

**Ministry of the
Attorney General**

Office of the
Assistant Deputy Attorney General
Criminal Law Division

McMurtry-Scott Building
720 Bay Street
6th Floor
Toronto ON M7A 2S9

Tel: 416-326-2615
Fax: 416-326-2063

**Ministère du
Procureur général**

Cabinet du
Sous-procureur général adjoint
Division du droit criminel

Édifice McMurtry-Scott
720, rue Bay
6^e étage
Toronto ON M7A 2S9

Tél.: 416-326-2615
Téléc.: 416-326-2063

MEMORANDUM TO: Richard Stubbings
Assistant Deputy Minister
Public Safety Division
Ministry of the Solicitor General

FROM: Susan Kyle
Assistant Deputy Attorney General
Criminal Law Division - Ministry of the Attorney General

DATE: June 12, 2020

SUBJECT: **The Re-Opening of the Ontario Courts to In-Person
Hearings – Hearing Preparation and Witness Notification**

On July 6, 2020 the Superior Court of Justice and Ontario Court of Justice intend on resuming in-person hearings, if it is safe to do so. Work is currently underway by our Ministry's Recovery Secretariat retrofitting courthouses to ensure that the Courts can open up safely for all justice system participants. An information sheet will be shared communicating what courthouse visitors can expect from a health and safety perspective on July 6. This will assist officers with addressing any questions witnesses have regarding their in-person attendance. I am requesting that you please share this memo with the policing community.

The re-openings will look different across the province as it is a regional approach with three phases of courthouse re-openings, with the first phase being July 6. This means that as trial matters recommence, they may look very different than in the past (e.g., where witnesses are subpoenaed to attend court and how Prosecutors meet with and prepare witnesses - both police and civilian - for hearings).

The assigned Prosecutor and the Officer in Charge, or their designate (hereinafter, the "OIC"), always work cooperatively in preparing matters for trial. The OIC role includes ensuring that witnesses are subpoenaed and participating in the organization and

attendance of witness preparation meetings. We appreciate that this role will continue with the resumption of trial matters in both the Ontario Court of Justice and the Superior Court of Justice. To ensure that the trials scheduled for the coming weeks are ready to proceed, there will be an increased need for continued and frequent communication between the Crown Attorney's office or assigned Prosecutor and the OIC. There are however, some specific COVID-19 considerations that will need to be addressed and those are provided for in this memo.

Preparing for Trial

The usual practice of gathering in the main hallways of courthouses on the morning of a trial is no longer feasible or safe due to the current health situation. This means that Prosecutors and police officers will need to work together to determine the safest, most practical method of ensuring witnesses are notified and attend court when required to do so for trials and preliminary hearings.

Some trials and preliminary hearings will take place with people in-person, while others will be done entirely virtually with the consent of the accused person. Some may be done with a combination of both in-person and virtual testimony. Prosecutors will know in advance of the trial or preliminary hearing date how it is scheduled to proceed. The Crown Attorney's office will communicate the method of the proceeding to the OIC.

Prioritization of all cases is necessary. Crown Attorney's offices have taken steps to prioritize all matters scheduled for trials or preliminary inquiries starting on July 6, 2020. It is important that the OIC obtain information and communicate that information from witnesses to the Prosecutor as this may impact the prioritization of the hearings. This will ensure that Prosecutors are aware of any issues that a witness might have early in their review of cases. It also allows witnesses to receive critical communication about the changes that may impact their attendance at court.

Moreover, it is anticipated that the court will ask for confirmation of trial readiness in the one or two weeks ahead of the scheduled trial, which is why it is very important that the OIC provide the Crown Attorney's office with information about the availability of each witness including addressing the questions outlined below.

1. Issuing Subpoenas to Witnesses

Given the July 6 date is rapidly approaching, it is imperative that all police services who have not already done so, ensure witnesses have been subpoenaed for trials or preliminary inquiries. To assist in determining if a trial is ready to proceed, the OIC is being asked to canvass some questions of the witness and provide that information to the assigned Prosecutor. The Prosecutor, in turn, will advise the OIC where this matter sits on the priority list and the manner in which the trial will be proceeding.

a. Witnesses HAVE received Subpoenas prior to COVID-19:

If the witnesses received subpoenas prior to the outbreak of COVID-19, the OIC should immediately contact each civilian, police, and expert witness necessary for the prosecution.

Each witness should be canvassed regarding:

- Do they have any current medical conditions or other conditions impacting their ability to attend court in person (i.e., are they immunocompromised, or caring for someone who is)?
- Do they have any other concerns about attending court in person for the hearing? If yes, what are the details of those concerns?
- Do they have access to the necessary applications and technology that may be required for remote testimony or preparing to testify?
- Do they have a quiet, private space that they can access in the event that they are required to testify or prepare to testify remotely?
- If they cannot prepare remotely, is the witness willing to attend a police station or the Crown's Office to review their evidence?
- Do they require additional assistance to attend court, such as transportation?
- Do they have child care issues as a result of limitations on daycare and summer camps?

b. Witnesses HAVE NOT been Subpoenaed:

Where subpoenas have not yet been sent out for matters scheduled in July 2020, the OIC should contact each witness by telephone and confirm their current address, and condition for receipt of subpoenas.

The OIC should also canvass witnesses regarding:

- Do they have any current medical conditions or other conditions impacting their ability to attend court in person (i.e., are they immunocompromised, or caring for someone who is)?
- Do they have any other concerns about attending court in person for the hearing? If yes, what are the details of those concerns?
- Do they have access to the necessary applications and technology that may be required for remote testimony or preparing to testify?
- Do they have a quiet, private space that they can access in the event that they are required to testify or prepare to testify remotely?
- If they cannot prepare remotely, is the witness willing to attend a police station or the Crown's Office to review their evidence?
- Do they require additional assistance to attend court, such as transportation?
- Do they have child care issues as a result of limitations on daycare and summer camps?

The OIC should also confirm that the witnesses have received subpoenas (if they did not serve them personally).

2. Witness Preparation

Each local court will determine where and how witnesses attending in person will wait for trials. It will be important that the OIC and the Prosecutor explain witness check in and waiting areas to the witness. If a hearing is being held remotely, using a virtual courtroom, or a particular witness is testifying remotely, an informational sheet will need to be provided to witnesses by the OIC. The information sheet prepared by the Crown is attached as Appendix A. **Note, this appendix is only to be distributed to witnesses only after it is confirmed they will be testifying remotely.**

In cases where the Victim Witness Assistance Program (V/WAP) is not assisting a witness, the OIC should assist in advising the witness about the court process during the COVID-19 pandemic. Additionally, even those witnesses who are assisted by V/WAP will continue to require support from the OIC for preparation meetings with the Prosecutor.

All witnesses should be advised to communicate with the OIC or V/WAP immediately if they have a new or worsening health condition that impacts their ability to participate in the hearing.

Given courthouses are currently not accessible to the public, witness preparation may not occur at the courthouse as it often does. By necessity, meetings with witnesses may need to be held remotely and the ability to review video and audio recorded statements will require some logistical planning between the Prosecutor and police.

a. Civilian Witnesses

It will not be feasible to have multiple witnesses attend on the morning of trial to review statements. Where a copy of a statement is reduced to writing (such as a note book or written statement) arrangements should be made to provide **only the statement** to the witness in person or by electronic means. The police should caution the witness that distributing or sharing that statement is unlawful and may jeopardize the prosecution.

Where a witness is required to or requests to review a video or audio recorded statement, arrangements will be required to provide them with a suitable place to review their statement in private. This may need to be arranged in the police station/detachment in advance of the trial date. Where this is not feasible, alternative arrangements may be required. This will require ongoing dialogue with the Crown Attorney's office to arrange a secure location or alternative means for statement review.

Where civilian witnesses require preparation meetings, they may be conducted by audio or video conference. As in the normal course, the OIC will be required to participate in these conferences.

Even where a meeting including the Prosecutor is not required, the OIC will maintain communication with the civilian witnesses and advise them, if a hearing is in-person,

where to attend or, if a hearing is being held remotely in the virtual court, information on how to connect remotely.

If at any time there are health concerns arising from COVID-19, these must be shared with the Prosecutor so that arrangements can be made, such as remote testimony.

b. Police Witnesses

The OIC will need to advise the assigned Prosecutor immediately if required police witnesses are no longer available for the scheduled hearing date. If there are health concerns preventing them from attending in person, the Prosecutor will need to be advised so that an application for remote testimony can be brought or seek an adjournment.

It will be important for all police witnesses to ensure that they have the appropriate notebooks in their possession for the relevant trials.

Conducting a remote hearing changes the way that evidence is presented. It will be important to discuss with your assigned Prosecutor how these changes may impact the hearings.

3. Remote Testimony

Open and frequent communication with the local Crown Attorney's office will be required to ensure that officers are aware of the process and platform used for remote hearings.

The Crown Attorney's office will share training materials specific to the platform being used with the local police service. If an officer requests a test hearing, in advance of the trial, arrangements should be made with the local Crown Attorney's office.

This is a dynamic and novel situation, and we are confident that Prosecutors and police will continue their ongoing communications and cooperation, particularly during these challenging times.

Thank you in advance for your assistance in communicating this guidance.

Sincerely,



Susan Kyle
Assistant Deputy Attorney General
Criminal Law Division – Ministry of the Attorney General