June 29, 2001

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

Dear Me Roland,

**Re: Revisions to Supreme Court of Canada Rules**

Further to our meeting with the Court on May 14, 2001, the following are the comments of the Supreme Court of Canada Liaison Committee concerning the May 14, 2001 draft of the revisions to the Rules of the Supreme Court of Canada, and concerning some further issues raised by the Court.

## 1. Definition of "party"

The definitions section of the draft Rules should define the word "party". The word is a fundamental concept and the definitions section is the natural place for a person unfamiliar with the Rules to look for guidance.

The draft Rules appear to leave some questions unsettled in terms of who is a party. The word is used in two senses: a party in the Supreme Court of Canada and a party in the courts below. To a large extent, this relates to the requirements of Rules 26(2)(a), 29(1)(b) and 34(a), which deal with providing notice to the parties in the courts below.

We propose a definition of "party" in Rule 2 below which makes explicit that the word "party" is used in these two senses throughout the Rules. It alerts the reader to the fact that the meaning of the word will have to be determined from its context.

The question of who had the status of a party in courts other than the Supreme Court of Canada will depend on the particular rules and legislation which govern those proceedings. Thus, for this sense of the word "party", the definition in Rule 2 cannot be more explicit. We have used the phrase "in the court appealed from" which is normally a Court of Appeal, but which also includes the trial court in those rare cases of a direct appeal to the Supreme Court of Canada.

We would modify Rules 2, 26(2)(a), 29(1)(b) and 34(a) to read as follows and would leave Rule 22 alone:

*Rule 2*
"party" means, in this Court, those named in the style of cause in accordance with Rule 22 including those added or substituted as parties under Rule 18, but where referring to the court appealed from, it means those who were parties in that court; . . .

*Rule 26(2)(a)*
. . . send to all other parties and intervenors in the court appealed from a copy of the notice of application for leave to appeal by ordinary mail to their last known address; and . . .

*Rule 29(1)(b)*
. . . send to all other parties and intervenors in the court appealed from a copy of the notice of application for leave to cross-appeal by ordinary mail to their last known address; and . . .

*Rule 34(a)*
. . . send to all other parties and intervenors in the court appealed from a copy of the notice of appeal by ordinary mail to their last known address; and . . .

**2. Timelines**

We still believe there are problems with the timelines for parties to file their facta. The principal concern is that in some circumstances an intervenor will have to file its factum before the respondent. If an intervenor is not to repeat the arguments of the other parties, then it must have the opportunity to see both the appellant's and the respondent's facta prior to filing its own.

Proposed Rule 37 requires the intervenor to file its factum within eight weeks of the order granting leave to intervene or the filing of the notice of intervention under Rule 61(4) (which deals with Attorney General interventions). The time period for intervenors to file their facta should always start on the date the respondent's factum is actually filed.

The proposal will create frequent problems with Rule 61(4) interventions. A motion to state constitutional questions must be filed within 30 days after the granting of leave or the filing of the notice of appeal. The intervenor usually has four weeks to file its notice to intervene after the constitutional question is stated. The filing of the intervenor's factum would then have to be filed within eight weeks after that.

This time frame means that the intervenor Attorney General's factum would have to be filed at the same time as the appellant's factum and record (which is due 12 weeks after the constitutional question is

stated). Requiring an intervenor to file before seeing the appellant's record and before seeing either party's factum is highly unusual. It increases the opportunity that these intervenors will repeat the issues dealt with by the appellant or respondent. It also decreases the chance that these intervenors will withdraw their interventions, which frequently happens when an Attorney General becomes aware that its issues have been dealt with by a party.

We suspect that the time frames will lead many Attorneys General to file their notices of intervention as late as possible after the constitutional question is stated, to maximize the time to prepare a factum.

**3. Penalizing Late Filing by Limiting Oral Argument**

Where a respondent has filed its factum late, proposed Rule 72(3) automatically deprives the respondent of its ability to present oral argument, unless the Court orders otherwise. In our August 18, 2000 letter to the Court, we called this proposal "draconian" and we remain seriously concerned about its implications.

The Court decides significant issues of importance to all Canadians. It is therefore crucial that the Court have the benefit of oral argument from all sides prior to issuing a decision. Given what's a stake in many of the Court's decisions, it should not matter that a party has committed a procedural error.

The Rule also detracts from the appearance of justice, which is important given that the Court is the final level of appeal. Respondents and some members of the public could be left with the impression that the Court's process is unfair. This will not enhance public perception of the Court.

A party cannot file a factum late without first obtaining an order. If the Court grants such an order, then presumably it is satisfied with the reasons put forward by the respondent to explain the delay. The Court can set the terms of its permission, including costs or other sanctions. There is no need to resort to further sanctions.

While not arguing for the extension of the rule, it is curious that the rule only applies to respondents, not appellants or intervenors. We question the basis for this.

We still believe the most appropriate sanction for late filing is the one most frequently used in the courts, namely costs. We understand the Court is concerned that such costs awards will simply be downloaded onto clients. However, in our view, counsel will have a difficult time explaining to their clients why they should have to pay costs arising from counsel's error. This is particularly so if the Court decides to award costs personally against counsel.

In our May 14 meeting, a suggested alternative was to cut the respondent's oral argument in half, instead of eliminating it entirely. As a general principle, we do not support this alternative. However we

do believe that if the Court is inclined to limit time for oral argument, this is the lesser of two evils. In assessing whether a respondent's time should be limited, the Court should be required to take into account whether the administration of justice, including the appearance of fairness, is being served.

**4. Vexatious Proceedings**

Proposed Rule 74 provides that there will be no reconsideration of an application for leave to appeal unless the Registrar is satisfied that there are exceedingly rare circumstances that warrant consideration by the Court. Proposed Rule 82 allows parties to bring a motion requesting a judge to review an order of the Registrar, except for orders under Rule 74. Thus, the Registrar's order under Rule 74 is insulated from further review.

This is a difficult issue. The exception in Rule 82 is designed to provide finality to the Court's decisions and prevent vexatious appeals of decided issues, which we understand are frequent. We recognize that some people will take advantage of any right of appeal or reconsideration. At the same time, however, an escape valve can be useful on those very rare occasions where the Court's decision not to grant leave is in error. There have been at least three circumstances where a reconsideration application for leave to appeal has been successful (*R. v. Hinse*, [1995] 4 S.C.R. 597, *Reekie v. Messervey*, [1990] 1 S.C.R. 219 and *Canderel Ltd. v. Minister of National Revenue* (1997), 215 N.R. 320).

We believe that, on balance, the interests of justice are better served by removing the exception in Rule 82. The Court can make mistakes and it is important that a judge be able to review the Registrar's decision as a last resort.

**5. Section 60 Security for Costs**

The Court requested our view on whether there should be a rule allowing the Court to dispense with the $500 for security for costs which is found in section 60 of the *Supreme Court Act*.

We agree that the provision is anachronistic and would support its removal from the *Act*. However, given the mandatory language in the *Act*, we believe that any change has to be made by legislative amendment. A rule allowing the Court to dispense with this requirement would appear to be inconsistent with section 60.

**6. Power of Remission to Court Below without Reasons**

Under sections 43(1.1) and 46.1 of the *Act*, the Court has the power to remand a case to the Court below without reasons. The Court requested our view on whether this power has caused any problems.

On occasion this power can cause problems when counsel do not agree on what issues are remitted back to the Court below. The Court should provide some guidance to the parties when the case is remanded back.

## 7. Stays of Execution

The Court also requested our views on the venue of stays of execution. Our view on this issue was expressed in a December 6, 1999 letter to the Court concerning the treatment of stays under the *Act*. The relevant portion is excerpted below:

> 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.

## 8. Conclusion

We thank the Court for the opportunity to present our views in person on May 14 and in writing. If the Court has any comments or concerns about this letter, please do not hesitate to contact me or Richard Ellis at the CBA's National Office.

Yours truly

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