FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

"The Voice of the Practising Lawyer in Ontario"

FOLA's SUBMISSIONS TO THE MINISTRY OF THE ATTORNEY GENERAL CONSULTATION TO REVIEW FAMILY LEGISLATION, REGULATIONS AND PROCESSES

Submitted to: Ministry of the Attorney General
McMurtry-Scott Building,
720 Bay Street, Floor 11
Toronto, ON M7A 2S9
ATTN: Ms. Lindsey E. Park, Parliamentary Assistant
lindsey.park@ontario.ca

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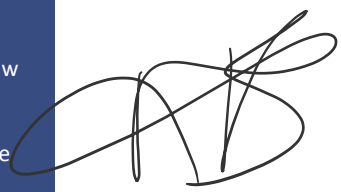
Submitted by:



Valerie L. Brown
Family Law Chair, FOLA
brown@brownlawfirm.ca

John Krawchenko
2nd Vice Chair, FOLA
jok@krawchenkolaw.com

INTRODUCTION

The Federation of Ontario Law Associations ("FOLA") thanks the Ministry of the Attorney General for the opportunity to personally participate in regional consultation meetings and to make submissions as part of its review of family legislation, regulations and processes. By way of background, FOLA's membership is composed of the presidents of the 46 local law associations (plus the Toronto Lawyers' Association), represented in every judicial district in Ontario. These local law associations collectively represent nearly 12,000 lawyers who are in private practice in firms across Ontario.

These lawyers and our member associations are on the front-lines of the justice system. Many of our members practice family law and child protection law in various capacities as Duty Counsel, reduced flat rate day of court counsel, Domestic Violence Legal Aid Certificates, Legal Aid Certificates, Children's Lawyers, and privately through traditional retainers and limited scope retainers. They also participate in the family court process as volunteer Mandatory Information Program Presenters, and volunteer Dispute Resolution Officers, as well as out of court Dispute Resolution processes as Mediators, Arbitrators, and through Collaborative practice.

BACKGROUND

In July, 2019 the Ministry of the Attorney General commenced a province wide consultation process with members of the legal community and the public, to review family legislation, regulations and processes with the goal of reducing cost, delay, and to encourage early resolution.

In particular, the Ministry of the Attorney General is requesting submissions for ways to:

- direct family law matters out of a combative court process, where possible;
- reduce the cost of the process to families and taxpayers; and
- streamline the processes to shorten the time to resolution.

The Ministry of the Attorney General is responsible for three primary family law statutes:

- the parts of the *Child, Youth and Family Service Act, 2017* related to the Custody Review Board and the Child and Family Services Review Board;
- the *Children's Law Reform Act*; and
- the *Family Law Act*.

The Federal Government recently passed Bill C-78, which amends various federal family law related statutes, including the Divorce Act. Changes under the new Divorce Act include:

- a shift in the language of custody and access to parenting orders, contact orders, decision making responsibility and parenting time;
- a positive requirement for counsel to encourage their clients to try to resolve matters through a family dispute resolution process, including mediation and collaborative practice;
- the requirement that family violence be considered as a matter of best interests of the child, as well as the positive obligation of parties to protect children from conflict arising from the litigation; and
- expanded "best interests" definition.

During its consultation process, the Ministry of the Attorney General has requested responses to the following questions:

1. Are there amendments the government could propose to the **provisions** or the **regulations** under these or other statutes to simplify family law procedures?
2. How can we improve the process to encourage more **early resolution** of cases before they enter the courts?
3. Would an early triage directing potential litigants to **Alternative Dispute Resolution (ADR)** before the pleadings stage be helpful? Is this already happening well now, from your perspective?
4. Are there any unnecessary **pre-trial procedures** or **motions** that are taking up a significant amount of court resources and/or are delaying time to trial?
5. Are there any **other steps** the government could take with little or no cost to reduce the time and financial burden of the family law process on litigants and taxpayers?

In responding to these questions, FOLA acknowledges the Ministry's statement that:

> The community's concern with the Unified Family Court is a priority for all of us. On this issue, Ontario has created twenty-five Unified Family Court (UFC) sites (in Barrie, Belleville, Bracebridge, Brockville, Cayuga, Cobourg, Cornwall, Hamilton, Kingston, Kitchener, Lindsay, London, L'Orignal, Napanee, Newmarket, Oshawa/Whitby, Ottawa, Pembroke, Perth, Peterborough, Picton, Simcoe, St. Catharines, St. Thomas and Welland) and hopes to

expand the UFC model to the rest of the province. *This will not be the focus of the planned consultation.*

We also understand that the consultation does not include a discussion on the recent reduction in funding to Legal Aid Ontario, or its consequences.

FOLA'S SUBMISSIONS

1. Are there amendments the government could propose to the provisions or the regulations under these or other statutes to simplify family law procedures?

Appeals:

Appeals present the greatest challenge to procedural understanding in family law, both to self-represented individuals and counsel alike. It is a veritable patchwork of case law, statutes and regulations. There is confusion about whether procedural orders made at interim stages are considered final or interim orders, which is governed by case law. Some appeal routes are clearly set out in statute, such as the *Partition Act*, while others are more generally set out in the *Courts of Justice Act*, *Family Law Rules* and the *Rules of Civil Procedure*. In the absence of a Unified Family Court, appeal routes for child protection matters will differ simply based on whether the matter is initially heard at the level of the Ontario Superior Court of Justice or Ontario Court of Justice. As well, some appeals require leave of the Court.

This is an obvious area that begs for simplification.

Children's Law Reform Act:

The *Children's Law Reform Act* should be updated to keep pace with the new *Divorce Act* and the less recent *Child, Youth and Family Services Act, 2017*. In particular, we support consistency in the language of parenting between federal and provincial legislation, consideration of domestic violence issues and their impact on families and co-parenting, as well as focus on reconciliation with FNIM identified families.

Family Law Act Modernization:

We also support modernizing the *Family Law Act*, for such purposes as removing the archaic matrimonial home deduction exclusion, which is already the case in some other Canadian jurisdictions such as British Columbia. There is no

compelling rationale for treating the matrimonial home differently as property, and the lack of deduction will in many cases create a windfall for the non-titled spouse. By eliminating the exception, we eliminate the incentive to spend litigation dollars and time on determining whether a property is a "matrimonial home" or not, and treat the parties more fairly.

A further change to the *Family Law Act* that we support is the creation of statutory authority for the court to make orders for possession of a family home for unmarried spouses (which is distinct from a married spouse having an inherent right to possession). Currently, where title is in the sole name of one spouse, the other is in a situation of trespass upon a breakdown in the relationship. Indeed, tenants have more rights than a spouse, to demonstrate the absurdity of the result. In some cases we see the Court making exclusive possession orders under the *Family Law Act*, when no actual authority for the order exists. It would therefore be a meaningful amendment, and reflect the expectations of cohabiting parties.

Annual Adjustments of Support:

Our membership supports amending the *Income Tax Act,* as well as the *Family Law Act,* to give the Court the authority to require the automatic release of income information of support payors, and enrollment in the Child Support Service, for the purpose of automatic adjustments to child support on an annual basis in appropriate circumstances. This will reduce Motions to Change and Motions for disclosure.

Voice of the Child Reports:

FOLA supports amending s. 89, or s. 122, of the *Courts of Justice Act*, or the *Children's Law Reform Act*, to create clear statutory authority for Voice of the Child Reports. Such reports are being increasingly requested by the Courts as a means of eliminating "he said, she said" evidence, and to assist the Court, and the parents, to understand the views of the child. Settlement is facilitated by such reports, diverting matters from Trial and further litigation.

As part of this amendment, FOLA supports additional funding to the Office of the Children's Lawyer to support these Reports and avoid drawing from funding for children's representation. That is, we support the amendment, but not at the cost of current levels of representation of children.

Financial Disclosure:

Currently, one has to refer to both the *Family Law Rules* and *Child Support Guidelines* to understand the financial disclosure that is required to be produced. It would be helpful, especially to self-represented parties, for required disclosure to be

set out in one location, according to issue. FOLA also supports expanding the disclosure required of incorporated businesses, partnerships and sole proprietorship to include general ledgers and account statements.

FOLA also recommends and supports dispensing with the filing requirement of Notices of Assessment with Financial Statements. For clarity, it is not sufficient to provide a Notice of Assessment that has been printed from CRA's My Account; the Court will only accept Notices of Assessment issued directly by CRA. While we agree such statements should be exchanged, and filed in due course, the requirement that they be filed with the Financial Statement within 30 days of being served with an Application is impractical and unduly burdens the Courts with 14b Motions to permit late filing of Answers and Financial Statements, or permit filing without Notices of Assessment. This is an utter waste of Court Filing Staff and Judicial resources and only serves to delay the parties in advancing to a meaningful step in the process.

Forms:

There are several Family Law Forms that are either redundant, or unused. FOLA supports reviewing and streamlining the required forms. For instance, some of our members have identified Form 35.1 Affidavit for Custody and Access and Form 13A Certificate of Financial Disclosure as under-utilized forms in their areas, or forms that are used inconsistently, and which should be eliminated.

While the Forms related to Motions of Change were clearly intended to create more of a simple "fill in the blanks" form, the experience is that the forms are overwhelming to self represented parties, and unhelpful to those with counsel. The language of "Motion to Change" is also misleading; it gives the perception of a more streamlined quick process, when in fact the same steps are required as in an original Application. Often, new issues arise alongside previously determined issues, raising process issues of whether an Application or a Motion to Change is required, or both.

FOLA supports changing the language and forms regarding Motions to Change. To avoid duplication of forms and process confusion, FOLA supports the use of a universal Application form (not for Simple Divorce) which permits variations and/or review similar to the Application form in child protection which allows the Applicant to check off a box on the front page indicating whether the pleading is an original Application or a Status Review Application.

Conversely, Form 20 Request for Information currently applies only to Child Protection matters. However, it is uniformly used by counsel in domestic matters, and rarely, if at all, in child protection. We support the Form being amended to be a Request pursuant to Rule 13(11) of the *Family Law Rules*.

2. <u>How can we improve the process to encourage more early resolution of cases before they enter the courts?</u>

Use of Technology:

Under the new *Divorce Act*, counsel are required to encourage parties to resolve their issues through a family dispute resolution process. Counsel are able to investigate and assess, even if informally, what the legal issues are, what the family dynamic is, and make recommendations to their clients about their process options in the circumstances of their case.

For those without counsel, technology may help to close the informational gap. While not comprehensive, some online platforms that may be adapted for use in a Family Court process include:

- In Ontario, Ryerson's Legal Innovation Zone has created the Family Law Portal to help guide parties through their substantive rights and obligations (https://www.familylawportal.com/). While the Family Law Portal starts to screen parties for family violence and power imbalances, it falls short of offering information on what family dispute resolution processes are available. The addition of such information, and support for these services, may assist in establishing expectations and process options prior to the commencement of litigation;
- Community Legal Education Ontario's (CLEO) Family Law Guided Pathways is an online resource that assists parties in completing their Court Forms. (https://stepstojustice.ca/guided-pathways);
- We also see an emergence of online dispute resolution services (for instance the Civil Resolution Tribunal in British Columbia https://civilresolutionbc.ca/), and disclosure sharing software (such as https://www.financialdisclosure.ca/ which has been adopted by the Ontario Association of Family Mediators), that may be adapted and used in Family Court processes.

FOLA supports self-represented parties completing an online Mandatory Information Program (or other information program), with an emphasis on family dispute resolution processes and family violence, prior to commencing an Application. A Certificate of Completion could be issued and required to be filed with the issuing of an Application (if no counsel). The Application Form itself could be amended to include information about family dispute resolution processes and an acknowledgment that the Applicant (or Respondent) is aware of these options.

Mandatory Mediation Intake/Triage:

FOLA supports early screening of cases for family violence as part of a triage process and/or mandatory mediation intake process, as explained in more detail below.

Mandatory Mediation:

FOLA supports parties participating in a mandatory mediation process, where appropriate (i.e. where the mediation intake process does not identify any power imbalances that cannot be reasonably mitigated or family violence). While it would be ideal for this step to take place prior to the commencement of an Application, we recognize that this may not be possible in cases where financial or other disclosure has yet to be completed.

Some of our membership envisions Mandatory Mediation as one of 2 or more family tracks; an accelerated and Case Managed track for Family Violence matters, and another track for matters without Family Violence issues which promote more engagement and discussion between parties, which includes mandatory mediation.

Which track parties will be assigned to will be determined through an early triage/screening step before an officer with the authority to make orders regarding interim support, parenting schedules, and other procedural Orders such as disclosure and non-dissipation Orders (a Judge or a Family Master).

Family Law Information Centres and Mediation Services:

We understand that the existence of Family Law Information Centres and Mediation services available vary geographically. FOLA supports the standardization of services available, as well as the improved use and enhancement of Family Law Information Centres and Mediation services.

Other Family Professionals:

We further support amending the definition of "service providers" under section 149(2) of *the Courts of Justice Act*, to include parenting coaches/counsellors, which will allow for future changes to the family court services and supports to potentially include such professionals in high conflict parenting cases, both prior to litigation, and during.

Bill Eddy, an America Lawyer and Social Worker, developed the New Ways for Families paradigm, designed to reduce conflict and create skills which allow the parties to ultimately make their own parenting decisions. For parties in litigation, this involves Court managed (and ordered) counseling. Parties may also participate voluntarily.

More locally, in Simcoe County, a family law practitioner developed a Cooperative Parenting & Divorce program focused on assisting parents to learn new skills to co-parent as separated parents and to educate them on the effects of conflict on their children. The response to this program by parties and the Judiciary has been positive.

3. <u>Would an early triage directing potential litigants to Alternative Dispute Resolution (ADR) before the pleadings stage be helpful? Is this already happening well now, from your perspective?</u>

FOLA strongly supports and encourages the implementation of an early triage process presided over by an official with the ability to make Orders (Judge or Family Master) to address both procedural and interim issues including financial disclosure, interim child and spousal support, non-dissipation, exclusive possession.

Outside of Toronto, both represented parties and self-represented parties face significant delay in simply being able to appear before a Judge for interim support and parenting issues. It is not unusual for it to take up to 4 months to have a Case Conference, which is a necessary procedural step before interim relief can be sought.

This delay creates financial hardship for separating parents, especially those who are already the most vulnerable. These include victims of family violence, those with mental health issues, physical health issues, and those who have been out of the workforce to raise their family. The delay also creates uncertainty and conflict regarding parenting issues.

These delays are not mere inconveniences. They are ultimately extremely harmful to the children of separating parents, effectively depriving them of financial support and exposing them to conflict and uncertainty.

In the absence of a triage process, FOLA supports broadening the scope of motions that may be brought before a Case Conference under Rule 14(6), or clarifying what is considered urgent or hardship under Rule 14(4.2) of the *Family Law Rules*, to allow such issues to be dealt with at an earlier stage. Notably, this solution does not resolve the underlying problem of delay in obtaining dates to appear before a Judge.

4. <u>Are there any unnecessary pre-trial procedures or motions that are taking up a significant amount of court resources and/or are delaying time to trial?</u>

Eliminate the Mandatory Information Program:

At this stage the parties are already in litigation. Although information is provided regarding ADR options, there is no anecdotal or other evidence to suggest this has been a successful endeavour diverting parties from litigation. Further, while the presentation provides very general information, parties are unable to benefit from specific information (legal advice) related to their circumstances. For parties with counsel, there is no benefit; ideally counsel will already have exhausted other resolution options and will have counselled parties on their rights and obligations in their circumstances.

Eliminate First Appearances:

The requirement that parties attend a First appearance for non-divorce/property matters is arbitrary and in any event unnecessary. The Rules requiring First Appearances target all Ontario Court of Justice Matters, and similar issues in the Superior Court of Justice where the Unified Family Court exists. The primary purpose of the attendance is to establish whether the pleadings are complete and to schedule a Case Conference.

It is submitted that this can be accomplished at the filing counter without requiring the cost and delay of a procedural Court attendance.

Waiver of Case Conferences:

Case Conferences are currently used as an opportunity to resolve procedural issues such as disclosure. FOLA supports the option for parties to waive a Case Conference and proceed to a Settlement Conference, where both parties are represented by counsel and there are no disclosure issues.

We may also consider supporting self-represented parties waiving Case Conferences providing they have attempted mediation (or a Legal Aid Settlement Conference) and there are no disclosure issues, which would be confirmed by a certificate from the mediator.

5. <u>Are there any other steps the government could take with little or no cost to reduce the time and financial burden of the family law process on litigants and taxpayers?</u>

Online Filing:

There is a current hiring freeze and Court staff are being packaged off. The Ministry is also "cross training" Court staff to perform multiple functions. These actions do not have the result of improving service for Ontarians. It is the experience of our membership that it in fact creates inefficiencies.

Many jurisdictions experience significant wait times for parties to simply file materials. This is time the parties are taking from work or paying someone to wait to file on their behalf. Wait times can be longer than 3 hours. If a matter has been inactive for any length of time, or if the matter is returning for a Motion to Change, the file is usually stored off-site and must be ordered, which can take several weeks. Further, it is not uncommon for files that are stored onsite to be missing for Court appearances, either in whole or in part. All of this reflects poorly on the administration of justice as a professional service, which service is responsible for making significant life decisions for families.

An obvious, and inevitable, solution to this issue is online filing. Ontario has already ventured into this option with joint divorces and in matters before the Small Claims Court. The technological platform exists and is being used in other provinces, notably British Columbia, as well as within Ontario in Federal Court and Tax Court.

Expansion of Dispute Resolution Officer (DRO) Program:

Dispute Resolution Officers currently act in 9 locations in Ontario. They preside over Case Conferences in Motions to Change. FOLA supports the expansion of this program to other Court locations, as well as expanding their role to include Case Conferences on Applications. The Ministry may also consider creating limited authority for Dispute Resolution Officers to make provisional routine procedural Orders such as disclosure Orders, which traditionally Judges have made during Conferences, which would have the dual effect of preparing the parties for the next Judicial appearance, while avoiding the need for Motions for basic disclosure.