24. Grounds for Review of an Arbitrator's Decision

This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help the parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This Guideline may be revised and new Guidelines issued from time to time.

The *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* [1] (the Legislation) provide for a review of an arbitrator's decision if:

- a party was unable to attend the original hearing due to circumstances that could not be anticipated and that were beyond his or her control;
- a party has new and relevant evidence that was not available at the time of the original hearing;
- a party has evidence that the arbitrator's decision was obtained by fraud.

The application must clearly set out the grounds for review, and be accompanied by sufficient evidence to support the grounds given. The arbitrator will generally make the initial decision of whether to reopen the matter based solely on the application for review submitted by the applicant and accompanying evidence, without a hearing.

An arbitrator may dismiss or refuse to consider an application for review for one or more of the following reasons:

- the issues raised can be dealt with under the provisions of the Legislation [2] that allow an arbitrator to
  - correct a typographical, arithmetical or other similar error in the decision or order;
  - clarify the decision, order or reasons, or
  - deal with an obvious error or inadvertent omission in the decision, order or reasons.
- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely;
- the application does not disclose sufficient evidence of a ground for review;
- the application discloses no basis on which, even if the submission in the application were accepted, the decision or order of the arbitrator should be set aside or varied;
- the application is frivolous or an abuse of process;
- the applicant fails to pursue the application diligently or does not follow an order made in the course of the review.

Unable to attend

In order to meet this test, the application must establish that the circumstances which led to the inability to attend the hearing were both:

- beyond the control of the applicant, and
- could not be anticipated.

An arbitration hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing. This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning,

1 *Residential Tenancy Act,* s. 79; *Manufactured Home Park Tenancy Act,* s. 72
2 RTA, s. 78, MHPTA, s. 71

could have attended. For example, parties should ensure that they know when and where the hearing is to be held, and permit adequate time to allow for heavy traffic and parking.

New and relevant evidence
Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the original arbitration hearing;
- the evidence is new,
- the evidence is relevant to the matter which is before the arbitrator,
- the evidence is credible, and
- .the evidence would have had a material effect on the decision of the arbitrator

Only when the applicant has evidence which meets all five criteria will a review be granted on this ground.

It is up to a party to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence to the arbitration hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in an arbitration hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be evidence.

Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that he or she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

"New" evidence includes evidence that has come into existence since the arbitration hearing. It also includes evidence which the applicant could not have discovered with due diligence before the arbitration hearing. New evidence does not include evidence that could have been obtained, such as photographs that could have been taken or affidavits that could have been sworn before the hearing took place.

Evidence is "relevant" that relates to or bears upon the matter at hand, or tends to prove or disprove an alleged fact.

Evidence is "credible" if it is reasonably capable of belief.

Evidence that "would have had a material effect upon the decision of the arbitrator" is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

A mere suspicion of fresh evidence is not sufficient.

Decision obtained by fraud
This ground applies where a party has evidence that the arbitrator's decision was obtained by fraud. Fraud is the intentional "false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of

that which should have been disclosed, which deceives and is intended to deceive…"[3]. Intentionally false testimony would constitute fraud, as would making changes to a document either to add false information, or to remove information that would tend to disprove one's case. Fraud may arise where a witness has deliberately mislead the arbitrator by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterwards.

Fraud must be intended. A negligent act or omission is not fraudulent.

A party who is applying for review on the basis that the arbitrator's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the arbitrator, and that that evidence was a significant factor in the making of the decision. The party alleging fraud must allege and prove new and material facts, or newly discovered and material facts, which were not known to the applicant at the time of the hearing, and which were not before the arbitrator, and from which the arbitrator conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud. The burden of proving this issue is on the person applying for the review. If the arbitrator finds that the applicant has met this burden, then the review will be granted.

It is not enough to allege that someone giving evidence for the other side made false statements at the hearing, which were met by a counter-statement by the party applying, and the whole evidence adjudicated upon by the arbitrator. A review hearing will likely not be granted where an arbitrator prefers the evidence of the other side over the evidence of the party applying.

3 "Black's Law Dictionary", Sixth Edition, 1990, p. 660.