

BENCH ANDBAR COMMITTEE MINUTES

JUNE 22, 1999

1. IN ATTENDANCE

CITT:

Pierre Gosselin
Patricia Close
Ron Erdmann
Gerry Stobo
Michel Granger
Gilles Legault
Jean Archambault

COUNSEL:

Tom Akin
Greg Tereposky
Rick Dearden
Patt MacPherson
Glenn Cranker
Ron Cheng
Rick Woyiwada
Paul Lalonde
Denis Gascon
Gord Lafortune

2. MINUTES FROM PREVIOUS MEETING

The minutes of meeting held 18 November, 1998 were approved. Gerry Stobo mentioned that the minutes from previous Bench and Bar Committee meetings were now available on the CITT website.

3. SIMA UPDATE

There was a discussion about the status of the SIMA legislative changes. It was suggested that November 1999 was the target date to bring the legislation, regulations and rules into force. CITT is developing guidelines and policies to establish how certain aspects of CITT's process will be put into operation.

Gerry Stobo reviewed the transitional provisions and indicated that a practise notice would be circulated before implementation date to outline how the Tribunal will deal with the transitional provisions. In general terms:

- i) if a case is properly documented with Revenue Canada before implementation date, the "old legislation and regulations" will apply;
- ii) the new provisions with respect to public interest inquiries will come into effect only on those cases where the finding was made after the date of implementation;
- iii) expiry reviews will be conducted according to the new provisions if the notice of review is issued after implementation date (even though the notice of expiry was issued before implementation date).

CITT mentioned several rules changes which may provoke commentary including the continued requirement that counsel be residents of Canada, unlike experts, for whom no similar provision

exists. The CITT mentioned concerns it might have where non-residents seek access to confidential information but who, in the event of a breach, would be beyond the reach of the law were they to return to their home country. Factors that might encourage the CITT to grant access to non-residents include available mechanisms which would permit the extradition of persons who breach their undertaking.

The CITT mentioned its intention to move away from having forms prescribed in the rules, in hopes that this greater flexibility will allow forms to be amended as necessary. The CITT also mentioned that experts' reports will have to be submitted 20 days in advance of the hearing date to allow other parties an adequate opportunity to respond.

4. CONFIDENTIALITY GUIDELINES

Ron Erdmann discussed the status of the confidentiality guidelines distributed for consultation in March. While the comments were not unanimous, most were supportive of the general direction the guidelines were taking. Two areas of continued concern were disclosure of customer specific information in injury allegations and single-copy exhibits.

The CITT expects to circulate the revised guidelines in late summer. Although the guidelines should be followed by the CITT, special circumstances of a case may warrant a departure. If it appears that the guidelines need fine tuning over time they can be altered.

5. VALUE FOR DUTY CASES

The CITT outlined its approach to the nearly 20 pending value for duty cases following the Mattel and Nike Federal Court of Appeal decisions. Counsel for the parties were being contacted and asked for available hearing dates. It is expected that the cases will begin to be heard in late fall and winter 1999/2000.

Rick Dearden mentioned that an application for leave to appeal to the Supreme Court was still pending on the Mattel case. The CITT was asked whether it would delay the value for duty cases pending the decision on the leave application. The CITT intends to press on and schedule these cases.

6. INFORMATION TECHNOLOGY UPDATE

Michel Granger mentioned that the CITT was looking at Super Gravity, an electronic management program as a platform to run an electronic record in a SIMA case. He also mentioned that CITT transcripts are Folio Views compatible if parties want to purchase the electronic version.

7. SPRING 2000 CONFERENCE

Gerry Stobo and Glenn Cranker discussed the proposed spring 2000 CLE program of the international law conference and which topics relevant to the CITT's work will be covered. They

mentioned some of the topics which were being considered including: government procurement, the Millenium Round of WTO negotiations, customs and border issues, etc.

8. PROCUREMENT: COMPENSATION FOR LOST PROFIT

The CITT mentioned that it was developing guidelines dealing with compensation for lost profits in procurement cases. Guidelines were thought appropriate in view of the complexity of this area of CITT's jurisdiction and the need to have a transparent framework for analysis which will aid the parties in developing their submissions and assist the CITT.

9. HEARING ROOM ISSUES

Denis Gascon asked what the CITT thought of the new procedures introduced for SIMA cases almost two years ago. Pierre Gosselin mentioned that the CITT was generally pleased but changes were still in evolution and in need of fine-tuning. For example, the CITT had to ensure that its proceedings were not entirely run by the clock and that it was important for panel members to adjust schedule and time allotments as needed. Mr. Gosselin also stated that panels had little, if any, desire to sit late hours during a hearing except where absolutely necessary. He commented that counsel as well as the CITT found hearings that went into the evening very taxing.

It is important, he went on to say, that parties ensure their witnesses are able to speak one of the official languages. If counsel do not notify the CITT in advance of a hearing that a translator may be needed, or do not accurately assess their witnesses ability to give evidence, the proceedings can be adversely affected. When translators are used, they will be seated in the translators booth and not beside the witness at the table.

Mr. Gosselin stated that late filings in SIMA cases have continued to be a problem and he indicated that parties will have a high hurdle to jump if they want to introduce documentary evidence for the first time at a hearing. There are not many circumstances where documentary evidence will be permitted in during a hearing. When a party seeks to introduce a document at the hearing, they will have to demonstrate its relevance and why it could not have been presented earlier. Although the application of this position must still be flexible, generally speaking, there will be a presumption against allowing new documents to be filed at a hearing.

There was a discussion about requests for changes to the staff report following receipt of new data from the parties. While the CITT tries to ensure its staff report is current, in recent cases, several amended versions of the staff report caused confusion. The CITT was looking at this issue with a view to deciding when a revised staff report should be issued, if at all.

Several CBA members raised concern about the number of copies of confidential documents the CITT requested from parties, in some cases up to 35 or 40 copies. The CITT said it will review the number of copies required.

10. OTHER BUSINESS

Rick Woyiwada mentioned a concern held by the Department of Justice with respect to appeal cases, in particular the recent CITT policy requiring parties to file their exhibits and documents 10 days before the hearing begins. Some Justice lawyers felt that until the appellant's cases and documents have been received, the respondent cannot be expected to submit their documents. He also mentioned a concern that all documents filed before a hearing automatically become part of the record without having counsel go through the steps to introduce it at the hearing. If they are submitted before a hearing, parties may have difficulty in removing them from the record in those cases where counsel may want to object to something being filed. Mr. Gosselin said that we could discuss this at a future Bench and Bar Committee meeting.

11. NEXT MEETING

The next meeting date to be set following discussions between Tom Akin and Gerry Stobo.