



EAB Tribunal Cluster

Electronic Hearings

Rules and Procedures

September 10, 2021



Forward

These Rules apply to videoconference hearings held by the Environmental Appeal Board, Forest Appeals Commission, and Oil and Gas Appeal Tribunal. These Rules supplement the existing Rules. These Rules take precedence over the general Rules of Procedure in the event there are any inconsistencies.

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Defined Terms

The following defined terms will be used throughout this guide:

- Board:** The Environmental Appeal Board, Forest Appeals Commission, or Oil and Gas Appeal Tribunal—whichever one is holding the electronic hearing.
- Exhibit:** A physical or documentary item presented to the Panel that, on its own or with the aid of testimony, assists the Panel to resolve a factual question in the appeal.
- Panel:** One to three members of the Board tasked with running the electronic hearing, resolving procedural disputes, and deciding the appeal.
- Moderator:** A staff member from the Board or a Panel member appointed to handle technical aspects of the hearing. If a staff member is the assigned Moderator, they are not involved in the decision-making process.
- MS Teams:** Microsoft Teams.
- Offline Contact:** A Board staff member who the Users may contact to advise they are unable to connect to, or maintain a connection with, the electronic hearing.
- Presenter:** Any person (including corporations and societies) defined by the Board as a party, participant, or intervener to the appeal, who is authorized to present or challenge evidence and/or to make submissions in an electronic hearing.
- Representative:** Any person (often a lawyer or lay person, or employee or business owner) who is speaking to the Board on behalf of a party in the appeal.
- Recorder:** The designated court recorder for the hearing, who administers affirmations to witnesses, marks exhibits, and creates and maintains the record of evidence produced at the electronic hearing.
- User:** Any person who might use any of the MS Team functions, including the Panel, Moderator, Presenters, Representatives, and witnesses.

1.0 Introduction

The Board can convene electronic hearings by videoconferencing in appropriate circumstances. Using its authority under section 11 of the *Administrative Tribunals Act*, the Board has established the following videoconference hearing rules and procedures to help guide Users (and/or Board members).

Rule E1: Suitability of Electronic Hearings

The Board will assess the suitability of holding an electronic hearing by weighing several factors including:

- whether the number of Presenters can effectively be managed in the circumstances through a videoconference hearing;
- the Presenters' abilities to meaningfully participate in the hearing process by videoconference, including whether they have adequate access to technology;
- any procedural fairness concerns;
- the public interest; and
- whether a videoconference hearing would permit the appeal to be considered in a more timely, efficient, fair, and/or accessible fashion.

The agreement of the Presenters is not a prerequisite to holding an electronic, as opposed to an in-person, hearing. Before deciding to proceed by way of an electronic hearing, however, the Board will consider all the factors listed above to determine whether an electronic hearing would be appropriate.

1.1 Videoconferencing Software

The Board uses MS Teams and a corresponding teleconference number to hold videoconference oral hearings.

MS Teams is a videoconferencing service that forms part of the Microsoft Office suite of software. It allows voice and video communication, screen sharing, recordings with limited transcription capabilities, and a variety of functions to allow the Board to facilitate the oral hearing. It is available to everyone either through a website or an application that can be downloaded to a computer, tablet or smart phone.

The audio portion of Board’s hearings on MS Teams may be accessed by calling toll free telephone number provided along with the link to join the hearing. Those who cannot connect via videoconference feed, including because of lack bandwidth or suitable technology, can connect by telephone.

1.2 Access Requirements

MS Teams may be accessed either via a MS Teams account, which requires setting up an account associated with an email address beforehand, or via a web portal login, which requires no prior setup by the User. The User must have a stable Internet connection with sufficient bandwidth and speed. MS Teams requires accepting Microsoft terms of service.

2.0 Privacy and Information Security

2.1 Privacy

Only Users will be able to speak and share content during an MS Teams videoconference hearing.

MS Teams allows live broadcasting of hearings to members of the public. The Board will publish links to scheduled videoconference hearings in advance to provide public access to its electronic hearings. Note that a hearing broadcast to the public in British Columbia accessed outside of Canada is not a breach of privacy pursuant to section 33.1(c.1) of the *Freedom of Information and Protection of Privacy Act*.

The Board prohibits¹ any recording of any oral or electronic hearings, including taking “screen shots” and other pictures, other than for official purposes by the Panel and/or any Recorder. Any recording produced or obtained by the Board will be maintained by the Board in accordance with approved record retention policies.

However, all hearing information is public, unless the Board orders that it will be received in confidence. As such, regardless of the format of the hearing, Users should not expect

¹ See the Environmental Appeal Board’s Rule 19(10), the Forest Appeals Commission’s Rule 21(10), and the Oil and Gas Appeal Tribunal’s Rule 21(10), each accessible on the respective website of the applicable Board.

any information provided in the hearing to be kept private unless the Board orders otherwise.

The Board may, on its own initiative or in response to a request from a party, order that information received during a hearing will not be disclosed to the public.² In addition, a Presenter authorized to give evidence in a hearing can file an application³ requesting that the Board hear that evidence in a closed session (not open to the public). The application should define:

- the privacy concern in question;
- the portion or portions of the hearing requested to be closed to the public; and
- whether the privacy concern should be prioritized over the public interest in having hearings open to the public.

2.2 Information Security

There are inherent risks involved with all electronic communications. The Board cannot confirm the security of information sent via cellular or broadband networks, particularly via unsecured wireless networks. Furthermore, while the Board prohibits the recording of hearings other than by the panel and/or a designated court recorder, it is impossible for the Board to confirm and enforce, in real time, that no unauthorized recording is being done.

MS Teams uses identifying information of those participating in the hearing, such as email information and/or Internet Protocol (or “IP”) addresses, which will be stored on Microsoft servers housed entirely in Canada. This information may be retained after the hearing is concluded. Please check the terms of service provided by MS Teams for more information on the privacy offered by MS Teams.

3.0 Connectivity Issues

The Board will attempt to prevent and mitigate connectivity issues by arranging MS Teams testing with Users prior to the hearing (see 4.3, below). If a User is unable to connect to, or maintain a connection to, MS Teams during the scheduled hearing, they must use the

² The authority to do this comes from 41(2) of the *Administrative Tribunals Act*.

³ See the Rules on filing general applications: Environmental Appeal Board’s Rule 16, and Forest Appeal Commission’s and Oil and Gas Appeal Tribunal’s Rule 18. Each is available on the website of the respective Board.

teleconference call number to call into the MS Teams videoconference and advise the Panel of their technical issues or call the Offline Contact at the number provided to the Users in advance of the hearing.

The Panel will not assume any Users are absent from the electronic hearing due to connectivity issues unless they advise the Panel or the Offline Contact when or before they are to be connected. The Panel may proceed with the hearing even if some Users (including parties to the appeal) are not present, and have not advised the Panel or the Offline Contact.

The Panel or the Offline Contact may offer some basic technical support to help the party connect to a hearing by alternative means (if suitable) but is not an expert in any electronic hearing system or related technologies. Users with connectivity issues are expected to work diligently to fix them as quickly as possible and are encouraged to refer to the User Guide available on the Board's website.

The Board does not provide technical support for connectivity issues experienced by members of the general public viewing the livestreamed feed of a videoconference. The Board will, however, work promptly to resolve any technical issues with the livestreaming service to restore public viewing, once aware of any such difficulties.

If a Panel learns that a User is having connectivity problems, the Panel may wait a period of time it considers to be reasonable. The Panel may require a User to participate via telephone, if possible, or may proceed without the User in some circumstances.

Rule E2: Failure or Inability to Connect to Electronic Hearings

Users must be logged in to MS Teams in advance of the scheduled start time of the hearing, or must have advised the Panel or the Offline Contact of an inability or difficulty to connect by the scheduled start time. Failure to do so can mean that the Panel may proceed with the hearing without that User present.

In cases where a User cannot secure or maintain a connection to a hearing, the Panel may require that User to access the hearing via telephone, if possible. If the Panel considers it fair to do so, it may continue the hearing without that User. Examples of such circumstances may include where:

- a party (or their Representative) consents to proceed without being able to connect or without its Representative being able to connect;
- one Representative is unable to connect, but that party has another Representative present;
- a participant or intervener who is not authorized to present evidence or cross-examine witnesses cannot connect;
- a witness cannot connect but some other witness for the same party is available or the hearing is able to proceed in some other manner;
- a Recorder cannot connect but the Panel is satisfied that it can assume the functions of the Recorder in the interim; and
- in the case of a Panel member unable to connect, other Panel members and/or the Offline Contact will advise all Parties and Representatives as soon as possible. A multi-member Panel may continue without one or two members at its discretion and with the consent of all Presenters, if recording functionality is available at the time.

4.0 Pre-Hearing Procedure

4.1 Pre-Hearing Conference

The Board will generally hold a pre-hearing conference before an electronic hearing. At the pre-hearing conference, the Board will explain the electronic hearing procedure and

set various deadlines the parties need to meet in order to ensure a smooth and efficient electronic hearing.⁴

4.2 Teams Testing

The Board will schedule MS Teams testing with Users in advance of the scheduled hearing. Before this testing takes place, all Users are encouraged to review the whole of this document and the User Guide, which are available on the Boards' websites.

The MS Teams testing will serve the following objectives:

- confirm all Users are able to connect via MS Teams and test audio, video and other functionality of MS Teams prior to the scheduled hearing;
- confirm that all Users have conformed to the requirements for location set-up;
- set expectations for settings and conduct during the electronic hearing; and
- address any questions and identify and plan for any technical problems.

Training and orientation will be provided for the Panel and Recorder, as necessary, separately.

Rule E3: Physical Setup

All Users must ensure that they are set up in an appropriate location for the electronic hearing. Any incoming telephone, email, reminder/notification alerts must be turned off or set to silent. Smart speakers (e.g. Amazon Alexa, Google Personal Assistant, Samsung Bixby, etc.) must be turned off. Users must be in a private room where they will not be interrupted and, to the extent possible, distracting background noise or visual displays will not be present.

Each User is expected to have independent access to MS Teams. Two or more Users may be allowed to appear from the same location; however, such shared access must be authorized by the Board in advance, on any terms or conditions that the Board considers appropriate in the circumstances.

⁴ The Board has the authority to require pre-hearing conferences because of the Environmental Appeal Board's Rule 13, the Forest Appeals Commission's Rule 15, and the Oil and Gas Appeal Tribunal's Rule 15.

4.3 Exchange of Evidence

The Board has additional requirements for Users involved in a videoconference hearing to exchange evidence in advance of the hearing, above and beyond the requirements in place for oral hearings.⁵

First, documents must meet the formatting requirements of Rule E4 (below).

Rule E4: Documentary Evidence

Where evidence is provided electronically, any documents over 20 pages long, or which are a combination of smaller documents, or which contain appended documents, must include a digital table of contents, sequential pagination, and electronic bookmarks to separate sections of the document and/or separate constituent or appended documents, as appropriate. The Board has the discretion to waive these requirements or to reject any document which fails to conform to these requirements, and to require re-submission within a reasonable timeframe for it to be considered during an electronic hearing.

Second, before holding a videoconference hearing, the Board requires that all Presenters provide a list of Users expected to attend the videoconference hearings, contact information and email address of Users and a tentative schedule that Users will be called to join the hearing.

The Board typically requires the list of Users to be submitted with the Statements of Points of those Presenters. The Statement of Points contains a summary of that Presenter's case; a list of witnesses to be called; and the legal authorities relied upon by that Presenter. Copies of all documents to be referenced in the Presenter's argument must be attached.⁶ This process is governed by Rule E5 (below).

⁵ See the Environmental Appeal Board's Rules 19 and 25, the Forest Appeals Commission's Rules 21 and 27, and the Oil and Gas Appeal Tribunal's Rules 21 and 27.

⁶ See the Environmental Appeal Board's Rule 19, the Forest Appeals Commission's Rule 21, and the Oil and Gas Appeal Tribunal's Rule 21.

Rule E5: User Lists

All Parties must provide to the Board a list of Users they intend to have participate in the videoconference hearing. This User List must be provided at the same time as the Statement of Points, or otherwise as the Board orders. The list is to be in a table or list format, and indicate the full name, email address, and telephone number of each User. Users may include:

- the Presenter themselves (including corporate representatives, if appropriate);
- counsel/Representatives;
- support staff; and
- witnesses.

The Board will not disclose the User Lists or contact information within it to other parties or to the public.

The Board will generally communicate with Users via email; however, telephone numbers may be used where there are technical or other connectivity issues.

Third, the Board has different requirements for electronic and physical documents submitted in advance of a videoconference hearing.

The due dates for Statements of Points will generally be earlier than the due dates referenced in the Board's general Rules. The due date will vary case-by-case, but generally the Appellant's Statement of Points is due 60 days before an electronic hearing and a Respondent's Statement of Points is due 30 days before an electronic hearing.

5.0 In-Hearing Conduct

5.1 Panel Moderation Functions

The Panel may use (or direct a Moderator to use) a variety of functions to maintain order and ensure the efficient conduct of an electronic hearing. Examples of functions that may be available include:

- the use of "break-out rooms" or private channels;

- limiting access, individually or collectively, to MS Teams' functions (e.g. speaking ability, screen-sharing ability) to enforce Rules and rulings, and to ensure the orderly conduct of the hearing; and
- excluding Users from the hearing.

These functions may be used, for example, to address distracting noise or visual input or to limit the ability of a disruptive User to access electronic hearing functions (including the ability to speak in the hearing).

5.2 Hearing Procedure

5.2.1 General

In order to maintain an orderly electronic hearing, Users must use MS Teams in a way that conforms to the directions of the Panel and the content of Rule E6 (below).

Rule E6: Audiovisual Interface

Users are to ensure they are visible at all times and are not to use electronic backgrounds, other than blurred backgrounds, where required. Users must mute their microphones to avoid distracting others in the electronic hearing with background noise. Users are responsible for unmuting their microphone when they wish to speak.

5.2.2 Speaking in Order

Electronic hearings require procedures on speaking order and interruptions to maintain order in a virtual environment.

Typically, anyone wishing to speak will need to be invited to do so by the Panel. The Panel will make efforts to ensure that every party to the hearing has an opportunity to address each issue as it arises, in line with established oral hearing procedures. In a videoconference hearing, the Panel will generally proceed first with those who have standing to speak, whenever comments are called for. It is important that Users recognize this order and wait their turn to speak, other than in the limited circumstances where an interruption is appropriate.

If a User wishes to speak to a matter but there are not procedural or fairness concerns that require them to do so immediately, they are expected to not verbally interrupt, but communicate silently to the Panel that they wish to speak. In MS Teams, Users may use the virtual “raise hand” function or they may raise their hand on their video feed. Examples of situations where non-verbal interruption is appropriate include:

- requesting a recess for a non-emergency matter;
- wishing to address a point of procedure being discussed by the Panel; and
- seeking procedural clarification, where getting an immediate reply is not required to maintain procedural fairness.

The Panel or Moderator will choose a suitable time to interrupt any ongoing conversation to address a User signalling a desire to speak. If that User feels that their concern becomes urgent, they may interrupt in accordance with the guidance above.

Examples of situations where verbal interruption is appropriate include:

- an inability to see or hear relevant information;
- an objection to a question asked of a witness or to the admission of evidence;
- an urgent need for a recess or to discuss some other urgent procedural matter; or
- if that User has no ability to communicate silently to the Panel that they wish to speak (such as Users connected to the hearing via telephone).

When starting to interrupt, it is appropriate to interject politely (e.g. “Excuse me”) and to identify who is speaking, either by name or role (e.g. “This is Ms. Smith” or “The Respondent wishes to object...”) before explaining exactly why the interruption is occurring.

The cooperation of all Users is important for videoconference hearing to work efficiently. When interrupted, Users are expected to stop speaking until the Panel can hear the reasons for the interruption, solicit submissions (if needed), and make a ruling or otherwise provide instructions. Interruptions will only be tolerated in appropriate circumstances.

If translation is required, generally it will be done on a consecutive basis (where those speaking must pause so the translator can translate each segment), rather than a continuous basis (where a translator speaks at the same time as those speaking), due to the potential for confusing audio input through most electronic hearing systems. If any Users prefer continuous translation, they should raise that point of procedure with the Panel for a ruling during the electronic hearing.

5.2.3 Exhibits

Efficiently referring to documents in electronic hearings requires that the documents be shared between the parties and the Panel in advance. Unlike in-person hearings, documents cannot effectively be distributed at the time of the hearing.

Rule E7: Disclosure of Exhibits

Because of the limitations involved in sharing information during electronic hearings, all material that may be relied upon as Exhibits must be provided to the Panel and the other Parties in advance of the electronic hearing. The Parties are strongly encouraged to compile a Joint Book of Documents to facilitate efficiency.

Failure to provide materials by the designated deadlines may result in evidence not being admitted before the Board.

Parties and witnesses may request permission of the Panel chair to use the 'screen sharing' functionality in MS Teams to display documentary evidence (i.e. Exhibits) while testifying or making submissions. All Parties should have electronic and physical copies of all the same materials. Generally, the use of 'screen sharing', including referencing portions of an Exhibit with a cursor, is a visual aid and does not become evidence or an Exhibit.

Rule E8: Marking Exhibits

Exhibits may be marked by a Recorder or by a Panel member. If Exhibits are marked electronically, those marks will be of the same force and effect as though the Exhibit were marked by the Recorder or Panel member using ink.