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# CFTC

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Council of Federal Tribunal Chairs

## **REPORT ON THE IMPACT OF THE COVID-19 PANDEMIC**

November 2021

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## BACKGROUND

### Council of Federal Tribunal Chairs (CFTC)

Established on January 12, 2007, as the Heads of Federal Administrative Tribunals Forum (renamed the Council of Federal Tribunal Chairs on June 23, 2016), the CFTC is the only committee exclusively composed of federal administrative tribunals. It was established to provide a forum for dialogue, learning and networking for federal tribunals.

The CFTC has representatives from 28 federal tribunals:

- Canada Agricultural Review Tribunal
- Canada Energy Regulator
- Canada Industrial Relations Board
- Canadian Cultural Property Export Review Board
- Canadian Human Rights Tribunal
- Canadian International Trade Tribunal
- Canadian Nuclear Safety Commission
- Canadian Radio-Television and Telecommunications Commission
- Canadian Transportation Agency
- Civilian Review and Complaints Commission for the RCMP
- Copyright Board of Canada
- Environmental Protection Tribunal of Canada
- Federal Public Sector Labour Relations and Employment Board
- Immigration and Refugee Board of Canada
- Military Grievances External Review Committee
- Military Police Complaints Commission
- National Security and Intelligence Review Agency
- Office of the Intelligence Commissioner
- Parole Board of Canada
- Patented Medicine Prices Review Board
- Public Servants Disclosure Protection Tribunal Canada
- RCMP External Review Committee
- Ship-source Oil Pollution Fund
- Social Security Tribunal
- Specific Claims Tribunal
- Transportation Appeal Tribunal of Canada
- Transportation Safety Board of Canada
- Veterans Review and Appeal Board

## Report on the Impact of the COVID-19 Pandemic

The CFTC has the following mandate:

- Work to raise awareness of the roles and nature of independent tribunals in the federal government;
- Facilitate networking, discussion of issues of common interest and sharing of best practices;
- Issue statements and guidance on governance and administrative law matters;
- Serve as a common voice for tribunals on broad Government of Canada initiatives that affect them; and
- Arrange training and learning opportunities for federal tribunal Chairs and, as appropriate, members.

### COVID-19 and administrative justice

*Open courts are a hallmark principle of the Canadian justice system. The open courts principle promotes access to court hearings and court services for justice participants, the media, and the general public, while taking into account a number of relevant circumstances. However, essential health and safety measures put in place to respond to the COVID-19 pandemic – such as physical distancing and restrictions on maximum occupancy in court facilities – have created a unique challenge for courts in providing both safe and open access. Courts across Canada have risen to the challenge by implementing a combination of in-person and virtual access to court hearings, records and services, complemented by practical tools and guides for court users, members of the public and the media.<sup>1</sup>*

The COVID-19 pandemic and the subsequent lockdown measures have disrupted government organizations' agendas and procedures. Federal administrative tribunals have not escaped this new reality: since March 2020, the vast majority of their employees and decision-makers, with some exceptions, work from home, and most of their operations are virtual, including hearings. The way in which federal administrative tribunals' work was organized had to be adjusted in its entirety in a very short time, with the aim of supporting access to justice in the best possible conditions, maintaining service to the public, preserving its quality and respecting their procedural commitments.

How quickly and easily a tribunal can rise to the challenges of working virtually depends not only on its mandate and size but also on the way its operations are managed. Twelve of the 28 CFTC tribunal members are served by the Administrative Tribunals Support Service of Canada, which

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<sup>1</sup> [Upholding the Open Courts Principle during the COVID-19 Pandemic – A Case Study of the Federal Court](#), 2020.

provides integrated corporate services, including resource management, strategic planning and reporting, and technology support. The other 16 tribunals vary widely in size, from organizations with more than 300 employees, like the Canadian Radio-television and Telecommunications Commission (CRTC), to micro-tribunals with as few as 10 employees.

### **CFTC Report: Presentation of the questionnaire and methodology**

In the fall of 2020, the CFTC decided to survey its members to assess the impact of the COVID-19 pandemic on their respective tribunals. The results would then be published in the form of a report, which would be submitted to the Government of Canada's central agencies, including the Privy Council Office, the Treasury Board Secretariat and the Department of Justice, for their information, and published on the CFTC website. The members of the CFTC felt that it was important to be transparent by informing their respective communities, partners and clients of what federal administrative tribunals were doing to preserve their ability to deliver their mandates and maintain their operations despite the lockdown measures. They also agreed that the exercise would complement initiatives by other organizations to demonstrate the pandemic's impact on the federal government as a whole.

The COVID-19 impact survey was administered to all federal administrative tribunals represented on the CFTC between January 28 and February 17, 2021. All 28 federal administrative tribunals chairs were surveyed, and the response rate was 67.9% (19 of 28). The 15 questions in the survey covered three themes: adaptation, accessibility and technology.

Since the sample size is relatively small, the survey results should be interpreted with caution. In particular, it is important to keep in mind that the CFTC does not have any benchmarks to assess changes or identify trends. It should also be noted that some tribunals have seen a decrease in cases/applications, which may make some productivity results, among other things, less reliable. In short, the report does not pretend to offer a detailed statistically accurate picture of the COVID-19 pandemic's impact; rather, it provides input from CFTC members and food for thought, including best practices, for the administrative tribunal community as it looks toward a return to post-COVID normality in the coming months.

### **CFTC Report: Results and analysis**

Based on the responses and comments provided by CFTC members, it appears that the federal administrative tribunals that are members of the CFTC generally adapted effectively and quickly to the challenges arising from the COVID-19 pandemic. The level of accessibility seems to have been maintained, including in the area of official languages, although several respondents noted

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a greater impact on accessibility for certain client groups, particularly those located in remote areas or involved in certain types of cases or procedural steps (e.g., cross-examination).

From an operational standpoint, adjusting to the pandemic clearly placed increased demands on corporate services (human resources, finance and information technology). Technology was also singled out as one of the most important challenges for respondents. A number of respondents noted technological capacity issues (access to bandwidth, virtual communication interfaces, etc.) and problems with training their employees in such areas as organizing and managing virtual hearings.

## TOPIC 1: Accessibility

Federal administrative tribunals are a gateway to the justice system, serving Canadians so that they can exercise their rights. One of the challenges faced by federal administrative tribunals that are members of the CFTC during the pandemic was to deliver continued access to justice. In this regard, one of the pandemic's greatest impacts on case management was the ability of tribunals to provide in-person services, including hearings. However, accessibility is not limited to ensuring that the parties get a hearing and a decision. Accessibility covers a number of considerations that have an impact on case management, the tribunals' ability to fulfil their respective mandates, and the various judicial services offered to the parties during proceedings.

### Survey objectives

One of the survey's objectives was to identify the pandemic's impacts on the accessibility of services offered by federal administrative tribunals and hence their ability to carry out their respective mandates, and to identify best practices in order to preserve and promote service excellence within our community.

### Results

Because of the health restrictions in place, federal administrative tribunals' ability to provide in-person services and to have their employees on site has been significantly restricted since March 2020. The survey results indicate that this adaptation was not made to the detriment of access to their services, but that adjustments had to be made to their procedures in order to deal with the new reality and ensure continued access to justice.

*74% (14/19) of the CFTC members surveyed reported that the situation created by COVID-19 has had little or no impact on access to justice within their organization (Question 11).*

The survey results showed that working virtually was generally well received by the parties. In particular, some administrative tribunals had to provide the parties with the technical support required to conduct virtual proceedings. Another adjustment made in some tribunals was a review of processes to make them simpler and easier to follow for the parties.

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*68% (13/19) of the CFTC members surveyed reported that, despite the COVID-19 situation, they had been able to fully meet their accessibility obligations since the beginning of the pandemic (Question 6).*

The results also show how much more important it is in virtual mode to take a transparent approach to the conduct of cases, in particular by clearly notifying the parties of changes in proceedings and the progress of their case.

*58% (11/19) of the CFTC members surveyed identified support for proceedings and hearings as one of the elements most affected by COVID-19 (Question 2).*

With respect to official languages, the survey shows that the organizations have been able to fulfil their obligations, but that the costs of interpretation services and the difficulty of obtaining such service are potentially problematic. The difficulty of arranging simultaneous interpretation at virtual hearings was also noted.

### **A few issues**

According to the majority of the CFTC members who responded to the survey, the pandemic has not had a significant impact on the organizations' ability to carry out their mandate or on accessibility. However, for some organizations, the suspension of hearings for several months caused delays in managing cases.

*53% (10/19) of the CFTC members surveyed reported that the situation created by COVID-19 has had little or no impact on their organization's ability to fulfil its mandate (Question 1).*

## TOPIC 2: Adaptation

Organizations need to be adaptable when dealing with extraordinary situations such as the COVID-19 pandemic, especially when they have to continue to provide services to Canadians. When federal administrative tribunals' existing practices have to be adjusted, it affects employees, partners and parties alike.

### Survey objectives

The survey's aim was to shed light on how federal administrative tribunals have had to adapt to meet the challenges generated by the pandemic, particularly health protection measures and working virtually.

### Results

According to the survey results, the biggest change that occurred during the pandemic was the implementation of virtual proceedings.

*74% (14/19) of the CFTC members surveyed reported that they had held virtual hearings since the beginning of the pandemic (Question 9).*

Federal administrative tribunals' internal resources were also stretched to the limit in helping employees adapt to telework. In particular, there was increased demand for support from information technology (IT) units to provide employees with appropriate equipment and tools. Most of the tribunals surveyed had to provide training to employees and decision-makers so that they would be properly equipped for telework. The survey results indicate that, in general, employee telework does not appear to have had a negative impact on the productivity of federal administrative tribunals.

A small number of administrative tribunals have held in-person hearings since the pandemic started in March 2020. In this respect, one respondent tribunal had to establish detailed protocols to ensure the health and safety of participants.

*16% (3/19) of the CFTC members surveyed reported that they had held in-person hearings since the beginning of the pandemic (Question 10).*

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For some tribunals surveyed, the pandemic resulted in delays in processing cases, but the situation is not considered unmanageable.

*32% (6/19) of the CFTC members surveyed reported that the pandemic had generated a backlog of cases within their organization, but that the backlog was manageable (Question 14).*

### **A few issues**

Although the switch to virtual proceedings seems to have gone well overall, some tribunals surveyed identified mental health issues as a result of this technological shift. Conducting virtual hearings can increase stress levels for some participants and can be a challenge for some employees and decision-makers. One of the tribunals surveyed noted that the use of virtual meetings with decision-making members may have contributed to a sense of isolation in some cases.

## TOPIC 3: Technology

Federal administrative tribunals rely on IT, among other things, for case management, communication with the parties and their partners, and publication of decisions. IT includes electronic equipment (computers, tablets, smart phones), the software and applications that support operations, and data storage systems.

### Survey objectives

One of the survey's objectives was to determine the nature of the challenges faced by the federal tribunals surveyed in implementing virtual proceedings and telework. Making such changes may involve certain technological risks in the areas of system security and access to information, and they may even create unforeseen technical problems. The changes may also have an impact on employees and on the parties appearing before federal tribunals. The survey thus served as an opportunity to identify the best practices that were implemented as part of the virtual shift.

### Results

The majority of federal administrative tribunals surveyed identified IT as one of the elements most affected by the virtual shift. The survey identified three main challenges: technical issues, adapting to new proceedings, and providing technical support to employees, decision-makers and parties.

*68% (13/19) of the CFTC members surveyed reported that their organization was unequipped or only partially equipped to manage its proceedings and hearings electronically (Question 8).*

With regard to technical difficulties, insufficient bandwidth and unstable Internet connections were identified as problems. With respect to adapting to the new virtual proceedings, some respondents pointed out the difficulties in adjusting to cross-examination and witness management during in-camera hearings. One of the tribunals surveyed indicated that conducting virtual proceedings was much more demanding and took 30% more time than in-person proceedings.

Some respondents reported that providing IT support and the tools necessary for employees and applicants to work virtually has been a challenge. In particular, having to choose a

videoconferencing system that would meet the needs of all parties was identified as a key issue by one of the tribunals surveyed.

Despite the speed with which the virtual proceedings were put in place, the survey results indicate that IT system integrity was not an issue for the majority of respondents.

*74% (14/19) of the CFTC members surveyed reported that they had not encountered an IT security issue (Question 7).*

### **Best practices**

The survey results indicate that preparation is the key to ensuring that proceedings run smoothly in virtual mode and to addressing any technological issues that may arise. Several tribunals surveyed reported that they had developed guides for virtual proceedings to ensure that parties were well informed. Simplicity, both in communications with the parties and in the development of the processes themselves, especially for self-represented people, was identified as a best practice.

The following are some practical recommendations made by the tribunals surveyed for managing proceedings:

- Test equipment before the proceedings;
- Always have a Plan B;
- Schedule practice sessions prior to virtual hearings;
- Adjust the time of virtual sessions to avoid participant fatigue.

## CONCLUSION

While the perspectives gathered through this survey are instructive, it is clear that some of the pandemic's impacts are still difficult to assess. Further such exercises should be considered with the aim of gaining a more detailed understanding of the impact that the COVID-19 pandemic has had on the federal administrative justice system. It may be worthwhile consulting with partners to learn about their experiences during the pandemic and to better address issues identified as problematic. For example, particular attention should be devoted to the reality of people representing themselves before federal administrative tribunals and to communities in remote areas or with limited access to IT. Compliance with official languages and accessibility obligations in a strictly virtual context is another area that probably requires further investigation.

Lastly, the development of this survey revealed that it is difficult to separate the adjudicative function from the operational aspects of administrative justice, since COVID affects both components equally. Eventually, the CFTC may want to further investigate the necessary relationship between jurisdictional function and administrative autonomy, and consider certain projects which reflect this duality, for example, the development of a compendium on best practices for holding virtual hearings.