
TLAB RULES REVISION PROCESS AND RESULTING CHANGES: AN OVERVIEW

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Toronto Local Appeal Body
40 Orchard View Blvd.
Second Floor, Suite 211
Toronto, ON M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca

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Preliminary Comments on the Rules Revision Process:

When the TLAB was first constituted it was charged with the responsibility of crafting its own Rules of Practice and Procedure. This task was completed independently of the City of Toronto, and in many respects took cues from other Tribunals' Rules.

At the same time, however, the TLAB was, from its very inception, to be something new. As a result, its Rules did not entirely reflect or mirror those employed by other tribunals (at the time, for example, the OMB) but instead reflected an alchemy of certain old and new ideas/ideals concerning accessibility, timeliness, procedural and natural justice, and the reality of meeting the needs of an increasingly digital-world.

The TLAB's original Rules, which were first made effective on May 3, 2017, have been tested; the TLAB, and those members of the public whom the TLAB serves, have now had time to come to some preliminary conclusions about what has worked well about the TLAB's Rules, and what might benefit from certain changes.

In the Spring of 2018, then, the TLAB embarked upon the task of requesting, and receiving, significant input from a disparate array of stakeholders about what suggestions they might offer in order to improve the TLAB's Rules of Practice and Procedure.

The TLAB was heartened throughout this extensive review process to see its call for public input resoundingly answered. Tremendous and helpful input was received, debated, and considered. Many of the public's suggested revisions have now been included in the TLAB's revised Rules of Practice and Procedure, attached hereto.

Not every suggestion, however, could be incorporated into the TLAB's revised Rules. Some were simply not possible, in some instances because the law does not allow for it, and in other instances because the suggested changes lay outside of the TLAB's jurisdiction. Still others could not be adopted because, after long and careful consideration, and a delicate balancing of factors, the TLAB determined there was good reason to leave the Rules as they are.

Those who will see their suggested changes reflected in the attached revised Rules will likely feel no further explanation is needed as to why their particular suggested-changes were, ultimately, adopted. It is then primarily for those who do not find their suggested changes in the pages of these revised Rules that this short overview is directed.

Preliminary Comments on this Overview Document:

It should be stressed at the outset that what follows below is an overview, not a comprehensive point-by-point analysis of the many changes made, and not made, to these Rules. Doing otherwise would be both a disproportionately expensive undertaking and an unsettling process, leading to the potential for unending exchange. Finality is, in itself, a laudable goal to be kept in mind in any such exercise as this.

The TLAB is also cognizant of its overarching responsibility to maintain control of its process, and, to ensure that its process is fair, balanced, sensible, efficient and provides reasonable access to justice. It cannot be all things, to all people, all of the time.

What the TLAB has done in the pages that follow, then, is to group many (not all) of the suggested changes it has received and considered over the past year into themes, and then to address these themes in terms of how the TLAB has considered and dealt with these suggested changes.

Overview of Public Depositions and Comments

On Settlement and Mediation:

Many deponents raised issues concerning settlement within the TLAB's process. Some deponents felt there should be changes to the Rules to further encourage settlement discussions; others suggested changes to the Rules to more-directly or "necessarily" include Participants in all settlement discussions. Still other deponents suggested a greater push should be made to encourage mediation, and when settlements are struck between Parties, ensure that the matter is then "fast-tracked" towards an early Hearing and disposition.

The TLAB considered these suggestions in relation to its existing Rules, and considered potential changes thereto.

The TLAB's Rules 19 and 20 already provide a wide ambit for Parties and Participants to engage in settlement discussions. Those appearing before the TLAB are encouraged to engage in settlement discussions (Rule 19.1) and Participants are to be notified of settlements and the resulting Hearing in order that anyone might voice (any) remaining concerns.

As a result of deponent suggestions, however, the TLAB did determine that a change to Rule 19.3 was warranted to ensure matters that Parties do settle can be expedited to avoid unnecessary delay in having the matter heard. Thus, now, where Parties come to agreeable settlement terms, Parties and Participants will be given an earlier Hearing date (unless settlement occurs very close in time to the originally-issued Hearing date or no earlier date is available) at which these agreed-to terms can be considered by the presiding Member.

Additionally, the TLAB made changes to Rule 20.2, to include a requirement that, when the TLAB directs mediation, notice of that mediation will be given to Participants as well.

Rule 20.2 already allows for a Member to order that Participants be included in the mediation process, and thus no change was needed to provide for this possibility, when warranting circumstances exist.

On Experts:

A number of deponents suggested changes or clarifications relating to the role of experts within the TLAB's process. Some suggested the addition of a new category of expert (what was described as a "local knowledge" expert) while one deponent suggested the elimination of experts appearing before the Tribunal. Still others suggested that experts' testimony be given the same "weight" as any other witness. Underpinning at least some of the expressed concerns relating to the role of experts was the issue of the expense and complexity of retaining an expert to appear; in effect suggesting that the Party with the deepest pockets necessarily "wins".

The TLAB carefully considered these suggestions in relation to its existing Rules, and considered potential changes or additions thereto.

The TLAB's Rules 16.8-16.13 and Rule 14.4 speak to the issue of experts. In response to one deponent comment Rule 14.4 now clarifies that an expert cannot also be a Representative in the same matter. With respect to the remainder of the received comments the TLAB declined to make further changes. There are no established categories of expert and the TLAB cannot and should not pre-designate certain persons, or classes of persons, as experts. Anyone can be an expert, with the requisite training, or experience or knowledge, so long as they otherwise faithfully observe their duties as an expert to provide non-partisan, objective and fair expert evidence (as more fully-outlined in Rule 16.11).

The TLAB also declined the invitation to entirely remove experts from its process. Experts can and sometimes do shed valuable light on matters particular to their training, knowledge or experience and provide information that can even help foster settlement discussions or negotiations. Experts also remain subject to the rigors of cross-examination, and their prevailing duty is always to the TLAB, not to those who have retained them. The issue of cost, while important, is also not determinative, as any expert may reduce their fees, not require a fee at all, or may be retained by many Parties and Participants jointly.

On Legislative Changes:

A few deponents suggested to the TLAB that the fees relating to bringing an appeal should be reduced or eliminated. Others suggested that the TLAB should, like the Local Planning Appeal Tribunal (LPAT), provide free appeal assistance to those appearing before it. Still others suggested that the TLAB should stiffen the consequences for those who break its Rules.

The TLAB considered these but was unable to make any changes relating to these suggestions because these matters either fall outside of the TLAB’s jurisdiction or legislated powers, or because existing provincial legislation already circumscribes when, for instance, the TLAB can award costs.

On the TLAB’s Forms:

Some deponents indicated that the TLAB’s Forms are confusing, and complex, and that some Forms or Form-fields appear to be redundant, thus necessitating the filling-in of the same information multiple times. Others suggested the requirement for signatures (including electronic signatures) on some Forms should be eliminated. One deponent suggested that all of the Forms should be eliminated, while another suggested the Forms needed still-more detail in order to better direct persons on how to fill them out.

The TLAB considered these suggestions in relation to the Forms and determined that the Forms serve a significant and useful administrative and “guide” function for both Staff and Parties and Participants. The TLAB also made a decision to do a careful review and edit of each Form, with an eye to increasing their clarity, succinctness and utility in helping guide Parties and Participants on what the Rules require of them, when submitting documents, requests or information to the TLAB.

The TLAB also added Rule 2.5 to clarify that the Forms are a part of its Rules, except to the extent of any inconsistency, in which case the Rules themselves prevail. Additionally, the TLAB has added new Forms in order to provide additional guidance to Parties and Participants filing Responding Witness Statements, Replies thereto, and Responding Expert’s Witness Statements, and Replies thereto.

On Changing the Public Guide:

A few deponents suggested making changes to the TLAB’s Public Guide. Others indicated they were not aware of the Guide’s existence. Many of the suggested changes to the Guide pointed to some inconsistencies between it and the Rules, and to its need for further clarification so it might better serve as an aid to Parties and Participants navigating the TLAB’s process.

The TLAB considered these suggestions and has now requested that the Guide be updated in order to make it a more effective communication and aid document. The City has made additional resources available to ensure that a contemporary and extensive re-write of the Public Guide is prepared, consistent with the revisions to the Rules.

On “Fairness” and Natural Justice:

The TLAB heard from many deponents who referred to issues of perceived unfairness in the TLAB’s Rules and process. For instance, some deponents suggested that if the TLAB’s outcomes, following full Hearings, did not result in decisions that 50% of the time found in favour of the Applicant, and 50% of the time found in favour of those in opposition, the process was determinatively unfair. Others suggested that if one Party has legal representation and the other side has none the process is unfair or does not accord with the dictates of natural justice. Some suggested that in order to combat these perceived inequities Members should engage in “active” adjudication, which might entail asking probing or cross-examination style questions on behalf of unrepresented Parties or Participants. Other deponents suggested that the Rules should be expanded to include a right of response and reply to Witness Statements and a right of response and reply to Expert’s Witness Statements, to ensure every Party and Participant is able to adequately and fulsomely address each such Statement made.

The TLAB carefully considered these suggestions and criticisms and as a result made changes to its Rules to include Rule 16.5 (Response to Witness Statement), 16.6 (Reply to Response to Witness Statement), 16.9 (Response to Expert’s Witness Statement) and 16.10 (Reply to Response to Expert’s Witness Statement). The TLAB also expanded the Role of a Participant, provided in Rule 13.7, to permit Participants to ask clarifying questions of witnesses. The TLAB, however, was not persuaded that every suggested change or criticism raised in the name of “fairness and natural justice”, when considered in contrast to its counterpoise, was warranted.

On Civility:

One deponent suggested the TLAB should include a rule relating to civility, whereby Parties and Participants would be admonished to always conduct themselves in a courteous and civil manner when appearing before the Tribunal. Other deponents commented on this potential change and suggested its inclusion within the Rules would be an avenue for curbing what might be called “vigorous” cross-examination.

The TLAB considered this suggested change but ultimately declined to amend its Rules to include a warning to Parties and Participants to be civil. It is already an expected behaviour and the TLAB's Members always retain ultimate control (via Rule 2) of the process to ensure Hearings are fair, courteous, respectful and inclusive. Cross examination, while sometimes unpleasant to endure, is and remains an effective vehicle for discovering the strengths or weaknesses of any witness' testimony, and should not be curtailed, so long as the practice does not become abusive or patently disrespectful.

On Disability and Privacy Issues:

One deponent suggested changes to the Rules that would allow a person with disabilities to not be questioned about his or her disability, or, to be challenged on the asserted accommodation or needs at issue (in, for example, a minor variance application involving facilities or construction design). It was also suggested that "personal" information, such as email addresses, or names, should be (when requested) kept from public view.

The TLAB undertook a careful review of these suggested changes and ultimately declined to make changes to its process. While the TLAB receives requests for accommodation (e.g. acoustic aids, wheelchair accessibility to the TLAB's facilities, etc.) and accepts and accommodates these to the extent possible, when the substantive matter for determination by the Tribunal relates to an asserted need for (e.g.) a variance in order to accommodate a person's disability the normal Rules of evidence, and the right of cross-examination on material issues, apply, subject to procedural direction.

The TLAB has, however, made changes to all of its Forms to include a headnote advising all persons that any information disclosed to it becomes part of the public record, and is thus accessible to the world.

On Venues and the Timing of Hearings:

Some deponents suggested that the TLAB should always have Hearings in the neighborhood in which the property at issue exists. One of the reasons given was the difficulty in getting to other venues located in far-off neighborhoods, especially when a Hearing might take more than one day to complete, start early, or run late. Others suggested that the Hearings themselves should start later in the day (at, for example, 10am, rather than 9:00am) or be conducted in the evening (when people generally are not at work) rather than in the day.

The TLAB considered these suggestions and consulted with Staff about the ability to make changes to venue selection and Hearing times. As a result, the TLAB now schedules all Hearings to commence at 930am. Evening Hearings pose significant added difficulties, however, concerning staffing and security. Additionally, preferred locations are not always available, and audio and visual/computer technology limitations at some venues make conducting Hearings at the TLAB's Hearing rooms preferable.

On Technological Changes:

Some deponents made suggestions regarding the use of technology at the TLAB. Some, for instance, suggested improvements to the TLAB's website in order to make it more user-friendly; more "searchable" and easier to navigate. Several deponents also suggested the TLAB consider compiling and hosting a compendium of electronically available documents commonly referred to by Parties and Participants in Hearings before the TLAB. – This, it was suggested, would eliminate the need for Parties and Participants to email multiple copies of these common documents to each other, and the Tribunal.

The TLAB considered these suggestions and engaged its Staff to explore the ability of the TLAB to update its technical capabilities. Some of these suggestions resulted in changes to the TLAB's website, while others were not possible to implement because of the inherent limitations of the City of Toronto's current infrastructure and technological capabilities. The TLAB has, however, compiled a publicly available "List of Public Documents", and has changed its Rules to make it clear that Parties and Participants need not serve and file Documents: a) previously Filed with the Committee of Adjustment, b) on the TLAB's List of electronically available Public Documents; and, c) any Documents previously filed in the preceding by a Party or Participant (Rule 16.2).

On Deadlines and Timelines:

The TLAB heard from some deponents that (for example) the timelines for the election of status (Party or Participant) or the filing of certain documents are difficult to comply with, or simply too short. Others felt the timelines imposed by the Rules should be counted from the Hearing date backwards, rather than forwards from the issuance of the Notice of Hearing. Some deponents suggested the timelines imposed on Participants were unduly onerous, given the fact that often-times Participants are simply "lay" citizens, without the benefit of legal representation. Still others suggested that the holiday and work schedules of

Participants (and presumably Parties as well) should be taken into consideration, and that the time for electronically filing with the TLAB should be moved from 4:30PM to midnight, or the next day, to better accommodate Participants' lives.

The TLAB considered these suggestions and concerns and made several changes to its Rules as a result. The time for filing was moved from 4:30PM to 11:59PM (Rule 3.4); the timeline for Applicant's Disclosure was moved from 15 days after the Notice of Hearing to 20 days; the timeline for the election of status was moved from 20 days after the Notice of Hearing to 30 days (Rules 12.2 and 13.2); the timeline for the Disclosure of Documents was moved from 30 days after the Notice of Hearing to 60 days; the timeline for Witness Statements was moved from 45 days to 60 days after the Notice of Hearing (Rules 16.4, 16.7 and 16.8); Responses and Replies to Expert Witness Statements were additionally set at 75 and 85 days from the Notice of Hearing; and the "quiet zone" or period just prior to the Hearing date was reduced from 30 days to 15 days. The TLAB also considered the idea of potentially taking into consideration the particular schedules of all involved persons in a matter, but ultimately declined to make any changes in this respect for administrative, logistical and fairness reasons. Additionally, the TLAB determined that counting forwards or backwards from a particular date results in the same timelines; it thus elected to continue to count most timelines from the date of the issuance of the Notice of Hearing, forward.

On the Clarity of the Rules:

Some deponents suggested the Rules should be revised in order to use "plain" language, rather than "legalese". Some suggested that without a law degree, the Rules, for many, are confusing.

The TLAB considered this criticism and made some changes to its Rules as a result. However, in the main, the TLAB determined that the Public Guide largely allays any concern relating to "legalese". The Guide is drafted as an aid to understanding the TLAB's Rules and for the purpose of helping guide persons through its process, in very plain language. Additionally, succinctness and precision in rules aimed at achieving a fair and just process for persons appearing before the TLAB should be prioritized over the use of common, but often-times less precise, language.

On the Rule 31 Review Process:

While not the subject of significant comment by deponents, readers will note Rule 31 has undergone extensive revision. Members were of the opinion this Rule required further refinement and clarity for Parties wishing to institute a Review process. The result was the significant addition of new provisions to provide specific guidance on how a Rule 31 Review can be requested, sustained, and ultimately, considered.

Some of the revisions to Rule 31 include an itemization of the contents of a Review request, including the need for a requesting Party to provide an affidavit that contains a concise summary of the facts and reasons for requesting a Review. A Party must also include in a Review request (among other things) a concise written argument and explain how one or more of the grounds listed in the Rule apply.

Like a Notice of Appeal, the Rule 31 Review process institutes a preliminary screening of requests to ensure they comply with the Rules, and are not frivolous or, for example, simply instituted for the purpose of delay (see. Rules 31.11-31.18).

Once a request successfully passes the screening process, the TLAB will then issue a Notice of Review to all Parties, advising them a Review has been properly constituted. This Notice triggers the timelines for any other Parties to respond to the Review request (see Rules 31.19-31.23) and sets in motion the ultimate disposition of the subject request.

Concluding Comments:

The TLAB expresses its appreciation to all of those who participated in the Rules revision process. The valuable input from concerned citizens, the TLAB believes, has resulted in significant and important changes to the Rules that will prove to be of benefit to all, for years to come. The TLAB will continue to monitor and assess the strength of its Rules and continue to look for ways to improve them, into the future.

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