THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 28, 2010

Ms. Nadia Loreti
Acting Director, Registry Branch
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

Dear Ms. Loreti:

RE: Supreme Court of Canada Rules — Proposed amendments

I am writing on behalf of the CBA Liaison Committee to comment on the draft amendments to the SCC Rules, which we received on December 17. We will restrict our remarks to a few key proposals. We have read the response prepared by Justice Canada and the Public Prosecution Service of Canada, and commend to you their detailed editorial remarks. The short consultation period unfortunately permitted no opportunity to canvass fully all the views of the "SCC bar" on these matters.

Rules 42 and 71 – Factum on Appeal and Appearances

The CBA Liaison Committee has concerns about the proposed amendment to Rule 42, for its impact on the quality of arguments by Attorneys General and by interveners generally.

Although it is not clear from the language used in Rule 42(5) to reflect this proposed amendment, we assume that the proposal is designed to limit to ten pages factums filed by all interveners, including Attorneys General who intervene as of right on constitutional questions under Rule 61.

In our view, the proposed amendment would seriously curtail the right of an Attorney General to defend its own legislation. This curtailment would have a deleterious effect on the essential dialogue that occurs between courts and a legislative body when the constitutional validity or operability of legislation is in issue. The proposal fails to reflect not only the important role Attorneys General can play in assisting the court on these issues, but the more fundamental point that the legislature ought to have the right to defend its own legislation in a way that contemplates a participatory role greater than that of an intervener by leave.

Our concern with the proposed amendment to Rule 42 does not stand in isolation. The proposal for Rule 42 must also take into account the proposed amendment to Rule 71, which would eliminate oral argument as of right for Attorneys General in cases where constitutional questions have been stated. While the proposed amendment to Rule 71 reflects the current practice of the Court, the two

amendments, taken together, restrict in a meaningful way the participation of Attorneys General in the development of constitutional principles that will shape the way in which legislative authority is exercised.

The proposed amendment to Rule 42 would institutionalize the Court's recent practice of limiting an intervener's factum to ten pages when leave is granted. While we acknowledge the benefit of more efficient Court processes, that efficiency should be balanced with the benefit of an intervener's argument to the Court's deliberations. Such a dramatic reduction risks not giving the Court the full advantage of the intervener's argument. We suggest that the factum for interveners other than Attorneys General be limited to 15 pages. Where an intervener's factum does not present useful arguments, the Court can exercise its discretion to refuse oral argument.

Rules 35(1)(a) and 36 – Service of Documents

We support the proposal that interveners be given only an electronic copy of the appellant's and respondent's factum, record and book of authorities. This is a reasonable cost-saving measure. However, we believe that main parties to the appeal should continue to receive a paper copy of these documents, as well as the electronic format. As with the Court itself, counsel will generally work from a paper copy and it is not unreasonable to require service of one paper copy on the appellants and respondents.

Rule 63.1 – Simplified Procedure on Certain Motions

Applications for assignment of counsel under s. 694.1 of the Criminal Code are not limited to federal prosecutions. We believe that consent should therefore come from the attorney general responsible for the prosecution. We suggest that the reference in rule 63.1(1) to the Attorney General of Canada be changed to "the Attorney General who is the appellant or the applicant in or respondent to the proceeding."

Various Rules

In our view, "Ordonnance de non-publication" is more precise, and should not be changed to "Interdiction de nonpublication".

Throughout the Rules, time may be computed by days or by weeks. We suggest that this be made consistent, with all time references made to the number of days.

We appreciate the opportunity to comment on these proposals and trust that our comments will be of use in finalizing the changes to the Rules.

Yours very truly,

(Original signed by Tamra Thomson for Yves Tourangeau)

Yves Tourangeau
Chair
SCC/CBA Liaison Committee

c. Barbara Kincaid, General Counsel, Law Branch