June 9, 2021

VIA EMAIL: Andrew.Baumberg@fct-cf.gc.ca

Andrew Baumberg
Secretary to the Federal Courts Rules Committee
Federal Court of Appeal and Federal Court
90 Sparks Street, 12th Floor
Ottawa, Ontario K1A 0H9

Dear Mr. Baumberg:

RE: Amendments to the *Federal Courts Rules* with respect to Enforcement, Limited Scope Representation, Proportionality, Abuse of Process, and Federal Court of Appeal Motions

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of approximately 5,500 members throughout Canada. The Society's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. Our membership includes counsel who act before the Federal Court and the Federal Court of Appeal on a variety of matters.

On April 10, 2021, three sets of amendments to the *Federal Courts Rules* ("Rules") were pre-published in the *Canada Gazette*, Part I, Volume 155, Number 15. The Society has previously provided input to the Federal Courts Rules Committee ("Rules Committee") in its prior consultations regarding several of these proposed changes, as follows:

- *Enforcement of orders*. The Society responded to the Rules Committee's July 17, 2013 discussion paper regarding enforcement in a letter dated September 30, 2013.
- *Limited Scope Representation.* The Society responded to the Rules Committee's November 26, 2014 discussion paper regarding limited scope representation in a letter dated January 30, 2015.
- *Proportionality and Abuse of Process.* The Society responded to the Rules Committee's October 14, 2011 discussion paper and October 16, 2012 report regarding the global review of the Rules, including consideration of whether to add the principle of proportionality to the Rules, in letters dated December 16, 2011, and January 30, 2013.

The Society's prior submissions to the Rules Committee are attached to this letter for the Rules Committee's reference.

The Society formed a Task Force to review the amendments proposed on April 10, 2021, to bring these contemplated changes into effect in the Rules, and to develop feedback for the Rules Committee. The Society is grateful for the opportunity to provide input on the proposed Rules.

Enforcement of Orders

The Society agrees with the Rules Committee's proposal that the procedure for extending the validity of writs of execution be made an administrative procedure.[1] The Society believes that this amendment would free up judicial resources and reduce the cost of obtaining such extensions.

Limited Scope Representation

The Society supports providing litigants in the Federal Court and Federal Court of Appeal with the flexibility to be represented by a lawyer on a limited mandate, in order to expand access to more affordable legal representation.[2] The Society has several recommendations in respect of Form 124D, Notice of Limited Scope Representation, to promote clarity and certainty.

First, the proposed Form 124D provides that "The solicitor's representation of the plaintiff *(or as the case may be)* ceases, WITHOUT FURTHER NOTICE, on completion of the mandate."[3] The Society submits that it may not be clear to the parties or to the court when a limited mandate is completed. It would promote greater clarity and certainty for all parties to require notice when the limited mandate comes to an end. The Society suggests adding a checkbox to Form 124D which indicates the limited scope mandate has been completed and the date of completion. The Society recommends that the Rules require that Form 124D be sent to the parties and the Court again when the limited mandate is completed, with this box checked and the date filled out. This requirement would make it clear to the Court and other parties that the party is once again self-represented, and to the client that their representation has come to an end.

Second, we recommend that Form 124D provide for the client's deemed consent to receive the notice of termination of the limited scope representation electronically via email; this deemed consent is required because it may be necessary to communicate the completion of the limited scope retainer on short notice. Given the rise in e-filing, the Rules Committee may also wish to consider including an option on Form 124D by which parties may consent to being served with all future documents in the matter electronically.

Third, the presumption of continued representation in proposed Rule 340 is significant, and may have the effect of creating continuing lawyer-client relationships against the wishes of a lawyer or client. The proposed rule provides that "In an appeal from the Federal Court to the Federal Court of Appeal, the solicitor of record … on the appeal shall be the same as they were in the first instance, unless the solicitor of record in the first instance provided limited scope representation and their mandate did not include the appeal." For example, in matters under the *Immigration and Refugee Protection Act,* if a lawyer is retained by the client using a legal aid certificate, the certificate would only cover the proceedings at first instance and not extend to an appeal. Therefore, the presumption could give rise to unnecessary motions to remove lawyers from the record. We therefore recommend that this presumption be clearly stated on the face of Form 124D so that parties and lawyers are alerted to the importance of carefully defining the scope of the limited mandate.

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[1] See Proposed Rules 437(1.1), 437(2) and 437(3) of the *Rules Amending the Federal Courts Rules* found in the April 10, 2021, issue of the Canada Gazette, Part I, Volume 155, Number 15.

[2] See Proposed Rule 119(2) of the *Rules Amending the Federal Courts Rules (Limited Scope Representation)* found in the April 10, 2021, issue of the Canada Gazette, Part I, Volume 155, Number 15.

[3] See Proposed Rule 124 of the *Rules Amending the Federal Courts Rules (Limited Scope Representation)* found in the April 10, 2021, issue of the Canada Gazette, Part I, Volume 155, Number 15.

Proportionality and Abuse of Process

The Society endorses the Rules Committee's proposed amendment to Rule 3, which introduces the principle of proportionality. The Society is of the view that the incorporation of this principle in the Rules would allow the Court to manage the length and expense of proceedings, taking into account the complexity of the case, in order to achieve a fair and just result.

The Society further supports the other proposed rule amendments relating to proportionality and abuse of process, such as the proposed Rule 87.1, which stipulates that the "Court may, on its own initiative or on motion, order that the scope or duration of an examination be limited." However, the Society notes that the proposed Rule 87.1 does not expressly impose time restrictions on oral examinations for discovery.[4] The Society would welcome a future consultation on the implementation of specific time limitations for oral discovery.

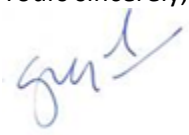
Federal Court of Appeal Motions

The Society is concerned by the introduction of a presumption in Rule 369.2 that "all motions brought in the Federal Court of Appeal shall be decided on the basis of written representations", unless the Court orders otherwise on its own motion or at a party's request.[5] While the Society recognizes that this has been the Federal Court of Appeal's general, if unwritten, practice in the past, the Society is concerned that a rules-based presumption applicable to all motions will make it more challenging to obtain an oral hearing when necessary for the just disposition of the issues.

The Society recognizes the difficulty of prescribing the types of motions that will always merit an oral hearing, or those that can always be decided on the basis of written representations. In June 2021, the Society's Modern Advocacy Task Force will be publishing a report on the future of advocacy, and in particular oral advocacy, in Canada. This report will include a model framework to provide guidance to parties, counsel, and the courts when considering the appropriate mode of hearing for a step in a proceeding, specifically including guidance as to when a hearing should be heard orally, as opposed to in writing. The Society encourages the Rules Committee to refer to the report's recommendations, and in particular the model framework, when further considering proposed Rule 369.2. The Society will transmit the report to the Rules Committee as soon as it is published.

Thank you for providing the Society with the opportunity to make these submissions. We would be pleased to discuss our comments with you further.

Yours sincerely,



Guy J. Pratte
President

[4] See e.g. Rule 31.05.1 of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[5] Proposed Rule 369.2 of the *Rules Amending the Federal Courts Rules* found in the April 10, 2021, issue of the Canada Gazette, Part I, Volume 155, Number 15.

Attachments:

1. The Advocates' Society's letter dated September 30, 2013
2. The Advocates' Society's letter dated January 30, 2015
3. The Advocates' Society's letter dated December 16, 2011
4. The Advocates' Society's letter dated January 30, 2013

CC: Vicki White, Chief Executive Officer, The Advocates' Society

Members of The Advocates' Society Task Force:

Melanie Baird, *Blake, Cassels & Graydon LLP*
Kirsten Crain, *Borden Ladner Gervais LLP* (chair)
J. Sheldon Hamilton, *Smart & Biggar LLP*
Alexandra Peterson, *Torys LLP*
Nastaran Roushan, *Barrister & Solicitor*

THE ADVOCATES' SOCIETY
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The Advocates' Society
PROMOTING EXCELLENCE IN ADVOCACY

VIA E-MAIL

September 30, 2013

Ms. Marie-Claire Perrault
Acting Secretary for the Rules Committee
Federal Court of Appeal
90 Sparks Street
Ottawa, ON K1A 0H9

Dear Ms. Perrault:

Re: Comments on the Discussion Paper dated July 17, 2013 of the Subcommittee on the *Federal Courts Rules* Regarding Enforcement

I write as chair of the Federal Courts Rules Task Force of The Advocates' Society ("TAS") to provide comments on the Discussion Paper dated July 17, 2013 of a Subcommittee of the Plenary Federal Courts Rules Committee which was constituted to (i) identify the enforcement provisions of the Federal Courts Rules that may be causing practical, procedural or legal difficulties; and (ii) suggest any modifications to the Rules to resolve such problems bearing in mind considerations of efficiency, consistency, access to justice and the sensible use of judicial resources.

TAS did not identify any enforcement provisions in need of amendment in addition to those identified by the Subcommittee in its Discussion Paper. With respect to the changes recommended by the Subcommittee, TAS agrees that the Subcommittee's recommended changes would result in sensible improvements to the enforcement rules. As discussed below, in two instances, TAS believes the Subcommittee's recommended change should be nuanced to achieve the purpose identified.

Issue #1: Should the process of writ renewal and the issuance of new writs be made an administrative procedure rather than a judicial one? (Rules 434-437)

TAS agrees with the Subcommittee's conclusion that issuance of a new writ should continue to require leave of the Court but that the Rules should be amended to provide an administrative procedure for renewal of writs. TAS believes that this recommendation if implemented will result in an appropriate degree of judicial supervision to obtain the original writ, while the administrative process for renewal would free up judicial resources and reduce the cost of obtaining a renewal.

Issue #2: Should Rule 439(3) be amended by adding the words "any interested person" after the word "sheriff" so that both the creditor and the sheriff are permitted to seek directions from the Court concerning enforcement issues? (Rule 439(3))

Rule 439(2) permits the sheriff to seek directions from the Court concerning any issue not addressed by the Rules that arises from enforcement of an order. The Subcommittee has recommended that the provision be amended to permit a judgment creditor to seek directions from the Court in the same circumstances as the sheriff.

TAS believes the Rule should be amended to permit any interested person to seek direction of the Court in such circumstances (rather than limiting this right to judgment creditors as suggested by the Subcommittee). This would permit the judgment debtor as well as the judgment creditor to move for direction from the Court. TAS agrees that the words "and any interested person" should be added after "sheriff" with the aim of achieving this goal.

Issue #3: Should garnishment procedures be administrative (e.g., requisition and issuance of a writ by the Registry upon certain conditions being fulfilled) rather than judicial (e.g. with the current show cause requirement)? (Rules 425, 449-457)

The current garnishment proceedings call for a high degree of Court intervention in garnishment proceedings. The Subcommittee has recommended that garnishment procedures should be made more administrative and has set out in Annex A to the Discussion Paper the suggested scope and wording of the various Rules relating to garnishment.

TAS agrees that the current Rules relating to garnishment require an unnecessarily high degree of judicial intervention. TAS also agrees that the Rules dealing with garnishment as currently drafted are inadequate and resort must often be had to the "gap rule", which is unsatisfactory. TAS agrees this should be remedied.

Therefore TAS agrees with the Subcommittee's recommendation that the garnishment procedures be administrative rather than judicial and agrees with the approach set out in Annex A. The recommended changes would bring the garnishment proceedings closer in line with those under Rule 60.08 of the Ontario *Rules of Civil Procedure.* TAS has no suggestions for further or other changes than those the Subcommittee has identified in Annex A to the Discussion Paper.

Issue #4: Should Rule 426 be extended to allow the examination of third parties with leave of the Court? (Rule 426)

Rule 426 as presently drafted permits a person who has obtained a judgment for the payment of money to conduct an examination of the judgment debtor. The Subcommittee has recommended that Rule 426 be amended to permit the examination of third parties with leave of the Court by way of motion, noting that this amendment would provide a quicker method for obtaining relevant information about the judgment debtor from third parties than issuing a Requirement for Information to third parties under the Income Tax Act and then bringing a compliance motion under s. 231.7 of that Act.

TAS does not disagree with the Subcommittee's recommendation.

Issue #5: Should Rule 458 on Charging Orders be amended to allow charging orders against "moneys, currencies and other moveable assets", and should the words "any beneficial" be added before the word "interest" in paragraph 458(1)(a)(i)? (Rule 458)

Rules 458 to 465 establish the procedure for obtaining a charging order for the purpose of enforcing an order for the payment of an ascertained sum of money. As currently drafted, on an *ex parte* motion brought by the judgment creditor, the Court may make an interim charging order over real property (R. 458(1)(a)(i)) or securities (R. 458(1)(a)(ii)).

The Subcommittee decided not to recommend an amendment of Rule 458 to permit charging orders against "monies, currencies and other assets", although the basis of this decision is not discussed. The Subcommittee recommended only that the Rule be amended to specify that the charging order should be with respect to "any beneficial interest" in real property and securities.

TAS agrees with the recommendation made by the Subcommittee with respect to amending the Rule to specify a charging order covers the judgment debtor's beneficial interest in real property and securities. TAS wishes to understand more fully the rationale for the decision of the Subcommittee not to recommend an amendment to permit charging orders against "monies, currencies and other assets" of the judgment debtor. If there is a further round consultation, TAS would appreciate receiving clarification from the Subcommittee on this point.

Issue #6: Should Rules 326 to 334 be amended to allow for the enforcement of domestic arbitral awards? (Rules 326-334)

Rules 326 to 334 govern registration and enforcement of foreign judgments and arbitral awards which may be registered in a Court in Canada under the listed statutes which include articles 35 and 36 of the *Commercial Arbitration Code* ("CAA").

For the reasons outlined by the Subcommittee in the Discussion Paper, assuming there are no constitutional issues (ref. *McNamara Construction v The Queen*, [1977] 2 SCR 654 and *Rhine v The Queen*, [1980] 2 SCR 442), TAS supports an amendment that makes it clear that Rules 326 to 334 apply to a domestic arbitral award covered by s. 5(2) of the CAA.

TAS notes that the Subcommittee's reference to domestic maritime awards in the final paragraph of this section of the Discussion Paper could appear to be a limit on the Subcommittee's recommendation. TAS's support of the recommendation is not limited to enforcement of a domestic maritime award.

Issue #7: Should Rule 326(a) be amended to reflect the renumbering of sections of a statute? (Rule 326(a))

TAS agrees the Rule should be amended to take care of this housekeeping matter.

* * * * * *

We would be pleased to answer any questions the Subcommittee may have about the above.

Yours very truly,

Nancy Brooks
Chair, TAS Federal Courts Rules Task Force

TAS Federal Courts Rules Task Force Members
Nancy Brooks (Chair)
Peter K. Doody
Barbara Jackman
Barbara McIsaac, Q.C.
Arthur Renaud
David Yazbeck

The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

PRESIDENT: Peter J. Lukasiewicz
Tel: (416) 862-4328 ● peter.lukasiewicz@gowlings.com

January 30, 2015

Ms. Chantelle Bowers
Secretary to the Federal Courts Rules Committee
Federal Court of Appeal
90 Sparks Street
Ottawa, ON
K1A 0H9

Dear Ms. Bowers,

RE: Limited Scope Representation ("LSR")

The Advocates' Society (the "Society") submits the following remarks in response to the request of the Rules Committee for comment in regard to the discussion paper circulated by the sub-committee on the unbundling of legal services. The Society speaks on behalf of litigation lawyers from across the country. With more than 5,000 members, the Society reflects diverse and considered views of the litigation bar. Our membership includes counsel who act before the Federal Court and the Federal Court of Appeal on a variety of matters.

We note that your discussion paper annexes the Society's letter of January 18, 2011, addressed to the Professional Regulation Committee of the Law Society of Upper Canada. That correspondence sets out the Society's views in regard to the amendments to the Rules of Professional Conduct which were then under consideration and, more generally, our views as to the issues associated with "unbundling" of legal services.

As is noted in the fourth paragraph of that letter, the Society recognizes that the high cost of legal services and underfunding of legal aid, along with the wide availability of legal information on the internet has led to record numbers of self represented litigants entering the system and that such individuals increasingly need and require access to limited scope retainers, which have the potential to greatly enhance the individual's access to justice.

On the specific issues raised by the discussion paper, we would respond as follows, dealing with each issue in the order set out in the paper.

General

In our view the Federal Courts Rules should be amended to support limited scope representation, and this could reasonably include representation of "mom and pop" corporations in which there are, for example, only one or two shareholders who also serve as directors. It is our understanding that the jurisprudence in general supports the notion that in such circumstances it may on occasion be appropriate for such a corporation to act through its officers, rather than by counsel.

An LSR Form

The Society is of the view that a standardized form for notifying the Court would be appropriate and such a form should specify the scope or mandate of the representation in general terms, and should include the contact information of the party and the lawyer, in order that opposing counsel and the Court may readily make contact for purposes of the proceedings, within the scope of the LSR. The form should for that reason specify the addressee for communications from opposing counsel, to avoid confusion or misunderstandings which may serve to delay the proceedings and increase its cost. It is not necessary, we feel, that the party sign to acknowledge the arrangements made with counsel. Since the Rules already place an obligation on the parties to update their address for service, in our view the form need not address that.

Appearances and Court Documents

The Society is of the view that there should not be a requirement that documents drafted by a lawyer on an LSR basis identify the lawyer, where the document is signed by the party. If the arrangement between the lawyer and the client provides for the services to be limited to drafting, with the client otherwise representing themselves, there is, in our view, no reason to identify the lawyer. To identify the lawyer would tend to encourage the opposing counsel or party to make contact with that counsel, and would potentially frustrate the arrangements made under the LSR agreement.

Where a lawyer on an LSR intends to appear before the court, in our view the lawyer should be required to provide advance notice of that. There may, however, be a need for an exception in the case of immigration proceedings, where the obligation to provide advance notice should not arise until after it is known that leave has been granted by the Court.

Terminating LSRs

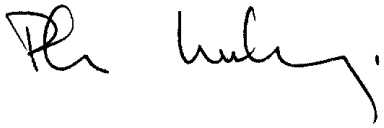
In our view, a lawyer acting on an LSR should be required to notify the Court of the termination of the representation where that lawyer has been identified to the Court and opposing counsel as acting on the client's behalf. Such notice could, however, be adequately conveyed by letter addressed to the registrar, without the need for any more formal process. It would appear reasonable that service be made on the lawyer in such a circumstance until notice has been given as indicated above.

Successive LSRs

The Society does not favour the institution of any presumptive limit on the number of successive LSRs in a proceeding as the circumstances of any particular case, and those of the individuals involved, should be considered in determining whether any reason exists to justify the denial of access to such representation.

We would be pleased to discuss these submissions with you further. In that regard, please contact Dave Mollica, Director of Policy and Practice, at (416) 597-0243, ext. 125, or dave@advocates.ca.

Yours very truly,



Peter J. Lukasiewicz
President

C: Dave Mollica, Director of Policy and Practice

2700 – 250 Yonge Street, P.O. Box 55, Toronto, ON, Canada M5B 2L7
Tel: 416-597-0243 Fax: 416-597-1588 E-mail: mail@advocates.ca Web site: www.advocates.ca

December 16, 2011

Ms Chantelle Bowers,
Executive Assistant to the Chief Justice,
Federal Court of Appeal,
90 Sparks Street,
Ottawa, ON K1A 0H9

VIA EMAIL: Chantelle.Bowers@fca-caf.ca

Dear Ms Bowers:

Re: Submission from The Advocates' Society on the Federal Court Rules Global Review

The Advocates' Society (TAS) is pleased to make the following submissions on the global review of the federal court rules.

About TAS

TAS was established in 1963 to ensure the presence of a courageous and independent bar and the maintenance of the role of the advocate in the administration of justice. Our goal is to promote excellence in advocacy. TAS is frequently asked to comment on changes to policy and legislation. We are very grateful for the opportunity to participate in the Federal Court's consultative process.

Policy Issues

1. The Involvement of the Courts in Proceedings

At present, with the exception of case-managed proceedings, the rules largely permit parties to manage their own proceedings, with little input from the court. The sub-committee posed several questions concerning the viability of having the courts more actively involved in the management of proceedings. TAS endorses the following positions:

- Case management should be the exception, rather than the rule; it should be employed only where it is needed and would be effective;

- Proceedings should not be subject to automatic case management; where parties to a proceeding agree that case management is appropriate, it should be accessible without having to bring a motion;

- Many proceedings involve sophisticated parties and experienced counsel; these parties are capable of managing proceedings in an efficient and timely way without the intervention of the court; in particular, parties should be able to file a case management plan which permits reasonable extension of certain deadlines without having to bring a motion;

- In order for case management to be effective, there must be sufficient resources provided by the courts, including more case managers; consideration should be given to having increased prothonotary involvement in case management;

- Other courts have experimented with appointing a trial judge early in a proceeding and having the trial judge manage all of the steps in the litigation; to date, TAS does not have sufficient

experience with this process in order to reach definitive conclusions, but agreed that this approach warrants consideration.

2. The Courts Authority to Control Abuse

As a general proposition, TAS certainly agrees that the Federal Courts should have the power to control abuse of process. We submit that the most effective power to control abuse is the use of costs sanctions. TAS feels strongly that the costs rules should be revisited and updated to provide for substantial indemnity costs and to either update or abolish the tariffs, which are out of date and do not reflect the true cost of legal proceedings.

3. Trial v. Disposition

Currently the rules are aimed primarily at getting matters ready for a judicial determination on their merits. The sub-committee queries whether the rules could and should do more to promote settlements.

In our experience, settlements are most likely to be effected when the parties have access to all relevant information and adhere to case management deadlines established by the rules or case management direction. The best tools for promoting settlement are to ensure appropriate disclosure, discovery and the setting of a hearing date in order to bring focus to the case. Consideration could be given to pre-trial type conferences in proceedings other than actions.

4. Proportionality

The sub-committee asked if the extensiveness of court proceedings should vary according to the magnitude of the dispute. If proportionality is to be introduced, the sub-committee queries whether it should be introduced pursuant to Rule 3 or under specific rules.

TAS endorses the principle of proportionality and the incorporation of this principle in the *Federal Courts Rules*. Introducing the concept of proportionality pursuant to Rule 3 would permit the court to control the length of trials and applications and control the length of discovery. That said, TAS would not endorse the use of discovery plans at this time. There was no agreement as to whether the use of discovery plans created litigation efficiency; indeed, in many cases, the requirement for discovery plans seems to have led to increased costs. Further, the court must employ flexibility in its application of the proportionality rule, recognizing that some complex cases will take considerable time to complete discoveries and court proceedings in order to achieve a fair and just result.

5. Making Effective Use of Practice Directions

It is strongly recommended that practice directions not be issued for substantive matters and their use should be confined to procedural issues. Even then, TAS has concerns with using practice directions for procedural issues given that the present practice directions are extremely difficult to access (for instance, they are difficult to find on the Federal Courts website) and it is virtually impossible for an unrepresented litigant to be aware of the existing practice directions. TAS would favour rule changes over practice directions. In the event that the Federal Courts wish to continue to use practice directions, they should be widely distributed and well-publicized.

A direction made by a case manager pursuant to a practice direction is not appealable unless it is enshrined in an order; the task force identified this as a procedural challenge which should be addressed. While appeals of such directions should be rare, they ought to be deemed to be orders capable of review by a judge.

6. Unified v. Specialized Procedures

It is submitted that additional rules should not be created for specialized procedures, although it was observed that there is a dearth of rules for *Canada Evidence Act* cases. It was also suggested that the intellectual property bar would benefit from a summary trial rule which would permit the court to determine the breadth and scope of a patent as a question of law. That said, Rule 220 does permit a preliminary determination of an issue of law, but the courts have had little recourse to this rule in the past.

7. Architecture of Rules

TAS does not have any recommendations regarding the current structure, ordering and number of the rules. However, it is submitted that better indexing would make the rules much more "user friendly". Specifically, an index of the on-line version of the rules would be invaluable. Also useful would be the ability to search the rules available on the Federal Courts website. At present, there is no search function exclusive to the rules; rather, the user must search the entire Federal Courts website.

Other Issues

As noted above, TAS identified costs as a major issue which is in need of reconsideration and updating for the reasons set out above.

TAS would be very pleased to provide submissions on specific rule changes when the Rules Committee reaches this stage.

Yours truly,

Mark D. Lerner
President
ML/sf

The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

Submissions

On Proposed Changes to the Federal Court Rules

Date: January 30, 2013

Submitted to: The Federal Court Rules Committee

Submitted by: The Advocates' Society

1700-480 University Ave., Toronto, ON, Canada M5G 1V2
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The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

January 30, 2013

Chantelle Bowers
Secretary to the Rules Committee
Federal Court of Canada
Ottawa, Ontario
K1A 0H9

VIA EMAIL: Chantelle.Bowers@cas-satj.gc.ca

Dear Ms. Bowers:

Re: Feedback on Report from Sub-Committee on Global Review of the *Federal Court Rules*

By letter dated December 16, 2011, The Advocates' Society (TAS) made submissions on the global review of the Federal Court rules. Thank you for providing us with the report of the Sub-Committee on Global Review of the *Federal Court Rules* (the Sub-Committee) in November, 2012. The purpose of this letter is to provide feedback from TAS concerning the Sub-Committee's study.

About TAS

TAS is a not-for-profit association of approximately 4,900 advocates, and was established in 1963 to ensure the presence of a courageous and independent bar and the maintenance of the role of the advocate in the administration of justice. Our goal is to promote excellence in advocacy. TAS is frequently asked to comment on changes to policy and legislation. We are grateful for the ongoing opportunity to participate in the Federal Court's consultative process.

Recommendation 4B: Costs

The Sub-Committee recommended amending the costs provisions "to make it more likely that a higher quantum of costs will be awarded when warranted, to provide greater incentive for pre-trial resolution." TAS submits that the Sub-Committee should recommend adoption of a costs regime in which costs are available on a complete or substantial and partial indemnity basis. This scheme would help to achieve the goals of proportionality and reducing procedural abuses. In the submission of TAS, simply increasing the tariff will not be effective, and indeed, TAS would support the removal or abolishment of the tariff. TAS would also support making the offer to settle rule more robust, including granting the ability to the Court to award costs thrown away due to the intransigence of a party.

Recommendation 6: Procedures for Specialized Areas

In considering whether practice directions for specialized areas are appropriate, TAS submits that the Sub-Committee should focus on streamlining processes where possible, which will benefit both the Court and the litigants. By way of example, there were approximately 12,000 leave applications in immigration matters in 2012 heard by the Federal Court. Consideration should be given to ways in which obtaining leave could be streamlined.

Recommendation 10: Proportionality

TAS certainly agrees that the principle of proportionality should be introduced into the Federal Court Rules. Of the three options discussed in the report (at page 22), TAS endorses the third option which would introduce the principle of proportionality concretely into particular rules. In the submission of TAS, concrete recommendations incorporating proportionality, will be the most effective. For instance, TAS would endorse an amendment to the oral discovery rules providing that no refusals would be permitted except for those grounded in privilege. Another way of implementing proportionality would be to impose time limits on examinations for discovery.

Recommendation 11: Vexatious Litigant Applications

The Sub-Committee queried whether parties should bring vexatious litigant applications more promptly in certain cases. TAS does not support the expanded use of vexatious litigant applications. These applications are (and should be) brought only in extraordinary circumstances. Rather, TAS submits that the Court and the litigating parties could reduce repetitive and/or vexatious steps if existing case management tools were used to full effect.

TAS also submits that some of the Rules could be streamlined in order to reduce the incidences of abuse. For example, Rule 51 provides that an order of a prothonotary may be appealed by a motion to a judge of the Federal Court. In many cases, litigants appeal a prothonotary's orders to the Federal Court and then appeal further to the Federal Court of Appeal. Rules such as this one could be streamlined in order to curb abuses. For example, appeals to the Federal Court of Appeal could be eliminated or considered only in writing. Another suggestion would be to have solicitor-client costs awarded against the unsuccessful party.

Recommendation 21: Duty Counsel Roster

TAS certainly supports the creation of a duty counsel roster populated with lawyers who could represent self-represented litigants or provide them with advice concerning the Federal Court Rules. TAS would be happy to have its members added to this roster. As the Sub-Committee is aware, TAS has partnered with the Federal Court and Pro Bono Law Ontario to create an assistance model in which volunteer lawyers provide legal advice, including an assessment of the merit of the client's position, preparation and review of documents, and representation in court. This free legal assistance is available to individuals who are not eligible for legal aid with cases that have legal merit.

Thank you for the opportunity to provide feedback to the Sub-Committee. We look forward to providing further input as this process moves forward.

Yours truly,

Peter H. Griffin,
President