

“It’s 2020” - Ontario Courts Embracing(?) Alternative Process and Remote Technology during the COVID-19 Pandemic

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As the COVID-19 pandemic continues to evolve, courts in Ontario have been working to find solutions to the suspension of regular court operations. Numerous directives have been issued by courts and tribunals across Ontario, providing guidance on how litigants are to proceed. While the approaches vary, and despite the Government of Ontario’s suspension of limitation periods, it is clear that courts and tribunals are looking to move litigation forward.

This article reviews the current orders and directives on limitation periods and timelines that litigants and counsel need to be aware of. This article also reviews recent decisions by Ontario courts that consider written hearings and remote technology as alternative formats to move litigation matters forward during the emergency period.

LIMITATION PERIODS & PROCEDURAL STEPS

On March 20, 2020, the Government of Ontario filed an Order pursuant to the *Emergency Management and Civil Protection Act*,¹ s. 7.1(2). The Order suspends limitation periods (section 1) and periods of time to take a step in a proceeding (section 2) retroactively to March 16, 2020.²

For the duration of the Order, time is not counted towards the running of a limitation period or step in a proceeding.³ The limitation period or period of time for a step resumes running on the date on which the temporary suspension ends.⁴ Whether and what, if any, extension of time will be granted when the suspension is over is unknown. Following the suspension, and based on direction from the Province about any extension of time to be granted, parties should determine their new limitations dates, as applicable.

¹ RSO 1990, c E9 [*Emergency Act*].

² *Order Under Subsection 71.(2) of the Act – Limitation Periods*, O Reg 73/20, ss 1–2.

³ *Emergency Act*, *supra* note 1 s 7.1(4).

⁴ *Ibid*, s 7.1(6).

The Order is in force for the duration of the emergency. The maximum duration of the Order is 90 days, however, the provincial Cabinet can renew the Order for an additional 90 days.⁵ The government may also terminate the Order if the emergency is no longer continuing.

Certain statutes are exempt from the Order suspending limitation periods and periods of time to take a step in a proceeding:

- ♦ as of April 9, 2020, the suspension does not apply to limitation periods and periods of time for a step created by the *Niagara Escarpment Planning and Development Act*⁶ or its regulations⁷
- ♦ as of April 16, 2020, the suspension does not apply to limitation periods and periods of time for a step created by the *Construction Act*⁸ or its regulations,⁹ and
- ♦ the suspension is deemed to never have applied to the *Planning Act*¹⁰ and its regulations and section 114 of the *City of Toronto Act, 2006*¹¹ (site plan control areas).¹²

The suspension of periods of time for a step in a proceeding is “subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding”. Thus, a court, tribunal, or decision-maker may order that a party comply with a time limit in a proceeding, despite the Order. The suspension of the limitation period, however, is not subject to discretion.

The Ontario Court of Appeal has exercised its discretion to limit the suspension of periods of time for a step in a proceeding, in certain cases. In a Practice Direction released on March 30, 2020, the Ontario Court of Appeal states that suspensions or extensions of regular prescribed timelines do not apply in the following cases:

- 1 urgent family laws appeals subject to the “Notice About Urgent Family Law Appeals”
- 2 civil proceedings where a notice of hearing has been sent and where proceedings have not been adjourned, and
- 3 civil proceedings that are case managed.¹³

⁵ *Ibid*, s 7.1(4).

⁶ RSO 1990, c N2.

⁷ *Order Under Subsection 71.(2) of the Act – Limitation Periods*, O Reg 73/20, s 3.

⁸ RSO 1990, c C30.

⁹ *Order Under Subsection 71.(2) of the Act – Limitation Periods*, O Reg 73/20, s 4.

¹⁰ RSO 1990, c P13.

¹¹ SO 2006, c 11, Sched A.

¹² *Special Rules Relating to Declared Emergency*, O Reg 149/20, s 3, and other rules.

Additionally, a Practice Direction released on March 31, 2020 states that the suspension and extension of time does not apply to the following matters before the Ontario Court of Appeal arising under the *Provincial Offences Act* (“POA”):¹⁴

- 1 POA matters related to COVID-19 under the *Health Protection and Promotion Act*¹⁵ and any other POA matters related to public health and safety in the context of COVID-19
- 2 POA matters where a notice of hearing has been sent and where proceedings have not been adjourned, and
- 3 POA matters that are case managed.¹⁶

COURT AND TRIBUNAL OPERATIONS

Courts and tribunals across Ontario are operating at various capacities. Each has issued its own direction about how litigants should proceed in light of COVID-19.

Ontario Court of Appeal

The Ontario Court of Appeal suspended all scheduled appeals beginning on March 17, 2020, except for urgent matters.¹⁷ On April 6, 2020, the Court of Appeal released a Practice Direction advising that while no in-person hearings will be held during the COVID-19 emergency, all matters will proceed by remote appearance or in writing.¹⁸ All documents that are required for the hearing of any matter are to be filed in electronic format only. The Practice Direction provides detailed information on the filing of electronic documents and the procedure to follow for virtual hearings. All matters to be heard on or after April 14, 2020 are subject to this Practice Direction.

¹³ Court of Appeal for Ontario, “Practice Direction Concerning Extensions of Time in Civil Proceedings in the Court of Appeal for Ontario” (30 March 2020), <https://www.ontariocourts.ca/coa/en/notices/covid-19/practice-direction-civil.pdf>.

¹⁴ RSO 1990, c P33.

¹⁵ RSO 1990, c H7.

¹⁶ Court of Appeal for Ontario, “Practice Directing Concerning Extensions of Time in Matters Arising Under the *Provincial Offences Act* in the Court of Appeal for Ontario” (31 March 2020), <https://www.ontariocourts.ca/coa/en/notices/covid-19/practice-direction-provincial-offences.pdf>

¹⁷ Ontario Court of Appeal, “COVID-19: Notice to the Profession and the Public” (17 March 2020) <https://www.ontariocourts.ca/coa/en/notices/covid-19/notice-profession-public.htm>.

¹⁸ Court of Appeal for Ontario, “Practice Direction Regarding the Electronic Conduct of Matters During the COVID-19 Emergency” (6 April 2020), <https://www.ontariocourts.ca/coa/en/notices/covid-19/practice-direction-electronic-conduct.pdf>.

A recent case from the Court of Appeal provides guidance on the Court's approach to dealing with hearings affected by the suspension of normal operations. In *Carleton Condominium Corporation No 476 v Wong*,¹⁹ the Court considered the rescheduling of an in-person oral hearing that was to take place on April 9, 2020. The appellant requested the hearing be adjourned until September or October 2020, arguing that he could not adequately prepare for the hearing as he did not have the technical capacity to work remotely. The respondent requested that the hearing proceed in writing.

The Court of Appeal held that the appeal should proceed in writing based on the materials filed, with an opportunity to respond to questions by teleconference on April 9, 2020. All the issues were sufficiently set out in the written materials filed such that the Court could deal with them appropriately without oral arguments. An undertaking by the respondent to furnish the appellant with electronic copies of all filed documents would adequately accommodate the impediments experienced by the appellant. While the Court acknowledges that the appellant's preference for oral arguments at an in-person hearing were understandable, the Court concluded that "...it is not in the interests of justice to overburden the court by adjourning matters that can be dealt with fairly, as scheduled."²⁰

Ontario Superior Court of Justice

As of March 17, 2020, the Ontario Superior Court of Justice suspended all regular operations until further notice.²¹ All criminal, family, and civil matters scheduled to be heard on or after March 17, 2020 were adjourned.

The Court identified urgent and emergency matters that will still be heard, including certain:

- ◆ public health and safety and COVID-19 related matters
- ◆ family and child protection matters, and
- ◆ civil and commercial list matters, such as
 - 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, and
 - outstanding warrants issued in relation to Small Claims Court or Superior Court civil proceedings

¹⁹ 2020 ONCA 244.

²⁰ *Ibid* at para 7.

²¹ Ontario Superior Court of Justice, "Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings", <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/>.

- ♦ other matters that the Court deems necessary and appropriate to hear on an urgent basis.²²

As of April 6, 2020, certain additional matters will be heard remotely by the Superior Court of Justice. The list of civil matters to be heard is set out in region-specific Notices to the Profession, but generally includes:

- ♦ pre-trial conferences that were cancelled between March 16, 2020 and May 31, 2020 due to Court closures
- ♦ Rule 7 motions or applications for approval of settlement, in writing, and
- ♦ consent motions, in writing.²³

Each region's Notice sets out the process to schedule a civil hearing and may include other civil matters that will be heard.²⁴

On April 20, 2020, notice was given that Criminal and Civil jury trials have been suspended until at least September 2020.²⁵

In addition to the various Notices issued by the Superior Court of Justice, recent case law provides guidance on what matters are urgent and require remote hearings:

- ♦ In *York Condominium Corporation No 419 v Black*,²⁶ the Superior Court of Justice held that an application for an injunction to prevent third party trades people from entering a condominium to renovate the respondent's unit was urgent because a majority of the condominium's residents were seniors and there may be a health and safety risk.
- ♦ In *Saine v Niagara Escarpment Commission*,²⁷ the Superior Court of Justice held that an application to challenge the Niagara Escarpment Commission's decision relating to a building permit was not urgent, but as the permit was about to expire, the issue relating to expiry of the permit was urgent and would be heard.

²² *Ibid.*

²³ Ontario Superior Court of Justice, "Update Regarding the Suspension of Superior Court of Justice Regular Operations" (2 April 2020), <https://www.ontariocourts.ca/scj/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update/>.

²⁴ *Ibid.*

²⁵ Ontario Superior Court of Justice, "Notice to the Profession, Public, Accused Persons and the Media Regarding the Suspension of Criminal and Civil Jury Trials" (20 April 2020), <https://www.ontariocourts.ca/scj/notice-suspension-criminal-and-civil-jury-trials/>.

²⁶ 2020 ONSC 2066.

²⁷ 2020 ONSC 2151.

- ◆ In *Chu Resto YS Inc v Greentower Service Inc*,²⁸ the Superior Court of Justice held that the hearing of an application for an injunction to prohibit a landlord from terminating the tenant’s lease was not urgent because the landlord provided an undertaking not to evict until the application was heard at a later date.

Ontario Superior Court of Justice – Divisional Court

Despite the Ontario Superior Court of Justice allowing only urgent and emergency matters to be dealt with, the Divisional Court began scheduling remote hearings for non-urgent matters on April 6, 2020. A Notice to the Profession sets out the process for scheduling a hearing²⁹ and recent endorsements of the Divisional Court, provide procedural and practical direction for holding virtual examinations and hearings:

- ◆ In *AG Ontario v Information and Privacy Commissioner of Ontario*,³⁰ the Divisional Court ordered an application to proceed by way of videoconference via ZOOM. The Court instructed the parties to provide the Court with the URL to a password-protected electronic drop box from which materials may be downloaded. All documents in the drop box must be in pdf format except for factums, which must be filed in Word version with hyperlinks for authorities.
- ◆ In *Sprague v Vaughan (City)*,³¹ the Divisional Court ordered a motion to quash an application for judicial review to proceed before a single judge of the Divisional Court via ZOOM through Arbitration Place. Neither the Court nor counsel will gown for the hearing. Business attire is required for anyone with a speaking role and parties must take reasonable steps to reduce the risk of interruption during the hearing.

In mid-April 2020, the Divisional Court broadcasted a hearing over a private YouTube channel to allow for a public gallery in the judicial review of the Minister of the Environment, Conservation and Park’s decision to revoke a wind farm approval for a project already under construction in *Nation Rise Wind Farm v. Minister of the Environment*.³² Another virtual hearing broadcast on YouTube took place last week in a request for leave to appeal the Local Planning Appeal Tribunal’s decision about a new mega hospital in Windsor.³³

²⁸ 2020 ONSC 1721.

²⁹ Ontario Superior Court of Justice, “Notice to the Profession – Divisional Court” (2 April 2020), <https://www.ontariocourts.ca/scj/notice-to-the-profession-div/>.

³⁰ *AG Ontario v Information and Privacy Commissioner of Ontario*, 2020 ONSC 2175.

³¹ 2020 ONSC 2859.

³² *Nation Rise v Minister of the Environment*, 2020 CanLII 25863 (Ont Div Ct).

³³ “Divisional Court to Hear Leave to Appeal on Hospital Planning Decision”, https://www.citywindsor.ca/Newsroom/Pages/Divisional-Court-to-Hear-Leave-to-Appeal-on-Hospital-Planning-Decision.aspx?fbclid=IwAR0iL_e_tz1E_MU-2CuLv201jOUg6mqQWW9BruQqQtO3Q3cTmqDevJzn27w.

Ontario Court of Justice

The Ontario Court of Justice adjourned all matters, including environmental POA matters, scheduled from March 16, 2020 to May 29, 2020.³⁴ On May 4, 2020, the Ontario Court of Justice released an updated Notice advising that the Court will not be returning to full operations on May 29, 2020. Rather, trials and preliminary inquiries will not be conducted until July 6, 2020 at the earliest, unless a judge seized with a continuing matter orders otherwise.³⁵ A detailed Notice about all proceedings in the Ontario Court of Justice is still to be issued.

Environmental Review Tribunal

The Environmental Review Tribunal (“ERT”) postponed in-person hearings as of March 13, 2020. The ERT is now holding scheduled hearings by teleconference or in writing.³⁶ Some in-person hearings may be adjourned to a later date. New appeals, applications, and documents can be submitted to the ERT by email.

Local Planning Appeal Tribunal

All hearings at the Local Planning Appeal Tribunal (“LPAT”) scheduled between March 16 and June 30, 2020 are adjourned to a future date.³⁷ On April 6, 2020, the LPAT began scheduling settlement hearings through teleconference or written submissions on a case-by-case basis.³⁸ Parties interested in settlement hearings must submit a Settlement Request Form and a list of filing materials demonstrating that there would be no prejudice to any party if the LPAT were to proceed by teleconference or written submissions.³⁹

Documents other than appeal records may be filed electronically. If parties submit documents by mail or courier, processing delays will ensue.⁴⁰

³⁴ Ontario Court of Justice, “Notice to Public Regarding Provincial Offences Act Matters (Updated May 4, 2020)” (4 May 2020), <https://www.ontariocourts.ca/ocj/notice-to-public-regarding-provincial-offences-act-matters/>.

³⁵ *Ibid.*

³⁶ Environmental Review Tribunal Update (30 April 2020), <https://elto.gov.on.ca/tribunals/ert/about-the-ert/>.

³⁷ Tribunals Ontario, Environment & Land Division, “COVID-19 Notice” (24 March 2020), <https://elto.gov.on.ca/covid-19-notice/>.

³⁸ Tribunals Ontario, Environment & Land Division, “Local Planning Appeal Tribunal Rescheduling Settlement Hearings” (3 April 2020), <https://elto.gov.on.ca/local-planning-appeal-tribunal-rescheduling-settlement-hearings/>.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

MOVING MATTERS FORWARD

Despite the suspension of regular court and tribunal services, litigants will need to keep moving their matters forward. The general sentiment from the courts is that counsel should, where possible, proceed with interim litigation steps.

In *Arconti v Smith*,⁴¹ the plaintiff expressed concerns about conducting examinations for discovery by videoconference and accordingly requested to postpone examinations until they could be held in person. In refusing the plaintiff's request, Myers J. stated, "[i]n my view, the simplest answer to this issue is, 'It's 2020'. We no longer record evidence using quill and ink."⁴² The *Rules of Civil Procedure* have provided for videoconferencing for more than 20 years.⁴³ Myers J. held that "[i]n my view, in 2020, the use of readily available technology is part of the basic skillset required of civil litigators and courts."⁴⁴ Alternative processes and technological know-how are imperatives for the court, and counsel, during COVID-19 times.⁴⁵

However, courts will balance the need to move litigation forward with the need for a fair process. In *Miller v FSD Pharma Inc*,⁴⁶ the Ontario Superior Court of Justice granted the plaintiff's request to delay a pre-certification motion in a class action proceeding until it could be heard in person. The plaintiff argued that proceeding by videoconference for a complex and lengthy motion with a voluminous evidentiary record would create logistical difficulties. Morgan J. stated that while he was "anxious not to delay litigation any more than needed given the present court suspension and general societal lockdown", he "would not want to hold a hearing that in its very format raises due process questions for whichever party ends up being unsuccessful."⁴⁷

Other courts have echoed the Superior Court of Justice's sentiment to move matters along. As the Court of Appeal stated in *Carleton Condominium Corporation No 476 v Wong* referenced above, "[i]t is not in the interests of justice to overburden the court by adjourning matters that can be dealt with fairly, as scheduled. The backlog that will be created by cases that must be adjourned to protect the public and ensure fair hearings will be imposing and it should not be unnecessarily aggravated."⁴⁸

⁴¹ 2020 ONSC 2782.

⁴² *Ibid* at para 19.

⁴³ RRO 1990, Reg 194, r 1.08.

⁴⁴ *Arconti v Smith*, *supra* note 41 at para 33.

⁴⁵ *Ibid*.

⁴⁶ 2020 ONSC 2253.

⁴⁷ *Ibid* at para 6.

⁴⁸ *Supra* note 19 at para 7.

Even during the writing of this article, additional notices, practices directions and decisions were issued. It is important that parties and their counsel continuously check for and review the evolving directions and decisions from the government, Courts and Tribunals.

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