

MESSAGE FROM THE ONTARIO TRIAL LAWYERS ASSOCIATION – March 27, 2020

During this time of emergency, the Ontario Bar Association, the Advocates' Society, the Ontario Trial Lawyers Association, the Federation of Ontario Law Associations and the Canadian Defence Lawyers have come together in an attempt to prioritize judicial resources available for civil matters. This submission is provided with the input of these groups to assist the judiciary.

Effectively Utilizing Judicial Resources

We applaud the Ministry for quickly taking action to protect all Ontarians in the judicial system by amongst other things freezing limitation periods, allowing for email service of documents on the Crown and expanding party's abilities to file electronic court documents.

During these challenging times, it is important that we strive to ensure that access to justice is assured for as many Ontarians as possible. Legal services have been deemed an essential service by the province for this very reason.

Judges and lawyers, like so many others, have been thrust into a new reality with virtually no notice and by working remotely from our homes. Nevertheless, we are optimistic that a great deal can be done to keep the civil justice system moving forward even while the courts are closed to most matters. We firmly believe that we should take these steps in order to avoid an insurmountable and overwhelming backlog when the COVID-19 Crisis eventually normalizes.

Wherever possible, and in order to ensure the system continues to move forward as much as possible, the courts should continue to proceed on matters. Below are some short-term suggestions of matters that should proceed:

1. Rules 7 Motions: All settlements involving a person under disability require court approval under a Rule 7 motion. The courts should continue to review all previously filed and new Rule 7 motions, as delays in this sphere will result in much-needed funds not getting into the hands of our most vulnerable citizens in need of care and medical treatment.
2. Injunctions/Urgent Motions/Applications: All of the associations agree that these matters are urgently in need of adjudication. Examples include: enforcement of a prior order of the court, matters under the Mental Health Act, Consent/Capacity legislation, Medical Assistance in Dying, Regulated Health Professions Act, Certificates of pending litigation, Summary Judgment, Condominium Act matters that

affect the health and welfare of residence, vacating a Lien and insolvency matters including: sale process orders, claims process orders and plan approvals to pay creditors.

3. Pre-Trials: Pre-trials are often an important last step prior to trial. Pre-trials should continue! Most agree that second pre-trials might be necessary to clear back logged trial lists. Senior members of the Bar have offered to assist by running pre-trials during this time of urgency. Pre-trials can easily be conducted via telephone (for shorter pre-trials) or video conference (for longer pre-trials or complex matters).
4. One-Judge Pilot Project: Actions that are already part of the one-judge pilot project should continue to move forward on an individual case by case and as needs basis. Given individual judges have already been appointed to these actions, parties should be allowed to correspond directly to the judge on the individual matter to move the case along so that once the courts fully re-open, the case will be in a position to go to trial within the pilot-projects two year timeframe.
5. Case Managed Matters: As with one-judge pilot project matters, where actions have either Rule 37.15 judges or case management judges already appointed to it, those matters should be allowed to continue on an as needs basis. The individual judge appointed in either one-judge pilot project or as case management judge would use his or her discretion to decide what matters should be heard or dealt with in the short term pending other judicial obligations he or she may have.
6. Unopposed and Consent Motions: Unopposed and consent motions should continue to be accepted by the courts and be dealt with by judges. To the extent a judge feels that he or she needs to hear from the parties, a phone or video conference can be co-ordinated.
7. Procedural Matters: Setting up a duty list of judges to deal with procedural matters such as scheduling and timetable issues. If not on consent, these matters can be dealt with via phone or video conference.
8. Contested Motions: Short (less than an hour) and uncomplicated contested motions should move forward. As with long or summary judgment motions, the parties should be required to submit a short overview of the motion to the courts and their position as to whether or not it can be heard without an attendance in person. To the extent the court questions the complexity or its ability to hear the motion in this matter, a call can be arranged between the parties to discuss this matter further. To the extent the motion is approved, the court would then require the parties to submit materials within a specified period of time. The motion would then proceed before a judge by phone or video conference.

Utilization of Technology

NOTE: The following associations - the Ontario Bar Association, the Ontario Trial Lawyers Association, the Federation of Ontario Law Associations and the Canadian Defence Lawyers - provide for your consideration the following comments on the utilization of technology.

These comments are not endorsed by the Advocates' Society.

We applaud the recent efforts made to enhance the court documents that can now be filed electronically. In order to ensure efficiency and that the courts continue to be able to function during these difficult times, We recommend additional and immediate enhancements be made to the electronic online filing system. We recommend that the online platform be enhanced to allow for the filing of the following additional documents in the short term: notices of motions, motion records for uncontested and unopposed motions, court approval documents certification forms, trial records and pre-trial memoranda.

In the interim, while the electronic online system is being enhanced, it would be helpful if the rule against contacting judges and masters directly could be relaxed somewhat to allow counsel to send materials directly to a judge or master. This would especially improve efficiency in circumstances where pre-trials, motions, case management conferences, etc. are already scheduled. This can be easily achieved by having the court notify the counsel directly as to which judge or master has been assigned to the matter. Of course, the rule of copying opposing counsel and limiting communication to serving documents or scheduling would still apply. To the extent the motion materials are too large to be directly emailed, the party serving the materials would be responsible to utilize, and bear the cost of, a secure electronic document service that can transfer the documents to opposing counsel and the judge. Services like Dropbox and Digify have already been utilized by many lawyers for years to transfer large documents to opposing counsel rather than provide paper copies. There is no reason why motion records or other large documents cannot also be transferred in the short term to judges. The parties would then of course be obligated to file materials directly with the courts once the filing offices re-open so that there would be a proper copy of materials in the court file.

In the interest of keeping momentum with existing scheduled matters, and preventing an enormous backlog once self-isolating measures have come to an end, we recommend that pre-trials, case conferences, motions, discoveries and mediation proceed via teleconference and video conferencing. A directive from the Chief Justice to the profession would be extremely useful. We understand that resources are limited. To that end, parties should be obligated to offer these resources and also bear the cost of providing this technology. For example, Zoom and Webex are secure platforms for which many firms already have accounts and can send an invitation to the judge or master to participate. All that is needed by a judge or master is a smart phone, tablet or laptop. The same is true for conference call lines, which almost every law firm uses. Many court reporting centers have already made use of these platforms so

discoveries and mediations can continue virtually. As mentioned, to the extent the parties may not already have these services at their firm, the parties should be required to jointly pay the cost of providing this service.

In fact, We believe it is entirely possible to conduct some opposed motions, where counsel agree, virtually or by phone. This will require a court reporter to participate virtually as well. Given that all court reporters usually already have a laptop readily available, if they are provided with a virtual invitation, and can hear the parties, they ought to be able to provide a transcript effectively. Many of our Members have already utilized these types of services in the past on cross-examination of affidavits of experts that are outside of Ontario or Canada. The produced transcripts have been accepted and utilized in court on motions. There is no reason that this same technology cannot be utilized at a motion where a court reporter is required.

Conclusion

Given scarce judicial resources which will be strained once it is back to business as usual, we firmly believes that court time and resources should be utilized wisely. While the COVID-19 pandemic has forced us all into unfamiliar territory, we submit this is an opportune time to create more efficiencies with our courts by using technology, which will further access to justice for all in the end. We would be pleased to discuss these ideas further should the need arise.