

Scott Rollwagen
416-865-2896
srollwagen@litigate.com



Rebecca Jones
416-865-3055
rjones@litigate.com

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Private Practice and the Duties of Tribunal Counsel

A recent decision of the Canadian International Trade Tribunal (CITT) provides rare guidance on the issues that can arise when counsel to an administrative tribunal enters private practice and begins to advise parties to matters before the tribunal. In *Certain Container Chassis,* the CITT rejected a motion seeking to remove counsel to a complainant because counsel had recently been employed by the Tribunal.

A modern administrative tribunal cannot function without dedicated legal advice. Most tribunals have available to them specialized in-house legal advisors. A pocket of jurisprudence has been developed that sets the boundary between proper legal advice given by in-house legal advisors and improper decision-making. The law is clear that counsel may advise the tribunal, but can never be allowed to usurp their role.

In-house legal advisors will develop deep expertise concerning the substantive law applied by the tribunal, and, more importantly, mastery of the custom and practice that animates the day-to-day functions of the tribunal. An important question of public policy arises when counsel leaves an administrative tribunal for private practice. In certain heavily regulated spheres, the highest and best use of any such lawyer's talents will be deploying this expertise for private clients' benefit.

Certain Container Chassis considered a motion to remove counsel for one of the parties to a proceeding before the CITT. The proceeding related to impermissible dumping and subsidization of container chassis and container chassis frames imported from China. The firm acting for the complainant in the proceeding included a lawyer who previously had acted as counsel to the Tribunal. At the time of the lawyer's departure from the Tribunal the proceeding in question had not been commenced.

The law firm representing certain companies opposing the complaints brought a motion before the Tribunal seeking an order that the former tribunal lawyer withdraw from his representation of the complainant. The law firm argued that the connection between counsel and the Tribunal gave rise to a reasonable apprehension of bias in light of counsel’s familiarity with the Tribunal, its methods of analysis and other institutional aspects of its decision-making.

The Tribunal rejected the motion. The Tribunal began by noting that “allegations of bias are made against adjudicators, not counsel” such that the law firm’s motion “can only be taken as a challenge to the Tribunal’s own impartiality.” Relying on the established case law on reasonable apprehension of bias, including the strong presumption of impartiality, the Tribunal held that 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." The Tribunal concluded that a reasonable and well-informed member of the public would not assume that former counsel could somehow unduly influence the Tribunal.

Most notably, the Tribunal also drew guidance from conflict of interest jurisprudence. Critical to the Tribunal’s decision was the fact that the lawyer possessed no relevant confidential information since the proceeding had not been commenced when he left the Tribunal. The Tribunal also relied on the principle that a client is not to be deprived of its choice of counsel without good cause. In doing so, the Tribunal accepted a principled and pragmatic approach to the issue. The Supreme Court of Canada in *Canadian National Railway Co v McKercher LLP* accepted that "you know how we think" is not sufficiently tangible and specific confidential information to justify disqualifying a lawyer acting against a former client in an unrelated mater. So, too, it should require more than showing familiarity and specific acumen to justify the drastic remedy of removal.

In-house counsel to administrative tribunals perform a valuable function. So long as specific confidential information connected with a case is not misused, the system as a whole functions best if counsel are permitted to build expertise in-house and maintain the freedom to pursue their careers elsewhere, including by helping private clients navigate the system. Such an approach – so long as there is no risk of tangible and specific misuse of information connected with a particular case – promotes efficiency and in no way undermines fairness.