

TRIBUNAL WATCH ONTARIO DISCUSSION PAPER

March 29, 2021
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THE “DIGITAL TRANSFORMATION” AT TRIBUNALS ONTARIO: The Impact on Access to Justice *

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*An earlier version of this paper was presented at the Law Society of Ontario, 6 Minute Administrative Law and Practice, March 10, 2021.

Synopsis

In the continuing 2020/21 public health crisis, it has become important for all jurisdictions to explore innovative ways to deliver justice, including administrative justice. More specifically, the expanded use of digital or electronic hearings has become essential, and increasingly, is accepted as an important option to maintain after the pandemic, where it can promote access to justice, including timeliness, without undermining a fair hearing process. At the same time, concern has arisen in many jurisdictions about the impact of digital justice on disadvantaged litigants, including persons with limited internet access or technological capacity.

In Ontario, at a mid-point in the pandemic, Tribunals Ontario, a group of fourteen tribunals, announced a “digital transformation”: electronic and written hearings would be the primary hearing format going forward on a permanent basis. This pivot away from in-person hearings raised concerns among poverty law advocates, including community legal clinics. Tribunals Ontario includes the adjudicative bodies hearing eviction applications, disability claims, discrimination claims, and child and family services disputes. Many litigants before these tribunals live in low-income households. This discussion paper was prepared for Tribunal Watch Ontario to explore the impact on access to justice where new limitations are placed on the right of disadvantaged litigants to participate in an in-person hearing.

A. Introduction

Tribunal Watch Ontario, a public interest, non-partisan organization advocating for accessibility, excellence and independence in Ontario's adjudicative tribunal system, supports innovation in the delivery of administrative justice in Ontario, including appropriate initiatives to address the challenges of the current health crisis. It is recognized that the expanded use of electronic hearings is essential at the present time and will continue to be an important option where it will promote access to justice, including timeliness, without undermining a fair hearing process for the parties.

Digital or electronic hearings¹ can enhance or impede access to justice, depending on the circumstances. For example, individuals living in remote

¹ The words “digital”, “virtual”, “remote” and “electronic” are often used interchangeably to refer primarily to video and teleconference hearings. Tribunals Ontario includes written hearings in its adoption of a “digital-first” transformation. Ontario's Condominium Authority uses online dispute resolution (ODR), another digital format that was first adopted in Canada by the British Columbia Civil Disputes Tribunal. For the most part, this paper focuses on video and

communities may be able participate effectively in a videoconference hearing without the hardship of travelling to a regional centre, provided they have reliable internet connectivity and a computer. For some persons living with a disability, a telephone hearing may accommodate their needs more appropriately than an in-person hearing. For others, a learning or communication disability, for example, whether diagnosed or not, may make participation in an electronic hearing more difficult than participation in an in-person hearing.² Some litigants may find a video or telephone conference hearing to be a less stressful experience, while others may distrust the informality of a virtual process.

Most obviously, in the words of Beverley McLachlin, “we know that technology can be an impediment to people getting justice if they don't have a computer or the bandwidth to use it”.³

Academic Research and Legal Commentary

There are fundamental questions about the quality of justice that is delivered through digital formats, including impacts on outcomes. Although these important issues are largely beyond the scope of this paper, some source materials are highlighted below.⁴ In the context of the worldwide shift to

teleconference as the predominate alternative formats for evidentiary hearings. However, we note that the issues raised in the paper also apply to written and ODR hearings. Re ODR, see *ODR: A Time for Celebration and the Embrace of Procedural Safeguards*, N. Welsh, Dickinson School of Law, Penn State University, June 27, 2016: [ODR: A Time for Celebration and Procedural Safeguards | Law, Technology and Access to Justice \(law-tech-a2j.org\)](https://www.law-tech-a2j.org/). Welsh outlines the elements of procedural fairness in an ODR context in arguing that government must offer multiple “channels” or “paths” to justice to support disadvantaged litigants, citing the danger that in-person hearings will in the future be reserved for cases that involve “a sufficiently large amount of money”. A longer version of this paper is available at <http://www.adrhub.com/> July 4, 2015.

² A recent Report by the Equality and Human Rights Commission in Britain found that “Video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions”. As reported in *The Guardian*, April 22, 2020. Available on the Council of Canadian Administrative Tribunals (CCAT) website under COVID-19 Resources. <http://www.ccat-ctac.org/en/covid-19-resources->

³ *The Lawyer's Daily*, May 12, 2020. <https://www.thelawyersdaily.ca/articles/19008/access-to-justice-visionary-thinking-to-update-a-legacy-system-beverley-mclachlin>

⁴ For discussion about the negative impacts of using technology to replace in-person court appearance, including a potential “dehumanizing” effect, as well as concerns related to privacy and “open court” principles, see “*Trial by Zoom*”: *What Virtual Hearings Might Mean for Open Courts, Participant Privacy and the Integrity of Court Proceedings*”, Amy Salyzyn, *Slaw*, April 17, 2020 <http://www.slaw.ca/2020/04/17/trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings/>

electronic hearings in the pandemic, there has been a call for urgent research on the impact on access to justice, particularly for self-represented and/or vulnerable litigants.⁵

A number of studies have raised concerns about the ability of non-lawyers to participate effectively in virtual proceedings, citing factors including technical disruptions, inability to hear and follow the proceedings, difficulties in communicating remotely through an interpreter in another location and difficulties in communicating privately with counsel located elsewhere.⁶

The bottom line in the academic research and legal commentaries currently available is that a person who is not afforded an in-person opportunity to participate in a proceeding in which their rights are at issue — refugee status, release from detention, disability benefits – is less likely to be successful, particularly if the conditions under which they participate are less than optimal. Although many studies to date do not involve fully electronic hearings, but rather formats where one litigant is participating remotely, the weight of the literature suggests that non-lawyers are less likely to participate fully in a digital format, with the result that asylum seekers are more likely to be deported;

and “*Zooming in on the Importance of Upholding Legal Values in Virtual Trials*”, Karim Benyekhlef, Nicolas Vermey, Sarit Mizrahi, *Slaw*, June 18, 2020 . [Zooming in on the Importance of Upholding Legal Values in Virtual Trials – Slaw](#)

Also see “*A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario*”, Amy Salyzyn, *Osgoode Hall Law Journal*, Vol.50, Issue 2, 2012, p.429. for a discussion of how videoconferencing may (i) unintentionally interfere with credibility assessments and the emotional connections between courtroom participants; and (2) threaten the solemnity associated with, and respect given to the justice system. [A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario \(yorku.ca\)](#)

These 3 papers are available through the Council of Canadian Administrative Tribunals (CCAT) website under COVID-19 Resources. <http://www.ccat-ctac.org/en/covid-19-resources->

⁵ *Rapid Review: The Impact of COVID-19 on the Civil Justice System*, Byrom, Beardon and Kendrick, UK Civil Justice, June 2020, p.9-10. See recommendation 9.15 on impact on outcomes. On the CCAT website, COVID-19 Resources. <http://www.ccat-ctac.org/en/covid-19-resources-> and at: [FINAL-REPORT-CJC-4-June-2020.v2-accessible.pdf \(judiciary.uk\)](#)

⁶ *ibid.*, p. 63-68. Also see “*What we know about the impact of remote hearings on access to justice: a rapid evidence review*”, Byron, N, London: Nuffield Family Justice Observatory, The Legal Education Foundation. www.nuffiedlfjo.org.uk. For a discussion of the role of interpreters and the need for a quality electronic interface in the context of the Immigration and Refugee Board, Refugee Protection Division (IRB-RPD), see “*Videoconferencing in Refugee Hearings*”, S. Ronald Ellis. and the IRB response: <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/Video.aspx> and <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/VideoRespRep.aspx>.

benefits are more likely to be denied; bail is more likely to be denied; incarceration is more likely to be ordered instead of community service.⁷ Non-lawyers who participate electronically in hearings report feeling disoriented, not being able to understand the proceedings and a lack of confidence in the fairness of the hearing.⁸

One issue that has emerged in successive studies is that the use of videoconferencing makes it more difficult for an adjudicator to identify vulnerability that may be affecting the ability of a party to participate fully in the hearing.⁹ Another consistent finding is that parties do not fully appreciate the seriousness and finality of proceedings when conducted remotely and therefore

⁷ See *Remote Adjudication in Immigration*, Ingrid Eagly, *Northwestern University Law Review* 109(4):933 (2015), reporting on an empirical study finding immigration detainees who participated in deportation hearings remotely by electronic means demonstrated depressed engagement with the process and as result were more likely to be deported. The paper advances several explanations, based on research, including the litigant's perception that the digital format was unfair, technical difficulties in litigating over a screen, and lower quality interactions with other courtroom actors including the adjudicator.
<https://scholarlycommons.law.northwestern.edu/nulr/vol109/iss4/2/>

See, *Tribunal Decision-Making: An Empirical Study*, Genn and Thomas, UCL Judicial Institute, UCL Faculty of Laws (2013), the report from a simulated British study that found claimants for disability benefits were 2.5 times more likely to be successful in an oral hearing as opposed to relying on written submissions. The study concluded that much of the difference in outcome was because the oral hearing process resulted in more information being provided by the unrepresented applicant to the adjudicator. This is relevant in comparing electronic and in-person hearings because of the research demonstrating that individuals participating remotely by videoconference tend to participate to a lesser degree in their hearings. This study may also partly explain the very significant success rate for disability appeals at the SBT. Available at: <https://administrativejusticereform.ca/appeals-tribunal-adjudication-of-claims-oral-hearings-2-5-times-more-efficacious-for-claimants/>
<https://administrativejusticereform.ca/tribunal-decision-making-why-are-oral-hearings-so-efficacious/>

For a study in the criminal context, see *Virtual court pilot: outcome evaluation*. Terry, M., Johnson, S., and Thompson, P. (2010), UK Ministry of Justice Research Series 21/10. Available at: <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

⁸ *Trial by Zoom": What Virtual Hearings Might Mean for Open Courts, Participant Privacy and the Integrity of Court Proceedings*, Amy Salyzyn, *Slaw*, April 17, 2020.
<http://www.slw.ca/2020/04/17/trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings/>

⁹ *What we know about the impact of remote hearings on access to justice: a rapid evidence review*, Byron, N, London: Nuffield Family Justice Observatory, The Legal Education Foundation.
www.nuffieldfjo.org.uk

fail to avail themselves of procedural safeguards available to them, including legal advice.¹⁰

Against this background, this paper will discuss the current shift at Tribunals Ontario to electronic hearings as the primary format for evidentiary hearings on a go-forward basis. Although Tribunals Ontario is now made up of fourteen tribunals, the focus in this paper is on four of the seven tribunals that were formerly clustered at the Social Justice Tribunals of Ontario (SJTO), namely, the Landlord and Tenant Board (LTB), the Social Benefits Tribunal (SBT), the Human Rights Tribunal of Ontario (HRTO) and the Child and Family Services Review Board (CFSRB).¹¹

The Legislative Framework

In Ontario, the *Statutory Powers Procedure Act*, (*SPPA*), authorizes a tribunal to hold an electronic hearing if provided for in its rules, but also states that it shall not do so if a party satisfies the tribunal that holding an electronic hearing is likely to cause “significant prejudice” (s.5.2 (1) and (2)). Subsection (4) provides that, in an electronic hearing, all the parties and members must be able to hear one another and the witnesses throughout the hearing.¹²

In March 2020, in the midst of the first wave of the pandemic, the Ontario government passed the *Hearings in Tribunal Proceedings (Temporary Measures Act)*, 2020,¹³ applying to hearings under *SPPA*,¹⁴ and setting out, without reference to mandatory tribunal rules, that a tribunal “may conduct a hearing in person, electronically, in writing or by a combination of any of them, as the tribunal considers appropriate”: s.3(1). Presumably the goal was to ensure that the absence of rules was not a barrier to tribunals in pivoting to electronic hearing formats, including videoconference and teleconference.

¹⁰ Ibid.

¹¹ The tribunals formerly at Social Justice Tribunals Ontario were: The Landlord and Tenant Board (LTB), the Social Benefits Tribunal (SBT), the Human Rights Tribunal of Ontario (HRTO), the Child and Family Services Review Board (CFSRB), the Custody Review Board (CRB), the Criminal Injuries Compensation Board (CICB) and the Ontario Special Education Tribunal (OSET). There were briefly 18 tribunals at Tribunals Ontario before the land tribunals cluster was moved into the Ontario Lands Tribunals in July 2020. The CICB is being discontinued.

¹² *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 5.2.

¹³ *Hearings in Tribunal Proceedings (Temporary Measures) Act*, 2020, S.O. 2020. C.5, Sched.3.

¹⁴ The scope of the *Temporary Measures* legislation is a little more complicated. It also applies to hearing “to which the *SPPA* would apply if its application were not excluded under another Act” and to hearings before any tribunal specified in regulations.

Before the arrival of COVID-19, electronic and written formats were not commonly used for full evidentiary hearings at tribunals in Ontario, including Tribunals Ontario. Adjudicators at the Landlord and Tenant Board, the Social Benefits Tribunal, the Human Rights Tribunal and the Child and Family Services Review Board travelled throughout the province to attend in-person hearings.¹⁵ By the spring of 2020, most if not all Ontario tribunals had begun to schedule matters for electronic hearings that would have previously been held as an in-person hearing.

B. Digital Hearings Forever – Is there a problem?

While tribunals and courts in most jurisdictions have needed to embrace virtual hearings during the pandemic crisis, the uncertain impact on access to justice and on hearing outcomes gives reason for caution in determining the role of technology in the post-COVID period.¹⁶ Nonetheless, on September 17, 2020, Tribunals Ontario, including the former SJTO tribunals, announced a “digital transformation”. On November 30, 2020, a further media release clarified that the “digital first approach will continue even when the pandemic is over”. The media release was accompanied by a new *Updated Practice Direction on Hearing Formats* that made it clear that in-person hearings would be the exception on a go-forward basis.¹⁷

The *Updated Practice Direction on Hearing Formats* states that, “Moving forward, all matters will proceed as written or electronic hearings with two exceptions”:

Where a party can establish:

¹⁵ Pre-COVID, adjudicators at the SBT and the CFSRB travelled to hearings in small communities across the province. The LTB and the HRTTO held in-person hearings at 7 or 8 regional centres and often went to smaller communities. Some legal and procedural issues were argued in teleconference hearings. The exception was an area in northwestern Ontario where, a decade ago, the LTB and Northwest Community Legal Clinic, based in Fort Frances, Kenora and Atikokan, established a local model using electronic hearings with tenant duty counsel support, in order to avoid travel between remote communities. This is a good example of a solution tailored with stakeholder input to meet the needs of the user public, legal aid and the Board.

¹⁶ See Footnotes 4-10.

¹⁷ The media releases and *Updated Practice Direction* are available on the Tribunals Ontario website. <https://tribunalsontario.ca/en/latest-news/> and <https://tribunalsontario.ca/documents/TO/Practice-Direction-on-Hearing-Formats-EN.html>

- That an in-person hearing is required to accommodate a *Human Rights Code*-related need; or
- That a written or electronic hearing will result in an unfair hearing.

The *Practice Direction* sets a seemingly higher bar to change an electronic hearing (as opposed to a written hearing) to an in-person hearing – the requesting party must establish “at minimum” that an electronic hearing will cause “significant prejudice”.¹⁸ The *Practice Direction* does not address internet/computer access as an issue in establishing prejudice and specifically states that a party’s “unfamiliarity with a new technology is not sufficient, in and of itself, to necessitate an in-person hearing”.¹⁹

Even before the November announcement that electronic hearings would be the new normal “even when the pandemic is over”, Ontario legal clinics, including ARCH Disability Law Centre,²⁰ and the Advocacy Centre for Tenants Ontario, had raised significant concerns, including in the media, about how the conversion to electronic hearings was creating barriers to a fair hearing process.²¹ In October, a report signed by over 40 Legal Aid Ontario clinics highlighted issues at the Landlord and Tenant Board, where implementation of the “digital transformation” has prevented tenants from participating in pre-hearing mediation, disrupted access to tenant duty counsel, and in some cases, rendered a tenant unable to participate in their own eviction hearing.²²

¹⁸ This is not inconsistent with the language in s.5.2(2) of the *SPPA* which provides that an electronic hearing shall not be held if a party satisfies the tribunal that holding an electronic hearing is likely to cause “significant prejudice”. However, proving significant prejudice becomes more onerous in practice when electronic hearings are, for the first time, the default option as a matter of course. The phrase “shall not” in s.5.2(2) *SPPA* also suggests restraint in allowing electronic hearings.

¹⁹ *Updated Practice Direction on Hearing Formats*. Tribunals Ontario. November 30, 2020. Bullet #2, para. 2, under Factors Relevant to the Appropriate Hearing Format. <https://tribunalsontario.ca/documents/TO/Practice-Direction-on-Hearing-Formats-EN.html>

²⁰ ARCH Disability Law Centre wrote the Associate Chair of the Human Rights Tribunal of Ontario on November 27, 2020, noting that depending on the circumstances, electronic hearings can enhance or impede access for person with disabilities and should not be the sole option.

²¹ See “New Measures hurting eviction appeals: tenant advocates”, *The Globe and Mail*, November 27, 2020, H10. [Tenant advocates say new measures tangling eviction appeals - The Globe and Mail](#)

²² *Ontario Legal Clinics’ Concerns: Landlord and Tenant Board Operations during the COVID-19 Pandemic*, ACTO website, October 13, 2020. <https://acto.ca/media-and-reports/reports>. The digital rollout has been accompanied by the introduction of province-wide, simultaneous and multiple block scheduling and the elimination of mediation services, compounding barriers to accessing tenant duty counsel and mediators. As pointed out by Mississauga Community Legal

Notwithstanding the outcry from clinics, Tribunal Ontario's November *Updated Practice Direction*, in effect, doubled down on restricting access to in-person hearings. The *Updated Practice Direction* removed language that was in the predecessor practice direction stating that an in-person hearing would be considered if a party objected to proceeding by electronic hearing "because they do not have the necessary equipment" and that the tribunal would then consider if it could "conduct a procedurally fair hearing in an electronic format".²³ This language does not appear in the *Updated Practice Direction*.

In March 2021, Tribunal Watch Ontario became aware of concerns that insufficient analysis and consultation had gone into the Tribunals Ontario decision to pivot to a "digital-first" policy on an ongoing basis, after COVID-19 restrictions are lifted.²⁴ Tribunal Watch identified the potential for a negative impact on access to justice for disadvantaged parties appearing before the tribunals, including people in low-income households which often only have internet access through smart phones, if at all²⁵ and in rural communities without high-speed internet.²⁶

The Canadian Radio-television Commission has reported that less than two-thirds of the lowest income households are subscribed to internet services and that where subscribed, the expense represented 9.1% of household income, as

Services in a letter to the Attorney-General dated January 31, 2021, mediators and tenant duty counsel provide important upstream interventions that save taxpayer money by, among other things, helping tenants access municipal rent bank funds to pay off arrears.

²³ As of March 2021, the earlier *Practice Direction* can still be found on the Tribunals Ontario website in the HRTO pages at: [https://tribunalsontario.ca/documents/hrto/HRTO Practice Direction on Hearing Formats During COVID-19_EN.html](https://tribunalsontario.ca/documents/hrto/HRTO_Practice_Direction_on_Hearing_Formats_During_COVID-19_EN.html).

²⁴ <https://tribunalwatch.ca/resources/>.

²⁵ Statistics Canada reports that over 24% of the lowest-income households have no access to the internet except through smart phones. Even in the middle 2 quartiles, a substantial proportion of households (14.7 and 13.8) only have internet access at home through their mobile phones: Statistics Canada, "School Closures and the Online Preparedness of Children during the COVID-19 Pandemic" April 15, 2020. [School Closures and the Online Preparedness of Children during the COVID-19 Pandemic \(statcan.gc.ca\)](https://www150.statcan.gc.ca/n1/pub/28-661-x/2020001/article/00001-eng.htm).

²⁶ The Canadian Internet Registration Authority (CIRA) reports that there is a "massive gap in actual, measured internet speeds experienced by Canadian households in rural and urban areas" and that internet speeds have fallen for rural users since the COVID-19 pandemic began: "New internet performance data shows the staggering scale of Canada's urban-rural digital divide", May 8, 2020. Available at <https://www.cira.ca>.

compared to 1.8% for households in the highest income quintile.²⁷ Low-income household can find themselves having to choose between paying the rent, feeding the kids or subscribing to the internet.

Importantly, 2016 census data demonstrates that people of colour, Indigenous people and recent immigrants are significantly more likely to live in poverty and accordingly will be over-represented in the group that will be negatively impacted if access to in-person hearings is unduly restricted.²⁸

Legal clinics and Tribunal Watch Ontario began to raise particular concerns with respect to the cluster of tribunals formerly housed in the Social Justice Tribunals of Ontario because their user communities include vulnerable populations - social assistance recipients, low-income tenants facing eviction, youth facing school expulsion, and human rights claimants. It can be assumed that, for example, social assistance recipients and tenants facing arrears evictions (approximately 45,000 arrears eviction applications each year in Ontario) are over-represented in the population with no household internet access.²⁹

C. First Principles

Focusing on the use of video and teleconferencing for evidentiary hearings at the Landlord and Tenant Board, the Social Benefits Tribunal, the Human Rights Tribunal and the Child and Family Services Review Board, Tribunal Watch Ontario puts forward the following as first principles to inform any ongoing reduction in access to in-person hearings at Tribunals Ontario after the COVID-19 health crisis has subsided.

²⁷ See *Communications Monitoring Report 2019: Canadian Radio-television and Telecommunications Commission*, (Ottawa, 2020), p. 27. https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2019/index.htm?_ga=2.236025729.127528141.1616781242-1957474395.1614718598.

²⁸ 24% of Indigenous people and 21% of racialized Canadian residents lived in low-income households in 2016 as compared to 12% of non-racialized Canadians. Immigrants entering Canada between 2011-2016 are twice as likely to live in low-income households as non-immigrants: *Data Tables, 2016 Census*, Statistics Canada. <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Index-eng.cfm>

²⁹ Moreover, basic internet or cellphone access does not guarantee access to the requisite printing, scanning and uploading abilities needed to exchange and file documents to comply with a time-sensitive disclosure order. Electronic proceedings may force already-overburdened tenants into impossible choices between paying unaffordable overage or usage charges to join a hearing; or paying rent and utilities costs, and feeding their families: *Landlord and Tenant Board Operations during the COVID-19 Pandemic*, October 13, 2020. <https://acto.ca/media-and-reports/reports>, p.7.

1. Better service to the public must be the goal of any fundamental change to how a tribunal delivers justice. A process that is more efficient for the tribunal itself but undercuts full participation by one or more segments of the user community is not acceptable.
2. One size does not fit all. The question of whether and to what extent electronic hearings should be used in the post-COVID era needs to be considered on a tribunal-by-tribunal basis, informed by the particular needs and characteristics of the public using the tribunal.
3. Meaningful public consultation is imperative *before* making a fundamental change to tribunal procedure that is intended to be on-going. This would require a series of meetings with stakeholder groups to allow each tribunal to better understand and respond to issues raised about the impact on users, including the risks and benefits on all sides.³⁰
4. Transparency is fundamental to accountability, which itself is articulated as a key value in the mission statement of Tribunals Ontario. This means not only clear information in Rules and Practice Directions about the process and factors for determining hearing format,³¹ but also published data in annual reports on hearing formats, comparative outcomes³² and user feedback for each type of proceeding.³³

³⁰ In the past, the tribunals in “social justice cluster” (SJTO) in Ontario typically had standing stakeholder advisory committees which would be the first stage in any consultation on changes in tribunal procedures. These committees have been discontinued recently. ARCH Disability Law Centre has called on the HRTO Associate Chair to re-establish its stakeholder advisory committee in a letter dated November 27, 2020.

³¹ For example, the Immigration and Refugee Board, Refugee Protection Division includes in its January 2021 hearing guide a list of the minimum factors necessary for a virtual hearing, including adequate internet access and a quiet space without distractions. The guide recognizes that “in some circumstances it may not be appropriate to hold a hearing virtually and that parties may apply to the IRB to request that a particular claim be heard in person”: IRB RPD *Virtual Hearings – Guide for Parties*, p.3. <https://irb.gc.ca/en/legal-policy/procedures/Pages/rpd-virtual-hearings-guide.aspx>

³² The critical need to track differences in outcomes as between in-person and virtual hearings has been specifically identified. See the UK Civil Justice: *Rapid Review: The Impact of COVID-19 on the Civil Justice System*, 2020, recommendation 9.15. Available on the CCAT website, under COVID-19 Resources. <http://www.ccat-ctac.org/en/covid-19-resources->

³³ Lack of transparency is a long-standing issue for Ontario tribunals. For example, Tribunals Ontario Annual Report does not include information on how many of the 70,000 plus LTB eviction applications resulted in an eviction order or on how many human rights applications go to mediation at the HRTO and are settled. In fact, there is no way to determine what happens to the 4,500 human rights applications filed annually when less than 100 are dealt with in a final

5. Any shift to electronic hearings as the default option should be incremental to allow evaluation and stakeholder consultation at each stage.³⁴ To the extent that the pandemic has served as a pilot project, its success is disputed by key stakeholders.³⁵
6. The evaluation of digital formats must include consideration of the impact on other justice resources, including the time and effectiveness of duty counsel services, private lawyers and legal clinics. A digital set-up that wastes the time and resources of counsel will have a negative impact on their ability to provide legal services to tribunal users.³⁶
7. Recognizing that each tribunal has the authority in the first instance to schedule a matter for an in-person or electronic decision,³⁷ the process for requesting a different format must not itself become a barrier to accessing the tribunal's process.
8. The adjudicator hearing the case must retain responsibility for ensuring that the hearing process is fair in accordance with the principles of natural justice. Where a party challenges an initial tribunal decision to schedule an

decision on the merits. Under the pre-2008 human rights system, the Ontario Human Rights Commission accounted for the disposition of every complaint filed, although, on the negative side, only about 10 final merit decisions were released annually.

³⁴ The need for incremental change evaluated at each stage is made by each of the commentaries referenced in Footnotes 4-10. See in particular *Zooming in on the Importance of Upholding Legal Values in Virtual Trials* which discusses how technology access and design issues need to be carefully addressed and that to do otherwise may cause "the general public to lose faith in the legal system".

³⁵ See Footnotes 20, 21, 22.

³⁶ At the LTB, the introduction of province-wide electronic hearing blocks in 2020 made it much more difficult for regional tenant duty counsel to identify potential clients. Moreover, whereas in an in-person setting, duty counsel can handle multiple clients in rapid succession – holding down one matter, negotiating with a landlord or mediator on another, reviewing documents, arranging payments from municipal rent banks, making referrals – in the new digital format, time was now wasted sitting at a desk waiting for potential cases to be called up in the videoconference hearing.

³⁷ Re *Cedarvale Tree Services and Labourers' International Union of North America*, 1971 CanLii 341 (ON CA) endorsed in *Prasad v. Canada (Minister of Employment and Immigrations)*, 1989 Can Lii 131 (SCC).

electronic (or in-person) hearing, the final determination on hearing format must fall to the adjudicator hearing the case.³⁸

9. Tribunals need to develop training for adjudicators and other public-facing staff on how to make digital processes as fair and effective as possible. Every adjudicator must have the communication and technological skills to reduce accessibility barriers in digital hearings, as well as the ability to recognize vulnerable litigants and take steps to support full and appropriate participation.

D. Environmental Scan

In preparation for public consultations, a tribunal cluster intending to restrict access to in-person proceedings should undertake an environmental scan for each of its constituent tribunals. This would include consideration of the following:

1. Who uses the tribunal? For example, are both sides generally sophisticated litigants? Does the tribunal regularly serve parties who appear to have language, literacy, communication or educational barriers that make participation by videoconference more difficult?
2. Are there imbalances between the constituencies using the tribunal that could be compounded by digital hearings (e.g., government v. welfare recipient)?³⁹ If so, can these be addressed?

³⁸ See the *Practice Direction for Electronic Conduct of Mediations and Hearings* of the Canadian Human Rights Tribunal that specifies that the process for electronic hearings is to be adapted to meet the circumstances of the case and that the adjudicator ultimately makes the decision as to how a hearing will be conducted, after hearing from the parties. The *TO Updated Practice Direction* establishes that an adjudicator will make the final determination on hearing format, but not necessarily the adjudicator who hears the case.

³⁹ One example is the fact that legal clinics are reporting that tenants are often only able to participate in an eviction hearing by telephone while the landlord's representative and the adjudicator are connected in a videoconference. *Ontario Legal Clinics' Concerns: Landlord and Tenant Board Operations during the COVID-19 Pandemic*, ACTO website, October 13, 2020. <https://acto.ca/media-and-reports/reports>, p.8. A recent report of the Brookfield Institute at Ryerson University found that 15% of households with less than \$20,000 income and 20% of those aged 60 and older lacked even a smartphone: *Mapping Toronto's Digital Divide*, January 20, 2021. <https://www.Brookfieldinstitute.ca>

3. Is it likely that a portion of the tribunal's user community lacks household access to the internet and/or an IT device (computer, tablet)?⁴⁰
4. Are parties often self-represented before the tribunal? Is one side more often without counsel? For example, human rights claimants are significantly more likely to be self-represented than respondents at the Human Rights Tribunal of Ontario. Does the tribunal's electronic hearing process give an advantage to represented parties as compared to the in-person process?⁴¹
5. Is there anything else about the nature of the proceeding, the demographics of the user communities or the type or volume of evidence that mitigates against the use of electronic hearings? For example, does videoconferencing work effectively for a multi-day, multi-witness hearing before the Child and Family Services Review Board about the placement of a foster child?
6. What has been the experience of parties and legal representatives with electronic hearings during the pandemic? Has the tribunal surveyed a sample of litigants, counsel and its own adjudicators? The Social Security Tribunal of Canada, for example, conducts a feedback survey of users which asks, among other things, if the participants were satisfied with the format of their hearing.⁴²

E. Stakeholder Consultation

⁴⁰ See Footnote 26 re the urban/rural gap in internet service. But it is not just rural households that lack high-speed internet. Data from school boards this year found that 25% of students under urban school boards lacked adequate internet access for synchronous remote learning: "The Successes and Challenges of the Transition to Remote Learning", OPSBA-Wilfred Laurier University Joint Research Project. (2020). <https://www.wrdsb.ca/wp-content/uploads/2020-10-19-COW-Package.pdf>, at p.42.

⁴¹ This possibility has been recognized in a joint report of The Advocates Society, the Ontario Bar Association, the Federation of Ontario Law Associations and the Ontario Trial Lawyers Association. See: *Best Practices for Remote Hearings, Report of the joint E-Hearings Task Force*, May 13, 2020. See recommendation #26 and 27 with respect to self-represented parties. https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Best_Practices_for_Remote_Hearings_oct30.pdf

⁴² 2020 Progress Report: *Helping people access justice*, Social Security Tribunal, p.11. Over 90% were satisfied, including people who didn't get an in-person hearing. <https://www1.canada.ca/en/sst/rdl/2019-progress-report.html>

Consultations with stakeholder groups have been an important part of the development process for previous changes to tribunal rules and procedures in Ontario.⁴³ The scope of consultations has varied depending on the extent of the proposed change and the characteristics of the stakeholder communities. Until recently, most, if not all tribunals in the former Social Justice Tribunals cluster, had standing Stakeholder Advisory Groups with representatives from the practicing bar, and sometimes from other stakeholder constituencies, as a first level of consultation on changes to rules or practices.

Tribunals Ontario does not appear to have invited any stakeholder input as it began to implement its electronic hearing process or before announcing that electronic hearings would be its primary format going forward. After implementation, legal clinics urgently sought input, wrote a highly critical report and ultimately went to the media to call attention to the difficulties that tenants at the Landlord and Tenant Board were experiencing in participating in their hearings and in accessing duty counsel.⁴⁴

The Human Rights Tribunal of Ontario, on the other hand, announced on November 16, 2020, that it would accept feedback until November 27, 2020, on its about-to-be-announced long-term pivot to electronic hearings. On November 30th, however, the new *Updated Practice Direction on Hearing Formats* was released, obviously written before any input was received during the just-concluded 11-day consultation (which included a half-day videoconference meeting).⁴⁵

A consultation should offer a meaningful opportunity to provide critical input into the design of a new process. A stakeholder consultation on Tribunals Ontario's new "digital first" policy should be informed by the shared results of each tribunal's environmental scan. A key component of an appropriate consultation would be to identify any barriers that mitigate against the use of electronic hearings as the default option or in particular circumstances or types of cases.

⁴³ Section 43(7) of the *Human Rights Code* (R.S.O. 1990, c.H19) requires the HRTO to hold public consultations before "making a rule under this section". Despite the *Hearings in Tribunal Proceedings Act*, s.43(7) is arguably still in effect under s.47(1) of the *Code* in any circumstances in which a new rule could be challenged as infringing a right under Part I of the *Code*.

⁴⁴ *Ontario Legal Clinics' Concerns: Landlord and Tenant Board Operations during the COVID-19 Pandemic*, ACTO website, October 13, 2020. <https://acto.ca/media-and-reports/reports>.

⁴⁵ November 16, 2020. Media release available on Tribunals Ontario website. <https://tribunalsontario.ca/en/latest-news/>

F. Designing to promote access to justice

Before an expansion of the use of virtual hearings as the default option at any tribunal after the COVID-19 crisis, Tribunal Watch Ontario recommends the following factors be considered by each tribunal. Included below is commentary on a recommended approach.

1. Lessons from the pandemic

Each tribunal should report transparently on its successes and failures in the use of electronic hearings during the pandemic. This is particularly important given that Legal Aid Ontario clinics have reported a myriad of difficulties at the Landlord and Tenant Board, including issues with internet connectivity and bandwidth, lack of access to computers, inadequate IT competency, barriers to obtaining duty counsel assistance and to accessing pre-hearing mediation.⁴⁶

What has been the experience for the parties, counsel and adjudicators at the Human Rights Tribunal? At the Social Benefits Tribunal?

Or consider the Child and Family Services Review Board (CFSRB). This tribunal has to decide highly emotional applications that often continue over several days, including appeals of Children's Aid Society (CAS) decisions to end adoption placements. Have the adjudicators been given the opportunity to provide feedback on how well videoconferencing is working out for them as decision-makers, and for the parties? There are only two or three long-term experienced adjudicators left at the CFSRB who will have done these hearings both in-person and by videoconference. Are they satisfied that the videoconference hearings are giving them a firm basis for decision? What is the feedback from CAS lawyers, private counsel, and from users like the would-be adoptive parents?

2. Consent as a pre-condition

This has been the approach of the Immigration and Refugee Board in refugee determination hearings. Its *RPD Virtual Hearings - Guide for Parties* (January 2021) provides that "Hearings will only be held virtually where

⁴⁶ Ontario Legal Clinics' Concerns: Landlord and Tenant Board Operations during the COVID-19 Pandemic, ACTO website, October 13, 2020. <https://acto.ca/media-and-reports/reports>.

claimants or protected person provide their consent".⁴⁷ The Ontario Bar Association has recommended consent as a pre-condition for virtual hearings at the Immigration Appeal Division during the pandemic.⁴⁸

At the Social Security Tribunal of Canada, starting in January 2019, individuals appealing Canada Pension Plan, Old Age Security and Employment Insurance decisions have been allowed, in most cases, to choose whether their hearing would proceed in-person or by teleconference, videoconference or by written submissions. Prior to 2019, teleconference was the default format. The SSTC reports that in over 66% of cases, the hearing is now scheduled for the requested format and that it strives to respect choice whenever possible.⁴⁹

Minimally, each tribunal should make consent a pre-condition during a post-COVID-19 pilot project aimed at giving the tribunal and stakeholder communities a basis for evaluating this approach. Building user-choice into the process over the long term would be efficient and cost-effective, as well as more accommodating of individual circumstances and needs. It eliminates the need for a preliminary process where users have to justify their need to be heard in person by pointing to a disability, a language or literacy barrier, their lack of internet bandwidth, IT hardware or know-how, etc.

3. Self-represented litigants

A joint report of the Ontario Bar Association, the Federation of Ontario Law Associations, The Advocates Society and the Ontario Trial Lawyers Association has recognized that self-represented parties will in some cases be unable to participate in remote hearings.⁵⁰

⁴⁷ *RPD Virtual Hearings – Guide for Parties* (Version 1.2.5) January 2021, p.3. Available on CCAT website and at <https://irb.gc.ca/en/legal-policy/procedures/Pages/rpd-virtual-hearings-guide.aspx>

⁴⁸ The Canadian Bar Association, Immigration Law Section recommended consent as a pre-condition for virtual hearings at the IRB Immigration Appeal Division in a letter dated April 21, 2020. <https://www.cba.org/CMSPages/GetFile.aspx?guid=6cded3bc-daed-4485-9c88-bc35045df86c>

⁴⁹ 2019 Progress Report, *Putting Clients First*, Social Security Tribunal of Canada, p. 9. <https://www1.canada.ca/en/sst/rdl/2019-progress-report.html>

⁵⁰ See recommendation #26 with respect to self-represented parties in *Best Practices for Remote Hearings, Report of the joint E-Hearings Task Force*, The Advocates Society, the Ontario Bar Association, the Federation of Ontario Law Associations and the Ontario Trial Lawyers Association, May 13, 2020.

The absence of counsel on one side of a videoconference hearing can be cause for concern, particularly if there is extensive documentary evidence or if the unrepresented party is participating with technology restraints, perhaps by smartphone or with limited bandwidth, while the adjudicator and the other party's representative participate by video. Legal clinics are reporting that scenarios like this have been occurring frequently at Landlord and Tenant Board hearings.⁵¹

The Canadian Bar Association COVID-19 Task Force notes that many self-represented parties do not have the technology or the capacity to participate fully in a digital justice process.⁵² It observes that "... delivering justice remotely has underlined the unequal access to technology (e.g. differences in software, hardware, internet speed, user skills) and its impacts on access to justice for self-represented litigants", and that "these differences often reflect the participant's income, age, physical and mental conditions".⁵³

An unduly rigid approach to hearing formats in a post-COVID world will undercut access to a fair hearing for self-representing parties who face barriers to participation of whatever kind – educational, literacy, disability, IT competency, internet access. Again, this has to be considered in the context of the population served by Tribunals Ontario, including low-income individuals seeking disability benefits, relief from eviction, discrimination remedies or the reversal of a school expulsion order.

4. Facilitating requests for an in-person hearing

Historically, the tribunal forms used at the Landlord and Tenant Board, the Social Benefits Tribunal and the Human Rights Tribunal were developed in consultation with stakeholders, including legal clinics, with the explicit goal of making the process accessible for self-represented parties. This same

[https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Best Practices for Remote Hearings oct30.pdf](https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Best_Practices_for_Remote_Hearings_oct30.pdf)

⁵¹ *Ontario Legal Clinics' Concerns: Landlord and Tenant Board Operations during the COVID-19 Pandemic*, ACTO website, October 13, 2020, p.7-8. <https://acto.ca/media-and-reports/reports>.

⁵² "No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19, February 2021, p. 51 under Family Law – Special Considerations. On CCAT website and at: <https://www.cba.org/Publications-Resources/Resources/2021/No-Turning-Back-CBA-Task-Force-Report-on-Justice>

⁵³ *Ibid.*, p.19.

approach should inform the process for requesting an in-person hearing in the post-COVID-19 period if electronic hearings are the default option. There needs to be a readily accessible form and a straightforward process to request an in-person hearing, and to set out the reasons for the request as an integrated part of the application and response process,⁵⁴ not as an extra step. Currently, Tribunals Ontario does not have any form available for requesting an in-person hearing unless the request is based on the need for a human rights accommodation.

The Quebec Tribunal administrative du travail has a form with optional boxes for requesting an in-person or electronic process for mediation.⁵⁵ This is also the approach of the Social Security Tribunal of Canada – individuals appealing Employment Insurance, Old Age Security or Canada Pension Plan decisions are offered an up-front choice of hearing formats in most cases.⁵⁶

It is also critical that Tribunals Ontario introduce user-friendly public information materials that inform potential users of their hearing format options. Currently, the Tribunals Ontario *Updated Practice Direction* does not identify any specific factors that will mitigate against scheduling an electronic hearing. Instead of addressing the fact that some parties may not have computers and/or internet access, it expressly provides that a party's "unfamiliarity with a new technology (for example, videoconferencing technology such as Microsoft Teams) is not sufficient, in and of itself, to necessitate an in-person hearing".⁵⁷

This language must be changed to instead support users in considering whether they need to request an in-person hearing in order to participate on a fair and equal footing. It can be contrasted with the *IRB RPD Virtual Hearings - Guide for Parties* which acknowledges that "in some circumstances it may not be appropriate to hold a hearing virtually" and sets out minimum conditions for a virtual hearing, including high-speed internet,

⁵⁴ At the Landlord and Tenant Board, given that there is no response form, a form for hearing format options could be attached to the Notice of Hearing.

⁵⁵ The Quebec Tribunal administrative du travail has shared with CCAT a simple checkbox format for parties to indicate their preference for an in-person or videoconference mediation. See form posted on CCAT website under COVID-19 Resources <http://www.ccat-ctac.org/en/covid-19-resources->

⁵⁶ 2019 Progress Report, *Putting Clients First*, Social Security Tribunal of Canada, p. 9. <https://www1.canada.ca/en/sst/rdl/2019-progress-report.html>

⁵⁷ *Updated Practice Direction on Hearing Formats*, under "Factors Relevant to the Appropriate Hearing Format", numbered paragraph 2, second bullet. <https://tribunalsontario.ca/documents/TO/Practice-Direction-on-Hearing-Formats-EN.html>

access to a telephone in addition to a device with a camera and a private space. ⁵⁸:

The Workplace Safety and Insurance Appeals Tribunal of Ontario issued *COVID-19 Interim Practice Guideline: Objections to Alternative Hearing Methods*, on June 15, 2020, referencing the need for the parties to have “the technological capability to participate by videoconference”. However, this language was removed when the guideline was re-issued on September 15, 2020. ⁵⁹ Significantly though, this is an interim guideline specific to the pandemic circumstances, not part of a permanent shift to digital hearings as at Tribunals Ontario.

The language in the Tribunals Ontario *Updated Practice Direction*, and the lack of any user-friendly form, will serve to discourage a party without internet access, a computer and IT skills, from believing these disadvantages could be the basis for requesting an in-person hearing.

No litigant before a tribunal should have to guess which factors might entitle them to an in-person hearing, particularly when the population served by the tribunal is characterized by economic and social disadvantage. As noted by the Canadian Bar Association its COVID-19 Task Force report: “technology must serve the disadvantaged, not perpetuate disadvantage”. ⁶⁰

5. Navigation support as part of tribunal services

The Social Security Tribunal of Canada has established a ‘best practice’ standard for assisting the public using its services. A “navigator” contacts each appellant after an appeal is filed to provide help, if needed, in understanding the process, completing the forms, determining what hearing format is best for them and to give general guidance on how to prepare for the hearing. The navigator will help the person understand the IT

⁵⁸ RPD *Virtual Hearings – Guide for Parties* (Version 1.2.5) January 2021, p.3.
<https://irb.gc.ca/en/legal-policy/procedures/Pages/rpd-virtual-hearings-guide.aspx>

⁵⁹ WSIAT *COVID-19 Interim Practice Guideline: Objections to Alternative Hearing Methods*.
September 15, 2020.
http://www.wsiat.on.ca/en/home/news/wsiat_covid19_interim_practice_guideline.html

⁶⁰ “No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19, February 2021, p.16. <https://www.cba.org/Publications-Resources/Resources/2021/No-Turning-Back-CBA-Task-Force-Report-on-Justice>

requirements if they choose an electronic hearing and can provide information on how to effectively participate in the electronic process.

Tribunals in other jurisdictions have been providing similar support. A hearing clerk may facilitate the process at the outset of the hearing and troubleshoot during the hearing in case technical difficulties arise or to assist with sharing documents etc. ⁶¹

The SSTC explains why it introduced a navigator services in its 2020 annual report as follows:

“Most people have no idea how a specialized tribunal works. And hiring a lawyer isn’t an option. At the Tribunal, 68% of people who bring a case to us represent themselves. Many of them come from more vulnerable groups, including people with disabilities, seniors, and those who are unemployed. Some of our appellants don’t have secondary or post-secondary education, or speak English or French as their first language”.⁶²

This could also be a description of some members of the public who appear at the Social Benefits Tribunal, the Landlord and Tenant Board, the Human Rights Tribunal and the Child and Family Services Review Board. If the SSTC can offer its users choice of hearing format and the assistance of a navigator and hearing clerk, other tribunals should be able to do too. Perhaps most impressively, the SSTC has partnered with an independent distress helpline. If an appellant shows signs of emotional distress when contacting frontline SSTC staff, the staff person will offer to connect them with a free, confidential listening and crisis intervention service. ⁶³

6. Access to tribunal facilities

Since the beginning of the pandemic, Tribunals Ontario has kept its 43 regional offices closed. Social assistance recipients and tenants who contact Tribunals Ontario about their inability to participate in their upcoming videoconference hearings, are regularly referred to their local community

⁶¹ Examples: IRB-RPD, the Alberta Human Rights Tribunal and the federal Social Security Tribunal, the Canadian Human Rights Tribunal.

⁶² 2020 Progress Report: *Helping people access justice*, Social Security Tribunal, p.4-5. <https://www1.canada.ca/en/sst/rdl/2020-progress-report.html>

⁶³ 2019 Progress Report, *Putting Clients First*, Social Security Tribunal of Canada, p. 10. <https://www1.canada.ca/en/sst/rdl/2019-progress-report.html>

legal clinic to request legal assistance and/or the use of clinic office space and computers to access their hearings. Even when clinics have been over-capacity and unable to provide representation, they have tried to share their limited office space with litigants who would otherwise be unable to connect to their hearings by videoconference. ⁶⁴

The closure of the 43 regional centres had been identified as a downloading of tribunal services on to under-resourced legal clinics, with an accompanying download of COVID safety risks that could be better managed by the province at the large regional offices. Since the beginning of the pandemic, legal clinics have called upon Tribunals Ontario to open their regional offices and set up terminals for tenants and social assistance recipients to use in accessing their hearings. ⁶⁵

There is ample precedent for providing access to office space with IT support for tribunal users. At the IRB-RPD, in cases where the adjudicator is not located in the refugee claimant's city, the claimant participates in their hearing at a government office with an IRB computer and camera set up. During the current health crisis, the IRB has retained the option of allowing appellants to use its offices. The IRB's January 2021 *RPD Virtual Hearings – Guide for Parties* informs claimants that they can ask to connect to their hearing from an IRB office using an IRB computer if they want a virtual hearing but lack the minimum requirements at home, such as high-speed internet access. ⁶⁶

⁶⁴ The Mississauga Community Legal Clinic wrote to the Attorney General and to the Executive Chair of Tribunals Ontario on January 31, 2021 as follows:

"Tribunals Ontario has a 6000 square foot space in Mississauga that serves Brampton and Mississauga residents when they need to appear before the SBT, LTB, and HRT. This space offered two full hearing rooms, three mediation rooms, counter staff, commissionaires, mediators, and tenant duty counsel. This space has been closed since March 2020 and inaccessible to the public. The shuttering of this location and the rush to proceed with a digital first strategy has resulted in our clients, who already have barriers in fully participating in society, to seek our limited space and resources to participate in Tribunals Ontario services. Our clinic has very limited available space for holding virtual hearings because we simply have not been funded to supplant the services provided by Tribunals Ontario. Community legal clinics across the province have been funded based on the assumption that there is a fully functioning tribunals system that operates on a primary principle of access to justice. Our limited resources to accommodate our clients' needs is further exacerbated by the 30% budget cut to Legal Aid Ontario that occurred in 2019, the ongoing pandemic and the social distancing and safety regulations we must follow to keep our staff and clients safe. "

⁶⁵ See: "Ontario Legal Clinics' Concerns: Landlord and Tenant Board Operations during the COVID-19 Pandemic", ACTO website, October 13, 2020. <https://acto.ca/media-and-reports/reports>, p.11.

⁶⁶ IRB RPD Virtual Hearings - Guide for Parties <https://irb.gc.ca/en/legal-policy/procedures/Pages/rpd-virtual-hearings-guide.aspx>

The Social Security Tribunal of Canada (SSTC) also has a long-standing practice of making Service Canada offices and computers across the country available for appellants who choose to have their hearing by videoconference.⁶⁷

Tribunals Ontario has recently taken a step in this direction, in response to concerns raised by legal clinics. On January 27, 2021, Tribunals Ontario announced a pilot project to allow Landlord and Tenant Board parties in Toronto, who need access to a computer and telephone terminal, to request access to a terminal at its downtown office. The pilot will apparently be evaluated to see if it can be applied to other LTB regional hearing centres.

G. Conclusion:

Who is hurt by unduly restricting access to an in-person hearing?

This is the most important question that needs to be answered before considering a permanent pivot to a process where electronic hearings are the default option that must be contested to be avoided. The answer to this question will flow from the environmental scan, from stakeholder consultations and from the preceding questions.

What can we anticipate in approaching this question? Take the example of the Human Rights Tribunal of Ontario (HRTO). Parties are currently experiencing very significant scheduling delays at the HRTO.⁶⁸ The applicants are rights-claimants and will benefit from a process that is more timely (as opposed to respondents who may take the position that time is on their side). During the pandemic, participation in a virtual hearing is the only way to avoid being stuck in an ever-growing backlog.

But in a post-COVID Ontario, a virtual hearing process will not necessarily reduce delays, particularly given the depth of the backlog at the HRTO. The Tribunal was only meeting its performance goal for scheduling hearing dates in 7% of cases as of March 31, 2020, according to its last published Annual Report. It can be expected that the 2020/21 Annual Report will show similar results in the past year given that a key cause for delay is the fact that, as of

⁶⁷ 2019 Progress Report, *Putting Clients First*, Social Security Tribunal of Canada, p.9. <https://www1.canada.ca/en/sst/rdl/2019-progress-report.html>

⁶⁸ See: *Justice delayed: The decline of the Ontario Human Rights Tribunal under the Ford government*, Globe and Mail, January 30, 2021. Available at: <https://tribunalwatch.ca/>.

March 2021, the HRTO continued to operate with half of the 22 full time adjudicators in place when the current government came into power.⁶⁹

This reduction in the number of adjudicators is a pattern across Tribunals Ontario. Since taking office in 2018, the government has failed to re-appoint adjudicators in the normal course if first appointed by the previous Liberal government and then failed to appoint new adjudicators in a timely fashion.⁷⁰ Reducing a tribunal's capacity, creating deep backlogs for would-be litigants,⁷¹ and then using that as a reason to maintain COVID-era restrictions on access to in-person hearings, with the attendant risks to access to justice, does not appear to be an appropriate strategy.⁷²

What other factors would help assess the potential harms of the 'digital transformation' at the HRTO? The HRTO Annual Report (part of the Tribunals

⁶⁹ Ontario Public Appointments Secretariat, Agencies and Current Appointees, Human Rights Tribunal of Ontario at <https://pas.gov.on.ca>.

⁷⁰ The declining number of adjudicators is a critical issue at several Ontario tribunals including the former social justice cluster at Tribunals Ontario. The government has failed to re-new appointments in the normal course for adjudicators first appointed by the previous provincial government and has failed to fill the vacancies with new appointees. For example, the Child and Family Services Review Board has approximately half the adjudicators it had in 2018. At the Social Benefits Tribunal, the number of adjudicators has fallen by one-third. See: *Statement of Concern about Tribunals Ontario*, Tribunal Watch Ontario, May 14, 2020. <https://tribunalwatch.ca/>.

⁷¹ A review of the last published Annual Report for Tribunals Ontario (2019/20) shows that the backlog at the LTB has grown 43% between March 31, 2018 and March 31, 2020. It also reports that the CFSRB is only meeting its performance target for scheduling hearings in 11% of cases and that there were 9,200 plus SBT appeals outstanding at the end of the 2019/20 fiscal year. It would take well over one year for the SBT to hear these backlogged appeals at the current average rate of approximately 6,500 hearings per year. [https://tribunalsontario.ca/documents/TO/Tribunals Ontario 2019-2020 Annual Report EN.html](https://tribunalsontario.ca/documents/TO/Tribunals%20Ontario%202019-2020%20Annual%20Report%20EN.html)

Also see "*Delays triple at the social benefits tribunal*", Toronto Star, February 16, 2021. [https://www.thestar-com.cdn.ampproject.org/c/s/www.thestar.com/amp/news/gta/2021/02/12/delays-at-the-social-benefits-tribunal-have-tripled-leaving-odsp-claimants-in-extended-limbo.html](https://www.thestar.com/cdn.ampproject.org/c/s/www.thestar.com/amp/news/gta/2021/02/12/delays-at-the-social-benefits-tribunal-have-tripled-leaving-odsp-claimants-in-extended-limbo.html)

⁷² In terms of access to justice, it is equally troubling that the Ministry of Community and Social Services has indicated to the Ontario Auditor General that it is considering rolling back appeal rights for social assistance recipients at the Social Benefits Tribunal where the wait times for disability benefits appeals is now well over one year. George Thomson, a former Ontario deputy minister and retired judge who headed a past government task force on social assistance reforms, has raised the alarm about the prospect of legislative reforms to reduce appeal rights of welfare recipients: "*Doug Ford and Bonnie Lysyk team up to go after some of Ontario's most vulnerable*", Martin Regg Cohn, Toronto Star, December 9, 2020. Available at <https://tribunalwatch.ca>.

Ontario Annual Report) no longer provides information on hearing representation. But archived annual reports for the HRTO from the SJTO cluster indicate that approximately 30% of claimants were self-represented at mediation as compared to 10% of respondents, and 50% of claimants were self-represented at hearing, as compared to only 6% of respondents.⁷³

This makes sense. Respondents are businesses, landlords, service providers. Applicants are individuals who believe they have experienced discrimination at work, in rental housing, in accessing services.

Based on the grounds of discrimination in HRTO applications, we know that disability was a claimed ground of discrimination in over 50% of applications and that applications claiming race, colour, ethnic origin, place of origin and/or ancestry as one ground of discrimination made up over 85% of the overall grounds claimed in applications in 2019/20.⁷⁴ So the data shows that people with disabilities, people of colour and immigrants make up a significant portion of the applicant pool.

There is no data available on income, but the HRTO-Tribunals Ontario Annual Reports indicate that, in the last four years, almost 68% of applications have claimed that the applicant experienced negative treatment in employment that amounted to discrimination. From decisions, we know that this means lost jobs and lost employment opportunities. This suggests that people with insecure employment income form a significant portion of the applicant pool at the HRTO. This correlates to the data we have on race, immigration status and disability in the applicant pool. We know that people of colour, recent immigrants, Indigenous people⁷⁵, and people withing with disabilities⁷⁶ are disproportionately living in low-income households.

⁷³ This percentage (50%) may not be entirely accurate as the HRTO at no point recorded and reported representation levels at the commencement of a merits hearing. This number would omit instances in which applicants retained counsel after mediation and before hearing, for example. Human rights applicants can access free legal support services through the Human Rights Legal Support Centre. The Centre provides unbundled legal services and often becomes retained between mediation and hearing. www.hrlsc.on.ca

⁷⁴ Many applications claim multiple grounds. It would be common, for example, for colour and race to be both included on a single application. Tribunals Ontario, Annual Report, 2019/2020.

⁷⁵ See Footnote 28.

⁷⁶ People between the ages of 25 to 64 with disabilities (including mild and more severe disabilities) are more than twice as likely to living below Canada's Official Poverty Line: *A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017*, Table 13 at: <https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm>

There is no information in annual reports on internet access or computer access for applicants and respondents but this information should now be collected by the HRTO as part of its evaluation of its experience with electronic hearings in the pandemic.

In a summary way, we can identify who could be hurt by the digital transformation at the HRTO. Low-income claimants with limited internet access, including disproportionately racialized and Indigenous claimants, persons with disabilities and recent immigrants. The picture may be somewhat different at the Landlord and Tenant Board (where landlords are the applicants in almost 90% of applications) and at the Social Benefits Tribunal and at the Child and Family Services Review Board.

Identifying impacts at each tribunal is the work that needs to be done by Tribunals Ontario. As noted by the CBA COVID Task Force Report, “there is the very real possibility that legal tech will make it easier for employers, creditors and landlords to bring cases against employees, debtors and tenants – not the other way around”.⁷⁷

This brings us back to where we started. The academic research is warning that electronic hearings have a detrimental impact on access to justice and on hearing outcomes for vulnerable individuals who face heightened challenges in effectively participating in a virtual format. Ontario legal clinics are reporting that marginalized individuals in their client communities fall into the group of people disadvantaged by a digital process.

There is one final point to be added. In a series of court decisions considering immigration detentions, both by way of judicial-review applications of decisions of the IRB and *habeas corpus* applications before provincial Courts of Appeal, the Federal Court of Appeal and the Supreme Court of Canada, and provincial appellate courts warned about the critical need to bring a fresh mind to each and every adjudication decision especially when there is a risk that the routine nature of the decision-making process may weigh against a robust consideration of the particular circumstances in each case.⁷⁸

⁷⁷ *No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19*, February 2021, p. 17, quoting from the Stanford Law School Blog. <https://www.cba.org/Publications-Resources/Resources/2021/No-Turning-Back-CBA-Task-Force-Report-on-Justice>

⁷⁸ *Chhina v Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248, July 31, 2017, at para. 43. Also: *Ali v. Canada (Attorney General)*, 2017 ONSC 2660, April 28, 2017; *Brown v. Minister of Public Safety* 2016 ONSC 7760 ; *Scotland v. Canada (Attorney General)*, 2017 ONSC 4850, August 14, 2017; *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C.

Although the nature and structure of IRB detention review process is very different than what exists at tribunals such as the Landlord and Tenant Board and the Social Benefits Tribunal, the high annual volume of similar cases (45,000 arrears evictions; 10,000 disability appeals), with often unrepresented litigants, creates a comparable risk that adjudicators will find it difficult to conduct a rigorous review of the evidence and bring a fresh mind to every case.

This is a factor that deserves consideration when assessing the merits of moving to limit access to in-person hearings. Given the other potential risks at play in a virtual format - reduced participation, distrust of the process, uneven internet access, disrupted access to mediation or counsel - the absence of in-person interaction seems sure to be an additional factor weighing against a robust consideration of the fullest case in favour of a vulnerable party.

This will be particularly true in the months ahead as the Landlord and Tenant Board, the Human Rights Tribunal, the Social Benefits Tribunal and the Child and Family Services Review Board face their very substantial backlogs⁷⁹ with

214 (T.D.); *Chaudhary v. Canada (Public Safety and Emergency Preparedness)* 2015 ONCA 700; *Brown, Alvin John and End Immigration Detention Network v. M.C.I. and M.P.S.E.P.* (F.C., no. IMM-364-15), July 25, 2017; 2017 FC 710. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350; 2007 SCC 9; *Canada (Minister of Citizenship and Immigration v. Thanabalasingham)*, [2004] 3 FC 572 (FCA); *Panahi-Dargahloo*, 2009 FC 114. *R. v. Ogiamien*, 2016 ONSC 4126, June 29, 2016; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 (November 2, 2017).

In light of these decisions, the author was retained by the IRB in 2018 to conduct an external audit of the fairness of detention review hearings conducted by the Immigration Division. The final audit report can be found at:

<https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx>

⁷⁹ For more information on delays, see Footnote 71 and other materials at:

<https://tribunalwatch.ca/>. Delays at the SBT are now as long as 18 months for disability benefits appeals. As of December 1, 2020, clinics have reported that no SBT appeals filed in 2020 had yet been scheduled for a hearing. See "Concerns for the Future of the Social Benefits Tribunal", Tribunal Watch Ontario, <https://tribunalwatch.ca>.

A 3-day hearing at the HRTO can now take 3 to complete, one day at a time: *Justice delayed: The decline of the Ontario Human Rights Tribunal under the Ford government*, Globe and Mail, January 30, 2021.

The Ontario Ombudsman has been conducting an investigation into delays at the LTB since January 2020, after receiving a "surge in complaints" even before the pandemic. Tribunals Ontario was the single largest source of complaints to the Ombudsman in 2019-2020, other than correctional facilities, with 1,051 complaints: Ombudsman 2019/20 Annual Report, p. 37.

https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/OntOmbud_AR-2020-EN.pdf

a reduced number of adjudicators, almost all of whom are recently appointed and lack the experience and expertise of their colleagues whose appointments were prematurely not renewed.⁸⁰

Moreover, in the context of these four tribunals, it is worth noting that, the wider the gap between the litigant's life experience and that of the adjudicator, the more important it may be for the litigant to be able to plead their own case in person in a public setting that affords dignity, respect and an unencumbered opportunity to tell their story.⁸¹

In conclusion, Tribunal Watch Ontario urges Tribunals Ontario, and all Canadian tribunals that serve a population that includes vulnerable or disadvantaged individuals, to proceed very cautiously in restricting access to in-person hearings in the post-COVID-19 period. For individuals with equality rights protections, human rights statutes require that barriers not be erected that impede their ability to access tribunal services. More generally, Canadians no doubt expect that innovations to the justice system will enhance and not impede access to justice for low-income and self-represented individuals. Videoconference and teleconference hearings, as well as other digital formats, may have a growing place in administrative justice but the integrity and legality of a digital justice model depend on maintaining in-person hearings as an accessible option.

⁸⁰ *Statement of Concern about Tribunals Ontario*, Tribunal Watch Ontario, May 14, 2020. <https://tribunalwatch.ca/resources/>

⁸¹ This factor is supported by the empirical studies (Footnotes 4-10) that capture feedback from laypeople who believed that their virtual hearings were not fair and did not communicate respect for the importance of their legal issues. See also *Online hearings and the quality of justice*, UK Administrative Justice Institute, ukaji.org. Link in *COVID-19 and administrative justice* on CCAT website, under COVID-19 Resources. <http://www.ccat-ctac.org/en/covid-19-resources->