

November 11, 2020

By email to:

Hon. Doug Ford, Premier of Ontario
Legislative Building
Queen's Park
Toronto, ON M7A 1A1
premier@ontario.ca

Hon. Christine Elliott, Minister of Health
Ministry of Health
5th Floor, 777 Bay St.
Toronto, ON M7A 2J3
christine.elliott@ontario.ca

Hon. Sylvia Jones, Solicitor General
George Drew Building
18th Floor, 25 Grosvenor St.
Toronto, ON M7A 1Y6
sylvia.jones@ontario.ca

Hon. Lisa MacLeod, Minister of Heritage,
Sport, Tourism, and Culture Industries
Ministry of Heritage, Sport, Tourism, and
Culture Industries
6th Floor, 438 University Ave.
Toronto, ON M5G 2K8
minister.macleod@ontario.ca

Dear Premier Ford, and Ministers Elliott, Jones, and MacLeod:

RE: Live Music Venues and the Modified COVID-19 Response Framework

Gilbert's LLP represents the Canadian Live Music Association ("CLMA"), who represent the breadth and depth of Canada's live music stakeholders (including venues, performing arts centres, festivals, concert promoters, talent agents, managers) and its complex supply chain, and Love You Live, an association of Toronto-based music venues. We respectfully request that the Province of Ontario revise its proposed modified COVID-19 Response Framework as it applies to indoor live music venues.

CLMA and Love You Live support and endorse each of the Province's stated principles for reopening Ontario and keeping Ontarians safe. We understand and support the need for aggressive measures to combat COVID-19. This is particularly true as cases rise and municipalities delay easing restrictions or impose new measures. This letter is directed to the future, when cases are hopefully in decline and the Province begins to re-open.

To be clear, our issues are not with particular safety measures. Rather, we write in respect of arbitrary distinctions being drawn between different types of establishments. In our view the Province's stated principles do not align with the proposed differential treatment of Performing Arts Facilities (as the term is used in the Province's framework), and in particular live music venues.

The decimation of Ontario's live music scenes, now fully in motion, will have far reaching and irreversible impacts. For example, a recent report by Nordicity (funded by Ontario Creates, among others) showed that 96% of Toronto music venues are at risk of business failure due to COVID-19.¹ Toronto alone has already lost at least 12 primary music venues as a result of the pandemic.

We urge you to also remember that these decisions affect more than just these businesses. The decisions you make affect the livelihoods of musicians and artists, sound engineers, event promoters, booking agents, production companies, venue staff, and many others in the live music ecology. The numbers cannot capture the impact of these closures on music fans who love the vibrancy of Ontario's music venues and who mourn their losses.

We stress that CLMA and Love You Live understand and appreciate that strict measures must be in place while Ontario experiences the current renewed wave of COVID-19 infections. However, unlike other businesses, live music venues will have no opportunity to build as restrictions ease and will suffer unduly.

We therefore ask that you consider the following:

Absolute Spectator Limits are Arbitrary

Under the proposed framework, at the Prevent level and above, live music venues would be restricted to an indoor capacity of 50 spectators with 2m physical distance maintained. These spectator limits are arbitrary for at least two reasons: 1) live music venues are arbitrarily being treated differently than other types of venues, and 2) the spectator limit is not based on the size of a live music venue or the actual ability of a venue to maintain 2m distance.

1. Spectator Limits Should Be Based on Capacity

There is no basis for setting absolute spectator limits (from the Prevent level and up) when the size of music venues varies greatly.

Under the regulations, the Phoenix Concert Theatre, with 18,000 square feet and a 1,350-person capacity has the same 50-person spectator limit as a smaller venue with 4,000 square feet and a 400-person capacity. Absolute capacity limits that are unconnected to the ability to maintain a safe physical distance are not evidence-based and should not be imposed.

2. "Live Music Venues" Should not be Treated Differently than other Venues with Live Music

The 50-person indoor spectator limit for live music venues applies at the Prevent level. Restaurants and bars have no set capacity limit until the Restrict level. Rather, the only requirement is that patrons are seated, with a minimum of 2m between tables. This is despite the fact that "singing and performing music is permitted" and "Karaoke [is] permitted" in such establishments. There is no material difference between a karaoke bar with live singing and a live music venue with live singing. Provided 2m minimum distance can be enforced and maintained, live music venues should have the same standards applied as other establishments and services that include live music.

¹ Nordicity. Re:Venues: A Case And Path Forward For Toronto's Live Music Industry. Oct. 2020. Page 7. <https://canadianlivemusic.ca/wp-content/uploads/2020/10/Re-Venues-FINAL-REPORT.pdf>

In addition, at the Prevent level, a religious service, wedding, or funeral is currently allowed 30% capacity, even though many such services also include live musical performances and singing.

The Province's framework states that "consistent measures will inform public health advice and government decisions." The Province's disparate treatment of similar situations is inconsistent with the key principles that are meant to guide the framework.

- ⇒ **RECOMMENDATION:** Live music venues' capacity should be 30% of overall capacity (or whatever capacity is allowed for other indoor spaces with live music), provided 2m physical distance can be maintained and appropriate impermeable plexiglass barriers are in place. In addition or in the alternative, capacity limits should be subject to accessible exemptions for establishments that can demonstrate safe, excess capacity.

Regulations Have Caused the Arbitrary Classification of Establishments

The Province's regulations do not align with municipal rules and by-laws. For example, the City of Toronto does not license "live music venues". As such, these venues legally operate as entertainment establishments, nightclubs, bars, or restaurants. They are now being classified as "Performing Arts Facilities" for the purpose of the Province's framework on the basis of their historical use.

In correspondence with the Ministry of Heritage, Sport, Tourism, and Culture Industries, The Phoenix Concert Theatre was informed that "...it has been determined that if a restaurant or bar in a Stage 3 region contracts with a person or group for a concert or other performance, promotes the concert or performance as an event, and advertises a start time that steers attendees to arrive at or about the same time, it would be subject to the performing arts capacity limit of 50 spectators."² Yet, religious ceremonies such as weddings and Sunday services also steer attendees to arrive at the same time. And restaurants and bars take reservations and also typically reach capacity during lunch and dinner hours. These distinctions are thus arbitrary and unfairly punish live music venues.

In order to survive, some live music venues have sought to operate as dance studios, restaurants, and other facilities. Yet, contradictory regulations have prevented such business-saving activities. For example, the Phoenix Concert Theatre has been told by the City of Toronto that its proposal to rent out its concert venue or theatre space to dancers or choreographers would be offside the Province's regulations, which limit such activities "to facilities for indoor sports and recreational fitness activities that includes gymnasiums, health clubs, community centres, multi-purpose facilities, arenas, exercise studios, yoga and dance studios and other fitness facilities."³

While concerns have been raised about the sound-level at live music venues, volume limits only apply to restaurants and bars at the Prevent level. It is unclear whether religious ceremonies ever face volume limits under the framework, but we note that many such ceremonies involve performers and worshippers singing in unison, which is itself a risk. Again, live music venues should be afforded the same treatment as bars, restaurants, and religious ceremonies that feature live music.

² See attached correspondence with the Province of Ontario at Appendix "A".

³ See attached correspondence with the City of Toronto at Appendix "B"; it is unclear why a live music venue providing dance classes would not be considered a "dance studio".

- ⇒ **RECOMMENDATION:** Treat all gatherings that include live music equally, provided that they can maintain safe physical distances for attendees/spectators.
- ⇒ **RECOMMENDATION:** Provide live music venues (and other underutilized businesses) with the explicitly stated ability to repurpose their space to accommodate safe alternative business models, such as operating as dance studios.

CLMA and Love You Live understand the delicate balance that must be found between safety and preservation of culture, heritage, and constitutional freedoms of expression and religion. Under the *Emergency Management and Civil Protection Act*, any regulations must be “necessary and essential in the circumstances to prevent, reduce or mitigate serious harm...”⁴ The inconsistency in the treatment of live music venues demonstrates that the measures being applied are not necessary and essential. The regulations must also be implemented in a manner that “limits their intrusiveness...”⁵ Unfortunately, the restrictions that have been imposed solely upon live music venues do not meet this standard. We submit that live music venues are at least as important to culture, heritage and constitutional freedom as karaoke bars and restaurants, and given their support of music and musicians, perhaps even more so.

In authoring this letter, I write not just as counsel, but as a member of the public that is personally impacted. As a musician, I have performed at these venues countless times. As a fan, I have joined my fellow Ontarians at concerts at these venues even more often. As a lawyer, I represent artists whose livelihoods depend on performing at these establishments. Our music venues are dear to our city, our province, and our national heritage. I proudly represent these critical cultural institutions and their fight for survival during this difficult time.

We therefore request:

1. A stakeholders’ meeting with Love You Live to address these and other concerns, to discuss financial assistance for live music venues, and to shape new proposals and regulations that allow live music venues to survive through the COVID-19 pandemic.
2. That the Province implement at least the recommendations set out above, namely that the Province:
 - a. Treat all gatherings that include live music equally, provided that they can maintain safe physical distances for attendees/spectators
 - b. Allow live music venues to operate at 30% capacity (or whatever capacity is allowed for other indoor spaces with live music) provided 2m physical distance can be safely maintained, and allow exemptions for venues that can demonstrate the ability to open safely with excess capacity; and
 - c. Provide live music venues with the ability to repurpose their vast spaces and explore safe, alternative business models during the COVID-19 pandemic.

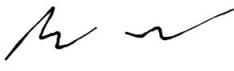
⁴ s. 7.0.2(2)

⁵ s. 7.0.2(3)1

We thank you for your prompt attention to this matter. Please contact me if you have any questions or concerns.

Regards,

GILBERT'S LLP

Per: 

Paul Banwatt

Encl.

cc: Hon. Rod Phillips (minister.fin@ontario.ca), Robin Martin (robin.martin@pc.ola.org), Helen Angus (helen.angus@ontario.ca), Mario Di Tommaso (mario.ditommaso@ontario.ca), Nancy Matthews (nancy.matthews@ontario.ca), Greg Orencsak (greg.orencsak@ontario.ca)

On Behalf Of:

- **Canadian Live Music Association**

The Canadian Live Music Association is the voice of Canada's live music industry. Established in response to an identified need in the music industry, the CLMA represents the full spectrum of the live music sector, including concert promoters, festivals, talent agencies, venues, clubs, arenas, performing arts centres, ticketing companies, industry associations and networks, as well as suppliers to the sector. Its mission is to entrench the economic, social, and cultural value of live music – creating the conditions for concerts to thrive, from coast to coast to coast.

- **Love You Live**

Love You Live is group of 28 Music Venues in the City of Toronto that came together in March 2020 during the early days of the Pandemic. Recognizing that music venues would be one of the hardest hit sectors, Love You Live's objectives are to engage, inform, and advocate for musicians and live music, and to seek out the support of all levels of government.

Appendix "A" – Excerpt of Correspondence

From: [REDACTED]@ontario.ca>
Sent: October 29, 2020 11:23 AM
To: lisa@the phoenixconcerttheatre.com
Cc: [REDACTED]@ontario.ca> [REDACTED]@ontario.ca> [REDACTED]@ontario.ca>
<ebenjamin@canadianlivemusic.ca> [REDACTED]@ontario.ca>; [REDACTED]@ontario.ca>; Erin Benjamin
Subject: RE: New Public Health Measures Implemented Provincewide to Keep Ontarians Safe

Hi Lisa:

Thank you for again submitting a proposal for the Phoenix Concert Theatre. And please accept my apologies for the time that it has taken us to respond to you, but we needed to consult with colleagues in other ministries on the details of your proposal.

As announced on October 9, 2020, in consultation with the Chief Medical Officer of Health, the Public Health Measures Table, and local medical officers of health and other health experts, the Ontario government introduced additional targeted public health measures in the Ottawa, Peel, and Toronto public health unit regions. These modified Stage 2 restrictions will be in place for a minimum of 28 days and reviewed on an ongoing basis.

Effective Monday, October 19, 2020, York Region joined Ottawa, Peel, and Toronto public health regions in a modified Stage 2, as a result of their trends in public health indicators, including higher than average rates of COVID-19 transmission. For regions in stage 2, music venues can only open for the purposes of rehearsing or performing a recorded or broadcast concert, artistic event, theatrical performance or other performance. No spectators are permitted inside. Concerts, artistic events, theatrical performances and other performances for more than 10 people can operate in Stage 2 regions, if the events take place in a drive-in or drive-through format.

For regions in Stage 3, restrictions for live music venues mean capacity is limited and subject to spectator limits specified in the Stage 3 regulation (i.e., 50 people indoors and 100 outdoors), including physical distancing and seating should be assigned wherever possible. All patrons must wear face coverings with some exceptions including while consuming food or drink, or as may be necessary for the purposes of health and safety. Plexiglass or some other impermeable barrier is required between the audience and singers and players of brass or wind instruments.

With respect to your specific question regarding capacity limits pertaining to music venues that also operate as a restaurants or bar, we have consulted with our colleagues across government as I indicated above. As a result, it has been determined that if a restaurant or bar in a Stage 3 region contracts with a person or group for a concert or other performance, promotes the concert or performance as an event, and advertises a start time that steers attendees to arrive at or about the same time, it would be subject to the performing arts capacity limit of 50 spectators.

The government will continue to review the situation and is committed to working with our partners on proposals for how their sectors can be safely reopened when the time is right.

-

We will follow up with you directly, if there are any changes relevant to your business.

Thank you,

[REDACTED]

Appendix "B" – Excerpts of Correspondence

From: [REDACTED]@toronto.ca>

Sent: October 27, 2020 4:08 PM

To: 'Lisa Zbitnew' <lisa@thephoenixconcerttheatre.com>; [REDACTED]

Cc: [REDACTED]

Subject: RE: Use of Space

I think you are right – no to dance classes but yes to dance rehearsals or performances as per the conditions.

From: Lisa Zbitnew [mailto:lisa@thephoenixconcerttheatre.com]

Sent: October 27, 2020 4:05 PM

To: [REDACTED]@toronto.ca>; [REDACTED]

Cc: [REDACTED]

Subject: Re: Use of Space

I'm not a lawyer either, but usually understand this stuff. I actually took it to mean no dance classes unless we are one of the facilities listed.

Oy. Not sure what to do.

From: [REDACTED]@toronto.ca

Sent: October 27, 2020 3:20 PM

To: lisa@thephoenixconcerttheatre.com; [REDACTED]

Cc: [REDACTED]

Subject: RE: Use of Space

Lisa – we consulted with Legal Services on both of your queries with regards to Stage Two regulations and exactly what you can do with your space. The response is as follows:

Thanks for the email and question. I've also received your question regarding the Phoenix Concert Theatre's suggestion that they may wish to pivot the use of their premises to an antique market retail use on Sundays only. I will respond to both questions below.

The Province's Stage 2 Regulation identifies specific categories of businesses, facilities and activities and prescribes whether the businesses, facilities and activities are required to be closed, closed but may open subject to certain conditions, or may open subject to certain conditions. For instance:

- Casinos, bingo halls and other gaming establishments are closed – see s. 20 of Schedule 2, and
- Strip clubs are closed – see s. 26.1 of Schedule 2;

- Nightclubs are closed, except for the purpose of serving food or beverages to patrons in accordance with section 1 – see s. 22.1 of Schedule 2, and

- Concert venues, theatres and cinemas are closed, subject to subsections (1.1) and (2) – see s. 18(1) of Schedule 2;

- Facilities for indoor sports and recreational fitness activities may open if they comply with certain conditions – see s. 13(1) of Schedule 2, and

- Restaurants, bars and other food or drink establishments may open if they comply with certain conditions – see s. 1(1) of Schedule 2.

The Phoenix Concert Theatre holds a City entertainment establishment/nightclub license (with a victualling endorsement that corresponds with the Regulation's permission to serve food or drinks to patrons) and they are a performing arts concert venue. Under the Stage 2 Regulation, the business is required to close except for the limited opening exceptions set out in section 18(1) and section 22.1. The Phoenix's proposal to rent out its concert venue or theatre space to dancers or choreographers may comply with the opening conditions of section 18(1.1). If the Phoenix is undertaking to rent the space for the purpose of rehearsing or performing a recorded or broadcasted concert, artistic event, theatrical performance or other performance then the business may open but it must comply with the following conditions:

1. No spectators may be permitted in the concert venue, theatre or cinema.
2. Every performer and other person who provides work for the concert venue, theatre or cinema must maintain a physical distance of at least two metres from every other person, except,
 - i. if it is necessary for the performers or other persons to be closer to each other for purposes of the performance or rehearsal, or
 - ii. where necessary for the purposes of health and safety.
3. Singers and players of brass or wind instruments must be separated from any other performers by plexiglass or some other impermeable barrier.

It should be noted that the regulatory authority to open the Phoenix's concert venue or theatre space to dancers or choreographers is NOT under the authority of section 13(1). The dance class provisions of section 13(1)(1.1) are only available to facilities for indoor sports and recreational fitness activities that includes gymnasiums, health clubs, community centres, multi-purpose facilities, arenas, exercise studios, yoga and dance studios and other fitness facilities.

As a final matter, the Phoenix's proposal to rent its nightclub or concert venue or theatre space to an antique market operator on Sundays does not appear to comply with the Stage 2 Regulation. It is important to note that under section 4 of Schedule 1 of the Stage 2 Regulation, the permission to rent out meeting or event space is qualified in so far as "a business or place that is open may only rent out meeting or event space" subject to the prescribed conditions. Under section 18(1) and section 22.1, performing arts venues and nightclubs are closed and the limited opening exceptions for these types of businesses do not include renting out the premises or part of the premises to a retail business or an organized public event such as a pop-up, once a week antique market.

I appreciate how very difficult these restrictions are for you and your business and I sincerely wish you every success – notwithstanding the challenges during this Stage.



To His Worship John Tory
 Mayor, City of Toronto
 100 Queen St, West
 City Hall, Second Floor, West
 Toronto, ON, M5H 2N2

CC Councilor Joe Cressy - TMAC Chair

From Jeff Cohen
 c/o Horseshoe Tavern
 + 25 Toronto Live Music Venues

Date Thursday, October 15th, 2020

Re Provincial Emergency Regulation 364/20

Dear Mayor Tory:

Toronto live music venues really need your help in recovering from the effects of the pandemic. Without your assistance and advocacy, we are concerned about our survival.

BACKGROUND

On March 17, 2020, due to COVID 19, and by order of Provincial Civil Authority, all of Toronto's live music venues were closed. We stayed shut for another four months, until Provincial emergency regulation 364-20 (mid-July 2020) allowed us to re-open partially, to a maximum **fixed capacity of 50 people – regardless of the overall capacity of the venue.**

The legislation stipulates other requirements for spacing of tables, installation of impermeable barriers around the stage, and conduct of staff and patrons - all of which seemed reasonable. Accordingly, we have plexi-glassed our stages, purchased tables and chairs, trained staff in social distancing, and addressed all other safety protocols.

ISSUE

Seven months into COVID-19, **fewer than 10% of Toronto's live music venues have re-opened.** Why? Because **the inflexible 50-person capacity has proved too economically restrictive** for all but a very few.

Though the **legislation provided our sister bars and restaurants**, and other entertainment facilities such as **event spaces, cinemas, and bingo halls**, with the **opportunity for exemptions to the 50-person cap**, our business has been limited in a way that neither Toronto Public Health nor the Ministry of Health can explain.

Other businesses have been able to submit a written plan to the Ministry of Health, or Toronto Public Health, allowing up to a 30% capacity or 200 people, whichever is less. **However, every live music venue that has applied for an exemption has been rejected**, based on the interpretation that we are

not a bar, nor a restaurant, nor an event space, but a **performing arts space – and penalized for being so.**

FAIRNESS

We fail to understand why bars and restaurants, cinemas, event spaces, and bingo halls were encouraged by the City and the Province to seek capacity exemptions - and why, because we **choose to operate a business that supports live music artists, we have been being legislatively penalized.** What is the difference between a live music venue (many of which carry a City of Toronto restaurant license) and a restaurant that does not present live music? Toronto Public Health has been unable to answer this question - **but suggested that we retain legal counsel to pursue the issue.**

REQUEST

We ask to be treated the same as all other Toronto bars, restaurants and event spaces when the City again moves forward to Stage 3. A city that values music and musicians should surely not penalize businesses for presenting live music – but if the capacity limits for live music venues remain more restrictive than those governing all other City businesses in our sector at that point, we fear that even more live music venues will close their doors for good.

We also ask that you speak with Premier Ford and/or Minister Elliott and convince them to add the following to 364-20, sub-section 11 (1) – ‘performing arts’

Subsection 11 (1.1) does not apply if the performing arts venue is in compliance with a plan approved by the Office of the Chief Medical Officer of Health

VISION

With **your advocacy this minor legislative change can be effected**, live music venues will no longer be excluded from opportunities afforded other similar businesses – and **we will re-emerge in phase 3 as full participants in Toronto’s economic recovery**, aiming at returning to and eventually exceeding the \$850m in annual economic impact we generate for the city and its residents.

Thanks so much for all you do and will continue to do for Toronto live music.

Jeff Cohen

Collective Concerts – Toronto Music Advisory Committee – "Love You Live" Toronto Music Association

Adelaide Hall, Bovine Sex Club, BSMT254, Cameron House, Castro's, Dakota Tavern, Dora Keogh, Drake Underground, Drom Taberna, Garrison, Baby G, Hard Luck, Sneaky Dee's, Horseshoe Tavern, Lee's Palace, Lula Lounge, Mod Club, Queen Elizabeth Theatre, Monarch Tavern, Opera House, Phoenix Concert Theatre, The Rex Hotel, The Rivoli, Sauce, Supermarket, The Tranzac