

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.

Introduction

The Ontario *Human Rights Code*¹ (the "Code") is the primary source for human rights law at tribunals such as the Landlord and Tenant Board (the Board). By reason of subsection 47(1) of the Code, the Code applies to the Board as a provider of services and facilities. This means every person has the right to equal treatment, without discrimination, with respect to Board services and facilities, pursuant to section 1 of the Code. Although the Board's services and facilities are designed to be accessible, some persons may require additional accommodation from the Board in order to access its services and facilities.

The Board must interpret the *Residential Tenancies Act, 2006*² (the "RTA") in light of the Code. In *Walmer Developments v. Wolch*, the Divisional Court held that "...the Code is the law of Ontario and its provisions must inform any Ontario decision maker in its deliberations."³ This means the Board must consider and apply the Code when, for instance, exercising its authority to delay or refuse an eviction, and determining, whether the landlord has accommodated the tenant to the point of undue hardship. The Code may also apply to certain applications filed by tenants against landlords.

According to subsection 47(2) of the Code, the Code is paramount over all other provincial laws, including the RTA. This is consistent with subsection 3(4) of the RTA which states that if a provision of the RTA conflicts with a provision of another law, other than the Code, the provision of the RTA applies. The Supreme Court of Canada has confirmed that an administrative tribunal such as the Board has authority to find that a provision of an Act does not apply if it conflicts with the Code.⁴

¹ *Human Rights Code*, R.S.O. 1990, c.H-19, as amended

² *Residential Tenancies Act*, S.O. 2006, c. 17

³ 2003 CanLII 42163 (ON S.C.D.C.), para. 18

⁴ *Tranchemontagne v. Ontario (Director, Disability Support Program)* 2006 CanLII 14 (S.C.C.)

This Guideline addresses the following types of Code issues that may arise in Board proceedings:

1. A person requires accommodation from the Board in order to access the Board's services and participate in the Board's proceedings;
2. A tenant asserts that the Member should grant relief from eviction because they are covered by one or more of the categories in subsection 2(1) of the Code, such as disability, and the landlord has not accommodated them to the point of undue hardship;
3. A tenant asserts in a tenant's application that the landlord has contravened the Code; and
4. A party asserts that a provision of the RTA conflicts with the Code.

Code issues not considered by the Board

Some Code issues cannot be considered by the Board because the RTA does not apply to the situation. For instance, a person alleging that a landlord refused to provide them with a rental unit based on a Code ground of discrimination should contact the Human Rights Tribunal of Ontario. The Board has no jurisdiction to deal with such matters unless the person has paid a rent deposit and the landlord does not provide vacant possession of the rental unit, or return the rent deposit, in accordance with section 107 of the RTA.

1. Accommodation in a Board proceeding

According to section 1 of the Code, the Board is required to accommodate the needs of all persons who use the Board's services. Section 1 provides that every person has a right to equal treatment with respect to services without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex (including pregnancy, gender identity), sexual orientation, age, marital status, family status or disability. Disability is defined by subsection 10(1) of the Code to include both physical conditions and mental disorders.

Section 183 of the RTA states that the Board shall adopt the most expeditious method of determining the questions arising in a proceeding that provides all persons directly affected an adequate opportunity to know the issues and be heard on the matter. Although the Board's services and hearings are designed to be accessible to as many people as possible, some persons covered under section 1 of the Code may require additional accommodation from the Board in order to have an adequate opportunity to know the issues and be heard on the matter.

a. Where a party requests accommodation

Parties seeking accommodation should make their needs known to Board staff as soon as possible, preferably in writing, so that the necessary arrangements can be made.

The party must participate in the accommodation process by working with the Board so that the appropriate accommodation can be implemented. Accommodation must be provided in a manner that respects dignity and allows the party to participate in the Board's process. More information about the Board's policy on accommodation, and how to request accommodation, can be found in the Board's *Human Rights Policy* [**policy currently under development**].

In many cases, the needs of parties covered by section 1 of the Code can be accommodated with relatively minor changes to the Board's standard hearing procedures. For example, a party, witness or representative:

- with a physical disability may have difficulty bringing their evidence forward to the Member and require the assistance of security personnel;
- with a speech or hearing impairment may need all parties to speak slowly and loudly, or have the chairs in the hearing room positioned to enable lip reading;
- with a visual impairment may require the use of assistive devices;
- with diabetes may be permitted to consume juice or food in the hearing room as needed;
- with cognitive impairments may require multiple breaks during the hearing, a longer than usual scheduled hearing, a late or early start time for the hearing, additional time to present their evidence, or adjournments;
- with a disability relating to mental illness may need a support person (such as a social worker or family member) to sit with them during the hearing;
- may request that a hearing not be scheduled on a particular day because it is a religious holy day for that individual; or
- may be provided with an opportunity to consult with on-site Tenant Duty Counsel where available before proceeding with the hearing (applies to tenants only).

If, on the day of the hearing, a party believes that they do not have an adequate opportunity to participate in the proceeding and require accommodation, they should bring their concerns to the attention of the presiding Member as soon as possible during the hearing. Depending upon the circumstances, the Member may require the party to provide sufficient evidence to establish that they are covered under section 1 of the Code and need accommodation. The Member must be respectful of the party's privacy interests and should not require the party to disclose more information than is needed to make the necessary determination respecting the issue of accommodation.

If the party requesting accommodation is disclosing intimate personal information, the Member may consider excluding the public from the hearing room under Rule 24 of the Board's Rules of Practice, "Restricting Public Access to the Hearing" and section 9 of the *Statutory Powers Procedure Act*. However, the other parties to the application are entitled to remain in the hearing room, examine all of the evidence submitted to the Board, conduct cross-examination and make submissions solely with regard to the issue of accommodation as it relates to the Board's hearing procedures.

The nature and extent of any accommodation is determined by the Member on a case-by-case basis upon consideration of the evidence and submissions made by all of the parties. However, even if one party objects to the requested accommodation, the Member is still obliged to provide the accommodation necessary to permit the party to participate in the hearing.

If the party cannot be adequately accommodated at the hearing, the Member will generally grant an adjournment and liaise with Board staff to ensure that the necessary accommodation will be in place for the next hearing date.

b. Accommodation issues arising during a hearing

Members must be attentive to indications which suggest a party may require accommodation in order to participate in the hearing, even if the party does not request any accommodation from the Board. Pursuant to section 201 of the RTA, the Member may on their own initiative ask questions and request submissions from both sides to determine if the party requires accommodation. As discussed above, the Member may consider different methods of accommodation to ensure a fair hearing with an opportunity for participation by all parties.

c. Where the capacity of a party is at issue

Members must also be attentive to indications which suggest a party may be unable to participate in a hearing due to a lack of mental capacity, even if the party does not bring this issue to the attention of the Board. Pursuant to section 201 of the RTA, the Member

may need to ask questions and request submissions from both sides to determine if the party understands the nature or purpose of the hearing, appreciates the possible consequences of the hearing and can communicate with their legal representative, if they have one.

Where a party may lack capacity and is not represented at the hearing, the Member may consider different methods of accommodation to ensure a fair hearing with an opportunity for participation by all parties, even if no request for accommodation has been made. Examples include standing down the hearing to allow a tenant to consult with on-site Tenant Duty Counsel, where available, or adjourning the hearing to allow the party to obtain assistance from a family member, social worker or another person of the party's choosing.

Under Ontario law, all adults are assumed to be capable unless they have been found to be incapable by an assessor appointed under the *Substitute Decisions Act, 1992*⁵ (the 'SDA'). Such an assessment may result in someone else being appointed to look after that person's interests. The Board does not have the authority to find that a party to one of its proceedings is incapable within the meaning of the SDA or order that someone else represent that party in a Board hearing.

It should not be assumed that a person who is incapable of one thing is incapable of everything. A person who is incapable of making treatment decisions, or a person who is incapable of managing their money such that a guardian has been appointed, may still be capable of participating in a hearing and instructing their legal representative. Incapacity can be issue-specific.

d. Conduct during a Board hearing

Members have an obligation to ensure that all hearings are conducted in a manner that is respectful towards all of the participants. Members must also control the proceedings to ensure that the conduct of a party, witness, spectator or representative does not infringe upon another person's rights under the Code to equal treatment with respect to services. For example, a Member will not permit a hearing participant to make derogatory comments about a party's race, religion, or sexual orientation.

2. Landlord applications

Issues relating to any of the grounds set out in subsection 2(1) of the Code may be raised during Board hearings. Subsection 2(1) of the Code provides that everyone has the right to equal treatment with respect to housing, without discrimination because of race, ancestry,

⁵ *Substitute Decisions Act, S.O. 1992, c.30, as amended*

place of origin, colour, ethnic origin, citizenship, creed (religion), sex (including pregnancy, gender identity), sexual orientation, age, marital status, family status, disability, or the receipt of public assistance. “Disability” is defined by subsection 10(1) to include both physical conditions and mental disorders.

Code issues are most commonly raised when a landlord files an application to evict a tenant because of the tenant’s conduct, and the tenant asserts that:

- the tenant has a disability;
- the landlord has discriminated against the tenant;
- the tenant’s conduct is caused by the disability; and
- the landlord has not accommodated the tenant up to the point of undue hardship.

The Member must first determine, after hearing from all parties, whether the landlord has established that the tenant engaged in the alleged conduct. If the landlord does not meet this burden of proof, the application is dismissed. If the landlord meets the burden of proof, the Member will then consider the tenant’s claim that the landlord has not met its obligations under the Code having regard to the following criteria:

a. Is the tenant protected under subsection 2(1) of the Code

The tenant must provide sufficient information to establish that they are covered by one or more of the categories set out in subsection 2(1) the Code, such as disability. Sometimes this will not be difficult for the tenant to establish because the disability is not in dispute. In other cases, the tenant may need to submit evidence, such as a letter from a doctor or other medical forms, to establish that they have a disability as defined in the Code.

The Member must be respectful of the tenant’s privacy interests and should not require the tenant to disclose more information than is needed to make the necessary determination. For example, a party with a disability may not need to disclose their specific diagnosis if sufficient medical evidence about the impact or effect of the disability is submitted to the Member. If the tenant is disclosing intimate personal information, the Member may consider excluding the public from the hearing room under Rule 24 of the Board’s Rules of Practice, “Restricting Public Access to the Hearing” and section 9 of the *Statutory Powers Procedure Act*. However, the other parties to the application are entitled to remain in the hearing room, examine all of the evidence submitted to the Board and make submissions.

b. Has the tenant been discriminated against contrary to the Code

If the Member determines that the tenant falls within one or more of the categories contained in subsection 2(1) of the Code, the tenant must next establish that the landlord has discriminated against the tenant. In some cases, the discrimination may be clear. For

example, the landlord is seeking to evict the tenant simply because the tenant practices a particular religion. In other cases, the discrimination may be indirect, such as a rule or standard applied by the landlord that appears neutral but has the effect of discriminating against the tenant because the tenant belongs to one or more of the categories contained in subsection 2(1) of the Code. For example, a requirement that all tenants remove their belongings from cupboards and drawers to enable the landlord to fumigate all of the rental units may discriminate against tenants who are unable to perform such tasks because of a physical disability. If the landlord is seeking to evict a disabled tenant for failing to comply with this requirement, the Member would take such discrimination into account in applying the Code.

The Divisional Court in *Connelly v. Mary Lambert Swale Non-Profit Homes*⁶ suggested that where the landlord's application for eviction is based on the tenant's conduct, the Member must also consider whether the conduct has been directly caused by the tenant's disability.

If the grounds for eviction contained in the landlord's application are unrelated to the tenant's membership within one or more of the categories contained in subsection 2(1) of the Code, the Member cannot find that the tenant has been discriminated against by the landlord. For example, if the landlord has filed an application for termination of the tenancy based on arrears of rent, the fact that the tenant has a hearing impairment is likely not relevant to the Member's determination of the merits of the landlord's application. However, even if the Member finds that the landlord's application is unrelated to the tenant's membership within one or more of the categories contained in subsection 2(1) of the Code, the Member may still take all of the tenant's circumstances into account when considering relief from eviction pursuant to section 83 of the RTA. Both scenarios are discussed below.

c. Has the landlord accommodated the tenant to the point of undue hardship

Once the Member determines that the tenant is covered by one or more of the categories contained in subsection 2(1) of the Code and has been discriminated against by the landlord, the legal burden shifts to the landlord to show that it has accommodated the tenant to the point of undue hardship.

Section 11 of the Code provides that a right under the Code is infringed where a person identified by a Code ground is excluded because of neutral rules or requirements that are not "reasonable and *bona fide* in the circumstances". According to subsection 11(2) of the Code, this determination requires a consideration of whether the needs of the group to which the tenant belongs can be accommodated without undue hardship to the landlord. In other words, section 11 allows the landlord to demonstrate that the requirement, qualification or factor applied by the landlord is "reasonable and *bona fide*" by showing

⁶ 2007 CanLII 52787 (ON S.C.D.C.), para 8

that the needs of the group to which the tenant belongs cannot be accommodated without undue hardship.

Subsection 17(1) of the Code contains a similar provision that specifically applies to disability. Subsection 17(1) states that a right is not infringed if the person with a disability is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right. In other words, there is no violation of the Code if the tenant is unable, because of a disability, to "... act as is reasonably required of a tenant"⁷. However, according to subsection 17(2) of the Code, this defence is not available to the landlord unless it can be shown that the needs of the tenant cannot be accommodated without undue hardship.

In *Walmer Developments v. Wolch*⁸ the Divisional Court stated that the limitation on the rights of a disabled person in section 17 must be read narrowly, as befits the purpose of the RTA, and the requirement for accommodation of the needs of the person is a keystone of the Code.

In determining whether the landlord has satisfied its duty to accommodate the tenant pursuant to either subsection 11(2) or 17(2) of the Code, the Member should consider the following criteria:

- **Landlord's knowledge of the tenant's circumstances**

The Member must determine whether the landlord was aware, prior to filing the eviction application that the tenant is covered by one or more of the categories set out in subsection 2(1) the Code, such as disability. The duty to accommodate exists only for needs that are known to the landlord⁹ However, this does not mean that a tenant with a disability is obliged to provide the landlord with full details of their medical condition and history. In *Eagleson Co-Operative Homes, Inc. v. Théberge*¹⁰, the Court found that the landlord had received an uncontradicted medical opinion from the resident's doctor stating that she was unable to participate in any volunteer work due to medical reasons, and it was a violation of the Code to require a person with a mental disability to divulge private medical information as a condition of maintaining her accommodation.

Even if the tenant does not tell the landlord about the disability, the landlord cannot be willfully blind. If a disability is obvious, the landlord will be considered to have

⁷ *Walmer Developments v. Wolch* 2003 CanLII 42163 (ON S.C.D.C.), para. 31.

⁸ *Ibid.*, para. 34.

⁹ See *Bathurst-Vaughan Mall Limited v. Eini*, 2009 CanLII 3550 (ON S.C.D.C.)

¹⁰ 2006 CanLII 29987 (ON S.C.D.C.)

constructive knowledge of it and therefore should have attempted to address the issue with the tenant prior to taking steps to evict the tenant.

- **Tenant's role in the accommodation process**

If a tenant wants accommodation under the Code, the tenant has a duty to provide the landlord with sufficient information about their needs so that the landlord can determine possible accommodation. The tenant also has a duty to cooperate with the landlord in the development and implementation of the accommodation. If the tenant refuses to cooperate, the landlord can argue it has fulfilled its duty to accommodate.

- **Has the landlord developed and implemented an appropriate accommodation plan**

The landlord will be expected to provide evidence about the steps the landlord has taken to address the problem, if any, prior to applying to the Board for eviction.

In developing accommodation for the tenant, the landlord should have regard to three guiding principles identified by the Ontario Human Rights Commission:

- (1) accommodation must be provided in a manner that respects dignity;
 - (2) accommodation must be individualized to meet the needs of the specific person;
- and
- (3) accommodation must provide for the inclusion of people protected under the Code.

Where the landlord is unable to immediately provide the ideal form of accommodation, other options such as phased-in, interim or alternative accommodation must be implemented by the landlord.

- **Will the accommodation cause undue hardship**

A landlord must accommodate the tenant up to the point that any further accommodation would cause undue hardship. The Courts have considered this issue in several decisions.

In *Walmer Developments v. Wolch*¹¹ the Ontario Rental Housing Tribunal (now the Board) found that the tenant had interfered with the reasonable enjoyment of the landlord and other tenants by engaging in conduct such as screaming loudly and causing food to catch on fire on her stove. The Divisional Court found that the Tribunal had erred in evicting the tenant because the Member had failed to consider the tenant's disability pursuant to the Code. At paragraph 35, the Court stated that the Tribunal ". . . must consider whether any

¹¹ 2003 CanLII 42163 (ON S.C.D.C.)

disruption in the enjoyment of other tenants may be sufficiently alleviated by a reasonable accommodation of the disabled tenant without undue hardship to the landlord.” The Court rejected the argument that the tenant could not, because of her disability, act as is reasonably required of a tenant, so as not to disturb her neighbours and found that accommodation would be appropriate in this case. The Court ordered the parties to enter into an arrangement whereby the landlord informs the tenant’s relatives at the first sign of trouble, so that they can intervene.

In *Canadian Mental Health Association v. Warren*¹² the Tribunal found that the tenant had created disturbances within the residential complex by shouting, screaming, slamming doors, verbally abusing and threatening other tenants, activating the smoke detectors, continually threw garbage out of her second storey window and that her unit was in such a state of hazardous disarray that it posed a real threat of fire. The Member determined that the tenant was disabled within the meaning of the Code. The Member accepted that the landlord’s accommodation attempts included the negotiation and mediation of agreements which provided the tenant with relief from eviction, taking part in a “transition team” which had been formed to assist the tenant in resolving her problems, assigning caseworkers to deal with the tenant’s needs, and installing less sensitive smoke detectors. The Member concluded that the landlord’s accommodation met the requirements of section 17 of the Code and that the accommodation had now reached the point of undue hardship. The Divisional Court upheld the Tribunal’s decision, finding that “there was overwhelming evidence of accommodation, to the point of undue hardship, on the facts before the Tribunal”.

In *McKenzie v. Supportive Housing in Peel*¹³ the Tribunal found that the tenant had seriously impaired the safety of the superintendent by stabbing the superintendent with a pen. The superintendent required medical attention and the tenant was convicted of assault. The tenant by her own testimony was disabled within the meaning of the Code. The member found that the landlord had done everything in its power to attempt to accommodate the tenant to the point of undue hardship, but that the tenant had refused to accept help. In upholding the Tribunal’s decision, the Divisional Court quoted with approval the following passage from the ORHT decision:

[3] ...Therefore, I find that the Landlord has done everything in its power to attempt to accommodate the tenant to the point of undue hardship, and has thus satisfied its requirements under the Ontario Human Rights Code. Further, permitting the tenant to continue residing [in the] rental unit would constitute an undue hardship to the building Superintendent, in light of the safety concerns raised by the tenant’s conduct.

¹² 2004 CanLII 16439 (ON S.C.D.C.)

¹³ 2006 CanLII 7838 (ON S.C.D.C.)

In *Connelly v. Mary Lambert Swale Non-Profit Homes*¹⁴, the Tribunal found that the tenant was addicted to drugs and was operating a crack house in the complex. The Divisional Court found that the tenant's drug addiction must be considered a disability, but upheld the Tribunal's order evicting the tenant. The Court held that:

[10] On the finding of the Tribunal, no accommodation is possible. The appellant denied he was dealing drugs from his apartment. He denied that his conduct created difficulties both for the respondent and its tenants.

[11] The Tribunal found that the appellant's operation of a crack house substantially interfered with the rights of the other tenants.

[12] We reject any suggestion there is an obligation on the respondent to permit the tenant to operate a crack house in order to accommodate his disability. We conclude that such an attempt at accommodation would be an undue hardship to the respondent by substantially interfering with the rights of the other tenants.

Subsection 17(2) of the Code also prescribes three considerations when assessing whether an accommodation would cause undue hardship. These are:

- (1) cost
- (2) outside sources of funding, if any
- (3) health and safety requirements, if any.

If issues relating to cost, outside sources of funding or health and safety requirements are relevant to the proceeding, it is the landlord's obligation to provide evidence respecting these three considerations if arguing that any or further accommodation would cause undue hardship.

Costs will amount to undue hardship if they are quantifiable, shown to be related to the accommodation, and are so substantial that they would alter the essential nature of the enterprise or so significant that they would substantially affect its viability.

For further guidance on undue hardship, see the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* under "Policies" on the Commission's website at www.ohrc.on.ca.

- **Relief from eviction**

¹⁴ 2007 CanLII 52787 (ON S.C.D.C.)

In *Walmer Developments v. Wolch*¹⁵ the Divisional Court held that the Ontario Rental Housing Tribunal (now the Board) must consider and apply the Code when exercising its authority to grant relief from eviction. A Member considers such relief pursuant to section 83 of the RTA. Section 83 states that the Member must have regard to all the circumstances to determine whether it would be unfair to refuse the landlord's eviction application or postpone the enforcement of the eviction order.

If the Member determines that the landlord has failed to accommodate a tenant covered by one or more of the categories contained in subsection 2(1) of the Code up to the point of undue hardship, the Member must consider relief from eviction in accordance with clause (a) of subsection 83(1) of the RTA. However, even if relief is granted, the Member may still consider whether other types of conditions and requirements should be ordered to address the conduct or problem at issue. The authority to make such orders comes from subsection 204(1) of the RTA.

In some cases a Member may find that there are no Code-related grounds for relief from eviction. For example, the Member may find that the reason for the landlord's application is unrelated to the fact that the tenant belongs to one or more of the categories contained in subsection 2(1) of the Code, or that the landlord has met the obligation to accommodate the tenant to the point of undue hardship. However, in these circumstances the Member must still consider granting relief from eviction having regard to all of the circumstances of the parties pursuant to section 83 of the RTA. For example, there may be no connection between a landlord's application for arrears of rent and the fact that the tenant uses a wheelchair. However, the Member could take into account the difficulty the tenant may experience in finding alternative wheelchair accessible accommodation, and thus delay enforcement of the eviction order pursuant to section 83.

3. Tenant applications

A tenant may allege in a tenant's application that the landlord has contravened the Code. Such allegations may relate to a number of different sections of the RTA and the Code.

For example, a tenant may allege that the landlord has substantially interfered with the tenant's reasonable enjoyment of the rental unit in contravention of section 22 of the RTA by failing to make changes to the unit that are necessary to accommodate the tenant's physical disability. The Member's consideration of such a claim will be similar to that described above with respect to Code issues raised pursuant to section 83 of the RTA. The Member must first determine whether the tenant falls within one or more of the categories contained in subsection 2(1) of the Code and has been discriminated against by the landlord. The Member must then determine whether the landlord has accommodated the tenant to the point of undue hardship. If the tenant's claim is successful, the Member has

¹⁵ 2003 CanLII 42163 (ON S.C.D.C.)

the authority pursuant to clause (f) of subsection 31(1) of the RTA to order the landlord to make necessary changes to the rental unit or residential complex to accommodate the tenant's needs.

A tenant may also allege in a tenant's application that the landlord has harassed, obstructed, coerced, threatened or interfered with the tenant in contravention of section 25 of the RTA, and that the landlord acted in this way because the tenant is covered by one of the grounds set out in subsection 2(1) the Code. Such conduct may also contravene subsection 2(2) of the Code which provides that tenants have a right to freedom from harassment by the landlord or the landlord's agent. The Member will consider such claims in determining whether the landlord contravened the RTA, and if so, what the appropriate remedy should be.

4. Conflict between the RTA and the Code

Tribunals that can decide questions of law, such as the Board, have the jurisdiction to consider whether a legislative provision within its mandate is consistent with the Code. This does not mean that the Board has the authority to find that the legislative provision in question is invalid, as a Court may determine. However, if the Board finds that there is a conflict between a legislative provision and the Code, the Board has the authority to determine that the provision does not apply to the proceeding, pursuant to section 47 of the Code. Section 47 of the Code is applied when there is conflict between a legislative provision and the Code to ensure that the Code takes precedence.

Therefore, a party to a Board proceeding may argue that a particular section of the RTA should not be applied because it is in conflict with the Code's provisions.