



Workplace Safety and Insurance Appeals Tribunal (WSIAT)

COVID-19 Interim Practice Guideline: Objections to Alternative Hearing Methods – Revised June 15, 2020

The WSIAT has postponed in-person hearings to support the province-wide effort to stop the spread of COVID-19. Alternative hearing methods are being offered to parties to prevent undue delay in having their matters resolved by the WSIAT and include teleconference, videoconference or written submissions. The WSIAT has a statutory mandate to adjudicate the matters within its jurisdiction during the unprecedented circumstances of the COVID-19 pandemic and minimize undue delay.

This Interim Practice Guideline sets out the WSIAT's approach to objections to alternative hearing methods during COVID-19.

Statutory Provisions

Pursuant to subsection 124(3) of the *Workplace Safety and Insurance Act, 1997* (the WSIA), the WSIAT may conduct hearings orally, electronically, or in writing. Section 131 of the WSIA provides the WSIAT with broad discretionary powers to determine its own practice and procedure in relation to proceedings, among other things.

The Government of Ontario passed Bill 188, *Ontario's Economic and Fiscal Update Act, 2020*, which received Royal Assent on March 25, 2020. Schedule 3 to the Act, the *Hearings in Tribunal Proceedings (Temporary Measures) Act*, (the "HTPA") came into force on the same date. With the passing of the HTPA, the Government has made it clear that the public must continue to have access to justice through administrative tribunals during the COVID-19 pandemic.

Pursuant to the WSIA, the WSIAT is already empowered to do most of what the HTPA authorizes. The HTPA provides tribunals with the broad power to control the nature of their proceedings with regard to process, format, and conduct. Under the HTPA, a tribunal may conduct a hearing in person, electronically, in writing, or by a combination of these methods, as deemed appropriate by the tribunal. Furthermore, the HTPA provides tribunals with the power to make any orders or give any directions that it considers appropriate in the circumstances regarding the format and conduct of the hearing, as well as any ancillary matters regarding notice of the hearing, the service or filing of materials, attendance at the hearing, and any recording or public access related to the hearing.

Highlights of Relevant Case Law

The duty of fairness does not require an oral hearing in every case.¹ It is also recognized that the duty of procedural fairness is inherently variable and flexible, and what is required in any specific proceeding will depend on the unique circumstances of the adjudication.²

Recent decisions of the courts at various levels and several tribunals have favourably considered alternative hearing methods during the COVID-19 crisis.³ As acknowledged by Justice Myers in *Arconti v. Smith*⁴, being able to use readily available technology is part of the basic skill set required of representatives and courts in the year 2020. Concerns about using technology or being uncomfortable with such resources do not outweigh the desirability of proceeding with a matter and do not justify unnecessary delay.⁵

Further, as Justice Paciocco wrote in *Carleton Condominium Corporation No. 476 v. Wong*⁶, in which he ordered an appeal to proceed in writing (with certain conditions), while the appellant's preference for an in-person hearing might be understandable, an in-person hearing is not necessarily required in the interests of justice. He also wrote that it is not in the interests of justice to adjourn matters that could be fairly dealt with as scheduled, so as to not further contribute to the backlog of cases that must be adjourned.⁷ Particularly as it is not known when in-person hearings will resume, agreeing to wait for an in-person hearing is "tantamount to granting an adjournment of an indeterminate length."⁸ Accordingly, in most cases, a preference for an in-person

¹ See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), in which Justice L'Heureux-Dubé wrote that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved, but rather, "[t]he flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations." Oral hearings can take place in-person, but also include hearings via teleconference or videoconference.

² *Ibid* at para. 21.

³ For example, see *Mitchell Hutchinson v. Point Farms Provincial Park*, 2020 CanLII 25912 (ON LRB); *Labourers' International Union of North America, Ontario Provincial District Council v. Berkim Construction Inc.*, 2020 CanLII 27468 (ON LRB); *Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America v. Blythwood Homes Inc.*, 2020 CanLII 30888 (ON LRB); *Labourers' International Union of North America, Local 183 v. Bloomfield Developments Inc. and/or Bloomfield Homes Inc.*, 2020 CanLII 31657 (ON LRB); *AMAPCEO v. Ontario (MAG) GSB #2018-1346* (unreported); *Southampton Nursing Home v. Service Employees International Union, Local 1 Canada*, 2020 CanLII 26933 (ON LA); *Lakeridge Health Corporation v. Ontario Nurses' Association*, 2020 CanLII 31785 (ON LA); and *TDSB v. OSSTF Grievance 18-004* (unreported).

⁴ 2020 ONSC 2782 (CanLII).

⁵ *Ibid* at paras. 33 and 43 to 44.

⁶ 2020 ONCA 244 (CanLII).

⁷ *Ibid* at paras 5 and 7.

⁸ *Ontario Public Service Employees Union, Local 389 v. LifeLabs LP*, OLRB Case No: 3559-19-U (available on the OLRB's website) ("LifeLabs") at para. 13.

hearing, or a lack of comfort with utilizing certain technology, will not be a sufficient basis to adjourn a matter so that it can proceed in-person.

As recognized by Justice Corbett in *Association of Professional Engineers v. Rew*,⁹ something will be lost if court business does not continue, as best as can be managed, during the COVID-19 crisis.¹⁰ In most cases, the relative importance of a case will not be relevant or determinative of whether a case can be heard fairly and efficiently using an alternative hearing method.¹¹

In the decision, *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*,¹² Justice Roberts observed: “It is also beyond controversy that the COVID-19 pandemic has created extraordinary circumstances to which we must all adapt as best we can.”¹³ That decision further recognizes that unnecessary strain on the court system is a relevant factor to consider in determining the appropriate hearing method.

In summary, the WSIAT has adopted the following general principles drawn from the relevant statutes and the above authorities:

- It is vitally important that administrative justice, including the work of the WSIAT, continues through alternative hearings methods during this time;
- The principles of natural justice do not require an in-person hearing in all circumstances;
- WSIAT stakeholders and adjudicators have an obligation to work together to adapt to the current circumstances;
- Preventing undue delay and the judicious use of the WSIAT’s resources are relevant considerations in determining the appropriate hearing format;
- The consent of the parties is not required to schedule a matter to be heard through an alternative hearing method; and
- The determination of whether a matter can proceed fairly via an alternative hearing method is a fact-specific exercise.¹⁴

⁹ 2020 ONSC 2589.

¹⁰ *Ibid* at para. 9.

¹¹ *Ibid* at para. 8. It is also worth noting that as of June 9, 2020, the Supreme Court of Canada, Canada’s final level of appeal, has converted all hearings to take place by videoconference.

¹² 2020 ONCA 303.

¹³ *Ibid* at para. 6. See also the *LifeLabs* decision, *supra* note 8 at para. 9, which states that it is generally accepted that the unprecedented COVID-19 pandemic has changed the traditional notion of a “hearing”.

¹⁴ *LifeLabs*, *ibid* at para. 10.

WSIAT's approach to Alternative Hearing Methods during COVID-19

During the COVID-19 pandemic, the WSIAT remains committed to providing access to justice: proceedings should not be delayed any more than is necessary. Accordingly, during this period when in-person hearings have been suspended, whenever possible, in-person hearings will be converted to hearings in writing or by teleconference, and, as noted below, videoconference.

Effective June 8, 2020, all scheduled in-person WSIAT hearings will be converted to a teleconference hearing unless the WSIAT is satisfied that another hearing format is appropriate and necessary.

Beginning the week of June 15, 2020, certain hearings scheduled to proceed in-person may proceed as a videoconference hearing, provided that the parties have the technological capability to participate by videoconference and there is sufficient time to undertake all of the additional, necessary steps required for videoconference hearings specifically. Please see the **Adjudication Update Q and A** and **Best Practices: Teleconference and Videoconference Hearing Information for Representatives and Parties** documents for more information.

The WSIAT's experience with utilizing alternative hearing methods, including hearings in writing or by teleconference or videoconference, both during and before COVID-19, has been positive, and has allowed for successful hearings (or alternative dispute resolution, as the case may be) with few difficulties.

Procedure for Objecting to the Hearing Format

Parties are encouraged to raise any concerns with a matter proceeding by teleconference or videoconference (or in writing) as soon as possible. Whenever possible, these concerns should be set out in writing and sent to the WSIAT as set out below. Parties should also ensure that other participating parties are copied on these communications and if possible, the position of the other parties with respect to the hearing format should be canvassed and confirmed in the written communication.

It is important that these communications include all necessary information and be as specific as possible.

The manner in which these concerns will be addressed will depend on the stage when the concerns are raised:

- Concerns about the potential hearing format that are raised before a matter is scheduled will be addressed by the Vice-Chair Registrar. The Vice-Chair Registrar will make a decision about the hearing format, which will be made part of the record.
- Objections to an alternative hearing format that are raised after a matter has been scheduled will be addressed by the Manager, Scheduling Administration and will also be noted on the record. In some cases, the Manager, Scheduling Administration may refer the objection to the Vice-Chair Registrar for direction.
- Parties who continue to have concerns about the hearing format may raise an objection with the assigned Vice-Chair or Panel at the hearing. **However, parties and representatives should be prepared to proceed on the scheduled hearing date.**

A party's preference for an in-person hearing, in itself, is not sufficient to warrant an adjournment.

Factors to consider in addressing objections to Alternative Hearing Methods

In addressing a party's objection to proceeding by teleconference (or videoconference, as the case may be), the Vice-Chair or Panel will balance and weigh the interests of the parties and the WSIAT's interests in not delaying the proceedings, and make a decision as to whether the matter can proceed fairly by an alternative hearing method.

Some of the factors that may be considered to determine whether there is a reason why the teleconference (or videoconference) would not permit a fair hearing include but are not limited to:

- The length of the delay if the matter is adjourned in favour of an eventual in-person hearing, including whether the delay would be of indeterminate length because it is not known when the restrictions related to COVID-19 on in-person hearings will be lifted.
- The potential prejudice to a party.
- The significance of the issue to the parties.
- The complexity of the matter, including whether the matter will involve a consideration of surveillance or other video evidence.
- Whether the individual circumstances of the case and procedural fairness considerations necessitate an in-person hearing.
- It should be noted that while a witness's demeanour may be an appropriate consideration when assessing credibility, "demeanour can also be misleading and should be factored into the credibility assessment with care", as it can be

inappropriately emphasized.¹⁵ Accordingly, credibility being at issue in a matter will not always necessitate an in-person hearing.

- Any other relevant matter.

Requests for Accommodation at WSIAT hearings

Both before and during COVID-19, the WSIAT provides accommodations at hearings. As set out in the WSIAT's [Accessibility Policy for Customer Service](#), which can be found on the WSIAT's "[Accessibility](#)" webpage, requests for accommodation are considered by the WSIAT on an individual basis and every reasonable effort is made to accommodate requests.

Requests for accommodation in relation to a hearing can be made at any point in the adjudicative process. For matters that are not yet scheduled, parties may contact the staff person assigned to their file or the WSIAT's Call Centre. For cases in which a hearing date has been scheduled, parties should contact the Manager, Scheduling Administration.

Accommodation requests should be made as early as possible and should include as much specific information as available – the WSIAT will be sensitive to the privacy concerns of those persons who seek accommodation. More information can be found in the applicable policy and on the WSIAT's "[Accessibility](#)" webpage.

La version française de cette page sera disponible sous peu. Si vous désirez obtenir les nouveaux renseignements en français avant leur publication, veuillez contacter notre centre téléphonique à distance au 416 436-8378 (ou au 1 888 618-8846) ou nous envoyer un courriel à WSIATCallCentre@wst.gov.on.ca. Nous aurons le plaisir de répondre à vos questions en français.

¹⁵ *R. v. D.P.*, 2017 ONCA 263 (CanLII) at para. 26.