

CANADIAN DEFENCE LAWYERS

May 29, 2023

VIA EMAIL: Sean.Weir@ontario.ca; Sara.Mintz@ontario.ca

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Dear Executive Chair, Associate Chair:

RE: Response and Feedback to Draft *Common Rules of Practice and Procedure*

Thank you for your correspondence of May 1, 2023 inviting the Canadian Defence Lawyers (CDL) to provide its feedback to the Draft *Common Rules of Practice and Procedure (Rules)*, and the Tribunal's request for further stakeholder input in respect of the draft. We acknowledge with thanks the extension you provided to the CDL to consider and respond with feedback.

CDL is pleased that the stakeholder recommendations were carefully considered and that many of our recommendations were incorporated into the draft *Rules*. In particular, **CDL supports** the following draft *Rules*:

- (1) **Rule 8.1 Summons** – Restricts the issuance of a summons to witnesses and items relevant to the issues in dispute and which are admissible at a hearing. The suggested change addresses the issues of hearing ambush, intimidation of witnesses, disorderly proceedings and presentation of irrelevant evidence.
- (2) **Rule 9.2 Production Orders by the Tribunal** – Provides that a party must make reasonable efforts to obtain documents; and, Rule 9.2.1 provides that no order will be issued for documents not relevant to the issues in dispute. This correctly requires parties to produce best efforts letters and to provide rationale for production demands.

- (3) **Rule 9.2.2 Orders for Non-Party Productions** – Provides the ability to seek an order from the Tribunal from non-parties, which is equivalent to Rule 30.10 in the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194 and was absent from the *Rules*, effective October 2, 2017.
- (4) **Rule 16.3 Factors to Consider (Adjournments)** –While CDL does have some concerns with several enumerated factors, as outlined below, the guidance to parties regarding adjournment requests is welcome.
- (5) **Rule 24.4 Representative Withdrawal** – Provides the method and grounds for removal / withdrawal of solicitors of record, which assists in preventing unnecessary adjournments of hearings and holds representatives to account.

CDL does, however, have the **following concerns** in respect of the draft *Rules*:

- (1) **Timelines should be simplified and staggered** – The current proposed global deadline for productions and expert reports encourages a “trial by ambush” approach. It denies a responding party the full knowledge of the case it is required to meet and removes the ability to adequately respond to last minute productions and expert reports. In order to allow the parties to effectively prepare to meet the case presented at a hearing, CDL recommends setting a staggered timeline for the production of the applicant’s documents (Rule 9.5.2) and expert witness reports (Rule 10.3) and the production of the responding documents and expert witness reports. CDL suggests that the applicant’s documents and expert witness reports remain due 45 days prior to the hearing, and the respondent’s due 30 days prior to the hearing. This would require further amendments to Rule 9.4.2 and 10.3.
- (2) **Rule 9.5.2, 9.5.3 and 9.5.4 Rules Specific to AABS Matters and Rule 10.3 Disclosure and Filing Timelines** - CDL requests that in each of the subrules “on consent of the parties” should be added as an enumerated option related to the extension or variation of the set timelines.
- (3) **Rule 14.2 Scope of Case Conferences** – CDL suggests adding “Requests for court reporter” as an enumerated option to consider at a case conference.
- (4) **Rule 14.6 Party Attendance and Authority of Representatives at Case Conference** – CDL does not support the amendment to this Rule. If the primary goal of a case conference is to attempt resolution of the application, all parties should be present. This ensures applicants are invested in and have knowledge of the process. It is also the only opportunity the parties, and adjudicator, may have to speak and interact directly and frankly with the opposite party. A party’s attendance at the case conference should be the default requirement, absent the consent of the parties.

- (5) **Rule 16.3 Factors to Consider** – CDL is concerned that the first enumerated factor is the age of the file. CDL recommends that criteria (m) ‘broader institutional and public interests’, (n) ‘legislative requirements’, and (p) ‘operational considerations’ either be removed as considerations or defined as these terms are ambiguous and likely to lead to significant disputes in interpretation. CDL further recommends that an additional consideration be added related to setting out any objections raised/conflicts that arose when scheduling the event with the Tribunal. CDL submits that the proper adjudication of the dispute on its merits and the procedural fairness to the parties must not be secondary to operational or performance factors of the Tribunal.
- (6) **Rule 16.4 Adjournment Requests Following a Denial** – CDL does not support a blanket denial of further adjournment requests for the same event unless the initial denied request was made on consent of both parties and there has been no material change in circumstances. A blanket denial of further adjournment requests does not take into consideration difference in respect of all matters before the LAT and would result in a “one size fits all” approach to each matter.
- (7) **18.2 Criteria for Granting Reconsideration** – CDL does not support amendment to this Rule and submits that the original Rule 18.2 stand. The term “material breach” in the “new” 18.2(a) is not defined and is open to broad interpretation. The criterion dealing with false evidence (“old” 18.2 (c)) ought to remain as a criterion to consider. There does not appear to be any rationale provided for its removal, nor did CDL request this amendment.
- (8) **18.5 Review On Own Initiative** – CDL strongly objects to empowering the Tribunal to review any decision on its own initiative. The right to seek review of a decision or let a decision stand should rest with the parties alone, as established by the Divisional Court of the Superior Court of Justice in *Shuttleworth v. Licence Appeal Tribunal*, 2018 ONSC 3790 (CanLII).
- (9) **20.4 AABS Case Conference Summary** – CDL recommends the current form be updated to reflect the changes to the Rule. CDL suggests adding “A brief description of the parties’ positions on the issues in dispute” as an enumerated factor to include on the form.

Final Comments

CDL asks the Tribunal to consider its input, and the input of the Stakeholders, in further amending the draft *Rules*.

In consideration of transparency to the Stakeholders, CDL continues to strongly recommend that any Policies and/or Practice Directions be made available to the public. Further, CDL recommends regular meetings with the Stakeholders take place at least once annually.

CDL is happy to provide any further contributions and input in respect of Policies and/or Practice Directions. We look forward to meeting with you in future alongside our fellow Stakeholders.

Yours very truly,



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