Health Professions Review Board

Practice Directive 5

Facilitated Settlement

I. Introduction

This Practice Directive addresses the Review Board's facilitated settlement process set out in Part VII of the Review Board's *Rules of Practice and Procedure* (Rules 36-39) (the "Rules").

This Practice Directive has been updated effective June 1, 2016, to reflect changes made to the Rules at the same time. The *Rule* changes are the result of December 2015 amendments to s. 28 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA"), which now states:

> 28 (1) The chair may appoint a member or staff of the tribunal or another person to conduct a facilitated settlement process to resolve one or more issues in dispute.
>
> (2) The tribunal may require 2 or more parties to participate in the facilitated settlement process, in accordance with the rules of the tribunal.
>
> (3) The tribunal may make the consent of one, all or none of the parties to the application a condition of a facilitated settlement process, in accordance with the rules of the tribunal. [1]

II. The Rules

The Review Board's primary method of facilitated settlement is "mediation." Rule 3(1) defines mediation this way:

> "mediation" means a confidential and without prejudice assisted negotiation or discussion process between some or all of the parties to a review, assisted or mediated by a mediator, the purpose of which is to provide the parties an opportunity to resolve or narrow the dispute without the need for a formal hearing,

Rule 37(1) confirms that mediation proceedings are confidential unless the parties consent.

Rule 36(1) provides that an application "will proceed to mediation unless the Review Board directs the matter into the pre-hearing conference or hearing process stream."

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[1] Section 16 of the *Administrative Tribunals Statutes Amendment Act, 2015*, S.B.C. 2015, c. 10 (*Amendment Act*) repealed and replaced s.28 of the ATA. Section 97 of the *Amendment Act* made the new s.28 applicable to the Review Board. These sections came into force on December 18, 2015: B.C. Reg. 240/2015.

Mediation may be voluntary, or it may be required by the Review Board. Rules 36(3) and (4) now state that "the review board may require some or all of the parties to participate in a mediation" and "the review board may require a party to participate in a mediation even if that party does not consent."

Rule 36(5) provides that the Review Board "may require the parties to separately attend one or more pre-mediation meetings with the mediator(s) to be held in person or by telephone."

Where mediation is voluntary, Rule 37(2) requires all parties to sign an "*Agreement to Mediate.*" The *Agreement to Mediate* (Form 8) provides in clause 4 that:

> Each party or a representative of each party familiar with the case and with authority to settle the dispute will attend the mediation. Agreements may be subject to any of the parties' respective board, management or higher decision-making authority.

Where mediation is mandatory, Rule 37(3) requires all parties to sign an *Acknowledgment of Mandatory Mediation Process and Duty of Confidentiality* (Form 12).

Rule 38 outlines what may happen if a party fails to attend mediation. Potential consequences include the mediation proceeding in the absence of that party, the matter being directed into another process stream in the absence of that party, or even eventual costs against that party irrespective of the outcome of the review: Rule 38(4) and 54.1.

Rule 39 provides that at any time after mediation has commenced, the Review Board may dismiss the application if all issues are resolved, or direct the matter into another process stream if all issues are not resolved.

III. Philosophy and outcomes to date

The benefits of mediation are well-known. The simple opportunity for understanding, facilitated by meeting face to face in a confidential setting where parties can explain their perspectives and concerns, can resolve many disputes. Mediation can also enable parties to identify the interests underlying a previous position, and to explore alternative means for achieving those interests, or at least to narrow the points in issue between them. Because mediation attempts to reduce unnecessary polarization, mediation can be successful both in resolving "one off" disputes and in resolving disputes involving parties who have an ongoing connection and must continue to deal with each other over time.

Part VII of the *Rules* is predicated on the view that mediation processes can be effective and successful in a public law setting. This view finds support in the Review Board's experience with the mediation process to date.

What is not clearly expressed in the Rules - and what we wish to clarify in this Practice Directive - is that "mediation" cannot operate in a public law setting exactly as it

operates in a commercial law or family law setting. The Review Board recognizes that our mediations must be adapted to the reality that public bodies charged with protecting the public interest cannot walk into a mediation prepared to "negotiate" their view of the public interest merely to resolve a dispute.

That does not, however, mean that there is no value for parties to participate in a mediation process. In some cases, an understanding may follow from the simple opportunity for an applicant or complainant to participate in a direct and respectful meeting with the college and/or the registrant to discuss the matter and the college processes which may be perceived as being less than transparent and responsive. In other instances, Colleges learned new information that caused them to agree to re-evaluate the subject matter under review. Other instances may arise where colleges consider it appropriate to recommend that matters be reopened, or for all parties to enter into consent agreements that are put before the Review Board for approval.

Review Board experience has shown that the most common theme in disputes between health professionals and the individuals they serve is inadequate communication in the delivery of the health-related service. The reasons for this may vary, but the bottom line is that health professionals who do not adequately communicate end up creating situations where the patient or client believes that the professional either doesn't care or doesn't know. What the Review Board has also found is that the best solution for poor communication is good communication, facilitated through mediation. And the results can be both dramatic and cathartic - we have seen complainants gain insight into the demands of professional practice, and a realization that the professional does care, and is competent. On the other side of the table, professionals often come away with a renewed commitment to make good communication a priority in their practice.

The Rules recognize that mediation is not appropriate for every case. Mediation may be inappropriate where, for example, an application identifies a broad systemic problem, or where a dispute raises an issue of law, policy or interpretation that needs to be determined on the record, or where an applicant or complainant is proceeding with a vexatious application, or where there are allegations of abuse of power. Each of these situations can raise special concerns that require adjudication and determination within the Review Board's formal decision-making process. But these exceptions do not undermine the general philosophy in favour of a robust process designed to encourage all parties to participate and resolve applications in a non-litigious way.

IV. Legal Concerns

For the most part, most parties have participated in Part VII mediation without objection. However, early on in the Review Board's mandate, two Colleges raised legal concerns about the Review Board's mediation rules. These concerns, which were raised in both general correspondence and in correspondence specific to individual applications, may be summarized under four headings:

A. Review Board authority to require mediation: One college expressed "significant concerns about the Rules regarding mediation where participation

of the parties appears to be mandatory…."

B. Authority of a college on mediation regarding decisions of its inquiry committee and registration committee: One college emphasized that decisions under review by the Review Board are decisions of the College's registration committee or inquiry committee. The College has no jurisdiction to reopen, reconsider or overturn a decision made by the inquiry committee or registration committee.

C. College Impartiality: One college stated that its participation in mediation must reflect its role as an impartial decision-maker - its participation cannot exceed the limits of "standing" applicable to an impartial decision-maker. Thus, while the college can properly participate to explain its jurisdiction, explain the record and explain the decision (as would be the case on judicial review), it cannot go beyond this in any Review Board process, including mediation.

D. Law governing finality of decisions: Both colleges emphasized that their actions on mediation must be consistent with the law governing the finality of decisions. One argued that it cannot reopen a concluded decision unless such an action is found to be consistent with the *Health Professions Act* and necessary to "avoid a miscarriage of justice". It cannot simply sign an agreement that represents that the participants have "authority to settle the dispute."

Each of these concerns is assessed below.

V. Assessment

A. Review Board authority to require mediation

The first question is whether the Review Board has statutory authority to require "mandatory mediation."

As a matter of proper characterization, the Rules do not make mediation "mandatory" in the sense that mediation is a precondition to every review. While mediation is the presumption, each application is assessed on a case-by-case basis. The Rules make clear that the Review Board retains discretion to exclude a particular application for review from mediation. To that end, all parties are of course free to raise a principled objection to mediation on any application (as contemplated in VI. B herein, pp. 9 and 10). That determination that an application is not appropriate for mediation may be made prior to the mediation, in a "pre-mediation" discussion, or at the mediation itself.

Section 28(2) of the ATA, which applies to the Review Board, now expressly authorizes the Review Board "to require 2 or more parties to participate in a facilitated settlement process, in accordance with the rules of the tribunal." The consequence if a party does not attend mediation is the party's potential loss of participation in the review process, and the potential exposure to costs. A "robust encouragement" to participate in mediation is obviously necessary if mediation processes are to achieve their purpose.

Sections 11(1) and 11(2)(b) of the ATA expressly confer the following rule-making authority on the Review Board:

> **11** (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.
>
> (2) Without limiting subsection (1), the tribunal may make rules as follows:
>
> …..
>
> (b) respecting facilitated settlement processes;
>
> …..

Section 1 of the ATA defines "facilitated settlement process" as being "a process established under s.28." For easy reference, ss28 and 29 of the ATA are quoted together:

> 28 (1) The chair may appoint a member or staff of the tribunal or another person to conduct a facilitated settlement process to resolve one or more issues in dispute.
>
> (2) The tribunal may require 2 or more parties to participate in the facilitated settlement process, in accordance with the rules of the tribunal.
>
> (3) The tribunal may make the consent of one, all or none of the parties to the application a condition of a facilitated settlement process, in accordance with the rules of the tribunal.
>
> 29 (1) In a proceeding, other than a criminal proceeding, unless the parties to an application consent, a person must not disclose or be compelled to disclose
>
> (a) a document or other record created by a party specifically for the purposes of achieving a settlement of one or more issues through a facilitated settlement process, or
>
> (b) a statement made by a party in a facilitated settlement process specifically for the purpose of achieving a settlement of one or more issues in dispute.
>
> (2) Subsection (1) does not apply to a settlement agreement.

These provisions reflect a clear legislative intent to authorize the Review Board to utilize and design voluntary and mandatory mediation processes to facilitate the resolution of applications for review.

B. Authority of a college on mediation regarding decisions of its inquiry committee and registration committee

One college submitted that while the college is a statutory "party" to a review before the Review Board, the college has no jurisdiction to reopen, reconsider or overturn a decision made by the inquiry committee or registration committee. This submission appears to emphasize the independence of the committees from the college as a whole,

and the finality of committee decisions. The suggestion is that if the college cannot direct the inquiry committee or registration committee in their decision-making, there is no purpose in the college participating in mediation at the Review Board.

The college is correct when it points out that while the committees operate within the larger college structure, they operate as distinct legal entities within a college. Their structures, personnel and mandates are carefully laid out in the *Health Professions Act*, (the "Act") and the various college bylaws. It has long been a feature of professional regulatory statutes that within the larger structure of a college, the legislation contemplates "distinctive bodies," with each body being given "separate and distinct duties to perform" (*Harris v. Law Society of Alberta*, [1936] S.C.R. 88 at p. 102; see also *Richmond v. College of Optometrists of Ontario*, [1995] O.J. No. 2621 (Gen. Div.)), even though these bodies are made up of members who at times necessarily exercise overlapping functions: *Ringrose v. College of Physicians and Surgeons of the Province of Alberta*, [1977] 1 S.C.R. 814; *Gagnon v. College of Pharmacists*, [1997] B.C.J. No. 1362 (C.A.). This structure even enables the "college" to appear as a party before one of its own committees and even to appeal decisions of college committees: the Act, ss.38(2) and 40(1). Indeed, experience has shown that a college will not always support the decision of a committee. There may be cases where the college agrees that a committee has committed a serious error – for example, by failing to provide any procedural fairness, failing to comply with mandatory provisions of the statute, considering the public interest in a way that was unreasonable or acting in a fashion contrary to clear jurisprudence – or that it should take new or further information into account.

How does all this impact on a college's role in mediation? The answer, as the Review Board's experience has shown, is that in these and other instances, the college, while not being the decision-maker, is fully entitled to recommend that the inquiry committee or registration committee reopen or revisit a complaint. On that basis, the college, as a party to the review, is entitled to enter into discussions with the other parties and to come before the Review Board pursuant to the following ATA provisions which apply to registration reviews and complainant reviews:

> **Consent orders**
>
> **16** (1) On the request of the parties to an application, the tribunal may make a consent order if it is satisfied that the order is consistent with its enabling Act.
>
> (2) If the tribunal declines to make a consent order under subsection (1), it must provide the parties with reasons for doing so.
>
> **Withdrawal or settlement of application**
>
> **17** (1) If an applicant withdraws all or part of an application or the parties advise the tribunal that they have reached a settlement of all or part of an application, the tribunal must order that the application or the part of it is dismissed.
>
> (2) If the parties reach a settlement in respect of all or part of the subject matter of an application, on the request of the parties, the tribunal may make an order

> that includes the terms of settlement if it is satisfied that the order is consistent with its enabling Act.
>
> (3) If the tribunal declines to make an order under subsection (2), it must provide the parties with reasons.

As noted in Part VI below, the Review Board mediation process advises the parties that while a college cannot simply "agree" to change a considered decision of the registration committee or the inquiry committee, it can enter into an agreement to make a recommendation to either committee where legally appropriate, and/or participate in an order under ss.16 or 17 of the ATA. Many applications for review are resolved on this basis.

C. College impartiality

If, as correctly submitted by one of the colleges, the college is legally distinct from the inquiry committee and the registration committee, it follows that the impartiality of those committees is not compromised when the college participates in mediation because those decision-makers are not parties to the review.

The Legislature's decision to make "the college" a party to the review – and in registration cases, the only party to the review - reflects a legislative intention to ensure that the colleges can participate in our process in a fashion that is flexible and that ensures that the Review Board's processes are effective. Since "the college" is not the specific statutory decision-maker, it is not fettered by the impartiality principles involving in the "tribunal standing" cases, whose application in judicial proceedings would in any event be subject to modification in an administrative tribunal setting. While the college will in the nature of things *normally* appear in our process to support the decisions of the committee in question, it does so in its own capacity, as the body governed by its board and whose officers prepared the investigations and recommendations that informed a committee's decision.

This understanding of a college's broader role on a review is consistent with our direction that the "record" a college must produce on a review not be limited to the information that was put before the inquiry committee or registration committee. It reflects the clear legislative intent that, on a complainant review, the Review Board is entitled to consider matters over and above the committee's disposition – to address the "adequacy of the investigation respecting the complaint": the Act, s.50.6(a).

The final point to be made regarding impartiality arises from the objection that a college cannot enter into an agreement that would compromise the public interest. As noted in Part VI below, it is a standard part of the Review Board mediation process to advise the parties that while it would be inappropriate on mediation for a college to "compromise" regarding the public interest, the college may participate in mediation discussions designed to determine whether an agreement can be reached while fully respecting the public interest. The Review Board's experience has shown there are many instances where the public interest is not compromised, and is even enhanced, by a resolution reached on mediation.

D. Finality of decision-making

Both colleges emphasized that their actions on mediation must be consistent with the law governing the "finality" of decisions.

The law of "finality" does not operate as rigorously in administrative law as it does with regard to courts: *Chandler v. Alberta Assn. of Architects*, [1989] 2 S.C.R. 848 at paras. [20-26]. Further, the law supports the view that, given the roles of the inquiry committee and registration committee, their decision-making is not subject to a rigorous application of the finality principle and so may be more readily reopened in order to ensure proper decision-making based on all relevant information: *Ferrari v. College of Physicians and Surgeons of Alberta*, [2008] A.J. No. 262 (Q.B.). It is noted that the Act specifically contemplates that a decision of a registration committee or inquiry committee may not be final and provides that it is subject to reconsideration by the committee by order of the Review Board after a review: the Act, ss.50.54(9)(c) and 50.6(8)(c).

The fundamental point is that there are potentially many lawful and proper opportunities for the non-litigious resolution of review applications beyond those cases that result in a withdrawal merely because the other party now has a better understanding of the decision and why it was made. If the parties can have discussions between themselves that give those outcomes, it is the Review Board's view that it must be capable of creating a process that facilitates those discussions in appropriate cases. That is precisely the purpose of the *ATA* provisions which have been incorporated by reference into the Act.

VI. Mediation Procedure

For reasons given above, the Review Board is of the view that the Rules have a secure legal foundation. What needs specific clarification is the reality that the Review Board's mediation process must recognize the public interest focus of the Act. On that issue, we direct as follows:

> On any matter that proceeds to mediation, the parties will be advised as follows:
>
> (a) That while a college cannot simply "agree" to change a considered decision of the registration committee or the inquiry committee, it can enter into an agreement to make a recommendation to either committee where legally appropriate, and/or participate in an order under ss. 16 or 17 of the *Administrative Tribunals Act*.
>
> (b) That while it would be inappropriate on a mediation for a college to "compromise" regarding the public interest, the college may participate in mediation discussions designed to determine whether an agreement can be reached while fully respecting the public interest.

These terms are included as express terms of Forms 8 and 12.

A. Assessing the Appropriateness of Mediation

The Review Board encourages early dispute resolution through mediation when possible – utilizing adjudication only where no other option makes sense. This means an Application for Review will commence with settlement discussions and mediation, absent compelling indications to the contrary. In the event mediation is unsuccessful, the Review will proceed to a formal hearing. The following guidelines outline some of the broad considerations that might result in a referral directly to a hearing. While generally indicative of circumstances in which adjudication may be more appropriate, these criteria are not necessarily determinative. The circumstances of each case need to be considered in light many other factors (like the characteristics of the parties and the context).

B. Principle-Based Criteria

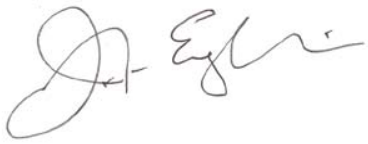
Generally, an Application for Review will be referred to a hearing when:

1. The parties do not have the capacity to participate safely and effectively in mediation.
2. A power imbalance (e.g., cultural factors, information disparity) among the parties cannot be redressed with the assistance of a neutral third party and/or through legal counsel or an agent.
3. Circumstances indicate that the primary benefits of mediation will not be realized (i.e., the process will not result in a quicker, less costly resolution; greater party satisfaction; and preserved relationships)
4. The public interest cannot be balanced with the rights and needs of the parties; for example, when the circumstances of the dispute raise a broad systemic problem.
5. A full public record of the proceeding is required and a mediation process cannot provide such a record.
6. An issue of law, public policy or interpretation needs to be clarified on the record. The tribunal may desire an elaboration of a particular issue of law or policy and, in some cases, a hearing may be seen as the best way to accomplish that.
7. People who are not parties to the dispute might be prejudiced by the outcome. One of the tenets of mediation is that the interests of those affected by the outcome should be represented at the table. If that is not possible, a hearing may be required.
8. The case is genuinely frivolous, vexatious or opportunistic - the Review Board should not waste resources on attempting settlement with parties bringing truly frivolous or vexatious cases, particularly if the hearing process allows for some type of summary determination and dismissal.
9. The case involves apparently well-founded allegations of illegality or impropriety.
10. When the parties simply want a determination of their rights, win or lose. Parties

are entitled to have their rights decided in a hearing with appropriate procedural safeguards.

Having issued these clarifications, the Review Board reaffirms its commitment to the robust use of mediation.

The Review Board is hopeful that the discussion and clarifications set out in this amended Practice Directive will encourage all parties to recognize and utilize the benefits of the mediation process in appropriate cases. We remind the Complainants, Applicants, Colleges and Registrants that if they decline to participate in mediation where directed to do so, the Rules provide potential process and costs consequences.



J. Thomas English, Q.C.
Chair

June 1, 2016
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