

## The Canadian Maritime Law Association



### L'Association canadienne de droit maritime

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February 10, 2012

### **SUBMISSIONS OF THE CANADIAN MARITIME LAW ASSOCIATION TO THE DISCUSSION PAPER ON THE GLOBAL REVIEW OF THE FEDERAL COURTS RULES**

#### **Overview**

The Canadian Maritime Law Association (“**CMLA**”) makes the following submission in response to the discussion paper entitled “Global Review of the *Federal Court Rules*” (“**Discussion Paper**”) as circulated and invited by the Federal Court Rules Committee.

It is the view of the CMLA that many of the concerns described in the Discussion Paper are not as prevalent in Admiralty actions as they may be in other areas of practice.

In so far as Admiralty proceedings are concerned, the CMLA does not feel that there is an immediate need for more court-led proceedings or that there has been an uncontrolled increase in the number of abusive procedures. Members of the CMLA are aware of and make use of the mediation services of the Federal Courts. They are familiar with the Practice Directions and architecture of the Rules.

While the CMLA does consider that there is room for improvement of certain rules, especially in Part 13 which governs Admiralty actions, overall the Federal Courts Rules have functioned relatively well for the members of the CMLA since 1998. Some specific potential amendments to the Rules relevant to Admiralty actions will be separately submitted for consideration at a later time.

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

*Should the Rules reflect a shift in the balance of emphasis from party-led to court-led proceedings in which the role of counsel is to facilitate the progress of proceedings, which are primarily directed by the court, rather than to have primary responsibility for conducting proceedings? If so, would this reform best be reflected in a general interpretive provision or in specific amendments to the Rules? Should case management in the Federal Courts be further enhanced? If so, should it be incorporated as a general interpretive principle, or by way of a preliminary case planning conference, or by other reforms in the process?*

As acknowledged in the Discussion Paper, the Rules already permit the Courts considerable control over any proceeding before them. This is accomplished by time limits on completion of various steps in the proceeding, limiting the number and utilization of experts, limiting the number and manner of conduct of discoveries, implementation of case management of its own accord (Rule 384), etc. In the view of the CMLA, the Federal Courts already have sufficient tools to ensure that the parties to a proceeding move it forward in an efficient manner.

Moreover, it is the parties to the action that have the only true interest in the substantive outcome of the action. Thus, while it is imperative that the Courts have control over their own process, that process should not usurp the parties' interests in the proceeding. The parties and their counsel know their case than the Court do not and are therefore in a better position to assess how it should be conducted.

With respect to the suggestion in the Discussion Paper that the fairness of the proceedings may be jeopardized if the process is party-led and the parties are of unequal resources, our experience is that more typically litigants are very cost conscious, are averse to taking unnecessary steps in the proceeding and instruct their counsel accordingly. In the event that one party is attempting to use the process to financially overwhelm the other party, that is an issue of abuse and the Courts may deal with it as such. In the view of the CMLA, this concern does not warrant shifting the balance of control from a party-led to a court-led process. The same can be said with respect to what the Discussion Paper refers to as the pursuit of unnecessarily complex and protracted procedures, which can also be addressed by way of case management.

The CMLA is of the view that, like in Ontario, primary responsibility for case management should remain with the parties. Efficiency in the proceedings is to be encouraged. This can be and is being accomplished under the existing Rules.

**Issue 2 – The Court's Authority to Control Abuse**

*Should the Federal Courts rules for abuse of process provide more clearly for the Court's authority to act on its own, as do the provisions in articles 54.1 of the Quebec Code of Procedure? Should this be done as recommended or in some other way?*

In the context of controlling abuse of the Court's process, it is the view of the CMLA that the Federal Courts should be able to act on their own authority to control abuses. However, care must be taken to ensure that the rights of the parties are not compromised. Therefore, like Quebec's *Code of Civil Procedure*, any new power to be given to the Federal Courts must be clearly delineated and a due process for its exercise established as a part of any rule revision. For this reason, the CMLA prefers the approach taken in articles 54.1 through 54.6 of the CCP to a simple amendment of Rule 3 of the Federal Courts Rules.

### **Issue 3— *Trial vs Disposition***

*Should Rule 3 or other aspects of the Rules be amended to reflect the evolving objectives for the just disposition of matters before the Federal Courts?*

The Discussion Paper asks whether we have reached the point where the objective of the Rules should now be described not merely as accommodating the disposition of matters without a complete trial, but as promoting it.

In the view of the CMLA, the Rules already recognize and formalize the Courts' interest in the promotion of settlements and institutionalize a proactive approach towards settlements. We refer specifically to Rules 386 through 391 which in our experience have served their intended purpose well and require neither amendment nor improvement. Further, the Rules contain a modern and reasonably effective summary judgment rule and Rule 220 permits a flexible approach to pre-trial determinations of questions of law.

Given the foregoing, it is the view of the CMLA that the Rules at present support pre-trial disposition or settlement of cases and this is reflected in the fact the vast majority of cases are resolved prior to trial. In the CMLA's view, no amendments to the Rules, whether of Rule 3 or otherwise, are necessary. That being said, the CMLA would be open to an amendment requiring mandatory mediation, as has been adopted in some other jurisdictions. However, mandatory mediation should only be implemented if the parties are permitted to choose their mediator.

### **Issue 4 – Introducing the Principle of Proportionality**

*Should further reforms be undertaken to implement the principle of proportionality? To what would the principle apply – the extent of discovery, the length of trials, some other aspect of the process – and how should it be applied? Should such a principle be incorporated as a general concept, perhaps in Rule 3; or should there be some combination of the two approaches?*

Pre-trial processes, and especially discovery, should be tailored in each case to the amount in dispute, the importance of the issues in the case, and the balance between the requirements of justice and the relative convenience of the parties. This last consideration may be especially important in Admiralty cases, in which the defendant or

other party involuntarily before the Court, may be foreign and at a relative disadvantage as compared to a domestic party.

Notwithstanding the above, since 1998 the experience of the Admiralty Bar has generally been that case management has been reasonably successful in accommodating the needs of domestic and foreign litigants and addressing issues of proportionality.

The CMLA suggests that if the Courts feel that there is a need for the general principle of proportionality to be expressly recognized in the Rules, then perhaps a general statement added as Rule 3(2) and based on new Ontario Rule 1.04(1.1)), such as the following, may serve that purpose:

*In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues in the proceeding, to the amount involved in the proceeding, and to the balance between the requirements of justice and the relative convenience of the parties to the proceeding.*

#### **Issue 5—Making Effective Use of Practice Directions**

*Is the current balance between Rules and Practice Directions appropriate for the Federal Courts? Should the Court make more use of Practice Directions? Should the Global Revision of the Rules serve as an occasion to reconsider the many Practice Directions currently in effect in order to determine which should be incorporated into the Rules as formal amendments and which should be rescinded? Should the Global Revision serve as an opportunity to establish a policy of periodic review of Practice Directions for this purpose? Are there other ways of ensuring familiarity with Practice Directions that could be developed to address the concerns that the lack of public awareness might raise?*

The Admiralty Bar is a specialized bar and most of its members are very familiar with the Rules of the Federal Courts and their Practice Directions.

It is the view of the CMLA that the correct balance currently exists between the Rules and Practice Directions. The Practice Directions provide useful guidance to counsel regarding the manner in which certain motions, applications or other procedures should be presented to the Court, the manner of preparing documentation and submissions, etc. That said, the CMLA agrees that this is an opportunity to reconsider the many Practice Directions currently in effect to determine which should be incorporated into the Rules and which should be rescinded.

Most CMLA members know that Practice Directions can be obtained via the Federal Courts websites. However, it would be of assistance to practitioners if all Practice Directions were on a single, centralized and easily accessible page on the websites. Moreover, it would also be very helpful if all Practice Directions were submitted to the publishers of the *Federal Courts Practice* and printed in the annual editions of that publication.

### **Issue 6 – *Uniform Procedures v Specialized Procedures***

*Could the practice of the Federal Court benefit from the introduction of specialized procedures for particular kinds of disputes? Would it be appropriate to transform practice procedures for particular kinds of disputes into subject-matter specific rules, and thereby increase the public awareness of these specialized procedures?*

It is the view of the CMLA that the Federal Courts Rules already provide specialized procedures for maritime matters in Part 13 governing Admiralty actions. These specialized rules have clearly been of benefit. To the extent that other bars require similar specialized procedures, then this should be accommodated. Specialized procedures permit rules to be tailored to the needs of that practice area and also permit the Court to address specific areas of concern identifiable within a particular practice area.

### **Issue 7—*Making the “Architecture” of the Rules more User-Friendly***

*Should the manner in which the Rules are presented be made more “user-friendly”, for example, by introducing an index, or by making the presentation format more consistent with the rules of other courts? Should the Rules be presented in a way that would facilitate web-based access?*

It is the view of the CMLA that the architecture of the Rules is adequate and that the Rules themselves are clear. The CMLA does not consider that the format of the Rules should be changed substantially to bring them more in line with the rules of practice of any of the provincial superior courts. There is a great degree of the difference between the rules of practice of each of the provincial superior courts. By way of example, the architecture and substance of the *Code of Civil Procedure* of Québec varies greatly from the rules of practice of the common-law provinces. Aligning the Federal Courts Rules with the rules of practice of any given provincial superior court would not necessarily make them more familiar to practitioners from other provinces.

The CMLA nevertheless supports the initiative of the Federal Court subcommittee to make the Rules more user-friendly, even though it is not a major concern of the Admiralty Bar.

There is little doubt that creating a detailed index of the Rules and the *Federal Courts Act* would be of great assistance to all practitioners and unrepresented litigants. This is an initiative that the CMLA supports. Web based presentation of the Rules permitting ease of access and inquiry (such as plain language search ability) would also be advantageous to all users.

The CMLA suggests consideration be given to the creation of a "user-friendly" guide to the Federal Courts Rules which would be made available at the various Registries of the Federal Courts and on the Federal Courts website. Such a guide would serve as a primer for self represented parties, practitioners who are not used to appearing before the Federal Courts or interested members of the public.

**Issue 8 – Other Areas of Possible Reform**

*Are there other areas of potential reform that should be considered at this time by the Subcommittee on Global Review of the Federal Courts Rules?*

The CMLA is generally satisfied with the Federal Courts Rules. There are, however, a few specific rules where some reform would be beneficial and the CMLA will be making a separate submission addressing these potential amendments.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Christopher J. Giaschi". The signature is written in a cursive, slightly slanted style.

Christopher J. Giaschi  
**President**  
**The Canadian Maritime Law Association**