August 18, 2000

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

Dear Maître Roland,

Re: Proposed Amendments to *Supreme Court Rules*

We are writing on behalf of the Supreme Court of Canada Liaison Committee of the Canadian Bar Association. We thank the Court for the opportunity to provide our thoughts on the draft of the proposed new *Supreme Court Rules*. This letter has been reviewed by the CBA's Legislation and Law Reform Committee and approved by its Executive Officers.

We understand that the committee of Ottawa agents will address a number of potential problems caused by what appear to be drafting errors or oversights. We avoid addressing such concerns here and instead limit ourselves to matters of a substantive, or non-technical, nature.

Overall, the draft *Rules* greatly improve on the current version in organization and readability.

Our most significant concerns relate to certain time frames (and penalties for non-compliance), which we believe may create unrealistic burdens on litigants.

As well, the general increase in the required number of copies of various documents would create unnecessary costs, additional to the already daunting bill awaiting a Supreme Court of Canada litigant. Even though the draft *Rules* would require only one or two additional copies of each document, the result would be a significant cumulative cost to litigants, given the number of documents required – applications for leave, replies, motions, books of authorities and so on. Moreover, the move to extra paper copies seems odd in view of the general trend elsewhere towards electronic filing and in view of the growing ease of handling electronic versions of documents, particularly among those most likely to come before your Court.

Some of our concerns relate to placing substantive matters in the *Rules* as opposed to the *Supreme Court Act*. We understand that a decision has been made not to review the *Act* at this time. Part of the problem with this is that the *Rules* are being revised when the *Act* is not. There are some differences

between the *Act* and the Rules which can lead to ambiguity and confusion. Looking at the Rules in isolation may lead to further ambiguity and confusion. Consistent with our comments concerning the Project 2000 proposals to revise the *Act*, both documents should be revised at the same time. This would ensure that the *Act* deals with substantive matters and the *Rules* deal with procedure. Nevertheless we comment on those matters that we think are out of place in the *Rules*.

We will comment on the draft provisions in numerical order.

Rule 3 - The Court's existing practice is to allow parties to request directions. We agree that this procedure should be codified.

Rule 5 - Subsection (3) takes July out of the computation of time for some documents but not for others. In view of the new time frame for the filing of the appellant's factum, this selective suspension of time will create anomalies and confusion. For instance, if leave were granted on June 15, the Notice of Appeal would need to be filed by August 15. The appellant's factum and record would then be due September 15. However, in cases requiring statement of a constitutional question, the required motion would also have a September 15 deadline. In such circumstances, the appellant would have to prepare the record and its factum without knowing whether constitutional questions would be stated and, if so, what the questions were.

The *Rules* should use a uniform rule for all documents for computing summer vacation time.

The draft *Rules* would shorten the time period for filing the appellant's record and factum to three months after leave to appeal is granted (or, in an appeal as of right, three months after the notice of appeal is filed). Including the traditional July vacation in this already reduced time period will cause significant problems for some appellants. We therefore believe time should not run during the month of July for all documents, including the filing of factums.

Rule 17 - This provision, dealing with addition or substitution of parties, is more or less unchanged. As a result, it maintains the same peculiar procedure. Subsection (4) reads "Upon motion to set aside the substitution or addition referred to in subsection (1) . . .". This implies that a party which objects to the addition or substitution of another party does so by bringing a cross-motion to set aside the addition or substitution. We suggest that the objecting party simply respond to the original motion.

Subsection (4) allows a judge to direct that an issue relevant to the motion be determined in another court. This is an odd provision. We cannot conceive of a situation where another court would need to determine a relevant issue on a motion to add a party. Surely, the Supreme Court of Canada itself can determine whether a party can no longer pursue an appeal or whether a party should be added. Furthermore, there is something unseemly in the Supreme Court of Canada deferring to another on the question of who should have access to the Court.

Finally, we note that the jurisdiction of the Registrar to add or substitute parties has been removed. We question the reason for this. It is an efficient use of the Court's resources to allow the Court's Registrar to make such decisions in the name of the Court.

Rules 26 - 28 - The proposed rule increases the number of copies that must be filed and therefore increases the cost to litigants. The number of copies should remain the same.

The draft *Rules* provide extra time for filing the reply to the response to the application for leave. We agree with this change. However, we disagree with the elimination of "clear days" from the *Rules*, as this means that the respondent will lose one day in responding to the application for leave.

Rule 29 - This proposed rule requires respondents to apply for leave to cross-appeal where they wish to set aside or vary any part of the "disposition" of the judgment being appealed. We realize that this is the terminology used in the existing rule, but we think the meaning of the term "disposition" is unclear. It would be better for the rule to refer to "any part of the judgment" instead of "any part of the disposition of the judgment".

Under the proposals, Rule 29(3) would be eliminated. This rule clarifies that the respondent may use new arguments to support the judgment appealed from without applying to cross-appeal. We believe this rule should be maintained. Frequently it is confusing and difficult for parties to know when they should apply to cross-appeal. Rule 29(3) significantly, and helpfully, reduces this confusion.

Rules 29 - 31 - All of these proposed changes require parties to file additional copies of documents. We disagree with these proposals, as they will mean increased and unnecessary cost to litigants.

Rule 35 - Currently, Rules 34 and 38 require that the applicant's record and factum be filed within four months of the date the Notice of Appeal is filed. The draft Rules would reduce this time frame by two months. We believe that the proposed time frame is unnecessarily onerous, particularly during the summer vacation, when the proposed revisions would allow time to run during the summer months.

The requirement of additional copies of the book of authorities (14 instead of 12) will create additional expense for litigants. We believe this is excessive.

Rule 37 - This proposal represents a change from both the current *Rules* and from an earlier draft of the proposed new *Rules*. The current *Rules* require an intervener to file its factum within four weeks of receiving the respondent's factum. The proposed new rule requires an intervener to file its factum within eight weeks of the *order granting leave to intervene*.

There are two problems with this. First, where an Attorney General intervenes as of right under Rule 32, there is no order granting leave to intervene. It is unclear how time would run in such circumstances. Second, and more significantly, the proposed rule could result in interveners being required to file

factums before the appellant and respondent. This would defeat the Court's desire that interveners make different arguments than the other parties. We support the approach reflected in the current *Rules*, whereby all intervenors file their factums after the respondent.

Rule 44 - Subsection (4) says that a book of authorities may include "jurisprudence, legislative materials, treaties and *doctrine*" (emphasis added). The term "doctrine" is ambiguous and might open the doors for parties to insert material that should have been previously introduced as evidence. Recently, the Court struck material such as statistical information and newspaper articles from a party's book of authorities (*Public School Boards' Assn. of Alberta v. Alberta*, [1999] 3 S.C.R. 845).

Rule 48 - 49 - Where the parties consent to a motion or where no written argument is being filed in support of a motion, parties should not be required to file six copies of the motion or response materials. This is excessive.

Rule 62 - This proposed Rule should be deleted. The Court's authority to grant a stay is a substantive matter and should be dealt with in the *Act* as opposed to the *Rules*. Currently, stays are governed by ss. 65 and 65.1 of the *Act*. Indeed, the stay provisions of the *Act* are currently under review. There is, therefore, no reason to include this matter in the *Rules*. The Liaison Committee has already provided its comments to the Court on the existing provisions.

If Rule 62 is retained, then it should cover the Court's powers to stay proceedings and to stay the execution of judgments.

Rule 73 - Under proposed subsection (3), a respondent which files its factum late is prevented from presenting oral argument on the appeal, unless otherwise ordered. This introduces a new penalty which, in our view, is draconian. It is also quite unnecessary, as a party cannot file a factum late without first obtaining an order and the Court can set the terms of its permission, including similar sanctions in disposing of the motion for late filing.

Rule 75 - 77 - The Court's ability to reconsider motions or appeals is a substantive matter. It would be more appropriately dealt with in the *Act*.

Under subsection 75(3), the Registrar is granted the power to refuse to submit a motion to the Court. We question whether the *Rules* can provide such jurisdiction in the absence of specific authority granted by the *Act*.

Rule 89 - This proposed provision seems out of place in the *Rules*. Section 64 of the *Act* sets out a number of exceptions to the requirement for security for costs. Rule 89 adds a new one for appeals *in forma pauperis*. This would be more appropriately placed with the other exceptions in the *Act*.

Rule 91 - This proposed rule sets out a procedure for parties to cross-examine on affidavits. It should also provide a mechanism for dealing with objections made during the cross-examination.

Rule 93 - This proposed rule deals with the appointment of *amicus curiae*. It changes the terminology used in the existing rule and, in doing so, changes the substance. The new rule would allow the Court to appoint an *amicus curiae* to argue for a party, as opposed to counsel for a party.

There is a significant difference. Counsel appointed to act for a party represents that party's interests. The role of *amicus curiae* is quite different. An *amicus* does not take instructions from a party but rather acts as a friend of the Court. The *amicus* fills a void in the information that the Court needs to decide a case. As there have been some recent cases where the Court has appointed counsel to act in the traditional *amicus* role (e.g. *Miron v. Trudel*), we assume that including the power to appoint an *amicus* was intentional. However, the Court should maintain its power to appoint counsel to represent a party.

In either case, there is nothing in the rule to indicate who would pay the fees of the *amicus* or appointed counsel. An order requiring another party, including an attorney general, to pay the fees should not be made without hearing submissions from that party.

Once again, we thank you for the opportunity to provide input. We would be pleased to comment on any future drafts of the *Rules*. If you have any questions or concerns, please do not hesitate to contact the Supreme Court of Canada Liaison Committee through Joan Bercovitch, Senior Director of Legal and Governmental Affairs at (613) 237-2925, ext. 138 (joanberc@cba.org).

Yours truly,

Robert G. Richards, Q.C.
Chair, Supreme Court of Canada
Liaison Committee