

Media Access to Ontario's Courts During COVID-19

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Current Status of the Courts

- Ontario courts are closed for in-person hearings until further notice.
- “Urgent” or “emergency” proceedings are defined by each court depending on their jurisdiction. However, most courts have now expanded the types of non-urgent hearings they are able to accommodate remotely (by telephone or videoconference) or in writing.
- In the Ontario Superior Court of Justice, for instance, there are [eight regions](#), all of which have their own practice directions dealing with the types of matters that may be heard during the shutdown that are not considered “urgent”. The Ontario Bar Association has prepared a [consolidated list](#) of the matters being heard by the courts in each region. Notably, many Superior Courts now advise that they are hearing short or non-complex contested motions that would not otherwise be considered “urgent” remotely or in writing.
- The [Small Claims Court](#) advises that “[a] judge will review each request and decide whether an urgent hearing will be scheduled. Urgent cases may include: 1. Cases in which a judgment debtor has an outstanding warrant for arrest issued in relation to a Small Claims Court proceeding; or 2. Time-sensitive cases that would result in immediate and serious financial hardship if there were no hearing.”
- The [Divisional Court](#) advises that “[a]ll Divisional Court matters (in all Regions of Ontario) scheduled for in-person hearings on a date after August 31, 2020 are still scheduled for those dates for now. Parties need do nothing to preserve these hearings dates for now.” In addition to urgent matters, all previously scheduled in-person matters that were cancelled may be rescheduled for hearing by videoconference or other means directed by the court.
- The [Ontario Court of Justice](#) – which hears family law matters, the majority of criminal charges laid within the province, provincial offence matters, plea and bail hearings, and search warrants – is more limited in terms of hearing non-urgent matters. The OCJ is more or less limited to hearing plea and bail hearings for those in-custody and urgent family matters. The OCJ has advised in relation to family matters that, “[s]tarting on May 19, 2020, cases conferences in previously adjourned matters and, subject to local direction, other matters will be permitted to be heard in the Ontario Court of Justice. In addition to these matters, each local courthouse will continue to hear certain in-chambers requests.”
- The [Court of Appeal](#) advises that all matters to be heard on or after April 14, 2020 will be conducted remotely or in writing. For matters scheduled for oral argument, the Court will contact the parties and will determine if the matter will proceed by way of a remote hearing or in writing.

Accessing Docket Information

Ontario Superior Court of Justice:

- Superior Court of Justice (including Divisional Court) docket information can be accessed at: <http://ontariocourtdates.ca/scj/>.
- At present, all hearings are remote hearings unless otherwise specified. However, the Court notes that some cases do not appear in the Superior Court of Justice daily court lists. These include matters in writing, matters added after the list is posted and matters subject to statutory, common-law or court-ordered public access restrictions.

Ontario Court of Justice:

- Ontario Court of Justice docket information can be accessed at: <http://ontariocourtdates.ca/>.
- At present, the hearing lists for the Ontario Court of Justice include only criminal proceedings that were identified, at the time they were scheduled, as a plea or bail hearing. All hearings are remote hearings unless a judicial official has ordered otherwise.
- Some in-custody matters that do not appear on the lists may be proceeding, including: matters that were not scheduled for a plea or bail, matters that are subject to a publication ban, and matters that were adjourned or added to the court list within two days of the hearing date.
- Some out-of-custody matters, such as non-urgent matters that were scheduled for a plea before court operations were changed due to COVID-19, may appear on the lists although they will not be proceeding.

Ontario Court of Appeal:

- Ontario Court of Appeal docket information can be accessed at: <https://www.ontariocourts.ca/coa/en/caselist/>

Accessing Remote Hearings

Ontario Superior Court of Justice:

- The Ontario Superior Court has advised that any member of the media or the public who wishes to hear/observe a remote proceeding may e-mail their request to the local courthouse staff in advance of the hearing. The person requesting access should advise of the hearing they wish to hear/observe, and their contact information.
- The media access policy is available at: https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/#5_Public_and_media_access_to_SCJ_Virtual_Hearings

Ontario Court of Justice:

- The Ontario Court of Justice has advised that attendance in courtrooms will be restricted to the judicial official, essential court staff, and those attending for urgent and/or essential intake court functions, with physical distancing measures to be strictly enforced in the courtrooms and throughout the courthouse.
- The Court advises that, to request information for remote hearing access, media should “contact your local courthouse directly by email and include “Hearing Access Request” in the subject line. Include your name, the hearing you wish to hear/observe, and your contact information. Email contact information for Ontario courthouses are available [here](#) and phone numbers are available [here](#).”
- The media access policy is available at: <https://www.ontariocourts.ca/ocj/covid-19/media-access/>

Ontario Court of Appeal:

- The Court of Appeal advised that members of the media or the public who wish to observe a scheduled matter being held by videoconference or teleconference should send a request in writing to the Court's Registrar at coa.registrar@ontario.ca at least 48 hours before the proceeding begins.
- The media access policy is available at: <https://www.ontariocourts.ca/coa/en/media/>

Publishing/Broadcasting a Remote Hearing is Prohibited:

- Note that copying, recording, publishing, broadcasting or disseminating any court hearing, or any portion of it, including a hearing that is conducted over videoconference or teleconference, is prohibited and is an offence under s. 136 of the *Courts of Justice Act*.

The Open Court Principle & COVID-19

Ontario Courts have commented on the importance of the open court principle during COVID-19 closures:

- In *Eureka 93 Inc. et. al. (Re)*, [2020 ONSC 2532](#), at paras 7-9, MacLeod J. of the Ontario Superior Court of Justice commented on the open court principle in the context of a bankruptcy proceeding, stating:

[7] It is important however to consider the open court principle not only during the public health crises but for the future. The only nod to public access at the moment is a notice on the Ontario Courts website which invites members of the public who wish to view or hear a virtual hearing to contact courts administration at generic email addresses. In that case, assuming the request is received and processed in time, arrangements can be made for public monitoring of a virtual hearing. There have been instances where members of the public or the media have been provided with information to hear or view a conference. In this case, that could not have practically occurred because this hearing was not shown on the daily court list and in any event, it would not have been posted very long in advance.

[8] I am not criticizing counsel who organized the conference call with my approval after contacting the bankruptcy office. I am simply flagging this concern for the future. Any hearing that would normally be open to the public should be listed on the daily court list and publicized sufficiently far in advance that a request to monitor the proceeding can be granted.

[9] In the long term, more robust solutions are required. A virtual court should be striving to give at least the level of public access that would exist if the proceeding took place in open court at the courthouse. Ideally there should be a practical method for a virtual hearing to be viewed or heard by anyone who is interested while simultaneously avoiding the risks that to date have influenced restrictions on televising or streaming live court proceedings.

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- In *R. v. Haas*, [2020 ONCJ 235](#), at paras 14-18, Wheeler J. of the Ontario Court of Justice considered the open court principle and the fact that media outlets had been covering the trial prior to COVID-19. The Court decided that closing submissions would be held by audioconference and the media who had been actively covering the trial should be notified:

[14] There has been considerable public interest in this trial. Defence counsel advises that to their knowledge, two media organizations covered the trial, one associated with Queen's University, the other a national media organization. In addition, the local newspaper, the Whig Standard, often covers trials in the Ontario Court of Justice in Kingston. As well, some of the Crown witnesses chose to return to court to observe the proceedings after they testified. This included the complainant. Furthermore, there were people who accompanied the complainant to court to observe the trial.

[15] In my view, closing submissions held by audioconference can be done in a way that respects the open court principle and the rights of persons to observe court proceedings, provided that appropriate steps are taken to ensure that interested persons/organizations are given sufficient notice of the hearing date and details of how to access the audioconference.

[16] Justice will not be “seen”; there will be nothing visual to observe. However, interested parties will be able to monitor and scrutinize the court process, to know exactly what is said and by whom, and how it is said. [...]

[18] Notifying the media is a more difficult issue. The two media organizations identified by defence counsel (Queen's University Journal and Global News) should be notified, and so should the Kingston Whig Standard. This will occur by email through the court administration. In addition, this ruling will be publicly accessible from the court office in Kingston, and also on online sources of court decisions. Through this ruling, interested organizations will know that this trial will continue with closing submissions being heard by audioconference, on a date to be fixed, and that they should contact the Ontario Court of Justice in Kingston in order to obtain the relevant information (date, time, audioconference details).

Accessing Court Files

- Other than the Ontario Court of Justice, the courts have not articulated a policy on media access to court files during this time. However, the courts are advising that they do not want anyone attending the courts in person. It seems that journalists should try e-mailing and/or calling the relevant court and asking for electronic copies of filings.

Ontario Superior Court of Justice:

- While the courts are closed, certain courts (such as the Toronto Region) have advised that media may contact staff at the relevant courthouse to request electronic copies of materials. They have suggested media should provide the file number, short style of cause, and the specific documents requested. Contact information for all SCJ courthouses is posted on the [Ministry of the Attorney General website](#).
- Obtaining exhibits or other documentation during a hearing will likely be difficult to do in a timely manner.

Ontario Court of Justice:

- At the Ontario Court of Justice, the Court has advised media and the public should not attend in person at a courthouse to request access to a court document. Media representatives and members of the general public may make a request for access for documents by contacting local courthouse staff by email [here](#).
- Access requests will be prioritized to ensure urgent matters scheduled before the court are proceeding. Access will be provided in accordance with existing [access policies](#). The Court further advises that due to the reduced staff levels at courthouses, there may be delay in fulfilling requests.

Ontario Court of Appeal:

- While the courts are closed, the Court of Appeal has advised that media may contact the relevant Court of Appeal Intake Office at (416) 327-5020. They have suggested media should provide the file number, short style of cause, and the specific documents requested.
- Media may also e-mail requests for access, including the file number and short style of cause to coa.e-file@ontario.ca.

Accessing Audio Recordings

Ontario Superior Court of Justice:

- The Superior Court of Justice [practice direction](#) advises:

“Due to resource constraints during the COVID-19 pandemic, some SCJ proceedings are being recorded on devices other than Digital Recording Devices. This should not be a barrier to accessing recordings.

Under this Notice, section C of Part VI of the *Consolidated Provincial Practice Direction* ([Release of Digital Court Recordings](#)) also applies to all digital court recordings that meet all of the following criteria:

- the recording is of a Superior Court of Justice hearing that took place remotely after March 17, 2020;
- the recording was made by the presiding judicial official, by another person at the direction of the presiding judicial official or by staff of the Court Services Division of the Ministry of the Attorney General; and
- the recording is in the possession of the Court Services Division.

Also under this Notice, digital court recordings made on a device other than a Digital Recording Device will not have annotations.”

Ontario Court of Justice:

- The [Policy Regarding Access to Digital Audio Recordings](#) continues to apply to requests for access to audio recordings of OCJ proceedings. However, media should not attend in-person to request access to a digital audio recording. Urgent requests by email from media representatives and the public can be made to local courthouse staff [here](#). Due to the reduced staff levels at courthouses, there may be delay in responding to requests.

Ontario Court of Appeal:

- The Court of Appeal makes digital audio recordings of its proceedings for internal use pursuant to its inherent power to govern its own process. Pursuant to s. 17 of the [Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario](#), these recordings are made available on request, for personal use only, on the condition that the person requesting the recording signs an undertaking agreeing to respect the limits on the permitted uses of the recording. Requests for access to digital audio recordings should be made in the Registrar's Office and are subject to payment of the prescribed fee.

Publication Bans & Sealing Orders

- At the Superior Court of Justice, publication bans and sealing orders appear to have been handled virtually where they have arisen.
- For instance, in *Doe v Havergal College*, [2020 ONSC 2137](#) & [2020 ONSC 2227](#), the Court convened a hearing via Zoom videoconference to hear all of the parties' motions for sealing orders and publications bans and hear submissions from media.
- Motions for sealing orders and publication bans are still required to be made on notice to the media in accordance with Part "F" of the [Consolidated Provincial Practice Direction](#).

Motions for Access & Unsealing

- We are not aware of any reported decisions from motions brought by media outlets in Ontario for access/unsealing during COVID-19.
- Therefore, it is difficult to say whether a motion for access or unsealing would meet the test for urgency. However, Ontario's courts recognize that the value of reporting is dependent on timely publishing of facts (See e.g.: *Toronto Star Newspapers Ltd. v. Canada*, [2009 ONCA 59](#), at para 127: "Freedom of the press encompasses not just the freedom to decide what to report but also the timing of the reporting... Immediacy is the essence of news").
- Given that courts are beginning to expand the type of non-urgent matters that may be heard while in-person hearings are suspended, it is increasingly likely that an Ontario court would entertain a motion for access or unsealing either remotely or in writing.

Return to Regular Operations

- It is not clear when in-person hearings will resume in Ontario courtrooms.
- The Superior Court of Justice and Ontario Court of Justice have advised that in-person hearings will not resume until July 6, at the earliest. Jury selection and jury trial will not proceed until September 2020, at the earliest.
- The Divisional Court has indicated that for the time being, in-person hearings after August 31, 2020 will proceed as scheduled.

The New Normal: Written & Remote Hearings

- Chief Justice Morawetz of the Superior Court stated that “the world of a paper-based system is not going to exist anymore” when COVID-19 is over.
- Courts and counsel are quickly becoming familiar and comfortable with written and remote hearings.
- If there is a shift towards written hearings after the courts re-open (as litigators become more comfortable forgoing oral advocacy), media will have to be more diligent about checking with the courts to determine the status of a proceeding and any upcoming written hearings, as the daily court lists typically do not reflect these matters.
- With respect to remote hearings, the ability to interject as a remote participant is more difficult. Media outlets and their counsel ought to consider advocating for a procedure to allow for interjections that would be possible during an in-person hearing.