



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Non-Medical Mask Regulation and Guidelines

Date: June 23, 2020

To: City Council

From: City Solicitor

Wards: All Wards

REASON FOR CONFIDENTIAL INFORMATION

This report contains advice or communications that are subject to solicitor-client privilege.

SUMMARY

I am providing this supplemental report to specifically address the legal issues relating to whether the City or Province has the authority to require wearing masks in public.

The City has continued to support public health guidance to recommend and encourage the use of non-medical masks in specific situations and settings where physical distancing may be difficult. Such support is part of a comprehensive and balanced approach to suppress COVID-19 transmission. Currently businesses, workplaces and event organizers are responsible for following public health guidance, and deciding whether to make mask-wearing mandatory. This is based upon each setting's particular risk profile, the occupational health and safety of employees, and health risks to members of the public invited onto their premises. Individual businesses and workplaces may refuse entry to persons not wearing a non-medical mask, subject to reasonable exceptions, including those set out in existing public health guidelines (e.g. respiratory illness).

After canvassing the potential legal authorities, it is our view that, if recommended by public health authorities, the Province of Ontario would be in the best position to mandate the wearing of non-medical masks by the general public under the Emergency Management and Civil Protection Act. If the City were to seek to enact regulations itself, the best option for doing so would appear to be Council's general authority to legislate for the health, safety and well-being of persons in the City based on clear recommendations of public health authorities and operational requirements.

Where the City seeks to implement requirements for the wearing of masks on City property or with respect to City operations (e.g. permit counters, TTC transit operations), it may also rely on its additional authority as the owner and occupier of the premises with an inherent ability to institute policies for the safe delivery of services.

The practical challenges in these situations include:

- enforcement;
- public education
- choosing the least intrusive effective means to address these concerns;
- considering who would bear the costs for the necessary supply of masks; and
- considering the method for the termination of such measures once no longer required.

Should the evidence, degree of community spread, and public health approach to mask wearing evolve, particularly with regard to various aspects of reopening, and it becomes advisable to mandate mask wearing in one or more settings, this report outlines the legal options that may be considered.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council receive this report for information.
2. City Council direct that the confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it contains advice which is subject to solicitor-client privilege.

FINANCIAL IMPACT

Adopting the recommendation in this report will have no financial impact.

DECISION HISTORY

At its May 28, 2020 Special meeting, City Council requested the City Manager, in consultation with the City Solicitor, the Medical Officer of Health and other City Officials as required, to report to the June 29 and 30, 2020 meeting of City Council on the ability of the City to require the wearing of masks or face coverings by the public within permitted businesses, offices and public gathering places so as to ensure that the re-opening of permitted businesses and activities is done in a manner which protects the health and safety of the public.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2020.CC21.1>

COMMENTS

1. Public Health Guidelines Respecting Masks (Status Quo)

This section of the report summarizes advice from Toronto Public Health. Currently, the public health officials at all government levels are recommending the use of non-medical masks or face coverings for persons in public places where it is difficult to maintain two metres of physical separation from others.

1.1 International Guidance

The World Health Organisation (WHO) recently updated its international guidance on June 5, 2020 to *encourage* the use of non-medical masks.

See: WHO: - [Access the guidance](#)

1.2 Federal Guidance

The current federal guidance states that wearing a homemade non-medical mask or face covering in the community is recommended for periods of time when it is not possible to consistently maintain a two metre physical distance from others, particularly in public settings, such as stores, shopping areas and public transportation.

See: Federal Guidance: [Appropriate use of non-medical mask or face covering](#) / [Non-medical masks or face coverings while travelling on public transportation](#)

1.3 Provincial Guidance

The Province's current guidance recommends the use of a face covering (non-medical mask such as a cloth mask) to reduce the risk of transmission of COVID-19 when physical distancing and keeping two metres' distance from others may be challenging or not possible. However, they caution that face coverings should not be placed on or used by children under the age of two, anyone who has trouble breathing or anyone who is unconscious, incapacitated or otherwise unable to remove the mask without assistance.

See: Provincial Guidance: [Learn about face coverings](#)

1.4 Toronto Public Health Guidance

Toronto Public Health currently recommends many public health measures to prevent the spread of COVID-19 in the community. They include:

- Limit non-essential trips out of your home.
- Keep two metres/six feet distance from others.
- **Wear a mask or face covering if you can't keep physical distance.**
- Clean your hands often. Use soap and water or an alcohol-based (70-90 percent) hand sanitizer.
- Avoid touching your face with unwashed hands.
- Cover your cough or sneeze with your elbow or a tissue. Immediately throw the tissue in the garbage and wash your hands.
- Clean and disinfect frequently touched objects and surfaces.
- Avoid close contact with people who are sick.
- Stay home if you are feeling unwell.

The most important measures are to keep a two metre distance from others, wash hands often and to stay home when you are sick. These main measures need to be reinforced and promoted fully. The use of masks in public settings is in addition to the above measures.

See: Toronto Public Health: <https://www.toronto.ca/home/covid-19/covid-19-protect-yourself-others/covid-19-reduce-virus-spread/>

The City's Medical Officer of Health has also supported the TTC Board's decision at its meeting of June 17, 2020 to mandate face masks on the transit system and TTC property as the TTC's ridership increases. Toronto Public Health continues to strongly recommend cloth masks and face coverings in other public settings where physical distancing is difficult to maintain, especially in indoor settings. In the context of Toronto Public Health's other responsibilities around COVID-19, including case management and contact tracing, it may not be practical for Toronto Public Health to follow up on workplaces or other settings which are not high risk.

Encouraging the use of non-medical masks together with other public health recommendations may be the best option at this time. Toronto Public Health advises that guidance on mask wearing should be balanced against ensuring that members of the public do not overemphasize their effectiveness or develop a false sense of security in their use, which may potentially lead to lower adherence to other critical preventative measures such as physical distancing and hand hygiene. In addition, the lack of practical enforcement options may undermine any relative advantages of making this measure legally mandatory. The Medical Officer of Health continues to confer with Legal Services and the Province as the reopening process evolves.

The headings that follow provide the alternative options and considerations for making mask wearing legally mandatory and enforceable.

2. Provincial Emergency Management and Civil Protection Act and Regulations

If public health advice supported the necessity of mandating non-medical masks in a large range of general community settings, the Province would have paramount authority under the Emergency Management and Civil Protection Act ("EMPCA"). This has already been used to impose infection control measures and phased reopening, and could be used to require mandatory masks particularly as the Province permits gradual reopening of various sectors of the economy.

2.1 Regulating particular Businesses or Workplaces

To date, the Province has brought in mandatory measures that have impacted a range of settings, including workplaces (e.g. closure of non-essential workplaces) and social settings (e.g. restrictions on organized social gatherings of more than 10 persons). These measures have been directed at both persons responsible for places of business, and at members of the public. Therefore, it is clear that where such

emergency orders are deemed necessary as a threshold issue, they could be directed at either individuals or particular workplaces or businesses.

2.2 Business Reopening

With regard to businesses that are already open or are preparing to reopen, the Province has already set conditions under Ontario Regulation 82/20 and Ontario Regulation 263/20 (under the EMCPA), including ensuring compliance with the Occupational Health and Safety Act and compliance with the guidance of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting. In addition, the new Stage 2 regulation (O. Reg. 263/20) with respect to personal care settings already mandates that *patrons wear masks at all times while receiving personal care services*, based on the lack of physical distancing necessary in that context. These business reopening regulations could easily extend mandatory mask wearing to other business settings, subject to appropriate consultation, if deemed necessary for the reopening of particular businesses at a particular stage of recovery. In the interim, businesses are expected to follow the existing provincial guidelines and public health guidance on how to open safely and protect their employees and customers.

See: Provincial Workplace Guidelines: <https://www.ontario.ca/page/resources-prevent-covid-19-workplace#section-0>

2.3. Enforcement/Enforceability of Provincial Orders

Another advantage to bringing in a mandatory measure under the EMCPA is that there is an existing enforcement process for a contravention of the orders pursuant to O. Reg. 114/20 - [Enforcement of orders](#). This would avoid the necessity to have set fines approved by a Regional Senior Judge of the Ontario Court for any measure that becomes a provincial offence.

3. City of Toronto By-law

Under the City of Toronto Act, 2006, the City has broad powers to enact by-laws with respect to the public. Specifically, the City has the power under section 8(2), para. 6 of that Act to enact by-laws to protect the "health, safety and well-being of persons" within the City's boundaries.

Prior to the resumption of Council meetings, the Mayor used this general "health and safety power" as part of his emergency powers to enact by-laws establishing regulations prohibiting specific behaviour within parks and public squares to ensure physical distancing during the current COVID-19 pandemic. The City could enact similar by-laws to require the wearing of masks in response to specific public health evidence and advice.

If sufficient evidence exists supporting wearing masks, a general by-law could be directed to members of the public, or to individuals responsible for the operation of businesses or other facilities, or both. It would be imperative that such a by-law be tailored to reflect current public health advice.

A by-law requiring the wearing of suitable masks could also be focussed on specific civic facilities, such as parks, public squares, or public transit; or to specific facilities both public and private, such as types of businesses, which are permitted to operate. The City's by-law would need to establish reasonable measures reflecting any potential health benefits of wearing masks in appropriate circumstances and settings, and would also need to be designed to be compatible with any orders issued by the Province under the authority of the EMCPA.

3.1. Business Licensing

The City's business licensing powers are primarily intended to regulate businesses, not their patrons. While a handful of provisions in these regulations create offences aimed at the general public, this is unusual.

The City of Toronto Act, 2006 gives the City specific business licensing powers which could be used to establish mandatory mask regulations with respect to categories of business operations. However, the City currently licenses only a limited portion of the types of businesses which operate in the City.

Business operations permitted to re-open under the EMCPA, could be subject to licensing by-laws requiring owners to take specified steps to address the wearing of masks. However, inserting this requirement into the Municipal Code Chapters 545, 546, and 547 would create a patchwork that may lead to confusion, especially for what may be a temporary measure. A requirement imposed by the Province in connection with the reopening would be more straightforward. Most importantly, strong public health advice would be required to support this sort of requirement, and the scope of the requirement should be tailored carefully to match the advice.

3.2. Toronto By-law Enforcement/Enforceability

A by-law, whether a general by-law or a business licensing by-law, could be enforced through the City's existing enforcement powers. This could include the issuance of tickets under Part I or an information under Part III of the Provincial Offences Act. The enactment of new City by-law provisions requiring enforcement through "Part I tickets" would require the City to make an application for new set fine amounts for approval by the Regional Senior Justice.

To be effective, the objective of any newly created municipal by-law must minimize or avoid infringing Charter protected rights. In addition, the City's by-laws must not conflict with the orders and regulations established by the Province under the EMCPA.

3.3. City Agencies

Pursuant to the City of Toronto Act, 2006 (COTA), the City has broad authority over most of its agencies, including the authority to direct that they follow policies established by the City. Accordingly, to the extent the City has authority to mandate the wearing of masks by members of the public, the City can direct its agencies to mandate the wearing of masks in facilities managed by the agency.

However, considering the differing mandates and circumstances of each City agency, it would seem preferable that the responsibility for seeking public health guidance and making mask wearing mandatory be left with the particular agency, based on the specifics of their operations, as the agency itself is best placed to make a determination as to what would be appropriate. As discussed below, the TTC has already undertaken an initiative regarding wearing masks on public transit.

4. TTC Recovery Measures

The TTC Board has made the wearing of a non-medical mask a mandatory requirement for every person on the transit system or on TTC property effective July 2, 2020.

The TTC's approach is based on public health evidence related to transportation systems supplied by Toronto Public Health. The Medical Officer of Health recommended, but did not herself impose, a requirement for mask use on the TTC. Considerations the TTC took into account before adopting non-medical masks as a mandatory measure included: the health and safety of the TTC users who may be exposed to COVID-19 on its buses, streetcars and subways, the safety of its workforce and other factors such as capacity issues and its ability to run extra buses, streetcars and subways in order to encourage physical distancing.

See: TTC Report: COVID-19 Transitioning from Response to Restart and Recovery - [Agenda and Reports from June 17, 2020](#)

5. Powers under the Health Protection and Promotion Act (HPPA)

The Medical Officer of Health, as with all local medical officers of health, has order-making powers under the HPPA and specifically the ability to issue orders under Section 13 in respect of a health hazard, and the ability to issue orders under section 22 in respect of a communicable disease. Section 22 is generally the appropriate power where an order may be warranted for the purposes of controlling the spread of COVID-19, a communicable disease. The Medical Officer of Health must be of the opinion, on reasonable and probable grounds, that certain conditions set out in the HPPA have been met prior to serving an order.

In relation to a measure directed at the public, there are limits on the authority of a Medical Officer of Health to pass a broad declaration (akin to a municipal by-law or provincial regulation) to prohibit an otherwise lawful activity. Accordingly, it is generally advised that the use of section 22 orders be focused on issues relating to quarantine and isolation of individuals, or to remediating or disinfecting specific settings in the context of particular outbreaks or other identifiable health risks. For example, the existing class order issued by the Medical Officer of Health requiring self-isolation is directed primarily at persons who have tested positive for or are presumed to have COVID-19. The Medical Officer of Health also has the discretion to issue an order against an owner or occupier of a business based upon reasonable evidence that the measure is necessary to decrease the particular risk presented by COVID-19 at that specific setting. This is in contrast to mandating masks as a precautionary measure directed at healthy persons in the community with no known contact with COVID-19.

Finally, it should be noted section 22 orders are not enforceable under Part 1 of the POA as a ticket offence, and may be appealed under the HPPA.

6. Occupational Health and Safety Act

At present, there are no specific provisions in the Occupational Health and Safety Act (OHSA), or in its regulations, that require the general use of masks in a workplace to mitigate the spread of infectious disease. The OHSA, therefore, does not preclude or conflict with a City initiative requiring the general use of masks in public or private workplaces in Toronto. As noted below, mandating masks may very well have the effect of influencing how the Ministry of Labour (MOL) enforces the OHSA in the context of workplace health and safety during the COVID-19 pandemic.

In its enforcement role, the MOL would have reference to a City mask initiative when reviewing the sufficiency of the health and safety measures implemented to address COVID-19 in Toronto workplaces. In determining whether an employer has fulfilled its broad OHSA duty to take "every precaution reasonable in the circumstances for the protection of a worker", the MOL will be informed by the City's mask rule, including the public health research behind it (among other authoritative sources) in setting the appropriate standard.

Once it has determined the standard for general mask use in the workplace, the MOL will use the tools available to it (orders, charges) to enforce the standard to protect the health and safety of workers, including in workplaces where the City is the employer. As an employer, the City would need to ensure that it has the ability to procure masks for its own employees for the duration of the pandemic.

7. Important Considerations:

Should City Council choose to take action to institute some measure to require the mandatory wearing of non-medical masks in some settings, there are additional issues which should be considered.

- (a) Resources for enforcement will be an issue given other competing priorities. Approaches and strategies to enforcement will need to be considered, both in respect of managing resources, and also with a view to avoiding conflict and confrontation.
- (b) Appropriate education of the public will be required to ensure that the wearing of masks does not result in a false sense of security or lead to the conclusion that other measures such as physical distancing are no longer required. It should be kept in mind that Toronto Public Health advises that such masks are largely to protect others from the wearer.
- (c) In general, public health measures should be the least intrusive effective means possible to address the concern. At the present time, the Province has largely chosen to impose less restrictive measures of physical distancing and sanitation (i.e. cleaning, hand washing). Additional measures (i.e. wearing masks) may be justified in connection with reopening if supported by public health advice. Advance consultation

with the business community could be conducted to address the particular concerns of various business.

(d) If masks are made mandatory, employees and/or the general public will either have to use their own masks, or have them supplied by their employer or the business owner in question. The costs associated with such measures must be considered to ensure that members of the public continue to have access to goods and services, including City services.

(e) The implementation of such a measure should also consider its potential termination, either by making it time-limited (i.e. a "sunset clause") or delegating authority to City officials to terminate such measures as appropriate.

(f) The City also has an inherent ability as the owner and occupier of City property and City operations (e.g. permit counters), to institute policies for the safe delivery of public services and is doing so. Again, this would be subject to public health necessity, and balanced against the limits required by the Charter of Rights and Freedoms.

8. Conclusion:

This report details many possible options to require mandatory mask-wearing. Toronto Public Health will continue to strongly recommend, reinforce, and fully promote many public health measures including mask-wearing within enclosed settings in the City of Toronto, where physical distancing may be difficult. During phases of reopening, should the public health advice support mandatory mask wearing in a particular context, there are a number of measures that could be put in place to impose this requirement.

The Medical Office of Health has been consulted in the preparation of this report.

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SIGNATURE

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ATTACHMENT

Confidential Attachment 1 - Confidential Information