

Interpretation Guidelines are intended to assist the parties in understanding the Board's usual interpretation of the law, to provide guidance to Members and promote consistency in decision-making. However, a Member is not required to follow a Guideline and may make a different decision depending on the facts of the case.

The authority of the Board to review its own orders comes from section 21.2 of the *Statutory Powers Procedure Act* (the "SPPA") and subsection 209(2) of the *Residential Tenancies Act, 2006* (the "RTA"). Subsection 209(2) of the RTA provides that the Board's power to review a decision or order under section 21.2 of the SPPA may be exercised if a party to a proceeding was not reasonably able to participate in the proceeding. The procedures for dealing with a request to review an order are found in the Rules of Practice (see Rule 29).

This Guideline provides guidance concerning the *scope* of the power to review.

The party may ask for a review of the order if they believe the Member made a "serious error" or where they were not reasonably able to participate in the proceeding relying on section 21.2 of the SPPA, subsection 209(2) of the RTA, and Rule 29 of the Rules of Practice.

If the order subject to the review request was resolved by a hearing, the review will be decided by a Member other than the Member who heard the application. Otherwise, any Member may decide the review.

What is a Serious Error?

A serious error may include one of the following:

- an error of jurisdiction (e.g., applying a provision of the RTA in a case to which it does not apply, or exercising a power outside the proper authority of the Board), whether or not it was raised at the original hearing
- an error of procedure which prejudiced a party (e.g., failing to comply with the rules of natural justice)
- if a party to a proceeding was not reasonably able to participate in the proceeding pursuant to subsection 209(2)

- an error of fact which was material to the decision, and which was clearly an unreasonable finding considering the evidence which was before the Member
- an error of fact which is material to the decision which is demonstrated by new evidence which was not before the Member (e.g., a witness who was out of the country on the day of the original hearing), so long as the Member reviewing the order is satisfied that there is a sufficient reason why the evidence was not presented in the original hearing
- an error in law, but the Board will not normally review a reasonable interpretation of the statute by a Member, even if the interpretation differs from that of the reviewing member
- an error in applying discretion allowed by the law which is unreasonable (e.g., the Member allowed remedies which were inappropriate in the circumstances or which were, in quantum or degree, beyond what would reasonably be allowed).

What will be Reviewed?

Under Rule 29.10, a Member will conduct a preliminary review of a request to review an order without holding a hearing and determine whether or not the order may contain a serious error or a serious error may have occurred in the proceedings.

Where the Member determines that there is a possibility of a serious error affecting the result of the case, a review hearing will be held. Otherwise, the Member will issue an order dismissing the request for review.

Where a review hearing is held, a Member will hear submissions on whether or not the request for review actually discloses a serious error. Where a Member determines that no serious error occurred, the request for review will be denied.

Where a Member determines that a serious error has occurred, parties requesting a review should understand that they will not automatically obtain a full rehearing of the application, and that the review may be limited to certain issues. The hearing may proceed with one or all of the following:

1. There may be a partial or full rehearing of the matter.
2. The Member will decide what, if any, issues will be reviewed. This may be some or all of the issues set out in the request and any potential errors identified by the reviewing Member.

3. The Member may or may not hear or rehear evidence and may simply decide to hear submissions.

Not Interfering With Discretion

The Board will not interfere with the proper exercise of discretion by a Member. Discretion refers to decisions such as whether relief from eviction should be granted (see section 83 or what remedies should be ordered in a particular case. The reviewing Member should not interfere with the decision even if they may have exercised the discretion in a somewhat different way. A review is not for making minor adjustments to the discretion which was reasonable: for example, that an abatement was within the reasonable range of amounts which could have been ordered.

Error of Fact

Since a party cannot appeal an order to the Divisional Court, except on a point of law, it is important that the Board review alleged errors of fact. However, the Board may decline to review an order if the alleged error is trivial in amount or would not significantly change the result. This means that it is essential that the party requesting the review should specify in some detail not only what the error is, but how it would change the order if the Board agrees it is an error.

New Evidence

If a Member did not give proper consideration to the evidence before them, this should be reviewed. However, if the evidence was not presented by the party now making the request, the reviewing Member has a discretion to accept or refuse the new evidence. If the original Member improperly refused the evidence, it should now be admitted. If the party had no access to the evidence at the time of the hearing, and it is necessary to properly decide the case, the evidence may be permitted, allowing the other parties their respective rights.

Nevertheless there are some cases in which new evidence can be refused. If there is no reason why the evidence was not presented in the first instance, permission may be denied. Presenting a “case” in stages is inappropriate because it prejudices the other party and increases the costs and delays of proceedings. New evidence of little weight or related to issues which were not in dispute should not be accepted.

Interim Orders

A Member may stay the order under review upon a party's request or on their own initiative. This will prevent parties from enforcing the original order during the review, which in some cases would mean a review order would have no effect. The decision to stay the order may be further considered after submissions are heard at the review hearing. The stay may be lifted if, for example, it was requested only for delay.

Any other interim order which is appropriate may be made, such as one for disclosure, for certain work to be performed by a landlord, for payment into the Board by a landlord or tenant, etc.

Results of the Review

A request to review may be granted or denied. If the request is granted, section 21.2 of the SPPA allows the Board to “confirm, vary, suspend or cancel the decision or order.” Thus, the reviewing Member may resolve the request in any of these manners:

- dismissing the original application and canceling the order;
- varying part of the original order or reasons;
- canceling the original order and replacing it with a new order; or
- confirming the original order.

Where appropriate, the reviewing Member may take into account any change in the facts of the case since the date the order was issued. For example, if any payment was made under the order or any work was done which it ordered, it would not be proper to ignore such changes. If more has been paid under an order than the review shows should have been owing, the reviewing Member may order repayment to set the matter right in accordance with the conclusions of the review order.

Under section 182 of the RTA, the reviewing member may order a refund of a fee paid for a request to review if, on considering the request, the Board varies, suspends or cancels the order.

What Happens Where an Appeal is Filed with the Divisional Court?

Where an appeal from a Board decision has been filed in the Divisional Court, the appeal operates as a stay of the matter under subsection 25(1) of the SPPA. In this circumstance, clause 25(1)(b) permits the Board to lift the stay. If a party or a person directly affected by

the order has filed a request for review, the requester should include in the written request an explanation why the Board should lift the stay and consider the request for review. The lifting of the stay is a discretionary power that the Board may exercise in the appropriate situation and parties should be prepared to make submissions on it if requested by the Member. In the situation where the Board decides to proceed with the review, the Board may make an interim order lifting the stay and may include in that order any conditions that it considers appropriate. Such conditions may include preserving the status quo between the parties until the matter is finally disposed of.