



June 23, 2020

VIA E-MAIL

The Honourable Lise Maisonneuve
Chief Justice of the Ontario Court of Justice
Office of the Chief Justice
2300-1 Queen St. E.
Toronto, Ontario M5C 2W5

Dear Chief Justice Maisonneuve,

RE: Expansion of Remote Court Operations – Priority Items for Family Matters

On behalf of the Ontario Bar Association (OBA), The Advocates' Society (TAS) and the Federation of Ontario Law Associations (FOLA), and with the input of Legal Aid Ontario (LAO), we are writing to you to share the urgent and pressing concerns of the Family Law bar, and the public they serve. The Ontario Bar Association appreciates the efforts of the Court in working to expand the matters that can be addressed during the emergency period. We also understand the challenges that the Court is facing, and would like to be of assistance in any way we can.

There will inevitably be a backlog of matters to address when regular operations resume, which is why it is imperative that the Court and the bar work together to continue to move matters forward towards resolution in an attempt to lessen this accumulation. Additionally, family law practitioners anticipate a surge in family breakdowns resulting from the tension building while people are confined to their homes, as well as in Motions to Change, given the financial impacts of the pandemic. This will further exacerbate the backlog and increases the urgency for moving matters forward now.

Further to the justice sector table that the OBA convened at the beginning of the pandemic, we have gathered together input from our members, along with LAO, TAS and FOLA, in an effort to assist the Court in identifying which matters ought to be prioritized as remote operations continue to be expanded.

For your consideration, attached to this letter are the results of our consultation – a summary of priority matters, as identified by the bar, for family matters. While we recognize that a few courts are addressing a small subset of these matters, the vast majority of courts across the province have not expanded their operations to incorporate these important matters. It is critical that, regardless the jurisdiction, Ontarians be able to continue to access the courts and move their matters forward.

While we understand that the Court is diligently working towards the re-opening of physical courthouses with a targeted date for Phase 1 of July 6, an expansion of remote operations is a critical component of any re-opening plans. Addressing the attached priority items remotely will

assist in reducing the backlog and prioritizing matters which ought to be addressed in-person given the necessary limitations of in-person attendances in the interest of health and safety. In the event that the anticipated re-opening of physical courthouses is delayed for public health reasons, or a further suspension of in-court operations becomes necessary due to a “second wave” of infection, having the flexibility for certain matters to continue remotely will enable the Court to effectively continue serving justice.

We would welcome the opportunity to discuss this with you, and would be happy to provide further input on these and other matters. Additionally, if we can provide any additional support to the Court, technical or otherwise, please let us know.

Sincerely,



Colin P. Stevenson, President
Ontario Bar Association

cc. Marcus Pratt, Legal Aid Ontario
Kathleen Murphy, Legal Aid Ontario
Vicki White, The Advocates Society
Katie Robinette, Federation of Ontario Law Associations

Priority Items for Expanded OCJ Operations in Family Matters

In an attempt to best combat the accumulating backlog, we have identified the below priority items for expanded court operations. Accessing precious judicial time to address these priority items is the most effective way to move matters forward, and clear the path for counsel and parties to continue to work towards resolving matters. Further, these items can be addressed by leveraging available technology that is already being used by the bar and the courts. These priority items would enable the courts to continue to serve justice through these challenging times. They are procedurally effective, technologically available and well suited to being carried out remotely.

It is imperative that issues in family matters be resolved as expeditiously as possible. Left unresolved, these issues can fester and further sour relationships between the parties. This can lead to additional conflict in the future requiring further judicial resources and negatively impacting any children involved.

1. 14B Motions

14B motions are a very effective tool to obtain consent orders and to overcome procedural and uncomplicated hurdles that are otherwise tying up matters and preventing counsel and the parties from moving forward towards resolution. Allowing 14B motions to resolve these hurdles enables counsel to then continue to move matters forward outside of the court. It will also assist in alleviating some of the growing backlog.

Since 14B motions are done in writing in the ordinary course and do not require an attendance, they are particularly well suited to remote operations. The volume of 14B motions can also be reduced by utilizing alternate forms for consent adjournments. Particularly:

- Consent adjournments for conferences by Form 17F
- Consent adjournments for motions by Form 14C

(Note: Consent adjournments to continue by 14B only for child protection matters)

2. Case Conferences

Case conferences are a highly valuable use of judicial time and provide maximum value. They can be used very effectively to narrow issues, address procedural hurdles and provide direction for moving the matter forward, including outside of court.

Case conferences are ideally suited to remote operations as they are non-determinative steps, with no need for examination or cross-examination of any witnesses.

3. Commencing New Proceedings

Allowing the filing of new Applications, Motions to Change, and Answers/Replies will help to alleviate the accumulating backlog to address once operations return to normal. The commencement of new proceedings can help prevent matters from festering to the point where they become urgent. It also sends a clear message that the Court is open and functioning, which will act to dissuade those who might otherwise refuse to engage in negotiations (in the absence of a tangible consequence).

For new matters, this is also a necessary step to get the matter to a case conference where a judge can be instrumental in guiding the matter towards settlement.

Permitting the filing of domestic contracts for enforcement, pursuant to subsection 35 (1) of the *Family Law Act*, will allow support recipients to enforce the agreements through the FRO or on their own.

4. Child Protection matters – Status Reviews, first appearances, temporary care and custody motions and access motions.

A lack of access between a child and his/her parents can be devastating for all parties involved. These matters should be priorities, and at a minimum, should be scheduled for a telephone conference to plan the next steps.

We also suggest that matters that were originally scheduled for March and April and subsequently adjourned be conferenced by telephone in June/July.

5. Motions

In addition to urgent matters, it would greatly reduce backlog and facilitate settlement of matters if the court expanded the scope of non-urgent motions being heard remotely. In particular, motions which should be prioritized include:

- Non-urgent support and parenting motions. Even if they do not meet the urgency threshold, support and parenting issues are particularly important to the parties involved. They can also become urgent if not addressed, and can lead to a further breakdown in the relationship between the parties which can have devastating impacts for the children involved.
- Disclosure motions. A lack of disclosure can be a major impediment to settlement as disclosure is essential for making progress on all other matters. While many disclosure motions can be resolved by way of a 14B motion, permitting resolution of more complicated

disclosure issues by motion ought to be available to allow counsel to continue to move matters forward.

6. Settlement Conferences and Trial Management Conferences

For the reasons outlined above for Case Conferences, Settlement and Trial Management Conferences are also an excellent use of judicial time and well-suited to remote operations, and should proceed remotely.

In the current context, parties are increasingly interested in settling their matters and exiting the system: this could help them do so. Through virtual mediations, the experience of the bar is that, in many cases, virtual settlement discussions can be highly effective in resolving matters. Even if settlement of all issues cannot be achieved, these conferences can be effective in narrowing issues and developing a road map for moving the matter forward. Some jurisdictions also regularly hold a case conference and settlement conference together in appropriate circumstances.

For trial management conferences, in particular, which are available only for matters that are ready for trial, these can be used to vet files to see if there are alternatives to lengthy, in-person trials (for example using affidavit evidence or limiting witnesses), which can help to alleviate the backlog of cases awaiting trial.

Technology, Process and Opportunities for Subsequent Improvement

Technology and logistics should not be a barrier to expansion. The above matters can be effectively and efficiently handled using available technologies that the court and the bar are already using.

Remote hearings can be conducted by Zoom or other video conferencing technology, or by telephone conference. We propose that, to prevent backlog, delay and denial of access to justice, the above matter should be heard remotely by default and should not require the consent of both parties. In the SCJ, counsel frequently provide telephone conference call lines for telephone conferences. This solution could be implemented in the OCJ if availability of conference lines is otherwise a hurdle.

Filing of all materials, including new Applications/Motions to Change, can be done by way of email. Similarly, court orders can be issued and entered by email. Additionally, we ask the Court to confirm that service may be effected by email for the time being, except for documents requiring special service.

To address fairness concerns, where one party is represented and the other is self-represented, counsel could be required to advise the self-represented person of the conference call/video conference details, and the availability and contact info for Duty Counsel.

First appearances could be done via telephone calls with the court clerk. Phones could also be used to set dates for matters that have been missed due to restricted operations in the current environment.

Utilizing the above mentioned technology, operations can continue albeit in a somewhat ad hoc manner. We are advocating for immediate expansion using existing technologies. That said, there are subsequent opportunities for improvement to bring further efficiencies. These include:

- Arranging a virtual registrar for Judges hearing Zoom/Video hearings so that the Judge has ability to concentrate on the hearing, not on the technical aspects
- Arranging for digital document storage so that counsel could provide digital versions of Continuing Record, endorsements etc that is anticipated to be needed for the Judge hearing the matter. (e.g. BOX, DROPBOX or similar product)
- Establishing an online scheduling platform, similar to that the SCJ is rolling out, would make scheduling easier and free up Court Services staff.
- Arranging for the ability to get an event history of the file and last endorsement on the file – this is like arranging for the Public Computer access to be online, plus having access to some confidential document storage.

Our associations are ready and willing to assist the Court in any way we can. We are available to consult as needed on drafting new policies and practice directions: Although the experience from the SCJ is that there will inevitably be some challenges as new processes are rolled out, we are available to provide the best advice from practitioners at the outset to minimize any hurdles after the rollout. We are also willing to provide judicial training as needed. The OBA continues to offer Zoom training to the judiciary, which has been well subscribed to date and is ongoing. Our associations are also willing to pull together demonstrations for the judiciary of conferences and motions. Finally, we are able to advocate for the necessary software and hardware with the Ministry.