

# Rules Respecting Practice and Procedure for Appeals to the Board of Directors of the OMERS Administration Corporation

## PART 1 – GENERAL MATTERS

### 1.1 Definition of Terms

In these rules:

- (a) “**Joint Book of Documents**” means the compilation of documents that the parties agree may be filed with the Panel as evidence;
- (b) “**Board of Directors**” means the board of directors of the Corporation; and “**Board Member**” means a director of the Corporation;
- (c) “**By-law**” means By-law No. 4 of the Corporation;
- (d) “**Chair**” means in context, the Chair of the Committee or the Chair of a Panel;
- (e) “**Committee**” means the Appeals Committee of the Board of Directors as constituted under section 2.3 of the By-law;
- (f) “**Corporation**” means OMERS Administration Corporation;
- (g) “**designated staff member**” means the designated staff member referred to in section 2.8 of the By-law;
- (h) “**document**” includes an audio recording, a video recording and an “electronic record” as that term is defined by the *Evidence Act*, R.S.O. 1990, c. E.23;
- (i) “**electronic hearing**” means a hearing held by conference telephone or some other form of electronic technology allowing persons to hear one another and communicate simultaneously and instantaneously;
- (j) “**filing**” of any document means the effective delivery to the Panel, in accordance with these rules, and its receipt by the Panel;
- (k) “**holiday**” means Saturday, Sunday and any statutory holiday if the Corporation’s offices are closed;
- (l) “**oral hearing**” means a hearing involving the parties and/or their Representatives attending in person before the Panel, and includes an electronic hearing;
- (m) “**Panel**” means
  - (i) members of the Committee designated under section 2.4(b) of the By-law who have been selected to hear an appeal;
  - (ii) members of the Committee designated under section 4.2 of the SPPA (defined below) to hear a procedural or interlocutory matter in an appeal; and

- (iii) the Board of Directors or the person or persons designated by the Board of Directors to hear an appeal, as the case may be, where an appeal is being heard pursuant to sections 2.5 or 3.1 of the By-law;
- (n) “**party**” or “**parties**” means the person or persons defined under section 2.2 of the By-law;
- (o) “**Pre-hearing Conference Report**” means the report issued by the Chair or any other Committee member to the parties, pursuant to section 3.2(f);
- (p) “**President**” means the President of the Corporation, and includes a person to whom the President has duly delegated his or her decision-making authority respecting any matter which is the subject of the By-law;
- (q) “**President’s Determination**” means a determination made by the President, including a failure by the President to make a determination;
- (r) “**Representative**” means a person authorized under the *Law Society Act* to represent a person in a proceeding before an administrative tribunal;
- (s) “**SPPA**” means the *Statutory Powers Procedure Act*, R.S.O. 1990, c.22; and
- (t) “**written hearing**” means a hearing held by means of exchange of documents, whether in written form or by electronic means.

## 1.2 Purpose of these Rules

The purpose of these rules is to provide a fair, open and accessible process, to increase the efficiency and timeliness of proceedings, and to assist the Board of Directors of the Corporation in exercising its authority to adjudicate appeals under section 2.1 of the By-law. These rules, together with the By-law and the SPPA, apply to appeal proceedings before the Board of Directors of the Corporation.

The rules and the By-law are available on the OMERS website and the SPPA can be found on the Government of Ontario e-laws web site. Copies of these documents may also be requested from the Corporation.

## 1.3 Application of these Rules

The effective date of these rules is January 1, 2018. These rules will only apply to appeals that have commenced on or after January 1, 2018. Appeals that commenced before January 1, 2018 continue to be governed by the rules in place prior to January 1, 2018.

## 1.4 Authority of these Rules

These rules are made pursuant to section 5.1 of the By-law and section 25.1 of the SPPA. If any conflict arises between these rules and the By-law, the provisions of the By-law will prevail.

The Panel may exercise any of its powers under these rules on its own initiative or at the request of a party. A defect in form or other technical breach in a proceeding or in any step, document or order in a proceeding will not make the proceeding or the step, document or order in the proceeding invalid.

## 1.5 Procedures

A Panel may make decisions regarding the procedures in an appeal, including modifying the procedures set out in these rules, or lengthening or shortening the time prescribed for the performance of any obligations under these rules, as may be required to maintain fairness and efficiency. Where procedures are not provided for in these rules, the Panel may do whatever is necessary and permitted by law to effectively determine the matter before it, including making a procedural order.

## 1.6 Computing Time

In computing time periods under these rules or an order, except where a contrary intention appears,

- (a) where there is a reference to a number of days between two events, they will be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words “at least” are used;
- (b) where a period of less than seven days is prescribed, a holiday will not be counted;
- (c) where the time for doing an act under these rules expires on a holiday, the act may be done on the next day that is not a holiday.

Filing of a document made after 4:00 p.m. EST or at any time on a holiday will be deemed to have been made on the next day that is not a holiday.

## 1.7 Representation of Parties to an Appeal

A party to an appeal may be represented by a Representative.

## 1.8 Prior Decisions of the Committee

A party or a member of the public may request copies of decisions of the Committee made in other appeals, and may obtain copies of decisions of the Committee made since 2005 from the OMERS website. Portions of a decision may be redacted to protect a party’s personal information.

# PART 2 – ORDERS

## 2.1 Procedural and Interlocutory Motions

- (a) At any stage of the proceeding, either on its own motion or at the request of the parties, a Panel may make orders for:
  - (i) the disclosure of documents;
  - (ii) the oral or written examination of a party or a witness;
  - (iii) the exchange of witness statements and expert reports, if applicable;
  - (iv) the provision of particulars;

- (v) the provision by a party of further information or documents;
- (vi) any other matter that may aid in simplifying the proceeding or ensuring a timely, just and cost-effective determination of the issues on their merits;
- (b) Other than issues that are addressed in a pre-hearing conference as outlined in section 3.2(a), a party will inform the Panel of any anticipated preliminary issues they expect to bring before the Panel by the later of:
  - (i) 30 days prior to the hearing date specified in the written notice of hearing;
  - (ii) the date on which that party becomes aware of the issue;
- (c) The Panel will advise the remaining parties of a preliminary issue raised by any party within five days of the issue being raised;
- (d) A pre-hearing motion relating to a procedural or interlocutory issue may be determined by a Panel consisting of one or more members of the Committee as assigned by the Chair of the Committee;
- (e) The Panel assigned to hear the motion will determine whether the motion should be held in writing or orally and, if orally, whether the motion should be heard electronically;
- (f) A Panel may amend any of the time limits set out in these rules to accommodate a pre-hearing motion.

## **PART 3 – PRE-HEARING MATTERS**

### **3.1 Commencement of Proceeding**

A party will file with the Corporation a written request for appeal within 30 days from the date of release of the President's Determination from which that party is appealing.

### **3.2 Pre-hearing Conference**

- (a) For all hearings, the parties will participate in a pre-hearing conference for the purposes of:
  - (i) addressing any request for an oral hearing;
  - (ii) addressing any request for party status;
  - (iii) deciding procedural issues including the dates by which any steps in the proceeding are to be taken or begun, including the estimated duration and the date of the hearing;
  - (iv) establishing the order in which written submissions must be filed, and in the case of an oral hearing, the order of appearance by the parties at the hearing;
  - (v) identifying and simplifying issues;
  - (vi) setting dates for disclosure and production of documents, and the filing of witness statements and expert reports, if applicable;

- (vii) identifying and resolving preliminary objections or procedural issues including issues relating to disclosure, witness statements, expert witnesses and examinations of parties;
- (viii) determining whether any participant in the hearing may require accommodation due to disability;
- (ix) deciding any other matter that may aid in simplifying the proceeding or ensuring a timely, just and cost-effective determination of the issues on their merits;
- (b) The Chair may designate itself or a member of the Committee to preside at a pre-hearing conference;
- (c) The Chair or other Committee member who presides at a pre-hearing conference may make such procedural orders as they consider necessary or advisable with respect to the conduct of the proceeding. There is no right of appeal from any such order;
- (d) Unless directed otherwise by the Chair, the Chair or other Committee member who presides at a pre-hearing conference may preside at the hearing of the matter;
- (e) The pre-hearing conference will be conducted via teleconference, unless otherwise directed by the Chair or other member of the Committee designated to preside at the pre-hearing conference;
- (f) The Chair or any other Committee member who presides at the pre-hearing conference will issue a Pre-hearing Conference Report to the parties setting out the results of the pre-hearing conference (including any orders), together with a written notice of hearing.

### **3.3 Notice of Pre-hearing Conference**

- (a) The designated staff member will give written notice of the pre-hearing conference to:
  - (i) the parties;
  - (ii) the Corporation (if it has elected to be a party pursuant to section 2.2(b) of the By-law);
  - (iii) those who have applied for party status; and
  - (iv) such other persons as the Chair determines;
- (b) The notice of the pre-hearing conference may require parties by specified dates to file documents or provide such other information as the Chair deems appropriate, and such notice will include:
  - (i) the date, time, place, format and purpose of the pre-hearing conference;
  - (ii) notice that each party or person who has applied for party status, to whom the notice is given, is required to participate themselves or through a Representative who has binding authority to make agreements and

- undertakings on behalf of that party or person respecting the matters addressed at the pre-hearing conference;
- (iii) notice that if a person to whom the notice is given does not participate in the pre-hearing conference themselves or through a Representative, the conference may continue in the absence of that person and that person will not be entitled to any further notice in the proceeding;
  - (iv) notice that each party or person who has applied for party status, and to whom the notice is given, is required to provide the other parties (through the designated staff member) with a pre-hearing submission setting out the issues they expect to bring before the Panel no later than the date set out in the notice of pre-hearing conference;
  - (v) notice that some or all of the issues may be settled at the pre-hearing conference; and
  - (vi) notice that orders may be made at the pre-hearing conference that will be binding on all parties, including parties added at the pre-hearing conference, with respect to the proceeding, including setting the dates for a hearing.

### **3.4 Disclosure and Production of Documents**

- (a) After the pre-hearing conference, the designated staff member will provide the parties with all the documents that were exchanged amongst the parties and the Corporation for purposes of the President's Determination (that is being appealed). Subject to any objections by a party, such documents will be included in a Joint Book of Documents that will be shared with the Panel and all the parties for purposes of the appeal;
- (b) The parties will have the opportunity to submit additional documents (i.e., not previously provided for purposes of the President's Determination) to the designated staff member for purposes of the appeal. All additional documents submitted will be provided to the parties by the designated staff member and, subject to any objections by any party, included in the Joint Book of Documents;
- (c) The designated staff member will provide notice to the parties of any objections made to the proposed exclusion or inclusion of documents in the Joint Book of Documents. Such objections may be addressed in a subsequent pre-hearing conference with the Chair and all the parties prior to the hearing, or at the hearing, as determined by the Chair;
- (d) The designated staff member will provide the final Joint Book of Documents to the Panel at least ten days prior to the hearing date of the appeal.
- (e) Where a party has not produced a document after being requested to do so by another party, that other party may by motion request the Panel to make an order for production;
- (f) The Panel may refuse to consider evidence not served or submitted in accordance with the rules or direction of the Panel, or may direct that the evidence be tendered

in a different manner or that the evidence will only be considered on such conditions as the Panel may specify.

### **3.5 Communication**

- (a) After the filing of the written request for appeal, all subsequent communication (which includes filings) by or on behalf of parties to the Committee will be made through the designated staff member. No party will engage in direct communication with any member of the Committee, including the Panel, once an appeal has commenced unless prior approval is received from the Chair;
- (b) Notwithstanding section 3.5(a), where the Committee has retained its own independent legal counsel in relation to an appeal, pre-hearing communications by or on behalf of parties to the Committee may be made through the Committee's independent legal counsel;
- (c) Copies of all communication to and from the Committee will be provided to all other parties by the designated staff member or the Committee's independent legal counsel, as the case may be;
- (d) Where a party is represented in a proceeding, the designated staff member or the Committee's independent legal counsel, as the case may be, will communicate with that party through that party's Representative;
- (e) Notwithstanding section 3.5(a), if the Corporation is a party to an appeal, the Corporation may engage in direct communication with a member of the Committee, including the Panel assigned to hear and determine the appeal, if the communication does not concern the appeal.

## **PART 4 - HEARINGS**

### **4.1 Hearings of Panel**

The Panel will make an independent determination of the matter being appealed.

### **4.2 Form of Hearing**

- (a) Once an appeal has been commenced, the Chair of the Committee will assign a Panel of three members to hear the appeal, in accordance with section 2.4 of the By-law;
- (b) Hearings before the Panel will proceed by way of written hearing;
- (c) Notwithstanding section 4.2(b), if a party satisfies the Panel that there is a good reason for not holding a written hearing, the Panel will hold an oral hearing;
- (d) A party who wishes to request an oral hearing will do so at least ten days prior to the date of the pre-hearing conference;
- (e) Notwithstanding any request by a party, the Panel may decide, in its discretion,

that there is a good reason for not holding a written hearing, in which case, the Panel may require an oral hearing;

- (f) In deciding whether to hold an oral hearing, the Panel may consider any relevant factors, including:
  - (i) the suitability of a written hearing format considering the subject matter;
  - (ii) whether the nature of evidence is appropriate for a written hearing, including whether credibility is an issue and the extent to which the facts are in dispute;
  - (iii) the personal characteristics of the parties to the appeal, including issues relating to geographical location, language, education, capacity, ability and disability;
  - (iv) the extent to which the matters in dispute are questions of law;
  - (v) fairness to the parties, including any anticipated prejudice to a party;
  - (vi) the cost, efficiency and timeliness of proceedings;
  - (vii) avoidance of unnecessary delay;
  - (viii) ensuring a fair, accessible, understandable and transparent process; and
  - (ix) the desirability or necessity of public participation or public access to the Panel's process;
- (g) In the event the Panel requires an oral hearing, the Panel may in its discretion, or on motion by a party, hold some or all of the oral hearing as an electronic hearing;
- (h) Notwithstanding section 4.2(g), the Panel will not hold an electronic hearing if a party satisfies the Panel that holding an electronic hearing is likely to cause a party significant prejudice;
- (i) The Panel may in its discretion hold any combination of written, electronic and oral hearings;
- (j) Subject to section 4.2(k), an oral hearing will be open to the public;
- (k) The Panel may direct that a hearing, or part of a hearing, be held in the absence of the public if, in the Panel's opinion, intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature that, having regard to the circumstances, the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

### **4.3 Resolution**

Once an appeal has been initiated, any agreement that may be reached between the parties purporting to resolve any or all of the issues under appeal is not binding on the Committee without the Panel's approval.

## PART 5 – WRITTEN HEARINGS

### 5.1 Submissions for Written Hearings

Written submissions will be made by the parties in the order and according to the schedule set out in the Pre-hearing Conference Report.

## PART 6 – ORAL HEARINGS

### 6.1 Written Submissions for Oral Hearings

For an oral hearing, written submissions will be made by the parties in the order and according to the schedule set out in the Pre-hearing Conference Report.

### 6.2 Conduct of Oral Hearings

- (a) Unless the Panel otherwise directs:
  - (i) at the beginning of the hearing, each party may give a brief opening statement that describes the issues that party will address at the hearing; and
  - (ii) opening statements will be made in the order set out in the Pre-hearing Conference Report;
- (b) Evidence at the hearing will be presented by the parties in the order set out in the Pre-hearing Conference Report;
- (c) The party presenting evidence first in the hearing may respond with reply evidence to the evidence of the party presenting second or third (as applicable);
- (d) Any witness may be cross-examined immediately following that witness's testimony in chief by a party adverse in interest to the party who called the witness;
- (e) Re-examination of witnesses may be permitted in appropriate circumstances and will be limited to:
  - (i) matters arising during cross-examination which were not addressed during examination;
  - (ii) clarifying matters which, though addressed in examination, become unclear during cross-examination;
- (f) Members of the Panel may ask questions of parties and witnesses as they consider necessary;
- (g) After the parties have had an opportunity to present evidence, the Panel will give all parties an opportunity to make final arguments in support of the order they want the Panel to make;
- (h) Unless otherwise ordered, the parties will make their final arguments in the order in which they were given an opportunity to present their evidence as referred to in (c) above.

### 6.3 Summonses

- (a) The Panel may require any person, including a party, by summons to:
  - (i) testify under oath or affirmation; and
  - (ii) produce documents, records or things at an oral hearing;
- (b) A party that requests a summons will obtain a signed summons from the Chair and serve the summons personally on the person summoned;
- (c) The person summoned is entitled to receive from the party requesting a summons, the same attendance fees paid to a person summoned to attend before the Superior Court of Justice. These fees can be found on the Financial Services Tribunal's website at <http://fstontario.ca/en/rules/Pages/appendix-b.aspx>.

### 6.4 Witnesses

- (a) Subject to any direction made at a pre-hearing conference, a party who plans to call a witness to present evidence in an oral hearing will provide the other parties (through the designated staff member) with a witness statement for each witness no later than the date set out in the Pre-hearing Conference Report or as otherwise directed by the Panel. The witness statement will include the name of the witness, and a brief description of the substance of the evidence to be provided by the witness. The witness statement will not be included in the Joint Book of Documents.
- (b) The Panel may order that:
  - (i) any particular facts be proved by affidavit;
  - (ii) the affidavit of a witness be submitted at an oral hearing; and/or
  - (iii) a witness be examined under oath or affirmation at the hearing.
- (c) The Panel may direct a witness to confirm under oath or affirmation that certain written evidence was prepared by the witness or under the direction or control of the witness and is accurate to the best of their knowledge or belief.

### 6.5 Oath or Affirmation of Witnesses

The Panel will require oral evidence given before it to be given under oath or affirmation.

### 6.6 Exclusion of Witnesses

- (a) The Panel may order that witnesses be excluded from the hearing until called to give evidence;
- (b) An order under section 6.6(a) may not be made in respect of a party to the hearing or a non-party witness whose presence is essential to instruct counsel for the party calling the witness, but the Panel may require such a party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party;

- (c) Where an order is made excluding witnesses from the hearing, there will be no communication to the witness of any evidence given during their absence from the hearing, except with leave of the Panel, until after the witness has been called and has given evidence.

## **6.7 Recording of Hearing**

No person will make any audio or visual recording of any part of the hearing or take any photographs at a hearing, unless authorized by the Panel.

## **6.8 Court Reporters**

The Panel may arrange for the recording of oral hearings for the purpose of creating a transcript. The cost of the recording will be at the Corporation's expense except if the Panel makes an order of costs against a party under section 7.4, and in its discretion decides that the cost of the recording will be included in the order of costs.

## **6.9 Interpreters**

If a party or witness requiring an interpreter notifies a Panel in compliance with the time limits indicated under these Rules for the filing of preliminary issues, the Panel may provide an interpreter, at the Corporation's expense, for the purpose of interpreting oral testimony given at the hearing, where the Panel is satisfied that the presence of an interpreter is necessary and appropriate.

## **6.10 Expert Witnesses**

- (a) Any party may call an expert witness at an oral hearing with leave of the Panel;
- (b) Any party may tender an expert report at a written hearing;
- (c) The Panel has the right, in its discretion, to retain its own expert witness to assist the Panel.

## **6.11 Duty of Expert**

- (a) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a hearing:
  - (i) to provide opinion evidence that is fair, objective and non-partisan;
  - (ii) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
  - (iii) to provide such additional assistance as the Committee may reasonably require to determine a matter in issue;
- (b) The duty of the expert prevails over any obligation owed by the expert to the party by whom or on whose behalf the expert is engaged;
- (c) Any expert who gives evidence at a hearing will certify, either in writing or during oral evidence, that they acknowledge and understand the duty described in this section.

## PART 7 – DISPOSITION OF THE APPEAL AND COSTS

### 7.1 Decision in Writing

An order of the Panel disposing of an appeal and its reasons for decision will be in writing.

### 7.2 Dismissal of Proceeding without a Hearing

The Panel may dismiss a proceeding without a hearing if:

- (a) the proceeding is frivolous, vexatious or commenced in bad faith;
- (b) if it relates to matters outside the jurisdiction of the Panel;
- (c) a statutory requirement for bringing the proceeding has not been met; or
- (d) there has been undue delay by the party who initiated the proceeding.

### 7.3 Notice of Dismissal

Before dismissing a proceeding without a hearing under section 7.2, the Panel shall give notice of its intention to dismiss the proceeding to all parties to the proceeding.

### 7.4 Costs

- (a) The Panel may order that the costs of a party be paid by another party or parties where the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith;
- (b) In determining whether a party is liable to pay the costs of another party, the Panel will consider:
  - (i) whether the party acted in bad faith or engaged in conduct which is clearly unreasonable, frivolous or vexatious;
  - (ii) whether the party's conduct unreasonably delayed or prolonged the proceeding, including any failure to comply with the undertakings or orders;
  - (iii) whether the party failed to cooperate with other parties during pre-hearing proceedings or at the hearing;
  - (iv) whether the party failed to attend a hearing or other proceeding, or to send a Representative, despite notice being provided to the party;
  - (v) any other matter that the Panel considers relevant;
- (c) The amount of costs ordered under section 7.4(a) will be based on a consideration of the circumstances of the case, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of costs incurred by the party requesting costs, or the conduct of the party requesting costs.

## **PART 8 – POST-HEARING MATTERS**

### **8.1 Effective Date**

An order of the Panel is effective from the date of the order, unless the Panel directs otherwise.

### **8.2 Correction of Errors**

The Panel may, at any time, correct a typographical error, calculation error or similar error made in an interim or final order.

#### **HISTORY**

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Effective Date: *January 1, 2020*

Approval Dates: *February 26, 2015; May 21, 2015; May 18, 2017; May 22, 2018;  
May 16, 2019*