



**OBA Submission on the Consultation on the Financial Services Tribunal
Practice Directions:
*In-Person Hearings COVID-19 and Electronic Hearings***

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General Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide a submission on the two practice directions put forward for public consultation by the Financial Services Tribunal (“FST”) in October 2020, namely, the *In-Person Hearings COVID-19 Practice Direction* and the *Electronic Hearings Practice Direction*.

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest, and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Working Group on this issue. The Working Group is composed of members from the following OBA Sections: Administrative Law, Civil Litigation, Criminal Justice, Insurance Law and Pensions and Benefits Law. Collectively, our members regularly represent a broad range of clients appearing before the FST.

1. Scope of the Practice Directions

The practice directions propose new requirements in respect of how in-person or virtual proceedings will be conducted in the particular circumstances arising from COVID-19 restrictions. However, the *Electronic Hearings Practice Direction*, states at para. 2 that: “*this practice direction is of general application and is not limited to COVID-19 related circumstances*”.

As drafted, it is not clear if some or all of these new requirements are being imposed for the specific time period that the COVID-19 restrictions are in place (which flow from applicable legislative or regulatory requirements currently in force to deal with COVID-19, such as the *Reopening Ontario (A flexible response to COVID-19) Act, 2020*), or if they



will continue indefinitely. The COVID-19 legislative or regulatory restrictions will change or end at some point.

We suggest that the practice directions specifically indicate that these new in-person or virtual proceeding requirements are being implemented due to applicable current COVID-19 legislative or regulatory restrictions and consequently designed to deal with a particular (calendar) time frame. We believe adding such a provision could help ensure that there is no inadvertent impression or expectation that even after the COVID-19 situation ends, proceedings will be mostly virtual or subject to restrictions which are only in place due to current temporary legislative or regulatory requirements.

2. Disproportionate Impact on Disadvantaged Participants

The impact that a hearing format may have on the parties and participants at the tribunal will vary greatly, depending on the circumstances applicable to those individuals. For example, in some cases, proceeding by way of a written hearing could increase costs. The written hearing format could also present challenges to vulnerable and disadvantaged participants, such as self-represented parties or parties who cannot meaningfully participate through an official language. The electronic format could present challenges for those in rural areas or on indigenous lands who do not necessarily have a stable broadband internet connection or where this connection is very costly. Further, seniors may have difficulty using the technology.

Proceeding by way of written hearings can also result in timely and valuable submissions being lost since new or material submissions are often made in the course of oral submissions where the party is responding spontaneously to material facts or arguments that have just arisen or require that they be addressed in the circumstances at that moment. Imposing written hearings as a default format of hearing is not necessarily consistent with increased access and efficiency. Later in this submission, we discuss how this concern could be addressed.

3. Sunset or Review Clause

Related to point #1 above, we suggest that the practice directions also include a sunset or review clause that indicates that the new proceeding requirements will end on a specific date or be subject to review by a specific date.



The FST has authority to make rules for the practice and procedure to be observed, and can alter its rules or practice directions at any time. Nonetheless, we believe including such a clause clarifies that these new proceeding requirements are largely in place because of existing COVID-19 legislative or regulatory requirements, which at some point will change or end. In other words, these new requirements should not be considered or interpreted as the “default” position once the COVID-19 legislative or regulatory restrictions are removed. While the FST deals with sophisticated matters and litigants, and this point might appear self-evident, many may conclude or proceed on the basis that this is or should be the “default” position, and in-person proceedings should be reduced or eliminated. Clarifying this on the face of the practice directions would be helpful.

4. Litigant/Participant Resources and Access to Technology

Many people – as is often the case of self-represented or less sophisticated parties - do not have resources or access to a cell phone, computer equipment, a printer, unlimited internet access and various technological services that would be needed to participate in virtual proceedings in a meaningful and timely manner. Also, some parties and their counsel may be participating virtually, but not physically together at the same time, or similarly, one may be able to virtually participate but not the other.

Again, we observe a potentially disproportionate impact of the proposed shift in the process on disadvantaged parties. In addition to actual access to technology, some hearing parties/participants may not have the necessary sophistication or ability to deal with the variety and complexity of technology that is increasingly required for virtual proceedings. While the practice directions provide detail on how technology such as Microsoft Teams should be used, the requirements appear to be premised on all participants at the tribunal having both the required technological resources and the necessary technological understanding to allow them to participate in the varied components of a virtual proceeding. On that note, we suggest, for example, that parties be permitted to participate via smartphone or dial-in telephone as opposed to a computer with internet access if necessary and where appropriate, subject to submissions on the format by the parties.

We appreciate that this issue faces all tribunals attempting to deal with COVID-19 restrictions. We believe that it is important that the FST practice directions specifically provide for rules that address how persons with no such ability, resources or access can be accommodated without jeopardizing the integrity or timeliness of the proceedings,



including how the FST could provide office space, access to technology or other assistance, for example, to such persons.

5. Specific Provisions

Below are comments on specific provisions of the practice directions which complement or amplify the comments raised above:

In-Person Hearings COVID-19

Paras. 7 to 10 (Discretionary In-Person Hearings)

Para. 7 provides that the FST may, in its discretion, order an in-person hearing or if a party demonstrates that there are “*exceptional or special circumstances which justify an in person hearing*”.

Para. 9 provides that... *However, the Tribunal, if satisfied that such safety and health concerns can be met, may consider exceptional or special circumstances supporting an in-person hearing which, for example, could include where a party demonstrates that irreparable harm will be caused to the party, the merits of its case, or its ability to present that case, unless an in-person hearing is held.*

While “*irreparable harm*” is referred to in para. 7, there appears to be no definition of what constitutes “*exceptional or special circumstances*” referred to in para. 7 and it is not clear if “*irreparable harm*” is the actual test for such a determination.

We suggest that a section be added outlining what constitutes “*exceptional or special circumstances*”, with a listing of examples and provisions for analogous grounds.

Also, para.10 provides that the consent of the parties to an in-person hearing is preferable, but by itself does not necessarily constitute exceptional or special circumstances. We believe the consent of the parties should prevail, and also it would be helpful for the parties to be able to make submissions at the start when pleadings are exchanged on the preferred method of proceeding.



Para. 11(a) (Discretionary In-Person Hearings)

This paragraph refers to the FST being able to limit the number of persons whose physical attendance is deemed by the FST to be essential where there is an in-person hearing.

Presumably, the intent is not to limit the total number of witnesses, but to limit the number who must physically attend. As drafted, this is not entirely clear and we suggest this could be refined.

Electronic Hearings

Para. 4 (Pre-Hearing Conferences)

The first sentence of para. 4 states: *“While the Rules provide that a pre-hearing conference may be held in person, they direct that “Pre-hearing conferences shall be held by tele-conference, unless a party satisfies the Tribunal that holding it in this format would likely cause that party significant prejudice, or unless the Tribunal directs otherwise” (Rule 16.02).”*

We suggest that “shall” be changed to “may” like the beginning of the sentence, so that it provides an option and does not inadvertently hinder opportunities for resolution at an early state, such as an adjudicator mediating the matter and having access to the benefits of an in-person setting, such as caucus discussions and break-out rooms. The use of “may” would also be consistent with the other proposed changes.

Also, para. 4 does not appear to provide for video pre-hearing conferences, and we suggest that such a provision be added.

For video pre-hearing conferences, there should be a description of how the video platform permits break-out rooms and caucus opportunities where requested. The practice direction should detail how the tribunal intends to use the video platform to maintain the separation, confidentiality, and integrity of such break-out room or caucus discussions.



Appendix “A” – Guide to Electronic Hearings (Video Conferencing) and Microsoft Teams:

Para.15 of Appendix “A” (Recording)

As drafted, it is not entirely clear on who is prohibited from recording the proceeding or how that could be enforced. It is relatively easy to record using the device or application on which the virtual proceeding is taking place, or even to use a different device to record the matter as it is proceeding.

Para. 20 of Appendix “A” (Objections)

Using Microsoft Teams, several steps are outlined in order to raise an objection such as raising your hand first and turning on the microphone.

It does not appear necessary to have a two-step process in order to raise an objection. This could be cumbersome or confusing in real time, and could be an impediment to making a needed or appropriate objection in real time, thus resulting in lost efficacy or material argument precisely at the moment it may be needed. This two-step process could also be a barrier for those who are less “tech savvy”.

We suggest that this be modified to state that a party wishing to object can unmute their microphone at the appropriate time and state their objection.

Para. 23 of Appendix “A” (Public proceedings best practice)

Members of the public who wish to observe must do so on the Microsoft Teams platform on prior notice by e-mail to the FST Registrar. We submit that this would not be in accordance with the “Open Court” principle and could be viewed as a barrier to observing proceedings.

Further, the process for observing a proceeding appears premised on everyone having equal ability/sophistication or technological resources and access as discussed above in point # 4.

We suggest that a proceeding schedule be posted and a mechanism be implemented to allow the public to simply go onto the FST website and observe the proceeding in real time (where no confidentiality orders are involved), the way that debates of the Legislative



Assembly or its committees can be observed, for example. For those without a computer, they could attend at a public library, for example, to use those computers, or, they could view the proceedings through their smartphones.

6. General Comment - Assessments of the Regulated Sectors for the FST's Expenses

Presumably if the FST is increasingly conducting its activities and proceedings on a virtual basis, this could result in the FST incurring lower expenses which, in turn, could result in the regulated sectors being assessed lower amounts for the expenses incurred by the FST. We note that if the FST undertakes particular measures to assist self-represented or less sophisticated participants to access the FST virtual proceedings, as mentioned in point #4 above, this could result in the FST incurring more expenses.

While it may be outside the scope of the practice directions to deal with how the regulated sectors will be assessed for the FST's expenses in relation to new or particular COVID-19 restrictions, we note that how these particular expenses might be determined or assessed could be of concern to the regulated sectors.

Conclusion

Once again, the OBA appreciates the opportunity to provide comments to the call for consultation on the within two practice directions put forward by the FST and would be pleased to answer any questions that may arise. We look forward to participating in future consultations as the FST moves forward.