



## **Financial Services Tribunal**

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## **Tribunal des services financiers**

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## **FINANCIAL SERVICES TRIBUNAL OF ONTARIO**

### **PRACTICE DIRECTION – DISCRETIONARY IN-PERSON HEARINGS DURING COVID-19**

#### **Background**

1. This practice direction is COVID-19 specific in its application and will be reviewed and revised, as required, in response to changes in COVID-19-related public health and safety circumstances.
2. Further to Rule 25.01 of the Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal (“Rules”), in April 2020 the Tribunal decided to adjourn all previously scheduled in-person motions/hearings before it due to ongoing COVID-19-related public health and safety restrictions. These in-person adjournments continue until further notice or until the Tribunal orders otherwise in specific proceedings.
3. Also, until further notice, and subject to Tribunal orders under this practice direction or otherwise, all existing and new motions/hearings in a proceeding scheduled to be heard by the Tribunal will be held either in writing or electronically (by tele-conference or by video conference), as determined by the Tribunal pursuant to its Rules and practice directions in consultation with the parties to the proceeding.
4. The Registrar has contacted all affected parties to existing proceedings with respect to such adjournments and pre-hearing conferences were scheduled as necessary for the parties, with their panel chair, to discuss any required changes to proceeding arrangements, including the setting of new motion/hearing dates, as required.
5. Under Rule 2.04, the Tribunal may issue practice directions pertaining to certain types of proceedings or with respect to any matter the Tribunal deems appropriate.

6. In this regard, the Tribunal has prepared and posted on its website an electronic hearing practice direction to provide parties with a framework for motions/hearings to be conducted electronically by means such as teleconferencing (telephone) or by video conferencing using Microsoft Teams. The electronic hearing practice direction is of general application and is not limited to COVID-19-related circumstances. Under the electronic hearing practice direction the Tribunal retains the discretion in all circumstances to determine the manner in which an electronic or virtual motion/hearing will be conducted (Rule 20, 21 and 22).

### Discretionary In-Person Hearings

7. The Tribunal has prepared this Covid-19-focused in-person hearing practice direction to provide guidance in relation to the exercise of the Tribunal's discretion to order in-person hearings during the Covid-19-related adjournments described above.
8. As further discussed below in paragraph 10, the Tribunal may, in its discretion, after determining that adequate health and safety precautions are in place in the circumstances, order that a matter be heard by way of in-person hearing, either on its own motion, or at the request of a party. An in-person hearing will be considered if the Tribunal determines that there are "exceptional or special circumstances" having regard to the principles of natural justice and fairness and the impact the format of the hearing will have on those principles in all of the circumstances. A request by a party for an in-person hearing must be made to the Tribunal by way of written motion under the Rules.
9. This practice direction applies to pre-hearings, motions and hearings and is subject to the Rules, the *Statutory Powers Procedure Act*, R.S.O. 1990, c 22 and all applicable legislation.
10. In considering whether to exercise its discretion to order that a matter be heard by way of in-person hearing during the COVID-19-related adjournment, the Tribunal will consider the following:
  - a. **Health and Safety Precautions** - The health and safety of participants, including Tribunal members and Tribunal staff, as well as the public, in the context of COVID-19 restrictions and best practices, are paramount. In determining whether the requirement for adequate health and safety precautions can be met, factors to be considered by the Tribunal include<sup>1</sup>:

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<sup>1</sup> Note - In a recent Ontario Securities Commission decision (First Global Data Ltd (Re), 2020 ONSEC 23) it was further noted that the adequacy of precautions is a highly fact-specific inquiry that may depend on factors such as the dimensions of a hearing room, the presence of ventilation systems, the incidence of COVID-19 in the relevant area, and the timeliness and effectiveness of COVID-19 tests in that jurisdiction.

- i. ability to permit appropriate physical distancing and availability of protective barriers,
- ii. personal protective equipment including masks/face coverings,

*(Note: All persons who refuse to wear a mask/face covering will be required to identify in advance the exemption that prevents them from wearing a mask/face covering. The Tribunal may require written medical confirmation before granting any such exemption. In addition, exemptions will only be granted in consultation with all participants and may impact the Tribunal's assessment of the suitability of the in-person hearing format. For further information see Appendix "A")*

- iii. hearing room capacity relative to the number of in-person participants,
- iv. adequacy of available cleaning practices,
- v. restrictions on use of common areas, and
- vi. compliance with **Appendix "A"**-related COVID-19 in-person attendance safety protocols, including:
  1. frequent hand-washing and sanitizing; and
  2. the completion of a COVID-19 screening questionnaire and other related documents in advance of the proceedings.

b. **Principles of Natural Justice and Fairness** - To apply the principles of natural justice and fairness in the decision of whether to order an in-person hearing, factors to be considered by the Tribunal include:

- i. whether an in-person hearing is preferable given the exceptional complexity of the evidence and/or issues in the matter; and
- ii. whether a party is unable to reasonably participate in an alternative hearing process due to significant technological issues or other personal reasons, such as personal health issues or a need for accommodation.<sup>2</sup>

c. **Exceptional or Special Circumstances** – After considering a and b above, the Tribunal will consider whether there are any exceptional or special circumstances which support holding an in-person hearing to avoid significant prejudice. These considerations, with reference to Rules 20.03 and 22, may include:

- i. the subject matter of the hearing;

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<sup>2</sup> Requests for accommodation in relation to hearing format can be made at any point in the adjudicative process. Requests should be detailed and they should be made as soon as possible. For matters that are not yet scheduled, parties may contact the Registrar and/or raise the issue with their panel chair.

- ii. the nature of the evidence, including whether credibility is an issue and the extent to which facts are in dispute;
- iii. the extent to which the matters in dispute are questions of law;
- iv. the convenience of the parties;
- v. the cost, efficiency and timeliness of the proceeding;
- vi. avoidance of unnecessary length or delay;
- vii. ensuring a fair and understandable process;
- viii. the desirability of facilitating public participation or public access to the Tribunal's process; and
- ix. any other relevant factors affecting the fulfilment of the Tribunal's statutory mandate.

**11.** A party's lack of comfort with using certain technology will not, by itself, be a sufficient basis upon which to justify holding an in-person hearing under this practice direction. The Tribunal will, however, canvas with the parties and the Registrar the possibility of providing office space, access to technology or other assistance to persons who raise concerns with respect to technology and electronic hearings.

**12.** The agreement or consent of the parties that an in-person hearing is preferable or optimal does not demonstrate exceptional or special circumstances. This practice direction is founded on the principle that it is desirable that proceedings move forward expeditiously to a safe and fair hearing without lengthy or indefinite adjournments. In this regard, the Tribunal will schedule written or electronic hearings while COVID-19 concerns remain active. Exceptional or special circumstances supporting an in-person hearing under this practice direction will be rare and based on the unique circumstances of the proceeding and the parties involved. While the Tribunal will take into consideration the consent of the parties in considering whether an in-person hearing should be held or whether adjournments should be granted, such consent alone will not be determinative, If the Tribunal determines, in accordance with paragraph 10 above, that an in-person hearing should be held, the in-person hearing will be scheduled by the Registrar of the Tribunal on dates set in consultation with the parties and subject to strict compliance with COVID-19-related restrictions in place at the Tribunal premises, as ordered by the Tribunal.

**13.** If the Tribunal decides to hold an in-person hearing, it may, in its discretion, impose such conditions as may be required to protect public health and safety, including that of all participants. Such measures will be determined in the exercise of the Tribunal's sole discretion and may include, but are not limited to the following (see **Appendix "A"** for further information):

- a. limiting in-person attendance to those persons whose physical presence is deemed to be essential (e.g., witnesses, parties, counsel, etc.), in the sole discretion of the Tribunal;
- b. ordering in-person attendees to comply at all times with all health and safety measures or other restrictions put in place at Tribunal premises;
- c. requiring masks be worn;

- d. requiring electronic copies of documents be filed with the Registrar instead of filing paper copies of documents during the hearing;
  - e. restricting what may be brought into the hearing room;
  - f. organizing the hearing room to ensure that appropriate social distancing takes place;
  - g. requiring nonessential or other attendees to participate by way of video conference or tele-conference;
  - h. posting security at the door to ensure that measures are followed; and
  - i. limiting in-person public attendance at the hearing in favour of public electronic access.
- 14.** In conjunction with the Tribunal's determinations made above, the Tribunal may decide to hold an in-person hearing with one or more electronic participants (including public access) or with written format components. Such "hybrid" hearing formats will be considered by the Tribunal under this practice direction having regard to the Tribunal Rules and the Electronic Hearings Practice Direction.
- 15.** This practice direction is issued having regard to ongoing COVID-19 restrictions, including current public health guidance and the Tribunal's operational capacity. It will be reviewed periodically, as circumstances warrant, in the ongoing process of gradually resuming the Tribunal's ability to hold in-person hearings on a regular basis.

**December, 2020**

**APPENDIX “A”**

**Discretionary In-Person Hearings During COVID-19  
Practice Direction**

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**Before the In-Person Hearing – Preparing the Tribunal’s Offices**

**Preparing Staff**

A number of precautions have been taken to ensure the health and safety of Tribunal members, staff and hearing participants when an in- person hearing is scheduled. Staff (the Registrars) and Tribunal members have been advised of their health and safety obligations, including the obligation to conduct a COVID-19 Self-Assessment prior to attending the Tribunal offices and to stay home if they are sick or have symptoms associated with COVID-19. They have also been advised of physical distancing and mask/face covering requirements.

## Temperature Check

Anyone attending the Tribunal's offices will be required to have their temperature taken immediately upon entry.

## Physical Distancing

Current best practices indicate that a distance of 2 metres or 6 feet is appropriate to provide protection from the spread of COVID-19. The following steps have been taken to support physical distancing within the Tribunal offices:

1. The Registrars and Tribunal members are required to work from home to reduce the number of people in the Tribunal's offices.
2. The furniture in the hearing rooms and waiting areas has been reconfigured to support physical distancing.
3. Other measures to support physical distancing may include:
  - Signage and visual markers
  - Floor decals/queuing markers
  - Entry and exit lanes to and from elevators
  - Guidelines for building entry and exit
  - Capacity restrictions and standing location markers in elevators
  - Reminders by the Registrars about staggering exit times from hearing rooms

## Hearing Room Capacity

Maximum occupancy levels will be observed for hearing rooms which can support physical distancing measures. The maximum capacity for each room will be indicated at the entrance of the room.

## Plexiglass Barriers

Plexiglass barriers may be installed as an engineered control to help prevent the transmission of COVID-19, even where physical distancing is possible. Plexiglass barriers assist with accessibility, security and safety of persons, as well as the normal operation of hearings.

## Hand Sanitizer

Frequent handwashing is the best way to stop the spread of COVID-19. When

handwashing is not possible, hand sanitizer should be used. Wall-mounted hand sanitizer stations are located in the building main lobby area and throughout the Tribunal offices as an administrative control to help stop the spread of COVID-19. Hand sanitizer stations are clearly marked. Hand sanitizer is given directly to Tribunal members and staff.

Visitors are encouraged to use hand sanitizer upon entering the building, and required to do so upon entering the Tribunal offices and hearing room. Exceptions will be made for those people who are unable to use hand sanitizer for medical reasons.

## Enhanced Cleaning

Enhanced cleaning using cleaning products that are effective at reducing the spread of bacteria and viruses is another administrative control used to help stop the spread of COVID-19. The current cleaning practice is to help ensure a hygienic environment is maintained throughout the Tribunal's offices.

Enhanced cleaning of high-contact areas has also been implemented, where appropriate. High-contact areas include: door handles, hand rails, elevators, push plates, light switches, washroom areas, etc. Enhanced cleaning includes cleaning with stronger disinfectant cleaner consistent with the advice of public health officials.

Appropriate staffing and supplies are available in the event that building cleaning and sanitizing protocols require further enhancement.

## Personal Protective Equipment (PPE) and Face Coverings

**Personal protective equipment (PPE)** includes surgical/procedure (medical) masks and gloves. PPE does not include face coverings (non-medical masks).

**Face coverings** are recognized as helping to protect the wearer and others against infection. When worn, face coverings must be cleaned or disposed of properly. Many municipalities, including Toronto, have passed bylaws which make it mandatory to wear masks or face-coverings while in enclosed public spaces. All visitors to the Tribunal's offices are required to wear a mask or face covering, to cover their mouth, nose and chin, when inside the Tribunal's offices. Tribunal members and staff will be required to wear a mask or face covering (except when exempt – see below) when they are in the hearing room or otherwise outside of their individual workspace, such as when they are walking in a hallway, are in an elevator or the lobby, or using a public washroom.

PPE and related instructions will be provided to visitors for use in areas where required and are mandatory (except when exempt – see below).

Some of the exemptions to the mandatory mask/face covering rule include:

- When testifying, making submissions or otherwise speaking during a hearing
- Persons with an underlying physical or psychological medical condition, which inhibits the ability to wear a mask/face covering
- Persons who are unable to place or remove a mask/face covering without assistance
- Persons who are reasonably accommodated by not wearing a mask/face covering in accordance with the *Ontario Human Rights Code*.

If you cannot wear a mask or face covering while at the Tribunal's offices, please advise the Registrar before you arrive to identify the exemption you are claiming. For matters that are not yet scheduled, parties may contact the Registrar.

All persons who refuse to wear a mask/face covering will be required to identify in advance the exemption that prevents them from wearing a mask/face covering. The Tribunal may require written medical confirmation before granting any such exemption. In addition, exemptions will only be granted in consultation with all participants.

Training on the management of exemptions to wearing a mask/face covering will be provided to staff conducting screening.

### **Public Washrooms**

Fully accessible public washrooms are located on the Tribunal office floor. Public washrooms will undergo enhanced cleaning.

### **Elevators**

Entry and exit lanes to and from elevators are marked, along with maximum occupancy restrictions. Masks/face coverings are required in elevators. Elevators will undergo enhanced cleaning.

### **Attending at the Tribunal Offices for your In-Person Hearing**

#### **Tribunal Communications**

Please do not come to the Tribunal's offices unless you are attending a scheduled in-person hearing.

Parties are asked to minimize those attending the hearing by not bringing unnecessary observers or support persons (i.e., anyone other than witnesses or a person representing the party) to the hearing. If requested the Registrar may be able to provide observers/support persons with electronic hearing access.

Requests for accommodation should be detailed and be made as early as possible before the hearing.

Please follow all of the mandated safety measures when visiting the Tribunal offices.

For the Tribunal's most recent announcements and communications, refer to the Tribunal website: <https://www.fstontario.ca/en/index.html>.

## **Personal Supplies**

While the Registrar will have a supply of face masks, visitors are asked to bring their own masks/face coverings, water, and tissues to the hearing, and any other materials or supplies needed.

## **Entrance and Exit Protocol**

An entrance and exit protocol has been established to help stop the spread of COVID-19 while at the Tribunal's offices.

### ***Access to the Building***

Upon entering the building you are asked to:

- Use hand sanitizer to clean your hands. Please note that frequent hand washing with soap and water is the best defense against COVID-19. Should hand washing not be readily available, you are encouraged to use hand sanitizer frequently throughout your visit.
- Wear a mask or face covering during the duration of your visit, subject to exceptions such as during testimony or when making submissions. If you do not bring your own mask or face covering, you will be provided with one.
- Maintain physical distancing. Please note that masks/face coverings do not remove the need to physically distance.
- Adhere to safe practices identified within the building.
- Only attend the areas of the Tribunal's offices as are necessary.

Please leave the building as soon as your hearing has ended, or when you have been told by the Vice-Chair or Panel that you may leave. Follow any exit instructions given to you.

### ***Signage and Markers***

Observe physical distancing floor markers and safety signage as posted in the building's main lobby and in the Tribunal's offices.

Signage reminds visitors of:

- The need to maintain physical distancing

- Mandatory wearing of masks or face coverings while inside the building and Tribunal offices
- COVID-19 information, including appropriate hand washing, and proper cough and sneeze etiquette
- COVID-19 Screening requirement
- Maximum occupancy

### ***Checking In for Your In-Person Hearing***

On the day of the hearing please go to the Tribunal office floor and enter the reception area. The Registrar will direct you from there following the screening process.

### ***COVID-19 Screening***

A COVID-19 screening questionnaire, contact tracing consent and participation information sheet must be completed and produced on the day of your hearing, see Schedule I, II and III below.

Parties and representatives will receive the COVID-19 screening questionnaire in advance of the in-person hearing and are asked to produce the completed questionnaire when they check-in for their hearing.

If you answer “YES” to any of the screening questions, or if you fail or refuse to complete the screening, you will not be permitted to remain in the Tribunal’s offices.

**It is important that any person who is sick or who has symptoms associated with COVID-19 stays home and does not attend the Tribunal’s offices.**

If you answer “NO” to all of the screening questions, you will be directed to your hearing room.

### ***Collection of Contact Tracing Information***

In order to facilitate contact tracing by public health agencies in the event of a possible exposure or outbreak of COVID-19, the Tribunal will temporarily collect the contact information of persons attending the Tribunal offices. The provision of contact information is encouraged by public health agencies and is voluntary.

Contact information will be collected when you check-in for your hearing, and will be stored in a safe and secure location for 28 days – a duration equivalent to two COVID-19 incubation periods - at which time it will be permanently destroyed.

### ***Inside the Hearing Room***

Access to the hearing room will require that you:

- Practice physical distancing
- Practice frequent and proper hand hygiene
- Wear a mask or face covering, except when exempt (e.g., when testifying, providing submissions etc.).

### ***Guest Wi-Fi***

The Tribunal's Guest WI-FI will be available for hearing participants on the day of their hearing. To use the Tribunal's Guest WI-FI, each individual hearing participant must agree to the applicable terms and conditions. Use of the Tribunal's Guest Wi-Fi is restricted to the hearing participants on the day or days of their hearing only.

### ***Hearing Room Reconfiguration***

The layout of furniture in the hearing room has been reconfigured to support physical distancing between the Registrars, panel members, court reporter, parties and their witnesses etc.. Seating will be assigned.

### ***Public Washrooms***

Fully accessible public washrooms are located on the floor outside the Tribunal offices.

### ***Breaks***

The Registrars and/or signage on the premises will direct parties to the areas they may use during breaks in the hearing. Witnesses should remain in the area assigned to them by the Registrar until they are called to the hearing room to testify.

### ***New Documents***

To help control the spread of COVID-19, hard copy documents will not be permitted to be introduced and physically shared at the in-person hearing. However, parties may bring to the hearing hard copies of all documents previously filed with the Registrar and exchanged with other parties as long as hard copies are not shared at the hearing. Please refer to the pre-hearing conference orders made by your panel chair with respect to proper document management and protocols.

### ***Cleaning of Hearing Rooms***

In addition to the Tribunal office regular cleaning schedule, hearing rooms, when in use, will undergo enhanced cleaning twice daily. In addition, sanitization cleaning supplies will be available in the hearing room for visitors to clean their personal areas within the hearing room before and after use.

## **Probable or Confirmed Case of COVID-19**

If a Tribunal/staff member or visitor becomes unwell with COVID-19 symptoms while at the Tribunal's offices, or attends at the Tribunal's offices and is subsequently confirmed to have COVID-19, they will be asked to:

- Self-isolate and leave the building immediately, if possible.
- Use the Ontario Self-Assessment Tool, and/or contact Telehealth, or their health care provider, or their local public health unit to seek guidance and testing, if recommended.
- Tribunal/staff members will also be asked to notify the Tribunal Chair immediately.

Public Health will conduct any required contact tracing and will communicate directly with any individual identified through their processes who may have come into contact with a confirmed case.

The Tribunal will also investigate to identify which persons may have come into contact with the symptomatic individual. All Tribunal/staff members and appropriate Ministry officials will be informed if there has been an incidence of COVID-19 in the Tribunal's offices, while reasonably respecting the privacy rights of the infected individual.

**It is important to note that contracting COVID-19 is a health and safety issue and no one should fear any stigma or reprisal for reporting an exposure to or symptoms of COVID-19.**

## Schedule I – COVID-19 Screening Questionnaire



**Financial Services Tribunal**

**Tribunal des services financiers**

### **COVID-19 Screening Questionnaire**

*This questionnaire is to be completed on the day of your hearing and must be produced when you check-in for your hearing.*

Have you tested positive for COVID-19 in the last 14 days?  Yes  No

Have you been asked to self-isolate by a doctor, health care provider or public health unit due to COVID-19 in the last 14 days?  Yes  No

Have you been in close contact with someone who is sick or has confirmed COVID-19 in the past 14 days?  Yes  No

Have you returned from travel outside Canada in the past 14 days?  Yes  No

Do you have any of the following symptoms? Choose any and all symptoms that are new and not related to pre-existing medical conditions:

- |  |  |
|--|--|
| <input type="checkbox"/> Fever and/or chills                   | <input type="checkbox"/> Sore throat   |
| <input type="checkbox"/> Pink eye (conjunctivitis)             | <input type="checkbox"/> Falling down often  |
| <input type="checkbox"/> New cough or cough that is worsening  | <input type="checkbox"/> Runny or congested nose   |
| <input type="checkbox"/> Fatigue or unusual extreme tiredness  | <input type="checkbox"/> Muscle aches that are unusual or long lasting   |
| <input type="checkbox"/> Difficulty breathing                  | <input type="checkbox"/> Lost sense of taste and/or smell  |
| <input type="checkbox"/> Headache that is unusual/long lasting | <input type="checkbox"/> Nausea, vomiting, diarrhea, loss of appetite, or stomach pain (not related to known causes or conditions) |
| <input type="checkbox"/> Shortness of breath                   |  |
| <input type="checkbox"/> Difficulty swallowing                 |  |

Please check this box if all of your answers were "NO" Date this form was completed:

**If you answered "YES" to any of these questions, DO NOT PROCEED TO YOUR**

**HEARING.** Go home and self-isolate right away. Use the Ontario Self-Assessment Tool, and/or contact

Telehealth at 1-866-797-0000, or your health care provider, or your local public health unit to seek

guidance and testing, if recommended.

## Schedule II – Consent to Contact Trace



**Financial Services Tribunal**  
**Tribunal des services financiers**

### **Consent to Contact Trace**

In order to facilitate contact tracing by public health agencies in the event of a possible exposure or outbreak of COVID-19, the Tribunal will temporarily collect the contact information of persons attending at the Tribunal's offices. The provision of contact information is encouraged by public health agencies and is voluntary.

Contact information will be collected when you check-in for your hearing. This information will be used to notify you in the event of a possible exposure or outbreak and to assist public health agencies in tracing contacts of COVID-19 cases.

Your personal information will be stored in a safe and secure location for 28 days – a duration equivalent to two COVID-19 incubation periods – at which time it will be permanently destroyed.

I consent to my personal information being collected, used and disclosed for the limited purposes and in the manner described above:

<b>Name:</b>	
<b>Address:</b>	
<b>Phone number:</b>	
<b>Date of hearing:</b>	
<b>Signature:</b>	

## Schedule III – In-Person Hearings Participant Information Sheet



Ontario

Financial Services Tribunal

Tribunal des services financiers

### **In-Person Hearings Participation Information Sheet** **Before the Hearing**

- Complete the COVID-19 Screening Questionnaire on the day of your hearing. If you answer “yes” to any of the questions, please do not attend your hearing. We will try to reschedule your hearing as quickly as possible, including by exploring whether the symptomatic person can participate in the hearing by teleconference.
- Please contact the Registrar before the hearing if you will be claiming an exemption to the mandatory mask/face covering rule, or if you require other accommodation.
- Bring a mask or face covering, water, and tissues to your hearing, and any other materials or supplies you need.
- To help control the spread of COVID-19, documents will not be permitted to be introduced at the hearing in hard copy. Please refer to the pre-hearing conference orders made by your panel chair with respect to proper document management and protocols.

### **When You Arrive at the Tribunal’s Offices**

- Do not enter the building until your scheduled arrival time.
- When moving through the building, follow the verbal and written safety directions, including the physical distancing markers, safety signage, and the elevator entry and exit lane procedures. Key safety messages are to:
  - ◇ Keep a distance of at least 2 metres or 6 feet from other people.
  - ◇ Wear a mask or face covering at all times, except if you are testifying, making submissions, speaking during the hearing or are exempt.
  - ◇ Practice hand hygiene often, including when entering new areas of the building or Tribunal’s offices.
- Proceed to the Tribunal’s office reception area where the Registrar will meet you for screening