A Question of Fairness

A Review of the Assessment and Collection of Overpayments in the Saskatchewan Assistance Program

Ombudsman
SASKATCHEWAN

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Executive Summary

A Question of Fairness

The Saskatchewan Assistance Program ("SAP" or "SA program") is the provincial welfare program designed to meet the basic needs of individuals and families who have exhausted all other means of financial support. The SA program is delivered and administered by the Ministry of Social Services ("the Ministry") and operates under the authority of *The Saskatchewan Assistance Act* and *The Saskatchewan Assistance Regulations*.

When individuals receive a social assistance ("SA") benefit that they are not entitled to receive, the Ministry considers this to be an overpayment of benefits. Overpayments occur for a variety of reasons and are considered to be debts to the Crown that are required to be repaid.

The Ministry is responsible to collect the outstanding overpayment and in situations when an individual has left the SA program with an outstanding overpayment the Ministry will refer the individual's file to the Canada Revenue Agency-Refund Set-Off program (the "CRA-RSO program"). Under the CRA-RSO program, the Canada Revenue Agency acts as a collection agency for the Province of Saskatchewan by intercepting an individual's income tax refund, GST rebate and provincial tax credits, and diverting that money to the province to repay the SAP overpayment. The Ministry believes that the CRA-RSO program is an efficient and cost effective administrative means to collect outstanding overpayments.

As of 2007 there were 23,122 closed SA cases with an outstanding overpayment registered with the CRA-RSO program. The average overpayment of a former SA recipient was reported to be $1,680.00. The reasons for the overpayments vary, but generally can be attributed to either external factors beyond the control of the Ministry (as with a client failing to report earned income), internal factors within the SA program (such as improved financial controls), or some combination of those factors.

Since 2004, Ombudsman Saskatchewan has received 38 complaints related to the Ministry's handling of SA overpayments. Many of these complainants expressed frustration with the process of recovery through the CRA-RSO program and believed that the process was unfair.

On September 18, 2008 the Ombudsman notified the Deputy Minister of the Ministry of his intention to initiate a review and specified the parameters of that review.

Scope and Purpose of the Review

This Report focuses on the administrative and decision-making process, used by the Ministry and its appeal tribunals with respect to SA overpayments. The purpose of the review was to examine whether the Ministry has adequate policies, procedures, practices, and appeal mechanisms in place to ensure good public sector decision-making with respect to SA overpayments, through the use of procedurally fair processes. In order to facilitate this review, Ombudsman Saskatchewan developed a best practices model applicable to decision-

making in the SA program by both Ministry staff and the appeal tribunals. The Ministry and its tribunals' policies, practices, and procedures were then evaluated against this model.

Administrative Decisions and the Appeal Process

Individuals who disagree with a decision made by their SA worker may be entitled to appeal that decision—this includes decisions related to the assessment of an overpayment. The Act and Regulations provide a three-tiered appeal process.

The **first level** of appeal is an internal appeal and is initiated when an individual requests that a decision be reviewed. These reviews are conducted internally to the Ministry and are completed by a unit administrator. Once the request has been received, the unit administrator is required to review the matter and determine if an error was made or if the matter can be resolved. If the unit administrator finds that no error has been made or believes that resolution is not possible, the matter is then moved to the **second level** of appeal—a Regional Appeal Committee (RAC).

The RACs hold hearings at which both sides have the opportunity to make presentations, submit evidence, and question witnesses. If the individual or the Ministry is dissatisfied with the RAC decision, either can request the decision be reviewed by the Social Service Appeal Board (SSAB). The SSAB is the **third level of appeal**.

A Fair and Best Practice Model

Decisions related to SA overpayments involve a series of interconnected administrative decisions, beginning when a SA worker assesses that an overpayment has occurred. Once this decision is made, the process of decision-making has the potential to continue through three levels of appeal. The decision-making process often ends with the Ministry registering an individual on the CRA-RSO program.

Decisions made with respect to an overpayment may have serious consequences for the individual about whom the decision is being made. Given the potentially serious consequences resulting from that decision, there are basic requirements of **procedural fairness** that must be observed at every level of decision-making. How thoroughly these requirements are considered and applied is dependent on the level of the decision-maker or the decision-making body.

Ombudsman Saskatchewan identified seven best practices, based on the rules of procedural fairness, that Ministry staff and the appeal tribunals (RACs and SSAB) should follow when making administrative decisions related to the assessment, appeal, and recovery of overpayments. These best practices follow.

Best Practice 1: Reasonable Notification

Individuals about whom a decision is being made should be notified in a reasonable manner that:

a) a decision is going to be made before it is made; and

b) the basis being used to make that decision.

Best Practice 2: The Ability to Respond

Following proper notification and before the decision is made, the affected individual should be provided with:

a) an opportunity to review the information being considered; and

b) an opportunity to provide the decision-maker with alternative or contrary information.

Best Practice 3: Consideration of Relevant Information

All relevant information should be fully and fairly considered by the decision-maker, and information that is irrelevant to the decision at hand should not be considered.

Best Practice 4: Decisions should be Reviewable and Correctable

All decisions should be open to review and be correctable.

Best Practice 5: Provision of Adequate Reasons

Adequate reasons for the decision must be provided to the individual. At a minimum, reasons for a decision at all levels should include:

a) a statement of the decision;

b) a summary of the information relied upon by the decision-maker;

c) an explanation of how any contradictions in the information were reconciled by the decision-maker; and

d) any other relevant reasons for making the decision.

Best Practice 6: Free From Bias

The decision-maker should be free of and be seen to be free of bias.

In addition to these six best practices, the Act and its Regulations provide certain procedural rights to the individual and outline the obligations of the RACs and the SSAB. In light of the legislative requirements, the following best practice must be added.

Best Practice 7: Additional Procedural Requirements for Hearings at the RACs and the SSAB

For decisions of the appeal tribunals, greater procedural fairness is required, including:

a) a face-to-face hearing within thirty days of the appeal request;

b) the ability to present evidence, including witness testimony;

c) the ability to cross-examine the other party's witnesses;

d) the ability to designate a representative for the hearing and access to appropriate support services;

e) the ability to adjourn to prepare for the hearing, if necessary; and

f) a written decision including reasons provided by the appeal tribunal within seven days of the hearing.

Findings

We evaluated the Ministry's and the tribunals' current policies and practices as well as their decision-making processes against the best practices model and we found that a number of the current practices could potentially result in unfairness to the individual.

In order to ensure a procedurally fair process, best practices require that individuals be notified that a decision to assess an overpayment may be made against them. The notification must also include the information being relied upon by the Ministry and must indicate that the individuals have the ability to respond before a final decision is made. We found that:

- The Ministry's current practice is to have staff decide that an overpayment has occurred and then to notify the affected individual that they are in an overpayment situation.
- The fact that an overpayment decision is made without prior notice to the individual and without an opportunity to respond is contrary to the requirements of procedural fairness and is not reflective of best practices.

Best practices require notification to be sent to an individual once a decision is made, providing reasons for the decision. We found that the current Ministry practice respecting notifi-

cation does not meet best practices and creates unfairness for the individual at the very early stages of the decision-making process. We found that:

- The Ministry's practice prior to October 2009 allowed for notice letters to be sent to the last known address of the individual even if the Ministry was aware that the address was incorrect. Since 2009 that practice has changed and letters are no longer sent to an address if the address is known to be incorrect.
- The Ministry assumes that once a letter is sent, notification has been achieved, regardless of whether or not the individual receives the letter.
- The Ministry's practice of sending only one letter after the decision has been made setting out both the overpayment decision and the individual's right to appeal, does not constitute best practices.
- In order to fulfill the requirement for notice of a decision, that letter should include reasons for the decision including an explanation of how any contradictions in the information before the decision-maker were resolved.

Decision-makers at all levels use program policies in the course of making their decisions about overpayments. Policy, however, should be used as a guide to assist the decision-maker and should not be rigidly interpreted. Policies are not intended to reduce or replace the role of the decision-maker. Decisions must still be made based on the individual circumstances of each situation. We found that:

- SA program policies have replaced or, at least, reduced the role of the front line decision-maker in the initial decision to assess an overpayment and in some of the other administrative decisions Ministry staff make in regard to overpayments.
- Ministry staff do not adequately understand their discretionary authority in the application of policies to a particular situation.
- Current Ministry policy does not provide sufficient guidance for staff or tribunal members to assist them in applying their discretionary authority when making decisions about overpayments.

Best practices also require that an individual be provided with the right to have the decision reviewed and corrected, if appropriate. We found the Ministry's current appeal structure to be acceptable. We found, however, that best practices have not always been followed at all three levels of appeal. We found that:

- The Ministry's interpretation of the time period in which to file an appeal is too restrictive and is unfair.
- There is inconsistency among the regions as to whether an appeal may be registered after the 30-day time limit and in what circumstances it is appropriate to make such an allowance.
- The Ministry does not always submit the required information to the appeal tribunals in a timely manner, leaving tribunal members and affected individuals with no time to review the information or, in the case of individuals, insufficient time to prepare an adequate response.

Best practices require that decision-makers at all levels of administrative decision-making be unbiased. Decision-makers with a bias have a tendency to prejudge an issue or be partial to one side over the other. We found that:

- Once the Ministry makes a decision that an overpayment has occurred, the onus is placed on the individual to prove that there is no overpayment.
- The initial judgment, which is made without any prior notice to the individual and without giving the individual any opportunity to respond, is often preferred unless the individual can provide documentary information from a third party proving the initial judgment to be wrong.
- The members of the appeal tribunals wrongly rely on Ministry staff to act as experts in the interpretation of program policy.

The appeal tribunals' hearing procedures appear to provide sufficient protection for the individual to ensure a procedurally fair process. The manner in which a hearing is conducted, however, can create issues of unfairness. We found:

- Tribunal members had limited knowledge about their hearing and decision-making process. This lack of knowledge could affect the manner in which a hearing is conducted and impacts the parties' ability to effectively respond in the hearing.
- The current adversarial model used by the tribunals places the Ministry in an advantageous position to the detriment of individuals appealing Ministry decisions.
- The current lack of accessible advocacy and support services has the potential to compromise an individual's right to respond when appealing overpayment decisions.

The SA program is a highly complicated and regulated system. Ministry staff and tribunal members require consistent and ongoing training in all aspects of the SA program, public sector decision-making, the role and application of policy in public sector decision-making, and the rules of procedural fairness. Overall we found the training provided to Ministry staff to be inadequate in these areas. In addition, we found an unacceptable lack of training for members of the RACs and the SSAB.

Are Overpayments Legally Enforceable?

Although the focus of this Report is on best practices, there is also a legal issue pertaining to the application of the CRA-RSO program to overpayment claims by the Ministry that is worthy of comment.

Like private parties, the Government can sue those who owe it money. If the Crown proceeds in this way, both the Ministry and its legal counsel acknowledge that the limitation periods that apply to individuals apply equally to the Crown. In Saskatchewan, *The Limitations Act* specifies court proceedings must be started within two years from the time the debtor failed to make a payment due under the contract.

However, the Ministry does not use the courts to collect its debts. The Government collects SA overpayments through administrative means by registering a person with the CRA-RSO

program. It has been the Ministry practice to register individuals on the CRA-RSO program long after the debt was discovered and often after the two year period allowed under *The Limitations Act*.

It is not within the power of the Ombudsman to decide whether the Provincial Government can legally collect SA overpayments through the CRA-RSO program, regardless of the limitation periods set out in *The Limitations Act*. Suffice it to say that there is a legal argument that the Government cannot do so.

Regardless of the answer to the question of the strict legality of the province's right to rely on the CRA-RSO program to collect dated SA overpayments, the fairness issue remains. It is within the Ombudsman's purview to ask the question whether it is fair for the Provincial Government to collect debt through the CRA-RSO program when the overpayment occurred so far in the past that it could not be recovered through a court action due to the expiry of the limitation period.

It is the position of Ombudsman Saskatchewan that the Ministry's collection of SA overpayments through the CRA-RSO program when the debt could not be collected through judicial means because the statutory limitation period has passed is generally unfair. It is akin to government collecting debt through the back door when it cannot be collected through the front door.

Recommendations

Ensuring fairness is certainly the responsibility of each individual public official and administrative tribunal member in the SA system. It requires, however, much more than the simple good intentions of an individual worker, manager, policy analyst or administrative tribunal member. It requires an organizational structure that supports and furthers the principles of fairness and equity in the Ministry's daily practices, whether that practice involves the provision of direct service, the development of policies, the implementation of legislation or regulations, or the adjudication of appeal hearings. The Ombudsman has made 32 recommendations that speak specifically to the furtherance of fair practices within the SA system. Specifically the Ombudsman has recommended:

- The establishment of a fair practice office in the Ministry of Social Services.
- Improved practices that will ensure individuals are properly notified of overpayments, have the opportunity to provide information and have the opportunity to appeal any decisions adverse to their interests.
- The introduction of an inquiry-based hearing model at the RACs and the SSAB.
- Improved procedures for conducting hearings and delivering decisions at the RACs and the SSAB.
- Provision of adequate training for Ministry staff and members of the RACs and the SSAB.
- Clear articulation of the role and responsibility of the Ministry of Social Services and, ultimately, the Government of Saskatchewan in ensuring the effectiveness of the RACs and the SSAB.
- The application of time limits as outlined in the *The Limitations Act* to the collection of SA program overpayments through the CRA-RSO program.

Final Thoughts

The Ombudsman does not suggest that if individuals have received SA benefits to which they are not entitled that those benefits should not be repaid to the Ministry. The Ministry is accountable for the public funds they distribute. The legislation that governs the SA program requires the Ministry to assess overpayments and provides for several methods for recovery of those overpayments. The use of the CRA-RSO program is an efficient and cost-effective administrative means to collect overpayments. Just as the Ministry is accountable for the public funds it distributes, however, the Ministry and ultimately the Government of Saskatchewan are equally accountable to ensure that the administrative decisions made by its public officials and administrative tribunals with respect to the assessment, collection, and review of overpayments are fair, reasonable, and lawful.

1 Introduction, Purpose and Methodology

1.0 The Issue

The Saskatchewan Assistance Program ("SAP" or "SA program")[1] is the provincial welfare program designed to meet the basic needs of individuals and families who have exhausted other means of financial support. SAP is delivered and administered by the Ministry of Social Services ("the Ministry").

When individuals receive a social assistance ("SA") benefit that they are not entitled to receive, the Ministry considers this to be an overpayment of benefits. Overpayments occur for a variety of reasons and are considered to be debts to the Crown that are required to be repaid. While an individual is receiving SA benefits (an "open case"), overpayments are collected through existing benefits. Should an individual leave the SA program with an outstanding overpayment (a "closed case"), the Ministry is responsible to collect the outstanding overpayment and does so through a variety of methods.

The Ministry has an administrative process in place to collect overpayments on closed cases. This process includes referring the individual to the Canada Revenue Agency-Refund Set-Off program (the "CRA-RSO program"). Under the CRA-RSO program, the Canada Revenue Agency acts as a collection agency for the Province of Saskatchewan by intercepting an individual's income tax refund, GST rebate and provincial tax credits, and diverting that money to the province to repay the SAP overpayment.

Since 2004, Ombudsman Saskatchewan has received 38 complaints related to the Ministry's handling of SA overpayments. Typically these complaints came from former recipients of the SA program who, several years after leaving the program, found that their income tax refunds, GST rebates and provincial tax credits were being intercepted by the CRA–RSO program and sent to the province to recover an overpayment. Many of these complainants expressed frustration with the process of recovery and believed that the process was unfair. In reviewing those cases, the Ombudsman identified two primary issues:

- the fairness of the decision-making process used by the Ministry when assessing and ultimately collecting the overpayments, and
- the lack of an effective and accessible appeal process.

On September 18, 2008 the Ombudsman notified the Deputy Minister of the Ministry of his intention to initiate a review and specified the parameters of that review.

1.1 The Purpose of the Review

When government ministries make administrative decisions that could potentially affect the rights, privileges or interests of an individual, a group of individuals or the community, government has a "duty of fairness" to those affected by its decisions. Decision-making by public sector employees must follow a process that is procedurally fair – one that is fair, reasonable, and lawful. Supporting and maintaining procedural fairness protects the rights of individuals

and enhances public confidence in the government and its public officials, and ultimately in the services that government provides.

This Report focuses on the decision-making processes used in the Ministry and by its appeal bodies with respect to SA overpayments. Overpayments typically come to the attention of the Ministry when the Ministry's automated benefits system identifies that an overpayment has occurred. We began our inquiry at this initial decision point and followed it through the appeal process and finally to the collection of the overpayment. The purpose of the review was to examine whether the Ministry has adequate policies, procedures, practices, and appeal mechanisms in place to ensure good public sector decision-making with respect to SA overpayments, through the use of procedurally fair processes. In order to facilitate this review, Ombudsman Saskatchewan developed a best practices model applicable to decision-making in the SA program by both Ministry staff and the appeal tribunals. The Ministry and its tribunals' policies, practices, and procedures were then evaluated against this model.

1.2 The Distribution of the Report

This review will be publically reported in a summary format in the Ombudsman Saskatchewan's 2010 annual report. The complete report will be provided internally to the Ministry. The decision to produce two reports (a summary report and the larger technical report) was made in light of the current reorganization of the Ministry and, more specifically, the reorganization of its SA programs.[2] It is our understanding that the reorganization plans are underway and will be implemented over the coming months. It is our hope that this Report will provide some assistance to the Ministry as it goes forward with its reorganization.

1.3 Methodology of the Review

The methods used to carry out this review included:

- A review and analysis of existing provincial and federal legislation and regulations related to the mandate and administration of the SA program, the methods for overpayment recovery, the limitations on recovery, and the authority of the Canada Revenue Agency ("CRA") to offset debts owed to the provincial government.
- A review of the common law applicable to administrative decisions and decision-making in Canada.
- A review and analysis of provincial policies, procedures, and practices with respect to the SA program and the assignment, appeal, and collection of overpayments.
- A review of the CRA-RSO program and its policies and procedures, as made available by the Ministry, as well as the Memorandum of Understanding (MOU) entered into between the CRA and the Province of Saskatchewan.
- An analysis of the current provincial appeal system in the SA program, including the policies, practices and procedures of the Regional Appeal Committees ("RACs")[3] and the provincial Social Services Appeal Board ("SSAB").

- A literature review concerning:
  - Social welfare policy and welfare administration in Saskatchewan
  - Public sector decision-making models
  - Procedural fairness and procedural justice
  - Procedural fairness in public sector decision-making
  - Best practices for administrative tribunals.

- A review of the Ministry's training material provided to its Regional staff, the RACs and the SSAB.

- The development of a best practices model for all administrative decision-makers in the SA program, including the appeal tribunals, to use in making decisions about overpayments.

- A review of the incidence and prevalence of overpayments.

- Consultation with the Social Policy Research Unit, Faculty of Social Work, University of Regina.

- Consultation with anti-poverty advocates.

- Interviews with 26 key personnel, including program regional staff in 4 of the 5 service regions, staff from the Financial Services Branch and the Income Assistance Service Delivery Division[4] and legal counsel from the Ministry of Justice. The Ombudsman Investigators also interviewed the two municipal police officers who are assigned to investigate fraud allegations in SAP cases in Regina and Saskatoon.

- Interviews with five members representing four Regional Appeal Committees and the Social Service Appeal Board.

- Two focus groups conducted in Saskatoon with 11 current and past SAP recipients who experienced an overpayment.

2 An Overview of the SA Program

2.0 Saskatchewan Assistance Program

The SA program is a welfare program and is considered to be a social safety net of last resort designed to meet the basic needs of individuals and families who have exhausted all other means of financial support. Benefits under this program are "provided on the basis of need and individuals are expected to pursue opportunities, within their capacities, to become independent of social assistance."[5] The SA program operates under the authority of *The Saskatchewan Assistance Act*[6] (the "Act") and *The Saskatchewan Assistance Regulations*[7] (the "Regulations"). The Ministry administers and delivers the SA program through its regional service delivery structure that includes the provincial Contact Centre, the Benefit Administration Service Unit, the regional offices and the local service centres.

2.1 Establishing Eligibility—from Applicant to Client

In Saskatchewan, individuals over the age of 18 can apply on their own behalf and on behalf of their dependents (spouse and children) for assistance.[8] Since 2001 individuals applying for SAP benefits call the provincial Contact Centre through a 1-800 telephone number.

The Contact Centre is typically the first point of contact and accepts inquiries about the available income assistance programs. The primary function of the Contact Centre is to screen and sort applications and ensure potential recipients are assigned to the most appropriate income assistance program, including SAP. In addition, the Centre can, if appropriate, divert individuals to other "non-welfare options" such as Employment Insurance, the Canada Pension Plan, or Workers' Compensation.[9]

The Contact Centre staff begins the process by determining if an individual qualifies for SAP and, if so, the potential needs of the applicant. Once the applicant is screened into the SA program stream, Contact Centre staff schedule a SA program intake meeting for the applicant within 5 working days. Intake meetings take place in-person at the applicant's local income assistance office.

The application for the SA program is completed at one or more intake meetings. The amount of assistance an individual receives is determined through a "budget-deficit calculation."[10] To perform this calculation, the individual's income (and, if applicable, any declared dependent's income), maintenance payments (current or potential), property (both liquid and real), and personal assets are measured against "allowable needs," as defined by the Act and Regulations. A "budget-deficit" occurs when an individual's or a family's allowable needs exceed their available resources. If a deficit occurs, need is established and benefits can be paid. This calculation is completed through the Ministry's automated electronic benefit management program called the Social Work Information Network ("SWIN").

At the intake meeting(s), applicants are also told of their responsibilities while on SA program. Applicants are required to report any changes to their circumstances (in a specified manner and within specified time periods)[11] and follow any case plans or transition plans that are developed while in receipt of benefits.[12]

At the intake meeting, applicants must sign a standardized "declaration and consent," which is a part of the SA program application form and which indicates that applicants are aware of their reporting responsibilities. The declaration and consent also provides the Ministry with the authority to contact third parties to seek information relating to ongoing eligibility. This signed consent gives the Ministry broad authority to obtain information from third party sources that may otherwise be considered the private and confidential information of an applicant.

Individuals may also be provided with the *Saskatchewan Assistance Handbook*, a Ministry-produced handbook that summarizes the SA program, a client's responsibilities and rights under the program, and the process for appealing decisions of the Ministry. This handbook states that any and all money a recipient receives must be reported. This would include any money that is considered "exempt income" under the Act (income not affecting SA benefits, such as GST rebates, child tax benefits, and compensation for residential school victims). According to the Ministry, 10,000 handbooks are printed and distributed to the regional offices annually. Though the handbook is available both in written form and online, the Ombudsman Investigators were informed by regional staff we interviewed that the handbook is not routinely provided to applicants.[13] Whether a regional office routinely provides a copy of the handbook to recipients seems to vary.

Following the intake meeting(s), applicants are assigned to the caseload of a regional Income Assistance worker ("SA worker") and become clients of the system.

2.1.1 Ongoing Eligibility

Regional SA workers provide "ongoing administration of income assistance benefits, adjustment of benefits, counseling, referrals and case planning," for all SA recipients on their caseloads.[14] SA workers ensure clients have continuing eligibility for SA benefits.

In order to continue to be eligible for their benefits, recipients of SA must comply with the reporting requirements set out in the Regulations, which are discussed at the intake meeting(s). Recipients are required to report to their SA worker of any changes in resources, dependents or address.[15] This includes changes in employment, needs, common law or marital status, or disability status. According to the Regulations, benefits may be cancelled for the failure, neglect or refusal to provide, within the time prescribed by the Regulations, any information that the Ministry may require.[16]

Ministry policy requires eligibility reviews to be conducted any time there is a change in the client's circumstances. Annual reviews must also be conducted on all cases, whether a change in a client's circumstance has been recorded or not. Annual reviews can be conducted in-person or through the provision of written information mailed by the SA recipient to the Ministry. Annual reviews include "an assessment of the clients' circumstance - needs, assets, income, employability, case plans, efforts to obtain support" and confirmation of any declared disability and special needs.[17]

2.2 SAP Benefits

SA benefits are provided on a monthly basis and are typically issued to the designated head of the household. Benefits are issued one month in advance. Advance payments allow recipients to meet their basic needs (food and shelter) at the beginning of the month and also provide the recipient time to report any changes in circumstances. The amount of benefits issued depends on one's personal circumstances, the number of dependents or family type, and where in the province one lives.

Although some SA benefits are provided for the support of dependents, children are no longer on the provincial welfare rolls for basic support. The basic support benefit for a child is provided through the federal government's Child Tax Benefit ("CCTB") program administered through the CRA. Therefore, in addition to applying for SAP benefits, a parent must also apply separately to the CRA to receive this monthly CCTB.

Individuals who are working can still receive SAP benefits if they are unable to earn enough to cover their basic needs. Under the Act, Regulations, and policy, there are allowable income exceptions. Any income earned beyond those income exceptions is deducted from the individual's monthly SAP payment.

There are times when individuals receive SA benefits they may not be entitled to receive. The Ministry considers this to be an "overpayment" of benefits.[18] All overpayments must be repaid to the Ministry by the individual. Overpayments and the methods of collection will be fully discussed in Section 3.

2.3 The Appeal Process

The SA system is a highly regulated system where eligibility criteria, benefit levels, overpayments and collection of overpayments, and appeal mechanisms are all set out in the Act and the Regulations.[19] The manner in which these enactments are put into practice is described in the SAP Policy Manual.

Ministry staff are required to apply SA program policies on a daily basis to make a variety of administrative decisions. Some of these decisions are fairly straightforward while others are more complex. Some have a significant impact on an individual SAP recipient, and others have less impact. Individuals who disagree with a decision made by their SA worker may be entitled to appeal that decision. The Act and Regulations provide a three-tier appeal process to challenge the decisions made by Ministry staff that are related to an application for SAP benefits, the determination of eligibility and continued eligibility, the amount of assistance granted, any changes to the level of assistance provided, and other decisions based on the general application of Ministry policy (See Appendix A).[20]

2.3.1 First Level of Appeal — Review by the Unit Administrator

Individuals are typically notified in writing about a Ministry decision. Should individuals disagree with a decision, they "have the right to appeal within 30 days after the notification of

the decision."[21] Individuals who disagree must make a written request for an appeal of the decision (whether in the form of a letter or on a prescribed Ministry form).

Once the Ministry receives the written appeal request, the Ministry must "register" the request. The Ministry's unit administrator is required to review the decision and, if it is determined that an error has been made, to rectify the error. The Ombudsman investigators were told that this typically involves a unit administrator and the worker first reviewing the decision. The unit administrator will then talk to the SAP recipient either in person or by telephone and attempt to resolve the issue.[22]

If the unit administrator is satisfied that no error has been made or that a resolution to the individual's appeal cannot be found, the unit administrator then arranges for a hearing before an RAC. RAC hearings are to be held within 30 days from the date the appeal is first registered.[23] The Ministry must inform the individual of the date and place of the RAC hearing.[24]

2.3.2 Second Level of Appeal — the Regional Appeal Committee

Regional Appeal Committees are administrative tribunals created under *The Department of Social Services Act*[25] and exist in all five service regions.[26] Members of the RACs, including the chairpersons of those committees, are appointed by the Minister of Social Services through a Minister's Order. The role of the RACs is to independently review decisions made by the Ministry staff. The RACs must adhere to the Act and Regulations, but have discretionary authority with respect to the interpretation and application of Ministry policies.[27]

RAC hearings are not open to the public.[28] Prior to the hearing, the chairperson schedules the members who will hear the case. A quorum of three members, including the chair, is typically required at a hearing.[29] The individual appealing the decision can choose to be represented by an advocate.[30] The Ministry is represented by Ministry staff. Three days prior to the hearing, the Ministry must provide the RAC with a summary report outlining the decision under appeal and any other information related to the decision. In advance of the hearing, the Ministry must also provide a copy of the summary report to the individual. The individual can provide information to the RAC at the hearing or in advance of the hearing. If the individual fails to attend, the hearing can proceed and a decision can made by the RAC in the absence of the individual.[31]

At the hearing both sides have the opportunity to make presentations, submit evidence, and question witnesses.[32] The RAC can make an immediate decision and provide its decision in writing to all parties.[33]

If the individual or the Ministry is dissatisfied with the RAC decision, either can request the decision be reviewed by the SSAB.[34] Requests for appeal to the SSAB must be registered within 20 days of the date of the RAC written decision.[35] The SSAB is the third and final level of appeal.[36]

2.3.3 Third Level of Appeal — the Social Services Appeal Board

The Social Service Appeal Board is an administrative tribunal created by *The Department of Social Services Act*.[37] The SSAB is comprised of a chairperson and a varying number of members who are appointed by the Minister through a Minister's Order. At the time we spoke to representatives of the SSAB, it had 13 members.[38] The role of the SSAB is to independently review decisions made by the RACs. The SSAB must adhere to the Act and Regulations, "but believe that they have some flexibility in dealing with the internal policy guidelines" of the Ministry.[39] Hearings are not open to the public[40] and are held in either Saskatoon or Regina. The chairperson schedules the members who will hear each matter,[41] ensuring there is a quorum, which is defined in a Minister's Order as no fewer than three members.[42]

Upon request for an appeal to the SSAB, the Ministry must provide the notice of appeal "along with documents and records in possession of the unit pertaining to the matter under appeal" to the SSAB.[43] In most cases, the Ministry also provides this information to the individual in advance of the hearing. The individual can also provide information to the SSAB in advance of the hearing or at the hearing itself.

The appeal must be heard by the SSAB within 30 days of receipt of the notice of appeal.[44] At the appeal hearing, the individual can choose to be represented by an advocate, while the Ministry is represented by Ministry staff.

It is the practice of the SSAB to hear evidence and to question the parties.[45] The SSAB also allows the parties to question one another. [46] The SSAB, upon completion of the hearing, provides a written decision to the parties.[47] Timelines as to when the decision must be provided are not specified in the Regulations, but practice would indicate that decisions are made within 24 hours of the hearing and are immediately sent to the parties.[48]

The decision of the SSAB is final and binding on all parties. There is no right to appeal a SSAB decision to the courts, although it is possible to bring an application for judicial review to the Court of Queen's Bench on matters of jurisdiction or law. This means that if an individual or the Ministry disagrees with a SSAB decision, they can request that the courts review the decision but only if the SSAB acted outside its jurisdiction or if the SSAB's conduct in hearing the matter or decision was so grossly unfair it requires judicial intervention.

2.4 Summary

The SAP system is a highly regulated system. The eligibility criteria, benefit levels, assessment and calculation of overpayments, methods of collection of overpayments, and appeal mechanisms are prescribed by the Act, the Regulations, and the SA program policy manual.

Ministry staff make a variety of administrative decisions on a daily basis as they apply SA program policies to manage their caseloads. These decisions can have a fundamental impact on the individual about whom the decision is being made. Should the individual disagree with a decision, they can ask that the decision be reviewed. The review or appeal begins internally at the Ministry level through the unit administrator and, if the issue remains unresolved, it potentially proceeds externally through a RAC and eventually the SSAB. Members

of the RACs and the SSAB also make administrative decisions that can have an impact on the individual and the Ministry.

At each level of decision-making, the individual decision-maker has certain discretionary authority. In other words, the decision-makers (Ministry staff and members of the RACs and SSAB) have some "room" or flexibility when applying the SA program policies to the circumstances of an individual case.

One significant area that involves the use of discretion to make administrative decisions concerns the assessment of SAP overpayments and their eventual collection. These administrative decisions are the focus of this Report.

3 Overpayments

3.0 What is an Overpayment?

There are times when an individual receives a SA benefit they may not be entitled to under the SA program rules. The Ministry considers this to be an "overpayment of benefits" (also known as "excess entitlements").[49] SAP allowances and benefits are typically issued to the "head of the family." The head of the family is the individual responsible for the overpayment no matter who caused or benefited from the overpayment.

3.1 Why do Overpayments Occur?

Overpayments can occur for a variety of reasons dependent upon the individual circumstances of the SAP client but are typically tied to situations where:

- Non-exempt income is not fully reported by the individual to the Ministry or not reported in the timeframe required by the Ministry.
- Program benefits are provided to an individual who is not entitled to them.

Overpayments can be client-initiated, such as a recipient's failure to report all income or sources of income, or they may be Ministry-initiated, such as staff misapplying a regulation or policy to a specific case situation and providing a benefit to which the client is not entitled.

When asked why overpayments occurred, the majority of Ministry staff we interviewed stated that in their opinion most overpayments, whether client or Ministry initiated, were unintentional, and occurred as a result of:

- An honest mistake on the part of the recipient or Ministry staff.
- A misunderstanding or misapplication of the SA program rules, often as a result of the complexity of the legislation and policies.
- A recipient's misunderstanding of the reporting requirements and timelines for reporting, particularly in relation to income changes.[50]
- A lack of communication between recipients and Ministry staff.[51]
- A recipient's personal circumstances and diminished physical or mental health impacting their ability to manage their financial affairs.
- The Ministry's use of inadequate information obtained from the CRA's electronic matching program concerning unreported income by individuals.[52]
- Other program specific issues.[53]

In addition, the majority of the regional staff we interviewed also believed that many clients, for a variety of reasons, cannot adequately manage on the allowances and benefits they receive from the SA program. Staff stated that, in their opinion, the benefit levels for some clients were inadequate and that this may "force" individuals into circumstances that result in the accumulation of an overpayment.[54]

3.2 The Prevalence of Overpayments[55]

Overpayments remain on the Ministry file after a person leaves the SA program. As shown in Figure 1, as of 2007 there were 23,122 closed SAP cases with an outstanding overpayment registered with the CRA-RSO program. The average overpayment of a former SAP recipient was reported to be $1,680.00.[56]

Figure 1: Overpayment Statistics (2003 to 2007)[57]

Year	No. of open SAP cases (Households)	Closed cases with overpayments	Closed SAP cases registered on CRA-RSO	New cases referred to CRA-RSO
2003	39,379	28,078	0	
2004	37,592	26,335	20,586	20,586
2005	31,166	26,771	21,748	1,162
2006	27,590	27,990	22,528	780
2007	21,980	26,611	23,122	594

The reasons for the overpayments in the cases registered with the CRA-RSO program cannot be determined. They may be attributed to either external factors beyond the control of the Ministry (as with a client failing to report earned income), internal factors within the SA program (such as improved financial controls), or some combination of those factors.

The Ministry does have a variety of controls in place to manage and ensure the appropriate allocation of SA funds. Though the Ministry described several of their internal control methods, staff interviewed for this review stated that overpayments are usually identified by SWIN and assessed against an individual when regional staff enter into SWIN information received through annual case reviews, case audits and electronic matches.

3.3 Overpayments and Recovery

Section 29.5 (1) of the Act defines an overpayment as a "debt to the Crown in the right of Saskatchewan" that may be recovered through administrative means or in court. Though the Act allows the Ministry to recover an overpayment by filing a "certificate" in the courts,[58] such action is rarely taken.[59]

The Ministry primarily uses administrative means to recover overpayments. If the case is open and the individual is receiving benefits, the Ministry typically recovers any overpayment through current or future SAP benefits. If the individual has left the SA program (a closed case) and has either failed to repay the overpayment or has not agreed to voluntarily repay the overpayment, the Ministry can use the CRA-RSO program to recover the overpayment.[60]

3.4 The Process to Recover the Overpayment

Though this Report focuses on the Ministry's collection of overpayments through the use of the CRA-RSO program, we will also review the Ministry's internal collections processes, to the extent that they relate to the external processes.

3.4.1 Notification

Once an overpayment is assessed, the Ministry is required to notify the client. The overpayment is posted to the client's electronic file and the Ministry attempts to notify the individual of the amount of the overpayment and how the overpayment was assessed. This notification allows the individual an opportunity to appeal the Ministry's decision.

Notification to a current client is completed by the regional staff through a series of letters to the client's last known address, or through telephone contact, if possible.[61] Regardless of the method of contact (letter/phone call), the client is informed of the amount and details of the overpayment and is invited to meet with regional staff to discuss the overpayment and methods of recovery. The client is also informed that she or he can appeal the decision of the overpayment to an RAC.

Following notification, if the client does not contact the regional office or initiate an appeal, it is assumed that the client has accepted the assessment of the overpayment, the amount of the overpayment, and the responsibility to repay the overpayment.

A similar process is used for individuals who have left or are leaving the SA program. If an individual's SA benefits are canceled, the client is advised, in writing, that the overpayment is outstanding, the outstanding balance of the overpayment, and that voluntary repayment is requested. The individual is also informed of the appeal process and the timelines attached to the appeal process.

Upon the closure of a file if an overpayment exists or is assessed at the time of closure, the client is again informed in writing of the amount of the outstanding overpayment, the amount of any new overpayment, the reason for the overpayment, and their right to appeal the decisions concerning the overpayments. Appeals are permitted in relation to any newly assessed overpayments made at the time of closure of the file, but not in relation to older overpayments for which the individual had previously been informed.

For those closed files where an overpayment is assessed after the case is closed, the regional office begins a similar notification process. A letter is sent to the individual's last known address. Appeals are allowed, but again only where the overpayment is newly assessed and the individual had not received prior notification of the overpayment.

Typically, notification letters are sent to the individual's last known address. The Ministry is of the opinion that proper notification has been made when it sends the letter, whether or not the individual has received the letter. When asked what happens if the overpayment letter is returned to the regional office (such as might occur when an individual has moved), regional staff interviewed stated that they will make some attempts to locate the person; however, if unsuccessful, their practice is to continue to send all correspondence to the

individual's last known address, even if they know the person no longer resides at that address[62]

During the writing of this Report, the Ministry acknowledged that regional staff were sending notification letters to what were known to be incorrect addresses. The Ministry has since informed the Ombudsman investigators that as of October 2009, SAP documentation guidelines have been amended to address this issue. The guidelines now require that staff not continue to send correspondence to an incorrect address when correspondence addressed to the client has been returned to the Ministry as either "undeliverable" or it is noted that the individual no longer resides at the address.[63] The Ombudsman acknowledges the Ministry's efforts to address the previous inappropriate practice.

3.4.2 Collection on Closed Cases by the Ministry's Financial Services Branch

Overpayment debts on closed cases are sent to the Ministry's Financial Services Branch for collection (hereafter referred to as the "Collections Unit" or "CU").

The CU cannot negotiate the settlement of a disputed overpayment amount. It has authority only to negotiate voluntary repayment plans with former SA recipients. If the individual agrees to make voluntary payments, the CU will arrange a monthly repayment schedule. The amount of monthly payments can be as low as fifteen dollars per month and, in some cases, even lower payments have been accepted. According to the Ministry, no amount is refused.[64] There are specific situations that may be excluded from the CU's collection efforts.[65]

In all cases the CU is required to assess if an individual has any special circumstances (such as disabilities), that may impact on the ability to repay the overpayment. If an individual contacts the CU claiming special circumstances, the CU will provide a "Statement of Affairs" package, which allows individuals to submit financial information that would demonstrate that they are unable to repay the overpayment (See section 3.6).

Once a case is sent to the CU, the unit sends letters to the individual at 30 and 60-day intervals, informing them of the overpayment and requesting repayment of the overpayment.[66] In the 60-day letter, the CU informs individuals that if they do not contact the CU to make arrangements for repayment, the case will be referred to the CRA-RSO program. After the 60-day letter, however, the CU will attempt to personally contact the individual by telephone.

During the writing of this Report, CU staff reported that they initially rely on the last known address on file to contact the individual; however, if the letters are returned, the CU staff report that they make concerted efforts to locate a new address. If a current address cannot be located, the CU staff does not, as had the regional staff, continue to send letters to the incorrect address.

Referrals to the CRA-RSO program typically occur after the file has been with the unit for 90 days and the unit has been unable to negotiate a repayment schedule with the individual. Cases are also referred to the CRA-RSO program when:

- An individual has promised to pay on at least two separate contacts but fails to do so, and has been verbally advised by the CU that the matter will be referred to the CRA-RSO program.
- The individual fails to pay after three separate contacts with the CU (including the situation where an individual has promised to pay but fails to do so) and the CU has sent a demand letter.
- An individual does not respond to contact or cannot be located.
- The individual refuses to pay.

3.5 The Canada Revenue Agency-Refund Set-off program

Under section 164(2) of the *Income Tax Act*, the CRA-RSO program intercepts income tax refunds, GST rebates, and provincially funded tax credits for the purposes of applying them against unrecoverable Crown debts, which can include provincial Crown debts.[67] The program is governed by the terms of a Memorandum of Understanding which permits the Government of Canada to act as an agent for the Province of Saskatchewan in the collection of unrecoverable debts.[68] Specific to the focus of this Report, the Government of Canada may intercept the payments of these entitlements and divert the money to the Government of Saskatchewan to repay an individual's SAP overpayment.[69]

As a CRA-RSO program partner, Saskatchewan has agreed to a number of principles and eligibility criteria. These include:

- The province has made reasonable attempts to collect the debt prior to referring the debt to the program.
- The debt will not be referred if it is the subject of an appeal or other litigation.
- The province assumes responsibility where the request for set-off causes an individual economic hardship.
- If the province has determined that an individual should be given relief and the set-off has been already processed, the province will deal directly with the individual.

The CRA recommends to participating provinces that "set-off" not be the first action taken for recovery of the debt. An application to the program should be considered only after all reasonable attempts have been made to collect the debt from the individual.

3.5.1 The CRA-RSO Process

When a debt is registered by the province the CRA will:

- Send a letter to the individual letting them know that their refund may be subject to a "set-off". Individuals are advised that they can enter into a voluntary payment schedule with the province and, if the individual does so, the set-off will not occur.
- Once a debt is registered, a grace period commences to allow the person to pay the debt voluntarily. If a refund becomes payable during the grace period, it is sent to the individual.

- Following the end of the grace period, if a refund becomes payable the CRA-RSO program calculates the amount that will be set-off against the refund and sends written notice to the individual advising of the set-off and providing contact information for the provincial office to which the money will be sent.
- The province is informed of the amount that has been set-off. Once the amount is secured, it is delivered to the province.

If an individual requests a written explanation from the CRA-RSO program about the debt, the request is referred to the Ministry's CU for a response. Given the fact that it is the regional office that determines the overpayment and the CU has no authority to negotiate or adjust the overpayment, the CU works with the appropriate regional office to provide a written response to the individual regarding the overpayment.

If the CU has concerns about the validity of the overpayment upon being contacted by an individual, it has the discretion to refer the file back to the region. Often, the only option provided to the individual by the CU is a voluntary payment schedule; otherwise, the individual's federal entitlements will be intercepted. The individual is advised by the CU that to remain in good standing, monthly payments are needed and that if a payment is submitted, the debt will be de-registered from the CRA-RSO program. If the individual fails to make subsequent payments, the debt is re-registered. It is also possible to de-register from the CRA-RSO program if the individual claims financial hardship and is able to demonstrate that hardship in the Statement of Affairs package.

While individuals cannot appeal the Ministry's decision to register them under the CRA-RSO program, individuals are advised of the right to appeal the Ministry's assessment of the original overpayment completed by the regional staff. Individuals are referred to the region which assessed the overpayment for information about appealing the assessment. Referring the individual back to the region to obtain information about the appeal process may be ineffective because the appeal time periods may have long since expired by the time the file has been sent to the CU.

3.6 Hardship Applications

The Ministry has assured the Ombudsman investigators that the intent of recovery of overpayments is not to push individuals back into a cycle of poverty. If an individual contacts the CU stating that they are unable to repay their debt, the CU can postpone collection efforts for a limited time period.[70] In addition, once individuals are registered on the CRA-RSO program, they can seek relief from set-off through the Ministry by declaring and proving financial hardship.[71] The reasons the Ministry may grant hardship status vary depending upon case circumstances, although the primary reasons given by staff to the Ombudsman investigators for granting hardship status and having the debt set aside, is if the individuals are able to prove that they have very limited employment prospects as a result of a disability.[72]

The determination of financial hardship by the CU requires the completion of the Statement of Affairs package by the individual. The package requires the individual to provide an outline of the family's income and expenses and demonstrate that the family's need is greater than the family income, making it a financial hardship to repay the debt.

Ministry staff reported that very few individuals request Statement of Affairs packages and that the package is only provided at the request of an individual or when individuals mention to the CU that they are unable to repay the debt.[73] It is apparent that completion of the Statement of Affairs application requires a high degree of budgetary and literacy skills that may exceed those of some individuals and, as such, individuals may require assistance with completing the application.

When asked if the CU would assist the individual with completing the application, we were advised that the CU staff will "walk an individual through" the Statement of Affairs package over the telephone. They provide individuals with a toll-free number they can use to request such assistance.[74] When asked if regional staff would assist an individual with completing the application in-person, we were advised that no such assistance is offered at the regional level.[75]

3.7 Summary

The majority of Ministry staff interviewed for this Report indicated that in many circumstances they understood why recipients of the SA program may end up in an overpayment situation, but none felt the overpayment could be forgiven by the Ministry. All regional staff we interviewed reported that the amount of benefits a client receives and any resulting overpayments were strictly dictated by Ministry policy. Policy requires every overpayment to be identified, posted, and collected.

The Ministry contends that the use of CRA-RSO program is an efficient and cost-effective means of collecting overpayments. Prior to the use of the CRA-RSO program, overpayments were sent to a collection agency. The Ministry found this process to be costly since collection agencies typically charge 30 to 35% of the recovered debt, and the process was viewed as unnecessarily harsh and one that had a long term negative impact on the client. The staff believe that the use of the CRA-RSO program is a humane means of collecting overpayments. The Ministry suggested that it has no other option but to aggressively pursue the collection of overpayments, as required by the Ministry of Finance. The staff further added that they cannot "write-off" or cancel the overpayment as only the Board of the Revenue Commissioners has that authority.

The Ombudsman does not suggest that if individuals have received SA benefits to which they are not entitled that those benefits should not be repaid to the Ministry. The Ministry is accountable for the public funds they distribute. The legislation that governs the SA program requires the Ministry to assess overpayments and provides for several methods for recovery of those overpayments. The use of the CRA-RSO program is an efficient and cost-effective administrative means to collect overpayments. Just as the Ministry is accountable for the public funds it distributes, it is equally accountable to ensure that the administrative decisions made by its staff with respect to the assessment, collection, and review of overpayments are fair, reasonable, and lawful.

4 Fair Practices in Administrative Decision-Making

4.0 Administrative Decisions in the Public Sector

In the public sector, administrative decisions are made by public officials, "typically acting pursuant to a grant of power provided under legislation."[76] In many situations, these decisions affect the rights, interests, and privileges of an individual or group of individuals.[77] Administrative decisions also include decisions made by an administrative board, tribunal, or committee created by legislation to deal with specific issues that arise from a variety of decisions made by the public sector.[78]

4.1 What Guides Public Sector Decision-making?

When public officials make administrative decisions they are bound by the particular legislation that governs the decision and provides them with the authority to make the decision. SA workers, unit administrators, CU staff, and members of the RAC and the SSAB are guided by the Act and its Regulations. The legislation provides a framework for decision-making, but does not set out the manner in which the legislation and regulations apply to the particular circumstances of an individual case. That detail is found in the Ministry's policies, practices, and procedures.[79]

The aim of effective public sector decision-making is to find a balance between the interests and needs of the individual citizen and the interests and needs of the community.[80] Administrative decisions cannot be made based on a rigid interpretation of a particular policy. Finding the balance often requires decision-makers to use what is referred to as discretionary authority. This allows the decision-maker to fit the circumstances of an individual situation to the goals of legislation and the intention of the policies.

4.2 Finding the Balance — the Duty of Fairness

In addition to the requirements of legislation, regulations and policies, the public sector decision-maker is also required to act fairly when making a decision. This is commonly referred to as the "duty of fairness." The duty of fairness is a legal concept that generally describes a set of requirements that must be observed when a public official is making certain statutory decisions. The duty of fairness is particularly important when the decision adversely affects the individual who is the subject of the decision. One such decision is the assessment and resulting collection of a SAP overpayment.

The duty of fairness has also been described as "procedural fairness." These terms are used interchangeably. For the purposes of this Report, we will use the term "procedural fairness."

4.3 What is Procedural Fairness?

Procedural fairness generally describes what steps a decision-maker must take before, during, and after making a decision. It refers to the criteria that should be used to make the decision, based on questions such as "who will be accountable, who will have input, and when the decision will be made."[81] The principles of procedural fairness have been developed over time to ensure that public sector decision-making is fair, reasonable, and lawful. Procedural fairness ensures that a fair decision is reached by an objective decision-maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.

A procedurally fair process will not be the same for all administrative decisions. To determine what level of fairness is required, it is helpful to examine the principles set out by the courts. In *Baker* v. *Canada (Minister of Employment and Immigration)*, the Supreme Court of Canada outlined when the duty of fairness is required and how stringent that process must be.[82]

In *Baker*, the Court found that the duty of fairness does not require a set procedure for every type of administrative decision.[83] Rather, the duty of fairness requires a procedure that "gives full and fair consideration of the issues" and is "appropriate to the decision being made."[84] If the decision affects the individual in a "fundamental way," the individual must be provided with an opportunity "to put forward their view and evidence fully and have them considered by the decision-maker."[85] The Court in *Baker* identified the following factors as relevant when determining the content of a procedurally fair process:[86]

- the nature of the decision being made
- the process by which the decision is to be made
- the terms of the legislation under which the administrative decision-maker operates ("whether or not there is a statutory right of appeal, whether the decision is binding")[87]
- the importance of the decision to the person or persons affected
- the legitimate expectations of the person or persons affected by the decision
- the agency's choice of procedure, especially if the agency has any expertise in its procedures or if its legislation gives it the ability to choose its own procedure
- any other relevant considerations.[88]

These factors determine what a fair procedure is for the administrative decision in question. The content of a procedurally fair process will be affected by the gravity of the outcome of the decision on the individual.[89] Simply put, the more serious the impact of the decision, the higher the duty on the public sector decision-maker. Ultimately, it is the Ministry that must ensure it uses a procedurally fair decision-making process in relation to all decisions made by its staff and the appeal tribunals.

The process involved in assessing, appealing, and collecting a SAP overpayment involves a series of administrative decisions. For the purposes of this Report, these decisions, in no particular order, generally include:

- the assessment of the overpayment
- the unit administrator's review of the overpayment and determination if an RAC hearing is required
- the decision of the RAC
- the decision to register an appeal with the SSAB, on all Ministry-initiated appeals
- the decision of the SSAB
- the assignment of the matter to the CU
- the decision of the CU to register and de-register the individual in the CRA-RSO program
- the decision by the CU when assessing financial hardship.

4.4 A Best Practices Model

There are minimum requirements of procedural fairness that are essential whenever an administrative decision that has an adverse effect is made. This includes decisions relating to an overpayment.

Decisions related to SAP overpayments involve a series of interconnected administrative decisions, beginning when a SA worker assesses that an overpayment has occurred. Once this decision is made, the process of decision-making has the potential to continue through three levels of appeal. The decision-making process often ends with the CU registering an individual on the CRA-RSO program. In the event that the decision-making process does continue through the appeal levels, a higher degree of procedural fairness is required.

Decisions made with respect to an overpayment may have serious consequences for the individual about whom the decision is being made. Given the potentially serious consequences resulting from that decision, there are basic requirements of procedural fairness that must be observed at every level of decision-making.

Procedural fairness in the SAP overpayment decision-making process requires, at minimum, providing the affected individual with the right to be heard and the right to an independent and impartial hearing.[90] A fair decision-making process with respect to the assessment and collection of overpayments should incorporate the following rights:

- Individuals have a **right to be notified** that a decision which could adversely affect them is being contemplated, and they should be informed of the evidence being used to make that decision.
- Individuals have a **right to respond** to the evidence against them before a decision is made, including the **right to provide any relevant evidence** not already being considered by the decision-maker.
- Individuals have a **right to have all of the relevant evidence** that is before a decision-maker **fully and fairly considered** and any evidence that is not relevant to the decision should not be considered, especially where it is prejudicial to the individual.
- Individuals have a **right to reasons for the decision**.

- Individuals have a **right to have a decision-maker who** is both seen to be and **is free from bias**.
- Individuals have a **right to have a decision reviewed**, especially if the decision failed to meet any of the above criteria.

4.5 Best Practices in the SAP Overpayment Decision-making Process

Based on information from the research literature, the Act and Regulations, and the courts, Ombudsman Saskatchewan has identified the best practices for decision-making in relation to SAP overpayments.[91] These best practices include:

Best Practice 1: Reasonable Notification

Individuals about whom a decision is being made should be notified in a reasonable manner that:

a) a decision is going to be made before it is made; and

b) the basis being used to make that decision.

Best Practice 2: The Ability to Respond

Following proper notification and before the decision is made, the affected individual should be provided with:

a) an opportunity to review the information being considered; and

b) an opportunity to provide the decision-maker with alternative or contrary information.

Best Practice 3: Consideration of Relevant Information

All relevant information should be fully and fairly considered by the decision-maker, and information that is irrelevant to the decision at hand should not be considered.

Best Practice 4: Decisions Should be Reviewable and Correctable

All decisions should be open to review and be correctable.

Best Practice 5: Provision of Adequate Reasons

Adequate reasons for the decision must be provided to the individual. At a minimum, reasons for a decision at all levels should include:

a) a statement of the decision;

b) a summary of the information relied upon by the decision-maker;

c) an explanation of how any contradictions in the information were reconciled by the decision-maker; and

d) any other relevant reasons for making the decision.

Best Practice 6: Free From Bias

The decision-maker should be free of and be seen to be free of bias.

In addition to these six best practices, the Act and its Regulations contain certain legal requirements for the decision-making process that must also be incorporated into a best practices model. The legislation provides certain procedural rights to the individual and outlines the obligations of the RACs and the SSAB. For example, once a decision is appealed to the RAC, the individual has the right to appear before the committee. This is a part of Best Practice 2, specifically, that the individual have the ability to respond. In light of the legislative requirements, the following best practice must be added:

Best Practice 7: Additional Procedural Requirements for Hearings at the RACs and the SSAB

For decisions of the appeal tribunals, greater procedural fairness is required, including:

a) a face-to-face hearing within thirty days of the appeal request;

b) the ability to present evidence, including witness testimony;

c) the ability to cross-examine the other party's witnesses;

d) the ability to designate a representative for the hearing and access appropriate support services;

e) the ability to adjourn to prepare for the hearing, if necessary; and

f) a written decision including reasons provided by the appeal tribunal within seven days of the hearing.

These best practices will be discussed in greater detail in Section 5.

4.6 Summary

Administrative decisions that affect the rights, interests, and privileges of an individual require a process that is procedurally fair. This includes administrative decision-making with respect to SAP overpayments.

In addition to what is required by the legislation, the SA program policies, as they relate to overpayment decisions, should act as a guide to the decision-maker in addressing and ultimately meeting the commonly accepted principles of a procedurally fair process. These processes should be reflective of best practices in public sector decision-making. Appeal tribunals must also implement a procedurally fair process that mirrors these best practices when conducting hearings and making decisions. A procedurally fair process will ensure that the Ministry, its officials and the appeal tribunals meet their obligation for, and their duty of, fairness.

5 Analysis and Findings

5.0 Best Practices

Procedural fairness is required at every level of decision-making. The content of a procedurally fair process will depend on the type of decision being made, the impact of the decision on the individual and the level of authority of the decision-maker. The Ministry's current decision making process in relation to SA overpayments is outlined in Appendix B.

Ombudsman Saskatchewan has identified the best practices required for a procedurally fair process that the Ministry, its employees, and ultimately the RACs and the SSAB should follow when making decisions about SA overpayments. The best practices outlined in this section are interconnected. Effective decision-making at each level will be, to a large extent, dependent upon the successful application of the best practices in the preceding level. For example, an individual cannot reasonably appeal the Ministry's decision of an overpayment assessment if the individual was never notified that the decision was made.

What follows in this section is an examination of the best practices for procedurally fair decision-making in relation to SA overpayments at each level of decision-making in the Ministry. We will set out each best practice (as listed in section 4 of this Report) and follow it with an examination of how that practice will apply in the context of (see Appendix C):

- the initial overpayment decision by Ministry staff
- decisions of the Collection Unit
- decision-making by the three levels of review or appeal: a review by the unit administrator and appeals to the RAC and the SSAB.

We will conclude this section with an examination of the rules and procedures for administrative tribunals (section 5.7) and the necessity of training in relation to the legislation, policies and the application of procedural fairness, as well as training specific to the appeal tribunals (section 5.8).

5.1 Reasonable Notification

Best Practice 1:

Individuals about whom a decision is being made should be reasonably notified that:

a) a decision is going to be made before it is made; and

b) the basis being used to make that decision.

Best practices within a procedurally fair process require that before a public official makes a decision, the official notifies the individual that a decision will be made. The notice should summarize the information the public official will rely on when making the decision.

In addition, notification must be given in a reasonable manner. For example, it would not be reasonable for a public official to provide notice in English to a person who does not speak English. In that situation, it is unreasonable to assume that the individual will understand the information in the notification.

5.1.1 Notification of the Initial Decision

Proper notification in advance of the initial decision to assess an overpayment by Ministry staff is a critical component of procedural fairness. Proper notice of the fact that the Ministry is considering a decision to assess an overpayment, as well as the basis upon which the decision will be made, provides an opportunity for the individual to respond or provide contrary information.[92] In addition, it is important that following the Ministry's decision to assess an overpayment, the individual is provided with notice of the decision that was made including reasons because this notice also sets out the time periods for an appeal of the Ministry's decision.[93]

The Ombudsman has identified the following Ministry actions or practices as not meeting the best practices for procedural fairness concerning notification. Each of these will be examined in more detail below:

- A failure to recognize that the initial decision to assess an overpayment is an administrative decision and therefore, proper notice, given in advance of the decision, is necessary.
- A failure to provide "reasonable" notice, especially when Ministry staff send notice letters to what is known to be an incorrect address for an individual.

Providing Notification Prior to Making a Decision on an Overpayment Assessment

The current practice the Ministry uses to assess an overpayment involves Ministry staff first determining that an overpayment has occurred and then providing written notice of the overpayment assessment to the individual. Included with that notice are the Ministry's reasons for making that decision and the information relied upon to make that decision. The notice also sets out any recovery methods the Ministry plans to use to collect the overpayment and advises the individual of the right to appeal that decision.[94] An individual may also be reminded of the overpayment assessment through other means, including a notation of the amount of the overpayment on the cheque stub of the recipient's next cheque for benefits.[95]

To understand the current practice used by the Ministry in making its initial decision to assess an overpayment, it is necessary to examine the manner in which the Ministry staff receives information that an individual may be in an overpayment situation. In the SA program, Ministry staff use an automated benefit management system referred to as "SWIN." Based on client information that is entered into the system by Ministry staff, the system automatically identifies an overpayment situation if excess entitlement has occurred, whether that is due to a budget surplus, duplicate assistance or an adjustment of benefits.[96] Once the system identifies an overpayment, Ministry staff make the decision to assess the overpayment—an administrative decision and a decision which is usually made without any notice to the affected individual.[97]

During the writing of this Report, the Ombudsman suggested that SWIN's identification of an overpayment should not automatically result in a decision that overpayment has, in fact, occurred. In response, the Ministry described the functional limitations of SWIN, noting that once the data on income, assets and needs are entered in the system, the system automatically identifies the overpayment, posts the overpayment, and adjusts the client's benefits accordingly. The Ministry contends that the SWIN system would not accommodate notification to an individual prior to an overpayment decision being made by Ministry staff.

Despite the noted limitations of SWIN, it is the Ombudsman's view that a computer program cannot take the place of Ministry staff in its decision-making process to assess an overpayment. The information generated by the computer program can be used to identify an overpayment situation; in other words, it is evidence or information that is to be considered by the Ministry staff when deciding whether or not to assess and overpayment. Procedural fairness, however, dictates that reasonable notice be given to an individual prior to Ministry staff actually assessing an overpayment. Prior to making a decision to assess an overpayment, Ministry staff must provide notice to the individual indicating:

- That Ministry staff are considering a decision to assess an overpayment.
- The information being relied upon to make that decision.
- That the individual has the opportunity to provide contrary or clarifying information.

The Ministry's practice of sending only one letter which provides notice that Ministry staff have already made the decision to assess an overpayment is not reflective of best practices for procedural fairness. It is the Ombudsman's view that the limitations of SWIN do not excuse the Ministry's duty to ensure procedural fairness. Best practices require that two letters be sent: one after the computer system generates or identifies an overpayment situation but before the Ministry staff make a decision to assess an overpayment; and a second notice should be sent after Ministry staff make a decision to assess an overpayment. In the preceding paragraph, we have set out the requirements of the first notice. The requirements of the second notice include a notice of the decision made, the reasons for that decision,[98] and any rights to appeal that decision.

Since the writing of this Report, the Ombudsman has been informed that the Ministry is developing a new computer system ("Linkin") to replace SWIN. SWIN is currently used in other Ministry programs such as those in child and family services. Ultimately, Linkin will be introduced throughout the Ministry and will replace SWIN; however, the Ministry has prioritized the child and family services program in its development of the new computer program. The Ombudsman acknowledges the Ministry's efforts to introduce the new computer program and recognizes the Ministry's need to prioritize its efforts and resources. The Ombudsman also recognizes the finite nature of Ministry resources, but encourages the Ministry not to overlook the needs of the SA program and other income assistance programs during the development and implementation of Linkin. Specifically, the Ombudsman encourages the Ministry to consider the importance of procedural fairness when developing the operational and program requirements of Linkin. For example, in the future Linkin should be able to accommodate notification to individuals that a decision which is adverse to their interest is being considered by the Ministry, before that decision is made.

Notification Must be Reasonable

A second issue of concern about the level of procedural fairness provided by the Ministry arises in the context of a certain practice previously used by the Ministry.

Prior to October 2009, the Ministry practice for notification of a decision, including the decision to assess an overpayment, involved providing written notice sent to the last known address of the individual or the address on the individual's SAP file.[99] Once a notification letter had been sent, the Ministry assumed that it had been received by the individual. While this practice was not problematic for those individuals whose contact information with the Ministry was current, for those whose contact information was not current, they were left at risk of not receiving the notification.

In the event that Ministry staff became aware that a former SA recipient had not, in fact, received a notification letter (such as might occur if the letter was returned to the Ministry by the postal service), Ministry staff would, if time permitted, try to locate an updated address by looking on publicly accessible online telephone directories or on the provincial health insurance database.[100] The Ombudsman investigators, however, were told that even if Ministry staff were aware that a former recipient's address was incorrect, they would continue to send letters to that incorrect address.[101]

Procedural fairness requires that the means of notification be reasonable. The Ministry's past practice of sending a letter to an address where the individual no longer resided was not reasonable notice and not reflective of best practices.[102]

Since and in response to the writing of this Report, in October 2009 the Ministry introduced a "SAP Documentation guideline" that directs staff not to continue to send correspondence to addresses known to be incorrect. The Ombudsman acknowledges the Ministry's effort to ensure that its practice complies with best practices for procedural fairness in this regard. Although this Ministry practice was discontinued in the context of the one notification letter sent by the Ministry to an individual advising of the overpayment decision, it is equally important that the practice not occur for any notice, including the recommended notice to advise individuals that the Ministry is considering a decision to assess an overpayment.

5.1.2 Notification by the Collections Unit

Although the CU does not have any decision-making authority with respect to whether an overpayment is owed, the CU still makes certain administrative decisions to which best practices apply. These administrative decisions include:

- Any decisions about the voluntary repayment of an overpayment, including decisions about the amount that is acceptable and the timing of those voluntary payments.
- The decision to refer a file to the CRA-RSO program, including any decisions relating to the collection of the overpayment once referred.
- The decision concerning whether or not an individual qualifies for financial hardship status.

Once a file is sent to the CU, they attempt to contact individuals both in writing and by telephone.[103] The letters request that the individual contact the CU to work out a voluntary repayment schedule. The letters also advise that the Ministry uses the CRA-RSO program to collect overpayments, which process could involve diverting the individual's income tax refunds and GST rebates.[104]

Although the CU sends notification to an individual that it may use the CRA-RSO program to collect the overpayment, it does not send another notice to the individual (once a decision has actually been made to register the individual with the program) advising the individual of the registration and of the information used to make that decision.

While the lack of notification by the CU does not comply with the rules of procedural fairness, the subsequent steps taken by the CRA after the Ministry registers the individual in the CRA-RSO program are likely sufficient to overcome these concerns. CU staff reported that upon registration with the CRA-RSO program, the CRA notifies the individual of the registration.[105] This notification, along with the provision of a "grace period" during which the CRA will not divert an individual's federal entitlements to repay the overpayment, allows the individual an opportunity to address the overpayment before any collection action is taken to within the CRA-RSO program, including the attempt of an appeal of the overpayment assessment.

5.1.3 Notification at the Appeal Levels

First Level of Appeal — Review by a Unit Administrator

When an individual is notified of the Ministry's initial decision to assess an overpayment, the individual is advised of the right to appeal that decision within 30 days. An individual's written appeal is "registered" with the Ministry and the Ministry's unit administrator reviews and, if necessary, corrects the decision.[106] In carrying out its review, the unit administrator often speaks to the individual and attempts to resolve the issue. If no resolution is reached and the unit administrator finds no errors with the decision, a hearing by the second level of appeal, the RAC, is arranged and the Ministry notifies the individual of the date and place of the RAC hearing.

Assuming that the Ministry follows the recommended best practices for notification of the initial Ministry decision,[107] the Ombudsman has no procedural fairness concerns in relation to the issue of notification at the unit administrator level. Given that the review has been requested by the individual, the individual is already aware that the unit administrator is considering a decision on the matter. It is only necessary to emphasize that a procedurally fair process, in terms of notification, must include disclosure by the unit administrator of any information that is being considered in the review decision. It is also important that the individual be properly notified of the unit administrator's decision (whether it be a decision to correct an error or to dismiss the appeal), the basis of the decision (including the information relied on), and if unresolved, the date and place of the RAC hearing.

Second and Third Levels of Appeal — RACs and SSAB

Notice of a hearing at both the RAC and SSAB level are set out in the Regulations and the Ombudsman does not take issue with this notice.

For appeals to the RACs and SSAB, the Ministry is required to provide the individual and the tribunal with the reasons for the initial Ministry decision as well as the information they relied on to make the decision. This "notification" is given in an Appeal Report, prepared by the Ministry for the RAC. If the matter is subsequently appealed to the SSAB, the SSAB is provided with a summary of the issues and the letter decision of the RAC. The information must be provided in advance of the hearings, usually within three working days of the hearing date. At each level of appeal, this information should be provided to the parties with sufficient time to allow the parties to review and, if necessary, respond to the evidence.

In interviews with tribunal members, the Ombudsmen investigators were told that the Ministry does not always meet the required timeframe for submitting the information and that it is not unusual to receive the information on the day of the hearing.[108] If tribunal members are not receiving information in a timely manner, it is questionable whether they can fairly and fully consider all the information put before them prior to making a decision. The late notification of this information is very problematic for the individuals appearing before the tribunal because they have little time to prepare their response to the Ministry's position as set forth in the Appeal Report.

5.2 The Ability to Respond

Best Practice 2:

Following proper notification and before the decision is made, the affected individual should be provided with:

a) an opportunity to review the information being considered; and

b) an opportunity to provide the decision-maker with alternative or contrary information.

The right to respond includes the rights:

- to provide one's side of the story
- to explain any information that is before the decision-maker
- to provide any additional, alternate or contrary information that is relevant to the decision
- to reveal any information that may mitigate the situation.

Procedural fairness does not require a face-to-face hearing for every type of administrative decision. For most administrative decisions, it is acceptable if the individual has the opportunity to respond to the decision-maker in writing, particularly if there is an opportunity for a face-to-face meeting later in the process. The procedure, through which the individual may respond, however, must be reasonable and appropriate in the circumstances.

The Ombudsman suggests that given the nature of the SA program and its use of human service workers or social workers, there should be a requirement for a face-to-face meeting with Ministry staff. Although the principles of procedural fairness may not require a face-to-face meeting at certain levels in the decision-making process of assessing and recovering an overpayment, it is generally an accepted best practice to do so within the human service sector. Such meetings not only provide individuals with an opportunity to explain their story, but also can assist the SA worker or supervisor to assess an individual's credibility[109] and also better manage the relationship between the Ministry and the individual. Many overpayment situations occur because of misunderstandings or inaccurate information. An in-person meeting might quickly resolve the issues at the beginning of the process, rather than at the end.

5.2.1 The Ability to Respond to the Initial Overpayment Decision

The current practice of the Ministry is not to provide notice to an individual that an overpayment may be assessed prior to the decision being made. Notification is provided only once a decision has been made. It is at that point that the individual is given an opportunity to respond and provide evidence. Currently, the timing of the notice and opportunity to respond does not follow the requirements of a best practices model of procedural fairness and forms the basis of the Ombudsman's recommendation, outlined in 5.1.1, for a two-stage notification process.

If during the early stages of the decision-making process "unfairness" or a mistake occurs, a procedurally fair process will often correct the "unfairness" at the higher levels of review. For example, in an overpayment situation, even though a SAP worker has posted an overpayment, that decision can be reversed with supervisory approval. While there is the possibility that unfairness could be corrected at a higher level of review, Ombudsman investigators found that this has, in fact, been difficult to achieve when it comes to an overpayment decision.[110] The Ombudsman investigators were told that overpayments are not likely to be reversed unless the individual provides some substantive proof that the overpayment did not occur, preferably in the form of documentation from an independent third party such as an employer, landlord, or government department.

In these situations, the fact that overpayments can be reversed will likely not be sufficient to overcome the initial lack of fairness. This is because once the initial decision has been made, the "onus of proof" shifts from the Ministry to the individual who received the overpayment. "Onus of proof" is a legal term referring to which of the parties has the obligation to prove their case. If the evidence results in a stalemate or a tie, then the benefit of the doubt is given to the party who does not have the onus of proof.

In the case of overpayments, it is the Ministry that should have the obligation to prove the assessment and calculation of the overpayment at the stage of the initial decision by Ministry staff. Individuals should not be required to provide evidence to prove the Ministry wrong, as they currently are required to do at the level of the appeal to the unit administrator. It is for these reasons that the unfairness at the level of the initial decision by Ministry staff cannot be corrected at the first level of appeal.

The onus of proof goes together with another legal term—the "standard of proof." The "standard of proof" refers to how much evidence has to be demonstrated by the party that has the onus to prove their case. The proper standard of proof relevant to overpayment decisions is that the Ministry's evidence must demonstrate that it is more likely than not that an overpayment has occurred. In the current situation, given the Ministry's automatic assessment of an overpayment without any opportunity for a response by the individual, the Ministry is not being held to this standard of proof at the level of the initial decision by Ministry staff.

The Ombudsman investigators found that the Ministry's current practice is to first decide that an overpayment occurred and then require the individual to prove that the overpayment did not occur at the level of an appeal to the unit administrator. This current practice does not comply with procedural fairness requirements. Therefore, along with the Ombudsman's recommendation of a two-stage notification process at the level of the initial Ministry decision, the Ombudsman recommends that the individual have an adequate opportunity to respond before the Ministry staff make that initial decision to assess an overpayment.

5.2.2 The Ability to Respond to the Collections Unit

The notification letters sent by the CU urge individuals to contact the CU to discuss their overpayments and how they intend to repay the Ministry. All letters sent by the CU inform the individual that the Ministry uses the CRA as a collection agent.

The Ombudsman does not have an issue with the individual's opportunity to respond to the CU in relation to the decision to refer an individual's debt to the CRA-RSO program, even though the CU does not notify the individual about the decision or action to register the individual prior to registration.[111] The Ombudsman also does not have any concerns with the individual's opportunity to respond with respect to decisions relating to voluntary repayments.

The CU also makes decisions relating to whether or not certain individuals qualify for "hardship status" which provides them with relief from the obligation to repay the overpayment. The Ombudsman investigators did not note concerns in relation to administration decision-making by the CU about whether or not a particular individual qualified for hardship status.[112] The investigators, however, did note concerns about the Ministry's ability to ensure that all individuals were aware of their right to make an application for hardship status and their right to respond or provide their information to the CU when claiming hardship status.

CU staff advised that they provide a Statement of Affairs package only to those individuals who either ask that it be sent to them or those individuals who specifically claim that repayment would cause a financial burden. The Ombudsman finds it problematic that there is no general notification given to all individuals that a hardship application may be made. Without this notification, individuals may never be aware of the availability of this relief and, accordingly, will be unable to provide their information to the CU.

When a person contacts the CU claiming hardship, whether before or after registration with the CRA-RSO program, the CU can assess whether repayment would be a financial burden. The information used by the CU to assess hardship is collected through the Statement of Af-

fairs package. Individuals are advised in a form letter sent with the Statement of Affairs package that they are required to send the CU:

- their most recent income tax return and the tax return of their spouse, if any
- copies of recent paystubs to indicate family income
- documentation to verify a disability, if applicable.

The Statement of Affairs package requires the individual to submit a detailed household budget, including estimates of monthly income and expenses, such as property taxes, utilities, household repairs and maintenance, medical expenses and so on. An instruction sheet, giving information about how to fill out the application is also sent out with the package. Upon a review of that instruction sheet, the Ombudsman is of the opinion that, depending on the individual's personal circumstances and literacy levels, the instruction sheet may not provide adequate assistance for the individual to independently complete the application.

The form letter sent along with the Statement of Affairs package states, "If you have questions regarding the form or supporting information, please do not hesitate to call [the CU]."[113] When interviewed, CU staff stated that they do, on request, provide assistance to individuals filling out the Statement of Affairs application.[114] This assistance is provided over the telephone through a toll-free number. Individuals are not provided with in-person assistance.

For some individuals, telephone assistance may be inadequate. Some individuals, due to literacy issues or a learning disability, may require a face-to-face meeting. The Ombudsman believes that it is necessary that individuals be able to obtain help, in-person, when help is needed and requested. In-person assistance could be provided through the regional or local Social Services office serving that individual. This type of assistance would provide individuals with better access to making legitimate applications for hardship.

Based on current Ministry practice, it is unclear if all individuals who could qualify for hardship considerations have proper access to such a claim. Hardship exemptions can only be considered by the CU if the individual knows about the availability of a hardship claim, understands how to make an application, and is able to successfully and independently fill out the application.

5.2.3 The Ability to Respond to Decision-makers at all Three Levels of Appeal

First Level of Appeal — Review by a Unit Administrator

The current practice of the Ministry at this level of appeal is to permit individuals, upon request, an opportunity for a face-to-face meeting with the unit administrator. This includes former as well as current clients, although if an overpayment has been assessed a number of years ago and the Ministry has registered that overpayment with the CRA-RSO program, a face-to-face meeting may not always be provided.

As previously mentioned in section 5.2.1, the Ombudsman found that the unfairness caused by the individual's lack of ability to respond at the level of the initial overpayment decision was not corrected by a subsequent ability to respond at the level of the review by the unit

administrator. This conclusion was drawn, in part, because of the requirement at the unit administrator level that the individual prove the Ministry wrong in its assessment of the overpayment, by providing significantly convincing evidence to establish that the overpayment decision was made in error. This process wrongly transfers the onus of proof to the individual on the first occasion that the individual has an opportunity to respond. If a two-stage notification process is implemented at the level of the initial decision by Ministry staff and the individual is afforded an opportunity to respond before that initial decision is made, an individual will be afforded proper procedural fairness at the first level of appeal, that is, the review by the unit administrator. Therefore, if the procedure is corrected at the first stage, the review by the unit administrator will truly be conducted as an "appeal," as is required by the Regulations.

Second and Third Levels of Appeal — RACs and the SSAB

Generally, the current appeal structure provides an adequate opportunity for individuals who are appealing issues to present their case and information at these levels of appeal. Decisions made at each level of appeal, however, are highly interconnected. If a mistake is made at a lower level of appeal it can either be exacerbated or corrected at the next level. Any unfairness becomes difficult to correct if the hearing process at any of the appeal levels is inconsistent and fails to provide procedural fairness.

For decisions made at the RACS and SSAB, there is a procedural fairness requirement for face-to-face hearings. The Regulations specifically require a face-to-face hearing at the RAC level and, although the Regulations do not make this specific requirement with respect to hearings at the SSAB, such a requirement is implied by the Regulations. These hearing are not public hearings.[115]

With respect to the process used at the appeal hearings, the Regulations specifically set out the process to be used at the RAC level, while the SSAB's process is outlined in Minister's Order #5/81. The Minister's Order outlines a hearing process very similar to that outlined in Regulations applying to the RAC hearings. Therefore, the process used in both appeal hearings allows the individual and the Ministry to submit evidence, including witness testimony. Both parties and the tribunal members are also able to question any witnesses.
The RACs and the SSAB are responsible to manage the process used in their hearings. Running a hearing requires that all tribunal members be well-versed in appropriate hearing and decision-making procedures as they relate to administrative tribunals. It also requires that members of the tribunals are familiar with any legislation, regulations and Minister's Orders that guide their process.

The Ombudsman Investigators noted a general lack of knowledge among tribunal members about hearing and decision-making procedures that may affect how a hearing is conducted and could impact the parties' ability to effectively respond in the hearing. For example, we noted that appeal tribunal members were unable to explain who was permitted to present a case at a hearing, what the applicable standard of proof was, and who had the onus of proof. A decision made at these levels may be compromised if the decision-makers do not know basic hearing procedures. Further guidance and training for the appeal tribunals is required to ensure that decisions are being made correctly, reasonably, and fairly.[116]

5.3 Consideration of Relevant Information

Best Practice 3:

All relevant information should be fully and fairly considered by the decision-maker and information that is irrelevant to the decision at hand should not be considered.

Relevant Information

An important part of the decision-making process is the assessment of information. Determining what information is relevant and what is not is an essential aspect of the decision-maker's role. Relevant evidence is evidence that relates to the issue to be decided. Questions to determine relevance may include: "Does the evidence have a logical connection to the issue?" or "Does the evidence assist in proving or disproving the issue?" Any information that is not relevant to the decision should not be considered by the decision-maker.

Weighing the Information

In addition to considering all of the relevant information and disregarding information that is not relevant, the decision-maker must also determine which information should be given more credence or "weight" in the decision-making process. Frequently, the information before the decision-maker is contradictory. It is the role of the decision-maker to resolve the contradictions by determining what information should be given more weight. As part of this assessment, it is important to consider the reliability of the information received.

The Role of Program Policies in Administrative Decision-making

Program policies are necessary. They are designed to help achieve the goals of the program and to establish a basic standard and consistent approach in service delivery. They are to act as a guide to the public sector decision-maker when making case or program decisions.

Given the importance of program policies to the decision-making function at all levels of the SA program, it is necessary to outline some important considerations on the role and use of policies and their relationship to the principles of procedural fairness. It is important to remember that at all levels decision-makers, including Ministry staff that make the initial overpayment decision, apply policy and, in doing so, necessarily exercise discretionary authority. As such, Ministry staff are required to observe the principles of procedural fairness when making decision related to SA overpayments.

Too strict adherence to policy sometimes leads to results that are contrary to the program goals. When implementing program policies, several questions must be kept in mind. What are the goals of the program? Does the policy generally advance the program goals? Does strict adherence to the policy in an individual case situation meet the overall program goals? If the answer to the final question is "No," then the decision-maker should be provided some flexibility with respect to the discretionary application of the policy.

Generally a program's policy should be one of the factors considered when making certain administrative decisions.[117] Policy should not to be treated as "law" or as binding in every instance.

The Australian Administrative Review Council's Best Practice Guides on Administrative Decision Making provides some suggestions for administrative decision-makers about the use and application of policy in public sector decision-making. They suggest that:

> A policy can guide decision making, but it must not prevent a decision maker exercising discretion. It cannot constrain them to reach a particular decision; nor can it prevent them taking all relevant considerations into account. Policy must not be applied inflexibly…The decision maker must be prepared to consider whether it is appropriate to depart from the policy in an individual case. Otherwise, the policy is effectively a rule, which is inconsistent with discretionary power.[118]

5.3.1 Assessing Relevant Information in the Initial Overpayment Decision by Ministry Staff

Current Ministry policies provide limited guidance to a SA worker or supervisor when making decisions related to overpayments; specifically, how one considers information including the relevance of information and considerations of the weight and reliability of information.

The Ombudsman investigators were told that when assessing information, Ministry staff rely heavily on paper documentation, giving this information significant weight and credibility. Though it is essential to reach decisions based on reliable evidence, all relevant information needs to be fully and fairly considered. Paper documentation is not the only reliable source of information.

On the other hand, second-hand or "hearsay" information is often a less reliable source of information and should not be given significant weight. This consideration is especially relevant to third-party complaints made anonymously to the Ministry. Historically, unverified third party complaints were given significant weight, even in the face of contradictory evidence.[119] The current practice of the Ministry is not to rely solely on third-party anonymous complaints. Interviews with regional staff revealed that many staff find this type of evidence wholly unreliable.[120] We believe that the Ministry is now responding properly to these types of complaints; however, for overpayments dating back a number of years that are now the subject of collection through the CRA-RSO program, it may be necessary for the Ministry to review the cases to ensure that the overpayments were assessed on the basis of credible and reliable information.

Ministry policies also provide limited guidance for Ministry staff when they are assessing the credibility of information provided by individuals subject to overpayment decisions. Further, some policies set out "rules" that are improper as guidelines for the proper consideration of evidence. For example, one policy requires staff to disregard specific oral information provided by SA program clients and former clients in an overpayment situation no matter how credible that information may seem to the worker. In responding to this Report, senior Ministry staff indicated their view of the policy: "Appropriate documentation or verification [such as pay stubs] is used to determine the overpayment. The client's verbal statement about the

amount of the wage is not sufficient."[121] This policy that would imply that a client's oral information is not considered as sufficient or credible evidence.

Ombudsman investigators found that questions regarding an individual's overall credibility stemmed, in part, from the fact that some individuals are untruthful with their SA worker and some individuals even commit fraud. On the contrary, our review of the information provided by the Ministry shows that the cases of fraud are few. It cannot be assumed that simply because one SA recipient has lied to a worker that all SA recipients will lie. If credibility is in issue, it should be for a reason that relates to the facts of the particular situation and the individual in question.

As a result of the limited guidance provided by current SAP legislation and policy in these areas, what is required is training to ensure that Ministry staff understand their roles in reviewing information or evidence, using only relevant evidence to make their decisions and applying weight to information on the basis of factors such as reliability and credibility. Ombudsman investigators found that Ministry staff are not currently provided sufficient training on these aspects of their decision-making powers.

The Application of the SA Program Policies and the Use of Discretionary Authority by Ministry Staff

The overwhelming majority of Ministry staff interviewed reported that they consider the SA program policy as "law," and on the same level as, or perhaps more important than, the actual legislation.[122] Furthermore, some Ministry staff stated that they believe that if they make decisions outside of policy, they could be subject to sanctions through the performance review process.[123]

When asked about the use of their discretionary authority, regional staff uniformly told the investigators that they have no discretionary authority in relation to overpayments. Any of the staff who believed they have some limited authority indicated that the extent of their authority is limited to what is outlined in the program policy manual.[124] In addition, the investigators were informed by the majority of regional staff that if the Ministry policy is silent on an issue, it means that they are not allowed to make a decision about the matter.

The Ombudsman investigators found that there seems to be a misunderstanding by Ministry staff about the relationship between the legislation and policy and the limitations of policy. If something is authorized by the Act or Regulations, it is absolutely permitted. If something is required by the legislation, it must be done. If a policy does not conform to legislation or regulations, then the policy should not apply. Where the policy is silent on an issue or it is unclear how the policy should apply to individual circumstances, the decision-maker has some discretion about what can be done. Policy is a way to help standardize key program decisions across the province and is a guideline that can be used to assist the individual decision-maker. Policy should not be rigidly applied or interpreted, and decisions must still be made based on the individual circumstances of each situation.

The Ombudsman investigators found that the concept of discretionary authority appears to be an unfamiliar concept in the SA system. The application of discretionary authority requires an understanding of the program policies and rules to which one can apply one's authority. Several Ministry staff complained that the current policies with respect to overpayments may

be too rigid and complex. As stated by one staff person, "It gets so complex that you spend so much time trying to figure out the rules."[125] Staff who are either unaware of the rules or do not understand the rules, can make errors that could result in an overpayment being assessed to the client. The consequence of a Ministry error is borne solely by the individual client or former client because the individual is required to repay the overpayment made in error, unless the individual is successful with an appeal. For many staff, it is felt that it is often better not to make a decision in case their actions inadvertently result in an error and an unwarranted overpayment assessment.

Though many staff claimed either not to have any authority or only limited discretionary authority, staff also stated that they believe that they have sufficient discretionary authority to do their job. When asked if they felt they needed more discretion, the majority of regional staff stated that they did not want additional discretionary authority. Others worried that discretion of any form may lead to errors or a general unfairness for all program clients as it may lead to inconsistencies where one client receives a benefit while another client is charged an overpayment.[126]

Though staff may not acknowledge or understand their discretionary authority, Ministry staff are indeed exercising discretion when considering cases involving the possible assessment of overpayments. Every time Ministry staff decide to prefer certain information over other information, that is an exercise of discretion. Even staff members not fully exercising discretionary authority, as a means to avoid an error or performance sanctions, are making discretionary decisions. Staff members who apply the policies uniformly across cases without consideration of individual case circumstances are also making discretionary decisions.

Ministry staff make discretionary decisions in relation to the application of SA program policies on a daily basis, whether they understand they are doing so or not. Even when the policy provides a black and white direction on what should occur in a certain situation, no policy is absolute. Ministry staff decide what information they will use to make a decision and how that information relates to what is stated in policy. Problems arise when staff do not recognize they are exercising their discretionary authority and, therefore, are not turning their minds to whether they are appropriately exercising that authority.

The Ombudsman investigators examined the training that is currently provided to staff to determine if that training provides the information staff need to effectively apply their discretionary authority and to review the interplay of that authority with the daily application of program policy. We found that staff do not receive sufficient training to assist them in understanding what their discretionary authority is and how to exercise their discretion in light of SAP policy.

5.3.2 Assessing Relevant Information by the CU

There are few provisions in the Act and Regulations that relate to the decisions being made by the CU, other than mention of the fact that overpayments are debts owed to the Crown and can be recovered through administrative means.[127] In addition, the CU does not currently have adequate written policies or procedures to assist them, although they have advised us that they are developing such policies.[128] Ombudsman Saskatchewan recognizes their efforts to update their policies and standardize their practices.

The Ombudsman believes that the CU staff have significant discretion in making decisions related to repayment, hardship applications, and the registration of an overpayment with the CRA-RSO program. We believe that the CU's current level of discretion is needed and appropriate as it provides the CU staff with ample flexibility to carry out their required duties. As with regional staff and appeal tribunal decision-makers, the CU staff must recognize their discretionary authority and ensure that they are exercising it appropriately. They must weigh all evidence fairly and consider only relevant evidence when making their decisions. Also, it is important that in developing their policies, the CU retains the level of discretion the staff currently exercises.

5.3.3 Assessing Relevant Information at the Appeal Levels

The First Level of Appeal — Review by a Unit Administrator

Unit administrators, who are regional Ministry staff working out of the regional offices, have many of the same issues relating to their use of information and evidence as do the workers and supervisors that they manage. They similarly place policy as the most significant consideration and appear generally unwilling to deviate from policy even where the facts of an individual case warrant it. When reviewing issues and making their decisions, unit administrators also seem to have difficulty in understanding what is relevant evidence, and how to weigh reliability and credibility.

In SA program policy, unit administrators are granted more visible discretionary authority than are other Ministry staff. They recognize discretionary authority that is explicitly laid out in the policy manual. They do not appear to recognize the discretionary authority that they, and all Ministry staff, have implicitly.

The Second and Third Levels of Appeal — RACs and the SSAB

As discussed under Section 5.3.1, training is important to ensure that decision-makers understand how to correctly and fairly make administrative decisions, including what information they should consider, what information should be given more weight, and how to appropriately apply their discretionary authority. This applies to all decision-makers in the SA system, including members of the appeal tribunals. However, as will be discussed in more detail under Section 5.8.2, the appeal tribunal members do not receive adequate training in any area and receive almost no training about how to properly evaluate information and make an administrative decision.

Ombudsman investigators found that there were situations where the appeal tribunals would be improperly provided with information that was not relevant to the decision they were making. For example, information that is not relevant that has been considered by the RACs and the SSAB is the Ministry's suspicion that a person has committed fraud. The Ombudsman investigators were told that some Appeal Reports submitted to a RAC or the SSAB include information that the individual is suspected of committing fraud or may be referred to the police for a fraud investigation.[129] The Ministry's suspicion that someone may have committed fraud is an allegation that has yet to be proven and is not relevant to the deliberations of a RAC or the SSAB when considering whether an overpayment occurred. For this reason, it should not be considered by the RACs or the SSAB.

More importantly, information about suspected fraud may affect the decision-maker's perception of the individual's credibility, with the result that the information is prejudicial to the individual. It is important that these kinds of allegations are not taken into consideration by the decision-maker. For RAC and SSAB members, however, who do not know how to assess what information is relevant and how much weight to give information, they may not understand that this is the type of information that they cannot consider. Again, training for the members of the appeal tribunals is necessary to ensure that they consider only relevant information.

Second and Third Levels of Appeal — Application of SAP Policies and the Use of Discretionary Authority

The appeal tribunals also appear to regard SA program policy as a "rule" rather than a factor to consider when making their decisions. Although the RAC and SSAB members have been advised that they are not bound by the policy,[130] the Ombudsman investigators were informed of cases where members of the tribunals were overly reliant on policy. In one case, described separately to investigators by both a tribunal member and an anti-poverty advocate, the advocate was asked by the tribunal to point out, "where in policy does it say that we can do what the client is asking for?"[131] This approach implied that in that case, the tribunal acted as if it was bound by policy and that any decisions it made were restricted to solutions found in the policy.

The Ombudsman is concerned that the appeal tribunals do not understand the nature and limits of their discretionary authority. This may be related to a lack of training, but also may reflect the tribunals' over-reliance on the Ministry and the information it provides to the tribunals.

The SA system is a highly regulated and complicated system. Its program policies provide limited guidance to tribunal members. Also, there appears to be no training provided to the RAC members and limited training provided to the SSAB members. All RAC members stated that when they have questions about how to interpret policies, they seek advice from Ministry staff. The Ministry and its staff are viewed as "experts" in the SA program and its policies. Given the position of Ministry staff in the SA system, the Ministry's information is improperly viewed as more reliable than that of a client or a client advocate.

Part of the role of the RACs and the SSAB is to determine if a particular SA program policy is fair and reasonable, and whether it applies in the individual case before them. If the appeal tribunals do not agree with policy in a given case, they are not required to follow policy. In addition, the tribunals are entitled to make recommendations to the Minister on needed changes to policies.[132] If policy is not fair or reasonable, it is the tribunals' responsibility to bring the matter to the attention of the Minister. Again, training and guidance would assist members of the RACs and the SSAB in understanding their role and the function of SAP policies in their decision-making.

5.4 Decisions Should be Reviewable and Correctable

Best Practice 4:

All decisions should be open to review and be correctable.

Best practices and procedural fairness require that most administrative decisions be reviewable or appealable if there is a concern with the substance of the decision or with the process used to reach the decision. It is best practice to provide a review process to ensure that decisions are correct, fair, and reasonable.

Most decisions related to overpayments can be appealed. The Regulations state that a request for an appeal may be made by an individual who is dissatisfied with a decision to the unit administrator and, once the request has been received, the unit administrator shall review the matter to determine if an error was made. The Regulations, therefore, set the first level of appeal as an internal appeal, with a review conducted and decision made by the unit administrator.

If the unit administrator finds that no error was made and that the matter is not otherwise resolved, the matter can be scheduled for a hearing with the RAC. The legislation provides for this appeal to the RAC (second level of appeal) and, if necessary, the decision of the RAC can be appealed to the SSAB (third level of appeal). In addition, SSAB decisions are subject to judicial review through the courts.

5.4.1 Access to Review: The Initial Overpayment Decision by Ministry Staff

The appeal process provided by the Act and Regulations for the initial decision of Ministry staff to assess an overpayment meets the best practices requirement to provide a route for appeal or review. The right to appeal is, however, only meaningful if the best practices with respect to procedural fairness are followed at all levels of the decision-making process. For example, if individuals are not notified that the Ministry decided they had been assessed an overpayment until after the appeal deadline has passed, then their right to an appeal has been interfered with and they have not been given a fair process. Our review determined that there is a general lack of procedural fairness in the decision-making process with respect to overpayments at the initial Ministry level.[133] This lack of procedural fairness could interfere with individuals' rights to appeal by limiting their access to a review and an appeal.

5.4.2 Access to Review: Decisions of the CU

The CU has discretion with respect to decisions about the recovery of overpayments, hardship applications, and the registration and de-registration of an individual with the CRA-RSO program. Given the potential impact of these decisions, they should be subject to review and correction. Currently these decisions, if objected to, can be reviewed by the CU supervisor. This practice is not yet supported or guided by policies or procedures.

The Ombudsman believes that, at minimum, decisions about whether an individual qualifies for hardship should be subject to an external review and appeal. This could be accomplished through a right of appeal to the RACs and the SSAB.

5.4.3 Access to Review: The Appeal Decisions

First Level of Appeal — Review by a Unit Administrator

When individuals disagree with the decision to assess an overpayment on their files, they have the statutory ability to "appeal" that decision. Upon providing an appeal request in writing to the Ministry, that appeal will first go to the unit administrator, an out-of-scope manager employed by the Ministry. The unit administrator is required to review the issue that has been appealed, seeking out all information that is necessary. In doing so, the unit administrator must make an administrative decision on whether or not "an error has been made" by the Ministry in its assessment of the overpayment and, if an error has been made, "if an adjustment to the satisfaction of both parties is possible."[134] It is only if the unit administrator finds that an error has not been made that they are to schedule a hearing at the second level of appeal—the RAC.

Generally speaking, there is access to a review or appeal built into the SA program. One major issue of concern to the Ombudsman though, is the fact that few Ministry staff interviewed by Ombudsman investigators recognized the review by the unit administrator as a level of appeal. While Ombudsman investigators found that the staff in regional offices were reviewing the overpayment decision when an appeal was registered to determine if there were any errors, Ministry staff often failed to understand that this was a separate level of appeal through which a separate administrative decision (in particular, the decision on whether or not the Ministry made an error) is produced. As a result, it is not clear that procedural fairness has been provided when making this decision.

With respect to appeals, one Ministry practice that remains of concern to the Ombudsman is the Ministry's interpretation of the commencement of the time period for appeal. Even though the Regulations prescribe the appeal period as expiring "30 days after notification of a decision," the Ministry considers the commencement of the 30-day appeal period as the date it sent the letter to the individual, not the date on which the individual receives the letter. Furthermore, in the most recent policy amendments, it is also clear that the Ministry must receive the request for an appeal within the 30-day window as well.[135] This interpretation unduly limits the time frame for an appeal and may mean that some individuals who wish to appeal a decision are unable to do so.

Connected to the issue of how appeal timeframes are calculated, is an additional issue regarding whether or not the Ministry is willing to allow an appeal to proceed when it receives the request outside its interpretation of the regulated timeframe. In our interviews with Ministry staff, Ombudsman investigators were advised that in two of the four regions, an appeal at the first level will be granted even if the appeal request is received after 30 days have lapsed since the initial notice letter was sent. In the remaining two regions, unit administrators would refuse to review the matter if the appeal request was received after the regulated timeframe for an appeal. In either event, the policy specifically states, "If the client appeals

after 30 days the request is filed with the committee chairperson who advises the client that a hearing cannot proceed because the time period has lapsed."[136]

The Ombudsman has two separate concerns with appeals registered late. First, it is not fair to have an inconsistent practice between regions on whether or not they will allow a review by the unit administrator. It has seemingly been left to the discretion of the unit administrators to determine whether they are willing to review the matter. The Ombudsman agrees that the unit administrators should exercise their discretionary authority in making these decisions. All unit administrators should be looking at the facts of each late filed appeal to determine whether a review is warranted. Right now it appears that some unit administrators will look at the case, while others blindly follow the policy that no appeal shall be granted after 30 days. To echo an earlier finding, more training is needed so that the unit administrators understand their discretionary authority and how to use it.

The second concern that the Ombudsman has in this regard stems from the fact that even if a late-filed appeal is reviewed by the unit administrator, Ministry staff do not allow further appeals to proceed to the tribunals. While limiting appeals to those filed within the regulated timeframes is an acceptable practice, when considered with other issues already described in this Report (such as the failure to notify people prior to a decision being made, the prior practice to send notification to knowingly incorrect addresses, and the additional limitations on the length of the appeal period as defined by policy and in contradiction to the Regulations),the Ombudsman believes that the appeal tribunals must have some discretion on whether or not to allow an appeal to proceed when it is filed beyond the timeframes set forth in policy. Since the appeal tribunals are not bound by policy, they appear to have some discretion to provide relief from time limits for filing an appeal, even where policy suggests that appeals registered after the 30-day period should be refused. Combined with the lack of training provided to the appeal tribunal members, it is questionable whether the members understand that the Regulations could be interpreted differently from how they are set out in the SAP policy.

Second and Third Levels of Appeal—RACs and the SSAB

Provided in the Act and Regulations is a right to appeal an overpayment decision to the RACs and then to the SSAB. The Ombudsman recognizes that the Ministry has an appropriate appeal structure in place at these levels. The Regulations specifically state that decisions of the SSAB are final. There is some limited opportunity, however, to have decisions of the SSAB reviewed by the courts, provided that an individual wishing such a review has resources to hire a lawyer and file a court action.[137]

Though an appropriate appeal structure is in place, the manner in which the appeal hearings are currently conducted follows an adversarial model of inquiry in which one party, the Ministry, is in an advantageous position. The conduct of appeal hearings, though informal, appear to be much like a court process, where each of the parties presents its information and its argument and the tribunal decides the case based on the information provided to it by the parties. As found by the Ombudsman, there is a heavy reliance on Ministry staff in the tribunal hearing process. In addition, Ministry staff typically have many more resources at their disposal than does a client. Ministry staff are professional staff representing the government. Although clients are permitted to have an advocate and the Ministry will pay $45 per

hearing for an advocate, the SAP client and former SAP client are often alone and have few, if any, resources to assist in presenting their case.

The Act and Regulations are silent concerning the appropriate hearing model that should be used by the RACs and the SSAB. Currently, in the hearings, it is the role of Ministry staff to provide the tribunals with nearly all of the information relevant to the case, whether or not that information supports the Ministry's position. The role of the SAP client or former client is to provide needed information and answer any questions.

In the Ombudsman's view, the Act, Regulations, and the nature of the appeal tribunals and their hearing processes all support an "inquiry-based" procedure, as opposed to the current adversarial model. In an inquiry-based procedure, it is the role of the tribunal members to collect the information they need to make the decision, rather than relying on the parties to provide that information. An inquiry-based process is a better model in these circumstances given the power imbalance involved in the current process.

5.5 Provision of Adequate Reasons

Best Practice 5:

Adequate reasons for the decision must be provided to the individual. At a minimum, reasons for a decision at all levels should include:

a) a statement of the decision;

b) a summary of the information relied upon by the decision-maker;

c) an explanation of how any contradictions in the information were reconciled by the decision-maker; and

d) any other relevant reasons for making the decision.

In the *Baker* case, an important issue addressed by the Supreme Court was the need to provide to the affected parties reasons for the administrative decision. The Court did not find that written reasons were required in every case. Rather, the Court held that written reasons are required in certain circumstances, including cases where the decision would have significant impact on the individual and cases where there is a statutory right of appeal.[138]

In speaking broadly about the desirability and usefulness of reasons, the Court held:

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review... Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given...[139]

In addition to the procedural fairness requirements outlined in *Baker*, section 14 of the SA program Policy Manual requires that the individual be notified, in writing, when an overpayment is initially assessed and posted. The written notice must include the reasons for the overpayment, the amount of the overpayment, and any other details regarding the overpayment. As well, section 41(10) of the Regulations requires RAC decisions to be provided in writing.

Overpayment decisions can have a significant impact on the individual and the Act and Regulations provide for a statutory right of appeal. As such, procedural fairness requires written reasons be provided for all levels of decision-making. Providing written reasons for all administrative decisions is a best practice, even if it is not strictly required by the rules of procedural fairness set out by the courts.

The provision of written reasons gives individuals an opportunity to understand why certain decisions were made and helps them determine whether they should consider an appeal of a specific decision. It is not necessary that the reasons be lengthy or include all of the information presented, as long as the information provided is adequate to understand what decision was made, what information was considered relevant, and how the decision-makers reached their conclusion.

The provision of adequate written reasons alone, however, should not take the place of direct communication between Ministry staff and the individual. Effective, direct, and clear communication is also a best practice for those working within the SA program. All of the appeal tribunal members interviewed for this Report expressed that a number of the appeals they heard were really situations where there needed to be better communication between the Ministry and the individual. They found that once the individual had a sufficient and clear explanation of the decision and the reasons for the decision, the appeal often resolved itself.[140]

5.5.1 Providing Reasons for the Initial Overpayment Decision by Ministry Staff

The SA program Policy Manual requires that written decisions be provided when an overpayment has been assessed. This can be accomplished through a letter advising the individual of the decision, the reasons for the decision, and consequences of the decision. The letter should also advise the individual of the right to appeal the decision.

The Ombudsman investigators were told that, on some occasions, a letter with the written decision and reasons had not been sent by Ministry staff because staff had forgotten to do so or because staff had already advised the individual in-person, on the telephone, or by another means. Other means of notification has included the placement of a message on the SAP recipient's next cheque for benefits, otherwise known as a "cheque message."[141]

The Ombudsman believes that written decisions are required for all overpayment assessments. A cheque message is not a reliable form of notification because individuals may not be carefully examining their cheque stubs for important information such as this. In addition, a cheque message may not contain sufficient information to meet the requirement to give adequate reasons. As a result of the Ministry practice to send a letter notifying an individual that there has been an assessment of an overpayment, the Ministry has, by its practice, cre-

ated an expectation that a letter of notification will be sent to individuals explaining how the overpayments were assessed and the reasons for those decisions. A cheque message deviates from Ministry practice, is insufficient, and should not be used.

In response to this Report, the Ministry has informed the Ombudsman that, as of October 2009, they have amended their policy to ensure that cheque messaging will not be used as the sole means of notification of the assessment of an overpayment or any other decisions in which individuals need to be advised of their right to appeal the decision.

5.5.2 Providing Reasons for Decisions of the CU

Best practices would suggest that the CU decisions should be accompanied by written reasons, given their potential impact on the individual. These include decisions related to hardship applications and registration and de-registration of a case with the CRA-RSO program.

CU staff were unable to adequately explain if reasons are provided to individuals if their application for hardship consideration is denied. Therefore, it is not possible for the Ombudsman investigators to comment on whether the CU practices are sufficient. Due to the potential importance of the decision, it is a best practice to provide reasons for the decision to the individual. This is an area that should be reviewed by the CU staff and included in the policies and procedures they are in the process of developing.

With respect to the decision to register an individual with the CRA-RSO program, best practices suggest that written reasons for this decision should be provided. The CU has stated that registration with the CRA-RSO program is not an administrative decision; it is a policy requirement. The Ombudsman disagrees. The decision to register may be subject to policy and supported in the Act and Regulations, but the decision to register an individual is still an administrative decision made by a Ministry employee. That employee can "decide" when to register an individual, depending on the particular circumstances of the case. Again, this is a decision that has a significant impact on the individual.

Currently, it is not clear if adequate reasons are provided by the CU. We are aware that the current practice is not to notify an individual that they have been registered with the program and, while not in accordance with best practices, the Ombudsman has found that the subsequent notification of the individual by the CRA is likely sufficient. In the Ombudsman's view, as long as reasons for registration are provided by the CU upon the request of an individual, there is at least some degree of procedural fairness afforded. When an individual is registered with the CRA-RSO program and the individual contacts the Ministry, the Ministry should provide the individual with the reasons for registration as well as an opportunity to make voluntary repayments or request hardship consideration, and the opportunity to have the decision to register the individual with the CRA-RSO program reviewed internally.

5.5.3 Providing Reasons for Decisions on Appeal

First Level of Appeal — Review by a Unit Administrator

Although the Regulations do not require that written reasons for decision are provided at this level of appeal, it is a best practice to do so. With respect to this first level of appeal, it is not

clear that decisions or reasons are provided at this level of appeal at all unless an error is found and changes to the initial decision are made. This is a level of appeal and individuals are entitled to know the results of this review, whether or not the review finds in their favour. Reasons for decisions must be provided to individuals about the outcome of the internal review by the unit administrator and should reflect the requirements set out above.

Second and Third Levels of Appeal — RACs and the SSAB

There is a regulatory requirement that a decision of a RAC be provided to the individual in writing within seven days of the date of the hearing. This is the RACs' current practice. There is, however, no legislative or regulatory requirement that the RACs provide written reasons for their decisions, nor are there any guidelines to assist with the provision of written reasons. Because of the importance of the decision to the individual and because of the possibility of further appeal to the SSAB, it makes sense and is a best practice to provide written reasons for these decisions. As a result, the decision letters currently used by the RACs should be standardized to reflect best practices.

Although the Regulations do not require written decisions (or reasons for decisions) at the third level of appeal, the SSAB, it is a best practice to provide written reasons for these decisions as well. The Ombudsman investigators were advised that the SSAB currently does provide written decisions, with reasons, to all parties appearing before it. Based on sample decisions we reviewed from both appeal tribunals, it is not evident that reasons are consistently being provided to all parties appearing before the tribunals, or that those reasons are always adequate.

5.6 Free From Bias

Best Practice 6:

The Decision-maker should be free of and be seen to be free of bias.

Another essential requirement of procedural fairness is that the decision-maker not only be free from bias, but be seen as being free from bias. Being free from bias means:

- There must not be any reasonable perception that the decision-maker's mind has been made up prior to hearing both sides of the case.
- There must not be any reasonable perception that the decision-maker is personally connected to any of the people involved in the decision or personally affected by the decision.
- The decision-maker must not be in a position to benefit from the decision being made, financially or otherwise.
- Administrative tribunals must be seen as independent and free to make decisions without interference from the Minister and ministry with which that the tribunal works.

A decision-maker can have general opinions about a program and about a program policy, but the decision-maker must be open to hearing both sides and the facts of a particular case prior to making a final decision.

5.6.1 A reasonable Apprehension of Bias in the Assessment of Overpayments – the Initial Decision by Ministry Staff

Given the current practice of Ministry staff in making the initial decision to assess an overpayment—that is, without prior notice to an individual that a decision will be made—there are no additional specific issues related to bias at this level of decision-making. The procedural fairness issues that arise with respect to the current practice, arise in the context of the lack of prior notice to individuals who are assessed an overpayment and these are outlined in full in Section 5.6.3.

Once the best practices recommended by the Ombudsman are implemented, including a two-stage notification process, it will be important that Ministry staff act in a manner that is free of bias or the perception of bias. This includes keeping an open mind when considering the information provided by an individual and remaining free of any biased perceptions of SAP recipients, either generally or specifically. Once such example of bias described earlier in this Report was a tendency to accept the belief that because one individual may be untruthful, all SA recipients are untruthful or should be viewed with suspicion.

5.6.2 A Reasonable Apprehension of Bias by the CU

Decisions regarding the collection of overpayments made by CU staff are based largely on unwritten procedures and historical practices. The CU polices and procedures are currently being developed and, given that this process is in its formative stages, the Ombudsman cautions the Ministry to be mindful of issues related to bias.

5.6.3 A Reasonable Apprehension of Bias at the Appeal Levels

First Level of Appeal — Review by a Unit Administrator

Ombudsman Saskatchewan suggests that the current practice as it relates to the initial calculation of an overpayment and the first level of appeal can create a perception of bias. The decision that an overpayment has occurred begins when information is entered into the computer system and the system generates an overpayment. The worker does not make the decision that an overpayment has occurred—the automated computer system does.[142] The individual is then notified of the decision and the evidence used to make the decision. Once an overpayment is posted, the onus is unfairly placed on the individual to prove the Ministry wrong. Individuals are often required to provide documentation from third parties proving that they do not owe the overpayment.

The current process first assumes that the overpayment is owed and then requires the individual to prove that it is not owed. This prejudgment can lead the individual to suspect bias on the part of the unit administrator. Since the individual knows that Ministry staff have already

made the decision that an overpayment has occurred prior to the individual presenting any evidence to the contrary, this knowledge may act as a deterrent for the individual to appeal the Ministry's decision to the unit administrator.[143]

Second and Third Levels of Appeal — RACs and the SSAB

As administrative tribunals, the RACs and SSAB are required to be independent and free of interference from the Ministry to ensure that they are unbiased decision-makers. Though there is no evidence or suggestion that the Ministry has directly interfered with the RACs or the SSAB, the Ombudsman is concerned about whether the RACs and the SSAB are sufficiently independent from the Ministry.

Currently, all of the support, such as administrative staff, office space and hearing space, for the RACs and the SSAB is provided by the Ministry. This structural connection to the Ministry is not necessarily a conflict and it generally will not affect the independence of the tribunals. The perception of many of the tribunal members, however, is that the Ministry staff are the "experts" in the system. This approach impacts on the ability of the tribunals to fully exercise their independence.

The Ombudsman investigators also found that there was insufficient training provided to the tribunals. The Ministry, as the host ministry, is responsible for providing resources for the training of the tribunal members. Providing adequate resources for training does not interfere with or jeopardize the independence of the RACs or the SSAB. The Ministry is currently not providing adequate resources for the training of the members of the RACs or the SSAB. Well informed and trained tribunal members are in the best interests of the Ministry, the SA program, and the individuals the program has served and is currently serving.

When combined, the lack of training of tribunal members and the overreliance by the tribunal members on Ministry staff's interpretation of the legislation and policy create an atmosphere in which it is difficult for individuals to successfully appeal issues to the tribunals, particularly issues with policy or a failure to exercise discretion to deviate from policy where appropriate.

5.7 Additional procedural requirements for hearings at the RACs and the SSAB

Best Practice 7:

For decisions of the appeal tribunals, greater procedural fairness is required, including:

a) a face-to-face hearing within thirty days of the appeal request;

b) the ability to present evidence, including witness testimony;

c) the ability to cross-examine the other party's witnesses;

d) the ability to designate a representative for the hearing and access to appropriate support services;

e) the ability to adjourn to prepare for the hearing, if necessary; and

f) a written decision including reasons provided by the appeal tribunal within seven days of the hearing.

In addition to the minimal requirements of procedural fairness that are reflected in the best practices, the Regulations also provide additional procedural protections for individuals appearing before the appeal tribunals. These include:

- Notification in writing of the time and place of a hearing, the individual's ability to present evidence at the hearing, and the right to designate a representative
- A face-to-face hearing
- A hearing held within thirty days of the registration of the appeal request
- Appeal hearings held in private
- The ability to produce witness evidence (testimony) at a hearing
- The ability to cross-examine the witnesses of the other party
- The ability of the appeal tribunal to question both parties and their witnesses
- A requirement that the committee provide a written decision within seven days of the hearing. If it cannot, then notification indicating it has been unable to make a decision within the required timeframe is required.

The majority of procedural protections outlined by the Regulations are only required for hearings at the RAC level. The requirements of notification of the time and place of the hearing, a face-to-face hearing, a hearing held within thirty days of the registration of an appeal, and a hearing held in private, are also required at the SSAB level.[144]

Though many of the other procedural protections are only required at an appeal before the RACs, the SSAB has developed a practice of conducting its hearings in a very similar manner. The SSAB allows individuals to be represented at the hearing; allows witnesses to testify and be subject to cross-examination; and provides written decisions, with reasons, within seven days of the hearing.[145] Ombudsman Saskatchewan believes that these procedural protections would be required of the SSAB according to the rules of procedural fairness. The Ombudsman believes they also represent best practices for both of the appeal tribunal levels.

There are other procedural protections that are not currently required by the Regulations or Minister's Orders but would form part of the best practices for the appeal tribunals. One example is the ability to request, if it is reasonable, that the hearing be adjourned to allow for further preparation. Another example and one that would support the individual's right to have a representative at the hearing, would be to require the Ministry to ensure that individuals have access to advocacy resources. These procedural protections give meaning to the procedural rights that have been provided in the Regulations and the procedural rights required under the rules of procedural fairness.

During our review of the hearing procedures used by the RACs and the SSAB and with our consideration of both the procedural protections afforded by the Regulations and the re-

quirements of procedural fairness, we have found four areas that merit further comment. Three of these areas will be discussed in the following subsections: the desirability of an advocate or support person for individuals at hearings before the RACs and SSAB (Section 5.7.1); the conflict and inadequacies of the statutory regime governing the RACs and the SSAB (section 5.7.2); and the power of the RACs and the SSAB to make recommendations to the Ministry (section 5.7.3). The fourth area, not limited only to the appeal tribunals, deals with training—its importance and the areas in which it could be improved (section 5.8).

5.7.1 Access to an Advocate or Support Person

> ***"If you have a good advocate it can make a world of difference. If you have a bad advocate, it can be detrimental."***
>
> ***- Appeal tribunal member***

Adequate and effective advocacy services ensure that individuals are given the full opportunity to exercise their appeal rights and the opportunity to participate in and feel like they have been heard in the appeal process. As one appeal tribunal member put it, "Having a representative or support person contributes to the individual's confidence and comfort level, enabling them to better present their case."[146]

Advocacy services are not required in every situation. Many individuals will be able to present their case on their own; others will simply need a support person. Some, however, will need the help of a skilled and qualified advocate. An advocate at the RAC or the SSAB level does not need to be lawyer. A lay person familiar with the SA program area can also be an effective advocate.

Without access to appropriate advocacy services, an individual's access to the appeal process may be compromised. The Ombudsman investigators were advised by tribunal members that advocates can be of assistance to the individual as they are often more familiar with the legislation, regulations and policies, and the hearing process.[147]

The Ombudsman investigators were told by SA recipients and former SA recipients who experienced an overpayment that they were largely fearful of and unfamiliar with the appeal process. They believe that having an advocate who is familiar with the appeal process would be of assistance when trying to appeal a Ministry decision.[148]

Currently, Ministry policy states that individuals are permitted to have an advocate or support person with them at the hearing.[149] In addition, the policy and the Regulations allow an advocate to be paid $45 plus travel and meal expenses, provided that the advocate is not the spouse or dependent of the individual or working for a funded agency.[150] The policy also provides that the notification for appeal hearings should also include, "the name and address of possible advocates."[151] This echoes the requirement in the Regulations that individuals be notified of the "time and place" of a hearing before the RAC, as well as "his right to present supporting evidence and witnesses at the hearing and of his right to designate a representative."[152] The Ombudsman recognizes that the Ministry policy goes further than the Regulations and provides useful information to individuals in the form of contact information for local advocates.

There is, however, a lack of advocacy services available across the province. There is only one community based organization that provides advocacy services to individuals who require assistance with their appeals. The Welfare Rights Office in Regina can only assist individuals living in Regina or close to Regina. Across the province there are some volunteer organizations who provide limited advocacy assistance to individuals, such as Equal Justice for All in Saskatoon or the Anti-Poverty Ministry in both Regina and Saskatoon, but it does not appear that these agencies are available to help people on a regular basis or that they are able to keep full office hours due to their volunteer nature.[153] There is also a free legal clinic in Saskatoon, CLASSIC, but we were advised that income security work is only a very small part of their caseload.[154]

One of the barriers to effective advocacy is the level of funding currently provided to community based organizations providing advocacy services. The current funding levels are inadequate to support province-wide and accessible advocacy services.

5.7.2 The Statutory Regime Governing the Appeal Tribunals

The Legislative Framework

Administrative tribunals are only able to do those things that their enabling legislation says they can do. *The Department of Social Services Act* and *The Saskatchewan Assistance Act* set out the jurisdiction, the role, and the rules and procedures of the RACs and the SSAB.

The Department of Social Services Act allows the Minister to establish appeal committees (the RACs) to look into the grievances of any persons related to a decision, act or omission of the Ministry. The same legislation also allows the Minister to establish a provincial appeal board (the SSAB) to hear appeals from the decisions of the appeal committees. In addition, subsection 10(4) of The *Department of Social Services Act* gives the Minister the ability to make orders that outline "rules for the procedure and operation of an appeal committee or a provincial appeal board." These orders are known as Ministerial Orders.

The Saskatchewan Assistance Act allows the government, in essence the Ministry, to create regulations under the Act.[155] In accordance with that provision, the Regulations have been enacted that outline specific rules and procedures for the appeal tribunals. Indeed, section 18 of the Act states that, "The procedure in all appeals shall be prescribed by the regulations."

Therefore, the appeal tribunals' rules and procedures are set out in three separate types of documents: legislation, regulations, and Minister's Orders. In the hierarchy of these documents, legislation governs. This means that if a regulation, Minister's Order, policy or other document conflicts with or contradicts the legislation, then the provision of the legislation will apply. Regulations are considered next in the order of priority. If a Minister's Order or policy contradicts the regulations, the regulations prevail. Finally, legislation, regulations and Minister's Orders all outrank policy.

Concerns with the Minister's Orders

There are two Minister's Orders which outline the procedures to be used by the appeal tribunals. Minister's Order #5/81, created in 1981, sets out the procedures for the SSAB. Minister's Order #9/91, created in 1991, sets out the procedures for the RACs.

Both Minister's Orders are historical documents that have not been cancelled or amended despite subsequent changes to the legislation and the enactment of certain regulations. The Ombudsman investigators were advised that the Regulations have been changed since the enactment of Minister's Order #9/91. Most of these changes to the Regulations deal with the procedures to be used by the RACs and are similar to those first outlined in Minister's Order #9/91. There are, however, two exceptions. The first exception, contained in the Minister's Order but not the Regulations, concerns the definition of quorum for a RAC hearing. According to the Minister's Order, RACs are required to have a 3-person panel hear a matter. Therefore, quorum for the RACs remains as that set out in Minister's Order #9/91.

This exception could lead to a situation where an RAC uses an improper process. Ombudsman investigators found that the appeal tribunal members did not know or agree on what quorum was at the RACs (or, for that matter, at the SSAB). One appeal tribunal member stated that a quorum was three members and that they would often schedule four members for a hearing to ensure that the quorum requirement was met. Another appeal tribunal member advised that their RAC would sit with less than three members, if the parties consented.

Minister's Orders #5/81 and #9/91 both set out quorum requirements for the respective appeal tribunals. The number of members who must hear and decide a matter is a requirement that the appeal tribunal members must be aware of in order to ensure that their hearings are properly run. It is also a requirement that the parties who appear before the tribunals are entitled to know. The Ministry must ensure that this information is available to all appeal tribunal members and any individual who may appear before the tribunal.

The second exception deals with a provision in the Minister's Order that contradicts a provision in the Regulations. It concerns whether a hearing could be open or closed. Minister's Order #9/91 states that hearings are to be open. The current Regulations clearly state that hearings are to be held in camera, meaning that they are to be closed to the public. Because the Regulations take precedence over Minister's Orders, this section of the Minister's Order is no longer in effect and hearings before the RACs must be closed hearings. Although this section of the Minister's Order #9/91 is no longer valid, we are advised that the Order has not been cancelled or amended to reflect this inconsistency.

For lay people sitting on an administrative tribunal such as a RAC, this can be confusing. They may not be aware that Regulations take precedence over a Minister's Order. Similarly, it is unclear if individuals who are appearing before a RAC would know this. Having a provision in the Minister's Order that is in contradiction to one in the Regulations is confusing. It may also result in an improper process being used.

The Ombudsman suggests that given the issues that have been identified with Minister's Order #9/91, the Ministry should review this Order and any other Minister's Orders to ensure that they are current. Any sections of the Minister's Order that are no longer in effect or no

longer necessary should be cancelled. In addition, any necessary changes, such as identifying the requirements of quorum, should be made to the Regulations.

Minister's Order #5/81 sets out the hearing procedures to be used by the SSAB. These procedures correspond with those set out in the Regulations for the RAC hearings. The Regulations have not been amended to include the procedure to be used by the SSAB. We were not aware of the existence of Minister's Order #5/81 until Ministry staff responded to a draft of this Report, indicating that this Minster's Order sets out the hearing procedures for the SSAB.

As stated in section 18 of the Act, hearing procedures for all appeals must be prescribed by the Regulations. As such, it is questionable whether it is permissible to have the SSAB hearing procedures contained within a Minister's Order. In addition to being compliant with the Act, the enactment of Regulations that set out the SSAB hearing procedures may help to ensure those procedures are accessible to appeal tribunal members and those appearing before the appeal tribunals. Currently, the SSAB hearing procedures are less accessible because they are contained in a Minister's Order that is not generally available to the public.

5.7.3 Appeal Tribunals Power to Make Recommendations

As previously stated, *The Department of Social Services Act* under which the RAC and SSAB were created also authorizes those appeal tribunals to make recommendations to the Minister about possible changes to the law, policies and practices of the Ministry.[156] This is an important and useful power. In the interviews with appeal tribunal members, however, not all members of the RACs were aware of or understood that they had this authority.[157] Training would assist the RAC members in understanding and applying their authority to make helpful recommendations to the Ministry concerning possible changes to the law and the policies and practices of the Ministry.

5.8 Training

One consistent theme raised throughout this review by all those interviewed was that additional training is required at every level.[158] The Ministry offers a variety of training sessions for its staff to assist them with the better performance of their duties within the SA program. This Report will focus only on the training that is related to the application of legislation, regulations, SAP policies, and procedural fairness in the context of decisions about SAP overpayments. The Ombudsman has found that there is a lack of appropriate training in these areas for Ministry staff and members of the appeal tribunals.

5.8.1 Training for Ministry Staff

Policy Training for Ministry Staff

The Ombudsman investigators were advised that the Ministry provides training to all new staff.[159] This training is two days in duration and includes a review of the SAP Policy Manual as it relates to overpayment assessments and the appeal procedures.[160] Ombudsman investigators were advised that all new staff are required to take this policy training,[161] but investiga-

tors were not advised when it is made available to new staff or of any timelines for completion. One Ministry staff person stated that they had never taken the policy training, despite having performed their duties for a considerable period of time.[162] We do not know if this individual's situation is representative of those of all new staff members.

Overall, it appears that the initial formal training on policy that the Ministry provides to its staff is adequate. It would be helpful if guidelines were put into place to ensure that individuals receive this training within a reasonable amount of time after beginning their employment. Training should also be enhanced to include information on discretionary authority and how and when to exercise it, relevant information, how to weigh information and how to determine credibility, as discussed in Section 5.3.1.

Ombudsman investigators were also advised that following the formal policy training given to new staff members, ongoing training is provided within the region through the unit supervisors.[163] Supervisors' meetings are held three times each year and include a number of supervisors from around the province. The supervisors meet to discuss any recent changes to policy and practice, problems they have encountered, and whether there is a need for any additional policy changes.[164] In addition, there is an annual meeting of the provincial policy review committee where supervisors from each region review policy concerns and recommend changes to the policy.[165] The unit supervisors are expected to take the information they learn at the supervisors' meetings and the meeting of the provincial policy committee and pass it along to their staff during staff meetings, team meetings or unit meetings.[166]

The Ombudsman investigators did note some regional differences in the delivery of this policy training. Staff from one region advised that they would provide one-hour training sessions in their staff meetings on various issues as they arose.[167] In addition, there appears to be regional differences in the frequency of staff meetings; some regions held staff meetings once per month, some weekly, and some several times per month. It is the Ombudsman's view that the current practice of using staff meetings to share information regarding policies and practices is not the most effective or consistent method of providing on-going training.

Despite frequent amendments to SA program policy, there does not appear to be any formal on-going policy training. The Ministry advised us that they are examining this issue and are considering the implementation of mandatory, on-going policy training.[168] The Ombudsman encourages the Ministry to create a formal training program that will ensure staff are well versed in policy, including all amendments to policy.

Training on the Legislation and Regulations for Ministry Staff

Regional staff interviewed for this Report stated that there were few training opportunities provided by the Ministry on the proper statutory interpretation generally and specific to the Act and Regulations.[169] Ombudsman investigators were advised that policy training also involves a limited review of the legislation and regulations as they relate to the policy being discussed. In addition, since the writing of this Report the Ministry has created new training on legislation and regulations. This training does not appear to be as comprehensive as required.

Most new Ministry employees have no background in applying legislation and regulations in a mandated service area. The Ombudsman investigators found that very few staff interviewed understood the Act or the Regulations. The Ombudsman recommends that the Ministry amend its current training or develop training that covers the Act and Regulations and teaches staff how to appropriately interpret these documents in relation to Ministry policy.

Procedural Fairness Training for Ministry Staff

The Ministry currently offers no training with respect to the application of the principles of procedural fairness, except the fair practices training provided by Ombudsman Saskatchewan. The Ombudsman investigators were told that the Ministry is considering making the Ombudsman's training mandatory for Ministry staff.[170] We recognize the Ministry's efforts in this regard but suggest that the current Ombudsman fair practices' training is not adequate for the work of the Ministry. At present, the fair practices training provided by our office is meant to be introductory in nature and will not meet the requirements for training in matters of procedural fairness as it applies in the SA program. Specialized training is needed concerning procedural fairness as it relates to the decisions made by the SAP worker and supervisor.

5.8.2 Training for the Appeal Tribunals

Ombudsman investigators found that there is a lack of training available for members of the RACs and the SSAB. Investigators were advised that, generally, all new members receive some "on the job" training or mentoring from individuals currently with the tribunal who are familiar with its processes.[171] We were also advised that new tribunal members are given a document titled, "The Roles and Responsibilities of Appeal Committees," which was authored by the Ministry's legal counsel and contains some of the information that tribunal members require to carry out their duties.[172] The Ombudsman investigators were advised that this document was used in the context of training presentations that were given by the Ministry's legal counsel to members of the tribunals.[173] This document, though still in use, exists in two different formats and is provided to tribunal members independently of any training. The investigators were informed that the Ministry is considering the reintroduction of the training presentations sometime in the future, though no firm plans were communicated to the investigators.[174]

Ombudsman investigators were also advised by members of the appeal tribunals that many of their members are new, having been appointed within the last one to two years.[175] They advised that there has been no formal training provided to these new members and that only informal training is provided by other tribunal members.

The only appeal tribunal members who have had some training are those with the SSAB, largely due to the commendable efforts of their past Chairperson,[176] who had taken it upon herself to provide training. The past Chairperson, who was interviewed for this Report, advised that she had independently researched available training and had sought out training for herself and her members about procedural fairness and the appeal process.[177] The Ombudsman recognizes the efforts of the SSAB and its past Chairperson.

When Ombudsman investigators asked Ministry staff about training for the tribunal members, we were advised that the Ministry is hesitant to directly provide training to these members, because it might interfere with their independence or perceived independence. The Ombudsman acknowledges the Ministry's concern that having its staff directly provide comprehensive training to the tribunal members may be perceived as interfering with the tribunals' independence. In the Ombudsman's 2007 report, *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals*, he recommended that the Government of Saskatchewan find ways to coordinate the provincial tribunal system to facilitate the sharing of resources. Training for tribunals is one such resource that could be shared among the tribunals.[178]

Choosing not to train tribunal members is not an appropriate way to ensure independence of the tribunals. In fact, in some cases, the lack of training directly leads to questions about the tribunals' independence. This occurs when tribunal members seek answers from Ministry staff about matters of policy interpretation. This conduct could jeopardize the independence of the particular tribunal. It is the responsibility of the Ministry and is in its own best interests to ensure that training for the members of the RACs and the SSAB is adequately supported and resourced.

5.9 Summary

Ombudsman Saskatchewan has identified seven best practices, based on the rules of procedural fairness, that Ministry staff and the appeal tribunals should follow when making administrative decisions related to the assessment, appeal, and recovery of overpayments. We evaluated the Ministry's and the tribunals' current policies and practices as well as their decision-making processes against the best practices model and we found that a number of practices could potentially result in unfairness to the individual.

In order to ensure a procedurally fair process, best practices require that individuals be notified that a decision to assess an overpayment may be made against them, before that decision is made. The notification must also include the information being relied upon by the Ministry and must indicate that the individuals have the ability to respond before a final decision is made. We found that:

- The Ministry's current practice is to have staff decide that an overpayment has occurred and then to notify the affected individual that they are in an overpayment situation.
- The fact that an overpayment decision is made without prior notice to the individual and without an opportunity to respond is contrary to the requirements of procedural fairness and is not reflective of best practices.

Ministry policy requires that an individual be notified when an overpayment is assessed. This is completed through a notification letter which also advises individuals of their right to appeal. Best practices require notification to be sent to an individual once a decision is made, providing reasons for the decision. We found that the current Ministry practice respecting notification does not meet best practices and creates unfairness for the individual at the very early stages of the decision-making process. Specifically we found that:

- The Ministry's practice prior to October 2009 allowed for notice letters to be sent to the last known address of the individual even if the Ministry was aware that the address was incorrect. Since 2009 that practice has changed and letters are no longer sent to an address if the address is known to be incorrect.
- The Ministry assumes that once a letter is sent, notification has been achieved, regardless of whether or not the individual receives the letter.
- The Ministry's practice of sending only one letter after the decision has been made setting out both the overpayment decision and the individual's right to appeal, does not constitute best practices. While this letter is appropriate to provide the individual with the decision and reasons for the decision, it is not sufficient to notify the individual that a decision is pending, since it is sent after the decision has already been made.
- In order to fulfill the requirement for notice of a decision, the letter notifying the individual that a decision has been made should include reasons for the decision including an explanation of how any contradictions in the information before the decision-maker were resolved.

Best practices for a procedurally fair process require that the decision-maker consider all relevant information and only relevant information. When considering information, the decision-maker must understand how to properly weigh information and determine what information can and should be given preference, especially when there is conflicting information. In addition, the decision-maker should be aware of the proper role of policy when making decisions, and know when the decision-maker has discretionary authority and how to apply that discretionary authority.

Decision-makers at all levels use program policies in the course of making their decisions about overpayments. Policy, however, should only be used as a guide to assist the decision-maker and should not be rigidly interpreted. Policies are not intended to reduce or replace the role of the decision-maker. Decisions must still be made based on the individual circumstances of each situation. We found several problems that relate to the use of policies in decision-making:

- SA program policies have replaced or, at least, reduced the role of the front line decision-maker in the initial decision to assess an overpayment and in some of the other administrative decisions Ministry staff make in regard to overpayments.
- Ministry staff do not adequately understand their discretionary authority in the application of policies to a particular situation.
- Current Ministry policy does not provide sufficient guidance for staff or tribunal members to assist them in applying their discretionary authority when making decisions about overpayments.

Best practices also require that an individual be provided with the right to have the decision reviewed and corrected, if appropriate. Currently, the Ministry has a three-tiered appeal process beginning with a review of the overpayment decision by a unit administrator, and, if necessary, an appeal hearing before a RAC, and ultimately a further appeal to the SSAB. We found the Ministry's current appeal structure to be acceptable. Best practices, however, have not always been followed at all three levels of appeal. We found that:

- The Ministry's interpretation of the time period in which to file an appeal is too restrictive and is unfair.
- There is inconsistency among the regions on the issue of whether an appeal may be registered after the 30-day time limit and in what circumstances it is appropriate to make such an allowance.
- The Ministry does not always submit the required information to the appeal tribunals in a timely manner, leaving tribunal members and affected individuals with no time to review the information or, in the case of individuals, insufficient time to prepare an adequate response.

Best practices require that decision-makers at all levels of administrative decision-making be unbiased. Decision-makers with a bias have a tendency to prejudge an issue or be partial to one side over the other. We found that:

- Once the Ministry makes a decision that an overpayment has occurred, the onus is placed on the individual to prove that there is no overpayment.
- The initial judgment, which is made without any prior notice to the individual and without giving the individual any opportunity to respond, is often preferred unless the individual can provide documentary information from a third party proving the initial judgment to be wrong.
- The members of the appeal tribunals wrongly rely on Ministry staff to act as experts in the interpretation of program policy.

The appeal tribunal hearing procedures are outlined in the Regulations for the RACs and in Minister's Order #5/81 for the SSAB. A number of procedures provide sufficient protection for the individual to ensure a procedurally fair process. The manner in which a hearing is conducted, however, can create issues of unfairness. The operation of the RAC and SSAB hearings is largely left to the tribunals themselves. Both appear to use an adversarial model of inquiry. The Ombudsman investigators found:

- Tribunal members had limited knowledge about their hearing and decision-making process. This lack of knowledge could affect the manner in which a hearing is conducted. This impacts the parties' ability to effectively respond in the hearing.
- The current adversarial model used by the tribunals places the Ministry in an advantageous position to the detriment of individuals appealing Ministry decisions. An inquiry-based hearing model would better serve the tribunals and introduce a better balance of power within the hearing process.
- The current lack of advocacy services has the potential to compromise an individual's right to respond when appealing overpayment decisions.

The SA program is a highly regulated and complicated system. Ministry staff and tribunal members require consistent and ongoing training in all aspects of the SA program, public sector decision-making, the role and application of policy in public sector decision-making, and the rules of procedural fairness. We found training to be inadequate in these areas. Of particular concern for the Ombudsman is the Ministry's position that it would compromise the tribunals' independence if it provides direct training to the members of the RACs and the SSAB. Using this reasoning to fail to provide tribunal members with adequate training is not

appropriate. It is the responsibility of the Ministry and it is in its own best interests to ensure it provides adequate resources for training of the members of the RACs and the SSAB.

Procedurally fair processes within public sector decision-making should at all times be reflective of best practices. We found that the best practices for procedural fairness in relation to SA overpayment decisions are interconnected to such an extent that the lack of procedural fairness in one area will often create further issues of procedural fairness in another area.

Ombudsman Saskatchewan believes that many of the procedural concerns identified in this Report can be resolved with some adjustment of current Ministry policy and decision-making processes, and with adequate training for all decision-makers.

6 Are Overpayments Legally Enforceable?

6.0 Are Overpayments Legally Enforceable?

Although the focus of this Report is on best practices, there is also a legal issue pertaining to the application of the CRA-RSO program to overpayment claims by the Ministry that is worthy of comment.

6.1 Legal Limitations on the Collection of a Debt

When someone owes a debt, the debt continues to be owed until it is paid in full. Most people who owe a debt will pay the debt and most people to whom a debt is owed expect prompt payment. Without an ability to collect, the debt has no value. When there is dispute over a debt, one remedy is to use the courts to settle the dispute. The ability to collect a debt through the courts, however, is limited.

The Limitations Act[179] specifies the time periods in which court proceedings must be started. *The Limitations Act* provides that court proceedings must be commenced within two years from the time the harm was discovered.[180] For debts, the harm is "discovered" when the debtor failed to make a payment due under the contract.[181]

If the person who is owed a debt does not start legal proceedings within the limitation period, the debt does not disappear, but the creditor loses the opportunity to collect the debt through court unless the debtor makes a voluntary payment. If the debtor acknowledges the debt in writing or by making a payment on the debt, then the limitation period starts over again.

6.1.1 Collection of a Debt by an Ordinary Creditor

It is often not easy for people who believe that money is owed to them to collect that debt. Usually, if a debtor (person owing money under a contract) has defaulted on the payments, the creditor (the person who is owed money) is required to sue for the debt; in other words, the creditor must start a court action. If the creditor is successful in court, the creditor will get a judgment. Generally, once a judgment has been obtained, the creditor has ten years to recover the money owed.

In some circumstances, debtors and creditors might owe each other money. In such circumstances, there is a legal remedy called a "set-off." This allows debtors who owe a creditor money the opportunity to keep some of the money owing to the creditor and to "set it off" against the debt that is owed to them by the creditor. Set-off, as a legal remedy, only arises in the course of a lawsuit.

6.1.2 Collection of a Debt by the Government

The Government has more means available to collect on debts than a citizen or private business. It has enacted legislation that gives it additional powers and opportunities to collect debts it is owed. Since the Government is recovering public money, there are valid public policy reasons for these additional powers.

Like private parties, the Government can sue those who owe it money. If the Crown proceeds in this way, both the Ministry and its legal counsel acknowledge that the limitation periods that apply to individuals apply equally to the Crown.[182]

The Ministry considers SAP overpayments to be a debt and it uses a variety of means to try to recover these "debts." The Act allows the Government to file a certificate in the Court of Queen's Bench.[183] That certificate is treated as a court judgment.[184] This means that the Government can enforce an overpayment as a judgment without having to prove its case through the normal court process.

The Government can also collect SA overpayments without proceeding to court through administrative mechanisms such as registering a person with the CRA-RSO program, collecting the overpayment from an individual's SAP benefits,[185] and by setting off the overpayment against money owed to the individual by other government ministries, agencies or Crown corporations.[186]

6.2 Collecting Debt after the Expiry of the Limitation Period

It is not within the power of the Ombudsman to decide whether the provincial government can legally collect SA overpayments through the CRA-RSO program, regardless of the limitation periods set out in *The Limitations Act*. Suffice it to say that there is a legal argument that the provincial government cannot do so.

In *Markevich v. Canada*,[187] the Supreme Court of Canada examined whether limitation legislation affected the ability of the federal government to use administrative means to collect outstanding federal and provincial tax arrears. The Court decided that the CRA's collection processes using administrative means were subject to a statutory limitation period. The Court found that:

- Just because the *Income Tax Act* does not mention statutory time limits, this does not mean limitations do not apply.
- A fair taxation system would include a, "reasonably diligent exercise of debt collection."
- The Canada Revenue Agency has a variety of means to collect unpaid arrears that renew the limitation period.

- The rationale for having limitation periods for court proceedings — that persons should not be accountable for ancient obligations, that evidence should not be allowed to grow stale, and that persons should not be allowed to "sleep on their rights" — apply equally to collection proceedings.[188]

The *Markevich* decision implies that limitation periods should apply to collection efforts by government, even if the collection matter is not being pursued in the courts but is pursued through administrative means.

The CRA-RSO program states that it can be used as a means to recover "legally enforceable" debts.[189] If the debt can no longer be enforced in the courts due to time limitations, there is an argument that the debt is no longer "legally enforceable," in which case it should not be subject to the CRA-RSO program according to the criteria of that program.

Due to differences between limitations legislation in Saskatchewan and the limitations legislation that applied in the *Markevich* case, it is not clear whether or not the same rationale—that limitations periods apply to administrative means of collecting debt—also apply to the Ministry collecting SA overpayments through administrative means. The question is whether the differences between the legislation are so great that a court would interpret Saskatchewan legislation to mean that limitations periods do not apply to collections pursued outside of the court system. This is a question that can only be answered by the courts.

6.3 The Fairness Issue

Regardless of the answer to the question of the strict legality of the province's right to rely on the CRA-RSO program to collect dated SAP overpayments, the fairness issue remains. It is within the Ombudsman's purview to ask the question of whether it is fair for the provincial government to collect debt through the CRA-RSO program when the overpayment occurred so far in the past that it could not be recovered through a court action due to the expiry of the limitation period.[190] Is it fair for the Ministry to collect these debts using means other than the courts when it is no longer possible to collect these debts through the court system?

Ombudsman investigators were told that SA overpayments are collected only through administrative means, including the CRA-RSO program. The Ministry currently does not use the courts to collect any overpayments.

The Government already has more opportunities and means at its disposal to collect debt than does the average citizen. The collection of debt by the Ministry, as with any body of Government, is a worthy objective and it is in the interests of everyone that these debts be pursued diligently and reasonably. Recovery, however, must not be accomplished at any cost. Fairness is a concept that applies to all aspects of justice, not only the judicial process, but also to administrative mechanisms that are outside of the court system.

Collecting debt through the back door when it cannot be collected through the front door is unfair. In this case it is the Government, the entity that enacted limitations periods, that is using other legislation to avoid the consequences of failing to act quickly and diligently to pursue debt collection. The purpose of statutory limitation periods is to ensure fairness — by balancing the rights and interests of a party with a complaint with the rights and interests of

the party said to cause the harm. It is recognized that it is not fair for the Government to "sleep on its rights in enforcing collection." It is not fair for the Government to allow evidence to go stale, and it is not fair for government to hold "ancient obligations" over a citizen's head.

It is unfair for Government to ignore its obligation to act diligently in trying to collect debts and then, years later, use a process that prevents the debtor from challenging the legitimacy of the debt that is said to be owed. No citizen would be able to pursue debt collection in this way. Even though the debt itself would still exist, the average citizen would not have access to such a remedy.

The Ministry has a variety of means to complete its collection process in a reasonably diligent way and one that respects the spirit of limitations law. The Ministry could reasonably register an individual with the CRA-RSO program within two years in order to begin to collect the debt through that program. Alternatively, the Ministry could reasonably register a certificate with the court within two years of the overpayment being assessed, giving the Ministry a judgment that it has ten years in which to collect. In addition to honouring the spirit and purpose of limitation period legislation, both of these options provide the debtor with an opportunity to question the debt, if necessary.

7 Recommendations

7.0 Recommendations

In 2007 Ombudsman Saskatchewan completed a comprehensive review of the province's administrative tribunal system and identified a series of general best practices for tribunals. The review, called *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals*, made 27 recommendations to the Government meant to improve the tribunal system across the province. As we began this Report, our focus was on the administrative decision-making process as it relates to SA program overpayments. We found that the administrative decisions that relate to overpayments are highly interconnected, beginning with the initial decision that an overpayment occurred through to the decisions of the RACs and the SSAB. As we concluded this Report, we found that much of what we recommended in the *Hearing Back* report was relevant to the appeal and administrative tribunal structure of the SA program. As such we will be repeating key recommendations made in *Hearing Back*.

What follows is a series of recommendations that speak to the interconnectedness of the SA system and administrative decisions made in that system. A procedurally fair process is required at each decision level. Unfairness at one level can be repeated, compounded or resolved at the next level.

Ensuring fairness is certainly the responsibility of each individual public official and administrative tribunal member in the SA system. It requires, however, much more than the simple good intentions of an individual worker, manager, policy analyst or administrative tribunal member. It requires an organizational structure that supports and furthers the principles of fairness and equity in the Ministry's daily practices, whether that practice involves the provision of direct service, the development of policies, the implementation of legislation or regulations, or the adjudication of appeal hearings. The recommendations made in this Report will speak specifically to the furtherance of fair practices within the SA system.

7.1 Promoting Fairness in the Ministry

Recommendation 1

The Ministry establishes an internal Fair Practices Office. This office would act as an organizational ombudsman operating in an arm's length capacity from the Ministry's administrative structure, but responding directly to the Deputy Minister. The function and scope of a Fair Practices Office could either be program specific, such as having an office only for income assistance programs, or be Ministry-wide. No matter the function or scope, the primary purpose of a Fair Practices Office, at minimum, should allow the office to:

a) Promote fairness and foster stated organizational values of the Ministry.
b) Receive, investigate and resolve complaints about the policies and practices of the Ministry that have not been resolved through existing internal dispute resolution mechanisms.
c) Identify complaint trends and systemic issues and make recommendations for improvement.
d) Work with and act as a liaison between the Ministry and community based organizations and advocacy groups to improve Ministry services.

Given the mandated nature of key Ministry services (income assistance, child and family services, services to vulnerable persons) and the already established regulated appeal processes (administrative tribunals and possibly, the courts) the Fair Practices Office would not act as an adjudicator or conduct investigations for adjudication. Rather it would be authorized to "resolve" issues constructively, act as an expert on fairness, provide advice to Ministry staff on fair practices, and assist in facilitating non-judicial appeals related to Ministry services.

Recommendation 2

The Ministry ensures that all SA program staff and managers receive training specific to their particular job function as it relates to procedural fairness in public sector decision making and the application of fair practices in their daily work.

Recommendation 3

The Ministry consults with key stakeholders, including SAP recipients, when annually reviewing its program policies and benefit levels.

Recommendation 4

The Ministry reviews its policies and practices as they relate to any SA program benefits eligible to be collected through the CRA-RSO program and ensure they are procedurally fair and follow a best practices approach.

Recommendation 5

The Ministry reviews the policies and practices of its Financial Services Branch (Collections Unit) as they relate to any SA program benefits eligible to be collected through the CRA-RSO program and ensure they are procedurally fair and follow a best practice approach.

Recommendation 6

The Ministry amends, if it has not already done so, the Saskatchewan Assistance Handbook to inform individuals:

a) that the Ministry uses the CRA-RSO program to collect overpayments;
b) of the consequences of registration on the CRA-RSO program; and
c) of the ability to seek hardship consideration through a Statement of Affairs package.

Recommendation 7

The Ministry provides every SA program recipient with the Saskatchewan Assistance Handbook upon receipt of first benefits, and annually thereafter during the annual review process.

Recommendation 8

With respect to the initial Ministry decision to assess an overpayment, the Ministry implements a two-step notification process that provides, at a minimum:

a) Written notification to the individual that a decision is pending, including provision of the information being relied upon to make that decision, and that provides the individual with an opportunity to respond.
b) Following the decision, written notification of the decision, the reasons for the decision, and information with respect to appealing the decision.

Recommendation 9

The Ministry ensures that written reasons are provided to the individual affected by all SA program administrative decisions that could adversely affect the individual. Written reasons should include, at minimum:

a) a statement of the decision;
b) a summary of the information relied upon by the decision-maker;
c) an analysis of how any contradictions in the information were reconciled by the decision-maker; and
d) any other relevant reasons for making the decision.

Recommendation 10

The Ministry no longer uses cheque messages as the sole method to notify individuals about decisions related to overpayments.

Recommendation 11

The Ministry ensures that the decisions of the Financial Services Branch (Collections Unit) about whether an individual qualifies for hardship can be appealed to the appeal tribunals (RACs and SSAB).

Recommendation 12

The Ministry ensures that individuals who are being considered for registration or who have been registered on the CRA-RSO program are made aware of the ability to claim hardship through the Statement of Affairs package and are given assistance to complete the application through their local or regional office.

Recommendation 13

The Ministry provides an opportunity for individuals to appeal to all levels of the appeal process if the Ministry cannot demonstrate that an individual received, or reasonably ought to have received, notification of an overpayment assessment.

7.2 Articulating the Role of the Government of Saskatchewan and the Ministry to the RACs and the SSAB

Recommendation 14

The Government of Saskatchewan ensures that all RAC and SSAB members are aware of the length of their terms, any reappointments, and the mandate of their respective tribunals. The Government of Saskatchewan ensures that the tribunal chairpersons are aware of the terms and any reappointments of all members of their tribunals.

Recommendation 15

The Government of Saskatchewan reserve positions for, and appoint on all RACs and the SSAB, current and former SA program recipients. For any appeal tribunal members who are SA recipients, all income earned as remuneration in relation to their duties on the appeal tribunal should be considered as exempt income.

Recommendation 16

The Ministry enter into Memoranda of Understanding with each appeal tribunal (RACs and the SSAB) that outline, at minimum:[191]

- The mandate and purpose of the tribunals and responsibilities of the Ministry and tribunal members in achieving the stated purpose.
- The role of the Ministry in relation to the tribunals, including the role of the Ministry in providing administrative supports and resources to the tribunal for matters such as human resource management, tribunal operating budgets, and information technology.
- The role of the tribunals as it relates to the Ministry's general functions in the provision of SA program services including policy development, legislative and regulatory drafting, stakeholder consultations and communications.
- The roles, responsibilities and reporting requirements of tribunals in the handling of public funds allotted to them for the operation of the tribunals, including any requirement of an appeal tribunal to produce an Annual Report or other required reporting structures to ensure the tribunals publically report on their activities.
- The provision and funding for legal services and other independent consultative services to tribunals.
- The role, responsibility and contributions of the Ministry for training and for the development of the practice competencies required by the tribunal.

Recommendation 17:

The Ministry responds, in writing, to all recommendations made by the appeal tribunals.

7.3 Preserving the Independence and Promoting the Effectiveness of the RACs and SSAB

In *Hearing Back* the Ombudsman recognized the need to coordinate the province's administrative tribunal system to maximize the efficiency of the resources across the system. In *Hearing Back* the Ombudsman presented several models of system coordination all of which have merit. A key advantage of any coordinated system is that it allows the sharing of resources across the tribunal system to "maximize the…limited resources, while at the same time improving the effectiveness of some tribunals."[192]

The Ombudsman also made several recommendations respecting the need for training of administrative tribunal members.

In this Report, the Ombudsman found that training was lacking for the RACs and the SSAB. The Ministry advised that it was hesitant to have its staff directly involved in training the tribu-

nal members because it might interfere with the tribunals' independence or perceived independence. The Ombudsman acknowledges the Ministry's concern; however, the Ombudsman also finds that the lack of training available to the tribunal members has impacted on their ability to ensure their proceedings are procedurally fair.

In *Hearing Back*, the Ombudsman recommended that the Government of Saskatchewan look to find ways to coordinate the provincial tribunal system to facilitate the sharing of resources. Training for tribunals is one such resource that can be coordinated among the tribunals. To this end the Ombudsman repeats the following recommendations made to Government in 2007.

Recommendation 18

The Government of Saskatchewan considers options for coordinating the administrative tribunal system to accomplish the following:

a) Facilitate the sharing of resources, directing resources to where they are most needed.

b) Provide consistency and structure to the system for the benefit of users and tribunal members.

Recommendation 19

The Government of Saskatchewan and administrative tribunals work together to provide each tribunal member with initial and on-going training.

The Ombudsman also recognizes that the implementation of these recommendations is not the sole responsibility of the Ministry of Social Services, the RACs or the SSAB. Training, however, is needed now for these specific tribunals. In 2009 Ombudsman Saskatchewan and the Dispute Resolution Office of the Ministry of Justice collaborated on a desk top reference manual and training curriculum for Administrative Tribunals. The manual is called *Practice Essentials for Administrative Tribunals*. The reference manual is publically available and training is now offered through The Dispute Resolution Office, Ministry of Justice.

Recommendation 20

The chairpersons of the RACs and the SSAB review the practice and core competencies outlined in *Practices Essentials for Administrative Tribunals* against the training requirements of their respective tribunals and ensure each member is provided with the required training.

Recommendation 21

The Ministry provides the funding required for the RACs and the SSAB to ensure that each member of these tribunals receives training regarding the proper hearing and decision-making processes, as outlined in *Practices Essentials for Administrative Tribunals*.

7.4 Improving the Procedures of the RACs and the SSAB

The Ombudsman found that there is a lack of accessible support and advocacy services for individuals appearing before the RACs and the SSAB. Many tribunals members also stated that they believed many of the appeals were as a result of a lack of communication or misunderstanding between the Ministry and the individual. The Ombudsman suggests that these sentiments echoed what we heard in 2007 when completing the *Hearing Back* report; not every case should or needs to proceed to a hearing before the tribunals. What appears to be lacking within the second and third level of appeal is an "appropriate dispute resolution" alternative to the hearing.[193] In *Hearing Back*, appropriate dispute resolution was called "a best practice, and it can, as the title suggests, offer people a more appropriate means of settling their disputes." To this end, the Ombudsman repeats recommendations respecting appropriate dispute resolution from *Hearing Back*, but directs these recommendations to the RACs and the SSAB.

Recommendation 22

The RACs and the SSAB offer other appropriate dispute resolution models as an alternative to the hearing process.

Recommendation 23

The RACs and the SSAB provide information to users on the available appropriate dispute resolution options.

Even when the appeal tribunals and the Ministry offer appropriate dispute resolution options for resolving disputes, there will be cases that will proceed to a tribunal hearing due to the complexity of the issue or because of the preferences and needs of the individuals involved. Individuals are allowed to have representatives and assistance when appearing before the tribunals. Such representatives can be community advocates and do not need to be legally trained. As identified by tribunal members, anti-poverty advocates and clients, there is a lack of support services to assist the individuals who appear before the tribunals. Such services are needed throughout the province, particularly if the RACs and the SSAB retain their adversarial hearing model. Without support services, these tribunals are not be fully accessible to those who need them. In *Hearing Back*, the Ombudsman made a specific recommendation to improve support services for those appearing before administrative tribunals. The Ombudsman again repeats this recommendation specifically in relation to the SA program:

Recommendation 24

The Government of Saskatchewan and the Ministry of Social Services, in collaboration with the administrative tribunals, study and consider providing affordable support services to individuals who are preparing for and appearing at an RAC or SSAB hearing on complex and significant issues.

This Report found that the RACs and the SSAB follow an adversarial hearing model. This model may not be ideal for adjudicating social assistance appeals as it may unintentionally place the Ministry in an advantageous position.

Recommendation 25

The RACs and the SSAB introduce an inquiry-based hearing model.

Recommendation 26

The RACs and the SSAB review their policies and practices and ensure they are procedurally fair and follow a best practice approach, as outlined in this Report.

Recommendation 27

RAC and SSAB hearings, whenever possible, be held outside the Ministry offices that directly deliver the SA program.

7.5 The Transparency and Operation of the Tribunals

Recommendation 28

The SSAB publishes in its Annual Report all recommendations made by the appeal tribunals, including all recommendations made by the RACs and the Ministry's response to the recommendations.

Recommendation 29

The Ministry ensures that any Minister's Orders related to the SAP appeal tribunals do not include unnecessary provisions or provisions that are contradictory to legislation or regulations.

Recommendation 30

The Ministry make all Minister's Orders related to the SAP system accessible to the public by publishing them on-line.

Recommendation 31

The Government of Saskatchewan, with the assistance of the Ministry, compare section 18 of *The Saskatchewan Assistance Act* against section 10 of *The Department of Social Services Act* to determine if the provisions of these two Acts are contradictory, and make any changes deemed necessary as a result of that review, including any necessary regulatory changes.

7.6 An Overarching Principle of Fairness in the Collection of SAP Overpayments Through Administrative Means

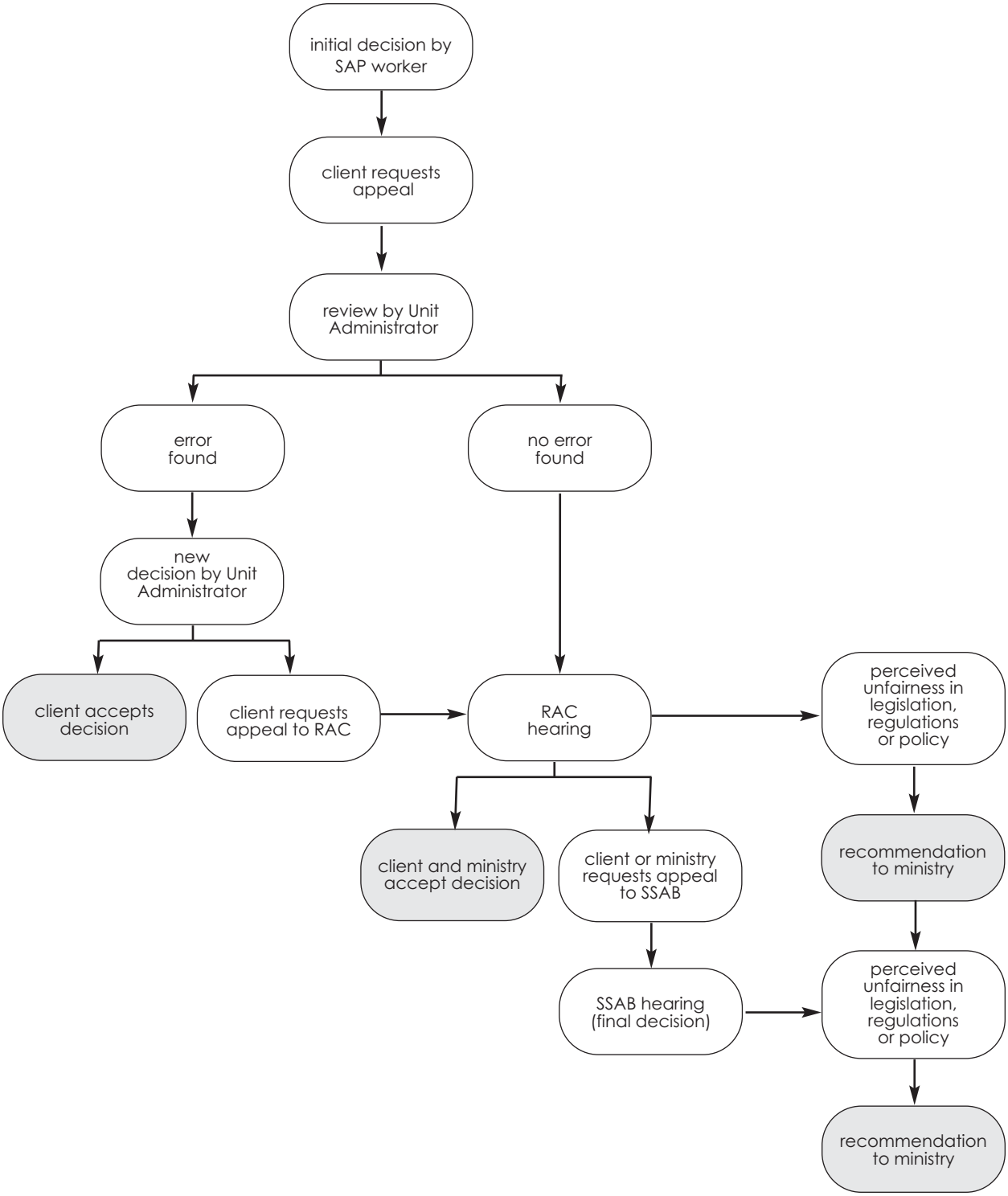
This review began in 2008 after several years of discussion with the Ministry about collecting SA overpayments through the CRA-RSO program. The overpayments being collected were often several years old and well beyond the limitation periods as prescribed by *The Limitations Act*. The purpose of statutory limitation periods in relation to the collection of debts is to ensure fairness. As is outlined in Section 6, Ombudsman Saskatchewan's position is that the Ministry's collection of SAP overpayments through the CRA-RSO program when the debt could not be collected through judicial means because the statutory limitation period has passed is generally unfair. It is akin to government collecting debt through the back door when it cannot be collected through the front door.

Recommendation 32

The Ministry applies the spirit and intention of *The Limitations Act* in its collection and recovery of any overpayments eligible to be collected through the CRA-RSO program.

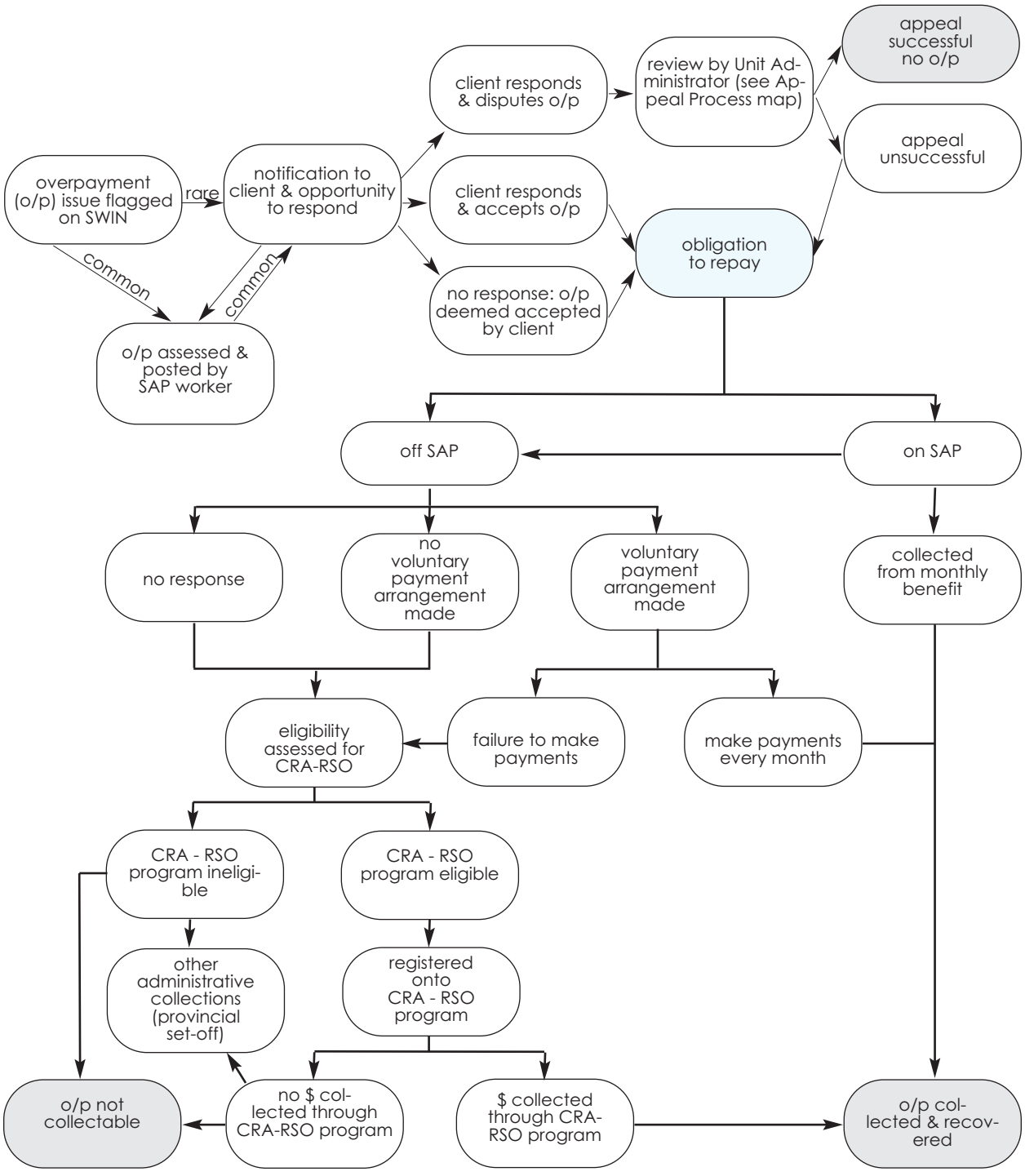
Appendix A

Appeal Procedure



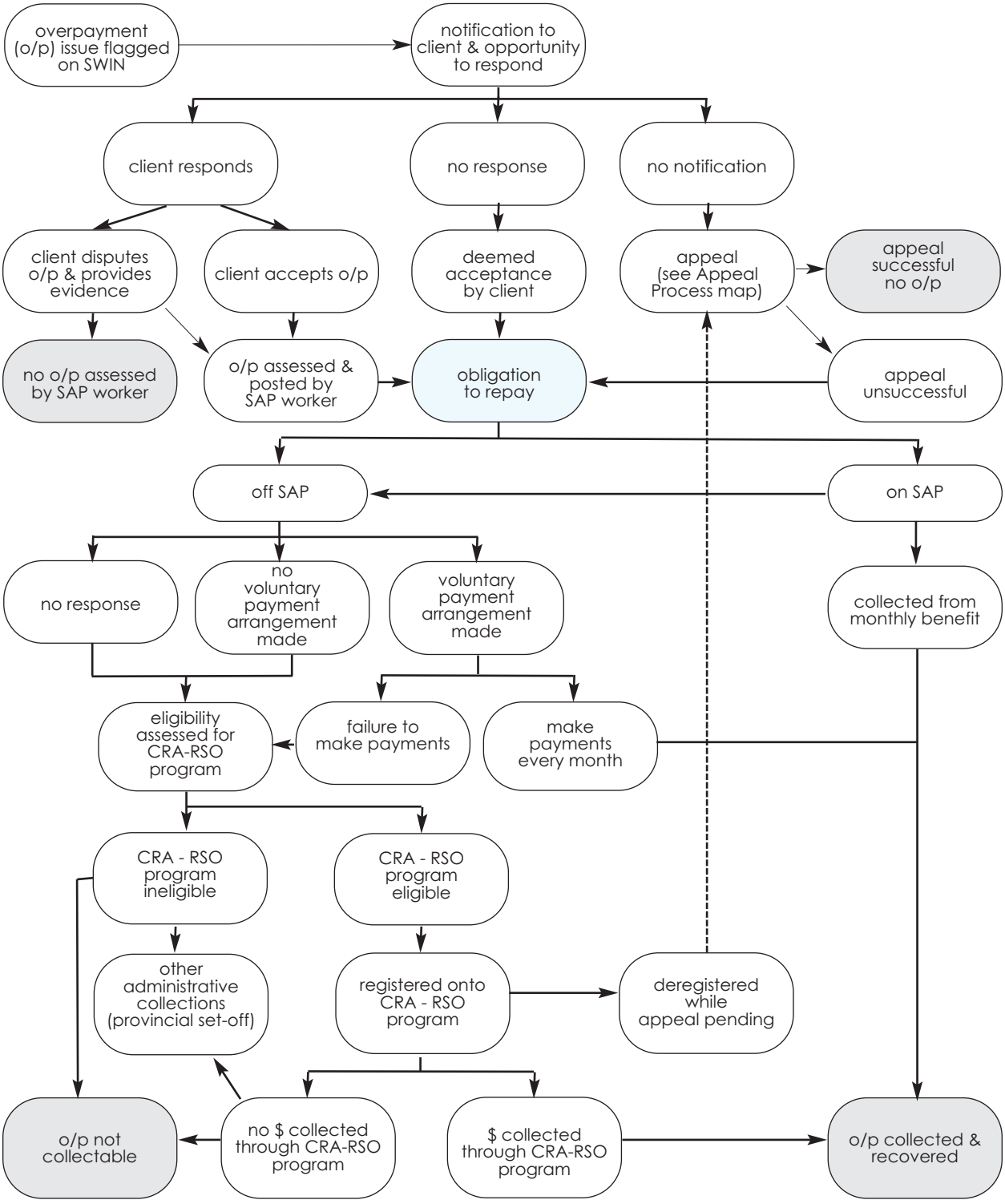
Appendix B

The Current Decision-Making Process



Appendix C

The Best Practices Decision-Making Process



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Endnotes

Section 1

1. Some of the Regulations associated with *The Saskatchewan Assistance Act*, R.S.S. c. S-8 (1978) [hereinafter the "Act"] refer to it as the Saskatchewan Assistance "Plan." See, for example, *The Saskatchewan Assistance Plan Supplementary Health Benefits Regulations*, S.R. 65/66. For the purposes of this Report, we will refer to it as the "Saskatchewan Assistance Program" or the "SA program."
2. In 2009 the Ministry made two major changes. In May 2009 the Minister launched "SAID," an income support program for people with disabilities. Administration of the program began in October 2009 and fundamentally alters the SAP population and the delivery of income support services to disabled adults. In June 2009 the Ministry, under the direction of a newly appointed Deputy Minister, began an evaluation and review of the operations of the Ministry. As a result of this review, a Ministry reorganization was implemented on October 1, 2009. This reorganization is in its initial phases, but it will involve a reorganization of the Ministry's administrative, policy and service structure.
3. Prior to February 2009, the Regional Appeal Committees were referred to as "Local Appeal Committees" in program policy. However, the Ministry advises that the name for the committees was changed in 2003 when the Ministry was restructured and became "Community Resources and Employment."
4. Since beginning this review, the Ministry has embarked on an organizational restructuring. Prior to and during this restructuring, the Income Security Division and the SA program have undergone a series of changes, including name changes. The Ombudsman investigators have attempted to "keep up" with those name changes. The program names identified in this Report were current to November 18, 2009.

Section 2

5. Saskatchewan Ministry of Social Services. (February 2009). *The Saskatchewan Assistance Program Policy Manual*, Appendix A ["SAP Policy Manual"].
6. The Act, *supra* note 1.
7. The *Saskatchewan Assistance Regulations*, S.R. 78/66 (1978) [the "Regulations"].
8. "Spouse" refers to a partner living with the applicant at time of application. "Child" refers to a child living with the applicant at time of application who is under age 18 years of age, or over 18 but under 19 years of age and attending a secondary institution.
9. Malatest & Associates Ltd. (2004). *Evaluation of the Re-organization of Service Delivery. Final report.*
10. Also referred to in the literature as a "needs" or "means" test.
11. Regulation 6(1)(d) requires as a condition of eligibility that a recipient advise of any changes in resources, dependents, or address. Standardized intake letters advise applicants of this requirement.
12. Transition plans establish goals and objectives that recipients must work toward to establish their independence from SAP.
13. Interviews with Ministry staff, October 2008.
14. Malatest & Associates Ltd., *supra* note 9, p. 3.
15. The Regulations, *supra* note 7, s. 6(1)(d).
16. The Regulations, *supra* note 7, s. 23(1)(e).
17. SAP Policy Manual, *supra* note 5.
18. This is also known as "excess entitlements."
19. The applicable legislation, regulations, and updated policy manual can be found on the Ministry's website.
20. The Regulations, *supra* note 7, s. 41 through 43.
21. The Regulations, *supra* note 7, s. 41(1).
22. Interviews with Ministry staff, October 2008.
23. The Regulations, *supra* note 7, s. 41(2.1).
24. The Regulations, *supra* note 7, s. 41(3).
25. *The Department of Social Services Act*, R.S.S., c. D-23 (1978).
26. At the time of writing this Report, 5 service regions existed. As of October 2009, the 5 service regions responsible for the delivery of the SA program were amalgamated into 2 service regions. It is unknown if the number of RACs will be reduced to mirror the number of service regions.
27. Interviews with Appeal Tribunal members, November 2008.
28. The Regulations, *supra* note 7, s. 41(2.1).
29. Minister's Order #9/91.
30. The Regulations, *supra* note 7, s. 41(3).
31. The Regulations, *supra* note 7, s. 41(9).

32. The Regulations, *supra* note 7, s. 41(5)-41(7).
33. The Regulations, *supra* note 7, s. 41(10). If the Committee is not able to make a decision within seven days of the hearing, it must notify the parties: the Regulations, *supra* note 7, S. 41(11).
34. The Regulations, supra note 7, s. 43(1) and 43(3).
35. *Ibid*.
36. The Regulations, *supra* note 7, s. 43(7).
37. *The Department of Social Services Act*, *supra* note 25, s. 10.
38. Interviews with Appeal Tribunal members, October 2008.
39. SSAB Annual Report 2007-2008, p. 7.
40. The Regulations, *supra* note 7, s. 43(6).
41. Interviews with Appeal Tribunal members, October 2008.
42. SSAB Annual Report 2007-2008, *supra* note 39, p. 7.
43. The Regulations, *supra* note 7, s. 43(2).
44. The Regulations, *supra* note 7, s. 43(3).
45. Interviews with Appeal Tribunal members, October 2008.
46. Interviews with Appeal Tribunal members, October 2008.
47. Interviews with Appeal Tribunal members, October 2008.
48. Interviews with Appeal Tribunal members, October 2008.

Section 3

49. SAP Policy Manual, *supra* note 5, p. 47.
50. In October 2009, an updated policy manual was introduced by the Ministry. The SAP Policy Manual highlights the reporting requirements at the end of each relevant chapter. While the Ombudsman hopes the new manual format will assist regional staff in better identifying reporting requirements and timelines, the legislation remains complex and difficult to interpret. The Ombudsman suggests that it would be helpful to develop "explanatory summaries" of the legislation and regulations and make them available to staff, recipients, appeal tribunal members and the general public.
51. A number of SAP recipients we spoke to reported that they did not understand the cause of the overpayment assessed against them. Appeal tribunal members also stated that a number of appeals they heard were due to a lack of communication between the regional staff and the client. Several appeal tribunal members stated that they often found that once the client and the Ministry had an opportunity to speak to each other and the Ministry outlined how the overpayment was assessed, many of the appeals were resolved. Interviews with Appeal Tribunal members, November 2008.
52. The CRA provides the Ministry with only an individual's SIN number and the income earned by the individual in the tax year. In situations where it appears that an individual has failed to report income to the Ministry, the individual is assessed an overpayment. The Ministry places the onus on individuals to prove that they should not have been assessed an overpayment based on the source and timing of the income. At the time of writing this Report, we were advised that if the Ministry does not receive the needed information from the individual and the Ministry is unable to obtain details from a third party (such as an employer), the Ministry would estimate monthly income by dividing the annual reported income by twelve. The Ministry charged an overpayment on the basis of the estimated monthly income. Ministry staff we spoke to felt this practice was unfair because the overpayment was calculated on an estimate, and not on documented evidence. Since the writing of this Report, the Ministry has informed the Ombudsman investigators that as of October 22, 2009, instructions were provided to staff to cease the practice of "estimating monthly income" and to ensure that Ministry staff are requesting and relying upon documentation of income.
53. Examples of program specific issues that Ministry staff raised in interviews with Ombudsman investigators include the following: the handling of benefits issued for utility costs in situations where a credit arises while the recipient is on equalized payments; inadequate benefit levels, in particular, shelter allowances; and the use of requisitions for unexpected expenses or emergency situations and the inconsistent treatment of those funds as either an overpayment or an early payment of the approved benefit for the following month.
54. Interviews with Ministry staff, October 2008.
55. In order to understand the prevalence of overpayments, Ombudsman Investigators requested information concerning the number overpayments in closed cases over a five year period (2003-2007). It should be noted that when this Report began, the information for 2008 was not yet available for the full fiscal year and therefore, the cut-off was the fiscal year ending March 31, 2007.
56. E-mail correspondence from Ministry staff to Ombudsman, December 2008.
57. Information in the first four columns of the table was provided to the Ombudsman by the Ministry. Ombudsman staff calculated the information in the last column by simply subtracting the closed cases reported to be

registered with the CRA-RSO program from the number of closed cases registered with the CRA-RSO program in the previous year.

58. See s. 29.5 of The Act, *supra* note 1.
59. Interviews with Ministry staff, September 2008.
60. Interviews with Ministry staff, September 2008.
61. Interviews with Ministry staff, October 2008.
62. Interviews with Ministry staff, October 2008.
63. Information provided to Ombudsman staff by the Ministry, November 19, 2009.
64. Interviews with Ministry staff, July 2009.
65. Situations where the Collections Unit may cease or suspend collection efforts include: cases where the individual has died; cases where the individual is over the age of 65; cases where the individual is under the age of 18; cases where a social worker or other qualified person has noted that the individual is under a suicide alert; cases where the individual has demonstrated an intellectual or physical disability and where there is no likelihood of gainful employment; and cases where hardship has been proven upon submission of a completed Statement of Affairs package.
66. It is very difficult to discuss a "typical" collection process with the CU, as the staff are firm in their opinions that each case is different. They report that they will send at least two letters and make at least one attempt to contact the individual by telephone. The two letters will be sent at least 30 and 60 days after referral from the regional office, although the letters may be sent long after the 30 and 60 day marks.
67. In Saskatchewan this would apply to the Saskatchewan Sales Tax Credit available to low income families.
68. Saskatchewan has been a CRA-RSO program partner since 2003.
69. Based on a telephone interview with Canada Revenue Agency staff in September 2009, the CRA-RSO program does not intercept child tax benefits and the program will not be used while an individual is undergoing bankruptcy proceedings. Families who earn an income below the Statistics Canada low income threshold are excluded from having their GST rebate and Saskatchewan Sales Tax Credits intercepted, but their income tax refunds are still subject to collection through the CRA-RSO program.
70. Interviews with Ministry staff, July 2009.
71. Interviews with Ministry staff, October 2008.
72. Interviews with Ministry staff, July 2009.
73. Interviews with Ministry staff, October 2008.
74. Interviews with Ministry staff, June 2009.
75. Interviews with Ministry staff, June 2009.

Section 4

76. Preston, D., Kummrow, J., and D. Cristiano (April 2007). *Administrative Decision Making in the Public Sector: Managing Legal Risk*. Retrieved from: http://www.vgso.vic.gov.au/resources/seminars/pastseminars/PastSeminars.aspx, p. 1.
77. *Ibid*.
78. *Ibid*.
79. *Ibid.*
80. *Ibid*.
81. Matheson, D & Kisson, N (2006). "A comparison of decision-making by physicians and administrators in heath care setting." *Critical Care*, 10(5).
82. [1999] 2 S.C.R. 817 [hereinafter referred to as "*Baker*" or "the *Baker* decision"].
83. See also: *Knight* v. *Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.
84. Sossin, L (2004) "Boldly go where no law has gone before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance." *Osgood Hall Law Journa*l. p. 16 citing *Baker*, *supra* note 82.
85. *Ibid*.
86. *Ibid*.
87. *Ibid,* p. 16.
88. *Baker*, *supra* note 82, paras 23-28.
89. Preston, D., et. al., *supra* note 76, p. 5.
90. Huscroft, G. (2008). "The Duty of Fairness: From Nicholson to Baker and Beyond." p. 117 in C. Flood & L. Sossin (Eds), I (pp. 169-195). Toronto: Emond Montgomery. Retrieved February 19, 2009, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159055.
91. The best practices model for decision making by administrators is based on the rules of procedural fairness as presently understood in Canada.

Section 5

92. The necessity and reasonableness of the "opportunity to respond" will be explored in greater depth in the context of section 5.2 dealing with "Best Practice 2."
93. For more on notice of the decision and the reasons for the decision please see Section 5.5.
94. Interviews with Ministry staff, October 2008.
95. In some situations, the amount of the assessed overpayment may be characterized as an "advance" on the cheque stub.
96. Interviews with Ministry staff, October 2008.
97. A minority of Ministry staff we interviewed indicated that there are times when the individual is told about the overpayment before or as it is being entered into the system: Interviews with Ministry staff, October 2008.
98. For further information on what is required in terms of reasons for a decision, please see Section 5.5.
99. Interviews with Ministry staff, October 2008.
100. Interviews with Ministry staff, October 2008.
101. Interviews with Ministry staff, October 2008.
102. It is vitally important that notification of the overpayment decision be received by the individual as the notice letters also inform the individual of the right to appeal the overpayment decision.
103. The CU will also use an individual's last known address and telephone number when attempting to make contact. However, the CU noted that they will not use the last known address if they know the address to be incorrect: Information provided by Ministry staff, November 2009.
104. See, for example, template letters from the CU.
105. Interviews with Ministry staff, October 2008.
106. Ombudsman investigators were advised that unit administrators in 2 of the 4 regions occasionally proceeded to consider and review appeals filed by individuals after the expiry of the 30-day time period for appeal.
107. See Section 5.1.1.
108. Interviews with Appeal Tribunal members, November 2008.
109. For guidance in resolving inconsistent and contradictory evidence, including the assessment of credibility, see Ombudsman Saskatchewan's manual, *Practice Essentials for Administrative Tribunals* (2009), in Part 4 "Making and Writing Good Decisions" at p. 61-63.
110. See also the discussion in Section 5.1.2.
111. See also the discussion in Section 5.2.3.
112. Given the low volume of hardship status applications considered by the CU, the Ombudsman investigators did not receive any complaints about the manner in which those decisions were made.
113. Covering letter sent by Ministry with the Statement of Affairs package.
114. Interviews with Ministry staff, June 2009.
115. The Regulations, *supra* note 7, s. 43(6).
116. Please see Section 5.8.2.
117. *Baker*, *supra* note 82, paras. 16 and 17.
118. Administrative Review Council (2007, August). *Decision Making: Lawfulness (Best Practice Guide 1)*. Commonwealth of Australia: ARC.
119. In an interview with Ministry staff, June 2009, we were told that this policy was changed in the early 1990s. However, in at least one file our office has involvement with where an overpayment was calculated prior to the policy change, the Ministry continues to rely on information from a third-party anonymous complaint. Therefore, in spite of the change to their policy for which we commend them, there may still be some overpayments being collected that were assessed on the basis of inadequate evidence.
120. Interviews with Ministry staff, October 2008.
121. Interviews with Ministry staff, June 2009.
122. This was especially clear when we asked one Ministry staff member a question about why the Ministry does not use certificates to collect its debts. Under the legislation there is a process to have a certificate approved by the court, stating the amount of the debt owed to the Ministry, and this certificate acts as a judgment of the court and can be enforced as a judgment of the court. One staff member replied that they do not use certificates, "because it is not in the policy."
123. Interviews with Ministry staff, October 2008.
124. Interviews with Ministry staff, October & November 2008.
125. Interviews with Ministry staff, November 2009.
126. Interviews with Ministry staff, November 2009.
127. The Act, *supra* note 1, s. 29.5.
128. Interviews with Ministry staff, October 2008.
129. Interviews with Appeal Tribunal members, November 2008.

130. Lang, L. *The Roles and Responsibilities of Appeal Committees*. (General instructions prepared for the appeal tribunals by the Ministry's legal counsel at the Ministry of Justice) at p. 8.
131. Consultation with advocacy group, November 2008.
132. Most of the RAC members interviewed were not aware they had the ability to make recommendations to the Minister. This power is provided to all tribunal members in *The Department of Social Services Act*, *supra* note 25, s. 10(3), which states:

    An appeal committee or a provincial appeal board may, in addition to deciding a matter under appeal, recommend to the minister:

    (a) changes in existing laws or policies administered by or affecting the department;

    (b) changes in service practices of the department.
133. For more on the Ombudsman's decision that there are insufficient procedural protections in the initial assessment of an overpayment, please see Sections 5.1.1 and 5.2.1.
134. The Regulations, *supra* note 7, s. 41(2).
135. Chapter 21 of the SAP Policy Manual, *supra* note 5, currently states, "The appeal must be made to and received by the unit administrator in writing within 30 calendar days of the decision letter." The italicized portions of text indicate recent additions to the policy.
136. SAP Policy Manual, *supra* note 5, Chapter 21.
137. While decisions of the SSAB are said to be final, there is always an opportunity to bring certain decisions (those that are outside of the jurisdiction of a tribunal or where the legal interpretation or the procedure used by the tribunal was grossly wrong) to the court for a "judicial review." However, judicial review applications are complex legal applications, so it is very difficult to be successful on such an application without the assistance of a lawyer.
138. *Baker*, *supra* note 82, para. 43.
139. *Baker*, *supra* note 82, para. 39.
140. Interviews with Appeal Tribunal members, November 2008.
141. Interviews with Ministry staff, October 2008.
142. This is the assessment of many people in the Ministry—that staff do not make the decision that an overpayment has occurred, the computer system does. The Ombudsman disagrees with this assessment and asserts that the Ministry must recognize that it is staff who makes the decision that an overpayment has occurred and that they use the information provided by the computer program when making that decision. For more on this, see Sections 5.1.1 and 5.2.1.
143. This is not the only potential deterrent to appealing decisions of the Ministry for individuals on the SA program. A potentially greater deterrent is the issue of uneven resources. Even after leaving SAP, for many individuals resources are limited and fighting a large government bureaucracy may not seem possible. For many it simply would be a situation where "you can't fight city hall." While the inadequacy of resources are less of an issue at the hearings before the appeal tribunals, attempting to question a decision of the SSAB through an application for judicial review in the courts would require more resources than many SAP recipients or former recipients can manage.
144. The Regulations, *supra* note 7, s. 43.
145. Minister's Order #5/81, sets out these as requirements for the SSAB, except that the Minister's Order only states that "A written decision from the chairman [sic] to the appellant and his representative will be provided as soon as possible following a decision."
146. Interviews with Appeal Tribunal members, November 2008.
147. Interviews with Appeal Tribunal members, October 2008.
148. Focus group, January 2009.
149. SAP Policy Manual, *supra* note 5, p. 108 and 112.
150. SAP Policy Manual, *supra* note 5, p. 83 and the Regulations, *supra* note 7, s. 27(4)(Q).
151. SAP Policy Manual, *supra* note 5, p. 107.
152. The Regulations, *supra* note 7, s. 41(3).
153. Consultation with advocacy group, November 2008.
154. Consultation with advocacy group, November 2008.
155. Regulations have to be approved by the Lieutenant Governor in Council.
156. For the text of the relevant section of *The Department of Social Services Act*, please see note 137.
157. Interviews with Appeal Tribunal members, October & November 2008.
158. Three examples of quotes we heard in interviews are as follows: "Training is lacking at every level." "Would like a better process for new supervisors since it is currently an 'induction by fire'." "If I hadn't been on the board for the last 8 years, I would be flapping in the wind. No training whatsoever! They are working with 8 year old guidelines. It is a weak system. They pay it lip service and then are shocked when the RAC gets upset."

159. Interviews with Ministry staff, October 2008. Training on policy is also provided by one-on-one supervision by a supervisor with every new worker.
160. Interviews with Ministry staff, October 2008.
161. Interviews with Ministry staff, October 2008.
162. Interviews with Ministry staff, November 2008.
163. Interviews with Ministry staff, October 2008. Of course, not all policy changes require training. Some, like rate changes, are simply sent out to staff via email or revised policy manuals, which are available both on the web site and in hard copy. However, for those policy changes that require training or explanation, supervisors are generally expected to provide this during staff meetings.
164. Interviews with Ministry staff, October 2008 & June 2009.
165. Interviews with Ministry staff, October 2008.
166. Interviews with Ministry staff, October 2008
167. Interviews with Ministry staff, November 2008.
168. Interviews with Ministry staff, October 2008.
169. The Ministry appears to have some new training materials which were developed in June 2009 and involve a review of the legislation, regulations and the policy: Interviews with Ministry staff, June 2009.
170. Interviews with Ministry staff, October 2008.
171. Interviews with Ministry staff, October 2008. Also stated in interviews with appeal tribunal members, October 2008.
172. Ombudsman investigators were provided with two versions of this document. Unfortunately, the author was unable to determine which of the two was more recent or more definitive, although both appear to be in use. However, we noticed that the two versions are somewhat different and it may be that different members of the RACs and the SSAB are relying on different versions of the document to guide their procedures and decision-making: Interviews with Ministry staff, October 2008.
173. Interviews with Ministry staff, September 2008.
174. Interviews with Ministry staff, September 2008.
175. Interviews with Appeal Tribunal members, October 2008.
176. Current chairperson of the SSAB as of November 2009.
177. Interviews with Ministry staff, October 2008.
178. A coordination of the provincial tribunal system could be accomplished through the development of a provincial "central council" or a research body, similar to the Administrative Justice Office in the Province of British Columbia.

Section 6

179. *The Limitations Act*, S.S. c. L-16.1 (2004). In 2005, *The Limitations Act* replaced an earlier statute, *The Limitation of Actions Act* (Repealed), R.S.S. c. L-15 (1978), changing the timeframe to launch most legal actions from six to two years, and streamlining limitations law in Saskatchewan.
180. *The Limitations Act*, *supra* note 179, s. 5. Under *The Limitation of Actions Act* the timeframes for commencing an action varied, but for actions on a debt it was six years. It is noteworthy that *The Limitations Act* came into force on May 1, 2005 so for harms discovered prior to May 1, 2005, the limitation period that applies is still six years under *The Limitation of Actions Act*.
181. This is an overly simplistic statement of the common law. Limitations law is very complicated in terms of how it applies to debt collection. For example, the debt is first "discovered" when a payment is missed. However, if the debt is acknowledged by the debtor, either verbally or in writing, or by the debtor making a payment on the debt, the limitation period starts over.
182. *The Limitations Act*, *supra* note 179, s. 4.
183. The Act, *supra* note 1, s. 29.5.
184. *Ibid*.
185. *Ibid*.
186. *The Financial Administration Act*, 1993, S.S. 1993, c. F-13.4, s. 42.
187. *Markevich* v. *Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9, online. Retrieved April 3, 2009 from http://csc.lexum.umontreal.ca/en/2003/2003scc9/2003scc9.html. [hereinafter "Markevich"].
188. *Markevich*, *Ibid*., at paras. 19-20.
189. CRA-RSO Program Guide.
190. This issue was first raised with Ombudsman Saskatchewan in 2002 by a community lawyer whose client had a debt owed to the Government collected by way of set-off.

Section 7

191. For a full discussion on the best practices for Administrative Tribunals please see the Ombudsman 2007 report *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals*.
192. *Hearing Back, Ibid.,* p. 34
193. Ombudsman Saskatchewan refers to alternatives to a hearing as Appropriate Dispute Resolution. These alternatives are also known as "Alternative Dispute Resolution" or "ADR".

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