

**FEE IMPLEMENTATION – ACCESS TO JUSTICE –
AND BARRIERS TO ACCESS TO JUSTICE:**

RESPONSE TO PROPOSAL NUMBER 16-MAG004 DATED APRIL 1, 2016

SUBMISSIONS BY THE FAMILY LAWYERS ASSOCIATION DATED APRIL 29, 2016

To: Ministry of the Attorney General
Court Services Division
720 Bay Street, 2nd Floor
Toronto, ON M7A 2S9
CSD.CivilFamilyPP@ontario.ca

It has recently come to the attention of the Family Lawyers Association that the Ministry of the Attorney-General by way of regulation and without adequate prior consultation with the Family Law bar is proposing that effective July 1, 2016:

- (i) fees will be introduced for all custody, access and support cases in the Ontario Court of Justice and the Superior Court of Justice;
- (ii) there will be an increase in (existing) fees in family court cases in the Superior Court of Justice.

The actual proposed fees to be charged commencing July 1, 2016 have not been disclosed, all that has been disclosed is that the current fees will be increased (on average by 36% according to the posting).

There has been speculation that the fees will apply for applications (even applications for custody, access, restraining orders, child and spousal support); answers; answers with claims; motions to change; motions; filing of trial records.

The Family Lawyers' Association is strongly opposed to these proposals.

On a procedural and fairness basis, it is difficult (and unfair) to comment on proposed fees/fee increases without specific information about the fee levels and fee waiver levels. One of the authors of these submissions sought this information from a representative at the Ministry of the Attorney General for the express purposes of preparation of these submissions. No information was forthcoming except for a response that “with respect to the fee increase/implementation, a summary of our plan will also be available on the Regulatory Registry in the coming weeks for comment/input. The Registry can be accessed at: www.ontariocanada.com/registry.” It is likely that more opposition would have been forthcoming from access to justice, victim support groups, and poverty law constituents if contemplated amounts were publicized by the Ministry of the Attorney General: i.e. more transparency for this proposed regulatory change.

The Ontario Court of Justice (which currently has no user fees) deals with this province’s most disadvantaged and marginalized citizens and their important family law issues. Many of these litigants are vulnerable, powerless and are already reticent about accessing the family court system. Often family law litigants access the family court system under crisis or emergency circumstances where safety of the litigant and/or children is an issue. This is quite different from other forms of litigation that do not involve the “human elements” as do family law cases. Many family law cases are not by choice to litigate but are a necessary part of the legal process to bring a relationship to an end; to put safety measures in place; to obtain necessary financial support; to seek recourse for custody and access regimes.

The implementation or increase in fees could deter litigants from accessing the court and could lead to the vulnerable being trapped in unhappy or violent relationships. The children in those families could remain in violent or harmful environments if the parent is unable to access the family justice system.

Many family law cases deal with issues or can impact on issues or relate to liberty and security of the person. For example, the results of a support enforcement proceeding, the breach of a family court restraining order, or an order made in a contempt proceeding can be incarceration of a litigant. If a family court litigant is unable to pay to initiate a motion to change where support is too high; pay to initiate a motion to change where there is a breach of a court order; or respond to an application for a restraining order, the result may be incarceration for that litigant. It would be shameful if this occurred simply because the litigant could not afford to access the system ab initio to commence the proceeding.

It is a well known fact that in both levels of family court but especially in the Ontario Court of Justice, there is a high percentage of litigants who are unrepresented. Despite a recent modest increase Legal Aid eligibility, the unrepresented litigants will not be able to afford the filing fees being proposed, no matter how modest these fees are.

The imposition of fees will result in the creation of a new barrier to access to the justice. The Family Lawyers Association submits that this will prevent many individuals who require the important issues of custody, access, child and spousal support and restraining orders not being brought to the court for determination.

The Ontario government has stated that there will be a waiver of fees in some cases but the government announcement provides no details of who may qualify for such a waiver of fees and at what the income/asset levels will be. One of the authors of these submissions sought information about the income/asset eligibility issues for fee waivers. No information was forthcoming except for a response that the Ministry is also raising the fee waiver eligibility threshold by 36%. The current fee waiver (from 2005) is unreasonably low: a 36% increase is still an unreasonably low level of income.

The current fee waiver forms are very difficult for litigants to complete. They require an amount of detail that many people could not easily provide: particularly those who are unsophisticated; those who are not proficient in English or French; those who come from environments where their access to the financial documents in the home is restricted. Many women fleeing an abusive relationship do not have access to their financial documentation. This may be as a result of controlling dynamics in the family home, or fears about trying to retrieve the documentation or information necessary to complete the fee waiver forms. In addition, many family court litigants will not have the necessary documentation for the fee waiver procedure if the litigant is a person who is in Canada without proper status: those litigants do not have social insurance numbers, proof of income, income tax returns.

The province's most vulnerable families, those living with domestic violence, may be placed at greater risk if they are desperate for help but cannot afford it or find their way through the daunting documentary requirements for the fee waiver procedure. In addition, there is a compelling safety factor to consider if the disclosure required for the fee waiver procedure or the fee waiver form for a woman in a shelter is inadvertently disclosed to or seen by the opposing party to the case. This is a very serious and real safety concern.

Fee implementation and increases in fees will put people at risk of being priced out of the justice system and will pose a major obstacle to the delivery of justice to those who do not qualify for a fee waiver and have difficulty affording fees for litigation.

The increase of the fees at the Superior Court level and the introduction of user fees at the Ontario Court of Justice level will add an increased and new layer to costs for an already stretched and underfunded Legal Aid Plan in Ontario. It is anticipated that all litigants (who are not afforded a waiver) will be required to pay the increased or new fees. Those who retain counsel through Legal Aid Ontario will be required to pay these user fees. This will deplete scarce resources

for additional families who require assistance with their family law issues through Legal Aid Ontario. The Legal Aid Ontario coffers should not be reduced by court fees/increased court fees in the family court system.

The increase of the fees at the Superior Court level and the (contemplated) requirement that divorce application fees be paid upfront will be a barrier to those who cannot pay to seek relief from the Superior Court. It is common that it is the woman who is the spouse entitled to an equalization payment or the spouse who is seeking an order for exclusive possession. With an increase in fees, it may become even more difficult for these litigants to obtain the relief to which they are entitled.

The introduction of these fees will serve as an institutional barrier to access to justice for families in crisis and the Family Lawyers association submits that this will place the woman and children at risk, as they will not be able to access the family court due to their personal financial constraints.

The Ministry summary of proposal implies that the funds generated from the fee implementation/increase in fees will be used for costs that are not earmarked for family law initiatives and will be used for the general court coffers. It is shameful that the Ontario Government would initiate fees/increase fees for family law litigants who are often the most vulnerable and needy users of the Ontario justice system.

The implementation of fees/increase in fees will result in more litigants filing motions to seek extensions of time in order to collect the funds necessary to file their court papers. This will put a strain on an already busy family court because judges and court staff will have to deal with this type of procedural motions. This will result in delays to all users of the family court system and added costs.

The implementation of fees/increase in fees will result in more litigants missing deadlines and being unable to file their necessary papers to respond to a proceeding. Without input from both parties to the case, family court judges will be less able to determine cases based on their merits (i.e. based on a full evidentiary record and with submissions by both parties). This may result in custody and access orders that are not based on children's best interests or support orders that are not based on a payor's current income.

The Family Lawyers' Association is strongly opposed to the proposals contained in PROPOSAL NUMBER 16-MAG004 DATED APRIL 1, 2016, and urges the Ontario Government to withdraw this proposal.