



June 30, 2020

Samantha E. Poisson  
Executive Director, Recovery Secretariat  
Corporate Services Management Division  
Ministry of the Attorney General  
11th Floor, 720 Bay St.  
Toronto, ON M7A 2S9

Dear Ms. Poisson,

The Ontario Bar Association (“OBA”) recognizes the significant public interest in continuing criminal and family law matters during the extraordinary circumstances of the COVID emergency. Over the past three months, we have assisted Ontario’s lawyers and three levels of court to conduct remote hearings, and we look forward to the safe resumption of in-court hearings as an important way to keep matters moving forward.

We appreciate that the MAG Recovery Secretariat has been working hard to prepare for the resumption of in-court operations for some 44 courthouses identified as Phase 1 locations across Ontario. We are sharing with our members your recently issued *Guidebook, COVID-19: Recommended Precautionary Measures for Resuming Court Operations (June 25, 2020)* and the local site assessment reports that are now coming out. We appreciate the opportunity to provide feedback and the Recovery Secretariat’s commitment to ongoing consultation and development. However, as the target reopening date approaches, we are writing to bring some important issues and recommendations to your attention:

### ***Safe Courthouse Reopening***

Before courthouse reopening, the public and the profession must have confidence both that courthouses are safe to attend for all users, including lawyers, clients, judges and court staff, and that physical controls and operational protocols will permit court processes to be carried out effectively in the interests of justice.

An essential first step in successfully achieving these goals is bringing together two distinct and essential perspectives: lawyer expertise about each step that is needed to have a matter effectively heard in-court, and public health expertise about how these steps can be carried out safely in a given location.

The OBA appreciates the opportunity to have had a local civil or family law member attend the site assessments during the week of June 15-20, which reviewed issues such as room capacities, queuing, signage, hand sanitizers, and plexiglass. Appendix A (attached) provides an overview of the feedback OBA representatives gave during the assessments. Although the new guidebook aims to address operational changes, it does not sufficiently address the necessary steps to have a matter heard from arrival through to departure, or communicate a public health assurance that the steps in the pathway will be carried out safely.

Once a comprehensive plan incorporating these perspectives has been developed, it must also be tested in practice to ensure that it achieves both the justice and health imperatives. Modifications can be made to address unforeseen or unexpected problems. The OBA would be pleased to assist the Ministry in carrying out this assessment with a test run, including a mock hearing.

*Essential Communications*

After a plan has been demonstrated as fit for purpose and certified by MAG's public health advisors as complying with health and safety requirements, it must be thoroughly communicated to lawyers and members of the public. Given that a safe courthouse requires a collective adherence to safety protocols, it is essential that every person attending knows what to expect, and what is expected of them. Ministry communications must meet the needs of all court attendees including those with differing language and accessibility requirements. Again, the experience in other provinces provides examples of public communications that maximize user understanding and confidence in the system.

At present, we understand that the Ministry plans to resume some in-person court proceedings starting on Monday, July 6, 2020. In addition to the issues outlined above, we believe it is important to communicate a final decision about whether matters will proceed with sufficient notice to counsel who may be scheduled to appear. With less than one week to the target date, we request that the Ministry advise us of the date by which specific courthouse openings will be confirmed.

*Continued Safe Operations*

Lastly, to ensure that courts remain safe after opening will require a continuous and rapid system for identifying what is working well and what is not. This provides a timely response to problems that arise at one court and allows solutions to be shared proactively to other sites to avoid similar occurrences. The OBA is establishing a portal to collect feedback from our members, and we will communicate this information in real-time to the Ministry. However, given the importance of broad and timely feedback, we suggest that the Ministry also launch a direct public feedback initiative that incorporates a Q&A section.

Once again, we appreciate the Ministry's efforts to prepare for the resumption of in-court operations and the opportunity to provide feedback and advice on behalf of our members.

Yours truly,



Colin Stevenson  
President, Ontario Bar Association

c. Irwin Glasberg, Deputy Attorney General

## APPENDIX A – SUMMARY OF OBA FEEDBACK

In the week of June 15th, OBA representatives in civil and family law attended site assessments of the Phase 1 courthouses. Our member role was not to provide health and safety expertise but to contribute lawyer practice expertise on the steps needed to have a matter effectively heard in-court, to support a reopening plan that ensures all users can safely and effectively access the courts.

The site audits addressed physical controls in courtrooms and common areas, such as queuing marks, signage, hand sanitizers, and plexiglass. They did not address building HVAC, which is a significant issue that MAG is addressing separately with Infrastructure Ontario.

In the course of the assessments, OBA representatives provided feedback on the key themes summarized below and on the specific issues that follow.

### Key Themes:

1. ***Courthouses must be safe before they can reopen and must continue to be safe in order to remain open.*** Before courthouse reopening, MAG's provincial health experts must certify the safety of the complete pathway court attendees must follow to have a matter heard. Many of the issues raised at the time of the site visits were referred to as "under consideration", leaving members with limited ability to provide critical feedback. These must be resolved and communicated satisfactorily, with an opportunity to provide feedback, before the courthouses can resume hearings. Courthouses must cease in-person hearings after reopening if at any point they are not safe, including if protocols are not being followed.
2. ***Courthouses must be safe to attend for all court users.*** Some consultants suggested that the review was focused on the health and safety of staff, and not lawyers or other court users. The documentation available to date also refers to specific protections for staff, which implies a lesser and unacceptable protection of health and safety for lawyers and others who are required to attend court.
3. ***There cannot be gaps between proposed physical controls and the operational protocols governing access and courtroom functions, which must be coordinated to ensure safety.*** Many of the issues raised at the site assessments were described as "operational" and therefore not within the scope of the review. For example, witness boxes were identified as locations where cleaning products might be placed for enhanced cleaning without an understanding of who would be responsible and how it would be done. There must be clear accountability and oversight to provide confidence that protocols are being followed appropriately.
4. ***There must be clear, advance communication of the requirements and processes that will be in place at each courthouse, including how these will be maintained if some court users do not comply.*** Lawyers need to understand and have confidence in the safety of the courthouse and courtrooms before attending. Many of the controls involved "encouraging" court users to follow a process, which exposes court attendees to the effects of non-compliance by others. A thorough understanding of requirements and compliance is also needed to permit lawyers to seek alternative

arrangements if they feel they cannot attend safely, e.g. those at higher risk of infection or health complications.

5. ***There must be clear communication of the requirements and processes that attendees must follow in each location within the courthouse.*** The processes need to provide clear instructions of what users should do when moving through the courthouse, e.g. entering a washroom or having to wait to enter an elevator/stairwell - and not just the capacity limit.
6. ***There must be a constant, robust and urgent ability to ensure that any problems arising during in-person proceedings are immediately dealt with, and that the solutions are proactively implemented at all other locations before similar problems arise.*** The OBA would be pleased to work with MAG and the courts to establish an ongoing, rapid feedback and response to ensure that new issues identified by our members are quickly rectified and then proactively addressed at other locations.
7. ***The physical controls and operational protocols must support court processes to be carried out effectively in the interests of justice.*** For example, plexiglass must permit witnesses to be seen and to see those posing questions (and to hear and be heard), lawyers must have an ability to confer privately and safely with their clients, and any mandatory mask-wearing must have exceptions such as giving testimony or submissions. Water must be available for those who forget to bring their own or run out to avoid disrupting proceedings unnecessarily.
8. ***Up-to-date public health guidelines must provide a consistent standard that informs court reopening planning.*** The approaches undertaken must be based on clear, consistent and up-to-date public health guidelines. These standards must be met, regardless of challenges in specific buildings because of design and age or because controls have already been installed in a non-compliant manner (as in some cases with plexiglass). Where public health guidelines differ by region, this should be taken into account in the planning and implementation.

### **Specific Issues:**

#### **1. Building entrance/security/COVID screening**

- The process for counsel to enter the courthouse must respect efficacy and the privileges recognized in regular protocols, with a separate entrance where possible.
- Many courthouse entrances will be bottlenecks, so protocols must effectively move attendees out of these areas quickly to avoid backing up and violating physical distancing requirements. The same applies for locations where attendees must wait for access, such as stairs, elevators and escalators.
- There must be clear responsibility for who will be responsible for keeping track of when the courthouse has reached its capacity, and what will happen when capacity is reached. There must also be clarity that attendees who do not meet the COVID screening requirements will not be permitted to enter. Lastly, if a court user is denied entrance because capacity is

exceeded or because of the COVID screening, there must be a clear real-time process for notifying the Court and counsel that the person has been denied entrance.

- There needs to be clear rules and staff assigned to ensuring that courthouse users follow the established safety protocols, e.g. physical distancing, wearing masks, etc., and dealing with non-compliance.
- There needs to be clear advance indication of what COVID screening will entail, including any information that will be required for tracing purposes.

## **2. Building cleaning**

- There needs to be a plan and resources for the additional cleaning of all court spaces throughout the day, especially for high-touch areas such as counsel tables and the witness box.
- The cleaning plan must include who will provide cleaning materials and who will be responsible for cleaning, so that lawyers have confidence that the cleaning has been done. The process should also recognize that lawyers are dealing with clients before and after formal proceedings, in counsel rooms, the cells, etc.

## **3. Physical controls**

- Plexiglass barriers should surround the witness box to permit counsel to approach when needed. The barriers must allow witnesses to be seen and heard, and to see and hear those questioning them. There is concern that the microphones for all court participants be appropriately cleaned after usage.
- There appears to be an inconsistent approach to plexiglass, including varying air gaps for documents (from 4” to 2”), which raises concerns about the effectiveness of the barrier. A standard that ensures it serves the purpose must be adopted and implemented, even where non-compliant plexiglass has already been installed.
- The desk mounting brackets for plexiglass add significant visual interference, and these could be replaced with suspensions that minimize the interference. Sound may well be a problem, which emphasizes the importance of a test run.
- Counsel lecterns should not be shared, particularly as counsel will likely not be wearing masks when making submissions.
- There should be an opportunity for spacing between co-counsel or clients who sit at the counsel table as plexiglass barriers at the counsel table are likely to prove cumbersome.

- There should be overflow rooms with video links to the main hearing room, to facilitate access but also limit the exposure to counsel, clients and witnesses. The first row of public seating should be left empty to support physical separation from counsel. This is especially a concern for small courtrooms. Video links may also be needed for interviewing vulnerable witnesses.
- Use of electronic documents should be encouraged, but there need to be additional protocols to safely deal with the exchange of paper documents when necessary, including at least hand cleaning protocol and sanitizer.
- There needs to be access to space where lawyers can communicate privately in the course of hearings with their clients, which respects physical distancing standards.

#### **4. Personal protective equipment & face coverings**

- There needs to be clear indication of where PPE will be required, if at all.
- If there are areas in which PPE is required, such as where physical distancing cannot be maintained, these should be supplied for all court users to ensure a single safety standard for all attendees.
- There must be clear standards for the conditions under which court attendees can refuse to wear a mask, and what mitigations will be in place to protect other court users.
- There must be clear protocols for the conditions in which court attendees may not be permitted to wear a mask, e.g. giving evidence or submissions in court.

#### **5. Ancillary services**

- Water needs to be available in the courthouse for members of the public, witnesses, counsel, experts, etc. Even if there are dispensations to permit attendees to drink their own water in the courtroom, those must be communicated in advance and there should be provisions for people who forget or run out to avoid disrupting proceedings unnecessarily.

#### **Conclusion:**

In summary, before and after reopening commences, the bar must have confidence both that courthouses are safe to attend for all users, including lawyers and their clients, and that the controls and operational protocols that have been implemented permit court processes to be carried out effectively in the interests of justice.