

## OUTREACH FOR REAL-TIME SOLUTIONS

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

As of Tuesday, March 25, 2020 (new items highlighted)

#### A. COURT ISSUES - PRACTICE SPECIFIC

##### Family Law

1. Must an existing order for access be strictly followed during the state of emergency, where families are being told to stay home? Whose home- both homes? Does one parent have the ability to refuse access if the other parent declines to self-isolate with the children during her or his access? Does one parent have the ability to refuse to allow daycare/babysitters untested for the virus to care for the children if the other parent must work? Is it in the best interests of the children to travel in public between homes during the pandemic and more so, when one of the parents must take public transportation with the children?
2. Could there be a directive or some form of guidance from the court regarding the fact that the CAS has suspended access to children in care by their family members who had ongoing unsupervised and supervised access? While each case may be different, some guidance from the court would be helpful in deciding whether to bring an emergency motion.

##### Trusts & Estates Law

1. 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.
2. What are the best practices for a client who is self-isolating or in quarantine and wishes to sign a will and powers of attorney?
3. In the case of needed wills, is a holograph will an option? Would a written statement that acknowledging restrictions due to COVID 19 by the individual without being witnessed be deemed acceptable?

4. Can lawyers file documents electronically in estates court? Could e-filing also be used for matters on consent, such as a supplemental record for unopposed judgment in a passing of accounts?
5. Can you advise whether this e-mail service applies to POA matters, specifically, service on a Ministry of Transportation prosecutor with respect to notice under s. 35 of the Evidence Act?

### General Litigation

1. 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?
2. 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.
3. 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?
4. Is there any way to note defendants in default? And will the Court office accept motions for default judgment in writing?
5. 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.
6. 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?

7. 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?
8. 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.
9. Rule 4.05.1 - despite the coming into force March 23 2020 of O. Reg. 456/19, there does not seem to be an authority to file a Form 38A Notice of Appearance (Rule 38.07(1)). Why any difference between a Notice of Intent to Defend, and a Notice of Appearance, for such filings? Can there be an amendment to add that?
10. The Notice from the CJO, dated March 15 2020 says that "For regular filings, that are not urgent as defined below, the Ministry of the Attorney General advises that courthouses will remain open. Those filings may continue to occur at courthouses". The Notice then states: "However, where procedural rules or court orders require the regular filing of documents during this emergency period...parties can expect the Court to grant extensions of time once the Court's normal operations resume." Which implies that regular filings do not need to occur. Does this mean that lawyers should try to file documents even though all regular operations are suspended (does regular operation include

filing?), even though the matters are adjourned and despite the fact that we are advised not to attend the courthouse? Or should they simply wait and file later, with a request for extension of time?

11. Are May and June trial sittings still to be planned/prepared for if we are looking at isolation until May 29th, per the government.

### 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

### Criminal

1. Should a consent release not become a reality, can a lawyer schedule a review? Can it be in court? The sureties can be cross examined remotely or can sit at a safe distance and can litigate the matter in court. Should lawyers reach out to the RSJ, the trial coordinator?

### Bankruptcy

1. How would a lawyer go about getting a discharge hearing before Master Jean in the bankruptcy court?

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

### Newmarket and Barrie

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.

2. Lawyers have expressed that their materials have been rejected from this court. Is it worth sending someone to file an Application or would that be rejected at this time?
3. Does court staff have any estimation of the timeline for issuing Certificates of Appointment in Newmarket?
4. Are the courts in Barrie and Newmarket accepting over-the-counter motions for consent Judgments or Orders?
5. Are the same courts accepting over-the counter motions for orders to a Master (Newmarket) or a Judge (Barrie) for substituted service that involve extensions of the time to serve a pleading? The 6 months to serve a statement of claim is a rule, and is not automatically extended by Sunday's Regulation suspending statutory limitation periods.
6. Will these two courts accept hard copy motion records for 1 and 2, or only electronic copies, and if the later, what happens if the material will exceed the 20 MG limit?
7. If only electronic copies are required, will hard copies still have to be filed, and when?

#### Toronto

1. Are Courts requiring Confirmations for what are scheduled (but not proceeding) court dates to be served/filed, and if not doing so may avoid the Court being unnecessarily inundated, or if the Rules as they require Confirmations would continue to apply?

#### Brampton

1. Apparently, Brampton judges are not dealing with non-emergency matters even in writing. Question: Is that a set policy? Is that province-wide? Possible Solution: Specifically, could a form 14-B motions (which are for procedural, uncomplicated and unopposed matters) be used during this period of closure. Follow up Question: Why can they not be doing more complicated stuff through facta exchange and telephone hearings if counsel agree?

#### Kitchener/Stratford

1. It appears that the registrar's offices at the courthouses are still open and should be issuing Applications, Motions to Change, accepting the filing of pleadings, and issuing Orders that have already been made. However, the Kitchener and

Stratford courthouses are advising process servers that they will not “deal” with anything that is not urgent. Solution: Allow for lawyers to have their pleadings issued so that they can schedule court dates once the courts are operating as normal again, instead of having to wait three (3) months or more to even start the process. Further – the Courts should be able to have pleadings issued by sending them electronically to the courthouse, which would alleviate the concerns of the courthouse staff.

## 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 - 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? Also

what is the application to other statutory provisions such as (1) Tarrion deadlines (these are the statutory warranties to new home buyers and include 1, 2 and 7 year deadlines especially for claims by condo corps against condo developers); and (2) Lien deadlines under the Construction Act (and apparently also under the Condo Act).

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?
3. Issue: suspension of procedural and limitation periods included in the government’s EMCPA Order from last week. Question: Are Consents under the Planning Act with conditions that are set to expire in the next couple of weeks captured under the Order or not?
4. Does Regulation 73/20 regarding limitation periods and procedural time periods apply to the Planning Act? Specifically, are the time periods for consent applications affected by the emergency regulation?

### 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?

### General

1. Virtual commissioning of declaration and affidavits. LSO is not able to change statutory requirements. To properly and formally deal with non- face to face commissioning will government make an order in council temporarily making

changes to section 9 of the Commissioners for taking affidavits act, temporarily waiving the “in presence” requirement.

2. Financial institutions. Most FI’s are still requiring payouts of secured loans on sales or refinances to be delivered to their office by certified cheque. Will MAG work to mandate that FI’s are REQUIRED to accept discharge funds for secured payouts via wire transfer, if the originating solicitor is able to do so.

## 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. Asking Counsel and clients to adhere to electronic document transfers, without paper being sent by mail.
4. Money transfers between lawyers. Lawyers are still seeing some law offices continuing to demand that trust funds be deposited by certified cheque as direct deposit to their trust account, or by cheque delivered to their offices. The LSO can temporarily order that requirements under bylaw 9 are temporarily changed so that any law firm MUST be required to accept funds into their trust account via electronic wire transfer, if the originating solicitor is able to do so. The sending law firm can provide a copy of their originating void trust cheque to confirm the source account is a trust account and a copy of the wire transfer confirmation in lieu of a certified cheque.
5. Can the LSO and/or the Courts provide information on specific procedures for virtual commissioning? [The BC Courts have put together a fantastic step-by-step guide. It would be useful to have something like that for our lawyers.](#)

6. What plan is the LSO putting in place for the June licensing examinations to proceed? Students are already raising concerns about needing to prepare for examinations and have them cancelled at the last minute.
7. What provisions are the LSO putting in place with respect to articling students who are being laid off?