

The Courts - Navigating Litigation under Lockdown in Ontario

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In addition to non-essential businesses, parks and sporting events, the COVID-19 crisis has placed severe restrictions on access to Ontario's court system.

Effective March 17, 2020, the Ontario Superior Court of Justice, Ontario's primary trial-level court for civil and commercial litigation matters, suspended all regular civil operations and adjourned all hearings scheduled after that date pending the court's resumption of normal operations. The court's civil docket has since been limited to "urgent matters" with hearings conducted largely by teleconference or videoconference. More recently, on April 2, 2020, the court released a further notice announcing that the court would expand its capacity to hear select non-urgent matters. Despite this, most civil and commercial matters will still need to demonstrate urgency in order to obtain a hearing.

This update will provide a summary of the court's determinations to date as to what matters are considered "urgent" enough to be heard and a preview of the recently announced expansion to the court's capacity to hear non-urgent matters.

What Qualifies as "Urgent" Under the New Regime?

Since March 17, 2020, the court has heard a number of urgent civil motions by teleconference. Matters that have been deemed to be urgent include:

- a) those which, if not addressed, may result in significant financial loss;
- b) questions of whether court orders should be enforced – the courts have been clear that court orders must be complied with during the COVID-19 pandemic, and, rather than condoning non-compliance, they are willing to hear matters in which there may be good reasons for granting a stay;
- c) imminent commercial and residential evictions, or those which have been executed and may require reversal; and
- d) other serious issues, such as the privacy interests of children, the ability of a regulatory body to conduct an investigation, and a matter impacting an ongoing leadership contest for a national political party.

Where there is no real evidence of urgency, or where the action has a history of procedural delay, judges have factored this into their determination of urgency and have refused to hear motions.¹

Examples of "Urgent" Matters Heard Since March 17, 2020

Risk of Financial Loss: A substantial risk of imminent financial losses has been a primary driver of the court's determination of urgency in civil and commercial matters. In *Ali v Tariq*, the sale of a property was put in jeopardy by a writ of execution granted pursuant to a default judgment that was filed against lands and premises that were to be sold.² The motion was "urgent" because of the impending loss of the sale and "dramatic losses" if the sale did not close – particularly given the current state of economic uncertainty. In *Morris v Onca*, a judgment creditor who was at risk of defaulting on a real estate transaction sought an urgent hearing for a contempt order to enforce payment of the money owed, which had been obtained by the respondent through fraud.³ The judgment creditor presented evidence that the fraudster was actively moving assets overseas, and the court determined that the matter was urgent.

The prospect of financial hardship, however, will likely not be sufficient on its own to make a matter urgent. In *Theis v Theis*, the court refused to hear a motion for the release of trust funds from the sale of the parties' matrimonial home because, despite the fact that the applicant's business had closed due the pandemic and she remained obliged to pay a number of expenses, "the evidence does not support a finding that Ms. Theis [is] in dire financial circumstances."⁴ The court underscored that clear evidence of "dire issues related to the parties' financial circumstances" was required, and that "[t]he results of any application for provincial or federal funds, or the anticipated timeline for a determination of such application for funds" was evidence the court would need to consider.

Compliance with Existing Court Orders: The court has also emphasized the importance of continued compliance with court orders. Rather than condoning non-compliance, courts have demonstrated that they are willing to hear matters where there may be good reasons for granting a stay. In *Hrvoic v Hrvoic*, the respondent had failed to comply with an earlier order for repayment of \$500,000.⁵ The court held that "the issue of whether the order ought to be stayed is time sensitive and important." The court found that the actions of the parties had made the motion urgent, even though the underlying actions (related to corporate ownership and family law disputes) were not themselves urgent.

The courts have heard many urgent family law applications in respect of compliance with existing orders, such as spousal support, and custody and access orders. Generally, the courts seek to enforce such existing orders,⁶ though they caution that all parties must abide by social distancing guidelines.⁷ It can likely be expected that a similar approach will be taken to enforcing injunctive orders in civil and commercial matters.

Commercial Tenancies: In *Oppong v Desoro Holdings Inc*, a commercial tenant sought relief from the

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forfeiture of the lease to her hair salon by her landlord.⁸ As the applicant was dispossessed, the motion was determined to be urgent. The urgency determination was not affected by the anticipated impending closure of non-essential businesses, including the applicant's hair salon.

Residential Tenancies: Despite the order that most residential evictions should not proceed, courts have found that issues related to residential evictions may still be urgent, and that some evictions may go forward where there are urgent reasons, such as tenants engaging in irresponsible or unlawful conduct. In *Atkinson v Lysak*, the court declined to order that an eviction should proceed but left it open to the landlord to bring an order that the court would consider if the tenant continued to behave irresponsibly and unreasonably.⁹ In *Young v CRC Self-Help*, a tenancy was reinstated pending appeal to the Landlord Tenant Board, even though the tenant had already been evicted.¹⁰ The court left open the option for this landlord to seek eviction again should the tenant continue to engage in illegal or dangerous conduct.

Other Serious Issues: In *Karahalios v Conservative Party of Canada*, the court held that an application to challenge a candidate's disqualification from the Conservative Party of Canada leadership race should proceed, as the leadership vote was scheduled for June and the list of candidates was to be released in a matter of days.¹¹ The court stated that, "[a]lthough the application does not raise a strictly financial issue, it is time sensitive and the consequences have implications on the national political process in the country."

In the context of ongoing litigation, the responding party in *Rogerson v Havergal College* alleged that the applicant breached a court order by filing affidavit evidence in the court's public file that improperly discloses the private information of several minor children. This was deemed to be urgent because the privacy interests of children are "of superordinate importance."¹²

In *College of Physicians and Surgeons v SJO*, the court modified an existing procedural order to reflect COVID-19 restrictions, enabling the professional regulator for doctors in Ontario to continue to perform its regulatory function by continuing its investigation through the pandemic.¹³

What's Next? Further Expansion of Virtual Court Offerings Beginning April 6, 2020

On April 2, 2020, the Superior Court released an updated *Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings*, providing new information about the expansion of hearings using videoconference technology. Courts largely remain suspended, for civil matters but starting April 6, 2020, the court will begin to hear limited non-urgent matters in addition to matters which are urgent. These vary by region and include pretrial conferences, Rule 7 motions and consent motions made in writing.

The court has advised that it will rely on its inherent jurisdiction as entrenched in section 96 of the

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Constitution Act, 1867 to relieve compliance with procedural rules, regulations and statutes when it is just, reasonable or necessary to do so. As an example, the court's April 2 notice provides that, going forward, parties will no longer have to seek consent to serve documents by email where email service is permitted. The court has requested all parties' cooperation, flexibility and creativity to ensure that hearings are timely, just and fair.

Each region of the court has issued its own a notice to the profession, setting out process modifications and the types of non-urgent hearings that will be heard starting April 6. Despite broadly expanded capacities for criminal and family law matters, the court's capacity to hear non-urgent civil matters will remain quite limited. Generally, the court will hear:

- Pretrial conferences where parties and counsel are prepared to attend by videoconference with full intention and authority to settle the case;
- Motions governing approval of settlements for parties under disability (known as "Rule 7" motions); and
- Consent motions or applications made in writing.

For all other matters, the urgency criteria described above will remain a relevant gatekeeper to obtaining a hearing during the suspension of regular court operations.

In addition, the Divisional Court, which hears appeals from interlocutory orders, decisions of the Small Claims Court and certain administrative tribunals, will begin scheduling hearings by ZOOM videoconference for select non-urgent matters. Priority will be given to matters considered urgent or time sensitive or that have already faced procedural delay in awaiting a hearing.

Finally, the specialized Commercial List in Toronto, which hears insolvency and other complex commercial matters, will begin to hear select motions and applications, case management conferences, pre-trial conferences and judicial settlement conferences which can be completed within four hours. All contested matters will be heard by ZOOM or other videoconference platform. From this, it can be expected that cases on the Commercial List may expect greater availability of court time for non-urgent matters in the short term as opposed to matters on the regular civil list.

Key Takeaways

The COVID-19 crisis has required Ontario courts and litigants to dive headfirst into the 21st Century and take full advantage of available technology to ensure that important disputes are resolved quickly and efficiently. While court time for civil and commercial matters continues to be limited, great strides are being made to increase the court's capacity to hear urgent and important matters during the suspension of regular court operations. Cassels will continue to monitor the expansion of court operations during the pandemic

and will provide further updates as information becomes available.

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1 See, for example: *Mills v Mills*, 2020 ONSC 2008, <http://canlii.ca/t/j64r9>; *Reitzel v Reitzel*, 2020 ONSC 1977, <http://canlii.ca/t/j63rt>.

2 2020 ONSC 1695, <http://canlii.ca/t/j5xxd>.

3 2020 ONSC 1690, <http://canlii.ca/t/j5xxh>; 2020 ONSC 1805, <http://canlii.ca/t/j607f>.

4 2020 ONSC 2001, <http://canlii.ca/t/j64qm>.

5 2020 ONSC 1703, <http://canlii.ca/t/j6010>, 2020 ONSC 1711, <http://canlii.ca/t/j600z>.

6 *Skuce v Skuce*, 2020 ONSC 1881, <http://canlii.ca/t/j63dl>, at para 36; see also *Scharafanowicz v DeMerchant*, 2020 ONSC 1916, <http://canlii.ca/t/j646c>, at para 16.

7 See, for example, *Eden v Eden*, 2020 ONSC 1991, <http://canlii.ca/t/j6463>.

8 2020 ONSC 1689 <http://canlii.ca/t/j5xs6>, 2020 ONSC 1697, <http://canlii.ca/t/j6017>.

9 2020 ONSC 1878, <http://canlii.ca/t/j61c7>.

10 2020 ONSC 1715, <http://canlii.ca/t/j601d>, 2020 ONSC 1874, <http://canlii.ca/t/j61ch>.

11 2020 ONSC 1820, <http://canlii.ca/t/j60nc>.

12 2020 ONSC 1940, <http://canlii.ca/t/j63dh>.

13 2020 ONSC 1934, <http://canlii.ca/t/j63d5>.