



June 23, 2020

The Honourable Doug Downey

Dear Minister:

Re: Necessary Changes to Draft Court Resumption Guidelines in order to Safeguard Health and Safety.

We are writing to you as a unified group to express our shared health and safety concerns relating to the Ministry of the Attorney General's plans for the resumption of in-person courthouse operations. Our members are federal and provincial crown attorneys and crown counsel, legal aid lawyers and courthouse staff. Together we represent over five thousand individuals who, once in-person appearances are resumed, will be attending at courthouses across the Province.

Our members are committed to access to justice and a functioning civil, family and criminal justice system. We collectively recognize the need to resume in-person court appearances. We are committed to working with the Ministry and other stakeholders to achieve an open and accessible justice system. At the same time, our associations take the position that the resumption of in-person court appearances can only take place once adequate health and safety measures have been implemented. As of the date of this letter, those health and safety measures necessary for the safe resumption of in-person appearances remain outstanding.

We have attended at the Brampton courthouse to tour the Ministry's model courtrooms and other court-adjacent spaces including interview rooms. We have also reviewed the Ministry's draft plan for the resumption of in-person courthouse operations. A number of our members have also attended at risk-assessments conducted in courtrooms across the province. Finally, along with the Government's various guidelines and publications relating to COVID-19, we have reviewed a number of Reports prepared by the health and safety consulting firm ECOH, which we understand have also been provided to the Ministry for its consideration and which we attach again for ease of reference. These documents and site visits inform our concerns and our comments below.

#### Concerns Regarding Risk-Assessments

We are concerned that the Ministry's risk-assessments are not covering all of the areas that will be used during the resumption of court operations. We also understand that the risk assessments are being conducted by individuals who are not aware of how courts function or how the virus may be spread. In North Bay for instance, the assessor who conducted the Ministry's risk assessment of that courthouse has spent his entire career in forestry and specializes in forestry safety. Though no doubt a competent forestry specialist, it is unclear how he can properly assess

whether the operation of a courthouse will be safe. In Lindsay we understand that the assessor took the position that COVID-19 spreads by contact with expelled bodily fluid and was not airborne. This position presumably informed the assessment, notwithstanding there appears to be debate about the issue of whether COVID-19 is airborne or not.<sup>1</sup> The Ministry has a legal duty, like all employers, to ensure all reasonable precautions are taken to prevent the spread of covid-19 under 25(2)(h) of the OHS Act. Further, when it comes to a lethal virus whose transmission is uncertain, this legal duty includes taking precautionary measures against the unknown. As recently stated by Justice Morgan at para. 78 of *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467:

An important recommendation of the Commission of Inquiry chaired by Justice Archie Campbell in the wake of the SARS outbreak of 2003 – an outbreak of a virus related to COVID-19 – is that the precautionary principle is to be put into action in order to prevent unnecessary illness and death. As explained by Justice Campbell, this principle applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown.

Our members have also been told that in-person court operations will resume on July 6, 2020 whether courtrooms are ready for that resumption or not. They have been told that even if a risk assessment has not been conducted in a locale, in-person operations will resume. This approach, which seems to be guiding the re-opening of the courts, is extremely problematic. It prioritizes the resumption of in-person court appearances – a goal we all share – at the expense of health and safety – a concern which cannot be overlooked. There is ample global evidence that large gatherings in indoor spaces where people are in close proximity or are sharing the same air for an extended period of time, such as a courtroom, enables the spread of COVID-19. Our members are deeply concerned both for their own safety and for the safety of other justice system participants. This rush to open is also causing our members anxiety, stress and other mental health concerns.

### Concerns Relating to the Draft Resumption Plan

Along with our concerns about the risk assessments being conducted across the Province, and whether the Ministry will be able to implement the measures in the plan before the July 6, 2020 date, we are also concerned that the Ministry's draft plan for the resumption of court operations does not address a number of ECOH's recommendations, which are evidence-based and which in

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1. <https://science.sciencemag.org/content/early/2020/06/08/science.abc6197> : "However, a large proportion of the spread of coronavirus disease 2019 (COVID-19) appears to be occurring through airborne transmission of aerosols produced by asymptomatic individuals during breathing and speaking" and: <https://www.nejm.org/doi/full/10.1056/NEJMc2009324>

<https://www.pnas.org/content/early/2020/06/10/2009637117>: "Here we show that airborne transmission is highly virulent and represents the dominant route to spread the disease."

our opinion must be implemented before in-person courthouse operations resume. These include:

1. **Masks and PPE.** Mandatory use of masks within the courthouse by staff where two meter distances cannot be maintained, and mandatory use of masks by building visitors at all times except when testifying or making submissions in court, must be implemented. Research demonstrates that masks offer some protection against infection for the user, and can be effective for source control. Face masks should be provided to staff and to visitors who arrive without their own masks. The scientific support regarding the importance of mandatory face coverings, particularly indoors in shared spaces, strongly supports mandatory use and simply cannot be ignored as part of a safe resumption plan. Also, use of hand sanitizer by building visitors must be mandatory, not merely encouraged or suggested.
2. **Enhanced Entry Controls.** We understand from comments made by Ministry staff that the current plan is that no person will be turned away from a courthouse – even in the extreme case where they identify themselves as being infected by COVID-19. It is our understanding that those individuals will be encouraged not to enter, but will not be prevented from doing so. This position requires correction. The safety of all courthouse users – from members of the judiciary to staff to justice system participants - requires the Ministry to institute and enforce screening measures which prevent ill or potentially ill individuals from entering. Individuals who enter the courthouse ought also to, along with mandatory masking, be required to provide their contact information for the purpose of effective contact tracing.
3. **Enhanced use of plexiglass and other protective barriers and spacing in the courtrooms and common areas.** We are concerned for example that at the Brampton mock-up there is no plexiglass barrier between the counsel tables and the gallery. Visitors sitting in the gallery (and any in-custody accused in the SCJ) will be less than 2-meters away from counsel sitting at the counsel tables. Plexiglass barriers must be installed so as to provide a barrier, just as plexiglass has been installed in front of the counsel tables, clerk’s tables and judicial dais.
4. **Appropriate modifications to ensure building air quality.** The risk assessments being conducted across Ontario do not include assessments of HVAC systems or air quality. The work by the facilities branch of the Ministry does not include work on the HVAC systems or in-court air quality. Our understanding is that Infrastructure Ontario has the responsibility to ensure that ventilation systems are functioning properly and will keep people safe. Reports have indicated that ventilation and air quality measures are necessary to keep people safe. The Ministry must ensure that these steps are taken at each courthouse to ensure air quality.
5. **Operationalization and Enforcement.** We understand that the Ministry has not finished work on, or shared, the guide for health and safety measures required for safe resumption.

Our concern, from comments by Ministry staff at the various tours and risk assessments, is that there will be no enforcement of social distancing, use of hand sanitizer or of wearing of PPE. It will be left to individuals to ask other non-compliant individuals to comply. This is an untenable solution and puts the health and safety of all courthouse users at risk. The Ministry must finalize and consult on its health and safety rules prior to opening the courts and then adequately implement and enforce them.

Our Concerns Must be Addressed

Along with the concerns set out above, we are concerned that the Ministry has not adopted the other recommendations set out in the ECOH reports. We call upon the Ministry to adopt all of those recommendations. Nevertheless, we are most concerned about the five items identified in the letter above. It is our position that each of those items must be addressed before in-person courtroom operations can safely resume. Some of the five points can be easily addressed while we acknowledge others may be more difficult. Nevertheless, if those items are not addressed, we may need to take further action to protect the health and safety of our members, including but not limited to steps under the *Occupational Health and Safety Act*.

Request for a Meeting

We understand that the Deputy Attorney General has advised the Criminal Lawyers Association that he is willing to meet with us to discuss these issues and to find solutions. Given how quickly courts are opening, we will make ourselves available at Mr. Glasberg's convenience. We are, as above, committed to working with you and the Ministry to achieve the safe resumption of in-person court operations.

Regards,



Tony Loparco  
President, Ontario Crown Attorney Association



Jeremy Glick  
President, Association of Lawyers of the Crown



Warren (Smokey) Thomas  
President, Ontario Public Service Employees Union



Scott Travers  
President, Society of United Professionals



David McNairn, President Association of Justice Counsel  
c. Deputy Attorney General Irwin Glasberg