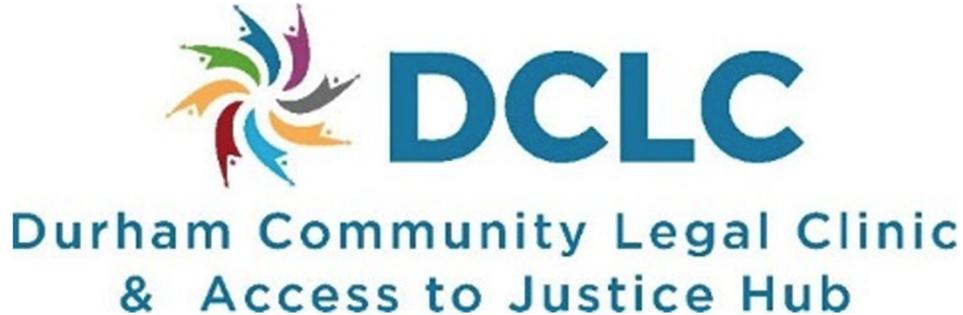


## **Submissions to the Standing Committee on Justice Policy**

Regarding Bill 276, the *Supporting Recovery and Competitiveness Act, 2021: Schedule 27*

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## About

The **Durham Community Legal Clinic (DCLC)** is a community legal clinic serving marginalized and low-income residents. The clinic was founded in 1985 and provides a variety of community services, including legal services, education, information, and representation. The clinic also partakes in advocacy and law reform initiatives, to make sure the law adequately represents and considers the perspectives of historically marginalized Ontarians. The DCLC offers legal services on a variety of topics, but specializes in employment, housing, human rights, and workplace safety law.

The **Durham Access to Justice Hub (the "Hub")** was established in 2019 with the support of Legal Aid Ontario (LAO) with various community partners in Durham Region. The initiative intends to provide legal services beyond formal income thresholds. The partnership looks to create client-centered services, and increase A2J by reducing administration barriers, while increasing the efficiency of taxpayer-funded programs. Some techniques include volunteer recruitment and using these volunteers' contributions to increase the overall footprint of the legal clinic in the surrounding regions. This program has allowed the clinic to expand its abilities and focus on combating root causes of poverty and inequality within our society.

**Omar Ha-Redeye** is a lawyer and the Executive Director of DCLC. He holds a JD from Western University, and an LLM from Osgoode Hall. He has received numerous awards for his efforts in law reform and advocacy on behalf of historically marginalized and low-income populations, including the Queen Elizabeth II Diamond Jubilee Medal, and the OBA Foundation Award.

**Francesco Bruno** is a first-year summer student at Schulich School of Law (Dalhousie University). He completed his undergraduate degree at Ted Rogers School of Management, Ryerson University, majoring in Law and Business. Francesco has worked as a Pro Bono student for multiple organizations including The Law Reform Institute of Nova Scotia, Doctors Without Borders, and the Prison Justice Society of Nova Scotia. Francesco is currently completing a summer internship with DCLC through the Schulich Academic Excellence Internship program.

**Samantha Iantomasi** is a first-year law student at the University of Ottawa Faculty of Law, and Durham Resident and volunteer with DCLC. She holds a Bachelor of Science and Certificate in Law from Queen's University.

## Introduction

1. Bill 276, the *Supporting Recovery and Competitiveness Act, 2021*, was introduced on April 15, 2021. These submissions focus on Schedule 27, which amends the *Statutory Powers Procedures Act*.<sup>1</sup>
2. Schedule 27 prohibits the recording of tribunal proceedings, which includes taking photographs and audio or video recordings, and prohibits the dissemination of recordings or photographs. It also imposes a significant fine for violating these provisions.

## Overview of Amendments Under Schedule 27

3. Courts have long been empowered in the law to make decisions and control the courtroom in a manner that properly allows for the administration of justice.<sup>2</sup> This power is also extended to statutory tribunals.<sup>3</sup> In recent years, courts have struggled with the proliferation of electronic devices, and have developed practice directions specifically for the purposes of addressing their use in court.<sup>4</sup>
4. Schedule 27 prohibits recordings or photographs at hearings of any people entering or leaving the room of the hearing or of people in the building of the hearing, if there are reasonable grounds to believe they are attending the hearing. The prohibition does not apply to notes or sketches of events at a hearing, approved audio recordings to supplement or replace notes, recordings required for evidence or purposes related to the hearing, recordings that have received consent by parties and witnesses, and recordings for a ceremonial proceeding. A person who violates the prohibition is liable to a fine of up to \$25,000, comparable to the provisions found in similar prohibitions in court.<sup>5</sup>
5. During the COVID-19 pandemic, most courts and tribunals moved their proceedings online to ensure cases could still be heard in a timely manner. However, this created new challenges in regard to the prohibition against recordings or photographs, with the relative ease of parties and members of the public making these recordings surreptitiously while observing a proceeding at home. This problem has become particularly acute at the Landlord and Tenant Board (LTB), given the increase in evictions, and the strong public interest around these evictions.

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<sup>1</sup> RSO 1990, c S.22.

<sup>2</sup> *R v Felderhof* (2003), 2003 CanLII 37346 (ON CA), 68 O.R. (3d) 481 (C.A.); *R v Romanowicz* (1999), 1999 CanLII 1315 (ON CA), 45 O.R. (3d) 506 (C.A.).

<sup>3</sup> *R v 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575.

<sup>4</sup> Ontario Court of Justice, “Protocol Regarding the Use of Electronic Communication Devices in Court Proceedings,” March 1, 2013, online *Ontario Courts*: <[www.ontariocourts.ca/ocj/legal-professionals/practice-directions/electronic-devices/](http://www.ontariocourts.ca/ocj/legal-professionals/practice-directions/electronic-devices/)>.

<sup>5</sup> *Courts of Justice Act*, RSO 1990, c C.43, s. 136 [the “CJA”].

6. The LTB is a government ministry that handles disputes between tenants and landlords. The LTB is an adjudicative tribunal operated by the Ontario provincial government that provides resolution for matters under the *Residential Tenancies Act, 2006*.<sup>6</sup>
7. Eviction applications have continued to increase throughout the pandemic, with periodic moratoriums in enforcement during lockdowns. The COVID-19 pandemic has exacerbated eviction rates due to a 9.4% increase in unemployment rate, the highest rate in over 20 years.<sup>7</sup> This unemployment rate has left many tenants relying on the Canada Emergency Relief Benefit (CERB). The CERB social benefits include approximately \$500 per week to cover all expenses. Considering that rent across the province is extremely inflated, especially in the GTA where the average rent for a 1-bedroom is more than the entirety of the CERB benefit,<sup>8</sup> it quickly becomes quite clear why evictions have increased at such an alarming rate.
8. There is a clear discrepancy and power imbalance between landlords and tenants, as landlords file approximately 96% of the cases before the LTB,<sup>9</sup> a majority of which are for eviction.<sup>10</sup> This power imbalance can also be observed in the representation rates before the LTB, with over 60% of tenants being self-represented. This is double the estimated representation rates of landlords, and contributes significantly to this power imbalance observed during the pandemic.<sup>11</sup> Low-income litigants are especially likely to struggle with virtual hearings, due to unstable Wi-Fi and inconsistent access to smartphones and computers, which create inherent challenges of equity.<sup>12</sup>
9. DCLC represents the perspectives of low-income and marginalized individuals, which in this context are predominantly self-represented tenants. These include people with disabilities and racialized communities, who face “significant barriers in housing.”<sup>13</sup> Although DCLC also represents many tenants in Durham Region, the realities of legal aid funding and limitations on staff prevent many of the tenants who are in need of legal

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<sup>6</sup> “Landlord and Tenant Board” (2015), online: *Tribunals Ontario* <tribunalsontario.ca/ltb/what-we-do/>.

<sup>7</sup> “Labour Force Survey, February 2021” (2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/210312/dq210312a-eng.htm>.

<sup>8</sup> Doyle Potenteau, “Online reports show rise in monthly rental prices in Kelowna” (14 December 2019), online: *Global News* <globalnews.ca/news/6298074/online-reports-rental-prices-kelowna/>.

<sup>9</sup> Holly McKenzie-Sutter, “‘People are being shown no mercy’, advocates warn in Ontario’s online-only tenancy hearings” (26 December 2020), online: *The Canadian Press* <www.cp24.com/news/people-are-being-shown-no-mercy-advocates-warn-in-ontario-s-online-only-tenancy-hearings-1.5245399?cache=yes&clipId104062%3FclipId%3D89531>.

<sup>10</sup> Mike Crawley, “Growing delays at Ontario rental tribunal have tenants fearing what Ford government will do next” (20 December 2019), online: *CBC News* <www.cbc.ca/news/canada/toronto/ontario-landlord-tenant-board-hearing-delays-1.5400739>.

<sup>11</sup> David Wiseman, “Paralegals, the Cost of Justice and Access to Justice: A Case Study of Residential Tenancy Disputes in Ottawa” at 2, online (pdf): *Cost of Justice Project* <cfcj-fcjc.org/sites/default/files//Paralegals%2C%20the%20Cost%20of%20Justice%20and%20Access%20to%20Justice%20-%20A%20Case%20Study%20of%20Residential%20Tenancy%20Disputes%20in%20Ottawa.pdf>.

<sup>12</sup> SM Schueller et al, “Use of digital mental health for marginalized and underserved populations” (2019) 6:3 *Current Treatment Options in Psychiatry* 243; Powell et al, “Inside Ontario’s first major criminal trial by Zoom,” (20 July 20 2020), online: *Toronto Star* <https://www.thestar.com/news/gta/2020/07/19/inside-ontarios-first-major-criminal-trial-by-zoom.html>.

<sup>13</sup> *Bekele v Cierpich*, 2008 HRTO 7 (Canlii) at para 88.

assistance from obtaining all of the required help. In this context, DCLC raises some significant concerns relating to Schedule 27.

10. These amendments found in Schedule 27 of Bill 276 are introduced during a peculiar time, sparking significant controversy concerning their objectives. There has been vast public criticism towards the LTB recently, with province-wide protests and vast outcry for the provincial government to investigate what some have called a “factory for eviction.”<sup>14</sup> This approach towards evictions appears to be a vicious cycle targeting vulnerable demographics, concentrated within certain jurisdictions, as 19 of the top 20 postal codes tracking eviction applications occurred within Toronto.<sup>15</sup>
11. The transition to virtual hearings during the pandemic, in combination with a five-month shutdown, has caused the LTB to fall behind, with thousands of cases resulting in a fast-tracked catch-up attempt.<sup>16</sup> The efforts to address this backlog has resulted in questionable tactics by adjudicators. Tenants with language barriers or disabilities are not being provided with proper support, the LTB often prevents tenants from obtaining adequate legal advice from Tenant Duty Counsel, and adjudicators are failing to fully consider the impact of COVID-19 on tenants.<sup>17</sup>
12. In response to many of these challenges, community members, supporters and attendees started releasing video footage of the hearings, to expose the injustice they believe are experienced by tenants. These videos show adjudicators evicting tenants within 60 seconds, refusing to hear cases that may take more than an hour, and kicking out observers from virtual hearing rooms.<sup>18</sup> Schedule 27 was purportedly introduced specifically in response to these videos, disseminated on social media. In some circumstances, these videos of LTB proceedings are the only evidence of the incidents that have occurred, and are a response of desperation from the most vulnerable members of our community. The appropriate response to these reactions is to strengthen the LTB and its processes, including ensuring adequate in-person hearings, and not through a punitive reaction.
13. While DCLC is generally in support of Ontario’s Digital First Strategy,<sup>19</sup> we note that for many low-income and historically marginalized populations, virtual hearings are less than ideal. For many of the tenants before the LTB, virtual hearings are actually creating a miscarriage of justice. It is in this context that Schedule 27, in responding to activism around the LTB, must be considered.

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<sup>14</sup> Melissa Nakhavoly, “LTB hearings to remain virtual post-pandemic” (15 April 2021), online: *City News* <[toronto.citynews.ca/video/2021/04/15/ltb-hearings-to-remain-virtual-post-pandemic/](https://toronto.citynews.ca/video/2021/04/15/ltb-hearings-to-remain-virtual-post-pandemic/)>.

<sup>15</sup> Tom Cardoso & Shane Dingman, “Eviction Factories, How Ontario’s tenants get trapped in a never-ending cycle with landlords” (19 December 2019), online: *The Globe and Mail* <[toronto.citynews.ca/video/2021/04/15/ltb-hearings-to-remain-virtual-post-pandemic/](https://toronto.citynews.ca/video/2021/04/15/ltb-hearings-to-remain-virtual-post-pandemic/)>.

<sup>16</sup> Shane Dingman, “Ontario Landlord Tenant Board in Chaos after five-month shutdown” (22 December 2020), online: *The Globe and Mail* <[www.theglobeandmail.com/canada/toronto/article-ontario-landlord-tenant-board-in-chaos-after-five-month-shutdown/](https://www.theglobeandmail.com/canada/toronto/article-ontario-landlord-tenant-board-in-chaos-after-five-month-shutdown/)>.

<sup>17</sup> “Ban Evictions NOT Tenants' Right to Organize - STOP Ford's Bill 276!” (29 April 2021), online: *Acorn Canada* <[acorncanada.org/take-action/ban-evictions-not-tenants-right-organize-stop-fords-bill-276/](https://acorncanada.org/take-action/ban-evictions-not-tenants-right-organize-stop-fords-bill-276/)>; “Attacking Transparency: Ontario’s New Bill 276”, online: *Evictions Ontario* <[www.evictionsontario.ca/](https://www.evictionsontario.ca/)>.

<sup>18</sup> McKenzie-Sutter, *supra* note 9.

<sup>19</sup> Ontario's Government Delivers Simpler, Faster, Better Services for Ontarians with New Digital Plan

## Prohibition on Cameras in Court

14. The amendments under Schedule 27 are consistent with section 136 of Ontario's *CJA*. Ontario generally prohibits recordings and photographs at court hearings.<sup>20</sup> Although this rule has been in place for many years, the COVID-19 pandemic has altered the functioning of the justice system with the closure of courts and tribunals. Attending hearings from the seclusion of a person's home decreases the public's awareness of the rule against taking photographs and recordings. The online format of virtual hearings also makes it easier for people to take photographs and recordings. However, during the webcast of several high-profile court proceedings, Ontario courts were capable of imposing a watermark on the feed, warning attendees not to capture a photo or video of the proceedings. This watermark provides adequate notice to attendees who may join a virtual hearing after the introductory warnings and is an approach that has not yet been employed by administrative tribunals such as the LTB.
15. The prohibition on cameras in court has been historically necessary for many reasons. The Court in *R v Squires* first held that the prohibition on taking pictures in and near courtrooms is justified to maintain serenity during proceedings.<sup>21</sup> The Supreme Court upheld this decision in *Canadian Broadcasting Corp. v Canada (Attorney General)*, finding that the limit on journalistic activities outside courtrooms imposed by s. 136 of the *CJA* is a justifiable infringement on freedom of expression.<sup>22</sup> The Court in *Canadian Broadcasting Corp.* also stated that the prohibitions on cameras in Ontario courts are less severe than measures taken in other countries such as the United Kingdom and France, which demonstrates an international consensus on the need to regulate cameras in courthouses.<sup>23</sup> The Court in *Restoule v Canada (Attorney General)* held that the restrictions on media in court are necessary to reduce the anxiety people naturally feel when appearing in court, recognize the vulnerability of parties in the justice system, minimize stress on witnesses to facilitate truth finding, and uphold the integrity of the judicial process.<sup>24</sup>
16. Although restrictions on cameras protect many important values, section 136(3)(a) of the *CJA* gives judges discretion to allow cameras in court under certain circumstances. The Court in *Restoule* utilized this discretion to permit live streaming of a proceeding to allow the remote communities of the Whitesand First Nation and Red Rock First Nation to view the hearing.<sup>25</sup> The Court in *Restoule* allowed the live stream to enhance the reputation of the administration of justice, foster a process that is perceived fair by the parties, and further the reconciliation of Crown and Anishinaabe people.<sup>26</sup>

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<sup>20</sup> *CJA*, s 136 (1).

<sup>21</sup> *R v Squires*, 1992 CanLII 7627, 11 OR (3d) 385 (ONCA).#

<sup>22</sup> *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2 at para 69.

<sup>23</sup> *Ibid* at para 96.

<sup>24</sup> *Restoule v Canada (Attorney General)*, 2018 ONSC 114 at para 31.

<sup>25</sup> *Ibid* at para 62, 97.

<sup>26</sup> *Ibid*.

17. The negative effects of allowing the media in courthouses can be seen from Quebec's permissive regime, which allowed cameras in all areas of courthouses except courtrooms up until 2005. Quebec courts had difficulty identifying members of the media, media crowds blocked hallways and fire exits, fights ensued between the media to get photos and interviews with parties, witnesses were intimidated by the media, filming occurred inside the courtroom despite the publication ban, and there was a lack of confidentiality between lawyers and clients because of the increased presence of cameras and microphones around the courthouse.<sup>27</sup>
18. Administrative tribunals like the LTB have the ability to exclude individuals from virtual hearings, or alternatively eject individuals from a virtual hearing that are being disruptive. These powers are available to adjudicators during in-person hearings and are maintained in the virtual context. This approach is less punitive and more focused than imposing fines, and is a less intrusive way of ensuring that inappropriate recordings are obtained during a hearing. Other judicial measures have been used prior to the pandemic to achieve similar goals for in-person hearings, specifically to ensure trial fairness.
19. When media are allowed in the courts, publication bans are effectively used to protect an accused's right to a fair trial.<sup>28</sup> Open courts in the online context can compromise the privacy and dignity of parties and witnesses by publishing personal information about parties and witnesses online.<sup>29</sup> Therefore, the use of cameras and recording devices in the justice system needs to be carefully regulated to protect all parties, while still providing proper consideration to principles that the courts should be open to public scrutiny.

### **Application of the Open Court Principle**

20. The open court principle is described as “a fundamental characteristic of judicial proceedings,”<sup>30</sup> that requires accessible court proceedings for the public. Open courts maintain public confidence in the court system through complete transparency, integrity, and publicity of court proceedings.<sup>31</sup>
21. The functions of the open court principle include maintaining an effective evidentiary process, ensuring impartiality throughout the process, ensuring safety, dignity, and privacy of all parties, and fostering public confidence in the court system through the fairness of a democratic process.<sup>32</sup> Open courts are important for educating the public on the court system and its functions, facilitating public participation in judicial decisions, and

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<sup>27</sup> Omar Ha-Redeye, “Lights, Camera... Judgement!” (13 May 2012), online (blog): *Slaw* <[slaw.ca/2012/05/13/lights-camera-judgment/](http://slaw.ca/2012/05/13/lights-camera-judgment/)>.

<sup>28</sup> Kent Roach & David Schneiderman, “Freedom of Expression in Canada” (2013) 61 SCLR (2d) 429 at para 80 (QL).

<sup>29</sup> Jane Bailey & Jacquelyn Burkell, “Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information” (2017) 48:1 Ottawa L Rev 143 at para 1 (QL).

<sup>30</sup> *Vancouver Sun (Re)*, 2004 SCC 43 at para 4.

<sup>31</sup> Justice Canada, “Victim Privacy and the Open Court Principle” (2015) online: *Department of Justice* <[www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr03\\_vic1/p4\\_2.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr03_vic1/p4_2.html)>.

<sup>32</sup> *Harper v Canada* (Attorney General), 2004 SCC 33 at para 23.

promoting public discussion of important issues.<sup>33</sup> Transparency of court proceedings often expose and remedy abuses in the justice system.<sup>34</sup>

22. The open court principle is at the core of our democratic society and is fundamental to the values of the Canadian Justice System. The Supreme Court in *Edmonton Journal v Alberta (Attorney General)* held that “a democracy cannot exist without that freedom to express new ideas and put forward opinions about the functioning of public institutions.”<sup>35</sup> The reason the open court principle is so fundamental is that it is interconnected with s. 2(b) of the *Charter of Rights and Freedoms*, which protects the freedom of expression.
23. The ability of the public to receive information is an integral democratic value, and keeps the public's faith in the legislative process at all levels. This principle is compromised by the type of regulation imposed by Schedule 27. This can be seen by the close connection between openness in judicial proceedings and freedom of expression. The Supreme Court of Canada recognized that publication bans that unduly restrict the ability to share or access information related to court proceedings violate the open court principle.<sup>36</sup>

### Concerns over Freedom of Expression

24. Freedom of expression is a fundamental freedom protected by the *Charter*, which is essential to attaining the truth, individual self-fulfillment, and engagement in the political processes.<sup>37</sup> The Supreme Court set out the test for determining whether freedom of expression has been breached in *Irwin Toy* as follows. First, the plaintiff's activity must be within the sphere of conduct protected by freedom of expression.<sup>38</sup> A plaintiff's activity is within the sphere of protected conduct if it attempts to convey meaning.<sup>39</sup> Freedom of expression also protects an infinite variety of forms, such as writing, speaking, arts, and physical gestures, but does not protect violent forms.<sup>40</sup> Second, the court will ask whether the purpose or effect of the government action restricts freedom of expression.<sup>41</sup>
25. Schedule 27 violates s. 2(b) of the *Charter* on a *prima facie* basis, because the legislation inhibits a person's ability to convey meaning, and the government's purpose is to control access to information by restricting what a person can share. People attending tribunal proceedings are unable to share what happened during the proceedings through recordings or photographs. The government is preventing the public from gaining knowledge of events that took place during the proceedings. Schedule 27 directly interferes with the purpose of freedom of expression, which is to attain the truth. This type of infringement should therefore be carefully scrutinized and justified, in the full context of the issues facing administrative tribunals in Ontario.

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<sup>33</sup> Bailey, *supra* note 29 at para 7.

<sup>34</sup> *Ibid* at para 9.

<sup>35</sup> *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1336, 64 DLR (4th) 577.

<sup>36</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 36 [*Sierra*].

<sup>37</sup> *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976, 58 DLR (4th) 577 [*“Irwin Toy”*].

<sup>38</sup> *Ibid* at 967.

<sup>39</sup> *Ibid* at 968.

<sup>40</sup> *Ibid* at 969-970.

<sup>41</sup> *Ibid* at 972.

26. The limits placed on freedom of expression by publication bans were analyzed by the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corp.*<sup>42</sup> The Court in *Dagenais* created a test for reconciling freedom of expression with other *Charter* rights, such as the right to a fair trial. There must be a real and substantial risk to the fairness of the trial that cannot be resolved with alternative measures to justify a s. 2(b) infringement.<sup>43</sup> The salutary effects of the publication ban must also outweigh the deleterious effects on freedom of expression.<sup>44</sup>
27. The Court in *R v Mentuck* expanded the test from *Dagenais* to reconcile freedom of expression with other social interests.<sup>45</sup> The Court in *Mentuck* held that a publication ban is required only when it is necessary to prevent a serious risk to the proper administration of justice because alternative measures are ineffective at preventing the risk, and the salutary effects of the publication ban outweigh the deleterious effects on the right and interests of the parties and the public.<sup>46</sup>
28. The Court has recognized that discretionary publication limits and confidentiality orders infringe freedom of expression and violate the open court principle.<sup>47</sup> However, the Supreme Court has justified court rules prohibiting filming or interviewing people inside a courthouse or broadcasting recordings of proceedings under section 1.<sup>48</sup>
29. Schedule 27 is attempting to protect the administration of justice at tribunal hearings. Whether the salutary effects of prohibiting recording during proceedings outweigh the deleterious effects is questionable, given that there are documented incidents of abuse and violations of procedural fairness being disseminated by tenant advocates. Administrative tribunals like the LTB are inherently different than courts, and the need for an even more open tribunal process, and a greater need to justify expression interests, are prominent in any analysis of maintaining process in light of contemporary issues.
30. While the limits on recording during proceedings minimize disruptions, increase efficiency, and protect the parties' privacy, the province will have to justify this infringement within the context of significant challenges at tribunals like LTB, which may not be properly addressed if there is not proper scrutiny by the public, including through recordings that are publicly distributed. DCLC does not encourage or condone this behaviour by community members, but instead points to the exceptional circumstances in which they are occurring.

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<sup>42</sup> [1994] 3 SCR 835 at 839, 120 DLR (4th) 12.

<sup>43</sup> *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 839, 120 DLR (4th) 12.

<sup>44</sup> *Ibid.*

<sup>45</sup> *R v Mentuck*, 2001 SCC 76 at para 31.

<sup>46</sup> *Ibid* at para 32.

<sup>47</sup> *Sierra*, *supra* note 36.

<sup>48</sup> Roach, *supra* note 28 at para 97.

## Recommendations

31. Tribunals have the existing tools to address the issue of recording hearings. Section 9(2) of the *Statutory Powers Procedures Act*<sup>49</sup> gives tribunals broad discretion to make any order or give direction to maintain order during a hearing.<sup>50</sup> Tribunals should exercise their existing power to control the proceedings and to prevent the public from making recordings, rather than creating new punitive powers.
32. A punitive approach may not be appropriate given the nature of tribunals compared to courts. The majority of litigants before the LTB are self-represented. The Advocacy Centre for Tenants Ontario (ACTO) explains that many self-represented litigants are unaware of procedural rules, and breaches should therefore be handled flexibly.<sup>51</sup> Imposing a significant fine on litigants is an extreme measure, especially for individuals who are already vulnerable and impoverished. LTB adjudicators can use their existing powers to remedy a breach, instead of imposing a fine.
33. Tribunals can also take additional measures to ensure people are not recording during hearings. For example, tribunals can clearly explain at the start of a proceeding that recording is prohibited. Additionally, tribunals can put a watermark at the bottom of the screen stating that recording is prohibited. This will help ensure that the public is aware of the rules, and will be more minimally impairing of any expression rights.
34. Finally, the experiences with recorded proceedings emphasize the need to ensure adequate in-person hearings. Although tribunals like LTB have a process for requesting an in-person hearing, many tenants are unaware of this option and are unable to utilize it effectively. In-person hearings remain the best control of the use of cameras, and should be retained for contentious matters or hearings with a significant public interest. Online hearings create many problems for low-income Ontarians, and the experience of clinics illustrate difficulties by LTB in maintaining their own proper recordings and records.
35. When legal professionals at clinics are also highlighting issues of procedural fairness before administrative tribunals, many members of the public are right to believe that virtual proceedings are ineffective at resolving their housing matters. Virtual hearings should therefore not be the default for the LTB, and the Digital First Strategy can still be employed with the recognition that certain proceedings are not as amenable to the online context, unless there is clear consent of all parties and assurances that digital participation is feasible and practicable. This is the more practical and reasonable approach to the issues currently before administrative tribunals, rather than attempting to impose and enforce a penalty based regime on impecunious members of the public.

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<sup>49</sup> RSO 1990, c S.22,

<sup>50</sup> s 9(2).

<sup>51</sup> Douglas Kwan, “Re: Bill 276, Supporting Recovery and Competitiveness Act, 2021,” (21 April 2021), online (pdf): *Advocacy Centre for Tenants Ontario* <<https://www.acto.ca/production/wp-content/uploads/2021/04/Letter-to-Minister-Sarkaria-April-21-2021.pdf>>.