

PRACTICE NOTE

INTERIM PROHIBITORY ORDERS, STAYS OF PROCEEDINGS AND *EX PARTE* APPLICATIONS IN FAMILY PROCEEDINGS

Background

1. In family matters, a litigant or potential litigant frequently considers it necessary to apply, on an urgent basis, to obtain an interim prohibitory order or stay of proceedings pending final resolution of a matter in dispute.
2. The issue may arise in diverse situations, such as where a parent seeks an order restraining the removal of a child from the jurisdiction pending a full custody or access determination or where a spouse in arrears of child support seeks a stay of execution pending an application to reduce or eliminate existing arrears or future payments.
3. There is an increasing tendency for such applications to be brought on *ex parte* (without notice) basis in circumstances where (a) the necessity of proceeding without first notifying the other affected party is not readily apparent; and (b) the originating application seeking the permanent relief is not filed before or concurrently with the application for interim relief.
4. There is also a continuing tendency for applicants for *ex parte* orders to seek prohibitions that are open-ended, without a future review date where the other party will be given an opportunity, in an *inter partes* hearing, to be heard in opposition to continuation of the prohibition and, in the past, such orders have occasionally been made. As noted by the Court of Appeal in **Chafe v. Henley**, 2003 NLCA 57,

para. [15], it is "entirely wrong to not insist on an early return date."

5. There is a general reluctance on the part of the court to grant any order on an *ex parte* basis because, to do so, offends the general principle of natural justice that both sides should be heard.
6. A party seeking an *ex parte* order must be prepared to demonstrate to the court why it is appropriate, in the special circumstances of the case, to make an order without hearing the other party.
7. Rules 56A.17, 56A.18, and 56A.19, adopted as part of the *Family Law Rules* on April 1, 2003, specified more clearly what is the appropriate procedure to be followed on *ex parte* and *inter partes* interim applications.
8. Recently, amendments to Rule 56A.17 and 56A.18 were made, effective December 1, 2003. In particular, Rule 56A.18(2), as amended, reinforces the observation in **Chafe v. Henley** that an early return date for an *inter partes* hearing following an *ex parte* order must be given.
9. To clarify the practice and procedure which should be followed where interim prohibitory orders or stays are sought, either *ex parte* or *inter partes*, it is considered appropriate to issue the following practice note.

Practice Note

10. Applications for prohibitory orders and stays of proceedings, whether made *ex parte*

or *inter partes* should, except in the most extenuating circumstances, be made in an existing proceeding, i.e. after commencing and filing an application for the final or permanent relief sought.

11. Even in extenuating circumstances justifying the making of an interim application for a prohibitory order or stay of proceedings without first commencing and filing an application for the final or permanent relief sought, the applicant for the interim relief shall, as contemplated by Rules 56A.17(2)(6) and 56A.17(2.1), prepare and submit a draft application claiming the final or permanent relief.
12. As contemplated by Rule 56A.16, all applications for interim relief should be made *inter partes*, except in exceptional cases or as expressly authorized by statute or a rule.
13. In the exceptional case, an interim application may be made *ex parte* but only in the circumstances outlined in Rule 56A.17(1) or where otherwise expressly authorized.
14. The judge hearing an *ex parte* interim application will generally not make an order *ex parte* unless
 - (a) the applicant files an affidavit, containing the information required by Rule 56A.17(2)(a); and
 - (b) the judge is satisfied there is sufficient urgency within Rules 56A.17(1)(b)(i) or (ii) that makes it inappropriate to give notice to the others affected by the application, or notice is otherwise not required.

15. Before making an *ex parte* interim order the judge will want to be satisfied that it is not appropriate to adopt some other form of procedure that would better protect the interests of any other affected party, such as
 - (a) requiring informal notice by telephone, email or facsimile to such party or his or her solicitor, if known;
 - (b) requiring notice but abridging the time for its service or delivery;
 - (c) expediting the hearing on the substantive issues.

16. On an *ex parte* application the applicant has an obligation of good faith to disclose to the court all material information, whether favourable to the applicant's case or not. Subsequent discovery of a failure of an applicant to make full disclosure may result in discharge of an *ex parte* order *pro tanto* and/or an order for costs.

17. In making an order *ex parte* the court, in trying to balance the urgent interests of the applicant against the potential prejudice to the party not being heard, will consider imposing appropriate terms upon the granting of the order including the provision of security and the taking of undertakings. To enable the court to comply with Rule 56A.17(3)(d) and (e) and Rule 56A.18(1), an applicant should include in the application any reasonable and appropriate proposals, including undertakings and security, for minimizing the potential impact on the other party in the event that, following the hearing on the substantive issues, the claims of the applicant to final relief are not sustained.

18. Where an order is made *ex parte*, Rule 56A.18(2) now requires the court to set a return date for an *inter partes* hearing within 7 days of the making of the *ex parte* order. Counsel seeking the *ex parte* order will not be heard to say he or she is not available for the scheduled *inter partes* return date.
19. On the subsequent *inter partes* hearing, Rule 56A.19(3) provides that the party who obtained the *ex parte* order retains the burden of satisfying the court, on the basis of the evidence then before the court, that grounds continue to exist for the granting of the interim order and that it should be continued.
20. On any application for an interim order, whether made *ex parte* or *inter partes*, the applicant will be required to satisfy the court that the legal and equitable principles applicable to the granting of a stay of proceedings have been met, including
 - (a) the existence, on the substantive issues relating to the claim for final relief, of either a *prima facie* case, or a serious issue to be tried (according to the applicable test);
 - (b) the existence of irreparable harm to the applicant if the interim order were not granted;
 - (c) the balance of convenience favours the granting of the order.

An offer by the applicant of an appropriate undertaking or security will be an important factor influencing the court as to whether to grant the order.

21. Rule 56A.16(7) contemplates that as a general rule an interim hearing will be conducted on the basis of affidavit rather than *viva voce* evidence. Cross-examination on affidavits is not a matter of right; permission to cross-examine is within the discretion of the judge, exercisable according to Rule 56A.16(7)(a).

Chief Justice

November 28, 2003