

<p>Consultation Draft</p>

Financial Services Tribunal

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**FINANCIAL SERVICES TRIBUNAL OF ONTARIO -
PRACTICE DIRECTION – ELECTRONIC HEARINGS**

Background

~~1. Due to ongoing COVID-19-related public health and safety restrictions, until further notice or unless the Tribunal orders otherwise, all existing and new motions/hearings in a proceeding scheduled to be heard by the Tribunal are to be held either in writing or electronically (by tele-conference or by video conference), as determined by the Tribunal pursuant to the Tribunal's Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal (the "Rules") and practice directions, and in consultation with the parties to the proceeding.~~

2.1. Under Rule 2.04 of the Tribunal's Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal (the "Rules"), the Tribunal may issue practice directions pertaining to certain types of proceedings or with respect to any matter the Tribunal deems appropriate.

3.2. The Rules also permit the Tribunal to direct the parties to participate in pre-hearing conferences (Rule 16.02) and to hold hearings (Rules 20-23; Rule 30) electronically, as well as orally (i.e., in person) and in writing. This practice direction applies to any part of an electronic proceeding (i.e., pre-hearing conference, motions and hearings) to be conducted by means such as, tele-conferencing (telephone) or video conferencing using Microsoft Teams, and is subject to the Rules, the *Statutory Powers Procedure Act*, R.S.O. 1990, c 22 (the "SPPA") and other applicable legislation. This practice direction is of general application and is not limited to any particular factor set out in Rule 20.03, including public health circumstances COVID-19-related circumstances. However, this practice direction will be reviewed and revised as required in response to changes in COVID-19-related public health and safety circumstances.

4.3. Under Rule 3, "electronic hearing" is defined to mean "...a hearing held by tele-conference, video conference or some other form of electronic technology allowing persons to hear one another." Rule 3 applies to pre-hearings, motions and hearings.

Pre-Hearing Conferences

5.4. 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). The Tribunal’s current practice has, for some time, been to hold pre-hearing conferences by tele-conference, unless a party to the proceeding submits a request to the Registrar for an oral or in-person pre-hearing, or the chair of the panel determines that the specific circumstances relating to the parties warrant an oral or in-person pre-hearing. This practice is further reflected in current Tribunal pre-hearing procedures and practices and is anticipated to continue. Under this practice direction video-conferencing may be ordered by the Tribunal, instead of tele-conferencing, as the pre-hearing conference format.

Hearings and Motions

- ~~6. For hearings and motions, the pre-COVID-19 practice was to hold them orally or in-person, whenever possible. Written or electronic hearings are also available (Rule 20), subject to certain factors (Rule 20.03) including any potential prejudice to a party and the extent to which there are facts in dispute requiring in-person witness testimony, credibility assessments, etc.~~
- ~~7. Oral or in-person hearings have provided a more traditional format for parties to lead evidence, examine witnesses, make submissions and otherwise engage with the Tribunal panel and other parties. Oral hearings also accommodate the Tribunal’s requirements relating to public access to proceedings (Rule 20.03; Rule 21.03; subject to Rule 23). Prior to COVID-19 concerns in-person hearings were the preferred hearing format for the Tribunal, as well as for the parties and it is anticipated that in-person hearings will again become the preferred format after COVID-19 concerns have eased. At the present time, during the COVID-19 pandemic and subject to the Rules and the Tribunal’s Discretionary In-Person Hearings During COVID-19 practice direction, electronic hearings are preferred.~~
- ~~8.5. Because of logistical and other hardships, or due to COVID-19 physical distancing recommendations by public health authorities at the federal, provincial and/or municipal levels it may be necessary and/or appropriate, At the request of a party, order of the Tribunal or otherwise, for the Tribunal may to convene all or any part of a hearing or motion electronically in accordance with its authority under Rule 20.03 which provides:~~

“20.03 In deciding whether to hold a written or electronic hearing in lieu of an oral hearing, or to hold a hearing in a combination of formats, the Tribunal shall consider whether an alternative hearing format will likely cause any party significant prejudice and may consider any relevant factors, including:

- (a) the subject matter of the hearing;
- (b) the nature of the evidence, including whether credibility is an issue and the extent to which facts are in dispute;
- (c) the extent to which the matters in dispute are questions of law;

- (d) the convenience of the parties;
- ~~(d)~~(e) _____ the cost, efficiency and timeliness of the proceeding;
- ~~(e)~~(f) avoidance of unnecessary length or delay;
- ~~(f)~~(g) ensuring a fair and understandable process;
- ~~(g)~~(h) _____ the desirability of facilitating public participation or public access to the Tribunal's process;
- ~~(h)~~(i) any other relevant factors affecting the fulfilment of the Tribunal's statutory mandate, including corroborated personal health issues raised by a party, public health and safety concerns or compliance with government public health restrictions."

9.6. The format to be used during all or any part of a proceeding will be determined by the Tribunal panel chair at a pre-hearing conference based on the Rule 20.03 considerations, Tribunal practice directions ~~(including the Tribunal's Discretionary In-Person Hearings During COVID-19 practice direction)~~ and the submissions of the parties.

10.7. Where the Tribunal determines that the appropriate electronic format for a pre-hearing conference, motion or hearing is by means of video conferencing, Microsoft Teams will be used where feasible.

11.8. In general, as part of the pre-hearing arrangements for an electronic hearing, the panel chair will have a detailed discussion with the parties relating to a number of matters, including:

- a. the participants' technical skills/savvy and device hardware/internet/speed/bandwidth capabilities to troubleshoot any threshold connectivity or other challenges participants may face at an audio/video hearing;
- b. reminding the parties that the prospect of an audio/video conference hearing makes it even more desirable for them to make every effort to reach agreement on an Agreed Statement of Facts ("ASF") and Agreed Book of Documents ("ABD") which is as comprehensive as possible;
- c. the requirement that disclosure, service and filing of all documents and submissions shall be in electronic format (e.g., PDF or Word by email, thumb drive or other electronic means) unless otherwise ordered by the Tribunal in consultation with the parties;
- d. reminding the parties that if a witness is participating in the hearing electronically, the witness (in addition to the other parties and the Registrar) should have, in advance, copies of all documents the witness is expected to rely on at the hearing during testimony. The panel chair will also encourage the parties to submit affidavit evidence through witnesses that will be subject

- to cross-examination at the hearing or, if the Tribunal so orders in consultation with the parties, cross-examined on the record before the hearing;
- e. reminding the parties that while evidence disclosed among parties other than that contained in an ASF/ABD should not normally be filed with the Tribunal in advance of the hearing, an exception is made for electronic hearings. Where the hearing format is electronic in whole or in part, the parties will be told to file all documents in this “other evidence” category with the Registrar at least 30 days prior to the commencement of the hearing. This will facilitate the Registrar’s ability to organize the documents expected to be put into evidence by the parties through their witnesses at the hearing. When received in advance the documents can be easily distributed to panel members by the Registrar at the hearing and placed on screen by the Registrar as potential exhibits for all to see, in addition to the copies directly in the possession of the witnesses and the parties; and
 - f. scheduling a practice Microsoft Teams session with the Registrar (absent Tribunal members) in advance of the first hearing date to familiarize the parties with the electronic hearing format and test technical requirements.

Public Access

12.9. Tribunal hearings, whether oral, written or electronic, are open to the public, unless the Tribunal orders otherwise pursuant to section 9 of the SPPA and Rule 23. Members of the public who wish to attend an electronic hearing should refer to the hearing schedule posted on the Tribunal website and contact the Registrar well in advance of the hearing to obtain instructions.

Guide to Video Conferencing for Proceedings Using Microsoft Teams

13.10. Attached to, and forming part of, this practice direction as Appendix “A” is a Guide to Video Conferencing for Proceedings Using Microsoft Teams initially developed by Tribunals Ontario and adapted for use by the Tribunal. Parties are encouraged to familiarize themselves with this practice direction including Appendix “A”.

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