TORONTO

Court Services

Toronto Licensing Tribunal
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TORONTO LICENSING TRIBUNAL

BUSINESS MEETING 15

Date of Meeting: Thursday, May 9, 2013
Time: 9:30 a.m.
Location: Council Chamber
2nd Floor, East York Civic Centre
850 Coxwell Avenue

Enquiry: Andrea Sloan
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If the Tribunal wishes to meet in closed session (privately) during its Business Meeting, a Member must make a motion to do so and the reason given (in accordance with the *City of Toronto Act, 2006*).

Declarations of Interest under the *Municipal Conflict of Interest Act*

Communications/Reports:

1. **Confirmation of Minutes – November 22, 2012**
2. **Approval of Procedural Rule Amendment (attached)**
3. **Mediation by Tribunal Members – Update (proposal attached)**
4. **Continuing Education for Tribunal Members - update**
5. **Cessation of Preparing Minutes of Hearings and Posting of Minutes and Certain Other Documents**
6. **Recidivism, probation breaches**
7. **Any other business**

Suggested Procedural Change

Rule 17 to read as follows:

Where a person has requested a hearing before the Toronto Licensing Tribunal and is properly notified of a pre-hearing or hearing and does not attend at the time and place set out in the notice, the Toronto Licensing Tribunal may proceed in that person's absence and, without further notice to that person, may dismiss the application if the matter has not been referred to the Toronto Licensing Tribunal by the City of Toronto.

Explanations:

Rule 17.

There is currently no authority in the Rules for dismissing an app without a hearing, even where the applicant does not show up. Even where an applicant has orally advised City legal department or TLT staff that he or she is abandoning the app, the TLT is reluctant to dismiss without a hearing in the absence of any signed written notice from the applicant. As a result, time is wasted as the City still has to prove its case. It is expected that the proposed Rule change will avoid this necessity. The TLT did feel however that the City should still have to prove its case where the applicant did not initiate the hearing.

PROPOSAL FOR MEDIATION AT THE TORONTO LICENSING TRIBUNAL
Prepared by Diane Hall – submitted February, 2013 (updated April, 2013)

A- Overall Scheme

Our Rules of Procedure allows the Tribunal to hold a "pre-hearing conference" which allows the Tribunal to "mediate any or all outstanding issues in dispute". The relationship framework also gives the Tribunal the ability to "… develop, refine and implement alternative dispute settlement mechanisms, if deemed appropriate."

I therefore suggest that the Tribunal's pilot project to introduce mediation in our services involve scheduling pre-hearing conferences which are mediated by one Tribunal member, as follows:

Pre-Hearing Conferences/ Mediations

- A member/mediator chairs and mediates scheduled pre-hearing conferences/mediations which should be held at the Tribunal office to preserve the optics of an impartial process

- The only individuals who attend the pre-hearing conference/mediation sessions are the member/mediator, a representative from the City and the applicant (and his or her legal representative if desired). A staff person is not present during the session.

- To start, hearings can be scheduled three Thursdays a month and pre-hearing conferences/ mediations can be scheduled one Thursday of every month (replacing the hearings for that day). The number of pre-hearing conference/mediation and hearing days can be increased or decreased as required.

- One mediation session can be scheduled every half hour to start and we can adjust the scheduling as we gain more experience with the process.

- These pre-hearing conference/mediation sessions are not recorded and there are no summaries written or minutes taken.

- Tribunal staff sends out the notice of mediation to the parties and respond to inquiries from applicants and arrange for interpreters or other accommodation requests when required much as they do now for hearings.

- During the pilot project phase, a current member with prior professional experience mediating could do the mediations (I believe there are two of us who have this kind of experience). After the pilot project period has ironed out some of the details and following some internal training and shadowing of the experienced member(s), other members can take turns.

B- Advantages to Pre-Hearing Conferences/Mediations

1) Greater Sense of Fairness and Balance

- The presence of the Tribunal at settlement discussions gives the Tribunal more responsibility and accountability for the process and content of settlement agreements. This would increase the optics that the Tribunal has a greater involvement with requests for hearings as per its mandate.

- The presence of a neutral third party may help the unrepresented party perceive less of a power imbalance between themselves and the City during settlement interviews

- The presence of a neutral third party can give the parties a greater sense of fairness with the process, more control over the outcome and a greater degree of satisfaction with the outcome.

2) Increased Efficiency and Better Results

- Both the Tribunal and MLS would be expending less time and resources implementing unnecessary bureaucratic processes to hear less serious cases that don't pose a threat to public safety and that have less impact on the public interest.

- Less administrative work for both the Tribunal and MLS in dealing with the less serious cases means that we should have more time to focus on and to prepare for hearings on the more serious cases and to hold them in a more timely manner. This will likely result in an increase in our effectiveness in protecting the public from licensees who continue to operate their business while waiting for a hearing. On the long term, it may also result in freeing up resources for ongoing monitoring of licensee compliance.

3) Time Savings

- A mediation session requires less administrative support because Tribunal staff do not need to type up minutes and manage the recordings, transcripts and evidence submitted during a hearing and edit decisions, etc.

- Since a mediation session only requires the key documents that are already on file, MLS would not need to prepare and endorse a report, arrange for and prepare witnesses and do the other tasks associated with a hearing.

- Settlement Agreements that move to a hearing for approval would for the most part, take up less time during a hearing.

4) Cost Savings

- The cost of a mediation session is significantly less than a hearing because it takes only one member and one city representative to attend a mediation session and no decisions to write. There are also less administrative costs with a mediation session because the staff only has to mail out the notice of mediation (which can be sent by ordinary mail) and copy the settlement agreement templates and completed agreements. In contrast, a hearing requires three members, two Tribunal staff and one recorder and one or more city representatives and sometimes a witness. There is also more paperwork to prepare, photocopy and distribute for a hearing and notices need to be sent by costly registered mail.

- Because of the informal nature of the discussions during a pre-hearing conference/mediation, it is expected that fewer applicants will request an interpreter. We should therefore pay less for the cost of hiring interpreters.

- Since only the more complex cases will be scheduled for hearings, it is likely that more full hearings will be held during our hearing days.

- Applicants also save on costs since most will likely not consider hiring a legal representative for this informal mediation process.

C- Role of the Member/Mediator during the Pre-Hearing Conferences/Mediations

- The mediator chairs the meeting to ensure that both the parties have the opportunity to understand the process, have realistic expectations about possible outcomes, have their questions answered and express their views and to keep the discussion on topic and moving towards an agreement.

- The mediator ensures that the process and settlement agreements comply with the principles of administrative law, jurisprudence, Tribunal by-laws and mandate and our Relationship Framework.

Member/mediators can be provided with a script which would give them specific procedures to follow such as the following:

Part 1 – Introductions

- Mediator introduces the participants and explains the purpose of the session, the role of the mediator and the code of conduct for the mediator and the parties (i.e.-neutrality of mediator, confidentiality of discussions, no pressure to accept agreement, etc.)

- Mediator explains the process of the mediation session and what will happen if agreement is reached or if agreement is not reached.

- Mediator can give a short explanation of the MLS and Tribunal's roles and goals in the licensing process in Toronto.

- Mediator asks the parties if they have questions about the above and are in agreement with the rules and process and if they want to proceed with the mediation.

Part 2 – Synopsis of Appeal and Options for Resolution

- Mediator now provides a summary of what has happened thus far in the licensing process (for example, the application was submitted, identifying what documents the City reviewed in response to the application, then City's letter of response, the applicant's request for mediation). Mediator confirms that the applicant received the key documents with the notice of mediation.

- Mediator manages expectations by identifying some options for resolutions such as licence issued without conditions, licence issued with conditions and explains the meaning of various probation requirements.

Part 3 – Proposals and Resolutions

- Mediator asks the city to explain the settlement it proposes and reasons for their proposal.

- Mediator asks the applicant if he or she is prepared to accept the city's proposal and if the applicant accepts, the mediator ensures that the applicant understands the terms of the settlement and no further discussion is required. The settlement agreement template is completed and signed.

- If the applicant does not accept, the Mediator asks the applicant to explain his or her counter proposal and why he or she believes that the city should accept the counter proposal. This could include an explanation about one of the incidents of concern or other information that brings light to the applicant's situation.

- Mediator generates open discussion between the two parties until they can agree on a proposal.

Part 4 – Conclusion

- Mediator completes the agreement template (the mediator can complete a generic template by putting the particulars of that application and mediation) and everyone signs it and leaves with a copy

- If there is no agreement, the mediator confirms that he or she will refer the matter to a hearing and that the parties will receive a notice of a hearing.

D- How do we inform parties of their option to participate in mediation?

Letter of Refusal from MLS

- Since under our regulatory framework. mediation is not a legally mandated right, the option to go to mediation need not and should not be offered to all licensees. When MLS identifies a concern with a licensee, before sending out a letter of refusal, it can decide which cases it would consent to mediation and which cases it does not want to mediate. This gives MLS the discretion to refer only those cases to mediation that it feels are appropriate depending on the level of complexity and the degree of risk to public health and safety and in accordance with the regulatory restrictions and other realities associated with different industries. MLS may also refer complex cases to mediation to explore common grounds and/or deal with preliminary matters relating to an upcoming hearing.

- MLS would then send a different letter of refusal to each of the two groups of licensees which are either being offered mediation or moving to a hearing.

- **For those cases that MLS does NOT agree to participate in mediation**, MLS will send their usual letter of refusal with the option to request a hearing.

- Upon receipt of the request for a hearing, MLS will send a report to Tribunal staff and Tribunal staff will send a notice of a hearing to the applicant as per their usual process.

- **For those cases where MLS agrees to participate in mediation**, MLS will send the letter of refusal with the option to go directly to a hearing or to participate in mediation. (The Tribunal can create a pamphlet about mediation that MLS can include in their letter of refusal.)

- Upon receipt of the request for mediation, MLS can provide Tribunal staff will a copy of this request along with a copy of the evidence it is relying on to refuse the application, and Tribunal staff will send a notice of mediation to the applicant.

- The notice of mediation can include:

    - the date and time of the mediation

    - a copy of the evidence (driving abstract, criminal history, etc) which caused MLS to send the letter of refusal

    - statement that if they don't show up to their scheduled mediation session, the mediator will refer the application to a hearing and the applicant will receive a notice of a hearing.

The Tribunal's Website

The Tribunal website can be updated to provide information on our mediation services

E- What happens when a party does not show up for a scheduled mediation or when an agreement is not reached?

- Where the applicant does not show up to the scheduled pre-hearing conference/ mediation, the mediator refers the application to a hearing, MLS prepares a report and the Tribunal staff schedules a hearing and sends out the notice of hearing as per the usual procedures.

- With consent from the city, we can consider allowing the applicant to re-schedule the mediation if, after the no show, the applicant communicates with the Tribunal (within a relatively short period of time) and it is determined that there may be extenuating circumstances for the no show.

- At any point in time after receiving a request for mediation, where the mediation breaks down, the mediator refers the application to a hearing and MLS prepares a report and the Tribunal then sends out a notice of a hearing as per our usual process.

- The parties are free to terminate the mediation at any time and request that the mediator refer the application to a hearing

- For the above noted circumstances, the notice of hearing could be revised to include a general sentence stating that since mediation was not successful or was not completed, the matter is being referred to a hearing.

F- What happens after an agreement is reached?

1) Signing the Agreements

The mediator completes the settlement agreement template and the parties sign it and obtain a copy before they leave.

2) Referring the Agreement to a Hearing

- *According to our regulatory scheme, the City has the discretion to issue a licence to applicants whose history of charges and convictions meet the business licensing thresholds set out in appendix K of the By-Law.*

- In contrast, the City stated that, as per section 545-4 C.1 of the By-Law, it does not have the authority and discretion to issue a licence to applicants who have not met those business licensing thresholds.

- *For those applications where the City has **no discretion** (therefore had to refuse the licence) because the applicant did not meet the business licensing thresholds, I suggest that:*

    - *the settlement agreement move to a hearing for approval*

    - the appellant not be required to attend this hearing

    - instead of submitting a full report to the panel, MLS provides a copy of the settlement agreement (signed by the City, the applicant and the mediator) and the documentary evidence that it already has in its possession such as the driving abstract and/or criminal history. (The applicant should already have a copy of these documents which he or she received with the notice of mediation)

    - the Tribunal members will therefore see the documentary evidence without testimony

    - the Tribunal member who mediated the agreement <u>should not</u> sit on the panel that approves the settlement agreement and should <u>not hear</u> a subsequent hearing relating to that case

- Following a review of the agreement and the key evidentiary documents, if the panel members <u>do not approve</u> the agreement, the matter can be scheduled for a full hearing at a later date. MLS will then prepare a report and Tribunal staff will send the applicant a <u>notice of hearing</u> and the report as per our usual procedures.

- *Currently, some members believe that if they do not approve an agreement, they still have the ability to hear that case with impartiality, therefore a member who rejected the agreement should be allowed to sit on the subsequent hearing. I agree with this view.*

<u>3) Closing Applications as Withdrawn</u>

- *In contrast to the cases referred to above, MLS **has the discretion** to issue a licence to applicants whose charges and convictions are less serious and therefore don't breach the business licensing thresholds listed in appendix K. In these cases, MLS has the discretion to issue a licence therefore, it can enter into an agreement that grants or renews a licence.*

- *In these cases, as a result of the pre-hearing conference/mediation session, the applicant agrees to withdraw his or her request for a hearing on the basis that he or she is satisfied with the agreement.*

- *At the end of his or her mediation session, the applicant can sign both the agreement and a withdrawal form and can leave the office with a copy of both. No other action is required by the Tribunal.*

- *These cases can therefore be Closed as Withdrawn at the end of the mediation session and the matter is concluded.*

- *A Tribunal panel of members never sees the agreement since the matter does not move forward to a hearing for approval.*

- The mediator maintains a position of neutrality and the decision making remains in the hands of the parties who both must consent to the agreement.

Advantages To Closing the Application as Withdrawn

- The Tribunal deals with the matter as being withdrawn therefore there is no legislative obligation (and likely no jurisdiction) to issue an order on a withdrawn application.

- Applicants currently have the right to withdraw their request for a hearing at any time and staff already have a process in place to deal with this therefore there is no need to introduce any new procedure to close these applications.

- There is greater incentive for the applicant to participate in mediation because he or she only needs to attend one mediation session as opposed to attending both a mediation session and then a hearing to approve the agreement.

- Since only failed or incomplete mediations move forward to a full hearing, closing some cases as withdrawn will reduce the number of cases that are affected by the rule that a mediator should not adjudicate a case he or she mediated. Consequently, there will be less scheduling difficulties for subsequent hearings.

- Best Practices – Tribunals across the province have been using the strategy of having the applicant withdraw their application to close mediated cases. This has proven itself as a legally sound and efficient way of concluding requests for a hearing without the complications, costs and delays of scheduling hearings.

G- A question that has come up is whether MLS has the authority to impose conditions and later monitor compliance to those conditions and refer the licensee back to the Tribunal without an order?

My view is that since the applicant is agreeing to the conditions, neither MLS or the Tribunal are imposing or ordering those conditions. The agreement is what gives MLS the ability to implement the conditions and take the matter back to the Tribunal at a later date.

In addition, Section 545-4 G (2) gives MLS the ability to request documentation from a licensee at any time. It states:

> *G. Renewal of licences.*
>
> *(2) Notwithstanding that a licence has been renewed, the Municipal Licensing and Standards Division may require the holder of a licence to file with the Municipal Licensing and Standards Division such certificates or other documentary evidence as may be required as evidence that such applicant satisfies the requirements of this chapter.*

It would appear that, even without the consent of the applicant, MLS can require documentation be submitted between renewals, to ensure the requirements of the chapter are being satisfied.

H- Another question that has come up is whether, following a failed mediation, the mediator should explore common ground with a view of shortening a subsequent hearing.

We may want to consider whether the problems that can be caused by moving from informal mediation to more legalistic matters during the same meeting outweigh the potential benefits.

For example:

- There could be a perceived contradiction (and confusion for the applicant) that one part of the mediation is informal, privileged and without prejudice and then, in the same session, the mediator moves to discussions that are more legalistic and prejudicial to a subsequent hearing.

- It will likely be difficult for an applicant to freely engage in informal confidential discussions that are supposed to be without prejudice when he or she knows that the information disclosed during the informal part of the mediation may be used during the more legalistic discussions relating to an upcoming hearing.

- An applicant whose application moves to a hearing due to a failed mediation is more likely to hire a lawyer for the subsequent hearing. An applicant's legal representative can later object to the hearing related agreements due to an unfairness in the mediated process and could also argue that since the applicant was unrepresented, he or she did not know how this agreement could impact his or her hearing.

- Since there is only one member facilitating the mediation process, some of us may not be comfortable dealing with legal discussions about the admissibility of evidence or sorting out other preliminary issues. During a hearing, we at least have other members to consult with.

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