OBA Submission on Improvements to the Motion to Change Process under the *Family Law Rules*

Submitted to: Motions to Change Working Group

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide this submission to the Motions to Change Working Group as it considers Rule 15 of the *Family Law Rules* (the "Rules") on motions to change.

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Family Law Section, who represent a wide range of clients within the family justice system, both in litigation and various alternative dispute resolution processes. They have significant expertise in provincial and federal family law legislation, case law, and applicable court rules across the full spectrum of family law issues.

Overview

As the impacts of the COVID-19 pandemic continue to unfold, members of the bar are anticipating an increase in motions to change arising from massive job losses, industry changes, income reductions, and changes to parenting schedules. In light of this expected influx, and in recognition of the pressures faced by family courts in working to assist families during restricted court operations and while dealing with backlogs, the OBA provides these recommendations aimed at enhancing the ability for Ontario families to access justice in this area in a more expeditious, efficient and cost-effective manner, both in the current circumstances and going forward.

These recommendations propose changes to the Rules respecting motions to change (primarily Rule 15) and accompanying Forms with the goal of:

- increasing access to justice for families needing court intervention to resolve disputes about motions to change;
- assisting the courts in fairly resolving the anticipated surge in motions to change; and
- creating uniformity across the province, to the extent possible.

Each recommendation provides some improvement towards a simpler and more efficient system and could be implemented individually; however, together, implementation of all these recommendations would have a significant impact on the expeditious and effective movement of matters through the judicial system. Where certain recommendations work particularly well together, we have cross-referenced them in the descriptions, below.

Recommendations

1. Encourage Early Mediation and Integrate Court-Connected Mediation Services Within the Motion to Change Process

Family mediation services, which are available at family court locations throughout Ontario, are an extremely valuable resource for assisting parties to resolve their matters. Integrating these services more comprehensively in the motion to change process will assist in diverting parties out of the court system, and resolving matters more expeditiously and cost effectively.

A small amendment to Form 15 and Form 15B could be made to include a question asking whether the person completing the form is willing to try mediation at this time. When a Form 15B (Response to Motion to Change) is filed, the court clerk could check if both parties are agreeable to mediation. If so, mediation through the on-site mediation service could be automatically scheduled, along with a first court date for at least 30 days after mediation (to allow sufficient time for resolution by mediation/negotiation). This would require coordination between court staff and the on-site mediation services; however, this could be expedited by use of an online booking system, such as Calendly.

Such a system would leverage already existing mediation services across the province and promote mediation within the context of motions to change. Mediation can assist to resolve, or at least narrow the issues in dispute, thereby reducing the cases requiring significant court time and resources. Automatic scheduling of mediation at the time the Response to Motion to Change (Form 15B) is filed moves matters forward expeditiously through the system.

Further, changes to promote mediation are consistent with the new duties imposed on parties (and corresponding duties on legal advisors) to, where appropriate, try to resolve matters through a dispute resolution process / alternative dispute resolution process (as will be respectively required by changes to the *Divorce Act* by Bill C-78 and to the *Children's Law Reform Act* and *Family Law Act* by Bill 207). However, as recognized in these legislative changes, there will be circumstances where mediation is not appropriate or is not appropriate at that particular time. This could include, for example, where there are safety concerns that cannot be accommodated within the mediation process, or one party has refused to provide necessary disclosure. A party should not be required to specify why they are or are not willing to try mediation at the time of filing, and the Form 15 and Form 15B should indicate that their answer is without prejudice.

If **judicial triaging**, as detailed below at 4, is also implemented, the Form 15 and Form 15B could include a question asking whether there are any urgent issues. If either party says there is an urgent issue, the triage appearance would proceed to be scheduled as normal. If both parties confirm there are no urgent issues, the triage appearance would be scheduled as set out above, at least 30 days after mediation.

2. Encourage Mediation as an Alternative to Court Conferencing

Mediation can be further encouraged by building an adjusted conferencing process into the Rules for parties who have already attempted mediation but have been unable to resolve all of their issues.

The specifics of which steps could be expedited may depend on whether other recommendations (specifically **judicial triaging** and a **simplified stream**, as detailed below at 4 and 5 below, respectively) are implemented. However, adjusting the default conferencing process for parties who attempt mediation builds in an incentive for the parties to try mediation without unduly delaying a final resolution of the case if mediation fails.

3. Centralize and Expand Early Mandatory Disclosure for Child Support and Spousal Support Cases

Insufficient disclosure is a significant impediment to the administration of justice in the context of motions to change child support or spousal support. It discourages settlement or results in settlements which are inadequate. Despite the fundamental importance of disclosure for the resolution of support claims, disclosure issues often require multiple court dates to assess, thereby increasing costs and creating delays. This paradigm seriously disadvantages the party seeking disclosure, particularly where the Rules create an onus on that party to pursue full financial disclosure, or to pursue remedies for failure to disclose under R. 1(8)-(8.1).

To reduce the time and expense of pursing disclosure, clarify disclosure obligations, create consistency across the province and place the onus on the party who is obligated to provide the disclosure, the OBA makes the following recommendations:

- Amend the Rules to import the requisite rules respecting financial disclosure for motions to change into Rule 15 itself, establishing a more contained and comprehensive framework for motions to change within Rule 15. This will assist in clarifying disclosure and the motion to change process for justice participants.

  Rule 13, which currently deals with financial disclosure, applies to applications, answers and motions to change. Determining which parts of Rule 13 apply on a motion to change is not straightforward and can create confusion, resulting in failure to provide the requisite disclosure, particularly where a party is unrepresented or self-represented. For example, for a motion to change child or spousal support, subrules 13(3.1), (4.2), and (5.0.1) all apply, but still need to be read in conjunction with the rest of Rule 13.

- Create a specific Certificate of Financial Disclosure for motions to change. The current Certificate of Financial Disclosure (Form 13A) can be confusing since, as with Rule 13, it applies to Applications and Answers, as well as Motions to Change. We recommend a new Form be customized to apply only to Motions to Change child support or spousal support. Part C: Claim for Equalization of Net Family Property from the current Form 13A should be

removed, and the expanded mandatory disclosure documents (discussed immediately below) should be added.

- Expand the minimum mandatory disclosure required under the Rules for motions to change child support or spousal support. For example, minimum mandatory disclosure could be the items listed in the Standard Disclosure Terms for support cases prepared by the Newmarket Family Court (attached hereto as **Appendix "A"**). This list depends on the person's sources of income. Note that there would, however, be no onus or requirement for a party to request these items. The Rules should require that this disclosure be served by the parties at the time their Form 15 (to commence a motion to change) or Form 15B (to respond to the motion to change) is served.

  There is a benefit to requiring this minimum disclosure at the earliest possible time – which is why we recommend that the Rules specify that it be provided at the same time as the pleadings. Providing basic disclosure encourages fair and informed settlements, and enables more productive court appearances where needed that can focus on the substantive issues in dispute. From an access to justice perspective, there is a disincentive to ordering it later (e.g. at the case conference stage), after significant time and effort has already expended. Further, after each party has filed their pleadings and provided minimum disclosure, later stages of the case can focus on more complicated and fact-specific disclosure requests.

- Provide for assessment of the adequacy of disclosure at an early stage of the proceedings, with significant consequences for not providing required disclosure. The FLRs should strongly discourage parties from starting litigation without providing required disclosure. While court clerks ought not have the authority to assess pleadings for the adequacy of disclosure, the Rules should give judges the explicit power to provide directions, including dismissing the motion to change with costs, at an early stage if the minimum disclosure requirements are not met. This recommendation works together with our recommendation on **judicial triaging** (discussed immediately below).

4. Judicial Triaging

Many motions to change would benefit greatly from early judicial intervention, which provides the flexibility for a triage judge to assess the case early on and determine what next steps are necessary to deal with a case in a way that is appropriate given its importance and complexity. By empowering a triage judge to make substantive temporary orders (as outlined below), early interim relief can be granted before issues become potentially urgent or require further judicial resources.

Where a responding Form 15B is filed, we propose the following model for judicial triaging:

1. Automatic scheduling of the first court date upon filing of the Form 15B, ideally within 30 days of Form 15B being filed. The timeline allows both parties to obtain legal advice and avoids non-urgent matters being considered based only on one party's materials.

2. The first court date shall be before a triage judge for a 15-30 minute triage appearance. Triage appearance dates may vary by court, but we recommend regular dates when triage appearances are held (e.g., every Tuesday and Thursday).

3. The triage judge shall have the power to make any of the following orders:

    a. A temporary order regarding ongoing child support or ongoing spousal support;

    b. A temporary order related to child support or spousal support arrears;

    c. A temporary parenting order or contact order;

    d. A temporary disclosure order;

    e. If there has not been substantial compliance with the disclosure required by the Rules, a final order dismissing the motion to change with costs in favour of the responding party on a full recovery basis, unless the court orders otherwise;

    f. A temporary procedural order that the matter proceed through a **simplified stream** (discussed further below);

g. A temporary procedural order, if the matter is not proceeding through the simplified stream, setting a date for the next appearance, and specifying whether the next appearance is an interim motion, case conference, settlement conference, trial management conference or a combined conference before a judge or dispute resolution officer (DRO), or a hearing of the motion to change; or

h. A temporary procedural order for any further directions regarding the conduct of the case as may be required.

4. At the triage appearance, the triage judge should have the following materials available: Form 15, Form 15B, and a Triage Confirmation Form from each party. The Triage Confirmation Form should be short and focused on the orders (if any) the party is requesting, based on the triage judge's powers, as set out above. It should be optional to attach a proposal for settlement/offer to settle.

While such a model does require a redistribution of judicial resources, triaging provides for issue spotting, case management, and procedural directions at an early stage, reducing the need for more extensive judicial resources at a later time. When issues are left too long, they can be more difficult and intractable to resolve, financial disparities often become worse, and children are more likely to be impacted by continued conflict.

For effective triaging, it is important that the triage judge has a wide range of expressed powers available, such as those detailed above. The Rules could provide further guidance on when a substantive temporary order (for example an order for temporary child support, spousal support or arrears, or a temporary parenting or contact order) would be appropriate. This could include requiring the Court to consider: (i) whether such an order should be a without prejudice order; and (ii) if further procedural directions should be given on how long such an order will last (for example to an anticipated motion date or conference date). Ultimately, the order should promote the primary objective of the Rules - to deal with cases justly.

While the judge clearly retains the discretion as to whether or not any of the above-outlined orders should be made in the particular circumstances of each case and given the evidence before the Court,

enumerating the types of orders that may be made will provide clarity to the parties and counsel as to the scope and purpose of a triage appearance. Outlining the types of orders that can be made in the Rules themselves also provides clear authority for judges at all Ontario courts of first instance (Ontario Court of Justice, Superior Court of Justice, and the Family Court Branch of the Superior Court of Justice).

Triaging is consistent with the primary objective of the Rules, to enable the court to deal with cases justly. Triaging would help the court identify the importance and complexity of a case and dedicate appropriate court resources to it, while taking into account the resource needs of other cases. Providing triaging after both parties have filed their pleadings also promotes a fair procedure. Keeping the required documents simple saves expense and time.

5. Simplified Stream

Some motions to change are simpler in nature, and could greatly benefit from a more streamlined process that ensures they are justly dealt with in a proportionate and more cost-effective manner. For this reason, we propose the creation of a simplified stream within Rule 15. Unless the parties consent, there is currently a single process for all motions to change, regardless their complexity. The availability of a simpler process could assist in moving less complex motions to change through the system more effectively, reducing costs to the parties and the courts, and requiring less judicial resources. Such a process would also be amenable to limited scope services (for example, retaining a lawyer to help draft a supplementary and page-limited Affidavit).

We propose the following model for such a simplified stream:

1. A triage appearance as set out above.

2. A single conference to deal with disclosure and attempts to settle (which could also include a referral out to court-connected mediation).

3. If the parties fail to settle within a specified time period (e.g., 30 days after the conference), the matter would proceed to a trial management conference to determine whether the matter

should be heard in writing or by a focused trial, and to set out guidelines for the hearing. This is discussed further, below.

4. The matter shall then be heard either in writing or in a focused trial.

The Rules could set out a presumption that the default process for cases in the simplified stream is that they be heard in writing. However, the trial management conference judge at step 3., above, has the discretion to order a focused trial if one is required to deal with the case justly. A focused trial is already permitted under Rule 1(7.2); however, this would build a focused trial into the process for simplified stream cases. The trial management conference judge should have the authority to determine the process, with the Rules providing guidance on the minimum documents required (the Form 15, the Form 15B, and Financial Statements if support is an issue) and on the other types of additional documents that may be used depending on the facts in a particular case (for example, an agreed statement of facts, joint document brief, limits on supplementary affidavit materials) or procedural directions if a focused hearing is heard (for example, which documents will form the evidence in chief, time limits on oral evidence).

A critical element to establishing a simplified stream is determining which cases can be fairly addressed in this expedited process. The Rules could outline guidance on the types of cases that would presumptively fall into the simplified stream. For example, these could include:

- Child support based on s. 3(1) for the amount of child support and relevant incomes based on s. 16 of the Guidelines;
- A change to decision-making only and not parenting time;
- Spousal support where the quantum of support is at issue but not entitlement; or
- Where the parties consent.

Such an approach would provide consistency across the province. That said, there are also drawbacks to specifying these types of cases in the Rules as the legal issues raised are not the only indication of

whether a case is suitable for the simplified stream. Other factors may include whether the parties are represented or whether a party seeks to admit expert evidence.

We recommend that a triage appearance, as proposed above, could be used to assess suitability for the simplified stream. Parties could "opt-into" the simplified stream, or the triage judge could order a matter into the simplified stream. The trial management conference provides an opportunity to assess the case after it is further developed to determine if it can be fairly heard in writing or if a focused trial is required.

While some parties and/or their counsel may want more extensive conferencing, longer materials, and/or an unlimited oral hearing, this can be addressed by building discretion into the process so the court can ultimately decide if minor adjustments should be made to address particular concerns or if the case should be removed from the simplified stream entirely.

6. Expand and Clarify the DRO Program

Dispute Resolution Officers (DROs) have a very important role to play in assisting parties to expeditiously move a matter forward towards resolution, while reducing the toll on limited judicial resources. The OBA supports expansion of the DRO program to all Superior Court of Justice (including Family Court) and Ontario Court of Justice locations across the province, to provide consistent access to this valuable resource, thereby freeing up scarce judicial resources. With the DRO program expanded across the province, it may be appropriate to consider incorporating it into the Rules, providing a more easily navigable process compared to the current inclusion of the program in various practice directions.

To more effectively utilize DRO resources, we recommend that DROs hear a first conference (either a case conference or settlement conference) following a judicial triage appearance (as discussed in 4 above). Following the early judicial input at the triage appearance, DROs would be well-positioned to facilitate settlement and address any ongoing disclosure issues. A judge ought to be available after every DRO conference, to assist the parties where they still require judicial input and to make orders addressing disclosure or procedural issues even where the parties do not consent to these orders.

Having DROs conduct the first conference after a triage appearance will also enable these conferences to be scheduled sooner. These conferences could also be held remotely, where appropriate.

7. Streamlined Conference Materials

Preparation of conference briefs, as currently required, can be a cumbersome and expensive step for litigants. In light of the recent welcomed changes to Forms 15 and 15B, the OBA questions whether the benefit of these briefs justifies the time and expense of preparing and reviewing them (by parties, counsel and/or the court).

As an alternative, we propose that materials before the conference DRO or judge should be the Forms 15 and 15B, and a short, optional conference form that focuses on requested disclosure, procedural requests, and any settlement proposal/offers to settle. This will save time and expense while still allowing the parties to focus on the impediments to moving the matter forward and/or settlement.

8. Remove the Mandatory Information Program for Motions to Change and Replace with a Targeted Motions to Change On-Demand Program

The Mandatory Information Program (MIP) is a valuable access to justice initiative which provides litigants with important information about family law, court process and alternatives to court proceedings. There are, however, significant exceptions where litigants bringing or responding to motions to change are not being required to attend (for example, motions that deal only with changing child or spousal support (Rule 8.1(6) and litigants who have already attended a MIP (Rules 8(2)(e))). For those who are required to attend, the program is not specifically tailored to motions to change, and critically does not provide substantive information on the threshold material change in circumstances test or much information specific to the process on a motion to change (as opposed to an application more generally). This greatly detracts from the benefits of early education and information in these circumstances. For some people, this information also comes too late in the process.

We recommend removing the existing MIP requirement for all litigants bringing or responding to a motion to change, and replacing it with a tailored on-demand education program that is specific to motions to change. This will ensure that the most relevant and useful information is being provided, including process, disclosure, examples of typical support or parenting issues, information on the

threshold material change in circumstances and a list of resources (for example, to Ontario's Family Law Limited Scope Services Project, Steps to Justice, etc.).

To minimize cost, reduce delay, leverage technology, and increase accessibility, the program could be developed primarily as an on-demand pre-recorded information session available online or by audio (telephone). When in-person regular court operations resume, the program could also be available at Family Law Information Centre (FLIC) offices.

We also recommend that litigants be required to view this program before completing their Form 15 or Form 15B. The Forms could include a section advising parties of this requirement, with a check box for the party to certify that they have viewed the program. If technology allows, they could even enter in a verification code or attach an electronic certificate that they receive after viewing the program.

9. Application of Rule 15 to Changes to Parenting Agreements

In order to simplify the process of changing existing orders and agreements, and thereby increase access to justice for many, we propose that Rule 15 be expanded to include changes to parenting terms in final agreements, to avoid a complicated and dual-process system.

Currently, the motion to change process is only available to change a final order or an agreement for support filed under section 35 of the *Family Law Act*. This results in an inconsistent process for changes to parenting. If the issues were previously resolved by court order (including where the matter was resolved by a separation agreement or minutes of settlement, and the applicable terms were subsequently turned into a court order), a motion to change can be brought to change the terms under Rule 15. Conversely, if the issues were previously resolved by a separation agreement alone, an Application must be brought to change the terms under Rule 8. This is in contrast to support changes, wherein the motion to change process under Rule 15 is applicable to either a final order or an agreement (provided the agreement is filed with the court).

Most parenting issues are resolved on consent, either by separation agreement or by consent order. Only a small percentage of litigated matters are determined at trial. Most consent orders are submitted to a conference judge or by way of 14B Motion. The level of judicial oversight involved in

a consent order differs significantly from the degree of review at a trial. Despite the limited judicial intervention involved in consent orders, Rule 15 applies to these orders, but not to final separation agreements which are often negotiated over time with the assistance of counsel, and often with the assistance of experienced mediators. The inconsistent treatment of parenting terms in orders (particularly consent orders) and separation agreements results in a significant access to justice issue in that it creates a simplified and often expedited process for changing parenting orders, and a more complicated and lengthy process for changes of a final parenting term in a separation agreement.

We propose expanding the application of Rule 15 to parenting terms in a separation agreement, which would reduce the confusion as to what process is to be used and simplify the process.

Conclusion

Motions to change are of critical importance to the parties involved, and the administration of justice generally. The goal is to ensure that potential changes to support and child-related issues are dealt with fairly, and in a manner that promotes timely, cost-efficient, and proportionate resolutions. COVID-19 has been the impetus for positive technological changes within the Courts. We hope that positive process changes can also be made to respond to increased demand and improve access to justice in challenging times.

We would be pleased to discuss this submission with you further and provide any additional feedback that may be helpful. We would also welcome an opportunity to meet with you further about our submission. We are interested in working with the Motions to Change Working Group, the Family Law Rules Committee, and other justice participants to assist in resolving the anticipated surge in motions to change. Thank you for considering this submission.

Appendix "A": Standard Disclosure Terms