

Ontario Litigation Update: COVID-19

March 23, 2020

By Macdonald Allen

COVID-19 is impacting all aspects of life including Ontario's Courts.

Thanks to the hard work, and responsiveness of the various justices, court staff, legislators, and other stakeholders – in a matter of days, Courts have suspended normal operations and established a framework for continuing to administer justice in the face of unprecedented challenges.

This article will briefly canvas the impacts of this new framework on Commercial and Civil matters in Ontario.

Ontario Court of Appeal

Effective March 17, 2020, the Ontario Court of Appeal suspended all scheduled appeals for a period of three (3) weeks until April 3, 2020. During this period, urgent appeals will be heard based on either the written materials or remotely.

Anyone wishing to have their matter heard on an urgent basis can send a request to the attention of the Senior Legal Officer at COA.SeniorLegalOfficer@ontario.ca.

Parties to non-urgent matters can request that their appeal be heard based on the written materials already filed, and single judge motions will continue to be heard remotely.

Information on changes to the Court of Appeal's process can be found [here](#).

Ontario Superior Court of Justice

On March 15, 2020, Chief Justice Morawetz issued a "Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings" (the "**Suspension Notice**") suspending all regular operations of the Superior Court of Justice (SCJ) effective Tuesday March 17, 2020 until further notice.

The Court calls for the cooperation of counsel and parties to engage in every effort to resolve matters during the temporary suspension of regular operations.

If you are a lawyer, or a self-represented litigant with matters before the SCJ, it is well worth reading the entire Suspension Notice which can be found [here](#). Some of the highlights from the Suspension Notice include:

A. The SCJ will continue to hear the following Civil and Commercial List (Toronto) matters:

1. urgent and time-sensitive motions and applications in civil and commercial list matters, where immediate and significant financial repercussions may result if there is no judicial hearing.
2. outstanding warrants issued in relation to a Small Claims Court or Superior Court civil proceeding.
3. any other matter that the Court deems necessary and appropriate to hear on an urgent basis. The Bar and the public are advised that these matters will be strictly limited.

A hearing may be conducted in writing, by teleconference or videoconference, unless the Court determines that an in-person hearing is necessary.

B. Procedures for Regular and Urgent Matters:

At the time of its publication, the Suspension Notice indicated that for regular filings courthouses will remain open. There are signs that this may be beginning to change. For example, on March 23, 2020, the Ministry of the Attorney General's Court Services Division posted a notice at 330 University Avenue in Toronto, directing that members of the legal profession and members of the public NOT attend courthouses in person at this time, unless they are required to be in court for a hearing or to make an urgent filing.

The Suspension Notice sets out a procedure to file, and to schedule an urgent matter. Among other things:

1. Urgent materials are to be filed by email to the appropriate courthouse. A list of email addresses can be found [here](#);
 2. Materials cannot exceed 10mb, and every effort must be made to limit materials to 10mb. If materials are greater than 10mb, further emails may be sent within the 10mb maximum.
 3. Filed materials must indicate how and when service was made, and include any prior orders or endorsements that are relevant to the urgent matter.
 4. Case law should be hyperlinked – where hyperlinks are provided, it is not necessary to file a Book of Authorities.
 5. Affidavits may be delivered unsworn, but the affiant must be available to swear or affirm the affidavit during a telephone or videoconference. As discussed further below the Law Society of Ontario has provided additional guidance on the remote swearing of affidavits.
 6. Where materials have been filed seeking an urgent hearing, the trial coordinator will seek direction from a judge on whether the matter is urgent, and should be scheduled for a hearing. The judge will also determine a schedule for the service and filing of responding material, and the manner of hearing.
 7. The Commercial List (Toronto) and Estates List have each prepared their own guidance on the changes to their operations in light of COVID-19.
- a. [Changes to Commercial List Operations in light of COVID-19 – March 16, 2020](#)
 - b. [Changes to Toronto Region Estates List Operations in light of COVID-19 – March 23, 2020](#)

Case Law – New Procedure in Practice

On March 19, 2020, in *Ali v Tariq*, 2020 ONSC 1695, Justice Myers considered an urgent application to set aside a writ of execution to seize a party's equity in a property in order to pay a judgment. The urgency was created because the property was scheduled to be sold imminently pursuant to an agreement of purchase and sale, and the writ was interfering with the vendor's ability to sell the property and the vendor risked losing the sale.

Justice Myers' urged the parties to resolve the dispute in a manner that did not prejudice either party, however if the matter could not be settled, in accordance with the Suspension Notice, Justice Myers established the following procedure:

[9] Service of any materials for this application may be made by email ... and shall be deemed effective on the date the email is sent or, if sent after 4:00 p.m., on the next day. No acknowledgement of receipt for email service is required for this motion...

[10] All evidence, motion records, and factums shall be filed with the court by delivering them as attachments to an email to the other parties and the Motions Coordinator in searchable PDF format. No Books of Authority or statutory materials are to be sent to the other parties or the Motions Coordinator. References to case law or statutory material shall be made by hyperlinks to CanLII contained in the parties' factums or in a separate list of authorities.

[11] The hearing will be held by telephone case conference to be held on a line arranged by the Motions Coordinator. The parties and the presiding judge may use videoconference technology (whether Skype or Microsoft Teams or otherwise) as may be available to them all and acceptable to the presiding judge.

[12] Upon the courthouse reopening to the public, each party shall file with the Civil Motions Office a copy of all the material he, she, or it delivered electronically for this motion, with proof of service, and pay the appropriate fees therefor.

Matters Scheduled to Be Struck from the Trial List

The trial coordinator in Toronto indicated that matters scheduled to be addressed by an in-person hearing at To Be Spoken to Court during the temporary suspension period will not be struck from the trial list if they were cancelled as a result of the temporary suspension of operations.

It is likely that these matters will be given to at least the end of this calendar year to be rescheduled before they are struck from the trial list. These matters will likely be dealt with as part of the Court's proposed rescheduling Court along with other matters that will require rescheduling.

Virtual Commissioning of Affidavits

The Law Society of Ontario has published in its FAQ a recent resource on the virtual commissioning of affidavits in light of the social distancing challenges presented by COVID-19.

Among other things: (i) the Law Society will interpret the requirement in section 9 of the *Commissioners for Taking Affidavits Act* that, "every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public" as not requiring the lawyer or paralegal to be in the physical presence of the client; (ii) rather, alternative means of commissioning such as commissioning via video conference will be permitted. Additionally, commentary and guidance from the LSO can be found in its Corporate Statement re COVID-19 located [here](#).

Limitation Periods in Ontario

By Order dated March 20, 2020, pursuant to subsection 7.1(2) of the *Emergency Management and Civil Protection Act* the Ontario Government sought to suspend limitation periods and deadlines in respect of any proceeding, or intended proceeding in Ontario. The Order states:

1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.
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 for the duration of the

emergency, and the suspension shall be retroactive to Monday, March 16, 2020.

Two immediate open questions are: (i) the basis on which courts or tribunals might exercise their discretion against the suspension of required time periods for litigation steps; and (ii) when and what state of a proceeding such direction might be given. Ontario's Local Planning Appeal Tribunal had initially taken the position that a deadline imposed under a Tribunal-approved procedural order was not affected by the Order and remains in effect. A day later, the LPAT has changed its position and now interprets the Order as having the effect of suspending any timelines established by order of the Tribunal. One can expect greater clarity will be forthcoming on these points.

If you have any questions about the effect that this Order will have on a limitation period or deadline in your proceeding, or anticipated proceeding please do not hesitate to [contact us](#).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[For more information or inquiries:](#)



Macdonald Allen

Toronto
416.947.5027

Email:
mallen@weirfoulds.com

Macdonald Allen is a partner in the litigation practice group at WeirFoulds LLP. He practises in a range of commercial and civil litigation matters.

WeirFouldsLLP

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035