

SUBMISSION TO THE SOCIAL SECURITY TRIBUNAL – USE OF AUDIO RECORDING OF THE HEARING IN A DE NOVO PROCEEDING

July 15, 2024

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About ISAC

The [Income Security Advocacy Centre \(ISAC\)](#) is a specialty legal clinic funded by Legal Aid Ontario. ISAC's mandate is to advance the rights and interests of low-income Ontarians about income security and employment. We carry out our mandate through test case litigation, policy advocacy, community development and public education. Founded in 2001, we are governed by a community Board of Directors representative of all regions of Ontario. ISAC works closely with local legal clinics that work every day with the challenges faced by low-income people relying on Ontario and Canada's income security programs.

Our perspective is informed by the experience of the Canada Pension Plan inter-clinic working group. The working group's membership is drawn from over 70 community legal clinics throughout Ontario whose mandate is to increase access to justice by providing free legal services to low-income people in Ontario and advocating on their behalf. The group aims to provide quality information, advice, and representation on various legal issues, including Canada Pension Plan disability benefits.

The Tribunal's Current Approach

Under current legislation, any hearing before the Appeal Division is considered a hearing *de novo*. That is, a new hearing where the Tribunal member can consider previous evidence, but must look at the matter afresh without being influenced by the previous decision by the General Division. The Tribunal should minimize any barriers for vulnerable parties.

For an appeal to take place, first, an appellant must seek leave to appeal a General Division decision. The criteria for leave to appeal includes failure to observe a principle of natural justice, an error of law, and/or an egregious error of fact. If the Appeal Division grants leave to appeal, written reasons are not required unless a party requests them within 10 days.

In *de novo* proceedings, the Appeal Division has discretion to consider materials from the General Division. As a matter of practice, the Appeal Division considers written evidence presented to the General Division. Audio Recordings of the hearing before the General Division can also be part of the evidence considered by the Appeal Division.

Regarding recordings of a General Division hearing:

- Appeal Division members will listen to the recording whenever a party asks them to;
- Parties can rely on the audio recording of the hearing (transcripts not required);
- Witnesses still must testify (unless impossible).

In practice, it is primarily the Ministry that requests that the Tribunal listen to the recording. These Ministry requests do not require that the Ministry explain why the recording is necessary or point out the segments of the recording with which the Ministry is concerned. Most of the Ministry's requests are intended to point out the appellant's alleged prior inconsistent statements to question the appellant's credibility or reliability.

In the current model, there is no threshold for the Ministry to meet in requesting that the Tribunal listen to the recording. The onus is on the appellant to object. However, the appellant may not be aware that they have the right to object to the use of the recording.

When the Tribunal orders the use of the recording, the appellant has access to the recording, but not the transcript .It is not clear if the Appeal Division members listens to the whole audio recording or only the segments of the recording that the Ministry refers to in their submissions.

Key Recommendations

ISAC makes the following recommendations:

- 1. The Tribunal must take a contextual approach in developing a policy for the use of recordings.**
- 2. When the Tribunal grants leave to appeal because of breaches of natural justice, the Appeal Division should not rely on the recording in the new proceeding.** It is unreasonable to use the recording when the General Division hearing was procedurally unfair because the testimony may be tainted.
- 3. The party requesting that the Tribunal listen to the recording must provide, in writing, the parts of the recording on which the party intends to rely and why.** Alleged prior inconsistent statements should be accurately stated in writing with references to the relevant point in the recording. This is necessary for transparency. And the opposing party should be given an opportunity to respond.
- 4. Appeal Division members should only listen to the recording in exceptional circumstances.**
- 5. The Appeal Division should require complete professional transcripts instead of allowing the parties to solely rely on the recording.** Members should have the discretion to waive this requirement when needed for a fair hearing or to avoid creating an access to justice barrier.
- 6. The Appeal Division should develop resources to assist self-represented appellants.** Procedural and evidentiary rules should not be used to compromise the legal interests of self-represented or under-represented persons living with disabilities.

1. The Tribunal must take a contextual approach in their use of the recording.

It is critical that the Tribunal's approach to use of the recording does not create unnecessary barriers to access to justice and increase the logistical burden for those living with complex "severe and prolonged" disability needs. The majority of appellants before the Tribunal do not have professional representation.¹ They are often people with disabilities who live on low incomes. Given the demands of taking care of themselves and their medical needs, they may struggle with the added burden of sorting through voluminous appeal-related documentation, navigating a recording, and understanding its intended use.

While the use of the recording may be permissible, the Tribunal's approach must balance fairness and efficiency concerns. This means that permission to use the recording should not be granted in order to challenge any and all inconsistent statements, but only when the alleged inconsistency is highly material.

2. When the Tribunal grants leave to appeal because of breaches of natural justice, the Appeal Division should not rely on the recording in the new proceeding.

An appellant must seek leave to appeal a General Division decision. The criteria for leave to appeal includes failure to observe a principle of natural justice. The two basic tenants of natural justice are the right to be heard and the right to know the case to meet.

When there is a breach of natural justice at a hearing, it may be not fair to rely on the recording. The testimony could be tainted because, for example, the appellant did not receive the Ministry's submissions before the hearing, the Member intimidates or interrupts the Appellant in an unfair manner or engages in harsh or sarcastic questioning, or an interpreter's error compromises the appellant's ability to understand the question.

The Federal Court has never considered the use of transcripts in a new proceeding at this Tribunal. While not binding, the Federal Court's jurisprudence in the immigration context is persuasive. The Court found that it was unacceptable to use the transcript from the original hearing in a new proceeding when leave was granted because of procedural fairness concerns in the original hearing.²

The Tribunal should refuse to listen to the recording when the General Division hearing was procedurally unfair or contained a breach of natural justice. To identify these proceedings, the Tribunal should give reasons for its decision when leave is granted because of natural justice breaches, and not require that the appellant request reasons within 10 days of the decision.

3. The party requesting that the Tribunal listen to the recording must provide, in writing, the parts of the recording on which the party intends to rely and why.

¹Social Security Tribunal. "Annual report for the 2023 to 2024 fiscal year: Empowering people to participate fully" (2023) online: <https://sst-tss.gc.ca/en/our-work-our-people/annual-report-2023-2024-fiscal-year-empowering-people-participate-fully>

² *Cheema v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1082.

Alleged prior inconsistent statements should be accurately stated in writing with references to the relevant points in the recording. The statement should not be put before the tribunal in a selective way or out of context. The Tribunal must guard against “cherry-picking” inconsistent statements. Failure to create this safeguard may result in an imbalance in the new proceeding.

The requesting party should clearly state its intention to use this statement as a prior inconsistent statement and explain why it is highly material. Knowing the case that one has to meet is a fundamental principle of administrative law. The appellant must have a meaningful path to understand the Ministry’s intention in using the recording and an opportunity to respond.

4. Appeal Division members should only listen to the recording in exceptional circumstances.

Members should only listen to the recording in exceptional circumstances because appellants already face great burdens in preparing for an appeal hearing, and responding to arguments stemming from an audio recording may add to that burden. Appellants have shared that it is overwhelming to prepare for a hearing. They experience difficulties in navigating through large amounts of documentation. They struggle with their physical and mental health, literacy challenges or have difficulties accessing a printer. Many do not have relatives, support workers, or others in the home who could assist with sorting through papers, listening to a recording and filling out paperwork, etc.³

Exceptional circumstance should include the following criteria:

- When a witness is unavailable;
- When a recording is needed as proof of a **highly** material prior inconsistent statement. The onus is on the party requesting the use of recording to prove that the alleged statement is highly material. The party must set out the alleged statement clearly, fairly, and in its entire context;
- As an accommodation for disability-related or other needs;
- Required for a fair hearing because the recording is highly material.

The Tribunal should use the exceptional circumstances standard because the appellant and the member should not be burdened to review the recording unless it is highly material and required for a fair hearing. Alleged inconsistent statements that go to a peripheral issue, or are not clearly inconsistent when considered in context, should not be put before the Member. This means that permission to use of the recording should not be granted to challenge any and all inconsistent statements, but only when the alleged inconsistency is material.

The exceptional circumstances standard should include consideration for those who find it psychologically disturbing to listen to the recording.⁴

5. The Appeal Division should require complete professional transcripts instead of allowing the parties to solely rely on the recording.

³ Jacobs, Laverne and Tomkinson, Sule. (2022). Examining the Social Security Tribunal’s Navigator Service: Access to Administrative Justice for Marginalized Communities. p. 6-7.
<https://scholar.uwindsor.ca/lawpub/133>

⁴ Jacobs, Laverne and Tomkinson, Sule. (2022). Examining the Social Security Tribunal’s Navigator Service: Access to Administrative Justice for Marginalized Communities. p. 7.
<https://scholar.uwindsor.ca/lawpub/133>

To promote fairness and efficiency, the Appeal Division should require complete professional transcripts instead of allowing the parties to solely rely on the recording. Transcripts are more user-friendly, quicker and easier to read for many. Transcripts are commonly used across courts and tribunals.

A recording is often challenging to navigate and intimidating for self-represented appellants. It can be overwhelming for an appellant living with disabilities to not only listen and re-listen to the recording, but to understand the significance of their prior testimony, accurately transcribe the essential points of their testimony and additional relevant parts of the recording, and explain their relevance to the Tribunal.⁵

Using the entire transcript will also guard against “cherry-picking” inconsistent statements, as discussed above.

The use of transcripts creates an access to justice to justice barrier. Members should have the discretion to waive the transcript requirement when needed for a fair hearing or to avoid creating an access to justice barrier. Transcripts may not be required when the appellant is not able to testify and the entire recording is relied on for a fair hearing.

6. The Appeal Division should develop resources to assist self-represented appellants.

Procedural and evidentiary rules should not compromise the legal interests of self-represented or under-represented persons living with disabilities. The Tribunal must consider whether self-represented persons are aware of their procedural options to object to the use of the recording and its intended purpose, and to direct them to available information if they are not. Prior to a hearing, the Tribunal should provide accessible plain language materials that explain the relevant law on prior consistent statements and their implications. The materials should explain that it is open to an appellant to admit having made the previous statement but then explain the inconsistency.

Conclusion

In developing a fair and efficient approach to the use of recordings, the Tribunal should keep self-represented and under-represented appellants top of mind. The appeal process is already onerous for appellants with disabilities. Through the use of a contextual approach, transcripts, procedural safeguards, and resources for appellants, the Tribunals can reduce barriers and ensure a more just hearing for all parties.

⁵ See exception set out in *R v Cain*, [2017 NSCA 96](#) (CanLII), at para 39, aff'd [2018 SCC 20](#), “Prior Consistent Statements that Provide Context for Admissible Statements”. There is nothing preventing an appellant from pointing to the consistency between the prior statement and their testimony. This is not done to prove that the appellant was being truthful in their testimony on those matters – the mere making of prior consistent statements does not prove credibility. The consistencies are relevant solely to enable the decision-maker to judge whether the relevant statement is really materially inconsistent when looked at as a whole, and to gauge the impact that any differences in detail should have on the overall credibility and reliability of the witness.