LAW TIMES

Access quite limited to ‘open’ courts

Written by Shannon Kari

Law Times - Monday, 30 April 2007

The steps taken by the Ontario Ministry of the Attorney General since the release of a special media-justice report last August do not go far enough to comply with open court principles set out by the Supreme Court of Canada, say media lawyers and reporters who cover courts regularly.

Attorney General Michael Bryant announced on March 29 that certain measures had been put in place as a result of the recommendations of the Panel on Justice and the Media, including the creation of a Justice-Media Liaison Committee “to improve interaction between the news media and the justice system.”

The 12-member committee includes judges, lawyers, a police chief, two Crowns, a senior ministry official, and two representatives from the media.

Elizabeth Bucci, a Crown attorney and chairwoman of the committee, did not return calls from Law Times. Ellie Sadinsky, director of communications at the Ministry of the Attorney General and a member of committee, also did not return calls. “She does not speak to the media,” said ministry spokesman Brendan Crawley.

The ministry has a policy that Crawley is the only person in the province authorized to provide a comment to the media on any issue.

The other Crown on the committee is Michal Fairburn, who was briefly involved in the criminal prosecution of writer Stephen Williams when he inadvertently posted (for less than 24 hours) the names on his web site of some of Paul Bernardo’s sexual assault victims. She also represented the Crown in successfully defending search warrants obtained by police against media outlets following the so-called Queen’s Park riots in June 2000.

“Every member of the committee was selected for their respective expertise,” said Crawley. “Michal has extensive justice-media experience.”

Along with the liaison committee, the ministry has designated courthouse managers as media contacts if there is a dispute about access to records and created a “justice and media resources” link on its web site. It is working on a pilot project to permit cameras in the Court of Appeal and other measures including reserved seating for media in high-profile trials.

But the biggest obstacle is a long-standing ministry policy that presumptively seals all public documents in any criminal file. (As well, a confidential memo sent to Crown attorneys in early 2005 instructed them not to provide copies of any materials filed in court to the media, even non-contentious documents such as an agreed statement of facts).

The ministry’s policy that a judicial order is required for access to any public document in a criminal file was implemented in May 1993. The policy is based on a 1991 Supreme Court of Canada ruling in Vickery v. Nova Scotia Supreme Court, which stated that

the courts have supervisory powers over exhibits.

There were “unique facts” in Vickery and the ministry has “cherry picked” a few principles from the decision, which also re-affirmed the basic principle that there is a presumption in favour of access, says Iain MacKinnon, a lawyer at Lerners LLP who frequently acts for the media.

Since Vickery, the Supreme Court has issued a number of rulings expanding the public’s right to access court materials. Cases such as Dagenais, Mentuck and Toronto Star Newspapers Ltd. are clear that any party seeking to deny access must show that disclosure will subvert the ends of justice.

It is prohibitively expensive and impractical to require the media to retain a lawyer every time it wants to look at a document and it’s contrary to “years of Supreme Court decisions,” says MacKinnon. “Somebody should challenge this policy on Charter grounds. I don’t think it will stand up.”

“Access to documents is key for all reporters,” said Dianne Wood, a reporter at the Kitchener -Waterloo Record and one of the two media representatives on the liaison committee.

Wood is hopeful that the committee will bring about changes to the ministry’s policy in this area.

For media that cover the courts on a regular basis it is often a “hit or miss” situation when asking for access, says Peter Small, a reporter with the Toronto Star.

It often depends on whether the court clerk knows you, or is experienced in their job, says Small.

He recounts an experience when he attempted to obtain copies of factums filed in a provincial offences prosecution. Lawyers for both sides suggested he access the material through the court.

The judge declined to deal with his request and told Small to ask court services. There he was told the judge had the material and if there was a copy available he would have to be supervised by staff while he read the factums.

Even criminal information can sometimes be difficult to obtain says Small. Often, he is required to fill out a form requesting the criminal information and does not receive a copy for as many as five business days (other reporters contacted by Law Times say they have had similar experiences).

It is not ministry policy to require someone to fill out a form to obtain a copy of a criminal information, “nor is it aware of any regularized practice to this effect,” said Crawley.

While other jurisdictions have similar requirements of judicial approval for access to material in criminal files, provinces such as B.C. have implemented other steps to provide more information to the public.

Computer terminals at each B.C. courthouse can be used to check charges, upcoming court dates, dispositions, and other information. The majority of Superior Court-level rulings are posted online within 24 hours of being released. There is a cost of $8 to view a civil file in B.C., compared to $32 in Ontario.

In B.C. there is also the position of communications counsel, a senior Crown who serves as spokesman and will attend high-profile trials to provide quotes and answer media questions.

The Ontario ministry is gathering information on how other jurisdictions “have approached the implementation of electronic services,” says Crawley, and it will be consulting with the chief justices in the province on how best to proceed.