March 8, 2002

Nancy Bélanger
Secretary to the Rules
Committee
Federal Court of Canada
Ottawa ON K1A 0H9

Dear Ms. Bélanger,

Re: Draft Class Action Rules in the Federal Court of Canada

We write on behalf of the National Environmental Law and Administrative Law Sections of the Canadian Bar Association (the Sections) to provide comments concerning the draft class action rules as published December 8, 2001 in the *Canada Gazette*, Part I.

"No-costs" Regime

The proposed rules include a "no costs" provision up to the disposition of common questions. This provision would be subject to exceptions, including "exceptional circumstances that make it unjust to deprive the successful party of costs" (proposed Rule 299.41).

There is a range of views within the Sections concerning the imposition of a "no costs" regime. Some agree with the approach in the draft Rules. Others believe that the Rules should expand the Court's discretion to award costs. The arguments for each approach are set out below.

Overall, the Sections recognize that imposing potential liability for costs on a class representative is a significant disincentive to the commencement of class proceedings. At the same time, class proceedings impose costs on defendants as well as social costs, including the consumption of scarce judicial resources and insurance costs. Unmeritorious defences impose similar costs on plaintiffs and on society. The principal question is whether it is appropriate to use costs awards as a disincentive to unmeritorious claims or defences.

Arguments for Maintaining the No-Costs Rule

The current draft rule strikes an appropriate balance between the interests involved, recognizing that a large portion of class actions in the Federal Court will involve the federal government as the defendant. In such instances, class actions would frequently be initiated to implement the federal government's obligations or to promote the public good. Plaintiffs in these cases,

according to this view, should not be exposed to costs awards, as this would inhibit the initiation of meritorious class proceedings.

Arguments for Expanding the Court's Discretion to Award Costs

It is important to provide some disincentive to bringing unmeritorious class proceedings or to pursuing unmeritorious defences. While the certification process resolves certain issues and requires that the plaintiff appear to have a cause of action (this issue is further discussed below), it cannot determine whether the proposed proceeding ultimately has any substantive merit. Accordingly, it is too narrow to permit costs only in "exceptional circumstances" or where parties have taken frivolous or unnecessary steps. Under this view, an appropriate balancing of these interests would be to preserve the general principle that costs follow the event while at the same time providing some guidance on how the Court should exercise its discretion in awarding costs — for instance, providing that costs should not generally be awarded against an unsuccessful class plaintiff or their counsel where the claim raised novel issues or was in the public interest.

Arguments Concerning Awards Against Counsel

Some have suggested that one way to address the concern that costs will be a disincentive to meritorious class proceedings is to include an express discretion to award costs against plaintiff's counsel in appropriate circumstances. Although costs awards against counsel are unusual, this position is based on the view that most class actions are counsel driven, that plaintiff's counsel stands to reap substantial benefits if successful and that, accordingly, costs awards against plaintiff's counsel in class proceedings should not be as narrowly restricted as those in traditional proceedings. The opposite view is that it is inappropriate to award costs against plaintiff's counsel, many of whom already incur significant risks by taking on class actions on a contingency basis and many of whom are responsible for payment of the client's disbursements up front.

Certifying Defendant Classes

Proposed Rule 299.15 would permit certification of defendant classes. We believe that this provision should be deleted. This view is consistent with the September 22, 2000 submission of a working group of the CBA to the Chair of the Rules Committee (a copy of which is attached for ease of reference).

In the September 22, 2000 submission, the working group noted that there is a fundamental difference between allowing a person to obtain a benefit and requiring a person to suffer a detriment. Persons facing potentially significant financial and other consequences have the right to defend their own interests and should not be required to rely upon a class representative to do it for them. Certification of defendant classes would deprive persons of this right.

The draft Rules go some way to addressing this concern by allowing a defendant to opt out of the class. At the same time, it is possible for individual defendants in a certified class not to receive actual notice of the proceeding, given the court's discretion as to notice under proposed Rule 299.34. Therefore, they may not be aware that there is a proceeding in which they can decide not to participate.

Having said this, some of us believe that certification of defendant classes should be permitted as a matter of public policy. Certification of defendant classes is permitted in Ontario with no apparent problems.[1]

Respondent's Evidence on Motion for Certification

Proposed Rule 299.17(4) sets out the requirements for affidavits from the moving party and respondent on a motion for certification. Proposed Rule 299.17(4)(a) would require both the moving party and respondent to swear that they know of no material fact relevant to the motion that has not been disclosed in the person's affidavit. Proposed Rule 299.17(4)(b) would require both the moving party and the respondent to provide, to the best of their knowledge, the number of members of the proposed class.

In many cases, it would be difficult for a respondent to meet these two requirements. From respondents' perspective, the amount of information that is "material" to a motion to certify a class action can be quite large. Some of us believe that requiring such information to be disclosed in the responding affidavit is potentially a significant and onerous undertaking which may inappropriately impose obligations akin to discovery obligations at the pre-certification stage. It also opens the door to parties using motions to certify as a fishing expedition. They would therefore recommend that proposed Rules 299.17(4)(b) be either deleted or clarified to make it less onerous. Others think the proposed disclosure requirement is no more onerous than the defendant's normal discovery obligations. Further, this view holds that it is appropriate to impose such an obligation given the purposes of class actions — to streamline the procedure and do justice to the parties — and given that the defendant usually has far more information than the plaintiffs.

Similarly, some believe that it is also inappropriate to require the respondent to provide an estimate of the number of persons in the class at the pre-certification stage. In many instances, there will be no way of the respondent knowing this number. In addition, in this view, the requirement appears to unfairly prevent the respondent, at the pre-certification stage, from denying the existence of a class. Others think that the respondent is often in the best position to have this information and that requiring the respondent to disclose this information or depose

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[1] *Class Proceedings Act*, S.O. 1992, c. 6, s. 4; *Chippewas of Sarnia v. Canada (A.G.)* (1996), 29 O.R. (3d) 549 (Gen. Div.).

that it is unknown is consistent with the policy purpose of identifying, locating and informing persons who may be within the class.

Criteria for Certification

As noted in the September 22, 2000 letter, the criteria for certification of a class action should not impede novel claims. Proposed Rule 299.18(1)(a) would establish a standard that the pleadings must "disclose a cause of action". On its face, this would seem to be an appropriately low threshold. However, it is conceivable that judges would use this standard to engage in a more rigorous examination of the merits. We would prefer a standard that the pleadings "appear to disclose" a cause of action or that they disclose a "reasonable" cause of action. In doing so, the rules would recognize that the appropriate test to satisfy this requirement is the test applied on a motion to strike for no cause of action.

In the September 22, 2000 letter, concerns were expressed about the criterion that the class action must be the "preferable procedure". However, there is now greater comfort with this standard, given that "preferable procedure" is determined with reference to the considerations in proposed Rule 299.18(2). We also note that the Supreme Court of Canada commented on the question of "preferable procedure" in its October 2001 decision in *Hollick v. Toronto.*[2] The headnote to that decision states:

> In the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions: judicial economy, access to justice, and behaviour modification. The question of preferability must take into account the importance of the common issues in relation to the claims as a whole. The preferability requirement was intended to capture the question of whether a class proceeding would be preferable in the sense of preferable to other procedures such as joinder, test cases and consolidation. The preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

Some consideration should be given to including these principles in the Rule.

Proposed Rule 299.18(1) allows the judge to certify an action. We suggest that the rules make it clear that judges also have the power to certify common questions of law.

Substitute Representative in Appeal

Proposed Rule 299.33(2) deals with substitution of a representative plaintiff who either does not appeal an order or who appeals and then discontinues the appeal. The proposed Rule would

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[2] 2001 SCC 68.

permit a member of the class to apply for leave to exercise the right of appeal within certain time frames.

In determining whether to grant leave to the substitute representative plaintiff, the judge should be required to consider the criteria in proposed Rule 299.18(1)(e) for determining whether a representative plaintiff is appropriate. This includes such matters as whether the representative would fairly and adequately represent the interests of the class, whether the representative has any conflicts of interest with other class members and so forth.

Expenses Relating to Notices

Proposed Rule 299.4 permits the judge "full discretionary power" over the amount and allocation of expenses for notices sent to class members. We suggest that where an action is successful, the defendant should, as a general rule, be required to pay the costs of the notice. The court should, however, retain the discretion to award costs differently in appropriate circumstances.

We thank you for the opportunity to present our views. If you have any questions or comments, we may be reached through Richard Ellis, Legal Policy Analyst at the CBA's National Office (tel: (613) 237-2925, ext. 144; email: richarde@cba.org).

Yours truly

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