

TRIBUNAL WATCH ONTARIO

<https://tribunalwatch.ca/>

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ACCESS TO JUSTICE THREATENED AT THE LANDLORD AND TENANT BOARD

STATEMENT OF CONCERN

Tribunal Watch Ontario is deeply concerned about the quality of justice currently being delivered at the Landlord and Tenant Board (LTB). Ongoing delays in the processing of applications, inexperienced adjudicators, as well as hearing-day inefficiencies caused by the LTB's new digital hearing format, are creating hardship for tenants and landlords across the province.

However, Tribunal Watch's most pressing concern at this juncture is access to justice for parties before the LTB who lack internet access and/or computer resources and skills. The LTB's permanent shift to digital hearings means that every year, thousands of parties, particularly low-income tenant households, will lose their right to an in-person hearing and will be unable to participate equally in their eviction hearings before the LTB. Statistics Canada data establishes that 46% of all Ontario tenants live in financially precarious households that spend more than 30% of household income on shelter costs, leaving little room for the purchase of computers or internet service. In practice, the result is that many tenants are only able to access their eviction hearings by telephone, if at all, while the adjudicator and their landlord participate together by videoconference. In addition, tenants are sometimes required to wait on the phone for several hours for their hearings to be convened, with the result that tenants with insufficient data and talk times become disconnected and are evicted without the opportunity to give evidence.

In addition to moving all hearings online with very limited exceptions, Tribunals Ontario closed its 43 regional offices in 2020. These offices housed hearing rooms as well as front line staff who assisted tenants and landlords daily in navigating the LTB application process. Although in 2021, the Tribunals Ontario opened limited-access videoconference terminals in four locations only - Toronto, Hamilton, Ottawa, and London - this restricted and discretionary access to a computer terminal for a scheduled hearing is an improvement only for parties lucky enough to live close enough to one of those terminals, to have their request granted, and to have sufficient technological skills to manage the electronic interface. Across the province, the public has lost the ability to get in-person assistance from LTB counter staff.

Also of particular concern is the announced introduction this year of a new case management and online dispute resolution system that has been developed to date without meaningful consultation with user communities. The first stage of this roll-out is a new online tool called "Navigate Tribunals Ontario" which can assist parties with internet access and computers to obtain information on the steps in the LTB process and the resources available. However valuable this new resource may be for parties

with computers and high-speed band width, it will do nothing to assist low-income and rural users who have no means of accessing the online navigation tool to get the assistance that was formerly available at the front desk of the 43 regional hearing venues.

Finally, the LTB has implemented its new digital hearing model in a way that undercuts the ability of tenants to readily access Legal Aid Ontario's Tenant Duty Counsel Program (TDCP) under which community clinic lawyers provide free legal advice to tenants facing eviction. By scheduling multiple province-wide hearing blocks to replace regional in-person hearings, the LTB has set up a model that prevents Tenant Duty Counsel lawyers from efficiently connecting to tenants to offer legal services. Lawyers now spend hours on the phone waiting for a tenant in their catchment area to be called up for hearing. At the same time, the LTB has now discontinued its long-standing practice of allowing TDCP lawyers to access a tenant's tribunal file on the day of the hearing, further undercutting their ability to offer effective representation. The LTB has failed to recognize that access to legal services is a key component of access to justice. Fewer tenants are now able to access legal aid services and it is more difficult for tenant duty counsel to provide effective representation. This has an overall detrimental impact on the quality and efficiency of the administration of justice at the Landlord and Tenant Board.

RECOMMENDATIONS

By moving to digital hearings and online dispute resolution, Tribunals Ontario will save significant financial resources associated with travel costs and regional hearing rooms. It is important that these funds be re-invested to ensure access to justice for parties who do not have the IT resources and skills to participate in a digital hearing. Tribunal Watch calls on the LTB to make the following minimum changes in its policy on hearing formats.

1. During a trial period of two years, establish that any party has the right to request an in-person hearing and that such requests will be granted in the normal course, absent extenuating circumstances. ¹
2. Establish a simple straightforward process for parties to choose an in-person hearing, as opposed to a telephone or videoconference. ²

¹ This is the practice of the federal *Social Security Tribunal* and the Immigration and Refugee Board, Refugee Division, except for current pandemic restrictions.

² For example, the federal *Social Security Tribunal* (SST) guidelines expressly recognize that many people lack internet access and skills, and are unable to participate effectively in an electronic format. The SST provides navigator support to help applicants determine the best hearing format to meet their needs.

3. Immediately invite meaningful stakeholder consultation on its soon-to-be-introduced case management and online dispute resolution system.
4. Introduce an in-person “navigator” resource for parties without internet access, with a real person available through an accessible telephone line.³
5. Retain regional in-person offices on a scaled-down basis, with the capacity to do in-person hearings at a reduced level, while expanding regional terminals to allow parties without internet access to participate by videoconference through a Tribunals Ontario terminal.
6. Consult with tenants, landlords and justice partners, including community legal clinics and the TDCP, on how to re-design the format and scheduling process for digital hearings to facilitate access to free legal services for tenants facing eviction.

BACKGROUND

What does the Landlord and Tenant Board Do?

The Landlord and Tenant Board is one of fourteen tribunals that together constitute Tribunals Ontario. The mandate of the LTB is to resolve disputes arising in respect of rental and cooperative housing.

The LTB receives in excess of 80,000 applications a year, of which over 70,000 are brought by landlords. Every year, over 90% of landlord applications seek termination of a tenancy and eviction. Of these eviction applications, the vast majority are based on arrears of rent.

The bulk of the work of the LTB is hearing and deciding eviction applications brought by landlords because a tenant household has fallen behind in rental payments. This means that low-income tenant households in precarious financial circumstances form a significant component of the public that uses the services of the LTB.

Why the Permanent Shift to Digital Hearings?

The move to reduce access to in-person hearings has been justified by Tribunals Ontario and the LTB as necessary to improve access to justice and to reduce delays in the processing of applications.

³ The Social Security Tribunal of Canada has instituted a navigator service. See its report at:

<https://www1.canada.ca/en/sst/navigator-cppd-gdis.html>

With respect to the first justification, it ignores the fact that offering online justice does not improve access for those who do not have access to the internet and the appropriate hardware, software and technological skills.

With respect to the second reason given for the transformation, we acknowledge that delay in processing applications is a critical issue at the LTB. The backlog of outstanding applications at the LTB increased by 43% between March 31st, 2018, the end of the 2017/18 fiscal year, and March 31, 2019, the end of the 2018/19 fiscal year. Until the 2020/21 Annual Report, now due, is published, we can only speculate as to what the current backlog is, but anecdotal evidence suggests that the rate of disposition has not improved over the course of the 2020/2021 fiscal year.

Since March 2020 is the month that in-person hearings began to be closed down because of the pandemic, it is clear that the delay in case processing began in 2018 as a pre-pandemic problem. In-person hearings were not the cause of the increased delays starting in 2018.

How did the delays at the Landlord and Tenant Board arise?

In large part, the delays at the LTB were caused by the failure of the current government to re-appoint, in the normal course, dozens of adjudicators previously appointed by the prior government, right across Tribunals Ontario. The Landlord and Tenant Board lost almost one-third of its full time complement of adjudicators between 2018 and 2020. Although the number of adjudicators has increased in 2021, the LTB has moved to digital hearings its panel of experienced decision-makers who could have mentored new appointees in the art of running a fair hearing and who could have contributed subject-matter expertise to the adjudicative work on the tribunal.

Largely because of the delays, Tribunals Ontario was, for the second year in a row, the single largest source of complaints to the Ontario Ombudsman in 2020/21 (other than correctional institutions), with the bulk of the over 900 complaints relating specifically to the LTB. The 2020/21 Ombudsman Annual Report notes that in the past year, it has also received an influx of new complaints from people frustrated with the virtual hearing process, including access issues. Hopefully the Ombudsman will add the issue of access to digital hearings to its ongoing investigation and monitor the LTB to ensure a level playing field for parties who do not have adequate IT resources, skills or internet access to allow their participation in a videoconference hearing.

Is there a process to request an in-person hearing?

The LTB has not created a straightforward process to facilitate requests for an in-person hearing and has issued a Practice Direction that specifically provides that lack of familiarity with technology is not a basis for requesting an in-person hearing. Unlike

other tribunals, the LTB Practice Direction is silent on the ability of parties to request an in-person hearing if they do not have adequate access to the internet and/or to a computer.⁴ The LTB has not created a form to use for parties to specifically request an in-person hearing although it has a form to request a French-language hearing and a *Human Rights Code* accommodation at a hearing.

Compounding this inequity is the fact that a much higher percentage of tenants, as compared to landlords, are unrepresented at LTB hearings. Unfortunately, Tribunals Ontario does not release statistics on representation rates at its tribunal hearings. However, a study by Legal Aid Ontario's Tenant Duty Counsel Program in 2018 indicated that while almost 80% of landlords had representation at LTB hearings, only 2.6% of tenants were represented.⁵

Inequities in Digital Access

Parties living in rural communities, regardless of income, are at a disadvantage in a digital-first hearing model. 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.⁶

But high-speed internet access is a problem for low-income parties in urban communities as well. Data from school boards this year found that 25% of students under urban school boards lacked adequate internet access for synchronous remote learning.⁷

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

⁴ See for example: IRB *RPD Virtual Hearings – Guide for Parties*, p.3. <https://irb.gc.ca/en/legal-policy/procedures/Pages/rpd-virtual-hearings-guide.aspx> or 2019 Progress Report, *Putting Clients First*, Social Security Tribunal of Canada, p. 9. <https://www1.canada.ca/en/sst/rdl/2019-progress-report.html>

⁵ *We Can't Wait: Preserving Affordable Housing in Ontario*. Advocacy Centre for Tenants Ontario, November 2019.

⁶ “New internet performance data shows the staggering scale of Canada's urban-rural digital divide”, May 8, 2020. Available at <https://www.cira.ca>.

⁷ “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.

substantial proportion of households (14.7 and 13.8) only have internet access at home through their mobile phones.⁸

Tenant households make up a significant portion of low-income households. Statistics Canada data establishes that 46% of all Ontario tenants live in financially precarious households that spend more than 30% of household income on shelter costs, leaving little room for the purchase of computers or internet service. Over 24% of the lowest-income households have no access to the internet except through smart phones.⁹ In practice, the result is that many tenants can only participate in their eviction hearings by telephone, while the adjudicator and their landlord participate by videoconference.¹⁰

Which Communities are Most Affected by Restricted Access to In-person Hearings?

Statistics Canada data assists in further identifying the constituencies that will face increased barriers to justice with a digital-first hearing format. We know that 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.¹¹ People between the ages of 25 to 64 with disabilities (including mild and more severe disabilities) are more than twice as likely to be living below Canada's Official Poverty Line.¹²

This means that the following constituencies will be disproportionately disadvantaged by losing the right to an in-person hearing at the LTB: persons living in low-income households, people living in rural communities, Indigenous people, recent immigrants, racialized people, and people living with disabilities.

⁸ 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/89-654-x/89-654-x2018002-eng.htm)

⁹ 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/89-654-x/89-654-x2018002-eng.htm)

¹⁰ Ontario's Tenant Duty Counsel Program, funded by Legal Aid Ontario, recently conducted a survey of LTB hearings over a 3-month period and found that 55.6% of tenants participated in their videoconference hearings by telephone, whereas only 26% of landlords participated by telephone as opposed to by videoconference.

¹¹ *Data Tables, 2016 Census*, Statistics Canada. <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Index-eng.cfm>

¹² *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>

Moreover, even households with basic internet or cellphone access do not necessarily have the requisite printing, scanning and uploading abilities needed to exchange and file documents to comply with a time-sensitive disclosure order issued by the LTB. 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.¹³

¹³ *Landlord and Tenant Board Operations during the COVID-19 Pandemic*, October 13, 2020. <https://acto.ca/media-and-reports/reports>, p.7.