July 11, 2024

VIA EMAIL

The Honourable Justice Simon Fothergill
Chair, 2024 Global Review Sub-Committee
Federal Courts Rules Committee
Federal Court
90 Sparks Street
Ottawa, Ontario K1A 0H9

Dear Justice Fothergill:

RE: 2024 Global Review of the *Federal Courts Rules*

Thank you for the opportunity to participate in the 2024 Global Review of the *Federal Courts Rules* (the "Rules").

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

In order to respond to this consultation, The Advocates' Society struck a task force composed of litigators who routinely appear in the Federal Court and Federal Court of Appeal, and who have expertise in a variety of areas of practice, including public law, administrative law, intellectual property law, class actions, and Aboriginal law. The Advocates' Society's task force examined and discussed the issues and proposals set out in the Invitation to Participate dated April 2, 2024, and offers the following comments, which we hope are helpful to the 2024 Global Review Sub-Committee.

Issue 1. Update the Rules to permit electronic service and filing of documents throughout

a. Electronic service

The Advocates' Society supports making electronic service the default mode of service, with limited exceptions on consent or with leave from the Court. These exceptions could include service by self-represented litigants and service when technical difficulties arise. This general rule in favour of electronic service should not apply where personal service is required.

It is important that the Rules contemplate electronic service by way of both email and file-sharing service to avoid issues with size restrictions on email attachments.

The Advocates' Society further supports requiring parties to provide an email address with each document filed with the Court. Non-compliance with this rule should lead to the document's rejection, or provisional acceptance pending the filing party providing an email address. There is no need to amend Rule 141 to deem consent to electronic service where a party has filed a document that includes an email address if electronic service becomes the default.

The Advocates' Society also supports amending Rule 146 to require that proof of service by email state the time and time zone the email was sent and/or received and attach a copy of the email. Rule 143 already addresses time of effective service.

Consequential amendments should be made to Rule 133 regarding service on the Crown.

b. Electronic filing

The Advocates' Society supports making electronic filing the default method of filing documents with the Court. However, in-person filing must remain available to address situations where, for example, technological issues prevent electronic filing, filing is urgent, or a party is self-represented and does not have access to the requisite technology. If electronic filing is to become the default, the Court must significantly increase the size of files that can be filed via its electronic portal, or make an alternative option for large files readily available, and work towards providing same-day confirmation of filing. The Advocates' Society further agrees with eliminating the requirement in Rule 71(5) that paper copies must also be filed.

As parties increasingly use electronic filing, the Rules should allow the Registry to grant parties a short delay to rectify any documents than that are deemed non-compliant before they are rejected for filing. This flexibility is necessary because the Registry may notify a party of a deficiency or non-compliance only after the filing deadline has expired. We address this further under Issue 7 below.

Issue 2. Remove references to anachronistic practices and technology

The Advocates' Society supports removing the references in the Rules to serving, submitting, or filing documents by fax, and the references to locked boxes.

While there may be some advantages to using a word count rather than a page count to limit the length of documents, it comes with additional complexities (for example, whether footnotes, graphics or charts are or should be included in the total word count) and administrative burden that may not be worthwhile.

The Rules should require that all documents be searchable (via optical character recognition) and that case law and statutes be hyperlinked. Any other formatting issues are better addressed by way of Practice Direction.

The Advocates' Society believes that the current Rules provide the Court with sufficient flexibility to collect payment of filing fees as technology evolves.

Issue 3. Incorporate important elements from the Federal Court of Appeal's *Consolidated Practice Direction* and the Federal Court's *Amended Consolidated General Practice Guidelines*

a. Confidential documents

The Advocates' Society agrees with the proposal to amend the Rules to make it explicit that a motion (or informal motion, as discussed in Issue 3(b) below) must be filed in order for material to be treated as confidential, including where another court or tribunal has previously ordered that the same material be treated as confidential.

The Advocates' Society does not believe that an amendment is necessary to further clarify the requirements and procedures that apply to the filing of confidential documents. Typically, confidentiality orders – such as the Model Order provided by the Federal Court – address the mechanics of marking and segregating documents in the Court files. Moreover, given the Order is intended to govern the handling of documents filed with the Registry (as opposed to documents exchanged between the parties which are subject to a Protective Order), the Registry is in the best position to develop and adopt best practices. Further, given that technology continues to rapidly evolve, it may not make sense to codify technical requirements or procedures in the Rules.

b. Permit informal requests for interlocutory relief

The Advocates' Society agrees the Rules should be amended to expressly permit a moving party to write to the Court for leave to seek relief by way of an informal motion.

In addition, it may be helpful if the Rules explicitly set out that informal motions by way of letter can be brought when the motion is on consent and when the motion deals with procedural matters, such as adjusting timelines or scheduling, amending pleadings, correcting defects, seeking a confidentiality order, addressing the procedure for costs submissions (see Issue 3(d) below), or similar matters, as opposed to seeking substantive relief. The Advocates' Society also suggests informal motions be available to parties when the matter is urgent and purely procedural, even when not on consent (for example, a motion for the adjustment of a timeline).

c. Adjournments

The Advocates' Society does not believe that an amendment to the Rules is necessary to clarify the procedure for seeking an adjournment.

d. Disposition and/or quantum of costs

The Advocates' Society agrees that it would be helpful for the Rules to provide a more uniform process for costs submissions.

However, it is often impractical for the parties to agree to costs or to make costs submissions before knowing the Court's decision, given some of the factors to be considered in Rule 400(3) will depend upon the outcome. If, for example, settlement offers have been exchanged, that information should not be provided to the Court until after the merits have been decided.

The Advocates' Society suggests the 2024 Global Review Sub-Committee consider providing in the Rules that, in the normal course, parties should be prepared to make submissions on costs at the hearing, but permit parties to be relieved from this requirement by way of written request made prior to the filing of the parties' motion record or application record. This request could be made by way of an informal request for interlocutory relief, as contemplated under Issue 3(b) above.

e. Condensed books, compendia, and day books

The Advocates' Society does not agree that the Rules should be amended to require the filing of condensed books, compendia, day books, or outlines of oral argument in all cases. In many cases, the Appeal Book or the evidence on an application for judicial review is relatively limited, and a requirement to prepare a condensed book or a compendium would impose a costly burden on parties with little benefit to the Court.

The Advocates' Society recognizes there is uncertainty in the current practice, however. One way to achieve greater certainty – while not unduly increasing the burden on parties at the appellate level – would be to have a trigger in the Rules to consider the issue as of the Appeal Book deadline. For example, if the Appeal Book is larger than two volumes, or exceeds a certain number of pages, then parties would be required to file a compendium three days prior to the hearing. If the Appeal Book is less than two volumes or does not exceed the page limit, then the Rule could require the parties to consider whether a compendium is advisable and to advise the Court whether they intend to file a compendium.

Issue 4. Amend the Rules to reflect jurisprudential developments

a. Should the Rules be amended to permit the summary dismissal of an appeal (Dugré v. Canada (Attorney General))?

The Advocates' Society supports this amendment. It is well-established in the Federal Court of Appeal's jurisprudence that the Court has the authority to dismiss appeals summarily, if the appeal is doomed to fail. The availability of summary dismissal is an important gatekeeping function for weeding out unmeritorious appeals that waste limited judicial resources. The Court's authority is currently based on its plenary power to regulate the litigation before it.[1] It would serve the interests of transparency and predictability to make this power explicit on the face of the Rules.

b. Should the Rules be amended to permit representation by a non-lawyer if the interests of justice so require (Erdmann v. Canada)? Should other amendments to the Rules be contemplated with respect to representation?

The Advocates' Society supports a modest amendment to the Rules to empower the Court to permit representation by a non-lawyer in special circumstances. The Advocates' Society does not support amendments to the Rules to provide a broader opening for non-lawyer representation of parties. This proposal raises a variety of concerns and is a complicated issue that would require deeper consultation and consideration.

Currently, Rule 119(1) states: "Subject to rule 121, an individual may act in person or be represented by a solicitor in a proceeding." Rule 121 in turn states: "Unless the Court in special circumstances orders

[1] *Fiederer v. Canada (Attorney General)*, 2022 FCA 102, at para. 8.

otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor."

It is anomalous that Rule 121 empowers the court to permit non-lawyer representation in a class proceeding where special circumstances exist, but not in other matters. The Advocates' Society would support an amendment to include the "special circumstances" discretion in Rule 119, so that it applies generally. That is, The Advocates' Society proposes that Rule 119 be amended to read as follows:

> 119 (1) ~~Subject to rule 121~~ Unless the Court in special circumstances orders otherwise, an individual may act in person or be represented by a solicitor in a proceeding.

If that amendment were made to Rule 119(1), then in The Advocates' Society's view Rule 121 could be repealed, as it just repeats the general requirements of Rule 119(1), but for a particular subset of proceedings.

c. Should Rule 167 be amended to provide that the burden of satisfying the Court that it ought to order another sanction rests on the party facing the dismissal of its action (Sweet Productions Inc. v. Licensing IP International S.À.R.L.)?

The Advocates' Society does not support this amendment. The proposed amendment appears to constrain judicial discretion, may encourage motions by parties not in default, and could add unnecessary complexity to proceedings.

d. Should Rule 300 be amended to explicitly provide that trademark infringement proceedings may be brought by way of application (BBM Canada v. Research In Motion Limited)?

The Advocates' Society supports this amendment. We support amendments that provide clarity to litigants, and given the treatment of trademark infringement proceedings in *BBM Canada* and in subsequent decisions,[2] it would serve the interests of litigants to make this mechanism explicit on the face of the Rules.

e. Should Rule 446 be amended to explicitly provide that failure to comply with a direction can constitute contempt (Njoroge v. Canada (Attorney General))?

The Advocates' Society does not support this amendment. In our view, there are many circumstances in which responsible, respectful parties may not comply with the letter of a direction, and because directions cannot be appealed (unlike orders), a party may be left in a very difficult position. While it is possible that the failure to follow a direction could constitute contempt, that possibility should be confined to exceptional circumstances. The Advocates' Society's view is that *Njoroge* already supports that possibility, and that explicitly setting it out in the Rules could unduly expand the circumstances in which contempt for non-compliance of a direction is alleged or, indeed, found. We do not believe such an outcome would be productive.

[2] See e.g., *Trans-High Corporation v. Hightimes Smokeshop and Gifts Inc.*, 2013 FC 1190.

Issue 5. Increase the monetary limit for simplified actions

The Advocates' Society agrees the Rules should be amended to increase the monetary limit for simplified actions. We propose that the monetary limit for simplified actions, both monetary and *in rem*, be increased to $200,000, exclusive of interest and costs.[3]

Issue 6. Expand the role of associate judges

The Advocates' Society recommends that associate judges' jurisdiction be expanded only to include matters that are unopposed or on consent. We propose a more limited expansion than the one set out in the Invitation to Participate for three reasons. First, there is the perception that associate judges are already operating past their capacity due to the lengthy time periods currently experienced by parties waiting for a decision from an associate judge. Second, permitting associate judges to decide issues that are opposed may lead to additional appeals to judges, thereby unnecessarily adding a layer of inefficiency to the system. Last, there are jurisdictional issues in allowing an associate judge to vary an order of a judge where the request is not on consent.

Issue 7. Grant a limited discretionary power to the registry to accept or refuse non-compliant documents

This is a function that the Registry already performs. As such, The Advocates' Society agrees that the Registry's discretion to accept or reject documents for non-compliance with formal requirements should be recognized and appropriately limited in the Rules. However, The Advocates' Society recommends that there also be a mechanism in the Rules for the Registry to accept documents with minor formal irregularities, subject to a requirement that the filing party remediate the document and file an updated version within a specific, suitably brief time period. The date of filing should be retroactively recorded as the date that the initial non-compliant document was received by the Registry. This 'safety valve' will ensure that the Registry's ability to reject documents for non-compliance does not lead to parties unnecessarily running afoul of deadlines, or create unnecessary delays.

In addition, to avoid miscommunications about the nature of the deficiency, parties should have the ability to communicate directly with the registrar who is rejecting the document, or who is accepting it with caveats.

[3] The Advocates' Society has recently recommended that the Ontario Civil Rules Committee consider expanding the mandatory use of Ontario's simplified procedure by increasing the monetary threshold for the simplified procedure rule from $200,000 to $400,000 (see The Advocates' Society's letter to the Ontario Civil Rules Committee re: Proposed Amendments to the Rules of Civil Procedure to Diminish Delay, dated April 3, 2024). However, other provinces have lower thresholds; as such, we recommend the Federal Court consider increasing its monetary limit for simplified actions to $200,000 as a first, incremental step.

Issue 8. Revise the Rules governing class actions to reflect procedural changes in the provinces

a. Permit certification only if common questions of fact or law predominate over questions affecting only individual class members

The Advocates' Society opposes this proposal. Ontario and Prince Edward Island are the only provinces that have a statutory predominance requirement for certification. The *Federal Courts Rules* require consideration of predominance and superiority already as part of the certification test, but do not make them mandatory controlling factors on certification.

The Federal Court's approach is already aligned with that of the other provinces, which either do not refer to these factors expressly in statute or include them among the factors to be considered on certification.

Neither The Advocates' Society nor the Law Commission of Ontario supported the proposal to change Ontario's *Class Proceedings Act, 1992* to add the requirement that common questions of fact or law predominate over individual issues.[4] Both organizations instead supported amendments in line with what the *Federal Courts Rules* already have in place. The Advocates' Society opposes adding a predominance requirement to the certification test in the *Federal Courts Rules* for the same reasons we opposed its addition to Ontario's legislation: we are concerned that imposing a predominance requirement would reduce access to justice, because some meritorious cases, which may naturally entail some individualized elements, will be more difficult to pursue as class actions (e.g., cases similar to those relating to residential schools). Rule changes of this nature impact all cases, not just those that are perceived to have low merit.

The Advocates' Society remains of the view that promoting access to justice should remain the guiding principle in considering any rule changes to the class proceedings regime.

An additional factor militating against this proposed rule change is that other jurisdictions have legislated the predominance approach, whereas the Federal Court is considering changing its rules of procedure; accordingly, it is already within the Court's power to interpret its Rules as the facts of each case require.

b. Clarify sequencing of motions to strike and certification motions, and the discretion of the Court to schedule motions based on the particular circumstances

The Advocates' Society did not support amending Ontario's *Class Proceedings Act, 1992* to require that motions that "may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding", be heard before the motion for certification, unless the court orders the two motions be heard together.[5] The Advocates' Society was concerned that this rigid approach to the sequencing of motions in a class action would lead to litigation by instalment, and associated delays. The Advocates' Society instead recommended that Ontario adopt the following more flexible provision, which the Federal Court may wish to consider in altering its rules on this issue:

[4] See The Advocates' Society's submission to the Legislative Assembly of Ontario's Standing Committee on Justice Policy re: Bill 161, *Smarter and Stronger Justice Act, 2019* (April 14, 2020), at pp. 6-9.
[5] *Ibid*, at pp. 4-6.

Early resolution of issues
(1) If, before the hearing of the motion for certification, a motion is made under the rules of court that may dispose of the proceeding in whole or in substantial part, or substantially narrow the issues to be determined, the scope of necessary discovery or the evidence to be adduced in the proceeding, that motion may be heard and disposed of before the motion for certification, unless the court orders otherwise.

(2) In deciding whether to make such an order, the court may consider:
(a) the likelihood of delays and costs associated with the motion;
(b) whether the motion, if successful, would decrease the costs to the parties;
(c) whether the outcome of the motion will promote settlement;
(d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
(e) the interests of economy and judicial efficiency;
(f) generally, whether scheduling the motion in advance of certification would promote the fair and efficient determination of the proceeding; and
(g) any other factor that the court may determine is relevant.

(3) Any request for an order under subsection (1) shall be heard and decided at a case conference.

(4) A determination made under subsection (3) is final and not subject to appeal.

The Federal Court also has unique jurisdictional issues in class proceedings that may militate in favour of hearing jurisdiction motions first.

We note that the trend in certain other provinces (e.g., B.C. and Saskatchewan) is to move away from the presumption that certification should be heard first.

c. Adopt an expedited process for carriage motions

The amendments to Ontario's *Class Proceedings Act, 1992* altering the process for carriage motions[6] have been generally well received by all stakeholders, although the jurisprudence is still limited. The Federal Court could consider implementing changes similar to the ones made in Ontario, including a deadline for bringing carriage motions, a simpler test for carriage, and eliminating appeal rights from carriage decisions.

d. Address matters pertaining to third-party funding agreements

In The Advocates' Society's view, the Federal Court should consider establishing some flexible rules and processes for the Court's consideration and approval of third-party funding agreements. However, we believe this issue ought to be the subject of a separate and specific consultation with plaintiffs, funders, and defendants. The private third-party funding market is a complex global market. Funding agreements are usually bespoke in nature and reflect complex elements and considerations. Ontario is unique in that it has a standardized domestic statutory funder in the Class Proceedings Fund. The Federal Court regime does not have any equivalent domestic statutory funder, which means that the market will be limited to private third party funders.

[6] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 13.1.

e. Coordinate multi-jurisdictional class actions, including communications between Courts

It can be helpful to have courts communicate, but a lack of clear process and reluctance by judges to do so can add complexity to a class proceeding. Communication and coordination between provincial courts and the Federal Court also raise potential constitutional issues that would have to be considered.

In 2011, The Advocates' Society made submissions to the CBA National Task Force on Class Actions in response to a consultation about a protocol for the management of multi-jurisdictional class actions. The Federal Court may wish to consider these submissions, attached to this letter, and any existing protocols as part of considering any changes to its Rules on this issue.

f. Provide for discretionary or mandatory dismissal for delay

Both plaintiffs and defendants generally favour the dismissal for delay rule implemented in section 29.1 of Ontario's *Class Proceedings Act, 1992*, and The Advocates' Society recommends that the Federal Court consider implementing a similar rule.

There is some uncertainty in the case law about whether Ontario's provision is truly "mandatory", or if a court retains residual discretion to relieve a plaintiff from an automatic dismissal, and whether the same plaintiff could simply re-file a claim following a dismissal for delay. The Federal Court should consider these issues and develop an approach that is both fair and clear.

g. Guidance on costs

Currently, the Federal Court is a no-costs jurisdiction for class proceedings. Some uncertainty has arisen at times regarding what is part of certification for the purposes of this rule; the Court may wish to consider providing clarification on this point.

The role of third-party funders, discussed above, is also connected to the issue of costs. A no-costs rule favours access to justice for claimants and also heavily reduces the need for the involvement of third-party funders in Federal Court litigation. By way of comparison, British Columbia is a no-costs jurisdiction in respect of certification motions and certified class actions, unless certain exceptional circumstances have arisen (e.g., vexatious conduct, improper or unnecessary steps to cause delay or to increase costs). Section 37 of the B.C. *Class Proceedings Act* contains the key statutory provision on the issue of costs. For pre-certification steps in B.C. – other than the contest of a certification motion – ordinary costs rules apply, unless the court orders otherwise.

h. Other

The Federal Court may also wish to consider changes to the Rules regarding the time for service and filing of certification motion materials, in order to accord with actual practice. Currently, the notice of motion and affidavit are required 14 days before the hearing and the response is due 5 days before the hearing, with the hearing date required to be set 90 days after defences are due. The Advocates' Society recommends that the Court adopt a rule providing that the scheduling of all steps in a certification motion be done by the parties in consultation with the Court, pursuant to the Court's case management function.

Issue 9. Miscellaneous amendments

a. Amend Rule 7(2) to increase the period of a consent extension beyond one half of the initial period

The Advocates' Society agrees that the period of a consent extension should be extended. The Advocates' Society proposes that parties be able to, by consent, extend the initial time period by up to 100%.

b. Amend Rule 51(2) to extend the deadline to appeal the order of an associate judge in a simplified action to 30 days from 10

The Advocates' Society opposes this amendment. The existing short time period is useful in keeping proceedings moving swiftly. Moreover, since the 10-day period is to file the motion for appeal, and not the entire appeal record, it does not pose major difficulties for the parties. In addition, as the deadline is a deadline under the Rules and not the *Federal Courts Act*, it can be extended by order of the Court.

c. Set a deadline for the service of expert reports under Rule 52.2

The Advocates' Society would appreciate further information about the proposed deadlines for the service of expert reports before commenting on this amendment. In general, our experience is that these deadlines are usually set as part of trial management.

d. Consider whether it would be preferable to set a fixed deadline (for example, 10 days) after service under Rule 203(2)

The Advocates' Society is of the view that the fixed deadlines that already exist (i.e. the timelines for serving and filing a statement of defence in Rule 204) are sufficient.

e. Remove the 30-day notice in the notice of pre-trial conference under Rule 261

The members of The Advocates' Society's task force had not personally experienced any issues with the operation of this rule. We therefore take no position on this proposal.

f. Consider whether the notice of appearance under Rule 305 should include grounds of opposition, and whether the timeline for filing the notice of appearance should be extended;

The Advocates' Society believes it would be helpful to require respondents to include grounds of opposition when filing their notice of appearance. To accommodate this additional requirement, The Advocates' Society suggests that the period for filing a notice of appearance be extended from 10 days to 30 days. Rule 310(2) would also have to be modified to require this document to be included in the respondent's record. However, any requirement to include grounds of opposition should be subject to fairly liberal rules relating to amendments, as it is not always clear exactly what the grounds of opposition are until the applicants' memorandum of fact and law is served.

g. Have the 30-day timeline for the service of the Applicant's affidavit under Rule 306 run from the date of transmission of Certified Tribunal Record (CTR) or, if there is no CTR, from the date of service of the notice of appearance or the expiry of the time to serve the notice of appearance

The Advocates' Society agrees with modifying the timeline for applications under Rule 300 such that, in addition to the 30-day period for serving and filing a notice of appearance referred to under Issue 9(f) above, the timeline for the applicant's affidavits under Rule 306 be set to run from the date of transmission of the Certified Tribunal Record (CTR) or, if there is no CTR, from the date of service of the notice of appearance or the expiry of the time to serve the notice of appearance.

h. Extend the 20-day limit for cross-examinations under Rule 308

The Advocates' Society believes that the period should be extended to 30 days, as the current 20-day time limit is often not adhered to by parties.

i. Amend Rule 314(2)(c) to require a party filing a requisition to indicate whether all parties agree with the assessment of the maximum number of days or hours required for the hearing, and if not, how many days or hours each party believes are required

The Advocates' Society agrees that Rule 314 and the accompanying requisition form be modified to indicate where the parties agree and disagree on the required items under Rule 314(2). This would include the number of days or hours required for the hearing, but could also include indicating whether the parties agree or disagree on other matters listed in Rule 314(2).

j. Amend Rule 314(2)(d) to require that parties provide their availabilities for more than 90 days in their requisition for a hearing

The Advocates' Society is concerned about the way application hearings are currently being scheduled in the Federal Court. Rule 314(2)(d) and Form 314 (Requisition for Hearing – Application) require parties to list all the dates in the next 90 days on which they are not available for a hearing. However, in practice, there is significant delay between parties filing the requisition for a hearing and the Registry contacting parties to schedule the hearing. Counsel are generally not able to hold availability in their calendars for that length of time; as such, we do not believe that the problem will be rectified by requiring parties to include their availability beyond 90 days in their requisition for a hearing. The Advocates' Society believes that changes to the current system are urgently required and would be pleased to work with the Court to identify a practical method of scheduling hearings that will benefit parties and the Court.

k. Consider whether the Rules should address the swearing of witnesses appearing by video from foreign jurisdictions, and whether Rule 92 should be amended to refer to "sworn or affirmed" rather than only to "sworn"

The Advocates' Society supports making it clear that witnesses from foreign jurisdictions are permitted to appear by video conference. In general, the Rules should not preclude the use of technological advancements that increase efficiency and decrease costs, while maintaining the fairness of a hearing.

The Advocates' Society further supports amending the existing language in the Rules to "sworn or affirmed".

l. Under Rule 95(2), consider requiring answers to non-privileged and proportionate questions under reserve of objection, unless otherwise ordered

The Advocates' Society opposes this amendment. The Advocates' Society is concerned that requiring witnesses to answer all questions may cause more problems than it solves, particularly without further and related amendments to the discovery and refusals motions process as a whole.

m. Consider limiting written representations on a motion to a fixed page or word limit under Rule 364, and making related changes to Rules 369(3) and 369.2(3) for motions in writing

The Advocates' Society considers it advantageous to provide more structure to all motions. We recommend that motions require the inclusion of a memorandum of fact and law, rather than "written representations", as the former has a prescribed structure and limits (see Rule 70).

n. Consider creating a new Rule under Part 2 – Administration of the Court to govern communications to the Court via the Registry on matters of substance without the consent of the other party or leave of the Court

The Advocates' Society's *Principles of Civility and Professionalism for Advocates*[7] may be of assistance to the Sub-Committee in considering a new rule to this effect. Principle 37 sets out that:

> 37. When advocates are about to send written or electronic communication to the court, or are about to take a fresh step in a proceeding that may reasonably be unexpected, they should provide opposing counsel with reasonable notice when to do so does not compromise a client's interests.

The Advocates' Society recommends that any rule on this subject include a degree of flexibility, in order to account for all circumstances.

Thank you for the opportunity to participate in this consultation. I invite you to contact The Advocates' Society should you have any questions about our submissions above.

Yours sincerely,

Darryl A. Cruz
President

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

Attachments:

1. The Advocates' Society Letter to CBA National Task Force on Class Actions re: Consultation Paper: Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions (July 6, 2011)

[7] The Advocates' Society, *Principles of Civility and Professionalism for Advocates* (February 20, 2020).

The Advocates Society's Federal Courts Rules Task Force

Melanie Baird, *Tyr LLP*
Andrew Bernstein, *Torys LLP* (chair)
Tim Dickson, *JFK Law LLP*
Matthew Fleming, *Dentons Canada LLP*
Jonathan Foreman, *Foreman & Company*
J. Sheldon Hamilton, *Smart & Biggar LLP*
Jason Harman, *JFK Law LLP*
Emily Kettel, *Bennett Jones LLP*
Keltie Lambert, *Witten LLP*
Senwung Luk, *Olthuis Kleer Townshend LLP*
Tamara Prince, *Cassels Brock & Blackwell LLP*
Tamara Ramsey, *Dale & Lessman LLP*
Nastaran Roushan, *Seabrook Workplace Law*
Jean-Simon Schoenholz, *Norton Rose Fulbright Canada LLP*
Annie (Qurrat-ul-ain) Tayyab, *Torkin Manes LLP*
Vera Toppings, *Fasken*

The Advocates' Society
PROMOTING EXCELLENCE IN ADVOCACY

July 6, 2011

CBA National Task Force on Class Actions
Canadian Bar Association
865 Carling Avenue, Suite 500
Ottawa, ON K1S 5S8

Dear Task Force Members:

Re: Consultation Paper: Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions

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Following the Request for comments in respect of the draft Judicial Protocol for the Management of Multijurisdictional Class Actions (the "Protocol"), The Advocates' Society has the following comments for submission.

First, The Advocates' Society is, in general, supportive of the Protocol. It is clear that there is a need for better overall coordination of multijurisdictional class proceedings in Canada and the Advocates' Society commends the Canadian Bar Association for its efforts. Following are some specific comments for consideration in the review of the Protocol.

1. Case Management Protocol - Generally

We note that the Protocol is intended to assist in the coordination of only procedural matters such as scheduling, and is not intended to affect any substantive rights. However, as a practical matter, certain procedural orders can and do affect substantive rights. For instance, an order as to the timing or order of certain motions can certainly affect the substantive rights of the parties to the extent that a certification hearing in one province be ordered to proceed before a summary judgment motion in another province. As well, there is some concern that a judge of one province does not have the legislative authority to "delegate" supervision of her action to a judge of another province (absent legislative reform). As such, we recommend that the appointment of a case management judge under the Protocol should only occur on the consent of all counsel and courts in jurisdictions in which proceedings have been commenced.

2. Case Management Protocol – criteria applicable

We believe that the case management judge, once appointed on consent, should have some guidance as to what principles to apply in her consideration of the various procedural matters that may arise. To that end, we note the recent amendments to the Alberta CPA with respect to multijurisdictional class actions. Those amendments seek to provide the Alberta courts with the procedural tools to address such actions, and set out new criteria to be applied in respect of

multijurisdictional class actions in the court's consideration of whether certifying the matter as a class proceeding would be the preferable procedure. In particular, the amendments provide, as part of the test for certification, the following:

> (6) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of a proceeding being considered for certification under this section, the Court must determine whether it would be preferable for some or all of the claims or common issues raised by the prospective class members to be resolved in the proceeding commenced elsewhere.
>
> (7) When making a determination under subsection (6), the Court must be guided by the following objectives:
>
> (a) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration;
>
> (b) ensuring that the ends of justice are served;
>
> (c) where possible, avoiding irreconcilable judgments;
>
> (d) promoting judicial economy.
>
> (8) When making a determination under subsection (6), the Court may consider any matter that the Court considers relevant but must consider at least the following:
>
> (a) the alleged basis of liability, including the applicable laws;
>
> (b) the stage each of the proceedings has reached;
>
> (c) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the prospective class members;
>
> (d) the location of the class members and representative plaintiffs in the various proceedings, including the ability of the representative plaintiffs to participate in the proceedings and to represent the interests of the class members;
>
> (e) the location of evidence and witnesses;
>
> (f) the advantages and disadvantages of litigation being conducted in more than one jurisdiction.

We propose that the Protocol provide for similar criteria for the court's consideration in making any rulings or orders, once appointed.

3. Settlement Approval Protocol - Generally

The Advocates' Society supports the settlement approval aspects of the Protocol and notes that it will streamline the process. However, we believe that the Protocol should make it clear that, after the joint hearing, the relevant courts in each province will still be required to issue their own orders (which may differ in some respects) and retain their own jurisdiction to resolve issues about their respective orders.

4. Inter-court communications and the ABA Protocol

We note that under the Protocol, the judges involved in a multijurisdictional class action to which the Protocol applies may consult one another in the absence of counsel (Sections 14 and 21).

We have reviewed the American Bar Association Protocol (the "ABA Protocol") and note that it provides that, the courts may consult without the parties present, (Section 7) but only provided that:

(a) such communications pertain solely to procedural, coordination or other non substantive matters;

(b) counsel for all affected parties are given advance notice of the communication; and

(c) following communication, counsel are given a summary of the communication.

We recommend that a "meet and confer" provision, akin to the protocol found under the Companies Creditors Arrangement Act ("CCAA") be introduced, whereby the courts are free to meet and confer without prior knowledge or participation of the counsel but that the courts will then report back to counsel that such a meet and confer has occurred. We note that while the ABA Protocol requires the courts go further and provide a summary of their discussion to counsel, and may only confer in the context of non substantive matters, we do not view that as a necessity in the context of the Protocol, given the consensual nature of its application.

We observe that the CBA Task Force has recognized that there are limits on improving judicial management and efficiency simply through the use of a Protocol. The Advocates' Society would encourage a continuing discussion with Canadian regulatory and policy makers in hopes that further changes, some of which may only be possible as a result of legislative reform, may be considered in the future.

We welcome any questions the Task Force may have in respect of the foregoing.

Yours truly,

Mark D. Lerner
President
ML/sf