

**CANADIAN INTERNATIONAL TRADE TRIBUNAL/
CANADIAN BAR ASSOCIATION**

BENCH AND BAR COMMITTEE MINUTES

June 1, 2000

IN ATTENDANCE

CITT

Pierre Gosselin, Chairman
Patricia Close, Vice-Chair
Ron Erdmann, Executive Director
Gerry Stobo, General Counsel
Michel Granger, Secretary
Jean Archambault, Director
Gilles Legault, Legal Counsel

COUNSEL

Tom Akin, McCarthy Tétrault
Ron Cheng, Osler, Hoskin & Harcourt
Riyaz Dattu, McCarthy Tétrault
Randall Hofley, Stikeman Elliott
Gord Lafortune, Grey, Clark, Shih &
Associates
Patt MacPherson, Corporation House
Roger Nassrallah, Thomas & Partners
Rick Woyiwada, Department of Justice

1. The minutes from the November 18, 1999 meeting were approved.

2. **Implementation of the *Special Import Measures Act***

Gerry Stobo mentioned that practise notices/guidelines were being prepared with respect to the preliminary determination of injury, public interest inquiries, interim and expiry reviews. Copies were made available to the participants. The Tribunal mentioned that to date, the implementation of the *Special Import Measures Act* (SIMA) seemed to be smooth. The changes were already being felt although it was too early to assess their impact. Counsel were invited to comment on the guidelines before they became final.

3. **Commencement of hearing before receiving the final determination of dumping from the Canada Customs and Revenue Agency (CCRA)**

In follow-up to a previous Bench and Bar Meeting, there was a brief discussion about the Tribunal's recent practice of beginning a hearing several days before

receiving a final determination (FD) of dumping from CCRA. In the recent Steel Plate IV case for example, the hearing began 3 days before the FD was received. Ron Cheng commented that the early hearing start was not a problem although the case may not have been a good example on which to draw general conclusions. Pierre Gosselin reminded everyone that having even a couple of extra days in the post hearing stage was valuable, particularly in large complex cases. He also reminded counsel of the Tribunal's practise to have its SIMA reasons for decisions translated before being issued and that this consumes time in the post hearing phase.

Patt MacPherson commented that while, in his view, the spread in the margin of dumping from the preliminary to final determination seems to have narrowed over time, when there is a variance it can be quite dramatic.

Ron Erdmann indicated that he would produce a review of these determinations made by CCRA and circulate copies of the report to members of the Bench and Bar Committee.

4. **Procurement**

There was a general discussion about the Tribunal's work load in procurement. The Tribunal mentioned how the number of complaints per year is rising but, when compared with the United States, the percentage of complaints/procurements issued, is very small. Public Works and Government Services Canada has been encouraged to more effectively inform suppliers of the bid protest mechanism, perhaps in the RFP documentation.

5. **Disclosure of confidential information to experts and non-resident counsel**

The Tribunal mentioned the possibility that experts and non-resident counsel may be given access to the confidential record. Dealing first with experts, the Tribunal mentioned that experts would only receive access to the confidential record under the direction and control of counsel. The Tribunal indicated that it may impose other terms and conditions on them, depending on the circumstances of the case. The Tribunal also needs to develop a process to qualify experts as such in the event they want access to the confidential record. The Tribunal expressed concern about the type of expert evidence and testimony counsel, particularly in Customs Act cases, attempt to put forward. More often the Tribunal is raising questions about the appropriateness of experts testimony and its usefulness. The Bar was invited to comment on this issue.

There was a wide-ranging discussion about the possibility of non-resident counsel getting access to the confidential record given the recent changes to SIMA. The new Tribunal Rules do provide for the possibility that non-resident counsel will

be given access. This contrasts with the previous SIMA regime, in which the Tribunal rejected two requests for access by non-residents. The Tribunal did however note that in a recent procurement case, a non-resident expert was given access to the confidential record only at the offices of Canadian counsel and only while acting under his direction and control.

It was noted that non-residents have, under the direction and control of resident counsel, received access to the United States International Trade Commission's confidential record. The Tribunal commented that it was looking at the issue of non-resident counsel to see what might be proper terms and conditions to impose on non-residents.

Concern from the Bar was expressed about allowing foreign counsel access as counsel standards for respecting the integrity of the confidential record may be different or "variable" from what we have come to expect from resident counsel. Some suggested that if U.S. counsel receive access to the confidential record, it will change the practise before the Tribunal.

The Bar commented that there would be a shifting in the burden to determine if non-resident counsel should or should not be given access to the confidential record. Whereas now, counsel who oppose someone getting access to the confidential record must show why access should be denied, under the new regime non-resident counsel should bear the burden of showing why they should be given access.

It was suggested that this issue be raised as a separate topic in the future. Gerry mentioned that he would speak to representatives at the ITC to see how they deal with non-resident counsel.

6. **Electronic case book**

Michel Granger discussed various aspects of the electronic casebook now being developed by the Tribunal. He mentioned that Tribunal staff was involved in a pilot case by inputting a recently decided SIMA case record onto the program to test its usefulness. He indicated that he would provide the Bar with an update on the pilot project.

Michel discussed the various features that an electronic case book should be able to offer including time saving for counsel and the Tribunal when searching the record. He mentioned that some counsel are now asking for questionnaires in electronic format.

7. **Transfer of confidential information from CCRA to the Tribunal**

There was some discussion of the issues the Tribunal was dealing with respecting the transfer of confidential information from CCRA. He mentioned that CCRA was developing a guideline to deal with the collection and transfer of confidential information.

8. **Value for duty cases**

The Tribunal mentioned that it would generally not proceed to hear Customs Act value for duty cases pending the Supreme Court of Canada's disposition of the Mattel case. If counsel for the appellant and/or the respondent wanted their case to be heard by the Tribunal, it would consider these requests on a case by case basis. Rick Dearden commented that Mattel would likely be heard in February 2001.

9. The meeting adjourned at 2:00 p.m.