

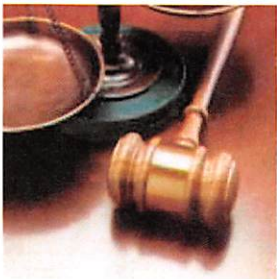
Canada-U.S. Blog

LEGAL DEVELOPMENTS AFFECTING CANADA-U.S. CROSS BORDER TRADE

Disqualification Orders Are Rare at the Canadian International Trade Tribunal: Will Dentons Case Be A Game Changer in Canada?

By Cyndee Todgham Cherniak on August 25th, 2015

Posted in Antidumping, Legal Developments, Trade Remedies



There have been a number of cases in Canada where one party to the proceeding has raised conflict of interest in respect of another party before the Canadian International Trade Tribunal (“Tribunal”). In most cases, the Tribunal has not disqualified counsel.

For example, in *Circular Copper Tube*, PI-2013-002, the Tribunal did not issue a disqualification order against counsel for the domestic industry where that same individual acted for the only Brazilian producer of copper tube in a case a few years earlier involving copper rod.

In *Steel Piling Pipe*, NQ-2012-002, the Tribunal did not disqualify a law firm acting for a member of the domestic industry in circumstances where the same law firm acted for a significant importer of piling pipe (which was a target in the antidumping proceeding).

The recent US ITC disqualification order in *Certain Laser Abraded Denim Garments* (Inv. No. 337-TA-930) may present Canadian counsel with a precedent to use before the Tribunal (even though *stare decisis* would not apply).

In *Certain Laser Abraded Denim Garments*, Chief ALJ Charles E. Bullock disqualified Dentons US, counsel for the complainants. Bullock made the following findings:

- 1) The authority to disqualify counsel derives from presiding officers’ inherent power to control their proceedings (the same would hold true for the Tribunal members);
- 2) This authority has rarely been exercised as disqualification of counsel is drastic and disfavoured (the same would hold true for the Tribunal);
- 3) The American Bar Association’s Model Rules of Professional Conduct provide guidance in resolving motions to disqualify counsel (in Canada, the Tribunal would look to the applicable rules of professional conduct of the law societies);

4) The critical issue is whether continued representation will cause prejudice or adversely impact the rights of another party in the matter and whether such prejudice outweighs the prejudice caused by disqualification of another party's choice of counsel; and

5) To warrant the severe sanction of disqualification, there must be a showing that the unethical conduct has somehow "tainted" the investigation. The factors to consider include:

- the nature of the ethical violation,
- the prejudice to the parties
- the effectiveness of counsel in light of the violation;
- the public's perception of the profession; and
- whether a disqualification motion was used as a means of harassment

In assessing the issue of whether the disqualification motion was used as a means of harassment, Chief ALJ Bullock stated:

"There is an undeniable tactical advantage to a respondent in disqualifying lead counsel. However, as with the issue of prejudice, Complainants were fully informed of and assumed the risk when they named the Gap as a respondent."

Chief ALJ Bullock was careful in balancing the conflicting interests of the parties. But, what this decision does is recognize that it is not appropriate to bring a trade proceeding that would negatively affect a current/former client and seek forgiveness from the decision-maker and the basis that disqualification of preferred counsel is unfair to the party who brought the proceeding.

Tags: 337, antidumping, Certain Laser Abraded Denim Garments, Charles E. Bullock, CITT, conflict of interest, ethics, rules of professional conduct, trade remedies, USITC

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