THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 18, 2018

Via email: Barbara.Kincaid@SCC-CSC.CA

Ms. Barbara Kincaid
General Counsel
Court Operations Sector
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

Dear Ms. Kincaid:

Re: Proposed Amendments to Supreme Court of Canada Rules

I am writing on behalf of the CBA members of the SCC-CBA Liaison Committee (the CBA Committee Members), to comment on the draft practice directive on interveners and proposed amendments to the Rules, as presented at our recent meeting and in your message of June 26, 2018.

Draft Practice Direction on Interveners

The CBA Committee Members reiterate our comments at the meeting on the interplay between paragraphs 3, 4 and 5 of the draft practice direction, and the tension they create between ensuring that interveners not take on the role of a party and permitting the distinct and different arguments they are required to make to justify their status as interveners.

In our view, the wording of paragraph 3 that interveners "should not take a position on the outcome of the appeal" could benefit from further clarification. Without restricting the Court in the phrasing, we suggest that something like the following examples could be added to paragraph 3:

- Nothing in this practice direction prevents an intervener from making submissions on the legal issues raised by the case.
- For greater clarity, interveners are not to take a position on any factual disputes between the parties.
- Nothing in this practice direction prevents an intervener from making submissions on the appropriate legal test at issue in the appeal.

There are circumstances other than the existence of a constitutional question where the Court will likely wish to hear from interveners on what the law ought to be, but making those submissions could run afoul of paragraph 3 as it is currently worded.

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The wording of paragraph 4 that interveners "should avoid arguments the parties could have made themselves" is also problematic, in our view. Paragraph 4 seems targeted at stopping an intervener from making arguments that duplicate those of the parties, or taking a position on the outcome of the case. In our view, this goal can be met by changing the wording to something like interveners "should not act as if they are a party" or "should not repeat the arguments of the parties" or "should focus on legal issues." The CBA Committee Members believe that paragraph 4 unduly restricts the arguments an intervener could make, bringing the intervener potentially into conflict with the requirement that it advance arguments distinct from those of the parties.

Finally, once the Practice Directive is finalized, we anticipate considerable interest from the bar for an opportunity to hear more from the Court – perhaps via a webinar – on the current approach to interventions, and in particular what the Court is looking for from interveners.

Proposed Rule Amendments

The CBA Committee Members generally agree that most of the proposed Rule amendments are of a housekeeping nature. One exception, however, is the proposed changes to the computation of time in Rule 5.1, which would reduce the Christmas/New Year recess for filing by almost a week. The CBA Committee Members do not endorse this proposed change, for the same reasons that the Bar initially advocated to institute a recess.

It is often difficult for counsel to make the arrangements necessary to file materials with the Court during the holiday season. This is true of both government counsel and the private bar. Challenges include seeking instructions at a time when clients and client representatives are often out of the office, and also arranging for practicalities like couriers and printing services. It is not unusual for other courts to suspend the computation of time for two weeks at that time – the Federal Court's recess is from December 21 to January 7, for example.

Proposed New Rule 95.1

The CBA Committee Members would like to learn more about the rationale for this proposed Rule change. Currently, a judge participates in a hearing by use of electronic means, during or after the proceeding, only in extraordinary circumstances (such as health issues), and with the consent of the parties. The proposed Rule does not require extraordinary circumstances, does not seem to limit the number of judges who could participate by electronic means, and requires only the approval of the Chief Justice. Indeed, Rule 95.1(2) suggests that the parties will be advised that a judge will participate electronically only where it is "practicable" for the Registry to give that notice.

Absent an understanding of the purpose and parameters of this proposed change, it is difficult for the CBA Committee Members to comment further. However, in our view, a judge's participation in a hearing by electronic means (during or after the hearing) should be exercised in exceptional circumstances, and we encourage the court to consider whether consent of the parties should be required.

Evolving Role of Agents

Finally, we confirm that we plan to engage in a wider consultation with the Bar on the evolving role of agents. We anticipate that the consultation will take place in September, and we hope to provide feedback to the Court by the end of October 2018.

Please do not hesitate to contact me if you have any questions.

Yours very truly,

(original letter signed by Lauren Wihak)

Lauren Wihak, CBA Chair
Supreme Court of Canada – Canadian Bar Association Liaison Committee