THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email : Chantelle.Bowers@cas-satj.gc.ca

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Ottawa, ON K1A 0H9

Dear Ms Bowers,

Re: Federal Court Rules – Possible Procedural Changes

I am writing on behalf of the CBA members of the Federal Court Bench and Bar Liaison Committee in response to the 2011 discussion paper of the Federal Court Rules Committee titled "Possible Procedural Changes". As requested at our May meeting, CBA Committee members circulated the discussion paper to other members of CBA Sections. We appreciate the opportunity to pass along comments we received on proposed procedural changes outlined in the discussion paper. We provide comments about some, but not all of the issues in the discussion paper, and have followed the same order used in the discussion paper. Please note that the Attorney General of Canada will forward comments separately.

Issue 1: Filing an appearance within the time limits for filing a defence
Rule 204 should be amended to provide for the filing of an Appearance within the time limits, and a defence 20 days following. Providing additional time to file a defence may, in some cases, eliminate the need for a Rule 7 motion.

Issue 2: Timely filing of books of authorities.
It would be beneficial for parties and the Court to accelerate the deadlines for filing books of authorities. A Rule requiring that Books of Authorities are filed in a timely way would ensure that the Judge or Panel hearing the case can review relevant authorities prior to the hearing. The deadline is less likely to be overlooked if it occurs at about the same time as the exchange of memoranda of fact and law, as opposed to 30 days before the hearing. It would also be beneficial to minimize duplication and reduce the amount of paper that is exchanged and filed.

Given that Rule 348 already provides a timeline for filing a Joint Book of Authorities, the proposed Rule 346(6) in the discussion paper may not be particularly useful. However, to accelerate the exchange of Books of Authorities, Rule 348(1) could be amended to read "subject to subsection (2), *no more than 20 days after the filing of the respondent's memorandum of fact and law*, the parties shall file….". This would retain the presumption that the parties should prepare a joint Book of Authorities and hopefully reduce the volume of paper that is filed with the Court.

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Another option would be to amend Rule 348 by requiring the Books of Authorities to be filed within 30 days after the court notifies the parties of the date for the hearing of the appeal. If Rule 348(2) applies, then the Appellant shall file within 30 days after being notified and the Respondent within five days after being served with the Appellant's book. That would give the Registry time to notify the parties if that deadline is not met, well in advance of the hearing date.

As for penalties for non-compliance, Tariff B does not have separate recovery for preparation of the Books of Authorities. In any event, cost consequences of a few hundred dollars would unlikely have an impact on the conduct of many litigants in the Court. Instead, an effective mechanism could be to make timely filing of a Book of Authorities a condition precedent to obtaining a hearing date. Form 347 (requisition for hearing – appeal) could include a confirmation that either the appellant has prepared and filed its own Book of Authorities, or that a joint Book of Authorities has been filed. This would encourage the appellant to file a Book of Authorities in a timely way, and at the same time not permit a respondent to delay the scheduling of the hearing.

Issue 3: Revising the content requirements for Books of Authorities

Book(s) of Authorities should include a complete list of all authorities mentioned in the parties' Memoranda of Fact and Law, listed in the order they appear in the parties' memoranda. Each party's list should appear one after the other. The second list may duplicate authorities on the first list, but they should still be listed. The list may also contain additional authorities not mentioned in the Memoranda if one or both parties intends to refer to those authorities. These additions should be listed after the last authority referred to in each party's main list and should be preceded by a heading like "Appellant's Additional Authorities".

To reduce the volume of paper, the practice notice released on April 15, 2008 provided for a common list of authorities. Authorities included in this list are deemed to be included in the book of authorities prepared by a party pursuant to Rule 70. As such, a party need not reproduce these authorities in full. There are currently common lists of authorities for immigration and refugee law, and also aboriginal law. A common list of authorities for other areas of law would also be helpful.

It would be useful to exchange electronic books of authorities or provide Internet links to cited decisions. The parties could be required to file a joint (or if 348(2) applies, separate) CD with a complete copy of all authorities available on CANLII, Quicklaw, Lexis, Westlaw/ecarswell, Taxnetpro or Canadian Tax Foundation's Taxfind. However, a practical issue often arises, in that the Court does not always have the technology to allow counsel to project documents for everyone to see. The Court must have a copy at hand if a particular case is referenced at the hearing. Until technological resources are in place, Books of Authorities should remain in paper format.

Rule 348(1) provides for a joint book (and CD) and Rule 348(2) says that the parties shall not duplicate material in each other's book (and CD). If there is a joint book there will be no duplication; if there are separate books (and CDs), it is the Respondent's obligation to ensure there is no duplication of material already filed by the Appellant.

In addition to a common list of authorities, another way to reduce the volume of paper filed would be to amend Rule 348 to make it mandatory to reproduce authorities on both sides of the page, which is now permissible under Rule 65(a). The physical books should contain all other authorities and excerpts from the material on any CD that the parties anticipate emphasizing in argument. As well as having the material printed double-sided, it should be highlighted in yellow by the Appellant and green by the Respondent where applicable.

Often relevant authorities are discovered after Books of Authorities are filed. This should be recognized by the Rules, so that a party may, not less than seven days before the hearing, serve and

file one list of supplementary authorities and a CD containing those authorities, with the relevant passages highlighted in the CD (if the Books of Authorities were filed in 3-ring binders, it would be easy to accommodate the filing of highlighted exerts of additional authorities simply by inserting them at the back of the binder. While the court may prefer cerlox binders, they are more difficult to open up, insert new material and re-bind when required.

Issue 4: Allowing non-lawyers to represent corporations without leave
Rule 120 should not be amended.

It is reasonable to require that corporate "persons" be represented by counsel, subject to leave being granted under Rule 120. In *Pacific Shower Doors (1995) Ltd. v. Canadian International Trade Tribunal*, 2009 FCA 317, the Federal Court of Appeal noted that corporate status confers advantages and disadvantages, including the requirement that corporations must be represented by counsel. In that case, there was no evidence of impecuniosity; it was apparent from the conduct of the proposed corporate representative that the corporation would benefit from professional legal representation.

Unrepresented litigants can present a challenge for the Court, its staff, opposing counsel and other litigants. Often, those litigants are unfamiliar with the Rules, the processes and procedures of the Court, the rules of evidence and the legal issues involved in a particular matter. As a result, hearings typically take more time than they would if all parties were represented by counsel.

A leave motion under Rule 120 provides a good, and often early, opportunity for the Court to gauge whether the person who proposes to represent the corporation will do so in an informed, fair and effective manner. The presumption should remain that corporate “persons” benefit from professional representation, but with an opportunity for a non-lawyer to represent a corporation in appropriate circumstances.

A Rule 120 motion is not an unreasonable obstacle. If a person who proposes to stand in the place of counsel on behalf of a corporation faces significant difficulties with a leave motion, that person is also unlikely to be able to comply with disclosure obligations, conduct discoveries and run a trial. The current procedure under Rule 120 permits the Court to balance access to the courts with the Court's ability to control its own process.

Issue 5: *Amici Curiae*
No comment.

Issue 6: Providing specifically for jurisdictional challenges
No comment.

Issue 7: Increasing monetary limits for simplified proceedings
Access to the Court for small and medium sized enterprises can be problematic. For example, even relatively routine trade-mark and copyright infringement proceedings can be prohibitively expensive, largely due to the costs associated with discovery.

Often the primary objective in an infringement proceeding is obtaining an injunction. As presently drafted, Rule 292 limits recovery in a simplified action to monetary relief. While the Court has indicated a willingness to allow such relief to be sought in a simplified action, this should be expressly included in the Rule. Parties may hesitate to commence a simplified action when the availability of an injunction or declaration will require a motion and leave of the Court. If declaratory and injunctive relief is to be available in simplified actions as a routine matter, such relief should be expressly included in Rule 292.

As for documentary discovery, the list of documents currently required by Rule 295 is practical. This could be expanded to adopt the Ontario practice of including identities of those persons who may have knowledge of the matters in issue (see Rule 76.03(2)).

If the monetary limit of a simplified action is increased substantially, it is unlikely that the present limitations on examination for discovery in Rule 296 are appropriate. There should be proportionality in discovery, recognizing that what may be appropriate for a $500,000 dispute may not be needed for a $10,000 dispute.

Rule 296 could be expanded to allow for either a written examination or an oral examination, not to exceed four hours. In Ontario, up to two hours is allowed under the simplified procedure where the limit is $100,000 (Rules 76.04(2) and 76.02(1)). The discovery process could be further streamlined by mandating that questions may not be refused on the basis of relevance, i.e. mandatory use of Rule 95(2). The propriety of the question could be determined when read-ins are submitted at trial, as is done in some American courts. To the extent there are follow-up questions arising from answers to undertakings or subsequently produced documents, these could be restricted to a written examination.

While numerous motions should be discouraged, it may not be practical to limit motions to be returnable only at the pre-trial conference as presently required by Rule 298. The Court has recently stressed the importance of the pre-trial conference. Parties should be prepared to discuss settlement and be ready for trial with all discoveries completed (e.g. *Apotex Inc. v. Bristol-Meyers Squibb* 2011 FCA 34). If contested amendments to pleadings or production of documents is outstanding at the time of the pre-trial (and the subject of a motion), this may limit the ability of the parties to discuss settlement, narrow the issues and schedule the trial. An amendment to include the possibility of bringing motions at an earlier time, but only with leave, would provide an important "gatekeeper" role. It would prevent one party from frustrating the summary nature of the proceedings with excessive motions, and at the same time allow for completion of discoveries before the pre-trial conference.

Issue 8: Garnishing joint bank accounts
No comment.

We hope these comments will be useful to the Rules Committee.

Yours truly,

(Original signed by Gaylene Schellenberg for Martin Masse)

Martin Masse
Co-Chair, Federal Court Bench and Bar Liaison Committee