

September 22, 2000

The Honourable Justice Donna McGillis  
Chair, Federal Court of Canada  
Rules Committee  
Federal Court of Canada  
Ottawa ON K1A 0H9

Dear Justice McGillis,

**Re: *Class Proceedings in the Federal Court of Canada: A Discussion Paper*  
Submission of the Canadian Bar Association**

I am writing on behalf of a working group of the Canadian Bar Association which was established to provide comments on the above paper. The working group is comprised of members from the following CBA groups: National Aboriginal Law Section, National Administrative Law Section, National Alternative Dispute Resolution Section, National Civil Litigation Section, National Environmental Law Section, National Maritime Law Section and Public Sector Lawyers Conference. This letter has been reviewed by the CBA's Federal Court Bench and Bar Liaison Committee and its Legislation and Law Reform Committee and has been approved by its Executive Officers.

**General**

We thank you for the opportunity to provide input on these important issues. On the whole, we support the Court's initiative toward entertaining class actions. Given the enormous difficulties of this task, we are impressed with the thorough treatment of the issues in the Discussion Paper and the decisions taken by the Rules Committee.

The availability of class proceedings enhances access to justice for litigants who may not have the resources to commence proceedings on their own.

**Rules or Legislation**

The changes being considered are principally procedural in nature. As the Discussion Paper notes, Rule 114 already provides for representative proceedings, which are akin to class proceedings. The Court should, of course, not draft Rules which are beyond the scope of its rule-making powers. However, this should not prevent the Court from proceeding where it has the jurisdiction to do so.

On a number of occasions, the Discussion Paper notes that the Quebec legislation is not very detailed. We suggest that the reason for this is that class proceedings in Quebec are governed by the Code of Civil Procedure. This approach was used to provide the Quebec courts with more flexibility to adjust class proceedings criteria in appropriate circumstances.

### **Defendant Certifying Plaintiff Class**

There should be a provision which sets out who the class representative will be where a plaintiff class is certified at the request of a defendant. This is a notable absence and should be clarified.

### **Certifying Defendant Classes**

In our view, there should not be certification of defendant classes, whether through cross-claim or otherwise. It is one thing to allow a person to obtain a benefit through being certified as a plaintiff in a class proceeding. It is quite another to require a person to suffer a detriment. Certification of defendant classes takes away a person's right to defend themselves where they might potentially suffer significant financial and other consequences. This is not appropriate.

### **Threshold Criteria for Certification of Class**

The threshold for certifying a class should not impede novel claims. Further, the judge hearing the application for certification should not be bound up in a detailed review of the factual and legal issues in a given case. This is the job of the trial judge. The question therefore becomes the extent to which there should be a test on the merits of the case.

We recognize that the potential answers to this question fall on a continuum – from a low standard of “arguable case” to something approximating full proof of the case. We suggest a standard which is in between these two extremes, although closer to the lower end. We would suggest the Quebec standard that the facts alleged “seem to justify” the relief sought. This will help ensure that novel claims can proceed while at the same time setting out some test on the merits.

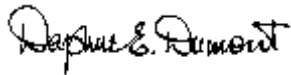
We have some concerns about adopting the British Columbia approach that proceeding as a class action be the “preferable procedure”, with a list of criteria. As noted in the Discussion Paper, the B.C. legislation is fairly recent and therefore has not produced much case law. It is therefore difficult to tell how that standard will be applied in practice.

### **Breadth of Applicability of Class Proceedings**

Class proceedings should be available in most types of proceedings, including applications for judicial review and statutory appeals. This recommendation is in keeping with our view that class proceedings be available to improve access to justice in the appropriate circumstances.

We hope our comments are of assistance and look forward to further opportunities for input as this important initiative proceeds. If you have any questions or concerns, please do not hesitate to contact Richard Ellis, Legal Policy Analyst at our National Office, who can direct your inquiry. He can be contacted at tel: 237-2925, ext. 144, fax: 237-0185, email [richarde@cba.org](mailto:richarde@cba.org).

Yours truly

A handwritten signature in black ink that reads "Daphne E. Dumont". The signature is written in a cursive, flowing style.

Daphne E. Dumont, Q.C.  
President