

Date: 20090615

Docket: A-174-09

Citation: 2009 FCA 204

Present: TRUDEL J.A.

BETWEEN:

MAAX BATH INC.

Applicant

and

ALMAG ALUMINUM INC., APEL EXTRUSIONS LIMITED, CAN ART ALUMINUM EXTRUSION INC., METRA ALUMINUM INC., SIGNATURE ALUMINUM CANADA INC., SPECTRA ALUMINUM PRODUCTS LTD., SPECTRA ANODIZING INC., EXTRUDEX ALUMINUM, ARTOPEX INC., ASIA ALUMINUM HOLDINGS LTD., BLINDS TO GO INC., EXTRUDE-A-TRIM INC., GARAVENTA (CANADA) LTD., KAM KIU ALUMINIUM PRODUCTS (NA) LTD., KAM KIU ALUMINIUM PRODUCTS SDN. BHD., KROMET INTERNATIONAL INC., LOXCREEN CANADA, MALLORY INDUSTRIES, PANASIA ALUMINIUM (CHINA) LIMITED, PANASIA ALUMINUM (CALGARY) LIMITED, PANASIA ALUMINUM (MACAO COMMERCIAL OFFSHORE) LIMITED, PANASIA ALUMINUM (TORONTO) LIMITED, PINGGUO ASIA ALUMINUM CO. LTD., R-THETA THERMAL SOLUTIONS INC., RAILCRAFT INTERNATIONAL INC., REGAL ALUMINUM PRODUCTS INC., SHINING METAL TRADING INC., SINOPEC TRADING INC., TAG HARDWARE SYSTEMS LTD., TAISHAN CITY KAM KIUM ALUMINIUM EXTRUSION CO. LTD., VITRE-ART C.A.B. (1988) INC., ZMC METAL COATING INC., ALFA MEGA INC., ALUMINART PRODUCTS LIMITED, ALUMINUM CURTAINWALL SYSTEMS INC., C.R. LAWRENCE CO. OF CANADA, CHINA SQUARE INDUSTRIAL LTD., CONCORD WEST DISTRIBUTION LTD., DIGI-KEY CORPORATION, HOME-RAIL LTD., HUNTER-DOUGLAS CANADA, INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION OF BRITISH COLUMBIA, KNOLL NORTH AMERICA CORP., LEVELOR/KIRSCH WINDOW FASHIONS (A DIVISION OF NEWELL RUBBERMAID/NEWELL WINDOW FURNISHINGS INC.), MILWARD ALLOYS INC., MORSE INDUSTRIES, NEW ZHONGYA ALUMINUM FACTORY LTD., NEWELL INDUSTRIES CANADA INC., NEWELL WINDOW FURNISHINGS INC., OPUS FRAMING LTD., PACIFIC SHOWER DOORS (1995) LTD., PROFORMA INTERIORS LTD. DBA ALUGLASS, RAHUL GLASS LTD., RUHLAMAT NORTH AMERICA LTD.,

**RYERSON CANADA, SILVIA ROSE INDUSTRIES, SONIPLASTICS INC.,
VANCOUVER FRAMER CASH & CARRY LTD., VAP GLOBAL INDUSTRIES INC.,
ZHAOQING CHINA SQUARE INDUSTRY LIMITED, CANADIAN INTERNATIONAL
TRADE TRIBUNAL and ATTORNEY GENERAL OF CANADA**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 15, 2009.

REASONS FOR ORDER BY:

TRUDEL J.A.

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TRADE TRIBUNAL and ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR ORDER AND ORDER

TRUDEL J.A.

[1] This motion was made by the applicant for orders pursuant to Rule 318(4) of the *Federal Courts Rules*, SOR/98-106:

1. Directing the Canadian International Trade Tribunal (CITT or Tribunal) to provide a copy of the material in the possession of the Tribunal prepared by the Tribunal's non-legal staff for use by the Tribunal members in making their determinations in Aluminum Extrusions from China, NQ-2008-003;
2. Dispensing with the Tribunal's objections to disclosure of these materials to the applicant for use in the judicial review through a supplementary affidavit;
3. Granting the applicant 30 days from the date that the Tribunal provide these materials to review these materials and to file a supplementary affidavit with the Court; and

4. Setting out such other directions and making such other orders concerning the production of these documents by the Tribunal as this Honourable Court considers appropriate.

[2] Upon reading the written submissions of the parties and the material contained in the applicant's motion record and the response record of the Tribunal, I am of the view that the within motion should be dismissed.

[3] On March 17, 2009, the Tribunal issued its determination regarding aluminum extrusions originating in or exported from the People's Republic of China. In its statement of reasons issued on April 1, 2009, the Tribunal determined that the dumping and subsidizing in Canada of aluminium extrusions (subject goods) from China have caused injury to domestic producers of like products in Canada and denied the exclusion request made by the applicant (NQ-2008-003).

[4] By notice of application dated April 15, 2009, the applicant sought judicial review of the Tribunal's determination of injury, its determination of the scope of aluminium products included within the definition of subject goods, its determination of the scope of the domestic industry producing like goods and its decision to deny the exclusion request made by the applicant.

[5] By notice of motion dated May 11, 2009, the applicant sought the release of the internal reports, memoranda and other materials prepared by the Tribunal's non-legal staff for use by the

Tribunal members as they considered their determination in the case, alleging the documents to be relevant and necessary (applicant's motion record, tab 3 at paragraph 4; tab 1 at paragraph 1).

[6] In its written representations, the applicant relies on the orders of this Court in *Telus Communications Inc. v. Attorney General of Canada*, 2004 FCA 317 [*Telus*] and *Canada (Human Rights Commission) v. Pathak*, [1995] F.C.J. No. 555 (C.A.) [*Pathak*] as supporting the conclusion that the materials at issue are properly part of the Tribunal record and should be disclosed.

According to the applicant, the materials are clearly relevant because they may have affected the outcome of the Tribunal's inquiry. Further, regardless of how the materials are described, they are akin to the staff memorandum ordered to be disclosed in *Telus* (applicant's motion record, tab 4 at paragraph 18).

[7] The respondent submits that the applicant has not established the relevance of the requested documents, that the decision in *Telus* is not an applicable precedent, that the applicant's request is general and vague and that the documents requested are subject to the deliberative secrecy privilege (respondent's motion record, tab 3 at paragraphs 30-46).

[8] Rules 317 and 318 provide:

Material from tribunal

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request,

Matériel en la possession de l'office fédéral

317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande,

identifying the material requested.

...

Material to be transmitted

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

- (a) a certified copy of the requested material to the Registry and to the party making the request; or
- (b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

...

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[...]

Documents à transmettre

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

- a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
- b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

[...]

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[9] The relevant documents for the purposes of Rules 317-318 are those documents that may have affected the decision of the Tribunal or that may affect the decision that this Court will make on the application for judicial review (*Telus, supra* at paragraph 5; *Pathak, supra* at paragraph 10).

[10] The applicant has failed to persuade me that the documents sought to be produced are relevant and necessary. The request made under Rule 317 lacks proper specificity (*Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1156 (T.D.) at paragraph 10 [*Atlantic Prudence Fund Corp.*]). Here, the applicant requests “... a copy of the material in the possession of the CITT prepared by the CITT’s non-legal staff for use by the CITT members in making their determinations” without reference to any specific documents (applicant’s memorandum, tab 4 at paragraph 1).

[11] This noticeable lack of specificity alone is sufficient to dispose of the motion. In any event, I note that in its 69-page decision, the Tribunal relied on a plethora of documents to support its reasoning. All public exhibits in the Tribunal’s voluminous record were made available by the Tribunal to the parties. Protected exhibits were made available only to counsel who, as the applicant, had made a declaration and confidentiality undertaking with the Tribunal in respect of that protected information (respondent’s motion record, tab 4B at paragraph 15; applicant’s affidavit, vol. 1, affidavit of Jeannette Cowan at paragraph 3).

[12] In its reply to the response of the Tribunal, the applicant refers to the “summaries and /or compilations of the information contained in the record and ... advice and /or analyses of market, financial or economic questions” in the Tribunal’s internal documents (*ibid.* at paragraph 10). On the record, as it stands, and in the absence of any reference, by the applicant, to specific passages in the Tribunal’s reasons from which it could reasonably be inferred that the Tribunal grounded its decision on material not available to the parties, or that inappropriate tampering with the decision

occurred, one cannot assume that such information has been adopted by the Tribunal in its reasons, thereby making it relevant to the decision made by the Tribunal or to the decision that this Court will make (*Trans Québec & Maritime Pipeline v. Office National de l'Énergie*, [1984] F.C. 432 (C.A.); *Telus*, *supra* at paragraph 3).

[13] For these reasons, I agree with the respondent that the decision in *Telus*, where the material sought to be produced related to sufficiency of reasons and consideration of relevant matters by the decision-maker, is not applicable to the present case as no such grounds are raised by the applicant.

[14] There can be little question here that the applicant is seeking access to documents consulted by or prepared for the Tribunal members as they were engaged in their deliberative role to determine how and why the members reached the impugned conclusions. I agree with the respondent that this is a matter of privilege going to judicial impartiality in adjudication (*Mackeigan v. Hickman*, [1989] 2 S.C.R. 797).

[15] In the words of this Court, the applicant's request "betrays a misunderstanding of the purpose of section 317 ... [S]ection 317 does not serve the same purpose as documentary discovery in an action" (*Access to Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224 at paragraph 17; *Atlantic Prudence Fund Corp.*, *supra* at paragraph 11). It should not be open to the applicant to engage in a fishing expedition.

THEREFORE, IT IS ORDERED THAT:

1. the motion directing the Tribunal to provide a copy of the material in the possession of the Tribunal prepared by the Tribunal's non-legal staff for use by the Tribunal members in making their determinations in Aluminum Extrusions from China, NQ-2008-003 be dismissed; and
2. upon consent the Tribunal's name as a respondent party be struck and be removed in the style of cause;
3. the style of cause shall now be shown as:

MAAX BATH INC.

Applicant

and

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ZHAOQING CHINA SQUARE INDUSTRY LIMITED and ATTORNEY GENERAL OF
CANADA**

Respondents

Johanne Trudel

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-174-09

STYLE OF CAUSE: Maax Bath Inc. v. Almag Aluminum
Inc. & als

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: TRUDEL J.A.

DATED: June 15, 2009

WRITTEN REPRESENTATIONS BY:

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FOR THE APPLICANT

Georges Bujold

FOR THE Canadian International
Trade Tribunal

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