

# **GUELPH OCJ FAMILY BENCH AND BAR: MINUTES OF MEETING**

Friday, September 28, 2018 at 9:00 a.m. – County of Wellington Lounge

**Present:** Justice Caspers, Ian Brown, Tony Circelli, Chris Dickens, Michelle Douglas-Cummings, Varsha Pasel, Mathew Poole, Gayle Porcellato, Michael Purves-Smith, Olivia Rebeiro, Jacquie Rodden Yetman, Mary Ellen Seftel, Colin Thurston, Chris Unruh, Angela Vincenzo, Luke Weiler.

## **1. Review of Minutes from previous meeting - April 28, 2017**

Minutes approved with notations below:

### **(i) Unified Family Court Expansion**

Two-Phase Expansion: It is proposed that there should be a province-wide plan for expansion, which includes two phases. The first phase will be the implementation of eight court sites – Belleville, Picton, Pembroke, Cayuga, Simcoe, Kitchener, St. Thomas, and Welland. The implementation of Phase 1 is underway and will be effective on May 6, 2019.

The second phase which will include the rest of the province, including the northern regions, is anticipated to be implemented no later than 2025.

The recent federal budget released February 27, 2018, allots money to expand Unified Family Courts, providing 39 new judicial positions in Alberta, Ontario, Nova Scotia and Newfoundland and Labrador. It is estimated that Ontario may have between 12 and 14 new judicial appointments available.

### **How will this change our scheduling?**

At this juncture, it is anticipated that effective April 1, 2019 Justice Caspers will do settlement conferences and visiting Justices will deal with any Trials or Motions for Summary Judgment.

### **(ii) Family Legal Services Review (Paralegals)**

On March 6, 2017 former CJ Bonkalo of the Ontario Court of Justice released her Family Legal Services Report regarding paralegals. On November 30, 2017, the Law Society released the Report of its Access to Justice Committee, which makes recommendations for the development of specialized paralegal licenses to provide family law services. The Committee sought approval of these and other

recommendations at the Law Society Convocation December 1, 2017.

Specifically the Motion before Convocation was as follows:

*“That Convocation endorse the proposition that licensed paralegals be recognized as officers of the court in every court of record in Ontario in which a paralegal is authorized to provide legal services.”*

The motion before Convocation was adopted.

Notably, the Committee’s Report includes the following recommendations:

- “1. Develop a licence for licensed paralegals and others with appropriate training to offer some family law legal services, following resource-related discussions with government. Recognising the urgency of the need, this licence will support training in process navigation, form completion, investigating forms such as financial, motions to change, and uncontested divorces, and possibly other areas outside the courtroom context.*
- 2. At the same time, assess what additional family legal services by providers other than lawyers, and including advocacy, are in the public interest, and consider how to develop a further expanded licence, following resource-related discussions with government.”*
- 3. Engage in a robust evaluation of the success of the family law services licence for providers other than lawyers, and make any adjustments that are in the public interest.*
- 4. As part of its priorities, consider experiential training for lawyer candidates in the licensing process, including how they may provide supports for the delivery of family law legal services under appropriate supervision.*
- 5. Review its rules relating to unauthorized practice of law and ensure that the rules are clear as possible concerning the difference between legal information that might be provided by court staff to unrepresented litigants, and legal advice.*

6. Continue to support the expanded use of unbundled services and legal coaching, including offering continuing legal education opportunities and tools to address liability concerns.”

### **How does this impact representation in the Ontario Court of Justice (Family)?**

#### **Rule 4(1) (c)**

**Note:** With respect to the issue of paralegals appearing in the Ontario Court of Justice, Rule 4(i)(c) of the *Family Law Rules* provides that a party MAY BE REPRESENTED BY A PERSON WHO IS NOT A LAWYER, BUT ONLY IF THE COURT GIVES PERMISSION IN ADVANCE.

This permission is considered on formal motion brought in advance. The party/lawyer who seeks to have a non-lawyer represent a client in family matters must satisfy the court that there are “special circumstances” and that the individual has “special expertise”. It is a matter of judicial discretion as to whether a non-lawyer is permitted to act.

It is not appropriate to have paralegals or other staff in the courthouse negotiating Minutes of Settlement. *Stone v. Stone (No. 2) [2000] O.J. No 570.*

This will be effective upon circulation of the Minutes of the Bench and Bar Meeting.

#### **(iii) Motherisk Update**

As you are aware, the Motherisk commission was established on the recommendation of former Justice Susan Lang, whose independent review of Motherisk concluded in December 2015 that the testing was “inadequate and unreliable” for use in child protection and criminal proceedings.

Justice Judith Beaman, was appointed under the Public Inquiries Act to probe 25 years of child protection cases in Ontario involving Motherisk’s flawed hair tests. She released her report on February 26, 2018.

Justice Beaman’s recommendations span 17 government agencies and professional bodies. They call for amendments to legislation and rules governing the use of expert evidence in child protection,

enhanced education for judges and strengthened representation for parents — changes she said which are intended to “help ensure that no family suffers a similar injustice in the future.”

Justice Benotto has created a sub-committee to address with the Rules Committee recommendations made by the Motherisk Commission.

Four recommendations of specific interest to the Ontario Court of Justice (Family) with respect to expert evidence, are very briefly summarized as follows:

1. the requirement that a medical or scientific test must be accompanied by a report of an expert;
2. holding a voir dire for the court to assess the reliability and necessity of any expert evidence before it is admitted into evidence;
3. summary judgments should: a) permit only evidence admissible at trial and not allow any hearsay evidence unless it meets common law tests for admissibility, b) expert evidence needs to comply with above rule (expert to explain report), c) require a voir dire for expert evidence, d) deviation from these rules only with parent expressly consenting.
4. Societies are to provide automatic, ongoing, thorough and timely disclosure to parents.

Note: Recommendation #1: This means that in the Ontario Court of Justice (Family) any medical or scientific tests must be accompanied by an expert report interpreting the results.

**(iv) FRANK Amendments**

The MAG is working on a CAS docket which will have reference to (1) the total number of days a child has been in care; and (2) the number of days a child has been in care from the date of the most recent apprehension.

**(v) OCL Reports**

In addition to the s. 89 and s. 112 appointments which may be made in the discretion of the Children’s Lawyer, the following have been added to the list of options.

**VOC**

Effective June 1, 2018, the Office of the Children's Lawyer Personal Rights, Clinical Department, will now be offering Voice of the Child Reports (VOC), throughout the Province of Ontario. The OCL will accept referrals for Voice of the Child Reports for children over the age of seven (7). For those unfamiliar with this type of report, the VOC is a short report authored by an OCL Clinician that contains a child's views and preferences about a particular issue related to a custody and access dispute.

### **FCLR**

The Office of the Children's Lawyer Personal Rights, Clinical Department will also be re-launching the Focused Children's Lawyer Report (FCLR) as another service to the courts. A FCLR is a report that provides information to the court on a discreet matter in the custody and access dispute. The FCLR usually involves the gathering of information from the parties, the child and any pertinent collateral information directly related to the issue. For example, should a Justice want more information on where a child should attend school, the clinician would interview the parties, the child, and gather information from the different schools in question. The Clinician will present this information and may make recommendations in regards to the school issue only.

A Justice may make a request to the OCL for an FCLR through the Standard Court Order form.

## **2. Child Youth and Family Services Act, 2017 - OCL 16/17 year olds**

There is a new specialized program directed by the Children's Lawyer for 16 and 17 year olds who are now embraced by the CYFSA. This will be a source of increased work as, in conjunction with the proposed legislation, there will be new Forms and Directions. The following is noted:

- It is expected that there will be more new appointments to the OCL panel to deal with the anticipated increase in workload.
- The tariff for OCL counsel is now equivalent to that of legal aid.
- There will be a new project which provides for legal representation for children who have been the victims of human trafficking.

Children will be able to apply for a restraining order under the Human Trafficking Act, 2017.

- The proceeding will be brought in the OCJ criminal court. A specialized roster will be developed to train lawyers and social workers to deal with victims of trafficking and to address any issues they may have with immigration.

Some interesting statistics regarding the OCL:

- In 2017, 6672 cases were opened by the OCL on issues relation to property, child protection and custody and access.
- 17,000 children are currently represented in the province of Ontario.
- 90% of the files are custody and access referrals.
- 60% of the custody and access files are s. 112 clinical investigations.

### **3. Ministry Courthouse Wi-Fi Networks and Devices**

The Ministry is providing Wi-Fi at courthouses.

**OG Public.** This Wi-Fi network does not require a password and is not secure. It is intended to provide the public with very limited Wi-Fi access in public

Courthouse areas only. On occasion it may extend into a courtroom or a judicial area, but is not intended for use outside of public areas.

### **4. Confirmations**

There are two new confirmation forms pursuant to the *Family Law Rules* amended April 1, 2018. They are:

**14 C - Confirmation of Motion**

**17 F - Confirmation of Conference**

Please note that the new confirmation forms require:

- a) Counsel and self-represented litigants to confer with one another regarding the confirmation.
- b) Counsel and self-represented litigants to provide a copy to the other except in child protection cases.
- c) If this does not happen then the motion/conference will not be heard or placed on an unconfirmed list.

- d) Confirmations are to be updated if applicable.
- e) Counsel and self-represented litigants are required to explicitly list the issues to be determined. No longer has “on all the issues”.
- f) There will be cost consequences for a failure to comply with the *Rules*.
- g) The sub-committee decided to amend the timeline for motions and conferences to six, four and three days for service, responding material and confirmation.

### **How do these changes impact the calling of matters in the Ontario Court of Justice (Family)?**

The Ontario Court of Justice (Family), except in child protection proceedings, will have a **confirmed and an unconfirmed list**. Failure to comply with the *Rules* means that matters will be placed on the unconfirmed list and may not be heard if there is insufficient time. In any event those matters which are unconfirmed will be heard after all confirmed motions including any lengthy matters.

### **5. Continuing Records**

As per the *Rules*, each volume of a continuing record should contain no more than 100 pages. With that in mind, the front counter has been advised to no longer accept continuing records that are over 1” thick.

Also, it is the responsibility of counsel/unrepresented litigants to ensure that the Table of Contents is up to date and that updated information appears on the face of the Continuing Records (counsel’s contact information and current addresses for all litigants).

### **6. Facta and Case law - Digital Format**

While it is helpful to the Justice to have a digital copy of facta and relevant case law, a hard copy will also be required.

### **7. Duty Counsel**

It is requested that counsel try to avoid attending to personal files when appearing as duty counsel as this can cause delay.

## **8. Police Assist Clause**

A reminder that parties must serve the relevant police service in advance and file an affidavit of service if a police assist order is sought. If the order is granted, the party must provide an order in accordance with the form required by the police force. (*Patterson v. Powell*).

## **9. Restraining Order Purge**

Not completed yet. We have the list for both the OCJ and SCJ and we will have it underway within the next month.

## **10. Membership of the Bench and Bar Committee:** The membership of the Bench and Bar Committee is comprised of the following who have agreed to participate:

Ian Brown, Tony Circelli, Chris Dickens, James Dobie, Michelle Douglas-Cummings, Jonathan Krashinsky, Mathew Poole, Michael Purves-Smith, Olivia Rebeiro, Elizabeth Renfrew, Jacquie Rodden Yetman, Mary Ellen Seftel, Judith Stofman, Colin Thurston, Chris Unruh, Angela Vincenzo, Luke Weiler.

## **11. **Next Date: March 22, 2019 - County lounge at 9am.****