

Legislation:

Sections 74, 78, 148, 175, 194 and 195 of the *Residential Tenancies Act* (the "RTA")

Related Rules:

Rule 14 (Settlements Reached without Board Mediation)

The RTA gives special recognition to mediation of applications which is conducted by Mediators employed by the Board. Section 194 of the RTA permits the Board to attempt to mediate a settlement of any matter that is the subject of an application or agreed upon by the parties, if the parties consent to the mediation (except mandatory mediation under section 148 of the RTA for care home "transfers"). If a mediation is conducted by a Board Mediator, the agreement may include provisions that contravene the RTA. There is, however, a limitation on agreements reached through Board mediation, since negotiated rent increases cannot exceed 3% above the annual guideline.

Subparagraph 78(1)2.i of the RTA provides that the conditions imposed on the tenant in the order or mediated settlement described in paragraph 78(1)2 include only those conditions which, if not met by the tenant, would give rise to the same reasons for terminating the tenancy under the RTA as were claimed in the previous application. Thus, a term of settlement which is a condition for future termination without notice to the tenant must meet two tests; it must be the same reason that was raised in the eviction application that was settled and the reason must be one recognized by the RTA. For this reason, mediated settlements of eviction applications based only on rental arrears will not allow for a section 78 application based on late payment of future rents, once the arrears and costs have been paid.

The RTA provides that these Rules will set out the way in which the Board will dispose of an application if a Board mediated agreement resolves some or all of the issues raised by an application. If there is no mediated settlement, the Board is required to hold a hearing.

Mediators will not mediate agreements intended to modify an order of the Board, such as an agreement with terms that impose conditions on the enforceability of the order. A Board order is a final disposition of an application and as such, these types of agreements, commonly referred to as "side agreements" will not be mediated.

Pursuant to subsection 194(1) of the RTA, the Board may only mediate landlord and tenant disputes when an application has been made to the Board. The Board

may decide not to mediate an application where there is little chance of success, where it will cause undue delay, or where there are minimal potential benefits.

When the parties to an application agree, a Board mediation may deal with and resolve issues which are not included in that application to satisfy the interests of the parties and to make more effective and long lasting agreements.

The Conduct of Board Mediations

13.1 A Mediator shall assist the parties in identifying their interests and in devising ways of satisfying those interests which may be agreeable to all parties.

Mediators are expected to elicit from each party their positions and interests relating to the issues. Mediators will assist the parties in focussing on their interests so as to find potential solutions to satisfy those interests.

13.2 If a Mediator ends a mediation before an agreement is reached between the parties, the application shall proceed to a hearing.

A Mediator may terminate a mediation for a number of reasons. It may become obvious that the mediation will be unsuccessful in settling the issues raised by the parties, or will take an unreasonable amount of time before a settlement becomes possible. One of the parties may become disorderly and refuse to follow the Mediator's requests to act in an orderly manner. A party may be attempting to delay the resolution of the application. A party may be badgering the other party or using inappropriate methods to obtain concessions, or misrepresent the facts, the law or the rules or practices of the Board. In any of these cases, the Mediator may bring the mediation to an end and send the parties to a hearing. Any settlement that the parties reach without the Mediator will be subject to Rules 14.1 to 14.3.

13.3 A Mediator shall explain to any party involved in a mediation the effect of any provision of the proposed agreement which may be inconsistent with the RTA or regulations before the party signs the agreement.

There may be disputes between parties to an application in which a resolution may involve an inconsistency with the rights and obligations set out in the RTA. It may be in the interests of both parties to make such an agreement. However, Board mediators will not allow a party to give up their rights under the RTA without that party being aware of what they are giving up. The degree of explanation necessary will depend on factors such as whether the party is represented at the mediation session and the nature of the contravention. The

explanation may be given in the presence of all parties or in individual "caucuses" with parties.

13.4 A Mediator may describe to the parties to the mediation, the provisions of the RTA, regulations, Rules, Guidelines, relevant case law or practices of the Board.

As many parties are not represented by a lawyer or agent, they will often be unfamiliar with the procedures for a mediation or a hearing. It is proper for a Mediator to answer questions about those procedures or inform the parties about the provisions of the RTA, the regulations, a Guideline or a past decision of the Courts, former Tribunal, or the Board which appears to be relevant.

13.5 A Mediator shall not offer a personal opinion or give advice to either party to the mediation regarding the merits of the application.

The role of a Mediator is to remain neutral, while assisting the parties to come to a settlement. They are an impartial facilitator of the discussions between the parties. They do not decide the case, nor express their personal opinion about the fairest outcome, if the case were adjudicated. In this role, it is not proper to give an opinion regarding the merits of the application or any other issue raised by the parties.

Representative's Authority at a Mediation

13.6 A representative who wishes to participate in a mediation without the party they represent shall do one of the following:

- (a) file an agency authorization signed by the party specifically authorizing them to enter into a settlement on the party's behalf;**
- (b) if the representative is a lawyer entitled to practice in Ontario, give assurances that the party has authorized them to enter into a settlement on the party's behalf; or**
- (c) indicate that they have the verbal authorization to act on behalf of the absent party and obtain the consent of the other participating parties and the Mediator to mediate with such an authorization.**

It is crucial to any settlement discussions in a mediation that all participants have authority to make an agreement. It is not satisfactory if a deal is reached, but a representative must have it ratified later by the party they represent. This leads to situations in which a representative can seek a settlement, and then use the client's

approval as a means of trying to obtain better terms. However, if the circumstances are acceptable to the other party and the Mediator, the mediation may be conducted with the participation of the representative, even without written agency authorization. The representative must give assurances that the party has authorized them to enter into a settlement on the party's behalf. The representative must also be prepared to either sign the resulting mediated settlement as the party's authorized agent, or give consent to the terms of the settlement before a Member of the Board in the event of a joint submission for an Order of the Board on consent. If the representative is a lawyer, it is assumed that they would not misrepresent their instructions from the client, since they are subject to discipline by the Law Society.

Settlement Agreements

13.7 A Mediator may prepare a written agreement based on the parties' settlement.

This Rule recognizes that Mediators may involve themselves to the extent of assisting the parties to draft their agreement since the Board believes this helps to ensure that the parties understand their respective rights and responsibilities and promotes the clear and objective wording of agreements between parties, especially where one or both are not represented.

The Mediator will tell the parties that a written mediated agreement will not result in an order of the Board. The written agreement may be structured to provide virtually everything which could be contained in an order, including the possibility of re-opening the application according to these Rules if any party does not carry out their obligations under the agreement within one year. The written agreement may also allow for a new application for eviction being filed by the landlord without notice to the tenant pursuant to section 78 of the RTA if the tenant does not carry out specified obligations under the agreement.

13.8 If a party has paid money into the Board, the Mediator shall direct payment out of the funds in accordance with the agreement of the parties.

Under the terms of the RTA, the Board may establish procedures in its rules for the payment of money into and out of the Board. This Rule deals with any situation in which a party has either voluntarily paid money into the Board or was directed to pay money into the Board. It is important that the funds held by the Board are dealt with, and the mediated agreement must address this. If there is a full settlement, the parties must agree how much will be paid to each party. The Mediator will then use their signing authority in respect of the Board account to ensure that this agreement is carried out properly. If there is only a partial settlement, this issue may be one of those which proceeds to the hearing to be decided by the Member.

Disposing of an Application

13.9 If a written mediated settlement resolves the issues raised by an application the Mediator shall dispose of the application.

When all of the issues with respect to an application are successfully mediated and a mediated agreement is signed by each of the parties, the Mediator will dispose of the application by updating the Board's electronic records to reflect that the application was resolved by means of mediation. If mediation results in a joint submission for an order of the Board on consent, the resulting order will dispose of the application.

Section 148 of the RTA (care home transfers), provides that mediation is mandatory and that the Board may dismiss the landlord's application where the landlord fails to participate in the mediation. As a result, the Mediator must advise the Member hearing the application that mediation has been attempted, and when applicable, where the landlord has failed to participate in the mediation. The Mediator may advise the Member orally or in writing.

Partial Settlement Reached Through Board Mediation

13.10 If mediation results in the resolution of some but not all of the issues raised in the application, the Mediator may present a joint submission to the Board respecting the resolved issues, leaving the unresolved issues to be decided at the hearing in accordance with the RTA.

The parties may be able to resolve only one or some of the issues raised in the application. The Mediator will explain to the parties that the hearing of the unresolved issues in the application will proceed and an order will be issued, but the Member will not usually question the parties' agreement regarding the issues which have been settled through a Board mediation. So that the Member is clear about which issues are left to be resolved by the hearing, the Mediator may present, either orally or in writing in the form of a Joint Submission, those issues which were settled. A copy of the mediated agreement for these issues shall not be presented.

13.11 If the issues in the application are not resolved through mediation but the parties have agreed on some of the facts, a Mediator may assist the parties in preparing an "Agreed Statement of Facts" which shall be presented to the Member at the hearing.

There may be situations where the parties cannot resolve the application through mediation but they do agree to some of the facts. In such cases, and if the parties agree, the Mediator can draft an "Agreed Statement of Facts" for the parties to sign. It facilitates the hearing if the Member can be told which facts are not in dispute.

13.12 A mediated settlement of procedural matters only may result in an interim agreement being signed by the parties and this agreement will be kept as part of the Board's record. Such interim agreements will not be subject to the confidentiality provisions of Rule 13.20.

If the mediation takes place before the date of the hearing, the parties may agree to sign an interim agreement on procedural matters. Such interim agreements may include terms such as rescheduling the hearing to a different date, disclosure of issues, and payment in/out. Interim agreements must contain a provision where each party agrees to have a copy of the interim agreement placed on the Board's record for consideration by the Member when the application is decided at a hearing.

Re-opening the Application

13.13 Either party to an agreement resulting from mediation by the Board may request in writing that the application be re-opened due to the failure of the other party to meet any of the terms of the written mediated agreement.

If a party does not comply with any term of a written mediated agreement, the other party may ask to re-open the original application. A party may ask for an application to be re-opened if either monetary or non-monetary items were not complied with.

However, since the Member hearing the re-opening can only consider issues properly raised in the application, it may not be useful to ask to re-open if the part of the agreement which was breached relates to something outside the application (e.g., brought up at the mediation). Also, as the Member is limited to ordering remedies permitted by the RTA, re-opening for a breach of a provision of the agreement that could not be ordered may not have the desired effect.

This right to request re-opening of the application exists whether or not the agreement provides for the re-opening of the application. A hearing will be scheduled, but the Board may attempt to mediate a request to re-open if the parties consent.

13.14 Either party to an agreement resulting from mediation by the Board may request in writing that the application be re-opened on the basis that, during the mediation, the other party coerced them or deliberately made false or misleading representations which had a material effect on the agreement.

If a party claims that the mediation which resolved the application was affected by another party's coercion or misrepresentation of material facts, the application may be re-opened to review that issue. The first issue at the hearing will be whether

there was any coercion, misrepresentation or the furnishing of misleading information. The seriousness of these allegations makes it unlikely that mediation of the request to re-open will be attempted as it would not likely be successful.

13.15 A request to re-open an application must state the alleged breach of the agreement and must be filed, with a copy of the agreement, within one year of the date the agreement was signed. However, with the consent of each party at the time of the signing of the agreement, the parties may agree to a longer re-opening period.

It is essential for the party requesting the re-opening of the application to file the agreement and set out in the request what part of the agreement was not met by the other party, and how it was not met. The request must be filed within one year of the date the agreement was signed. In some limited cases, for example, where there is an extended repayment period, the parties may agree at the time of the signing of the mediated agreement to a longer re-opening period. If the request is filed late, it must be accompanied by a request to extend the time for filing, explaining why it was late.

The procedural rules in the RTA and these Rules regarding applications apply with respect to a re-opened application. In deciding the re-opened application, the Member will usually take into consideration the terms of the agreement which were already met by each party, in deciding what remedies are then appropriate.

13.16 The person requesting that the application be re-opened shall give a copy of their request and the notice of hearing to all other parties to the application at least five days before the hearing.

Since the application is being re-opened, a hearing will be scheduled when the request is filed. A notice of hearing will be given to the party making the request. As with any application, it is their responsibility to advise the other party by giving them a copy of the notice of hearing. They must also give the other party a copy of their request (and, if applicable, a copy of the request for an extension of time). These documents must be served using one of the permitted methods of service (see Rules 5.1 to 5.2) at least five days before the scheduled hearing date.

Confidentiality of the Mediation Process

13.17 Anything said in a Board mediation and any offer to settle the application will be confidential and, where no agreement is reached, may not be used by one party against another in the same or any other proceedings.

It is essential to the mediation process that all parties trust that what they say in the mediation in order to try to settle the case is confidential and will not be used

against them later in the hearing or in other Board or Court proceedings. A party should feel free to make any statement of fact or suggest that a fact in dispute may be true in the mediation without fear that it will be used as an admission (that is, the other party must still prove the fact if there is a hearing). Similarly, parties must be able to make and discuss offers to settle, without concern that the other party will raise those offers at the hearing.

By the same principle, parties should be able to make written proposals to settle, or draft proposed agreements. If the mediation does not result in a complete settlement, the document should not be used by one party against another later (whether or not the document was expressly "without prejudice").

13.18 Board Mediators shall not reveal information obtained in mediation to any other persons, including Board Members.

Board Mediators must respect the confidentiality of the mediation process.

13.19 Notwithstanding Rule 13.18, Board Mediators may discuss the issues raised and offers of settlement in collegial discussions for professional development purposes without revealing the names of the parties or other specifics about a case that may reveal the names of the parties.

13.20 Except where the parties agree otherwise, copies of any Board mediated agreements are confidential and:

- (a) are the property of the parties; and**
- (b) any signed copy which has come into the possession of the Mediator will be returned to the parties or destroyed.**

The Mediator will normally assist the parties in setting out in writing the terms of their agreement. However, the signed copies of the agreement belong to each party, and any copies in the possession of the Mediator will be destroyed. Signed copies which are given to the Mediator for any reason will be returned to the party for whom they were intended. It is the intention of the Board to preserve the interest of the parties in maintaining confidentiality regarding the terms of their agreements.

13.21 Unless the Mediator is required by law to disclose information provided during a mediation, any information provided to the Mediator:

- (a) **will not be disclosed to any other party without the consent of the party who provided it;**
- (b) **will not be retained by the Board; and**
- (c) **if it is a document, will be returned to the party who provided it, unless the party who provided it asks that it be placed on the application file.**

The information may have been provided verbally or in the form of documents. A document provided to a Mediator will be returned to the party who submitted it after the mediation is terminated, and no copy will be retained in the application file (unless the party requested it to be filed). However, some documents received during a mediation are intended to be evidence or submissions to be placed in the application, and will be considered if there is a hearing because the mediation is not successful.

Permission to give the documents or information to other parties would normally be obtained when the information was provided, but could be obtained later. Permission will always be obtained before the information or document is shared with other parties. Permission can be given by the party regarding specified information or documents in writing or orally (noted in the file).

Under section 175 of the RTA, a Member or Mediator cannot be compelled to give testimony or produce documents in a civil proceeding if the information came to their knowledge in the course of their duties under the RTA. This means that a Mediator cannot be called to a hearing of the Board or a Court to report what was said at a mediation session or in separate discussions with any party.

However, in extraordinary cases, the evidence of a Mediator may be compelled in Court (such as at a criminal trial, where the public interest requires the evidence). It is also possible that information will have to be produced to a member of the public under the provisions of the Freedom of Information and Protection of Privacy Act. Further, the Board recognizes that it has an obligation to advise appropriate officials if any potential criminal act or intention is revealed in the course of the mediation.

13.22 Despite Rule 1.5, Rules 13.17 to 13.21 may not be waived or varied.

Rule 1.5 allows a Member to waive or vary any of these Rules in the circumstances of the application. However, the Rules concerning confidentiality of the mediation process cannot be waived or varied by the Member in any circumstances.