PART A

ACCESS TO JUSTICE AND HOUSING RIGHTS

Inquisitorial Process and Procedural Fairness—Electronic Hearings at the Landlord and Tenant Board

Access to Accelerated Justice for Landlords and Tenants

INQUISITORIAL PROCESS AND PROCEDURAL FAIRNESS—ELECTRONIC HEARINGS AT THE LANDLORD AND TENANT BOARD

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ABSTRACT

The new electronic format at the Landlord and Tenant Board (LTB) allows for an observational study of the effect virtual platforms have on procedural fairness within inquisitorial proceedings at a government board. The electronic format that was introduced due to the COVID-19 pandemic has hit its stride during the years after implementation, yet the backlog still persists despite claims of efficiency and simplicity. Access to justice is about creating pathways for claims made by the most vulnerable in our society, which is made more difficult by necessitating expensive devices or using a format with which many are unfamiliar. The modality being used to make decisions affecting livelihood or residency has changed drastically, and suddenly, procedural fairness suffers when legitimate expectations must shift. Using personal observations of the proceedings over Microsoft Teams, this paper details what the duty of procedural fairness is; the history of its use in government boards; how the inquisitorial model works; inquisitorial formats within government boards; and whether or not the threshold for fair proceedings is being hindered due to confusion, informality, and the anonymity of the Internet. These observations of the LTB's electronic format lead one to conclude that it is insufficient for an inquisitorial modality in its current form. Despite claims of efficiency increases, the change of format appears to be contributing to further difficulties with procedural fairness. There are precedents and legislation that permit adjudicators of the LTB to make procedural decisions and ensure proper representation using an inquisitorial framework. The aim of this paper is to demonstrate how more active adjudication is necessary in an electronic format.

I. ACCESS TO JUSTICE AND THE PARALEGAL PROFESSION

In his article published in the Fordham Urban Law Journal, Marc Galanter explains that access to justice can be defined as the ability to utilize the judicial branch of the government; it is the end goal of a legal aid office or any institution that aspires towards legal equality.[1] Hand-in-hand with this access to justice movement beginning in the 1970s was the opening up of Alternate Dispute Resolution (ADR) pathways in which a claimant could seek remedy for legal issues using out-of-court procedures, which were cost-effective and streamlined.[2] The paralegal profession's expanded scope, which commenced in 2007, included the ability to represent clients in a variety of quasi-judicial

1 Marc Galanter, "Access to Justice in a World of Expanding Social Capability" (2010) 37 Fordham Urb LJ 115 at 115–17.

2 *Ibid* at 116.

tribunals with one of the most prominent being the LTB; this movement toward expanding the paralegal scope of practice was foremost about access to justice in quasi-judicial tribunals and during ADR processes.[3] Paralegals were given the opportunity in Ontario to represent applicants in a variety of tribunals, and despite their scope being limited in comparison to a legal practitioner, the legal advice given to clients in these settings impacts vital interests and can create orders that have a major effect on their life.[4] The duty of a paralegal to their client in a tribunal setting is just as fundamental as an order from a higher court in many circumstances. Allowing for cost-effectiveness, efficiency, and speed of the process by delegating subsidiary aspects of legality to a supportive profession increases the public's ability to afford and gain access to legal procedures.

The electronic era of the LTB, a tribunal in which a major number of paralegals will find themselves practising, was supposed to do something similar by creating efficient ease of process through physical location elimination.[5] Despite good intentions, a report issued by the Advocacy Centre for Tenants Ontario in 2020 details a number of problems with the new system which impact an applicant's ability to access justice in a fashion that adheres to principles of procedural fairness.[6] In this report by the Ontario Legal Clinics, the impact of the LTB's shift to an electronic format on the most marginalized tenants, who arguably require the most access to justice, is severe. The report specifically highlights as its first concern that the principles of procedural fairness are not being adhered to due to the unequal application of and access to the technological boardroom; this is mainly a result of procedural issues surrounding access to remote hearings among the most vulnerable and impoverished tenants.[7]

This paper will demonstrate that access to justice is impacted when our legitimate expectations for tribunal procedure are misinformed during a massive change in hearing format. It will begin by explaining and describing the elements of procedural fairness, the features of a tribunal inquisitorial process, and observations on current hearing processes at the LTB in order to conclude with the impact that an electronic format has on procedural fairness as

3 Jennifer Zubick & Samantha Callow, *ADR for Legal Professionals*, 2nd ed (Toronto: Emond, 2023) at 8–9.

4 *Ibid* at 9.

5 Ontario Legal Clinics, *Ontario Legal Clinics' Concerns: Landlord and Tenant Board's Operations During the COVID-19 Pandemic* (Toronto: Advocacy Centre for Tenants Ontario, 2020) at 2, online (pdf): <https://www.acto.ca/production/wp-content/uploads/2020/10/REPORT-ON-Legal-Clinics-Concerns-LTB-Operations-During-Pandemic.pdf>.

6 *Ibid* at 2.

7 *Ibid* at 4.

well as a proposal for increased inquisitorial adjudication within such a format in order for its success.

II. THE ELEMENTS OF PROCEDURAL FAIRNESS

A. DEFINING PROCEDURAL FAIRNESS

Section 11(d) of the *Canadian Charter of Rights and Freedoms*[8] guarantees the presumption of innocence for individuals when faced with a trial to determine their guilt in a fair and public hearing before an independent and impartial tribunal. Section 10(b) of the Charter affords the individual the right to retain and instruct counsel. Section 7 of the Charter guarantees a person's right to security, which can be applied as a promise of fair procedure when dealing with the judicial branch of the government. Applying the principles of natural justice to administrative and quasi-judicial tribunals began in 1979, with the Supreme Court of Canada endorsing a general duty toward procedural fairness.[9] This decision mandated that the obligation for procedural fairness exists when the rights, privileges, or interests of an individual or group of individuals are substantially affected in proportion to the general public due to a decision made by an agency, board, committee, or tribunal (ABCTs).[10] The need for fairness is gauged on a case-by-case basis depending on what purposes are served by the procedure. During an application for judicial review of legal errors made by ABCTs, different standards of review are applied depending on the degree or type of error made; the modern standards are "correctness" and "reasonableness."[11] Choosing which standard to use depends on the degree of scrutiny or deference given to an adjudicator's original decision. The standard of reasonableness allows for less scrutiny and more deference given to the original decision, whereas correctness is the more rigorous standard of review as the law is applied with strict interpretation.[12] The seriousness of the impact on the individual as a result of the tribunal's decision correlates with the requirement to adhere to a legitimate decision-making process. Further standards for procedural fairness were

8 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

9 *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, 1978 CanLII 24 (SCC).

10 Liz Nastasi, Deborah Pressman & John Swaigen, *Administrative Law: Principles and Advocacy*, 4th ed (Toronto: Emond, 2020) at 136.

11 Derek McKee, "The Standard of Review for Questions of Procedural Fairness" (2016) 41:2 Queen's LJ 355 at 356–57.

12 Nastasi, Pressman & Swaigen, *supra* note 10.

laid out in *Baker v Canada (Minister of Citizenship and Immigration)*,[13] where the issues of notice, oral interview, and the presence of counsel are all considered to be aspects of fairness alongside the statutory scheme in place for appeals or reopening and the gravity of the decision at hand. The *Baker* case also provides precedent for the concept of legitimate expectations in a proceeding, especially when that proceeding's outcome has a tremendous amount of weight on the parties. Legitimate expectations in a tribunal, especially as it pertains to decisions affecting livelihood, income, or residency, give credence to what kind of process one will encounter when attempting to enforce their rights before a board such as the LTB.[14] The *Statutory Powers Procedure Act*[15] creates guidelines for the implied and inherent powers of a tribunal. Within the Act, procedural fairness applies to decisions made by agencies, boards, committees, or tribunals where a "power or right, conferred by or under a statute, to make a decision deciding or prescribing … the legal rights, powers, privileges, immunities, duties or liabilities of any person or party … [or] the eligibility of any person or party to receive … a benefit."[16] This Act outlines the procedures necessary to conduct a fair and honest hearing where one renders a decision that affects the rights and benefits of an individual or group disproportionate to the whole of society. Therefore, legitimate expectations in a fair proceeding before an impartial decision-maker with competent representation constitute the owed duty of procedural fairness within a government board such as the LTB. If these expectations are not met, the LTB has the inherent ability to ensure remedial action takes place.

In the case of *Khan v University of Ottawa*,[17] a law student sought an appeal for the denial of judicial review concerning a decision to overturn a failing grade that she had received; her appeal was allowed as the decision substantially affected her rights and because her legitimate expectation of an oral hearing format for a test of credibility was not met. This means that an appeal of a decision made within a process that did not meet the expected standards was allowed by law since it violated the appellant's right to procedural fairness. Parties appearing at the LTB are also owed a level of procedural fairness as the decisions made by the Board affect the parties in a substantial capacity made by a statutorily enabled decision-maker and because applicants have legitimate expectations about how a proceeding before the LTB ought to go, much like how the University of Ottawa owed Ms Khan procedural fairness.

13 1999 CanLII 699 at para 26 (SCC).

14 *Ibid*.

15 RSO 1990, c S.22.

16 *Statutory Powers Procedure Act*, s 1(1).

17 1997 CanLII 941 (ONCA).

An applicant and a respondent should expect to give evidence submissions that speak to credibility and should be allowed to present a full defence in front of an impartial adjudicator.[18] Procedural fairness, at its most rigorous, contains the rights to evidence disclosure, an oral hearing, cross-examination, and representation by a lawyer or an agent.[19] In order for a hearing to substantively serve the interests of the parties in a meaningful way when their rights, privileges, or interests are at stake, such as in cases of livelihood or residence in the LTB cases, certain standards for the administration of justice must be present. In the case of *Fontaine v Canada (AG)*,[20] the format of an Independent Assessment Process (IAP) used in settling cases for victims of residential schooling abuse was explained as being inquisitorial in nature; the adjudicator in a proceeding is tasked with asking questions in an active manner to elicit testimony from witnesses and parties.[21] The adjudicator is tasked with testing evidence and determining witness credibility when using the IAP to prove the existence of a claim, award compensation, or give orders where appropriate.[22] The IAP is a separate process from court decisions as claimants may elect to utilize one pathway or the other, reminiscent of purposeful privative clauses in tribunal legislation where the statutory scheme does not permit for a right of appeal—the courts are not mandated to involve themselves since tribunals are permitted to reopen their cases or make unilateral decisions on the nature of proceedings.[23] If such a process is used in the Immigration and Refugee Board (IRB), an inquisitorial approach could be used at other government boards, such as the LTB.

In the case of *Abuzeid v Canada (Citizenship and Immigration)*[24] before the Refugee Appeal Division, it was alleged that the duty of procedural fairness according to principles of natural justice was not met due to incompetent counsel. The onus to demonstrate incompetence is on the one alleging it, and the threshold for demonstration is the high standard of correctness.[25] In this instance, Abuzeid's evidence did not meet the criteria for a correctness standard, and the application to the IRB was dismissed. Despite this, we learn from this case that incompetent counsel is a component of a fair process before a government board. In the case of *Badihi v Canada (Citizenship and*

18 *Ibid* at para 3.

19 Nastasi, Pressman & Swaigen, *supra* note 10.

20 2012 BCSC 839.

21 *Ibid* at para 7.

22 *JW v Canada (AG)*, 2019 SCC 20 at para 7.

23 Nastasi, Pressman & Swaigen, *supra* note 10.

24 2018 FC 34.

25 *Ibid* at para 10.

Immigration),[26] procedural fairness and the component of proper legal representation are questioned yet again while dealing with an appeal of an immigration tribunal decision. Justice Gleeson, in this case, explains that deference will be accorded to a decision (or the process which led up to the decision) based on the evidence; an unacceptable decision is one that falls outside a range of acceptable outcomes to warrant court intervention.[27] The main question, in this case, was whether the doctrine of procedural fairness was breached as a result of incompetence or negligence by the legal representative; the one who alleges incompetence must show evidence that substantial prejudice was caused directly by the erroneous actions or inactions of the individual's legal representation.[28] Badihi's evidence also did not meet the correctness standard, and the application was dismissed. In both aforementioned instances, a test is put forth: A breach of fairness can be established when notice is provided to the offending counsel, an act or omission of counsel demonstrates their incompetence, and the outcome of the hearing would have been different *but for* the incompetent error.[29] The applicant making an allegation of incompetence must, with legitimate evidence to prove the notion, demonstrate both incompetence of performance and the prejudice that occurred to their case on a balance of probabilities. This means that a breach of procedural fairness can occur at a government board if an error made by a representative is so grave that it results in a flawed outcome as a direct consequence.[30] The expectation of competent representation when engaged in a legal process is an integral element of procedural fairness since it instills trust in the representative and in the justice system, thereby encouraging honest communication between council and client. Therefore, the assumption of representative competence must be considered a legitimate expectation of procedure generating enough faith in one's counsel to take advice without independent research or excessive questioning.

In an inquisitorial quasi-judicial tribunal or board, most parties are self-represented and rely on the adjudicator for instructions.[31] Section 210(1) of the *Residential Tenancies Act, 2006*[32] permits a party to appeal the LTB's decision to the Divisional Court for errors of law. Agents or lawyers that have perverted the administration of justice through errors committed by incompetence or

26 2017 FC 64.

27 *Ibid* at para 8.

28 *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at para 7.

29 *Badihi*, *supra* note 26 at para 17.

30 *Ibid* at para 18.

31 Richard Feldman, *Residential Tenancies*, 11th ed (Toronto: Thompson Reuters, 2018) at 860–62.

32 SO 2006, c 17.

by conflicts of interest constitute an abuse of process; as such, they may be removed from cases before social justice tribunals.[33] Due to this, one may draw the inference that poor instruction and/or conflicts of interest on the part of an *adjudicator* within the ABCT setting, where parties are arguably more dependent on adjudicative counsel to succeed in their claims, can constitute errors of omission demonstrating incompetence that results in a prejudicial impact on the final outcome. When activities by legal representatives who are paid and hold themselves out as lawyers or agents imperil the proper administration of justice, the Charter's guaranteed rights for a fair trial and the instruction of counsel are infringed.[34] In ABCTs, where the process is a less formal alternative to a court, the standards for rigorousness may be more relaxed; however, with the introduction of a drastically changed modality of procedure using the electronic format, what will our legitimate expectations of procedure, representation, and adjudication be like during such a shift? In a past case heard by the LTB prior to the COVID-19 pandemic of 2020, a representative was found to be incompetent due to a lack of proper licensing. The *Residential Tenancies Act* explains that the LTB has the authority to exclude or limit an agent's participation in a proceeding since Rule 1.4 of the LTB's *Rules of Procedure*[35] authorizes members to make procedural decisions;[36] this means that an adjudicator is authorized to dictate the processes of the LTB during a hearing.[37] Furthermore, the Board is ethically duty bound to ensure that the party has a chance to obtain access to proper representation at the LTB as A9.4 of the Rules allows for disqualification of counsel in instances of process abuse. There is a precedent of such rules being practised within a case that concerned incompetent council before the LTB, and it is stated that the LTB has the statutory ability to manage its own processes, including determinations on whether or not a representative is permitted to provide counsel.[38] Despite these precedents applying to paralegals and lawyers who represent clients before the Board, the cases also are demonstrable of the procedural ability and power of the adjudicator of a Board hearing to dictate the process and inferentially act as counsel to a proceeding. In the inquisitorial process, an active trier of fact participates in the uncovering of evidence and the questioning of witnesses; due to the literature uncovered above, the

33 *Hansen v Toronto (City)*, 2010 HRTO 13 at para 7.

34 *R v Romanowicz*, 1999 CanLII 1315 at para 6 (ONCA).

35 Landlord and Tenant Board, *Rules of Procedure* (1 September 2021), online: <https://tribunalsontario.ca/documents/ltb/Rules/LTB%20Rules%20of%20Procedure.html> [the Rules].

36 *Residential Tenancies Act, 2006*, s 176 and *Statutory Powers and Procedures Act*, s 25.1.

37 *TSL-13613 (Re)*, 2009 CanLII 74505 (ONLTB).

38 *TST-70144-16-IN (Re)*, 2016 CanLII 13765 (ONLTB).

statutory privileges afforded to LTB adjudicators would permit this type of active inquisition. Legal precedent clearly allows for and perhaps mandates that the adjudicator ensures parties before the LTB have access to proper guidance by actively engaging and explaining procedures of the Board, especially in a time of format transition.

B. PROCEDURAL FAIRNESS IN AN INQUISITORIAL PROCESS

The administrative purpose of tribunals and adjudicators is to increase efficiency by using expertise to make decisions in a cost-effective manner.[39] Within such a model, the applicant would expect the tribunal members to conduct their hearings in a way that caters to individuals who require cost-effective and expeditious proceedings. Especially now, at the dawn of a new digital frontier, where many unfamiliar with technology will be taking part, tribunal members bear the responsibility of ensuring that these proceedings are efficient but foremost that they are fair and comply with the concept of natural justice. The LTB operates on a standard of proof to the balance of probabilities with parties often being self-represented and having little input from counsel or agents. The parties, particularly the tenants, often are economically disadvantaged and have the potential to experience great loss when receiving an unfavourable outcome or order at the LTB. The parties' vulnerability, paired with a relatively foreign format to many participating individuals, including those representing the clients, results in a process that may not meet the standards of procedural fairness if parties have incorrect legitimate expectations while orienting themselves to the technological shift.[40] Electronic communication may result in the loss of body language cues, real-time conversation, and facial expressions. It can prevent parties from obtaining interpreters or real-time representation to effectively coach someone who is not physically present; this, too, is true for the instructions and questioning coming from an adjudicator.

Within an inquisitorial process, we often see the actions of the trier of fact less as a passive observer and more as an active investigator during court proceedings. Within an IAP framework mentioned in the immigration cases above, an inquisitorial process aims to reduce or minimize any further harm coming to the claimants involved in a proceeding.[41] Active participation from the trier of fact or from an adjudicator during the process is paramount to a successful and fair proceeding.[42] The importance of the decision at hand

39 Nastasi, Pressman & Swaigen, *supra* note 10.

40 *Badihi*, *supra* note 26 at para 17.

41 *Fontaine*, *supra* note 20 at para 29.

42 Charter, s 11.

and its effect on the parties involved increases the need for a fair proceeding and, in the cases of the LTB where residences, income, and livelihood are at stake, an active adjudicator maintaining order over the inquisitorial process is mandatory.[43] Those participating in the process must have a way to meaningfully present their case and the evidence that proves any essential elements of offences under the *Residential Tenancies Act*. The LTB has undergone a massive shift in recent years towards an electronic hearing format, and while this format increases the speed and efficiency of the proceedings, does it still uphold the duty of procedural fairness owed to the parties? Electronic hearings permit parties to access an adjudicator remotely if the party has the means to acquire the often expensive devices necessary to attend. The notable backlog at the LTB has resulted in a reported 53,000 cases remaining unresolved as of March 2023.[44] To cope with this backlog, an increase in the number of adjudicators employed at the LTB was suggested in ombudsman reports, along with an increase in the amount of training that these adjudicators actually receive.[45] The reports speak of claimants having issues with technology and understanding how to use the remote hearing process, as many of these claimants are not accustomed to complicated software; inadequate coaching in this regard may serve to halt efficiency as well as complicate the proceeding unnecessarily. The physical isolation of an electronic hearing is also apparent as one cannot congregate in a geographical location to solicit advice from outside sources, which are also proximally present when they are confined to a remote setting.[46] Meeting with other parties face-to-face permits more liberal communication around issues such as settlement than if these relations are conducted through a digital barrier. Communication with an adjudicator may be impaired if the party does not understand the electronic format, has a poor Internet connection (experiencing lag), is impoverished, or has a disability which makes remote communication difficult. In order to better glean what a typical electronic hearing may consist of, a full and thorough observation of the LTB's hearings is required.

43 *Baker*, *supra* note 13 at para 25.

44 Desmond Brown, "Report on Backlog at Landlord and Tenant Board Says Ontario Government Seems Willing to Let Situation 'Fester,'" *CBC News* (18 February 2024), online: <https://www.cbc.ca/news/canada/toronto/ontario-landlord-tenants-board-backlog-tribunal-watch-report-1.7118845>.

45 Paul Dubé, "Ombudsman Calls for Legislative Change, Overhaul of 'Moribund' Landlord and Tenant Board" (4 May 2023), online: <https://www.ombudsman.on.ca/resources/news/press-releases/2023/ombudsman-calls-for-legislative-change,-overhaul-of-moribund%E2%80%9D-landlord-and-tenant-board>.

46 Brown, *supra* note 44.

III. PROCEDURAL FAIRNESS IN THE LANDLORD AND TENANT BOARD

A. OBSERVATIONS OF THE ELECTRONIC LTB FORMAT

The hearing occurred on February 12, 2024 in a Tenant Blended Block. One of the hearings on the docket concerned an N12 eviction due for property sale and purchase by the new owner's personal use of the unit that was administered in bad faith by the original owners. In this hearing, both parties were self-represented and had to rely on the adjudicator for instruction. The tenant testified that she left the unit on November 1, 2021 because the purchaser wanted to move into the unit during the month of November 2021. The tenant said that the sale was brokered under a misrepresentation of the unit's vacancy. Before the sale, the tenant had corresponded with the buyer to ascertain whether or not she could continue her tenancy under the new purchaser. She procured an email demonstrating that she tried to negotiate a rental increase with the buyer when inquiring about their intentions. In response, she was told that the new buyer did not want to rent to any tenant and wanted the unit for possession. The tenant saw the home being advertised on Facebook marketplace on November 10, 2021 for a rent increase of $600 more than what she paid and provided screenshot evidence of these facts; the rent went from $2,000 to $2,600. She believed that the N12 given to her was done so in bad faith in order to get more rental income. The respondent stated that he did not know the new purchaser had listed the unit for rent after the property transfer occurred, as the purchaser's agent communicated the intention to his real estate agent for purchaser occupancy. This was all communicated to him through his real estate representation, and the respondent did not make direct contact with the buyer or the buyer's agent. He stated that his real estate agent served an N12 on his tenant to this effect, and the property was transferred on November 17, 2021. The landlord said that the purchaser should be held liable for the misrepresentation of intent as they had nothing to do with the unit being rented for a higher amount. Evicting the tenant to raise the rent was not under the original landlord's control as they had honestly thought the purchaser would occupy the unit after they served the N12 on the tenant. The fact that the original owners had administered the N12 and not the new owner post-sale made the nature of proceedings difficult to determine. Proper representation would dictate that the old owners should have delegated the eviction to the new owner, and due to the fact that this did not happen, the old owners are being held liable for actions outside of their control. Essentially, the adjudicator did not instruct the parties of a substantive cross-examination and direct examination. During the testimony, when the tenant was relaying information, the other party did not question the applicant or begin to ascertain the true nature of the interactions between her and

the new owners. The adjudicator did not clarify what a cross-examination was or how the normal course of court proceedings tends to unfold. This resulted in banter between the parties, who conveyed opinions and emotions rather than demonstrated material facts or essential elements of offences.

Uncontested hearings occurred on April 29, 2024 in an L2/N12 Block. One of the uncontested hearings on the docket involved a self-represented tenant and a represented landlord. There already was a disparity between the two regarding technological competence, Internet connection, and the presence of representation. The tenant appeared to almost haphazardly consent to an eviction order without seeming to understand the nature of the order. Despite the tenant sounding unsure about the proceedings with a tentative grasp of English, the adjudicator did not seek to clarify what the tenant was consenting to when he confirmed a termination date for eviction; this has serious implications for the tenant. Landlords and tenants already have a disparate relationship when it comes to residential ownership and funding. The tenant, in this instance, was not viewable electronically as he had no camera and his connection was riddled with lag. The tenant had no one to help him understand the nature of the order to which he had consented despite it being quite obvious that English was not a fluent language for him. Section 14 of the Charter guarantees the right to an interpreter when a party does not comprehend the language being spoken in a proceeding. There was no attempt by the adjudicator to clarify comprehension or seek to provide an interpreter for the tenant; procedural fairness was sacrificed in order to expedite the number of proceedings within an electronic format that makes comprehension even more difficult for disadvantaged parties. Another uncontested hearing in the proceedings regarded an N12 being served in bad faith by unrepresented landlords, a husband and wife. The tenant party was absent for the matter without explanation. The landlord alleges that they had attempted to sell their rental property and buy a residence in Edmonton, Alberta, but due to the tenant continuing to take residence in the property, their sale fell through. They now require that property for their own personal use due to the lack of their expected property sale and purchase. The landlord presented complex documentary evidence to demonstrate that their health standings leave them vulnerable enough to require their original unit, as both of them are on disability benefits and unable to work. Despite the claim that both husband and wife suffer from physical and mental health problems, the only evidence that was exhibited was a mental health diagnosis for the husband. The alleged diagnoses of multiple major physical ailments alleged by the wife were not confirmed through evidence or through questioning, and the adjudicator did not seek to clarify why this was absent. The absent tenant party was not addressed aside from a general question of notice; there was no evidence

to confirm that the tenant had been given notice of this hearing and they were unable to testify on their behalf themselves or through representation, and the hearing was done *ex parté*.

On April 29, 2024, a contested hearing took place where the represented landlord and unrepresented tenant parties attempted to elicit testimony from each other through the electronic format. A direct examination took place between the representative and the landlord in which the representative began to give evidence in lieu of the tenant; the adjudicator interjected in order to redirect the testimony but the representative continued to testify to the facts of the case. The tenant party began their cross-examination, which, despite some correction from the adjudicator, consisted of leading questions and instances where the questioner began to testify to the evidence rather than elicit it. The conversation between the two parties devolved into an argument over the particulars of their past relationship. The discussion was so convoluted that it was difficult for the observer to ascertain the facts of the case. Often, the conversation would involve maintenance issues which went beyond the bounds of an N12 good-faith hearing. Despite the adjudicator correcting the same mistake in multiple instances, she was ignored by the parties. The adjudicator attempted to gain order in the electronic boardroom, but the impact of this attempt was minimal. The parties' emotional involvement prevailed over the adjudicator's instruction which, from an observer's perspective, is probably due to the digital divide lessening the impact of verbal commands. Had the parties been in a formal boardroom setting outside of the familiar environment of their homes in formal clothing, perhaps the gravity of the proceedings would have been more apparent, and they would have been more amenable to redirection. The formality of a physical location devoted to the hearing of cases is lost in the electronic format, as is vocal tone and body language. Despite her many attempts, the adjudicator was quite overwhelmed by the party's heated testimony and her hold over the boardroom was lost. The topic of the hearing, proving that an N12 eviction application was given in good faith, was completely lost amongst the unintelligible arguments over contested facts; even the representative of the landlord failed to participate in curtailing his client's emotional outcries. To an observer, one can only wonder about the format of the hearing as it has been demonstrated through literature that digital barriers contribute to outlandish behaviour that a rational individual would otherwise not engage in face-to-face.[47] It was difficult for the adjudicator to interject or control the parties as any influence of her authority

47 Mark James, Natalia Koshkina & Tom Froese, "From Tech to Tact: Emotion Dysregulation in Online Communication During the COVID-19 Pandemic" (2023) 22:5 Phenomenol Cogn Sci 1163.

was diminished by having her presence confined to a small screen that is easily mutable or minimized.

In the first aforementioned examples, proper representation probably would have seen it more prudent to involve the new owner as a co-defendant in order to ascertain their motivation, if any actually existed, for misleading the property seller into thinking they would want to occupy the unit personally. The facts from this party were essential to determining culpability, and this evidence was completely omitted without any inquiry from the adjudicator. If the tribunal were to follow an inquisitorial modality, we might see a more proactive investigation on the part of the adjudicator. Both parties were self-represented, and this resulted in a hearing where very limited information or examination of evidence was undertaken by the side of the defence. Once the tenant had finished her opening statement, we had entirely reached the end of the discovery and exhibition portion of the hearing, which seemed lacking for such a serious situation where moderately large sums of money and a living situation were in dispute. They examined no evidence, provided no exculpatory evidence, and had no reasonable defence for the accusation of bad faith. Such an accusation could result in major financial penalties for this landlord as recompense for actions that may not have even been in their control as the new owner, who is arguably more culpable than the original owner (if we are to believe the tenant's version of events), was not involved in the proceeding. The examinations would have been aided had the adjudicator stopped to intervene or prompt the unrepresented parties as their unpreparedness should have been evident to her.

In the example of an uncontested matter related to a bad faith N12 eviction, the tenant party was absent without the adjudicator questioning this absence to any rigorous degree or confirming through documentary evidence that notice had been served. The evidence of the landlord did not support their claims to any great degree; the major health concerns of the female landlord were not proven, nor did any documentary evidence provide support for the supposed sale or purchases that both fell through. No correspondence was proven between the landlords and the tenant, the seller of a new home and the landlords, or the buyer of the contested rental property and the landlords. In another example, the proceedings essentially devolved into a fiercely emotional contest between the two parties, with the adjudicator struggling to maintain order in the boardroom. The parties struggled to properly elicit testimony from each other and often would testify for themselves; even in a forum where the rules of evidence are relaxed, having a party testify for itself clearly violates procedure. Despite the adjudicator trying in vain to interject and refocus the hearing, the parties continued with their banter unabated by her attempts at order; I believe this was due to the electronic format essentially

emboldening the parties to ignore the adjudicator. When parties attend a hearing in their own home wearing casual clothing and without the presence of staff or security, it undermines the formal process at hand. An adjudicator may find it very difficult to control the people in their boardroom when that room has no borders and where a party may lower the volume of voices or minimize the image on the screen. The cues of formality and respect are subtle and often physical body language or vocal tone; the electronic format takes away from any reverence one may have for a courtroom. In a forum where many self-represented parties engage with important decisions related to housing, economic losses, and security of tenure, one would imagine that rules and methods of procedure would be readily explained to the parties during the hearing or that the adjudicator would attempt an inquiry during the hearing in order to better determine the truth of the matter. No explanation of court procedure was provided to the parties, and if the information had been available, it was not utilized by the parties.

B. CONCLUSIONS FROM OBSERVATIONS OF ELECTRONIC HEARING FORMAT IN AN INQUISITORIAL BOARD

The observations made of the electronic hearing format at the LTB revealed multiple instances of inadequate upholding of the well-entrenched duty of procedural fairness by the actions of LTB adjudicators and representatives. In other tribunals, inquisitorial modalities of fact-finding have been offered as viable alternatives to the court system; the main difference is the digital format of the LTB is now the only option for applicants. The LTB's standard of proof is on a balance of probabilities, and very often, there is a limited role of counsel as many self-represented parties attend the LTB; all these factors favour an inquisitorial model where the trier of fact participates actively in evidence and provides much instruction. Much like the IAP process of the IRB, the LTB may benefit from creating its own structured inquisitorial modality that can be used as a court alternative with a mind to accommodate the major change from a physical format to an electronic format. The digital barrier created by the Internet has a major impact on our ability to communicate with each other, and this is a well-documented phenomenon. The divide is created by eliminating the boardroom, formal clothing requirements, body language, and in-person vocal exchanges. All these lost factors lessen the control that an adjudicator or a representative has over the tribunal process. From my observations, the electronic format made the tribunal less effective. It appeared to trivialize the boardroom and made adjudicatory inquisition more difficult to conduct. From my observations, many self-represented parties appeared lost about what a typical hearing should consist of, and this

was exacerbated by communicating through an electronic barrier. I note that those who are technologically illiterate or do not speak English seem to be at the greatest disadvantage. I also observed a lack of respect for the adjudicator while trying to maintain order in the boardroom, as it was very difficult for her to electronically "raise her voice" or assert control over the video conference.

Access to justice is fundamental to the creation of the paralegal profession and is to be expected within a tribunal like the LTB, where many paralegals find themselves practising. The electronic format confounds any classic legitimate expectations that a party has when making assumptions about future proceedings at the LTB and discourages equal access to a tribunal created as a way to cost-effectively streamline residential tenancy claims. The digital frontier creates uncertainty and changes the practical process of a hearing; thus, any legitimate expectations one may have are now less common sense, and access to a remote hearing becomes convoluted. In a tribunal that is backlogged and in desperate need of relief, the efficiency of having an electronic format is obvious (assuming the parties have access to such advanced instruments), but is it worth the sacrifice of procedural fairness, decorum, and the administration of justice? Does it favour the financially adept parties over the impoverished? May it be more prudent to offer video conferences as an option while maintaining a physical location to conduct hearings when the circumstances demand it to maintain a fair process? Many problems with in-person hearings exist, but believing the electronic format will be without major faults runs contrary to the LTB observable practice. Implementing a heavily inquisitorial process on the part of the adjudicator may be the solution to keeping the option of electronic hearings open. Having an active and controlling adjudicator could make the difference between understanding vital aspects of a proceeding or unknowingly agreeing to a decision that would devastate a claimant. The option of electronic hearings is promising, but when it exists as the only avenue, access to justice suffers.

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