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Mediated Agreements

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The Residential Tenancies Act, 2006 *(the "**RTA**") governs the relationship between residential landlords and tenants. The RTA provides landlords and tenants with certain rights and obligations, and sets out a process for enforcing them. Enforcement takes place at the Landlord and Tenant Board (the "**Board**").*

The RTA allows a landlord or tenant to make an application at the Board to, among other things, enforce his or her respective rights. It is the responsibility of the Board to resolve the application. The Board resolves applications in one of two ways:

1. **Adjudication:** The Board will listen to both parties' evidence at a hearing and will make a binding decision.
2. **Mediation:** The Board facilitates a discussion between the parties in the hope of enabling them to reach a solution.

This *infoON* will provide an overview of the Board's mediation process. It will describe what mediation is, outline the benefits and drawbacks of mediation, and provide some practical tips for using mediation as a tool to resolve landlord-tenant disputes.

This infoON *is for information purposes only and does not constitute legal advice.*

What is mediation?

When the Board receives an application, it will automatically schedule a hearing of the matter. Subsection 194(1) of the RTA, however, allows the Board to try to mediate a settlement if the parties agree. The parties can choose to mediate their dispute on the hearing date.

The Board employs mediators to lead the mediation process. A mediator is a professionally-trained, neutral third party that helps the landlord and tenant to resolve their dispute. On the hearing day, the mediators will be available to landlords and tenants who want to mediate. If both the landlord and tenant choose to mediate they will go, along with a mediator, to a private room where the mediation will take place. Typically, the only people that participate in the mediation are the mediator, the tenant, the landlord and their respective representatives (if any).

At the start of the mediation, the mediator will describe how mediation works. Once the mediator has finished explaining the mediation process, the applicant will discuss his or her case and will also describe the relief that s/he is seeking from the Board. After the applicant describes his or her case, the respondent will have the chance to explain his or her position. The mediator will listen to both parties and will help the parties reach an agreement. The mediator's role is to help the landlord and tenants to identify their interests and to work together to find a solution they can agree with.

During the mediation, parties will often caucus. This means that one of the parties will move to a more private setting. Each party then reviews the information that was shared at the mediation, confers privately with his or her respective representative and/or confers privately with the mediator. The mediator will bring information and offers back and forth between the caucusing parties in an attempt to reach an agreement.

There are a number of potential outcomes to mediation:

- The landlord and tenant may reach an agreement and the hearing of the application will not proceed.
- The landlord and tenant may be unable to reach an agreement and the application will proceed to a hearing.
- The landlord and tenant may reach a partial agreement, and leave the unresolved issues to be dealt with at a hearing.

If a settlement is reached, the mediator will leave the mediation room, return to his or her office and prepare a written agreement that contains the terms of the parties' settlement. Typically, the parties wait in the mediation room or at the Board while the mediator drafts the agreement. When the mediator is finished preparing the agreement s/he will return to the mediation room and give the parties a copy of the typewritten agreement to review, to comment on and, if necessary, to revise. When both parties are satisfied with the agreement, they will sign it.

Practice tip No. 1:

If a landlord believes there is a possibility of mediation, they should spend time preparing a draft a mediation agreement in advance of the hearing date.

A landlord can propose a settlement that s/he has drafted as a mediation agreement. If, after reviewing the proposed agreement, the tenant agrees, the landlord can share a copy of that agreement with the mediator. Even if the tenant and landlord agree to change the draft, preparing an agreement in advance can help the mediation process move more quickly. Even if the tenants do not agree to the provisions the landlord has proposed, the process is an excellent way to prepare for both mediation and a hearing.

Mediation is confidential

The landlord, tenant and their representatives are prohibited from disclosing any of the information that they heard during the mediation[1]. The mediator is also prohibited from disclosing information gained during the mediation[2] except under extraordinary circumstances[3]. In fact, a mediator cannot be forced to testify or produce documents related to a mediation in a civil proceeding[4].

In addition to the information and documents disclosed during the mediation, the mediation agreement itself is confidential and is the property of both the landlord and tenant[5].

This means that apart from the landlord, tenant and mediator, no one else knows the facts of the dispute, how the mediation was conducted, or the outcome of the mediation. This also means that none of the parties in the mediation can disclose any of the information or documents that they acquired during the mediation. As a result, the parties are free to talk openly during the mediation without fear that anything that they say will be used against them at a hearing. The primary reason for making the mediation confidential is to encourage the participants to have an open and frank discussion. This is vital to the success of the mediation.

Practice tip No. 2:

Even though open and frank communication contributes to the success of mediation, landlords still need to be cautious about the information that is shared.

Landlords must be careful not to disclose any information that would undermine their case. Keep in mind that if the mediation does not result in a settlement, a hearing of the application will proceed. Even though the other party cannot disclose the information that was disclosed in mediation, they may be able to obtain that same information by examining a witness at the hearing. Once they know what information they're looking for, the opposing party is able to tailor his or her questions to obtain that information at the hearing.

1 Rule 13.17 of the Board's Rules of Practice (the "**Rules**") states that:
"Anything said in a Board mediation and any offer to settle...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."

2 Rule 13.21 of the Rules states that:
"[U]nless the Mediator is required by law to disclose information provided during a mediation, any information provided to the Mediator...will not be disclosed to any other party without the consent of the party who provided it;...will

3 For example, if the mediator is advised by a party during the mediation that the party intends to commit a criminal act, the mediator may be required to advise the appropriate officials.

4 Pursuant to section 175 of the RTA

5 Rule 13.20 of the Rules provides that copies of mediation agreements are considered confidential and are the property of the parties

What can you include in a mediation agreement?

A mediation agreement should include terms that address the specific issues raised in the application that is before the Board. For example, if a landlord has applied to the Board to evict a tenant for damaging property, the mediation agreement should at the least contain provisions that require the tenant to refrain from damaging the landlord's property and to compensate the landlord for the damage that s/he caused. Alternatively, if the landlord has applied to the Board to evict the tenant because s/he failed to pay rent, the mediation agreement should require the tenant to pay the rent arrears and pay rent in a timely manner going forward.

A mediation agreement may contain provisions that involve issues that are not contained in the application.

In addition, a mediation agreement may contain provisions that are contrary to the RTA[6]. However, such provisions are not considered enforceable by the Board. However, because the mediation agreement is a legal contract between a landlord and tenant, these provisions should be enforceable in court proceedings. When a party breaches a provision of a mediation agreement that is contrary to the provisions of the RTA, and/or that deals with issues that were not contained in the underlying application, the non-breaching party ought to be able to enforce those provisions by suing the party that breached the mediation agreement at the Ontario Superior Court of Justice (the "**Court**").

Practice tip No. 3:

The need to include provisions that contravene the RTA does not often arise. In addition, the cost and difficulty enforcing those provisions at the Court makes them less attractive. It is recommended, however, that the following clause be added to mediation agreements:

"Should any provision of the mediation agreement be found to be contrary to a provision of the RTA, then that provision is saved by subsection 194(2) of the RTA."

It is important to include a clause like this because the Court may only enforce provisions that are contrary to the RTA in the event that the tenant has provided his or her informed and express consent.

The Court considers the RTA "remedial legislation" that has a "tenant protection focus."[7] Remedial legislation is legislation that is meant to be interpreted by a court in a way that "will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."[8] In short, it means that the judge has some latitude to interpret the RTA in a way that reflects the intent of the legislation. The rights given to tenants in the RTA will be given a large and liberal interpretation by the Court.

In contrast, the parts of the legislation that limit its tenant protection focus will be narrowly interpreted.

7 *Price v. Turnbull's Grove Inc.*, 2007 ONCA 408 (CanLII) at para 26.

8 *Ibid.* at para 26.

6 subsection 194(2) of the RTA

This includes subsection 194(2) which enables provisions contrary to the RTA to be included in mediation agreements. Before enforcing a provision that is contrary to the RTA and is against a tenant, the Court may want to confirm that the tenant understood that the provision was contrary to the RTA and that the tenant agreed to be bound by it anyways. Signing an agreement with the suggested clause helps to convey that the tenant understood what they had agreed to.

Practice tip No. 4:

It can be helpful to include issues that fall outside of the original application in a mediation agreement. For example, when drafting the initial Notice of Termination that forms the basis for an eviction application, including all of the relevant grounds for termination is a good idea. It is common for new issues to arise after the application has been filed, or for additional issues to be discovered.

It can be in both the landlord and tenant's best interest to deal with all of the issues during mediation. Otherwise, both the landlord and tenant will be forced into multiple hearings to deal with each issue independently.

How do you enforce a mediation agreement?

There are two good options for enforcing of mediation agreements:

1. Re-open the original eviction application.
2. Bring an ex parte (i.e., without notice to the tenant) application for eviction pursuant to section 78 of the RTA.

1. Re-opening the original application

If a tenant breaches the mediation agreement, the landlord may request that the Board re-open the original eviction application.[9] In order to do so, the breach must have taken place within one year of the date that the mediation agreement is signed.

To re-open an eviction application, the landlord must satisfy the Board that the tenant has breached a provision in the agreement. The provision, as explained above, must relate to the issues raised in the original application. Once the Board is satisfied that the breach occurred, the Board will hear the original application.

The right to request the Board to re-open the original application is an automatic right that exists whether or not it is explicitly stated in the mediation agreement. Rule 13.15 allows the parties to agree to a longer re-opening period (i.e., longer than one-year), provided that this term is added to the mediation agreement before it is signed.

9 Pursuant to rules 13.13 and 13.15 of the Rules

2. Section 78 application

Section 78 of the RTA allows a landlord to apply to the Board on an ex parte basis for an eviction order, which means that the tenant would be evicted without notification. This is allowed when the mediation agreement imposed conditions on the tenant that, if not met by the tenant, would give rise to the *same grounds* for terminating the tenancy as were claimed in the original application.

If the landlord obtains an order evicting the tenant, the tenant can make a motion to the Board, within 10 days after the order was made, to have the order set aside. To set aside the eviction order the tenant will need to establish at least one of the following:

- that s/he did not breach a term of the agreement
- that the breach did not give rise to the same grounds claimed in the landlord's previous application
- that, having regard to all the circumstances, it would not be unfair to set aside the order

The right to bring a Section 78 application is not automatic. The mediation agreement must expressly allow the landlord to apply to the Board in accordance with section 78 of the RTA. Unlike the right to re-open an application, the right to bring a Section 78 application does not expire after a one-year period. The Section 78 application must be brought within 30 days of the breach of the agreement.

Practice tip No. 5:

Including a Section 78 provision in their mediated agreements will help landlords more easily obtain an eviction order from the Board if the tenant breaches the agreement.

To obtain an eviction order, the landlord does not need to prove the grounds that were claimed in the landlord's previous application. The landlord simply needs to satisfy the Board that the tenant has breached a term of the agreement. In contrast, the right to re-open the application merely gives the landlord an opportunity to argue the original application if the landlord can first satisfy the Board that the tenant breached the agreement.

It is recommended that landlords include a Section 78 agreement in their mediation agreements. Without one, the landlord will be forced to re-open and re-argue the original application in addition to proving that the tenant breached the mediation agreement.

Conclusion

Mediation is a good option to consider when appearing at the Board. Mediation can promote reconciliation between a landlord and a tenant and enable the parties to maintain a harmonious relationship. Parties to a mediation are typically ready to work together toward a resolution. The parties' willingness to mediate means that they are prepared to consider a compromise. It follows that the parties are likely open to see the other party's side and to work together on resolving underlying issues. Also, because a mediation agreement is achieved by the parties working together, the prospects for compliance are reasonably high.

Mediation allows a landlord to retain some control over the outcome of an application. If drafted properly, a mediation agreement can provide the landlord with a relatively straightforward way to enforce an eviction if the tenant's actions do not change. The mediation agreement can include a term that allows the landlord to initiate a Section 78 application in the event that the tenant breaches the agreement. One of two things will happen: either the tenant will comply with the agreement, in which case the landlord will have successfully addressed the tenancy problem, or the tenant will breach the agreement, in which case the landlord can initiate a Section 78 application and obtain a quick eviction order from the Board. In either case, the landlord has resolved the matter.