant or employee of the party is entitled to complete access to the confidential record and to make argument at the Tribunal is inconsistent with the goals of the CITT Act, as expressed by the concerns of the Tribunal and the Federal Court of Appeal's ruling that the "predominant concern of Parliament [is] that confidential information not find its way into hands of business competitors or rivals of the person providing the information.[4]"

By letter dated May 14, 1998, counsel from Amsterdam & Peroff confirmed that Professor Mathewson would not be called as a witness.

In response to the submissions of counsel for Cello, counsel from Amsterdam & Peroff submitted that there is a statutory presumption that any person may receive the status of counsel, as of right, provided that person satisfies the definition of "counsel" under subsection 45(4) of the CITT Act. There has been no evidence adduced to suggest that Professor Mathewson has ever served as a director, servant or employee of Amcast or Elkhart. As a result, the issue which remains to be determined is whether Professor Mathewson is acting on behalf of Amcast and Elkhart in the proceedings.

Counsel from Amsterdam & Peroff submitted that Professor Mathewson has the same authority to act on behalf of Amcast and Elkhart as does Amsterdam & Peroff, as evidenced by his filing separate notices of appearance. Moreover, even if Amsterdam & Peroff retained Professor Mathewson on behalf of Amcast and Elkhart, it would have done so only in its capacity as agent for Amcast and Elkhart. In either case, Professor Mathewson is acting for Amcast and Elkhart and any and all benefits procured and costs incurred as a result of the retainer of Professor Mathewson will be borne by Amcast and Elkhart, not Amsterdam & Peroff.

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2. (1890), 18 S.C.R. 203.
3. *In the Matter of a Notice of Motion by Stelco Inc. for an Order Disqualifying Mr. Daniel W. Romanko*, Inquiry No. NQ-93-007, June 21, 1994.
4. *Canada (Director, Investigation and Research Competition Act)* v. *Canadian International Trade Tribunal* (1991), 48 F.T.R. 50 at 54, par. 20, Action No. T-2108-91, August 23, 1991.

In the view of counsel from Amsterdam & Peroff, there is nothing in the CITT Act to preclude the use of more than one counsel by a party, and Professor Mathewson's expertise is a complement to the expertise of Amsterdam & Peroff. Taken together, Professor Mathewson and Amsterdam & Peroff serve jointly as co-counsel for Amcast and Elkhart.

With respect to the issue of whether Professor Mathewson is precluded from acting as counsel in this review, counsel from Amsterdam & Peroff submitted that references to the unauthorized practice of law are not relevant, as "counsel," as defined in the CITT Act, is authorized to act as such in this proceeding. Counsel submitted that there are numerous examples of statutes which permit individuals, who are not lawyers, to make appearances, advocate or otherwise "act" before various courts and tribunals.[5]

Counsel from Amsterdam & Peroff submitted that, had the legislators intended to further qualify who may act as counsel, by restricting those persons to "qualified lawyers" or "experienced advocates" or "professionals governed by a code of conduct," language to that effect could have been incorporated into the CITT Act.

Counsel from Amsterdam & Peroff then addressed the issue of whether Professor Mathewson should be granted access to the confidential record. Counsel submitted that, but for the fact that Professor Mathewson is not a lawyer and is not bound by a professional code of conduct, Cello has not proffered any evidence to suggest that granting Professor Mathewson access to the confidential record would risk disclosure of confidential information. Counsel acknowledged that the fact that Professor Mathewson may not be a lawyer bound by a code of professional conduct may be a relevant factor. However, counsel pointed out that, even in *Romanko*, it was the nature of Mr. Romanko's earlier employment, and not the fact that Mr. Romanko was a trade consultant, that persuaded the Tribunal to exercise its discretion in favour of denying Mr. Romanko access to confidential information.

Counsel from Amsterdam & Peroff submitted that the Tribunal has a practice of permitting economists, employees of the Tribunal and other independent trade consultants access to confidential information although they are not lawyers bound by any professional codes of conduct. Furthermore, Professor Mathewson has experience with and respect for confidential information, as he has previously appeared before the Competition Tribunal and been given access to confidential information.

In the view of counsel from Amsterdam & Peroff, if the Tribunal denies Professor Mathewson, as counsel for Amcast and Elkhart, full disclosure of confidential information, it would deprive Amcast and Elkhart of the right to the kind of hearing afforded them under the *Special Import Measures Act*.[6] In counsel's view, if Professor Mathewson is denied access to the confidential information, he will not be in a position to adequately assess the case to be met by Amcast and Elkhart and, therefore, will not be able to properly represent the interests of Amcast and Elkhart.

Finally, counsel from Amsterdam & Peroff suggested that, in order to reduce the risk of inadvertent disclosure and enhance the protection of the confidential record, Amsterdam & Peroff agreed to receive and repose at its offices all confidential information and documentation directed to Professor Mathewson.

In his reply submissions by letter dated May 25, 1998, counsel for Cello submitted that the Tribunal must perform a two-part analysis. It should first assess the experience, credentials and competence of

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5. *R.* v. *Lawrie and Pointts Ltd.* (1987), 59 O.R. (2d) 161 at 166 (O.C.A.).
6. R.S.C. 1985, c. S-15.

persons who apply to receive status as counsel. The Tribunal must focus on the person's ability to operate with the same degree of caution and competence as the experienced advocates who appear regularly in the proceedings. The Tribunal must also consider the accountability of the individual, the availability of sanctions, and the chilling effect on future proceedings in the event that confidentiality and/or procedural efficiency are impeded by the individual. If "counsel" status is conferred, the Tribunal must then perform a second analysis to determine what portions, if any, of the confidential record may be disclosed to that counsel.

Counsel for Cello submitted that the permissive interpretation of the definition of "counsel" in subsection 45(4) of the CITT Act proposed by counsel for Amcast and Elkhart is overly broad and that it "is absurd to suggest that the Tribunal has complete and wide discretion to declare such persons as counsel." The definition of "counsel" in the CITT Act says that it "includes any person," which means that it does not include all persons, and that some discretion may be exercised by the Tribunal.

It was suggested by counsel for Cello that it is not tenable to suggest that Parliament intended to exclude a requirement for "experienced advocates" merely because the words were not expressly drafted into subsection 45(4) of the CITT Act. In counsel's view, the phrase "experienced advocates" is consistent with the plain meaning of the word "counsel." In addition, it is consistent with the concerns of Parliament that sensitive business information be dealt with in a way that minimizes risk of disclosure. Counsel submitted that Professor Mathewson has not demonstrated his skill as counsel.

In addressing the first issue, that is, whether Professor Mathewson may be considered to be "counsel" for the purposes of this review, the Tribunal relies on the definition of "counsel" in subsection 45(4) of the CITT Act for guidance. Subsection 45(4) provides that, for the purposes of subsection 45(3), "'counsel', in relation to a party to proceedings, includes any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party." The latter part of this definition is incorporated into rule 2 of the *Canadian International Trade Tribunal Rules*[7] which provides that "counsel" includes any person who acts in a proceeding on behalf of a party. The requirement that counsel not be a "director, servant or employee of the party" is incorporated into the declaration and undertaking which is required to be filed by counsel requesting access to confidential information.

Professor Mathewson has filed a declaration with the Tribunal in which he declares that he is not a director, servant or employee of a party to this review. Counsel for Cello has not provided any evidence which contradicts or calls into question Professor Mathewson's declaration and has not challenged his declaration. The remaining issue, therefore, is whether Professor Mathewson can be considered to be acting in the review on behalf of Amcast and Elkhart.

The Tribunal accepts that the mere filing of a notice of appearance as counsel does not, in itself, confer the status of "counsel." There may be limited circumstances which require that a person not be permitted to appear as counsel, such as where there is a conflict of interest. However, the Tribunal does not accept the narrow interpretation of "counsel" and the phrase "acts in the proceedings on behalf of the party" that has been suggested by counsel for Cello.

In particular, the Tribunal does not accept that the fact that Professor Mathewson may be paid directly by Amsterdam & Peroff as opposed to Amcast and Elkhart indicates that he is not acting on Amcast and Elkhart's behalf, particularly since Amcast and Elkhart in their notices of appearance as parties identified

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7. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

Professor Mathewson as their counsel. Moreover, the reference to the jurisprudence concerning appearances of non-lawyers and rules prohibiting practice by unauthorized persons are in respect of courts and are not, therefore, useful in interpreting the word "act" for the purposes of proceedings before the Tribunal, which is an administrative agency, not a court. Although the Tribunal notes that the courts have stated that, "[i]n assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness" and that "[s]uch an order should not be made unless there are compelling reasons."[8]

As an administrative agency, the Tribunal conducts less formal proceedings than do courts. The Tribunal is of the view that, given the quasi-judicial nature of its proceedings and the resulting duty to act fairly, there is an implication that parties are entitled to be represented by counsel,[9] as is contemplated by the CITT Act, and to be represented by counsel of their choice. The Tribunal regularly permits parties to be represented by persons other than lawyers, such as trade consultants, economists and accountants. The Tribunal is not persuaded by the submissions of counsel for Cello that a change in the Tribunal's practice is warranted in this review. Moreover, to require that Professor Mathewson have certain experience as counsel or an advocate before the Tribunal or other courts in order to be allowed to appear as counsel for Amcast and Elkhart in this review, as suggested by counsel for Cello, would, in the Tribunal's view, be reading a new requirement into the definition of "counsel" in subsection 45(4) of the CITT Act.

While it may not be necessary, at least in the opinion of counsel for Cello, that Amcast and Elkhart be represented by Professor Mathewson, in addition to the three counsel from Amsterdam & Peroff, the Tribunal regularly permits parties to be represented by more than one counsel. Indeed, this is consistent with jurisprudence. For example, in *Parrish (Re) (T.D.)*, the Federal Court of Canada said the following with respect to the issue of the number and participation of counsel in an administrative proceeding:

> There is no doubt that boards or tribunals are masters of their own procedure and when witnesses appear with two or three counsel, it is certainly within the Board's domain to limit not only the number of counsel but also the scope of their participation…. The Board may be perfectly free to prohibit the attendance of more than one counsel and it would be up to the investigator to determine if the presence of more than one would seriously impede the progress of the investigation. In most cases reviewed, the legislation provided for the presence of counsel but left the Board the power to determine its own procedure. If one finds that participation is unjustly restricted, judicial review is generally available.[10]

Should issues arise concerning the participation of four counsel acting on behalf of Amcast and Elkhart in this review which may have a negative impact on the conduct of the review or prejudice another party in the review, the Tribunal will address these at the appropriate time.

For the above reasons, the Tribunal is not persuaded that it should disqualify Professor Mathewson from acting as counsel for Amcast and Elkhart in this review. Having made that determination, the Tribunal must further consider whether it should disclose the confidential information on the record in this review to Professor Mathewson and if so, the conditions, if any, of such disclosure.

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8. *R.* v. *Speid* (1983), 43 O.R. (2d) 596 (C.A.) at 598.
9. See, for example, *Parrish (Re) (T.D.)*, [1993] 2 F.C. 60 at 87.
10. *Ibid*. at 87-88.

Subsection 45(3) of the CITT Act sets out the conditions upon which information provided by a party and designated to be confidential can be disclosed. Subsection 45(3) reads as follows:

> (3) Notwithstanding subsection (1), information to which that subsection applies that has been provided to the Tribunal in any proceedings before the Tribunal may be disclosed by the Tribunal to counsel for any party to those proceedings or to other proceedings arising out of those proceedings for use by that counsel only in those proceedings, subject to such conditions as the Tribunal considers are reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by counsel to any person in any manner that is calculated or likely to make it available to
>
> (a) any party to the proceedings or other proceedings, including a party who is represented by that counsel; or
>
> (b) any business competitor or rival of any person to whose business or affairs the information relates.

The Tribunal has interpreted subsection 45(3) of the CITT Act as conferring on it the discretion to refuse to grant disclosure of confidential information to counsel in its proceedings.[11] In *Ottoson-King*, the Tribunal found that, in exercising this discretion, the Tribunal must be mindful of its obligation to safeguard confidential information. The Tribunal, in that inquiry, decided not to grant Ms. Ottoson-King access to confidential information on the basis that she was not ordinarily resident in Canada, and, as such, her undertaking might not be enforceable in Canada and would not, therefore, provide "sufficient assurance that any confidential information disclosed to her may not be disclosed to another party to the proceedings or to a business competitor or rival.[12]"

In *Romanko*, the Tribunal found that it may refuse to grant access to confidential information "where it has reason to believe that there is a reasonable risk that the information may be disclosed by counsel to any person in any manner that is calculated or likely to make it available to a party to the proceedings or other proceedings, including a party who is represented by that counsel, or any business competitor or rival of any person to whose business or affairs that information relates.[13]" The Tribunal held that, as a result of his previous relationship with the Canadian Steel Producers Association (CSPA), Mr. Romanko would have been privy to confidential information relating to the strategy and tactics of the Canadian steel industry in dealing with unfair trade practices in Canada and the United States and some of which might be similar to the confidential information filed by the parties in that inquiry. The Tribunal denied Mr. Romanko access to confidential information based on its conclusion that Mr. Romanko could have "difficulty separating in his mind what [had] been disclosed to him as a result of his participation in these proceedings and what was acquired as a result of his prior employment" and "[t]here [was] an understandable apprehension on the part of the Canadian steel industry that a possible disclosure of confidential information could occur and that harm to individual companies may result."[14]

In *Maloney*, the Tribunal found that it had the discretion to refuse Ms. Maloney access to confidential information. However, applying the approach used in *Romanko*, the Tribunal determined, based

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11. *In the Matter of a Request by Ms. Ann Ottoson-King*, Canadian International Trade Tribunal, Inquiry No. NQ-93-003, March 11, 1994, at 2; *Romanko* at 7-8; and *In the Matter of a Notice of Motion by The Shoe Manufacturers' Association of Canada for an Order Disqualifying Ms. Sharon E. Maloney*, Canadian International Trade Tribunal, Review No. RR-94-003, February 7, 1995, at 5-6.
12. *Ottoson-King* at 2.
13. *Romanko* at 8.
14. *Romanko* at 8.

on the facts, that, given Ms. Maloney's relationship with the Footwear Council of Canada, it was unlikely that, during the time that she was Director of the Footwear Council of Canada or at the time of the inquiry, she was privy to the kind of information to which Mr. Romanko was privy as Chief Operating Officer of the CSPA.

The Tribunal finds that the facts in this review relating to Professor Mathewson and his request for access to confidential information are significantly different from those in *Ottoson-King, Romanko* and *Maloney*. Professor Mathewson is a Canadian resident, and there is no evidence of him having previously represented any of the parties to this review or having had an association with a person or company that might have resulted in the disclosure of confidential information about any of the parties. The Tribunal is not persuaded that the fact that Professor Mathewson is not a lawyer and does not have certain experience as counsel or an advocate before the Tribunal or other courts or tribunals provides a basis for concluding that there is a reasonable risk that Professor Mathewson may disclose the confidential information to any person in any manner that is calculated or likely to make it available to a party to the review or another proceeding or any business competitor or rival of any person to whose business or affairs that information relates. Accordingly, the Tribunal is of the view that Professor Mathewson should be granted access to the confidential information on the record in this review, subject to the conditions in his undertaking.

For these foregoing reasons, the motion by counsel for Cello disqualifying Professor Mathewson as counsel and denying him access to the confidential information on the record of the proceedings in this review is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member