

# British Columbia Human Rights Tribunal Mediation Policy

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## 1. Purpose of Policy

The purpose of this policy is to set expectations about participation in mediation at the Tribunal.

## 2. Application of Policy

This policy applies only to the Tribunal's mediation services.

Parties may:

- at their own expense, hire mediator services outside of the Tribunal
- settle a complaint without the help of a mediator.

This policy applies to everyone who takes part in a mediation [**participants**], including:

- the parties
- lawyers and advocates [**representatives**]
- the mediator
- others who attend the mediation.

## 3. Purpose of Mediation

Mediation is one way to fulfil the goals of the *Human Rights Code* [**Code**].<sup>1</sup>

The purpose of mediation is to resolve all or part of the complaint. Parties can choose to focus on their needs and can also consider broader solutions, such as a new policy or human rights training.

### A. Resolve an individual's complaint

Mediation is one way for the parties to agree about how to resolve the complainant's individual concerns. For example, if a complainant is concerned about second-hand smoke in their home, the landlord can agree to a solution that resolves the concern.

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<sup>1</sup> The [Code](#) aims for:

- a society with no barriers to full and free participation in the economic, social, political and cultural life of British Columbia
- a climate of mutual understanding and respect, where everyone is equal in dignity and rights
- discrimination to stop
- patterns of inequality to be eliminated
- redress for people who face discrimination contrary to the Code

## **B. Public purposes**

Parties can discuss solutions that will help others, such as a new policy or organization-wide training. Mediators may identify public interest issues:

- systemic discrimination
- the need for public education

Mediators will not require parties to address public policy issues. Mediators may encourage parties to explore these issues and find remedies that address them.

### **4. Trauma-informed Process**

The Tribunal is committed to a trauma-informed approach to its processes.<sup>2</sup> A trauma-informed approach is built on the principle of **doing no harm**. A trauma-informed approach requires that the mediation process be safe and respectful for all participants. It fosters each party's ability to make decisions about how to resolve the complaint or whether to continue with the complaint process.

Mediation is an alternative to an adversarial process. Parties or their representatives may harm a person or the process if they:

- treat a party as their adversary
- belittle the party's case or perspective

Parties may ask the mediator to help them express their views in a way that will move the parties toward a resolution.

The Tribunal expects that participants will act consistently with a trauma-informed approach.

The Tribunal expects representatives to seek to develop the skills needed to be trauma-informed. The Tribunal expects lawyers to assist in improving the administration of justice through trauma-informed practice,<sup>3</sup> in which the lawyer resolutely represents their client's interests while doing no harm to other participants.

### **5. Indigenous Justice, Truth and Reconciliation**

The Tribunal is committed to truth and reconciliation, including Indigenous traditions and dispute resolution approaches.

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<sup>2</sup> Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights, Recommendation 10.1

<sup>3</sup> The Tribunal aims to improve the administration of justice by ensuring that taking part in its processes does not harm people. The [Code of Professional Conduct for British Columbia](#) requires a lawyer to encourage public respect for and try to improve the administration of justice (c. 5.6-1).

An Indigenous party may tell their Case Manager that they want:

- a traditional ceremony before or after the mediation, such as a smudge, prayer, or song
- an Indigenous mediator
- an Indigenous dispute resolution approach

The Tribunal expects that lawyers appearing before it will act consistently with cultural competency and humility and will be learning and developing the skills need to be culturally competent.<sup>4</sup>

## **6. Conditions of Participation**

### **A. Standards of Conduct**

#### **a. Courtesy and Respect**

All participants in the Tribunal's process must:

- be courteous and respectful to all other participants
- be considerate of all persons
- act with honesty and integrity
- not discriminate
- not act in a way that would undermine the process.<sup>5</sup>

#### **b. Representative Complainants**

There are special obligations on a person bringing a complaint on behalf of another person or group.<sup>6</sup>

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<sup>4</sup> The Law Society of BC will provide an Indigenous intercultural competency training course at no cost.

<sup>5</sup> See Agreement to Participate in Mediation, section 3. Also see rule 7 of the Tribunal's Rules of Practice and Procedure:

Rule Responsibilities of participants and representatives

(4) Participants and representatives must treat all persons in the course of a complaint with courtesy and respect.

(5) Participants and representatives must participate in the complaint process with appropriate consideration for all persons without discrimination.

(6) Participants and representatives must conduct themselves with honesty and integrity, and must not act in a manner that would undermine the Tribunal's process.

<sup>6</sup> See step 5 of Form 1.2 and Part 1, Step 2 of Form 1.3 available on the [Forms page](#) of the Tribunal's website. See also the [Tribunal's Policy for Complaints on Behalf of Another Person](#)

## **B. Agreement to Participate**

Parties must agree to the terms of the Agreement to Participate in Mediation.<sup>7</sup>

### **a. Good faith**

Parties must participate in good faith for the purpose of resolving all or part of the complaint.<sup>8</sup>

Each party must be **open** to:

- listening to the other parties
- trying to understand the other parties' experience, views, and concerns
- considering solutions they did not think about before the mediation

### **b. Authority to settle**

The Tribunal expects parties to have full authority to agree to a final settlement at the mediation.<sup>9</sup>

Full authority means that the person attending the mediation on behalf of a party:

- does not need to get approval from some other person or body before agreeing to any part of a settlement, or
- does not have limited authority to agree to financial terms of settlement.

A person who does not have full authority must tell the Tribunal when they agree to take part in a mediation. They may explain how they would get approval for a final settlement. The other party may then agree to proceed on that basis.

### **c. Mediation is voluntary**

Participating in mediation is voluntary. Participating in mediation does not affect a party's right to proceed to hearing or to make an application.

The Tribunal expects parties to attend mediation if they agree to take part in one. A party must promptly tell the Tribunal and other parties if they cannot attend a scheduled mediation.

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<sup>7</sup> Available on the [Forms page](#) of the Tribunal website.

<sup>8</sup> Agreement to Participate: Section 1 - Purpose of mediation - We are participating in this mediation in good faith for the purpose of resolving all or part of this complaint.

<sup>9</sup> Agreement to Participate: Section 2 - Authority to settle - Any person representing a party to the mediation process has full authority to agree to a final settlement of all or part of the complaint.

#### **d. Mediation is confidential**

Mediations are private and confidential. This is so that parties can speak freely. No one can use information that a party gives in a mediation against them later on.<sup>10</sup>

The Agreement to Participate deals with exceptions.<sup>11</sup> Parties can agree to other exceptions.

Mediators do not report any details from the mediation to the Tribunal, including the specific outcome. Mediators only tell the Tribunal the status of the complaint process after the mediation, for example:

- the parties settled the complaint and the complainant has filed a withdrawal form
- the parties are working on a settlement
- the parties did not resolve the complaint and the process will continue.

A settlement agreement is not confidential by default. The parties must agree to that term. If the parties settle a complaint, they must decide if they want all or some of the terms of agreement to be confidential. Parties can also agree about what they can say publicly after the mediation.

#### **C. Mediator's Authority**

The mediator may give reasonable directions for the effective and efficient conduct of the mediation. Participants must follow those directions.<sup>12</sup>

The mediator may end the mediation if they decide that:

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<sup>10</sup> Section 40(2) of the *Code* says:

Any information received by any person in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed or admitted in evidence except with the consent of the person who gave the information (section 40(2)).

Section 28 of the Administrative Tribunals Act applies to the Tribunal (*Code*, section 32(e)) says:

(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.

<sup>11</sup> Agreement to Participate in Mediation, sections 7-9.

<sup>12</sup> Agreement to Participate in Mediation, section 4

- a participant is violating the conditions of participation,
- a participant is not following the mediator's reasonable directions,
- a participant is harming another participant,
- the mediation is unfair, unproductive, or abusive.

Participants should raise issues about the process with the mediator as soon as practical to give the mediator an opportunity to address any concerns.<sup>13</sup>

## 7. Participants

### A. Usual participants

A settlement meeting is private. Usually, the participants are:

- the mediator
- the parties
- the parties' representatives

The parties may agree to allow another person or organization, such as a union representative, to attend. If so, they should tell the mediator.

### B. Support persons

If a party wants to bring a support person, they should phone or email the Tribunal. Usually, the other party must agree. If the other party objects, the mediator will decide if the support person can attend. Every person attending the mediation must sign the agreement to participate in mediation and keep information discussed confidential.

If the support person is not allowed to attend the mediation, the party can ask the mediator for a break to speak to their support person.

### C. Complaints brought by a minor (under 19 years of age)

A minor may file a complaint. The *Infants Act* governs contracts with a minor. A person cannot enforce a contract with a minor, except in limited circumstances. A respondent may agree to contract with a minor complainant or may ask that the legal guardian attend. The minor complainant may agree to invite their legal guardian. If the parties do not agree on who will attend, the mediation will not proceed.

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<sup>13</sup> Agreement to Participate in Mediation, section 5



## **D. Representative Complaints**

If the complaint is on behalf of another person, the Representative Complainant must comply with the [Policy for Complaints on Behalf of Another Person](#). This includes giving the represented person a chance to:

- express their views to the Tribunal and
- take part in mediation, in a manner that is appropriate for them. (For example, they may appear in person, in writing, by audio only, or with supports).

A Representative Complainant should contact the Tribunal to discuss any accommodations needed for the represented person to take part in the mediation.

## **8. What happens before a mediation**

### **A. Pre-mediation calls**

The mediator will contact the parties to introduce themselves, usually a few days before the mediation. The mediator may:

- call the parties or
- email the parties to ask if they want to schedule a pre-mediation call.

The parties may also email or phone the Tribunal to say that they want talk to the mediator before the mediation.

The mediator can answer any questions and may talk to the parties about:

- the purpose of mediation
- what will happen at the mediation
- who will take part in the mediation
- any concerns with the Agreement to Participate
- any questions the mediator has about the complaint
- what the party hopes to achieve
- how to prepare for the mediation.

### **B. Getting ready for the mediation**

Participants get ready for the mediation. See [How to Prepare for Settlement Talks](#).

Participants may phone or email the Tribunal if they:

- have questions about the mediation process
- need accommodation for the mediation
- want a mediator who will take a specific approach to mediation. This policy sets out different approaches next, under “What happens at a mediation”.

## 9. What happens at a mediation

Mediators may take different approaches to mediation. The three main approaches are:

- Interest-based mediation
- Early evaluation or “rights-based mediation”
- Social justice mediation.

Mediators may use parts of each approach in a mediation. This policy describes the three approaches below.

### A. What to expect in every mediation

Mediations are usually scheduled for one day. If the parties need more time, they can talk to the mediator about scheduling more time.

In every mediation, participants can expect that the mediator will:

- invite each party to share their experience
- help each party identify what is important to them
- help each party understand what is important to the other party
- help the party understand what the other party says
- help the parties explore options
- help the parties put any agreement into words
- give a party time to get independent legal advice.

Usually, the parties can choose to:

- talk to the mediator and the other parties together [called a joint session]
- talk to the mediator separately [sometimes called caucusing].

In social justice mediation, the parties talk to the mediator separately.

### B. Interest-based mediation

The mediator:

- helps the parties focus on their interests instead of the legal dispute
- helps the parties to find solutions that address their interests

### C. Early evaluation

The mediator:

- listens to each party
- tells the parties their opinion about strengths and weaknesses of the complaint

- may tell the parties what they think the Tribunal might order if the complainant won at a hearing

#### **D. Social justice mediation**

The mediator:

- meets one-on-one with each party to discuss concerns and options
- shares each party's story with the other party
- pays special attention to parties' identities and power dynamics
- helps the parties find their own solution

### **10. The Mediator**

#### **A. Appointment of Mediator**

The Tribunal appoints the mediator. The mediator may be:

- a Tribunal Member
- legal counsel to the Tribunal
- an external mediator

#### **B. Role of the Mediator**

Mediators must comply with the [Mediators' Code of Conduct](#).

Mediators cannot give legal advice or act as legal counsel for any party.<sup>14</sup> However, mediators may give the parties information about human rights law and the Tribunal process.

#### **C. Tribunal Member acting as Mediator**

When acting as a mediator, a Tribunal Member has no power to decide the complaint. The Tribunal Member who acts as mediator will not hear or decide the complaint except in accordance with the Tribunal's [Policy on Mediation by Presiding Member](#).

### **11. After the Mediation**

#### **A. If Complaint is not resolved by Agreement**

If the parties do not resolve the complaint at a mediation:

- the mediator may agree to continue the mediation later

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<sup>14</sup> Agreement to Participate in Mediation, section 6

- the parties may agree about steps in the complaint process, such as timelines
- the mediator will confirm the next step in the complaint process

### **B. Agreement to Settle**

If the parties agree to settle the complaint:

- the parties usually put the agreement in writing
- the mediator can provide a sample agreement
- a party's representative will usually draft a settlement agreement
- if the parties need help, , the mediator may draft a settlement agreement
- the parties sign the agreement
- if the agreement includes a release, the complainant will sign it
- usually, the complainant keeps the original settlement agreement and the respondent gets a copy
- the Tribunal does not keep a copy of the agreement

### **C. Complaint Withdrawal**

The Tribunal must dismiss a complaint if:

- the complainant files a Complaint Withdrawal (Form 6)
- the complainant tells the Tribunal in writing that the complaint settled<sup>15</sup>

The parties may agree in a settlement agreement that:

- the complainant will sign a Complaint Withdrawal (Form 6) and leave it with another person, and
- the other person will file the form once a designated person tells them that the respondent has taken certain steps.

### **D. Enforcement of Agreements**

The Tribunal does not approve or enforce settlements.

After the Tribunal dismisses the complaint, the parties must solve any problems about implementing the settlement agreement on their own.

[Section 30 of the Code](#) governs enforcement of settlement agreements. A party may apply to the BC Supreme Court to enforce the agreement. The Court can only enforce parts of the agreement that the Tribunal could have ordered.

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<sup>15</sup> Administrative Tribunals Act, s. 17