

**CANADIAN INTERNATIONAL TRADE TRIBUNAL  
CANADIAN BAR ASSOCIATION**

**MINUTES OF BENCH & BAR COMMITTEE MEETING  
November 28, 2002**

**In attendance:**

CITT	Counsel
Patricia Close	Tom Akin
Pierre Gosselin	Gordon Cameron
Richard Lafontaine	Ron Cheng
Ron Erdmann	Glen Cranker
Michel Granger	Riyaz Dattu
Reagan Walker	Rick Dearden
Philippe Cellard	Gordon Lafortune
	Daryl Pearson
	Susanne Pereira
	Greg Tereposky

**1. APPROVAL OF MINUTES OF OCTOBER 17, 2001 MEETING**

The minutes of the October 17, 2001 meeting of the Bench and Bar Committee were approved by the Committee.

**2. INTRODUCTORY REMARKS**

The membership of the Committee has been changed. Denis Gascon and Paul Lalonde have left the Committee. Gordon Cameron (Blake, Cassels & Graydon LLP, Ottawa), who represents clients in procurement matters before the Tribunal, and Daryl Pearson (Gottlieb & Pearson, Toronto), who represents clients in trade matters before the Tribunal, have joined as new members.

The meeting agenda identified four areas of discussion: (i) experiences in the recent steel safeguard proceedings; (ii) experiences from recent expiry review proceedings; (iii) amendments to the CITT Act (safeguard proceedings and China); and (iv) other business.

### **3. EXPERIENCES IN THE RECENT STEEL SAFEGUARD PROCEEDINGS**

The Canadian Bar Association (CBA) members discussed new procedures related to the conduct of proceedings and the treatment of materials/documents that were introduced during the recent safeguard proceedings.

#### **A. Conduct of Proceedings**

With respect to the conduct of proceedings, a CBA member identified three procedures: (i) the presentation of witnesses in panels; (ii) the ability to direct *in chief* to individual panel participants; and (iii) the timing of final argument in relation to the close of evidence.

With respect to the first point, in the safeguard proceeding witnesses appeared before the Tribunal in panels. One panel was composed of all witnesses for the domestic industry. The other was composed of witnesses for importers, exporters, customers, etc. The purpose of this was to conduct the proceeding in a timely manner so that the proceeding could be completed within the imposed time limitations. The witnesses testified only in public and there were no *in camera* sessions. A CBA member commented on cross-examination complexities that are introduced when importers, exporters and customers are included on the same panel and queried whether this would be workable in other contexts such as trade remedy (i.e. anti-dumping and countervailing duty) proceedings. While paneling witnesses in such a manner may work in safeguard proceedings, it likely would not in trade remedy proceedings.

With respect to the second point, where witnesses are presented in panels, it was helpful to be able to direct *in chief* evidence to individuals appearing in the panel. This is what was done in a recent review proceeding.

With respect to the third point, in the safeguard proceeding final argument was presented immediately after the close of evidence. Understanding the time constraints facing the Tribunal in the safeguard proceeding, a CBA member suggested that this procedure could present problems in other proceedings. In his view, it would be helpful not to proceed with final argument on the same day as the close of evidence or, at the very least, have a half day break between the close of evidence and final argument.

The Tribunal noted that the procedures in the safeguard proceeding were driven by the time constraints facing the Tribunal. The Tribunal is always looking for ways to make the process more accessible and reduce cost in a manner that does not create procedural problems.

With respect to examination *in chief*, the Tribunal queried whether it was necessary. A CBA member responded that they would endorse keeping *in chief* examination to a minimum; however, such examination is helpful if not necessary in situations where there is a significant delay between the filing of evidence and the hearing. They also suggested limiting *in chief* examination to new evidence that has arisen since the filing of evidence.

With respect to the timing of final argument, the Tribunal commented that in a recent review proceeding counsel were asked whether they wanted to present final argument the next day and they preferred to present it later the same day. A CBA member responded that whether a break will be required will likely depend on the nature of the proceeding. The larger and more complicated the hearing, the longer the break required.

## **B. Treatment of Materials and Documents**

With respect to the treatment of materials and documents in the safeguard proceeding, a CBA member referred to the posting of information on the Tribunal's website and communications between counsel via email. They welcomed the posting of public information (e.g. questionnaires, staff reports) on the website as an efficient way to disseminate such information. They expressed some concerns about email communications to the extent that such communications involved confidential information. In their view, there should be no electronic distribution of confidential information until both the Tribunal and counsel are comfortable with the security of the communications.

With respect to distributing public information electronically, the Tribunal commented that the Tribunal would like to do so and is examining its feasibility. Issues that arise include ensuring that documents such as staff reports could not be converted in a manner that displays confidential information that appears in their protected version; providing a procedural safeguard where counsel inadvertently include confidential information in a public filing and later wish to remove it (currently the non-electronic procedure used by the Tribunal allows for this); and compliance with the requirements of the *Official Languages Act*. With respect to the last point, the Act requires that information be presented in both official languages. The Tribunal is reviewing the requirements and their implications for electronic dissemination of information in proceedings. The Tribunal appreciated the cooperation from counsel in filing information with the Tribunal in electronic form during the safeguards investigation.

With respect to distributing confidential information electronically, the Tribunal noted that it will not do so until a secure transmission method is established (e.g. through encryption). In the safeguard proceeding, counsel were filing submissions and information electronically, partly due to the tight timeframes imposed in that proceeding. Although some counsel may have transmitted confidential information, such information would have been their own information and they were informed by the Tribunal that they were sending it electronically at their own risk.

Members of the Bar welcomed the use of an electronic record, subject to sufficient protection for confidential information. One member referred to his experience appearing before the National Energy Board and described how the use of an electronic record substantially reduced the volume of paper in proceedings.

The Tribunal noted that it is one of its objectives to have an electronic record for all proceedings. The Tribunal will strive to disseminate documents electronically as soon as possible. Its experience in doing so in procurement proceedings has been positive.

The Tribunal anticipates that it is about one year away from using electronic records in its proceedings. The hearing room is being modified to allow for this.

#### **4. EXPERIENCES IN RECENT EXPIRY REVIEW PROCEEDINGS**

A CBA member commented on the experiences of counsel in his firm in recent expiry review proceedings. Most of his comments concerned actions by the Canada Customs and Revenue Agency (CCRA) and not by the Tribunal.

The Tribunal noted that the Auditor General is examining the expiry review process. The objective of all involved in the process is to make it as user friendly as possible in light of the changes in the law. The Tribunal welcomed any comments that would further its improvement.

A CBA member noted that one issue that has arisen concerns access to the confidential record of the “Letter of Expiry” (LE) proceeding. That record is created by the Tribunal and then passed on to the CCRA when a formal review proceeding is initiated. Private counsel acting in the review proceeding cannot access the confidential record from the LE proceeding through the CCRA. The Tribunal commented that the CCRA has not yet developed the procedures for the protection of confidential information that the Tribunal has in place. Accordingly, at this time, confidential information that the Tribunal provides to the CCRA cannot be disclosed to private counsel by the CCRA. However, private counsel can contact the Tribunal and arrange to view the information at the Tribunal’s premises. The Tribunal commented that the CCRA is in the process of modifying its procedures in a manner that is closer to the Tribunal’s registry.

Another issue relates to visits by the CCRA officials to exporters prior to the exporters filing their submissions with the CCRA. A question was raised as to whether this is appropriate. Responses queried whether such visits were any different from normal investigations where the CCRA conducts verification visits and meets with exporters prior to the submission of all questionnaire responses and information. It was noted that, in the case of review proceedings, the CCRA’s functions have evolved from being administrative to more quasi-judicial.

A third issue was whether it was necessary for the CCRA to undertake a normal value review in order to make a likelihood of resumed dumping finding. A CBA member queried whether such a review should be a formal part of a review proceeding. Another CBA member agreed that a normal value review should be part of the proceeding. He noted that in the *Bicycles* review, the CCRA made use of information gathered in a previous normal value review (gathered approximately one year prior to the review proceeding) to make its likelihood finding. The information that was gathered

concerned estimates of future selling prices to Canada. He expressed concern that the exporters providing the estimates may not have been aware that the information could have been used in a review proceeding. The Tribunal noted that, in order for the Tribunal to make its determination of likelihood of injury, it is important to not only know whether resumed dumping is likely but the estimated magnitude of the resumed dumping. In this sense, it would be helpful to have a normal value review conducted.

Finally, the issue of minimizing the paper flow between the Tribunal and the CCRA was discussed. Currently, the LE record is transmitted from the Tribunal to the CCRA, the CCRA develops its own record and then, if it makes an affirmative finding, its record is transmitted to the Tribunal. One suggestion raised by the Bar was that the CCRA record could be kept for the Tribunal phase of the review. It was commented that the CCRA and the Tribunal organize their records in a different manner which may complicate references to the CCRA materials in a Tribunal proceeding.

## **5. AMENDMENTS TO THE CITT ACT – SAFEGUARD PROCEEDINGS AND CHINA**

The Tribunal commented on the amendments to the *Canadian International Trade Tribunal Act* (CITT Act) respecting the special safeguard mechanism for China. These amendments resulted from China's terms of accession to the World Trade Organization (WTO).

The mechanism incorporates two special remedies. The first is a market disruption remedy which is similar to a safeguard remedy except that the injury threshold is lower. The second is a trade diversion remedy which arises where a trade action is taken in another jurisdiction and the subject goods are re-directed to the Canadian market.

The Tribunal is in the process of preparing draft guidelines for assisting interested parties in such proceedings. The members of the Bar did not have any comments on such guideline at this time.

## **6. OTHER BUSINESS**

A member of the Committee, queried how the members of the Bar who are on the Committee polled other members of the Bar in order to develop positions before the Committee. Another CBA member noted that contact was made both formally through the Canadian Bar Association sections and through the posting of minutes of the Committee meetings on the Tribunal's website and informally through conversations with fellow practitioners in the trade and procurement Bar.

It was agreed that future meetings would be agenda driven rather than calendar driven. The meeting was adjourned.