THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 17, 2012

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

Chantelle Bowers
Executive Legal Officer to the Chief Justice
Federal Court of Appeal
Ottawa, ON K1A 0H9

Dear Ms. Bowers:

Re: Global Review of the Federal Courts Rules

I am writing on behalf of the National Aboriginal Law Section of the Canadian Bar Association (CBA Section) to comment on the Global Review of the Federal Courts Rules discussion paper. Both the Global Review of the Federal Courts Rules paper and the Technology Review paper have been circulated widely throughout sections of the CBA.

The CBA is a national association of over 37,000 lawyers, notaries, law students and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of lawyers specializing in Aboriginal law and related issues from across Canada.

Issue 1 - Court-led Procedure vs. Party-led Procedure

The role of judges in case management has increased in all jurisdictions including the Federal Court. For Aboriginal law issues, overall, case management has been very successful in the Federal Court, notwithstanding some very lengthy trials in this area.

One suggestion in the discussion paper, based on the British Columbia experience, is to introduce case management early in the process as a prerequisite to proceeding with the matter.

While case management does occur now in many instances in Aboriginal law litigation and can be extremely helpful in particular circumstances, we strongly urge that proceedings remain party-led. For example, governance cases such as Band Council election challenges involve internal relations within communities. A successful resolution requires the parties to have the opportunity to try to address the issues themselves and believe they have control of the process.

Since the implementation of early case planning conferences in British Columbia, we have not noted a decrease in legal costs or an increase in access to the courts. Paradoxically, the opposite has occurred because legal counsel must attend several pre-trial processes with the Court. The requirement to attend a settlement conference at the beginning of the legal process may lead to

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

failure and wasted court time and costs. Parties often view their case as extremely strong and are not aware of the strengths of the other parties' case or the weaknesses of their case prior to the discovery process.

This said, Aboriginal litigants are often faced with extreme inequality of resources in litigation involving the Crown. The Court's assistance in narrowing issues and allowing for timely and cost effective resolutions may be welcomed. In some cases, excessive procedure employed by the "richer" litigants which would not meet the strict standards of "abuse of process" may benefit from stronger guidance from the Court.

Access to settlement conference judges and mediation should be encouraged at the appropriate time in the process. This could be developed by a requirement that a settlement conference be *considered* by the parties prior to trial.

Former Chief Justice Lamer concluded in *Delgamuukw v. British Columbia* that the goal should be reconciliation between the Crown and Aboriginal Peoples and the Courts have a role in advancing that reconciliation:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, **reinforced by the judgments of this Court**, that we will achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown".[1] **[emphasis added]**

The sensitive nature of Aboriginal/Crown relations and the serious steps taken in an Aboriginal community before commencing an action or filing an application with the Court need to be considered in this unique area of practice. The CBA Section recommends that the Court allow an option for case management but not require compulsory case management.

Issue 2 – Court's Authority to Control Abuse

Although one hopes there are few cases of abuse of process in Aboriginal law, when it does occur, these cases involve heightened emotions and reactions. When a party brings a motion "to prevent a remedy and abuse of process" a very high standard of proof is required by the Court. The discussion paper is unclear about the extent of the problem for the Court.

Provincial superior courts have inherent jurisdiction to prevent an abuse of process of their Court. If the Court sees a high risk of abuse of process the proposed amendment to Rule 3 may be appropriate and might be worded as follows:

> On motion of a party, or on its own motion <u>where there is clear evidence before the Court of</u> an impending or actual abuse of process, the Court may take steps necessary to prevent or remedy such abuse of process.

In our view, this issue should be considered with the issue of Court-led vs. Party-led process, with the hope of preventing situations in which abuse of process may arise.

Issue 3 – Trial vs. Disposition

We do not believe any substantive change is needed at this time. In the area of Aboriginal law the Federal Court has taken a strong leadership role in certain cases in addressing a resolution without the necessity for a trial.

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[1] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186.

Rule 3 as presently worded does not impair this option. The success of these processes has been a result of the parties agreeing to rely on a settlement conference judge to address the parties and guide them to a potential resolution without the necessity for a trial.

The difficulty with the Court "promoting" the disposition of matters without a complete trial is that Aboriginal parties to the dispute will more willingly rely on the aid of a settlement conference judge if they understand that they control the process and have the right to go back to Court.

Issue 4 – Introducing the Principle of Proportionality

The preferred tool in the area of Aboriginal law is individually designed proceedings. This allows a judge to assess the level of involvement in a particular case and to give guidelines where appropriate. Each case is unique.

Compared to other types of judicial review, the scope of Aboriginal law cases before the Court may be more extensive due to the nature of the breach of consultation obligations or other Crown conduct. It is difficult to assess the issue of proportionality by "type of case". If the concept of proportionality is included, consideration should be given to the unique nature of Aboriginal law matters and the general principle in Rule 3.

Issue 5 – Making Effective Use of Practice Guidelines

We support the implementation of regular Practice Guidelines, providing proper notice is given to counsel. Practice Guidelines are more expeditious than Rules amendments. We agree that a global revision of the Rules should consider whether existing Practice Guidelines are appropriate to be incorporated in the Rules. Practice Guidelines can be an effective way of "test driving" rules, while clarifying obscure, unique and challenging practice issues.

Lawyers who appear before the Federal Court, even on occasion, should have easy access to Practice Guidelines issued by the Court. In addition to notice and distribution, the Court should implement an integrated on-line system that links the Rules to Practice Guidelines.

Issue 6 – Uniform Procedures vs. Specialized Procedures

The *Aboriginal Litigation Practice Guidelines* and the *Elders Testimony and Oral History Practice Guidelines (Draft)* are examples of where guidelines may assist in dealing with specific matters in specific areas of law.

We suggest that the Court consider special procedures (either by Practice Guidelines or Rules) for Band and election appeals or challenges, given the proposed *First Nations Election Act* (Bill S-6, now before Parliament) that would bring election appeals of *Indian Act* band elections and customary elections to the Federal Court.

Under Bill S-6, appeals would flow to either the Federal Court or Superior Court of the Province. We suggest consideration be given to rules to address situations of concurrent jurisdiction between the Federal Court and other Courts in Aboriginal law matters.

While Rules set the general outline of the Court's jurisdiction and procedure, Practice Guidelines can assist with the specific considerations of particular types of matters. The flexibility of the Court through special management of Aboriginal law cases and other areas of law is of critical importance.

Issue 7 – Making the "Architecture" of the Rules more User-Friendly

We have no comments on this issue.

Issue 8 – Other Areas of Possible Reform

The Court's commitment to the Aboriginal Law Bar Liaison Committee and the Federal Court Bench and Bar Liaison Committee has been helpful in looking at ways to improve Aboriginal law practice.

The CBA Section, the Indigenous Bar Association and the Department of Justice have made a strong commitment to finalize Practice Guidelines for how to treat Elders evidence (*Elders Testimony and Oral History Practice Guidelines (Draft)*). This is an example of how guidelines can assist the Court and legal counsel in a sensitive area with creative solutions to meet the stated objectives of Rule 3, namely a just, expeditious and cost effective resolution. Where these practices gain acceptance or customary resonance, they can be incorporated into the Rules. We endorse the incremental approach of using Guidelines for the Court and litigants to test procedures and determine their effectiveness before entrenching them in Rules.

Finally, we suggest that the Rules Committee consider the concept of Access to Justice as an overall principle to guide the process of the Global Review. The committee may wish to recommend that ensuring the access to justice for all parties be included explicitly in Rule 3.

We trust that our comments on the Discussion Paper will be of use to the Rules Committee.

Yours truly,

(original signed by Marilou Reeve for Aimée Craft)

Aimée Craft
Chair, National Aboriginal Law Section