

## OUTREACH FOR REAL-TIME SOLUTIONS

### Association Member Issues for Justice Sector Check-In

As of Friday, March 24, 2020 (new items in red text)

#### A. COURT ISSUES - PRACTICE SPECIFIC

##### Family Law

1. Is the issue re: administrative dismissal deadline under the Rules of Civil Procedure being done for Family Law Rules as well?
  - SCJ Response: O. Reg. 73/20, issued on March 20, 2020 under the Emergency Management and Civil Protection Act suspends limitation periods and time periods within which steps in a proceeding are to be taken. The Court has asked the Ministry not to issue Notices of Approaching Dismissal in Family. The SCJ's Notice to Profession indicates: "...where procedural rules or court orders require the regular filing of documents during this emergency period, and it becomes impossible to file at the courthouse or the courthouse is believed to be unsafe, parties can expect the Court to grant extensions of time once the Court's normal operations resume."
2. Families would benefit from some immediate guidance re: managing access/parenting time schedules under existing court orders and/or refusing to return children to other parent. Also concerns about parents taking advantage and attempting to establish a new status quo.
  - SCJ Response: We understand that it will be difficult for many families to manage the parenting arrangements during this time and that it may give rise to some emergency situations. Clients and lawyers should be encouraged to resolve these issues between themselves where possible and only engage the court where there are really pressing issues regarding a child's safety or wellbeing, or the safety of a parent. We understand that virtual mediation services may also be available that could be considered, for appropriate cases, to address pressing child-related issues.
  - The does not take into consideration (i) lawyers dealing with self-reps on the other side who refuse to cooperate, for example, and have taken advantage of the situation for more access (not an "urgent" situation defined as "real and pressing issues regarding the child's safety and

wellbeing"), (ii) issues where spousal abuse (control and verbal abuse) is a factor and mediation is not to be undertaken, or (iii) the fact that Children's Aid Societies are cancelling access arbitrarily despite court orders. Many of these self-representing parents have no idea about the new processes and rules, or their rights during this period. Follow up Question: Where and when is the information about the processes, issues that might arise and how to resolve them going to be posted for the general public in a manner that is uncomplicated, so that they have access to justice?

(i) we acknowledge that this is not an easy situation but lawyers will have to do their best to deal with difficult litigants, whether represented or not, to attempt to resolve issues without the court's intervention.

(ii) the court is concerned about situations of spousal abuse and how that will impact well being and safety both before and after separation. Lawyers are encouraged to include any pertinent information in urgent requests. The court has been working with DV stakeholders and the OBA to maximize access to legal advice in these circumstances (more information to be shared shortly).

- (iii) we understand from MCCSS that supervised access may no longer be available through the societies for safety purposes and that societies have been encouraged to consider other safe alternatives. These situations can potentially be urgent, however lawyers should consider whether these requests are likely to be successful given the particular circumstances.
- Generally – As noted above, we are working incredibly hard with the OBA and the LSO and others to facilitate access to legal advice for SRLs to determine what is urgent and how to proceed.

3. If there is a specific Court Order imposing a serving and filing deadline on a party in a Family Litigation matter, will that party be able to file their documents with the Superior Court on March 20 or anytime in March, 2020? Further, if the party fails to comply with the specific Court Order by failing to serve and file documents by the deadline, is the opposing party allowed to file their Motion materials permitted by the same Court Order? The Motion material would be decided in writing and would not require a Court hearing or attendance. Further still, if the above type of documents can be filed, does that mean only electronically?

- SCJ Response: Parties are expected to comply with existing court orders, to the extent they are able. The Notice to the Profession indicates that the Court is expected to grant extensions of time where parties are unable to file, due to COVID-19. At this time, several courthouses remain open for “regular” filings. The direction from the Ministry suggests some courthouses may be closing due to COVID. Only “urgent” filings, as described in the Notice to the Profession from March 15, 2020 may be filed by e-mail to the listed trial coordinator.
4. Determination of “Urgent Matters” is there a tool that can be used for lawyers to provide clients or to walk through with clients (or that could be posted for use by self-reps) to help them understand what are “urgent” matters such that they can be heard, in each of the different contexts. This is to expand on the general information being provided by the courts on what constitutes urgency, as there is also a basket clause in most cases. Given that the courts are all now essentially operating privately, through technology, it is difficult to see what is getting through in the urgent category.
- SCJ Response: At this time, the only guidance in determining what is “urgent” is the language contained in the Notice to the Profession. The SCJ Notice did not exhaustively list what is an urgent family law issue intentionally, because the urgency of the matter may depend on the circumstances. Counsel may wish to be guided by the definition of urgency under the Family Law Rules for some guidance. The SCJ is tracking the number and nature of “urgent” matters that are being brought. The court is also assessing its capacity to hear other matters.
5. Question: Could a framework be created for simple Motions known as 14B Motions in Family Court, to still be dealt with in writing only?
- SCJ Response: Possibly. Some regions are seeking to deal with in-writing motions. At this time, the SCJ provincial policy is to only deal with “urgent” matters. An issue is the capacity to submit “in-writing” motion material via email given limited e-mail size capacity (10MB). We are seeking secure ways of transmission via tools like DropBox. 14B motions for urgent matters can still be brought.
6. Question: Can proposed Orders submitted pursuant to a Justice’s Endorsement, after all parties have consented, still be filed with the Court electronically or otherwise?

- SCJ Response: For “urgent” matters, counsel are encouraged to file draft orders, which can be signed by the judge hearing the matter, and sent back to the parties signed electronically. The ability to have clerks sign orders will depend on the ability of court clerks to perform this function remotely, which is a Ministry issue. Counsel should seek direction from the judge to ensure the timely issuance of the order.

7. Question: Can lawyers still book conferences and motions this time when part of the court operation is suspended?

Contact your local trial coordination office regarding scheduling protocols in their region.

8. Is the Registrar open for the purposes of filing and issuing documents? Will the judges accept remote phone calls, teleconferences, video conferences etc.

Contact MAG re the availability of filing counters. SCJ has directed that all urgent matters be filed by email to the appropriate trial coordination office. Teleconferences and in some circumstances video conferences are being arranged for matters with approval of the local triage judge.

9. Question: How should family lawyers be addressing situations where access parents are relying on coronavirus as an excuse not to return children to the primary caregiver? Should lawyers/clients be proceeding through court with an emergency motion.

See above. While these issues may meet the test of urgency, many likely will not given the court’s direction at this time. Lawyers are encouraged to consider other appropriate alternatives, eg. Mediation and parenting coordination where an acceptable agreement cannot be reached between the parties.

10. Same issue as above (but specific to the Orangeville Superior Court) parents who are using this crisis to punish the other parent by withholding the child. They are not at all interested in mediation or listening to reason. These are high conflict cases. Steven has a pressing case is in Orangeville Superior Court and is wondering if someone can consult with Justice Miller who is currently in charge there.

See above. The SCJ cannot comment on specific cases that are before the court, nor will this office reach out to judges regarding specific cases.

11. Will supervised access sites be closed? Is there any direction for parents/lawyers on how this should be handled if they close through until they re-open?

We expect that this has already happened for domestic and child protection cases. Clients should be encouraged to consider safe alternative arrangements to supervised access and supervised access exchanges.

### Trusts & Estates Law

1. Are file applications such as an Application for Certificate of Appointment and “in chamber motions” still being processed? Have judges/clerks been set up to do any of this work remotely? should clients be advised that they will have to be put on hold until at least June?
  - SCJ Response: Possibly. Some regions are seeking to deal with in-writing motions/applications. At this time, the SCJ provincial policy is to only deal with “urgent” matters as set out in paras 3 and 4 of the Notice to the Profession (civil and family) dated March 15, 2020. An issue is the capacity to submit “in-writing” motion material via email given limited email size capacity (10MB). The SCJ recognizes that this is an area where the court may be able to quickly expand the level of service it currently provides. We are seeking secure ways of transmission via tools like DropBox.
2. Status of Certificates of Appointment of Estate Trustees. How are estates processed and to file applications – would like a regional breakdown of preferred processes.

Issue: Wants the court system to give high priority to probate applications.  
Suggestion: Applications for appointment of estate trustee(s) with or without a will should be elevated to the same category of importance as, or just below, public health issues, child custody issues, on the grounds that certificates of appointment of estate trustees (issued probate in popular language) are the keys to unlocking frozen estate assets so that the estate trustee(s) can pay obligations and provide funds to needy spouses, children and other beneficiaries of the particular estate.

  - SCJ Response: These matters must be considered urgent, as set out in paras 3 and 4 of the Notice to the Profession (civil and family) dated March 15, 2020.
3. Issue: Estates Court in Toronto is accepting materials for filing. Concerns surround the issuance of notices of application when hearing dates are not being granted and when limitation periods are at risk. Further, it is recommended that

the court still accept materials for hearings in writing in order to allow for some matters to move forward and to reduce the backlog later.

### General Litigation

- ~~1. Question RE: Executions of unrelated parties that exceed \$250,000. In normal circumstances, a lawyer would need to obtain a statement from the Writ holder but with staff shortages and absences, this is not possible. Question: how to deal with this circumstance? Are counsel being recommended to accept undertakings to provide post-closing? (See Mag)~~
- ~~2. Can there be a central online hub where lawyers can view upcoming cases with court dates in local courthouses throughout Ontario? Such a service/portal would help reduce calls. (See Mag)~~
3. Is there a tool that can be used for lawyers to provide clients or to walk through with clients (or that could be posted for use by self-reps) to help them understand what are “urgent” matters such that they can be heard, in each of the different contexts. This is to expand on the general information being provided by the courts on what constitutes urgency, as there is also a basket clause in most cases. Given that the courts are all now essentially operating privately, through technology, it is difficult to see what is getting through in the urgent category.
  - SCJ Response: The SCJ is tracking the number and nature of “urgent” matters that are being brought. The court is also assessing its capacity to hear other matters. The SCJ will endeavor to provide greater clarity in the days ahead.
4. Can the court please issue a clear direction on basket motions – whether the court has capacity to address them and lawyers should be filing them?
  - SCJ Response: Some regions are seeking to deal with in-writing motions/applications. At this time, the SCJ provincial policy is to only deal with “urgent” matters, as set out in paras 3 and 4 of the Notice to the Profession (civil and family) dated March 15, 2020. An issue is the capacity to submit “in-writing” motion material via email given limited email size capacity (10MB). The SCJ recognizes that this is an area where the court may be able to quickly expand the level of service it currently provides. We are seeking secure ways of transmission via tools like DropBox.
5. Asking Courts if they will agree not to delay scheduled pre-trials, motions, trials in the event that this is a longer term effect or if the need for social isolation

waxes and wanes. Instead, I would be asking them to proceed by video-conference to avoid delaying/denying litigants their day in court and potentially overwhelming the court system later due to systemic delay (trials would almost certainly need to proceed on a non-jury basis in a video-conference scenario).

- SCJ Response: Cannot comment at this time.

6. Has there been any direction from courts on whether we need to continue to file and serve Confirmations for civil matters, and if so, are they just to be adjourned sine die? Can we get clarification on whether notice of applications continue to be issued at courts? What is the process? Are they being issued without return dates?
7. Question: Has there been any discussion about protocols for conducting examinations for discovery? For cases that cannot be done in writing, there is a risk that cases will become stuck at this stage. I know many firms are wondering about options.
8. Issue: Due to COVID-19 I think it is worth noting that a lot of our process servers are either off right now or unable to file defences in the small claims court urgently (which cannot be filed online). We worry about being improperly noted in default by self-reps who don't understand indulgences and can do so online. Solution: Can lawyers be allowed to file Small Claims Defences online (which is allowed in Superior Court) or have a way to note an intention to defend online?
9. Is there any way to note defendants in default? And will the Court office accept motions for default judgment in writing?
10. Issue: where a defendant cannot be served and the 6 month period for service will expire in early May for at least 2 actions, lawyer will need orders for substituted service and to extend the time for service. Lawyer does not know if Master Muir (who sits part-time in Newmarket) will be reading these motions, or if the motions may be filed with paper or must be filed pdf or if a USB stick is required. The practice direction from the Chief Justice last Monday hinted that retroactive orders (“nunc pro tunc”) are likely, but this is not really a guarantee. Advice needed.
11. General Question: What is the process for re-scheduling matters that were to be heard but have now been vacated during this “shut down” time? Newmarket-specific follow up questions: Are the courts (specifically Newmarket) responding to faxes requesting motion dates in June/July? If not, is it possible to send a process server with a blank Notice of Motion and the original Endorsement of J.

Douglas wherein this motion was scheduled, to have it rescheduled for June/July or are they not rescheduling anything at all at this time?

12. Is the Court is accepting / hearing Motions in writing (specifically infant settlement motions). Is the Court still doing chambers appointments by phone? If not, is that something that is in the works?
13. Please request that pre-trials and settlement conferences already scheduled to proceed, be permitted to proceed by telephone or video conference, to be arranged by counsel for the plaintiff. Alternatively, that pre-trials and settlement conferences already scheduled to proceed in Oshawa, be permitted to proceed by telephone conference, to be arranged by counsel for the plaintiff. According to Bosco Mascarenhas, mandatory mediations are scheduled by sending an email to [mandatorymediation@ontario.ca](mailto:mandatorymediation@ontario.ca). The recipient of these emails, sent on and after March 9, 2020 (before the crisis erupted) is not responding. Please provide a telephone number where the mandatory mediation coordinator can be reached and also and for greater certainty, direct the recipient of these emails to respond in order to assign a roster mediator and permit the parties to proceed to a mandatory mediation (the fees of which are limited, for a two party mediation, to no more than \$600.00 plus HST shared equally) before a roster mediator by telephone or video conference, the cost of which to be shared equally by the parties to the mediation, so that actions can be settled outside of the court system. Although non-urgent hearings in the court system are not proceeding, mandatory mediations can and should proceed without delay.

#### Real Estate

1. RE: Mareva motion at Toronto Court. Issue - Toronto Court is advising that they cannot entertain such a motion, where there is clearly a financial risk to my client of assets being dissipated and disappearing during this state of emergency. Possible Solution: RE: Motions of this nature, where it appears that defendants are taking advantage of the closure of the courts. Could these be "heard" in writing with materials submitted electronically and with an opportunity for the defendants to respond within the 10-day time period that is stipulated in the Rules of Civil Procedure?
2. RE: real estate deals that are closing in the next two weeks--will these proceed?
3. Will the land registry office be open? And what will happen to all the real estate deals that are pending

## **B. COURT ISSUES - REGION SPECIFIC**



### Thunder Bay Courthouse

1. Problem: Has a document box for all lawyers to pick up newly issued court orders and documents. Not Secure! Suggested solution: email the law office to advise court docs ready for pickup so lawyers' staff know when the court doc has been issued and is ready for pickup. Better still, scan and email the court order to the law office.
  - SCJ Response: This is a responsibility of the Ministry of the Attorney General. The Court will pursue this with MAG, including the option of emailing the scanned order to the parties

### Niagara

1. Regarding a "NOTICE TO THE PROFESSION IN CENTRAL SOUTH REGION REGARDING FAMILY AND CHILD PROTECTION MATTERS" dated March 18<sup>th</sup>. In Niagara, matters are adjourned to the same June dates and times. How are counsel expected to be impossible for counsel to be at two places at once?
  - SCJ Response: This has been brought to the attention of the Regional Senior Justice. Solutions are being explored, including staggering hearing dates between the two sites and virtual hearings. More information will be communicated to the local bar in the coming weeks.

### Ottawa

1. In Ottawa, it is unclear if we should continue filing per the original deadlines for conferences and motions (especially those coming up in April) or if there is a procedure to adjourn. The only correspondence I received recently from the trial coordinator was that they were not scheduling any new dates (after requesting an adjournment of a conference late last week). Also would like to know if we should continue reaching out to case management judges re: case managed matters or not.
  - SCJ Response: The Notice to Profession indicates that all currently scheduled matters are adjourned, until further notice. It also indicates that the Court expects to grant extensions where parties are unable to file documents. Will enquire re continuing to reach out to case management judges.

### Newmarket

1. RE: protocols for video/Zoom or audio conferencing for urgent motions. The Trial Coordinator in Newmarket is unreachable and there is no information posted.

## C. MAG ISSUES

### Criminal Law

1. With the increasingly limited availability of counsel other than through remote work arrangements, can e-disclosure be the standard in all cases? For urgent matters (and non-urgent matters that will continue to proceed through criminal courts in the coming months), there is some divergence in the availability of disclosure through e-transfer from Crown offices. Migrating production of disclosure to Ontario's existing portal (<https://attachmail.ontario.ca/courier/web/1000@/wmLogin.html?>), for example, would be a significant improvement. There is no reason in principle why e-disclosure couldn't be the standard operating procedure in all cases involving counsel, particularly for Crown offices that already upload all disclosure to the SCOPE program. I understand this type of e-production has already been introduced in some Crown offices in Ontario. As far as I'm aware, Hamilton, Kitchener, and Oshawa have used this program (or a similar program).
2. Issues: Access of inmates to remote appearances from the jail; Access to documents to sign from the jail and; Greater access to counsel. Specific Problem: Due to most law offices being closed, there are no land lines for them to call. I noticed that in Toronto there is a move to provide inmates with cell phones with no web access so that they don't have to congregate around a pay phone. What's being done to address this?

### Limitations

1. Re OIC order item #2 - "Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended ..."  
Question: whether this applies to timetables entered into by the parties that have been endorsed by court order? For example, are such timetables intended to be covered, or are they suspended unless the court orders otherwise, presumably on motion by one of the parties, or are parties to agree on new timetables and the courts will later endorse?

2. Issue #1: Clarification re: Ontario Regulation under subsection 7.1(2) of the Emergency Management and Civil Protection Act, with 2 sections. The first section suspends all statutory limitation periods retroactive to March 16th. The second section suspends any statutory rule, retroactive to March 16th, for a “period of time within which any step must be taken in any proceeding in Ontario ...” that includes intended proceedings is suspended, but this provision is “subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding...”. What this means is that the procedural rule for serving a statement of claim is not automatically suspended. Question: What are the rules around motions for substituted service that include a request to extend the time for service? Issue: Over the counter consent motions and applications in Barrie (judges only) and Newmarket (judges and masters). Question: What are the protocols?

### Essential Services

1. Question 1: Are law firms/legal transactions considered “essential services”? Are they allowed to stay open? This may be a critical issue in light of the technological challenges and internet challenges of practicing remotely in rural areas. “A lot of clients will not be able to engage with us if we are not available in person”. Question 2. Can firms still operate with a skeleton crew who need to be in the office to use the copier, fax, and arrange for couriers? Question 3: Can a law firm owner enter their firm if they are the only person to go it?

### Litigation

1. Question RE: Executions of unrelated parties that exceed \$250,000. In normal circumstances, a lawyer would need to obtain a statement from the Writ holder but with staff shortages and absences, this is not possible. Question: how to deal with this circumstance? Are counsel being recommended to accept undertakings to provide post-closing?

## **D. LSO ISSUES**

1. A local bank has demanded that all banking take place at the ABM, and not through a teller. This creates issues for their document requirements for their trust account, as mandated by the Law Society. Can FOLA get guidance from the LSO about whether the ABM slips will be sufficient at this time?

2. What provisions are being made for clients (the public) who don't have access to technology to meet remotely and/or do not have access to print out documents that need signing (and they do not have e-signature set up)? Temporary solution that some lawyers are adopting is to make an outside mailbox available for document pick up which a client then signs. But this is not ideal at all. Note that the commissioning rules seem to have been amended for court matters but there are documents that need to be sworn for real estate. Should lawyers just use an undertaking to provide these after these emergency measures have passed (ie: indefinitely until told otherwise)?
3. Encouraging acceptance of electronic signatures on retainers, settlement documents etc.
  - SCJ Response: Counsel should review the provisions of the Electronic Commerce Act, 2000,S.O.c.1
4. Asking Counsel and clients to adhere to electronic document transfers, without paper being sent by mail.
5. Looking for a practice management guide from the LSO for lawyers during COVID that addresses new issues for social distancing, work from home arrangements, etc.NOTE: Katie found this interesting post by the Legal Ethics staff at the Washington DC Bar Assn: <https://www.dcbbar.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>