



## **Guidance to Members on Ensuring Their Health and Safety for Court and Tribunal Proceedings**

### **Context for this Guidance**

The COVID-19 pandemic is an unprecedented world-wide public health emergency. As of February 11, 2021, almost 817,000 people in Canada have been infected and over 21,000 have died from the virus. Over 108 million people have been infected with COVID-19 world-wide and 2.3 million have died.

While we do not have separate statistics for Association of Justice Counsel (AJC) members, we have been advised that as of February 11, 2021, over 2,900 federal public servants have contracted COVID-19. That said, we are aware that significant numbers of cases have been confirmed for lawyers and court staff across Canada.

In 2020 public health authorities such as the Public Health Agency of Canada (PHAC), the U.S. Centers for Disease Control (CDC) and the World Health Organization (WHO) acknowledged that COVID-19 is transmitted by aerosol means, and not just by droplets during close contact within two meters.

According to PHAC guidance, “SARS-CoV-2, the virus that causes COVID-19, spreads from an infected person to others through respiratory droplets and aerosols created when an infected person coughs, sneezes, sings, shouts, or talks.” Most infections occur as a result of close contact and in indoor settings. Poor ventilation likely increases the risk of infection.

In late 2020 and early 2021 variants of COVID-19 were identified in the United Kingdom, South Africa, and elsewhere. These variants are significantly more infectious, and there is evidence that they may have higher rates of mortality. Numerous cases caused by the UK variant have already been identified in Canada, and according to the CDC this variant could become the primary strain circulating in Canada and the US by March 2021. While vaccines are gradually being rolled out throughout the year, it is clear that we will need to contend with COVID-19 for some time to come.

### **Legal Protections for Counsel**

Counsel who appear in Canadian court or tribunal hearings are protected by section 7 of the *Canadian Charter of Rights and Freedoms (Charter)*. They have the right to security of the person, which includes the right to a safe work environment and the right to not have their health or safety put at risk. A failure to respect the section 7 rights of counsel could provide the basis for an application for relief under section 24 of the *Charter* or other legal action.

Courthouses and courtrooms as well as tribunals and tribunal hearing rooms are workplaces where activities that are controlled by the employer are carried out by federal Crown counsel, federal prosecutors and other AJC members.



Under section 124 of the *Canada Labour Code* (CLC), Part II, the employer has an obligation to ensure that workplaces are healthy and safe for its employees. Also, under section 128 (1) of the *Code*, an employee may refuse to work in a place or perform an activity if the employee, while at work, has reasonable cause to believe that a condition exists in the place that constitutes a danger to the employee, or the performance of the activity constitutes a danger to the employee or to another employee.

Similarly, article 26.01 of the Law Practitioner (LP) Collective Agreement requires that, “[t]he Employer shall continue to make all reasonable provisions for the occupational safety and health of lawyers. The Employer will welcome suggestions on the subject from the Association and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.”

### **The Precautionary Principle**

The 2003 report of the public inquiry into the Severe Acute Respiratory Syndrome (SARS) epidemic in Ontario – aptly entitled *Spring of Fear* – established that the “precautionary principle” should be the foundation of public health and occupational safety.

The precautionary principle means that where a risk to health and safety is reasonably suspected but has not yet been established as a scientific or medical certainty, reasonable measures must still be taken to reduce that risk. This principle recognizes that reasonable measures to protect health and safety should not, and cannot wait for scientific certainty.

In the AJC’s view, public health guidance on COVID-19 is a minimum standard. The employer may go beyond these minimum standards and, in the AJC’s view, is required to do so to comply with article 26.01 of the LP Collective Agreement and the precautionary principle. This is the case where reasonable measures may reduce the risk of the transmission of COVID-19 – even if public health authorities have not yet recommended such measures. This is particularly true where other international health authorities have already recognized a risk.

### **Judicial Independence and Occupational Health and Safety**

While many courts and tribunals across Canada have taken health and safety very seriously during this COVID-19 pandemic, the AJC has received troubling reports of inconsistent approaches to health and safety by some courts and judicial officers – with judicial independence sometimes being cited as justification for departures from COVID-19 health and safety protocols. These inconsistencies have had a disproportionate impact on junior counsel and members of other vulnerable groups.

In the AJC’s view, neither judicial independence nor the court’s jurisdiction to control its own process provide the authority to conduct legal proceedings in a manner that puts the occupational health and safety of AJC members or other justice participants at risk. To conclude otherwise would be inconsistent with the public interest, best interests of justice, and the proper administration of justice.



## **Purpose of this Guidance**

In light of the inconsistent approach to health and safety in some courts and tribunals, the AJC has concluded that more detailed guidance to its members is required to ensure their occupational health and safety. This guidance is intended to complement the Public Prosecution Service of Canada (PPSC) and Department of Justice (DOJ) directions relating to health and safety protocol breaches in court and will help AJC members to better protect themselves from COVID-19.

## **PPSC and DOJ Direction on Health and Safety Protocol Breaches in Court**

Both the PPSC and the DOJ have issued directions to counsel on how to respond to health and safety protocol breaches in court proceedings. The PPSC and DOJ directions are nearly identical, and the full text of these documents can be found in **Annexes A and B**.

Generally, the PPSC and DOJ directions provide that where health and safety protocols to prevent the transmission of COVID-19 are breached or compromised, counsel are expected to do the following:

1. **Raise the issue:** Immediately raise your concerns with the court and respectfully ask the court to enforce its health and safety protocols.
2. **Ask for an adjournment or recess:** If the court is unable or unwilling to enforce health and safety protocols, ask for an adjournment or recess in order to contact your manager to alert them to the issue.
3. **Await a new court time:** If you are granted an adjournment, your supervisor or manager will contact the appropriate official, (e.g., court administrator, senior regional judge or Chief Justice), as soon as reasonably possible to request that protocols be respected. If contact cannot be made before the appointed time for court to resume, you may need to seek a further adjournment or explore the possibility of addressing the concern through a remote appearance.
4. **Remove yourself from the situation:** If you are not able to obtain an adjournment and protocols cannot be met when the court resumes, you should inform the court that you cannot continue and will be removing yourself from the courtroom, with the full support of your management. Remove yourself from the situation as safely as possible.
5. **Report the situation:** Upon your return to the office, speak to your supervisor/manager and prepare a written summary of the circumstances surrounding the situation.

It is AJC's view that for the purposes of these directives, the term "court" should be read to include a tribunal. Therefore, AJC members appearing before tribunals should follow the same approach.



## **Remote and Virtual Hearings**

For months, the AJC has advocated five principles for the reopening of courts and tribunals and resumption of proceedings, which can be found in **Annex C**.

The first principle states that the reopening of courts is not a return to business as usual. The COVID-19 pandemic will require new ways of ensuring access to justice yet respecting public health protocols, minimizing in-person appearances at courthouses, and maximizing remote and virtual legal proceedings.

In the AJC's view, during this unprecedented public health crisis, the use of remote or virtual hearings is the first and best line of defence against the spread of COVID-19, while at the same time maintaining access to justice.

## **Circumstances Which Breach or Compromise COVID-19 Health and Safety Protocols**

The following circumstances should be considered a breach or compromise of COVID-19 health and safety protocols, which engage the DOJ and PPSC Directions. These circumstances warrant raising the issue with the court, seeking an adjournment or recess, and/or the withdrawal from the court or tribunal proceedings:

1. **Denial of a Remote or Virtual Hearing:** The presiding judicial officer denies a request for a remote or virtual hearing, and orders an in-person hearing in circumstances where it is not absolutely necessary to do so;
2. **Travel:** The presiding judicial officer schedules a hearing that would require counsel to travel to attend the hearing including, but not limited to, circumstances where counsel would be required to travel from one jurisdiction to another (e.g., from province to province), to travel by aircraft or train, to travel from a COVID-19 hot-spot or lock-down area to another area (or vice versa), to travel to any location where local authorities require them to self-isolate for a period of time (or where local health authorities in the counsel's home jurisdiction would require them to self-isolate upon their return), and to stay in hotel accommodations;
3. **Health Vulnerabilities:** The presiding judicial officer schedules a hearing that would require counsel to attend an in-person hearing in circumstances where any of the following persons are considered high risk for COVID-19: counsel, a family member or person residing with counsel, or a person for whom counsel has caregiving responsibilities;
4. **Failure to Self-Isolate:** The presiding judicial officer or other participant in the proceeding has travelled from one jurisdiction to another (e.g., province to province) or from a COVID-19 hot-spot or lock-down area to another area (or vice versa), and has failed to self-isolate for 14 days;



5. **COVID-19 Symptoms:** The presiding judicial officer permits or authorizes a person exhibiting COVID-19 symptoms to remain and/or work in the hearing room;
6. **Presence of Infected Person:** A person who has a confirmed diagnosis of COVID-19 is present at in-person proceedings at any point while infected;
7. **Masks:** Persons present in the hearing room, including the presiding judicial officer, do not wear an appropriate mask covering their nose and mouth; or, where the presiding judicial officer invites persons in the hearing room to remove their masks, permits them to do so, or orders them to do so;
8. **Physical Distancing:** Persons present in the hearing room do not maintain two-meter physical distancing;
9. **Engineering Controls:** The hearing room is not configured with appropriate engineering controls to prevent the spread of COVID-19, including plexiglass barriers and portable HEPA air filters;
10. **Cleaning:** An appropriate cleaning and disinfecting protocol for the hearing room is not in place or is not observed;
11. **Failure of Enforcement:** The presiding judicial officer or other authority entrusted with enforcement of COVID-19 health and safety protocols in the hearing room or courthouse fails to do so;
12. **Courthouse or Hearing Room Operations:** The authorities responsible for operating courthouses and/or hearing rooms have:
  - a. **Screening:** Failed to implement and enforce appropriate COVID-19 screening measures for entry to the courthouse and hearing room;
  - b. **Cleaning:** Failed to implement or enforce appropriate cleaning and disinfecting measures for the courthouses and hearing rooms;
  - c. **Ventilation/Air Quality:** Failed to implement measures in courthouses and hearing rooms to maintain appropriate ventilation, air quality and air replacement, including the use of portable HEPA air filters in hearing rooms and compliance with the ASHRAE standards to prevent the airborne transmission of COVID-19 as well as other appropriate standards;



- d. **Contract Tracing:** Failed to implement an appropriate system for contact tracing for COVID-19 infections at courthouses and hearing rooms;
- e. **Communication:** Failed to implement a system for informing justice participants in a timely way of COVID-19 infections that have occurred at a courthouse or in a hearing room (including sufficient details regarding the whereabouts of the infected person at a courthouse or hearing room and the times when the infected person was present) in order to enable counsel to effectively assess the risk;
- f. **Other Reasonable Measures:** Failed to take any reasonable measures to reduce the risk of the transmission of COVID-19.

### **Responding to Questions from the Court**

Where you are questioned by a presiding judicial officer, we recommend that you follow the guidance in the PPSC and DOJ Directions and this guidance. You should respectfully advise the presiding judicial officer that:

1. The Direction to withdraw is a national policy, and that you have been directed to respectfully ask that any further questions and concerns be raised with your management.
2. Your union, the AJC, has provided detailed guidance to you on the circumstances which are considered to be a breach or compromise of COVID-19 health and safety protocols and would put counsel at risk.
3. The AJC Guidance has been communicated to the Chief Justice of the Court, your management, and Attorneys General.

### **Social or Other Activities with Judicial Officers or Other Officials**

During the pandemic, counsel should refrain from activities which would put their health and safety at risk, including sharing taxis or cars with a judicial or other court official, eating meals with a judicial or other court official, or attending social events with a judicial or other court or tribunal official. If counsel feel pressure to engage in any such activities, they should contact the AJC for assistance and/or raise the matter with their management.



### **Professional Obligations**

It is the AJC's firm position that counsel are not required to put their health or safety at risk in the course of discharging their professional obligations under provincial and territorial codes of professional conduct.

### **Reporting Breaches and Support**

If you experience a situation where you feel uncomfortable from an occupational health and safety perspective, or where COVID-19 health and safety protocols have been breached or compromised, we recommend that you follow the employer's direction on health and safety protocol breaches in court and report the situation to management.

We also encourage you to report the situation to the AJC without delay, through your Governing Council representative or by going to the AJC website and filling out an Intake Form. This will enable the AJC to support you and intervene where it is necessary to do so, as well as to monitor and address trends in breaches.



## APPENDIX A

### **Public Prosecution Service of Canada Direction on the Breach of COVID-19 Protocols – Courts**

The number of positive cases of COVID-19 is rising in Canada. Governments and public health authorities are responding with measures according to regional and local circumstances and needs. The PPSC continues to comply with national and local public health direction and guidance and the number one priority continues to be your health and safety. Recently, public health authorities have signaled that physical distancing requirements are more important than ever. In situations in which physical distancing is not possible or is unpredictable, employees should wear a mask. Moreover, public health guidance emphasizes the need for sanitizer, particularly when hand washing is not feasible. As such, we encourage you to report any breaches of protocols to your managers, remove yourself from unsafe situations and know that you are supported by all levels of management at the PPSC.

PPSC management from all of our regional offices are in constant communication with local courts and provincial counterparts to continuously monitor the measures they are taking and ensure your ongoing health and safety. In addition, a supply of masks and hand sanitizers and travel-size hand sanitizer bottles have been procured and provided to all PPSC offices.

Where you are required to attend court facilities or appear before a court in a courthouse or circuit court, you should expect that COVID-19 related protocols are in place in compliance with the public health direction of the jurisdiction in which you are appearing. To the extent possible, please familiarize yourself ahead of time with the protocols of the court or courthouse you will be attending.

Where physical distancing is concerned, if this is not possible or is unpredictable, it is expected that each person before the court be required to wear a mask. In the event you should find yourself before a court where protocols are not in place, we expect you to do the following:

1. Raise the specific issue with the court immediately and respectfully ask the court to enforce adherence to its protocols;
2. If the court is unable or unwilling to require adherence to protocols such as physical distancing or use of masks, you should ask for an adjournment or recess in order to contact your supervisor to alert them to the issue;
3. If you are granted an adjournment, your supervisor or manager will contact the appropriate point of contact, usually a senior regional judge or Chief Justice, to request that protocols be respected; it may also be possible to address the concern through a remote appearance on the matter;
4. If you are not able to obtain an adjournment and protocols cannot be met when the court resumes, you are expected to inform the court that you cannot continue and will be removing yourself from the courtroom with the full support of PPSC management;
5. Remove yourself as safely as possible while maintaining as much distance as possible from any other court participants who are not wearing masks.



We appreciate that this approach may result in cases being jeopardized and are prepared to live with those consequences in order to maintain the health and safety of our staff. We recognize that the management of the court is within the discretion of the presiding justice. Where questioned by the court, you can respectfully advise the presiding justice that the direction to remove yourself is national and that you have been directed to respectfully ask that further questions and concerns be raised with your CFP. Local PPSC management will also communicate to the judiciary and pandemic recovery committees in their respective jurisdiction that you have been given these instructions.

If in any case you were required to leave the courtroom, your managers will immediately inform the court point of contact, the local AJC representative, and the appropriate Deputy Director of Public Prosecutions.



## APPENDIX B

### Department of Justice Canada

#### Direction on Health and Safety Protocol Breaches in Court

If you find yourself in a situation in which health and safety protocols comprised of active measures to limit the spread of COVID-19 (such as two-meter physical distancing, the safe wearing of facemasks, or plexiglass barriers) are not in place, or are not being followed in court by other parties, participants or court/tribunal officials, we expect you to do the following:

1. **Raise the issue:** Immediately raise your concerns with the court and respectfully ask the court to enforce its health and safety protocols.
2. **Ask for an adjournment or recess:** If the court is unable or unwilling to enforce health and safety protocols, ask for an adjournment or recess in order to contact your manager to alert them to the issue.
3. **Await a new court time:** If you are granted an adjournment, your supervisor or manager will contact the appropriate official, (e.g., court administrator, senior regional judge or Chief Justice), as soon as reasonably possible to request that protocols be respected. If contact cannot be made before the appointed time for court to resume, you may need to seek a further adjournment or explore the possibility of addressing the concern through a remote appearance.
4. **Remove yourself from the situation:** If you are not able to obtain an adjournment and protocols cannot be met when the court resumes, you should inform the court that you cannot continue and will be removing yourself from the courtroom, with the full support of Justice Canada management. Remove yourself from the situation as safely as possible.
5. **Report the situation:** Upon your return to the office, speak to your supervisor/manager and prepare a written summary of the circumstances surrounding the situation.

#### Your safety is our top priority

Client officials have been informed of this directive and are aware that this may have a negative impact on cases. We are prepared to accept those consequences in order to maintain the health and safety of our staff.

We recognize that the management of the court is within the discretion of the presiding justice. If questioned by the court, you can respectfully advise the presiding justice that you are following national Justice Canada directives and that further questions and concerns should be raised with the Assistant Deputy Attorney General. The Department will inform the judiciary in their respective jurisdictions of these instructions.



In the event that you are required to leave the courtroom, your managers will immediately inform the court point of contact, the appropriate local bargaining agent representative, and the Assistant Deputy Attorney General.

If you have any questions or concerns relating to this Direction, please speak with your manager.



## APPENDIX C

### AJC'S GUIDING PRINCIPLES FOR THE REOPENING OF COURTS

Any plan for the reopening of courts during the COVID-19 pandemic must comply with the following guiding principles:

1. The reopening of courts is not a return to business as usual. The COVID-19 pandemic will require new ways of ensuring access to justice yet respecting public health protocols, minimizing in-person appearances at courthouses, and maximizing remote/virtual legal proceedings.
2. Courthouses are not just places where justice is administered, they are workplaces for the judiciary, counsel, court and other support staff, police, and security. Employers have a legal obligation to keep their employees safe and healthy when they perform their duties. Similarly, those responsible for the operation of courthouses have an obligation to ensure that court houses and courtrooms are safe and healthy for workers, litigants, and members of the public.
3. The safety and health of workers, litigants, and the public should be a paramount consideration in any plan to reopen courts. The interests of justice are not met if the safety or health of such persons are put at risk by the reopening of courts and/or the resumption of in-person proceedings. Neither judicial independence nor the authority of courts to control their own process are justifications for conducting in-person proceedings which put the health and safety of justice participants at risk.
4. Plans for the reopening of courts should be detailed, firmly grounded in science and based upon expert medical advice from public health professionals. That said, the "precautionary principle" should be applied to protect workers. This principle means that where a risk to health and safety is reasonably suspected but has not yet been established to a scientific or medical certainty, reasonable measures must still be taken to reduce that risk (see *Ontario Nurses Associations v. Eatonville/Henley Place*, 2020 ONSC 2467 for an example of when the courts have recognized and applied the precautionary principle). The precautionary principle may require reasonable measures to be taken to reduce risk which go beyond the minimum standards in public health guidance.
5. The planning and decision making for the reopening of courts should be open, transparent, respectful, and considerate of the interests and concerns of all stakeholders. Such planning and consideration should include meaningful, effective and timely consultation with stakeholders, including the representative bodies or bargaining agents for courthouse workers (e.g., legal counsel).