December 6, 1999

Anne Roland
Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa ON K1A 0J1

Dear Ms. Roland,

Re: *Supreme Court Act*, Sections 65-68; Potential Amendments

We are writing on behalf of the Canadian Bar Association in response to Barbara Kincaid's memorandum dated May 17, 1999 regarding stays in appeals. The Association is pleased to be consulted on this subject.

To review this question, the CBA struck an informal working group comprised of two members of the Supreme Court of Canada Liaison Committee (Jack Watson, Q.C., from Edmonton and Shawn D. Greenberg, from Winnipeg), one former member of that Committee (Douglas R. Stollery, Q.C., also from Edmonton) and the Chair of the National Criminal Justice Section (Isabel J. Schurman, from Montreal). This letter has been approved by the CBA's Legislation and Law Reform Committee as well as its Executive Officers.

As is evident from a series of decisions – most recently, *Quebec (Commission des droits de la personne et des droits de la jeunesse v. Montreal)*, [1999] 1 S.C.R. 381 – there has been some confusion among parties concerning the application of section 65. In those cases, the Court has determined that the automatic stay contained in this section only applies to executable judgments. The confusion between this section and the arguably more general stay power in section 65.1 has led to a reconsideration of the treatment of stays under the *Act*. We address this issue below.

1. Should stays of proceedings be automatic?

Our view is that stays of proceedings should not be automatic. If a party wishes a stay of all or part of a judgment, that party should be required to bring a motion.

There are several reasons for this position. The first is based on a simple notion of fairness. The successful party has convinced an appeal court that its position should carry the day. That party should not then bear the responsibility of demonstrating why the appeal court's judgment should remain in

force. Instead, the unsuccessful party should have the procedural and substantive onus of demonstrating why the court's order should be stayed.

In seven of the ten provinces, the three territories and in the Federal Court, a party is required to apply for a stay pending an appeal of a superior court decision. The exceptions are Ontario, Saskatchewan and Quebec.

There are certain types of proceedings and orders where an automatic stay is arguably inappropriate. These include child protection orders, orders in judicial review proceedings and child or spousal support orders. Even in Saskatchewan, Ontario and Quebec, where the general rule is an automatic stay, court rules recognize that certain types of orders should not be subject to automatic stays. In Saskatchewan these are orders involving *mandamus*, injunction and child/spousal/dependent support (see Court of Appeal Rules, Rule 15). In Ontario, the automatic stay does not apply to support orders, default judgments and non-monetary orders (Rules of Civil Procedure, Rule 63). In Quebec, there are matters where provisional execution can be ordered, such as possessory actions, custody of children and matters of exceptional urgency (*Code of Civil Procedure*, L.R.Q., c. C-25, s.547). The fact that automatic stays only exist for executable judgments in the Supreme Court no doubt reflects similar considerations.

Finally, it is arguable that having a discretionary stay allows the court greater flexibility in attaching conditions to the stay. Flexibility is important in a stay provision, as it recognizes the wide variety of circumstances which the Court might face. As a result, any amendment to the stay power should explicitly allow the Court to attach such conditions as it believes are appropriate and just.

A discretionary stay also arguably requires less in the way of legislative language, such as that found in sections 66-68 of the *Act*, spelling out the various ramifications of an automatic stay.

2. Which court should be the venue for granting stays?

Provincial and territorial appellate courts should have concurrent jurisdiction to stay their own decisions pending appeal to the Supreme Court of Canada.

The principal reason for this is that it would afford greater access to justice for parties who live outside the National Capital Region. Travel to Ottawa is often time-consuming and expensive and can establish a serious hurdle in cases where a stay is required urgently. Parties also tend to be more familiar with the rules of procedure of the provincial appellate courts. The courts themselves will also tend to be more familiar with the case being appealed.

At the same time, parties should continue to be entitled to bring their motion for a stay to the Supreme Court of Canada itself. While we suspect the preference will be to go to the provincial or territorial

appellate court, there may be situations where the issues in the case are too important or where there are other reasons for not bringing the motion in the court which issued the impugned decision. The Supreme Court should have the authority to vary stays in appropriate circumstances.

To ensure some consistency in approach between provinces and territories, it may be useful to submit this issue to the Uniform Law Conference to develop model legislation.

3. What is the appropriate terminology?

We suggest that the language of "stay of proceedings" or "stay of execution" is archaic and somewhat confusing. "Stay of execution" appears to apply more to enforcement proceedings, which would seem to be a subset of the broader concept of "stay of proceedings". In most cases, stay of execution will be sufficient, as most judgments would be empty if they could not be enforced. One exception may be judicial review proceedings, where parties seek stays of ongoing administrative proceedings where remedies on judicial review have been refused.

Recognizing that the word "stay" has become to some extent a term of art, we would prefer that the language be "temporary suspension of all or part of a judgment".

We hope these comments are of assistance in your deliberations. If you wish clarification or any further assistance, please do not hesitate to contact Richard Ellis at the CBA's National Office (237-2925, ext 144; richarde@cba.org), who can then contact us.

Yours truly,

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Member, Supreme Court of Canada
Liaison Committee

Jack Watson, Q.C,
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