

Practice Essentials for Administrative Tribunals



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A Few Words from the Ombudsman



Kevin Fenwick, Q.C.
Saskatchewan Ombudsman

One of the goals of Ombudsman Saskatchewan is to look at issues systemically. When we receive complaints from citizens, we want to ensure that, in addition to looking at the specifics of a citizen's complaint, we also look at a broader picture in the hope that our efforts might have a positive impact for many people.

It was with that goal in mind that we completed our 2007 review of administrative tribunals in Saskatchewan entitled *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals*. Initially designed as a review of the timeliness of decision-making by administrative tribunals, the report was broadened, partly as a result of requests from the tribunals themselves. The final product was a best-practices review of a number of aspects of the processes and organization of the "admin tribs."

Hearing Back contained 27 recommendations for improving the practice of tribunals.

Directly and indirectly, several of those recommendations referred to the need for better training for their members and staff.

In further support of those recommendations, Ombudsman Saskatchewan embarked on a project in 2009 in cooperation with the Dispute Resolution Office, a branch of Saskatchewan Justice, to develop a resource that would be responsive to the need for training. This manual is the product of our efforts.

This manual was written with several purposes in mind. It is intended to be a desktop resource to help tribunal members and staff use best practices in the design and delivery of their processes. We also expect that it will be used as a tool for orientation and training of members of administrative tribunals. Finally, we hope that public servants and others whose decisions may be appealed to administrative tribunals will find this manual a useful resource for best practices with respect to fairness.

We recognize that good materials already exist to guide administrative tribunals in the design and implementation of their processes. Many of those resources, however, are written for tribunals with more formal and complicated processes. Our hope is to provide a manual that will be a simple, easy-to-read guide, especially for those tribunals who operate relatively informally without the benefit of a large support staff. After we tabled our *Hearing Back* report in the Legislative Assembly of Saskatchewan in December 2007, I was asked to present a number of seminars about that report. Keeping in mind that the original goal of the establishment of administrative tribunals was to provide a timely and inexpensive alternative to the court system, some of those seminars were entitled "What Ever Happened to Quick, Cheap, and Uncomplicated?" We hope that this manual will be

especially helpful for those tribunals trying to stay close to their “quick, cheap, and uncomplicated” roots.

As Ombudsman for Saskatchewan, my mission is to promote and protect fairness in the delivery of government services, including administrative tribunals. For the citizen who appears before an administrative tribunal, fairness means many things. It includes fairness about what a tribunal decides, about how it makes its decisions, and about how it treats people while it is making those decisions. It is our hope that this manual will assist administrative tribunals to identify and respond to all three of those aspects of fairness.

I can conclude in no better way than by quoting Sir Andrew Leggatt in his 2001 report prepared for the Lord High Chancellor of England: *Tribunals for Users – One System, One Service: A Report of the Review of Tribunals by Sir Andrew Leggatt*.¹

It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.

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Introduction

In December of 2007, Ombudsman Saskatchewan released a system-wide review of administrative tribunals titled *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals*. It contained 27 best practice recommendations for tribunals and the Government of Saskatchewan.

The *Hearing Back* report noted a lack of accessible training for provincial administrative tribunals and made two best practice recommendations with respect to training. These recommendations focus on the important role that effective and accessible training has in supporting and improving the functioning of administrative tribunals. Building on the *Hearing Back* report, Ombudsman Saskatchewan has developed this reference manual as a resource for members of Saskatchewan administrative tribunals.

This manual provides administrative tribunals with a general introduction to the best practices for tribunal operations and covers four critical areas:

- the legal framework for tribunals (Administrative Tribunals and the Canadian Legal System)
- tribunal governance (Governing Your Tribunal and Yourself)
- the hearing process (Conducting a Fair Hearing)
- the making and writing of decisions (Making and Writing Good Decisions)

This manual provides an overview of practice and procedure for different types of administrative tribunals, from quasi-judicial tribunals operating an adversarial hearing model to tribunals using an inquiry-based hearing model. Many of the best practices outlined in this manual apply to statutory decision-makers as well as administrative tribunals.

A number of tribunals may already have policies and procedures in place that cover topics set out in this manual. The manual is intended to supplement rather than replace existing guidelines and policy manuals.

The best practices outlined in this manual are based on legal concepts found in the Canadian administrative justice system. These concepts have been simplified and are intended as general information only. The information provided should not be interpreted as legal advice. Tribunals seeking legal advice should consult a lawyer.

The reference manual is part of Ombudsman Saskatchewan's ongoing commitment to supporting and improving the quality of administrative justice in the Province of Saskatchewan.

Glossary Terms

Terms that appear in bold throughout this manual are described in the glossary at the back.

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Chapter One

Administrative Tribunals and
the Canadian Legal System



Administrative Tribunals

In Saskatchewan, **administrative tribunals** are the boards, commissions, appeal committees and other administrative bodies created by government to assist in carrying out its decision-making responsibilities.

Administrative tribunals are an important part of the legal system in Saskatchewan. Tribunals make **decisions** in a wide range of areas that have a significant impact on the public. Some tribunals make decisions about rights and benefits or resolve disputes between **parties**. Others hear public complaints or appeals. Some tribunals have a regulatory, administrative or policy-making role. Other tribunals are **quasi-judicial**, which means that they carry out their decision-making function in a manner similar to courts.

In order to understand where your administrative tribunal fits into the legal system, it is helpful to first understand what that system looks like and how it operates.

Understanding the Legal System

The legal system in Canada exists as a way to regulate conduct in our society: the conduct of individuals, businesses and government.² When people think about our legal system, they often think about lawyers, judges and courtrooms. The legal system's connection to government does not instantly come to mind.

Government acts as the system administrator. Laws form the rules of the system and are passed by elected representatives who are responsible for making decisions about what the rules should be.

THE STRUCTURE OF GOVERNMENT

Government is made up of three different branches – the legislative, the executive and the judicial.³ Each branch has different functions and decision-making responsibilities.

The legislative branch consists of representatives appointed by government or elected by the public to form the federal Parliament and the provincial Legislative Assembly. This branch of government creates the law and brings it formally into effect through the passing of **statutes** and related **regulations**.⁴

The executive branch consists of either federal or provincial cabinet ministers who lead the various departments and ministries of the government. The executive branch also includes the staff of these departments and ministries. This branch of government is responsible for the administration of the law.⁵

The judicial branch consists of the **court** system. This branch of government operates independently of the other branches and is responsible for interpreting the law and resolving disputes about legal rights and responsibilities.⁶

Administrative tribunals share certain similarities with both the executive and the judicial branches of government in their decision-making processes. Tribunals are technically an extension of the executive branch of government, but often run **hearings** and make decisions in a manner similar to judges in the court system.⁷

THE COURT SYSTEM

The court system in Saskatchewan is divided into three main levels. The first level is the Provincial Court of Saskatchewan. This level of court handles primarily criminal, small claims and some family law cases.

The second level of court is the Court of Queen's Bench. This level of court handles criminal cases and a wide range of civil cases including family law proceedings, personal injury

claims, contract disputes, estate administration and foreclosure proceedings.

The highest level of court in Saskatchewan is the Court of Appeal which primarily hears appeals from the lower court levels. Decisions of the Court of Appeal are binding on all other courts in the province.⁸

The highest court in Canada is the Supreme Court of Canada. This court hears appeals from Courts of Appeal across Canada as well as cases referred by the federal government.

The Supreme Court of Canada generally decides which cases it will hear. It typically considers matters that have national significance or involve areas of the law that are confusing or in conflict. Decisions of the Supreme Court are binding on all other levels of court in Canada.⁹

The courts in Saskatchewan hear appeals resulting from decisions made by a number of provincial administrative tribunals. The statute that creates a tribunal (referred to as a **governing statute**) generally sets out whether parties can **appeal** a decision and to what body they can appeal. In cases where the parties can appeal to the courts, the statute identifies whether the appeal is to the Court of Queen’s Bench or the Court of Appeal.

If parties are concerned that a provincial administrative tribunal did not follow a fair process or acted outside of its authority, they can also apply to the Court of Queen’s Bench for a review of the decision – a process referred to as **judicial review**.

The relationship between administrative tribunals and the courts is outlined in Figure 1.

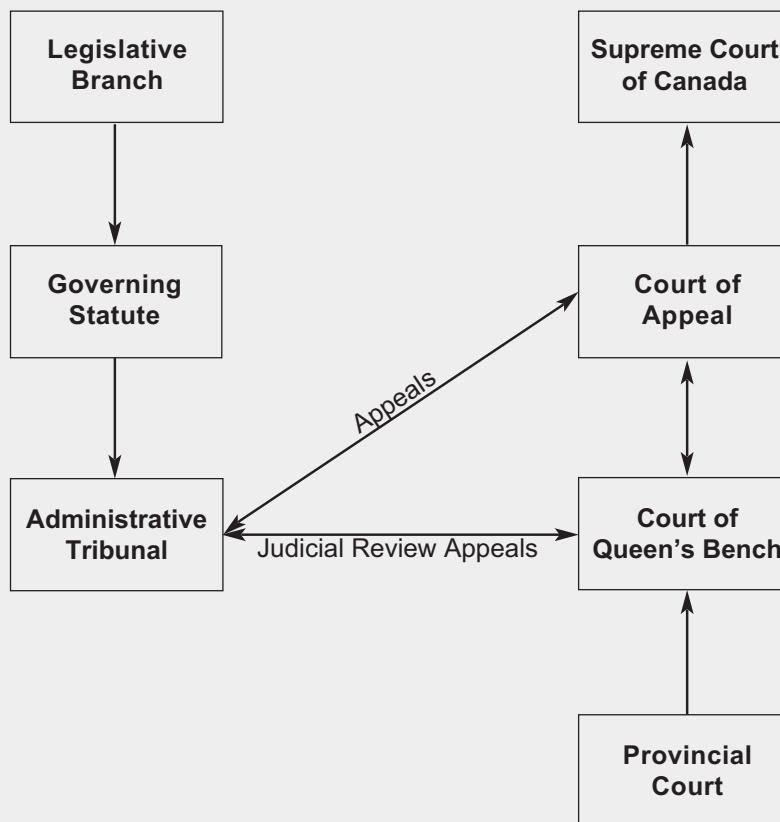


Figure 1: The Relationship Between Provincial Administrative Tribunals and Courts in Saskatchewan

Comparisons Between Tribunals and Courts

The role of administrative tribunals is to provide a quick and efficient means of resolving disputes. They are intended to provide a faster, less formal, more flexible and more specialized decision-making process than the court system.¹⁰

Administrative tribunals are similar to courts in a number of ways. Members of administrative tribunals may conduct hearings, assess **evidence**, interpret the law and provide decisions in a manner that is similar to the way judges carry out their responsibilities in the court system. Like judges, tribunal members are authorized to make decisions and are required to use a fair and impartial decision-making process.

Courts, however, have a higher degree of independence from government than administrative tribunals. Courts are separate and distinct from executive government. Tribunals are an extension of executive government. There are other major differences between administrative tribunals and courts as well:

- Courts have authority to govern their operations by virtue of their status as courts. Tribunals must find the authority to govern their operations within their governing statute. Tribunals have only those powers that are set out in their statute or that are reasonably necessary to carry out those powers.¹¹
- Courts have a high degree of formality in their processes with many complex rules and procedures that must be followed, making the court system difficult for the average person to use without the assistance of a lawyer. Tribunals are designed to have more informal processes and are intended to be more accessible to parties, without the need for legal **counsel** in most cases.
- Courts are bound by **precedents** set in previous decisions and operate on a hierarchical system – lower courts are governed by the decisions of higher courts. Once a court has determined the principles

that will apply to a particular circumstance, all courts lower in the hierarchy must apply those principles in similar cases. Tribunals are not bound by decisions they make in previous cases. In practice, though, tribunals have an interest in making consistent decisions, as fairness requires that similar cases be decided alike.

- Courts use formal rules of evidence in their hearing processes. Tribunals are not bound by the formal rules of evidence used in the court system. Tribunals are, however, required to ensure that the evidence they admit is **relevant** and reliable, in keeping with **procedural fairness** principles.

Practice Suggestion

While administrative tribunals may perform functions that are similar to courts, tribunals are not courts and do not have the same authority or degree of independence that courts do. Keep this distinction in mind when you are dealing with issues relating to your tribunal's independence and the extent of its authority.

THE RULE OF LAW

There are a number of limits on your tribunal's decision-making authority. One of the most significant limits is the **rule of law**. The rule of law provides that the law is the highest authority – no one is above the law and everyone is equal before the law.¹² Tribunals are subject to the rule of law, which means that they must operate within it.

Tribunals are governed by several sources of law including:

- The **Canadian Constitution**.
- The statute that creates the tribunal and any accompanying regulations (governing statute).
- The **common law** (also called case law or judge-made law).

The Constitution

The Canadian Constitution is the highest law in Canada – it governs all other law. Any law or portion of a law that conflicts with the Constitution may be considered unconstitutional and of no effect.¹³ One of the most important parts of the Constitution is the *Canadian Charter of Rights and Freedoms*.

In practice, while administrative tribunals are governed by the Constitution, they rarely deal with constitutional matters. Issues that do arise in this area generally relate to the *Canadian Charter of Rights and Freedoms*, which will be discussed in Chapter Three.

The Governing Statute

Your tribunal's **governing statute** sets out its **jurisdiction**: what it can make decisions about, the specific powers it has, the **remedies** it can provide, and the procedures it must follow.

If a statute does not outline a tribunal's procedures or only sets out some procedural requirements, the tribunal must use its **discretion** to decide on the procedures it needs to carry out its responsibilities.

The Common Law

The **common law** is the law that arises from cases decided by judges in the court system over time. It tends to evolve slowly as judges expand on principles decided in previous cases to fit new circumstances.

Practice Suggestion

As a general rule, if the common law conflicts with a statute, the statute governs. As a result, look first to your statute for direction and then to the common law for additional guidance in areas that your statute does not cover.

Administrative law is one area of the common law. It deals with the operation of government and the role of law in regulating the conduct of government.

Administrative law is mainly concerned with rules of procedural fairness and the principles that apply in determining whether government **decision-makers** have acted fairly and within their authority in carrying out their decision-making responsibility.¹⁴

THE DUTY OF FAIRNESS

Your tribunal is governed by the principles of administrative law in carrying out its responsibilities. One of the most important requirements of administrative law is the duty to act fairly, often called the **duty of fairness**.

While the requirement to act fairly applies to all government decision-makers, a higher level of procedural fairness is generally required for quasi-judicial decision-making than for policy decision-making.¹⁵

Practice Suggestion

At a minimum, acting fairly means providing a person whose rights, privileges or interests could be impacted by an administrative decision with

- Notice of the case and an opportunity to reply.
- A decision from an unbiased decision-maker.¹⁶

Notice of the Case and the Opportunity to Reply

The right to know the case and reply is also referred to as the right to be heard. The right to be heard generally means adequate notice and an appropriate opportunity to reply.

Adequate Notice

Those who will be directly affected by a decision must be given adequate notice that a decision is going to be made. Generally the people who should receive notice are the people the decision will be about. Sometimes, though, there are third parties who will also be directly impacted by a decision. In these cases, fairness may mean providing notice to this larger group as well.¹⁷

The notice should include brief information about who is involved, what the issues are, what decisions may be made, and what the potential consequences or outcomes may be. The notice should also include information about when, where and how the case is going to proceed.¹⁸ Potential parties need this information to make an informed decision about whether they are going to participate in the decision-making process and, if so, what the procedure will be.

Notice has to be provided in sufficient time to allow the people involved to have a reasonable opportunity to respond. The time frame required depends on such factors as the complexity of the case and the significance of the potential outcome. More complex cases with potentially serious consequences for people will require longer time frames to prepare.

Practice Suggestion

Adequate notice means providing parties with information on the who, what, when, where and why questions about the case and how it is going to proceed.

Appropriate Opportunity to Reply

Parties who will be directly affected by a decision have to be given all of the relevant information about the case in order to prepare a reply. This is known as **disclosure** or the “no surprises” rule. This generally means that a decision-maker must disclose any relevant information about the case that is in the decision-maker’s possession. This includes information that has been provided

by other parties in the case and any additional information that the decision-maker has obtained from other sources and intends to rely on in making a decision.¹⁹

Sometimes there are conflicts between a party’s interest in obtaining all of the relevant information about the case and someone else’s interest in keeping certain information confidential. When this happens, the decision-maker must balance these interests and decide whether the information should be disclosed. The fact that a person would prefer to have certain information kept confidential is not enough for non-disclosure. This person must convince the decision-maker that there is a serious concern or important interest to protect, and the harm likely to result from disclosure outweighs the party’s need for the information to prepare a reply.

An opportunity to reply may involve a hearing. However, fairness does not always mean that a hearing must be held. The process provided needs to fit the type of decision-making the tribunal carries out and the type of case that is involved. What is fair in any particular case depends on the circumstances of the case.²⁰

A hearing is one type of procedural protection or safeguard designed to ensure a fair decision-making process. Other examples of procedural protections include:

- receiving notice of the case
- having the assistance of legal counsel
- calling evidence
- **cross-examining witnesses.**

An **oral hearing** involving all of these procedures is at the high end of procedural protections for parties. As a general rule, where cases involve the rights of an individual and may result in serious potential consequences, a higher level of procedural protection will be required to ensure fairness and an oral hearing is more likely to be necessary.²¹ This rule is illustrated in Figure 2.

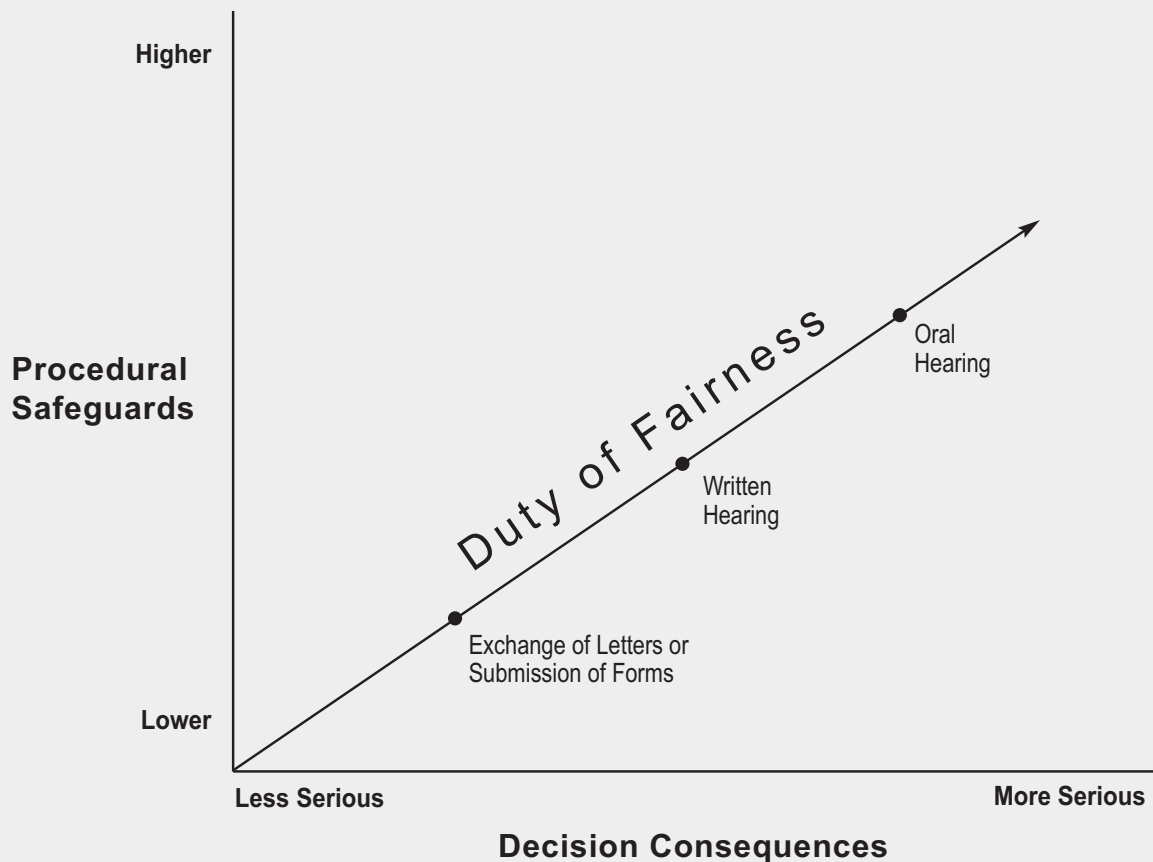


Figure 2: The Levels of Procedural Protection

More serious decision consequences include significant fines, loss of property, or an impact on an individual's health or livelihood. Less serious consequences include modest fines, denial of privileges, or rating changes.

Renewing a driver's license or obtaining a liquor permit are examples of administrative decisions that have less serious consequences and warrant only basic procedural protections such as an opportunity to answer questions or submit a form. For decisions that have more serious consequences such as eviction proceedings, human rights complaints, professional discipline proceedings, or personal injury matters, a much higher level of procedural protections is necessary and a **written hearing** or oral hearing is generally required.

A higher level of procedural protection may also be required in the following circumstances:

- Where the decision will be a final decision with no right of appeal.
- Where the decision and the decision-making process involved are similar to decisions made and processes followed by judges.
- Where a tribunal has created an expectation that a higher level of procedural protection will be provided in its decision-making process.²²

If an oral hearing is held, it generally means the right for parties to participate in the hearing, the right to counsel, and the right to present evidence and to cross-examine witnesses. It also may mean the right to reasonable **adjournments** to obtain counsel and to prepare for the case. These rights and their limits in the hearing process will be discussed further in Chapter Three.

The Right to an Unbiased Decision-Maker

The second part of the duty of fairness requires that decisions be made by unbiased decision-makers. Decision-makers must be neutral and appear unbiased. A decision-maker with a **bias** may have a tendency to prejudge an issue or to be partial to one side over the other regardless of the evidence in the case.

There are a number of common situations that can give rise to bias concerns. These situations are as follows:

- Where the decision-maker has a potential financial interest in the result of the case – either gaining or losing financially, depending on the outcome.²³
- Where the decision-maker is related to one of the parties or has a close association with a party.²⁴
- Where the decision-maker previously participated in the process in another capacity without statutory authority to do so, such as acting as legal counsel for one of the parties.²⁵
- Where the decision-maker makes statements or engages in conduct that demonstrates bias – such as making public comments that indicate a particular view will be taken in a case.²⁶

A party alleging bias does not need to demonstrate that the decision-maker is actually biased – an appearance of bias is usually enough to disqualify a decision-maker from making a decision.

Practice Suggestion

The general test for bias is whether a reasonably informed person looking at all the facts and having thought the matter through would reasonably conclude that the decision-maker is biased.²⁷ This test is referred to as the “reasonable apprehension of bias” test. It applies to tribunals that make decisions in a court-like way (quasi-judicial tribunals).

A lower standard applies to tribunals that have more of a policy-making role. Decision-makers on these tribunals can hold strong views without those views giving rise to bias issues as long as the decision-makers remain open to persuasion in the decision-making process.

More about bias and what it means in the hearing process will be discussed in Chapter Three.

The Person Who Hears the Case Must Decide It

Another important concept related to the duty of fairness is the idea that decisions be made by the person who heard all the evidence and the **arguments** in a case. This rule means that, with few exceptions, your decision-making responsibility cannot be transferred to another person.

This rule is intended to ensure that third parties do not become the actual decision-maker in a case by influencing the formal decision-maker to make the decision in a certain way.

The requirement for the person who hears the case to decide it impacts on the ability of your tribunal to meet as a group to discuss specific cases and on the use of **policy** guidelines in the decision-making process.

Full Tribunal Meetings

As a general rule, your tribunal can and should meet as a whole to discuss important legal or policy issues arising in cases before you, even if a decision on the actual case is restricted to those members hearing it. One goal of these meetings is to attempt to reach agreement on any new legal or policy directions the tribunal may take so that cases dealing with these legal or policy issues will be decided relatively consistently by different decision-makers hearing the cases.

The potential danger of full tribunal meetings is that the discussions involved will influence the decision-makers in a case to decide the case in a certain way. The courts have developed some guidelines to minimize the potential for decision-makers to be improperly influenced in these meetings. These guidelines are as follows:

- The meeting must be voluntary and informal (no minutes or attendance taken).
- No pressure should be put on the decision-makers to consider the views of other tribunal members in the case.
- The discussion should be limited to the legal and policy issues involved – there should be no discussion about the facts of the case or what the outcome should be.
- The decision-makers are responsible for making the final decision in the case.
- If the decision-makers will be making a decision based on any new policy or legal grounds raised at the meeting, they must inform the parties involved and allow them an opportunity to respond.²⁸

These guidelines only apply to full tribunal meetings to discuss legal and policy matters when decisions are pending involving the issues under discussion. They do not apply to other types of tribunal meetings such as Annual General Meetings and regular staff meetings.

Policy Guidelines

Another way that your tribunal can ensure that decisions made by different decision-makers are relatively consistent is through the use of policy guidelines. However, policy guidelines must be used appropriately. Policies are to assist in decision-making. They are not intended to reduce or replace the role of the decision-maker.

Many ministries and tribunals have developed policy manuals over time to assist decision-makers with the decision-making process. These policies are not binding, however, unless a statute requires the decision-maker to follow them.²⁹ It is up to the decision-maker to determine whether a policy guideline is appropriate in a particular case. While policies may be helpful in making decisions in the usual case, they cannot be so strictly applied that they take away the decision-maker's role.

Prior to accepting a policy guideline, the decision-maker must also ensure that it is consistent with the relevant statute. When it comes to a conflict between a policy and a statute, the statute governs.

Practice Suggestion

Policies should be treated as guidelines rather than as hard-and-fast rules. Policies should not make decisions for you – making decisions is your job. There may be good reasons for exceptions to policies, and fairness requires that you be open to permitting those exceptions where appropriate.

Summary

Administrative tribunals are an important part of the legal system. They fall under the executive branch of government, but frequently perform functions similar to the judicial branch of government. Tribunals are similar to courts in some ways, but there are many significant differences as well. The most significant difference is that administrative tribunals are intended to provide a faster, less formal, more specialized and flexible decision-making process than the court system.

Tribunals are required to make decisions fairly and in accordance with the law, including legislation and the common law. At a minimum, acting fairly includes providing notice to affected parties of a pending decision, allowing them an opportunity to respond to the issue, and providing them with an unbiased decision-maker.

The concept of fairness extends beyond the process used by decision-makers to tribunal governance matters as a whole. These additional fairness requirements are outlined in the next chapter. Chapter Two provides various suggestions for both you and your tribunal on how to govern yourselves to ensure you provide a fair service to your user group.

Chapter Two

Governing Your Administrative
Tribunal and Yourself



Members of the public begin to form their views about the **fairness** of your process when they first contact your tribunal. As a result, it is important to ensure that from that first contact until the conclusion of the decision-making process, your tribunal acts in a way that is fair to the people involved.

While tribunals often focus on fairness in conducting **hearings** and making **decisions**, it is also important to pay attention to what fairness means outside of the hearing room.

The Legal System and the Public

Members of the public have straightforward expectations about the legal system. Generally they expect to:

- Be treated fairly and courteously and to have their disputes resolved efficiently.
- Understand what is going on in their case.
- Have alternatives to litigation.
- Have their needs and expectations about the system heard by those working within it.

When setting up a decision-making process that will meet the needs and interests of the users of your tribunal's services, it is important to keep these expectations in mind.

A Broad Concept of Fairness

You can think of a fair decision-making process as having three different parts:

- the procedures involved
- the treatment provided
- the resolution reached

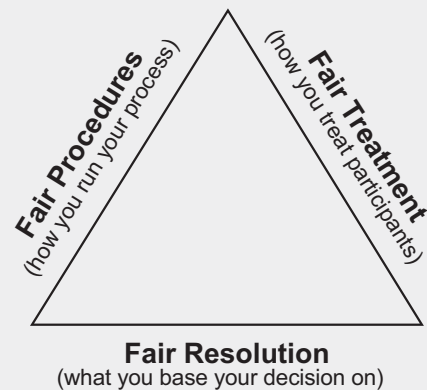


Figure 3: A Fairness Triangle for Tribunals

For a process to be fair to the parties involved, your tribunal must satisfy fairness requirements on all three sides of the triangle, as outlined in Figure 3.³⁰

Fair procedures refer to the processes your tribunal uses to make decisions. At a minimum, fair procedures include the **duty of fairness** which provides the individual with the right to notice that an adverse decision could be made, the right to respond to the **decision-maker**, and the right to an unbiased decision-maker. It also may include additional requirements such as:

- Were parties provided with sufficient information to know the case against them?
- Were the parties given an appropriate opportunity to reply?
- Were the parties provided with a hearing and a decision within a reasonable period of time?
- Were the parties provided with sufficient reasons for the decision?

Fair treatment refers to the way the parties were treated by tribunal members and staff throughout their contact with the tribunal. For example:

- Was the tribunal easily accessible?
- Were tribunal staff approachable and helpful?
- Were the parties treated with courtesy and respect?
- Were the parties provided with appropriate guidance throughout the process?

A fair resolution refers to the final decision made by the tribunal:

- Was the decision based on relevant information?
- Were the facts and the law relied upon in the decision correct?
- Was the decision consistent with previous decisions made in similar cases?

In short, fairness means much more than just providing parties with a fair hearing. It also means providing information and services that are easy to find, use, and understand; treating participants with courtesy and respect; providing an open, accountable, and timely dispute resolution process; and producing well-reasoned decisions prepared by skilled decision-makers.

You can use this broad concept of fairness as a guideline for governing your tribunal effectively.

Tribunal Governance

ACCESSIBILITY

Ensuring that your tribunal is accessible is one of the most important parts of governing your tribunal effectively. Keep in mind that a lack of accessibility can result in a denial of justice to the parties.

There are many potential barriers for people in accessing your tribunal. For example, they may not know where to find you, who to talk to, and what you can make decisions about. They may also have trouble understanding and completing your forms, or accessing your premises.

Accessibility generally means making your process straightforward for members of the public – straightforward forms, procedures, explanations, and decisions. The more that people understand your process, the less intimidating it will be for them, the faster they can move through it, and the more fair it will feel.

Use of Plain Language

One of the best ways to ensure understanding is through the use of plain language.

Practice Suggestion

All of your oral and written communication with parties should be in plain language. Plain language means language that is clear and easily understood.

Plain language techniques include:

- Using simple words and expressions.
- Using short sentences and paragraphs with only one or two ideas in a sentence or paragraph.
- Avoiding unnecessary words.
- Using the active voice in sentences (“Anne phoned Eve” instead of “Eve received a phone call from Anne”).
- Making sentences personal to the reader (“you need to write clear decisions” instead of “tribunal members need to write clear decisions”).³¹

Written Materials

If you do not have written materials to assist the public, it is a best practice to develop them. This is a basic requirement for your tribunal. At a minimum, these materials should provide information about:

- Eligibility – how people qualify for your services.
- Application deadlines.
- The extent of your authority – what you can decide.
- Your **remedies** – what relief you can grant.
- Potential alternatives to a hearing (mediation, for example).
- Pre-hearing and hearing procedures and timelines.

- Decision format (oral or written) and timelines.
- Appeal or review options if parties are not satisfied with the outcome of the hearing.
- Contact information including the location of the tribunal.
- Available resources (such as photocopying, interpreters) and how to access them.

Having written materials such as information sheets and brochures available in public locations and online is particularly important if your tribunal does not have an office location or a full-time staff person who can deal with public inquiries.

In developing your written materials, use language that your user group will understand. Write the materials at a reading level appropriate for that group.³²

Practice Suggestion

As a rough guide to reading levels, keep in mind that popular fiction is generally written at a 6th grade level, *Reader's Digest* at a 9th grade level, and newspapers at a 12th grade level.³³ Ideally, your written material should fall within a readability level between the 6th and 9th grade.

Forms

The written forms your tribunal uses need to be straightforward and written in plain language. Tribunals are often tempted to adopt forms that are used in the **court** system and modify them to fit the tribunal. Be careful in doing this – these forms may work well in a system where lawyers are frequently involved but may not work as well when they are not.

Some important questions to consider about your tribunal's forms are as follows:

- Are the forms in plain language?
- Have you tested the forms for simplicity and readability?

- Have members of your user group had difficulty in completing your forms?
- Are there ways you can make the forms less complex?
- Do you invite feedback from your user group about your forms?
- Do you periodically review and update your forms?

Practice Suggestion

People find it easier to understand forms written in plain language and are able to complete these forms with greater ease and fewer questions or mistakes.³⁴ As a result, greater use of plain language forms can mean less use of tribunal resources.

Other Sources of Information

Having information available in other formats such as audio or visual materials or information translated into other common languages can also increase your tribunal's accessibility, particularly for people with low literacy skills and those who have trouble speaking and understanding English.

In addition to informational materials, it is also important for your tribunal to have someone able to take questions, provide explanations, and make appropriate referrals to other resources such as free legal clinics and support services. Having a person available to handle public inquiries is essential for people with low literacy skills who may struggle with written materials. If public inquiries are frequent, a help line can also be of assistance. If there are particular groups who routinely contact your tribunal for information, consider providing information sessions specifically for these groups (community service agencies, advocacy services).

If you do not have an office location or staff to handle public inquiries, you may need to consider a message manager or an answering

service for parties to call in and leave messages. A toll-free line can also increase the accessibility of telephone contact for the parties.

The Benefits of Information and Assistance

The more that people understand your tribunal's procedures and expectations, the more accessible the hearing process will be for them.

Members of the public may think you can provide a remedy that you cannot. They may think you can decide an issue that you cannot. It is important to ensure that your mandate and the limits of your decision-making authority are clearly understood by parties prior to them making formal **application** to your tribunal.

Practice Suggestion

Providing assistance to parties early in the process may mean fewer groundless applications and fewer delays caused by lack of information and lack of understanding of tribunal **jurisdiction**, procedures, and expectations.

Office and Hearing Room Location

Accessibility also means visibility – how visible your tribunal is to the public. Members of the public should not have difficulty contacting your tribunal. At a minimum, ensure that your tribunal is listed in a public directory. The physical location of your office should also be easy to find. Keep the potential needs of the public in mind when you are thinking about where to locate your office and where to place office signs.

Your office space needs to be physically accessible to a range of people including those with physical challenges. For this reason, you need to think about:

- Whether your location will present any obstacles such as stairs that have to be climbed and if so, whether there are on-site alternatives to stairs such as ramps and elevators.
- Whether there are public transit options, public parking nearby, and the distance of your office space from parking areas – particularly parking for those with physical challenges.
- Whether on-site bathrooms can accommodate parties with accessibility issues.

If you hold hearings off-site in other locations, then in addition to the above items, you may also need to consider:

- The use of portable signs to assist the parties in locating the hearing room.
- Whether public bathrooms are available.
- Whether, and to what extent, the parties will have after-hours access to the premises if a hearing runs overtime. (For example, can they access facilities such as parking areas and bathrooms after office hours?)

Also consider whether your office and hearing room locations present other kinds of accessibility issues for the public. For example, it can be intimidating for members of the public entering your office or hearing room to go through security screening, or to deal with commissionaires or security guards. If the parties have to be escorted to your premises, your tribunal may not be in an optimum location unless you have good reasons for a secure environment.

Other common location issues include sharing space with bodies that have had previous involvement in a party's case, or locating next to bodies that may result in a negative association for your user group. Parties may be reluctant to approach your tribunal if you appear to be associated with a body they are appealing from or having a dispute with (such as locating a farm debt resolution process in a bank building or next to a lending agency). Keep in mind that these kinds of office and hearing room location issues can create accessibility "chill" for parties.

If your tribunal's physical location creates accessibility challenges and alternate space is not an option, then at a minimum:

- Maintain a secure administrative area that is separate from other agencies.
- Explain your separate structure and decision-making independence to members of the public.

Process Costs

The cost and travel involved to use your tribunal's services may also create accessibility issues for the public. If your tribunal has an application fee, consider building in the possibility of fee waivers for parties with financial challenges. Also, consider minimizing travel expenses for parties by having tribunal members travel to the parties' location for hearings or, in appropriate cases, permitting **electronic hearings** by telephone or videoconference (if available).

Procedures

It is a good practice to periodically review your tribunal's procedures to ensure that they are not creating accessibility barriers for the parties. You may have overly complex procedures or too many procedures in place to fit the type of decision-making involved. For example, parties should not have to fill in a complex form or follow a complicated set of steps for relatively minor procedural decisions such as waiving application fees or permitting telephone attendances. Overly complex processes for minor matters may not only result in delays, but parties may abandon these kinds of "relief from hardship" applications because of the hardship of the application process itself.

Monitoring Accessibility

It is important to monitor your tribunal's accessibility on an ongoing basis, as the needs of your user group may change over time. You need to ensure that your tribunal can respond to these changes and continue to meet accessibility goals.

One of the best ways to determine if your tribunal is meeting accessibility goals is to ask your user group. Some tribunals conduct formal user surveys to obtain this information while others use more informal methods such as suggestion sheets in office waiting areas.

ACCOUNTABILITY

Accountability is another important part of tribunal governance. As a publicly funded body, your tribunal needs to be accountable for services provided to the public and the tax dollars used to fund tribunal operations.

Your tribunal can meet accountability goals in the following ways:

- Provide the public with information about the tribunal's use of public funds through the preparation of an annual report, either in conjunction with the report prepared by your tribunal's "**host**" **ministry** or independently of the host ministry.
- Provide the public with information about the members of your tribunal (such as a list of members' names and a short biography for each member).
- Set performance standards and targets (for example client service goals and process time frames) and report publicly on the meeting of those targets.
- Develop an appropriate procedural framework in keeping with the mandate of the tribunal.³⁵
- Ensure that members fully understand their roles and responsibilities.
- Develop job descriptions for members and staff, and implement a feedback process.³⁶
- Identify training needs for members and obtain training resources.
- Identify and obtain the financial and human resources the tribunal needs to carry out its mandate.
- Develop and enforce hearing process and decision-writing timelines.

Leadership

The head of the tribunal is the person primarily responsible for ensuring the tribunal develops and meets accountability goals. If you are the tribunal head, it is your responsibility to set these goals with your fellow tribunal members and lead the tribunal in meeting them. As a tribunal head you are responsible for the direction of the tribunal, the challenges it faces and the resources it needs.

Your leadership responsibilities include overseeing the hearing process and the administration of the tribunal, including enforcing decision timelines, coaching staff, providing constructive feedback to tribunal members, and assisting members in obtaining the training they need to carry out their work. You may also be responsible for assigning cases and other administrative tasks if your tribunal does not have staff members in place to handle these matters.

As the head of the tribunal, it is your responsibility to become familiar with your tribunal's operational structure including:

- Who your ministry contacts are.
- What your budget and human resource allocation is.
- What the reporting lines and requirements are between the ministry and the tribunal.
- When appointments expire for tribunal members.

It is also your responsibility to consider whether the tribunal has sufficient members for the caseload, and sufficient resources for basic operational requirements. If the tribunal needs additional resources or legislative or operational changes for more effective operation, it is up to you as the tribunal head to discuss these issues with the ministry. Keep in mind that you are the tribunal's liaison with the ministry and you are responsible for developing and maintaining a good working relationship with ministry representatives.

TIMELINESS

A critical part of tribunal accountability is running a timely decision-making process.

Fairness requires that decision-makers conduct hearings and make decisions within reasonable timeframes.

Some tribunals have timelines set out in their **governing statutes**. If your tribunal does not have statutory timelines, then set appropriate time frames in your operational policies. It is important that a target be established and communicated to all tribunal members so that members know what is expected of them and can factor these timelines into their schedules.

Delays in providing timely hearings and decisions are a common problem for administrative tribunals. There may be a variety of reasons for delay such as complicated cases, time-consuming procedures, inadequate tribunal resources, overburdened members, or parties whose actions delay the process. Whatever the reason for the delay, it is an issue that the tribunal is responsible for resolving.

Dealing with Delay

The first step in dealing with delay is determining the reason for it. If the problem is a financial or human resource issue, then your tribunal needs to find ways to make greater use of existing resources or obtain additional resources. Strategies to consider include:

- Discussing budget and human resource options with your host ministry.
- Resource partnerships with other tribunals (such as sharing hearing space and equipment).
- Use of students and work placement options to provide additional short-term administrative support.
- Setting appropriate caseload targets, assessing member workloads, and rebalancing workloads to ensure members are carrying similar numbers of cases.
- Setting hearing and decision deadlines for tribunal members.
- Implementing short-term case completion strategies for members struggling with deadlines (such as assigning new cases to members with workload issues only when outstanding cases are concluded).

- Recommending the replacement of members who are generally unavailable for hearings or are consistently unable to meet deadlines and workload requirements.

If delays are as a result of the complexity of cases, then you might consider:

- Using a case management system to assist in getting complex cases “hearing ready” (such as **pre-hearing conferences** to identify and narrow issues, assess settlement opportunities, facilitate the exchange of information, and clarify hearing requirements).
- Structuring the progress of complex cases by setting timelines for each step in the process.
- Blocking hearing dates early for complex matters, particularly if there are numerous parties involved.
- Assigning **adjudicators** at an early point in the hearing process so that hearing preparation will begin well in advance of the hearing date.
- Assigning a **panel** of adjudicators to the case rather than a single adjudicator (if your **statute** will permit).
- Dividing the decision-writing workload among the panel members on the case.

If the parties are delaying the process, then you need to determine the reason why. Keep in mind that self-represented parties in particular may cause process delays because they may not fully understand what they are required to do. Strategies to deal with party delay may include:

- Providing more structured contact with and assistance for the parties (phone calls and meetings instead of letters).
- Referring the parties to advocacy resources (such as free legal clinics, anti-poverty advocates).³⁷
- Providing the parties with time frames for completion of process steps.
- Limiting the number of adjournments.
- Booking dates for pre-hearing conferences and hearings if dates within reasonable time frames cannot be set by agreement of the parties.

If delays are caused by procedural issues, then look for ways to simplify procedure. Keep in mind that procedures are intended to support the decision-making process rather than create a roadblock for it. It is important for your tribunal to periodically review your procedures and ask whether and how those procedures contribute to an efficient decision-making process.

The Impact of Delay

The impact of delay can be significant for the parties, your tribunal, and others who may be looking to the outcome of a case for direction in similar cases.

It is stressful for people to wait for a decision. Delays often have an emotional impact on parties and may have a financial impact as well.

Your tribunal is also impacted by delay. The longer it takes to make a decision, the more difficult it will be to remember **evidence** given and the context in which it was given. This leads to a heavier reliance on notes and a greater likelihood that errors will occur, particularly in interpreting evidence when the context it was given in can no longer be recalled. It is generally easiest to make and write a decision while the hearing and the evidence are still fresh in the decision-maker’s mind.

An unreasonable delay in providing a decision also means that your tribunal is not doing what it was designed to do. Administrative tribunals are intended to provide a relatively quick decision-making process for the public. A pattern of lengthy delays will negatively impact your tribunal’s credibility, as members of the public will lose confidence in your tribunal’s ability to provide a timely resolution of their issues.

If your tribunal reviews the decisions of third parties, these parties are also potentially impacted by delayed decisions as they may not have the direction they need from the tribunal to assist them in deciding similar cases. These parties need to know whether their decisions meet the standards set by your tribunal. If they do not receive timely guidance from your tribunal, they will be left to continue making their decisions without knowing whether their previous decisions were made in error. The potential result is the tribunal receiving

additional unnecessary appeals on similar issues and an impact on the tribunal's resources that could have been avoided.

COMMUNICATION

Another important part of tribunal governance is effective communication. This includes communication with the parties directly involved in your process (as outlined under "Accessibility"), and communication with third parties who have an interest in your tribunal operations. These third parties include the media and the host ministry for your tribunal.

The Media

Communicating effectively with the media can be challenging for tribunals as media contact at the tribunal level is infrequent, and many tribunal members do not have media training to handle inquiries.

Keep in mind that members of the media can play an important role in communicating information about your tribunal to the general public.³⁸ This can include information about your hearing process, your decisions, and any tribunal developments that would be of interest to the public.

Practice Suggestion

The key to dealing with media representatives is to be prepared for them. Your tribunal should have a plan in place to manage media inquiries.³⁹ The plan might include identifying the people who will handle interviews or information requests, the type of information that can be released, and guidelines for media access to your hearing process and decisions.

Members of the Media in the Hearing Room

If your tribunal has a public hearing process, then any hearings open to the public will also be open to the media.⁴⁰ The media represents the public and can be thought of as the "eyes and ears" of the public in the hearing room.

At the start of a hearing, it is a good idea to advise any members of the media present about your tribunal's media policies. Media representatives may ask you whether they can record the hearing. If your tribunal has an open hearing process and your governing statute does not provide any restrictions in this area, then you have the **discretion** to make this decision. However, you should be careful with these kinds of requests. Audio or video recordings can be edited and you do not have any control over the editing or the use of the recordings.

Video recordings in particular are not permitted by many administrative tribunals as they involve the use of equipment that can be a distraction and may affect the focus of parties and **witnesses** and their willingness to participate in the process.⁴¹ Some tribunals permit the media to make audio recordings of the proceedings on the condition that the recordings are used solely for verifying information and are not used for broadcast purposes.⁴²

In running a fair hearing process, you have a responsibility to ensure that order is maintained in the hearing room. This may include setting reasonable conditions on media conduct while the hearing is underway.⁴³ For example, you might restrict media use of cell phones in the hearing room and designate a specific location for the media to sit that will minimize any distractions they may provide in the hearing process.

If a media representative does not follow your directions or causes a disturbance in the hearing room, then provide a conduct warning. If a warning does not correct the conduct issue, then as a last resort, you can consider excluding the media representative from the hearing process.

Comments to the Media about Tribunal Decisions

Providing members of the media with copies of your decisions can be a good way to inform the public about them. It is not a good idea, though, for a tribunal member to speak to the media about the content of specific decisions.⁴⁴ It is very easy to be drawn into a conversation about why you made the decision you did. You do not want to get into a public debate about the merits of a decision or be put in the position of defending the result – that is not your role. Your job is to ensure that your decision has a clear and complete set of reasons so that your decision will speak for itself.⁴⁵

As a general rule, it is a good idea to confine public comments about your decisions to academic forums such as conferences or workshops. Even then, make it clear that your comments are your own and may not reflect the views of other tribunal members.

Providing Opinions to the Media

It is also a good practice to avoid expressing opinions to the media about issues or parties your tribunal may be dealing with. This caution applies to remarks made either before, during, or after the conclusion of the decision-making process.⁴⁶ You need to be careful about saying anything at any time that could potentially impact on your neutrality. Members of the public may think they cannot obtain a fair hearing in front of you if it appears that you are not impartial towards a party or have already made up your mind on an issue. As a result, when dealing with the media, avoid expressing opinions – stick to the facts.

For additional tips on dealing with the media see Appendix D.

The Ministry

Many tribunals are “hosted” within a ministry of government and have an assigned cabinet minister who is responsible for reporting back to the legislative assembly about the tribunal. Developing a good relationship with your **host ministry** is an essential part of effective governance for your tribunal.

Building an effective relationship with the ministry involves balancing independence and accountability. You need to ensure that your decision-making process remains free of influence while keeping the ministry informed about your operations.

Many tribunals are concerned that greater contact with the host ministry will lead to interference with the independence of their decision-making process. While the minister should not be directing the content of your decisions, ministry representatives may contact your tribunal with the following kinds of requests:

- Answering questions about inquiries the ministry has received.
- Providing briefing materials to inform the minister about your tribunal operations and any important issues your tribunal is dealing with.
- Providing financial information and statistics to support your operational expenses and budget requests.

These kinds of requests are unlikely to interfere with your independence and should be accommodated.

Meeting with ministry representatives periodically to discuss tribunal issues and government **policy** can be a good way to improve communication between the tribunal and the ministry and can improve the ministry’s understanding of your tribunal. This type of meeting does not generally give rise to independence concerns. The only time that this type of discussion with a ministry is not a good idea is if you have a decision pending in a related case. Any case-related discussions with the ministry in this situation could be seen to influence your decision.

One way to provide a level of comfort for greater contact with the ministry is to meet with ministry officials to clearly define roles and responsibilities. Some tribunals formalize their relationship with the ministry in an operational agreement or Memorandum of Understanding which may cover such areas as:

- reporting lines and expectations
- financial administration

- human resource management
- general administrative and legal support
- communications and consultation

Your tribunal has a vested interest in ensuring that the ministry is fully aware of your tribunal's mandate. The minister may be asked questions about your tribunal and needs to be able to provide an informed and accurate response. These responses can assist in raising awareness about your tribunal and may result in public inquiries and referrals being directed to you. Inaccurate responses can result in tribunal staff having to re-direct inquiries made in error and correct information after the fact – a situation that could be avoided with better information management up front. An inaccurate ministry response to questions about your tribunal may be an indication that your tribunal is not meeting its communication goals.

Practice Suggestion

Your tribunal is well-served if your host ministry fully understands what you do. The greater the understanding of how your tribunal works and the value of the services you provide, the greater the confidence the ministry will have in your tribunal's decision-making process and the easier it will be for the ministry to explain and support your work.

The ministry should be advised of key tribunal developments – it is not a good idea for the minister to be hearing about those developments for the first time by seeing them on the news or reading about them in a newspaper. The ministry needs to be prepared to deal with any media or public inquiries that new developments may generate and, to do this effectively, it needs to be kept informed.

It is generally a good idea to alert the ministry to an upcoming decision that may attract significant public attention so that the ministry can prepare its communications staff to deal with inquiries. While the content of the decision

should not be discussed until after the decision has been communicated to the parties involved, you can then release the decision to the ministry prior to making it available to the media. Keep in mind that the ministry is generally one of the initial points of contact for media representatives who are seeking information.

Ministries are typically responsible for allocating sufficient budget dollars to support tribunal operations with the level of support and the budget structure varying from tribunal to tribunal. Some tribunals manage their own budgets. The budget process for others is centralized in the ministry. If your tribunal manages its own budget, it is a good idea to help ministry representatives understand your budget requests, including the resources you need and how they will contribute to the effectiveness and efficiency of your operations. Keep in mind that ministries have to justify the need for budget requests and if they do not understand your request, they will have difficulty supporting it.

It is also a good idea for your tribunal to be aware of the ministry's budget priorities and the extent to which your resource requests may fit those priority areas. It can also be helpful to make the ministry aware of the key challenges your tribunal is facing. Ministries have to make difficult program and budget decisions and if they are aware of challenges you are dealing with, those matters will be factored into decisions that impact your tribunal.

The ministry is also a potential source of valuable information and assistance for your tribunal. Ministry representatives can provide tribunals with information in the following areas:

- Orientation to ministerial and program operations.
- Information about the budget cycle and process, and assistance with budget requests.
- Information about appointment processes and renewal and expiry dates for members.
- Staffing and general administrative assistance.
- Records management and information technology advice.

RESPECT

Another key area of tribunal governance involves treating members of the public with respect throughout the decision-making process. Respect can be demonstrated in a number of ways including:

- Adopting a user-centered rather than a tribunal-centered approach to service delivery in which the needs and interests of the user group are a priority for your tribunal.
- Being sensitive to diversity issues and accommodating parties with different ethnic, cultural, and religious backgrounds.
- Ensuring that parties are treated in a prompt, patient, and attentive manner throughout their contact with your tribunal.
- Being courteous in your interactions with parties prior to, during, and after the hearing process and in the tone of your decisions.
- Ensuring that your demeanor and your appearance convey to the parties that you are taking them and the case before you seriously, regardless of where the case ranks in importance in the range of matters your tribunal deals with.
- Handling the personal information of the parties with care.

Privacy

One important aspect of treating individuals with respect is protecting their right to privacy. Tribunals need to find an appropriate balance between providing the public with sufficient information to meet tribunal goals relating to transparency and accountability, and being respectful of the privacy of individuals the tribunal deals with.

Many tribunals run public hearings. The idea that tribunal hearings should be open to the public and that information about the outcome of the hearings should be available to the public is based on a concept known as the “open court” principle. The open court principle is an important part of our legal system. It provides that decision-making processes should generally be open to public scrutiny so that the

public can ensure that these processes are fair.⁴⁷

The importance of the open court principle does not outweigh the importance of the right to privacy. Tribunals must find an appropriate balance between these two competing principles.

The Saskatchewan Information and Privacy Commissioner has developed a number of recommendations for administrative tribunals related to the protection of privacy and the handling of personal information.⁴⁸ The Commissioner recommends that tribunals:

- Develop a privacy policy that deals with the collection, use, and disclosure of personal information.
- Make the privacy policy available to members of the public.
- Identify the personal information the tribunal deals with and decide how much of that information needs to be included in decisions.
- Have a specific person responsible for tribunal compliance with access and privacy legislation, the development of appropriate tribunal privacy policies and procedures, and privacy training for tribunal members and staff.
- Consider whether Internet publication of decisions is appropriate and, if so, alert parties to the fact that decisions will be published online.
- Remove party names and personal identifiers from decisions published on the Internet or restrict the ability to electronically index party names (for example use of robot exclusion protocols).
- Allow affected individuals to make an argument for privacy protection in cases where tribunals propose to make personal information available online.

In addition to these recommendations, tribunal members can protect the right to privacy in other ways. One of the simplest ways to protect privacy is to be careful with personal information. More specifically:

- Do not let a case become coffee talk in your workplace or have a discussion about a case in social circumstances or at home.
- If the parties attend your office for assistance in advance of a hearing and there will be discussions involving their personal information, have a private location available for them so potentially sensitive information will not be overheard by other staff members or third parties.
- Try to avoid having parties complete application forms in public front counter areas of your office where other members of the public can easily view the information being recorded on the forms.
- Notify parties at the outset of your process of the extent to which your hearings and decisions will be open to the public.
- If you are using a laptop computer to work on a decision or to access case information that may include personal information, make sure that the information is encrypted and that you have appropriate password protection for the laptop.
- If you take case files out of the office, keep them in a secure location at all times. Do not leave case files or laptops in your vehicle – it is not a secure location.
- Do not leave laptop computers unattended. Laptops are at high risk for theft and if they are stolen, any files in the computer case and any personal information that is on the computer are potentially in the public domain.
- Follow a clean desk policy when working on case files both at the office and at home – do not leave any personal information out in the open where it can be read by other individuals.
- Be careful with the type of information you admit into evidence – if information submitted by parties is sensitive or personal and is not relevant to the case, then it should not be admitted into evidence.
- Do not include social insurance numbers, bank account information, driver's license information or dates of birth in your decisions. This kind of information can be used for fraud or identity theft purposes. Also, information such as marital status, age, sexual orientation, national origin, criminal history, medical history, or specific workplace or residential addresses should only be included in decisions when it is directly relevant to the case and the reasons would be inadequate without it.
- Consider whether and to what extent your tribunal will make hearing records such as application forms and **exhibits** available for review by members of the public. If your tribunal deals with a significant amount of personal, potentially sensitive information, you may want to restrict public access to hearing records or limit the type of information that the public can view.
- Return original **documents** to the case file at the conclusion of the decision-making process.
- While you may have been given copies of documents to refer to during the hearing and the writing of the decision, do not keep copies of these documents past that point, particularly if they contain any personal information of the parties. Copies of documents that your tribunal is not required to keep should be destroyed using a secure method of destruction.
- Finally, use appropriate records management practices for case files including the development of record retention periods and the use of government archiving and records disposal systems and practices.⁴⁹

TRAINING

Training is an essential part of effective tribunal governance as it ensures that members have the knowledge and skills they need to carry out their responsibilities. Tribunals need technically competent decision-makers in order to provide a high quality of service to the public.

Responsibility for the training of new members starts with the tribunal. It is important to provide new tribunal members with a basic in-house orientation to the tribunal including an overview of the tribunal's:

- pre-hearing, hearing, and decision-making processes
- decision-writing format
- governing statute and the interpretation applied by tribunal members
- policies and procedures
- key decisions

In addition to tribunal information, members may also benefit from subject-specific training in the following areas:

- administrative law/principles of **procedural fairness**
- conducting hearings
- decision-making
- decision-writing
- evidence
- statutory interpretation
- ethics
- governance
- conflict management
- communicating in plain language

Training for tribunal members is also available from outside organizations. (See Appendix A for outside training resources.) If members of your tribunal will be attending training sessions offered by other organizations, there are two main cautions to keep in mind:

- It is generally not a good idea to take training from people who sit on appeal of your tribunal's decisions or have their decisions appealed to your tribunal. This precaution is to guard against any perception of influence in the training process, particularly if the training will be covering tribunal-specific topics such as the interpretation of your legislation or the extent of your mandate.
- Any external training sessions that involve other participants are essentially public sessions. As a result, in these sessions, keep in mind the public forum involved and be cautious with any comments you make about your tribunal, parties appearing before you, or specific cases.

CONDUCT

A good way to set basic standards of conduct for tribunal members is to develop a code of conduct. A code of conduct outlines a tribunal's expectations about how members should behave.

The Society of Ontario Adjudicators and Regulators (SOAR) has developed a model *Code of Professional and Ethical Responsibilities for Members of Adjudicative Tribunals*.⁵⁰ The purpose of the code is to identify a basic set of conduct rules for tribunal members. The code is intended to assist members in understanding what is expected of them in their primary areas of responsibility, both inside and outside of the hearing room. The model code is a conduct guideline that can be adapted to fit your tribunal.

The Law Society of Saskatchewan and the Canadian Bar Association have also developed codes of conduct specifically for lawyers. These codes of conduct provide guidance to lawyers about appropriate standards of behavior in carrying out their legal work. If you practice as a lawyer, it is important for you to become familiar with the conduct guidelines that apply to your work with administrative tribunals including ensuring that:

- You observe a standard of conduct that reflects well on the legal profession and the administration of justice and inspires the confidence, respect, and trust of clients and the community.⁵¹
- Your conduct toward all persons with whom you come into contact is characterized by courtesy and good faith.⁵²
- Matters entrusted to you are dealt with effectively and promptly.⁵³
- You do not allow personal or other interests to conflict with the proper performance of your official duties.⁵⁴

Your Personal Responsibilities as a Tribunal Member

GENERAL RESPONSIBILITIES

When you join an administrative tribunal, there are a number of responsibilities that come along with the job. Keep in mind that your main responsibility as a tribunal member is to support the work of the tribunal which includes:

- Adjudicating hearings and making decisions.
- Attending meetings and participating fully and frankly in discussions.
- Contributing to the ongoing development of tribunal decisions, policies and procedures.
- Working effectively with tribunal colleagues and staff.

It is important for you to attend initial training and orientation sessions to become familiar with tribunal operations. Regardless of your background, there will be a number of tribunal-specific practices you will need to learn.

You are also responsible for developing a thorough working knowledge of your governing statute. At a minimum, become very familiar with all sections that relate to your powers and process. Know your tribunal policies thoroughly as well.

You should ensure that you have a good understanding of the area you are operating in – the trends and relevant cases. Many tribunal members are appointed because of their area of expertise. Stay current in that area. The onus is on each tribunal member to get and stay informed.

If you will be chairing hearings and writing decisions, you may need to further develop your skills in these areas.

Practice Suggestion

Conducting hearings and writing decisions are learned skills. Keep in mind that it takes training and practice to do these things well.

It is also your responsibility to keep up with other cases being decided by the tribunal and to read key decisions that have been made in the past as this will inform your own decision-making.

You should have a solid understanding of tribunal administrative matters including who you report to, what your responsibilities are, and when your appointment will expire. Keep in mind that your authority to participate in your tribunal's decision-making process ends with the expiry of your appointment unless your statute provides otherwise.

Also, have a general understanding of where your tribunal fits within government, including which ministry hosts your tribunal and what the reporting lines are.

You are also responsible for protecting the reputation and integrity of the tribunal as a whole by:

- Avoiding public criticism of tribunal colleagues, decisions, or procedures (these kinds of issues should be raised internally in tribunal discussions).
- Carrying out your responsibilities in a professional manner including being courteous and even-handed in your treatment of parties.
- Making timely, well-reasoned, and relatively consistent decisions.
- Avoiding conflict-of-interest situations.
- Acting with diligence in carrying out your tribunal duties.

In the hearing room, acting with diligence means being prepared, being on time, and running an efficient process. Being diligent in your decision-making responsibilities means making and

writing clear decisions within reasonably short timeframes.

As a tribunal member, you are not doing your job if you:

- Fail to show up for a scheduled hearing.
- Cancel at the last minute without a good reason.
- Are frequently unavailable or often late for hearings.
- Do no hearing preparation.
- Are inattentive during hearings.
- Have to be chased to get your decisions in on time.
- Write decisions that cannot be understood by the average high school student.

These are common issues that can have a negative impact on the tribunal's decision-making process. If any of these items sound familiar, then you may have some changes to make.

Many of these issues arise as a result of tribunal members being pressed for time and having to choose between competing commitments. Keep in mind that there is often an element of public service in working for a provincial administrative tribunal. Like other public service commitments, you need to ask yourself whether you are fully able to make the commitment prior to taking on the work.

Part-time members frequently have a full or part-time job in addition to their tribunal workload. The demands of a tribunal can be difficult to balance with these other responsibilities. If you find that it is difficult for you to meet tribunal commitments and deadlines, then the tribunal may not be a good fit for you.

CONFLICTS OF INTEREST

As a tribunal member, you can avoid conflict-of-interest concerns by following a few common-sense practices. These practices include the following:

- Do not make personal use of any information you may obtain as a result of your work with the tribunal.

- Do not participate in any tribunal proceedings that you, family members, or friends have a financial interest in or that involve people you have a close relationship with.
- Do not participate in proceedings in which the outcome could impact on other legal proceedings that you may have an interest in.
- Do not accept gifts from parties in the hearing process – the only tokens of appreciation you might consider accepting are those given to you for participating as a guest speaker in a conference or workshop.
- Do not use tribunal property for personal use. Tribunal property includes tribunal fax machines, telephones, computers, photocopiers, letterhead, and business cards.
- If a case comes before the tribunal and you have a personal relationship with one of the parties or an interest in the outcome of that case, it is important that you not have any involvement in the discussion of the case, the assigning of the **hearing panel**, or the scheduling of the hearing and that you do not receive any of the material filed in the matter.
- At the time of your assignment to a file, check the party names to determine if you know any of the people involved. It is generally a good idea to step aside early if there could be a perception of a conflict of interest in a case rather than raising the issue at a hearing and letting the parties determine whether to object at that point.

BEING A TEAM MEMBER

As a tribunal member, you are part of a team of decision-makers and with a team comes the need for a certain amount of give and take. Your colleagues each bring different views and skill sets to the tribunal and they will not necessarily see issues the same way that you do. You need to develop a tolerance for differing views and opinions and be prepared for lively discussion. You should be open to considering the ideas of your colleagues although ultimately, you

may not agree with them all. It is important to have collegial debate with your colleagues but disagreement needs to be respectful.

It is a good idea to invite your colleagues to give you feedback about your decision-writing and presiding skills. Be prepared for constructive criticism. You may not see gaps in reasoning in your decisions or be aware of your approach to the parties in the hearing room. You need to obtain an objective view from your peers and the head of your tribunal in these areas. Your colleagues have a vested interest in your abilities, as your presiding skills and decisions will reflect on the tribunal as a whole. Keep in mind that it is better to hear private constructive comments from your peers than to be publicly corrected by the courts on **appeal** or **judicial review** or be publicly criticized by your user group.

The Benefits of Good Governance

Governing yourself and your tribunal effectively will enhance the fairness of your decision-making process and the credibility of your tribunal.

A tribunal's credibility is important because it affects:

- Whether tribunal decisions are likely to be accepted by the parties involved.
- Whether there will be issues relating to the enforcement of the tribunal's decisions.
- The number of applications the tribunal receives.
- The number of complaints both the tribunal and the Government of Saskatchewan receive.

As a general rule, the more credibility the tribunal has, the fewer problems it will have. Your tribunal's credibility can be negatively impacted if your decision-making process is overly complicated or has a pattern of delay; if your procedures are unknown, inconsistent or interfere with basic fairness principles; or if your

decisions have insufficient, unclear or irrelevant reasons.

Summary

Appropriate tribunal governance consists of your tribunal having fair procedures and processes, treating users courteously, and ensuring that decisions are timely and well-reasoned. Your tribunal must also be accessible to its users and the public and be accountable for its actions and decisions.

The head of your tribunal is responsible for ensuring that your tribunal is governed appropriately and is communicating effectively with the public, including tribunal users, the media and your tribunal's host ministry. Part of effective communication and good governance is treating participants with respect and protecting their privacy interests.

Tribunal members and staff require adequate training to perform their duties and must ensure that high standards of conduct are met. As a tribunal member you also have other responsibilities: to understand your duties and the subject matter of your tribunal, to meet or sit as requested and required, to ensure that you are not involved in conflict-of-interest situations, and to be a team member.

An appropriate governance structure supports a fair decision-making process for the users of your tribunal. It also benefits your tribunal in the form of enhanced public credibility. As a general rule, the more credibility your tribunal has the fewer problems it will have. Your tribunal's credibility is affected in large part by what it does (the conduct of its hearings) and what it says (its decision-making and writing processes). Being careful about these critical tribunal functions is the focus of Chapters Three and Four which deal with conducting fair hearings and making and writing good decisions.

Chapter Three

Conducting a Fair Hearing



Conducting a fair **hearing** starts with ensuring the **parties** are informed about the hearing process, understand the roles of the various participants, and are ready for the hearing. Hearings can be stressful for parties. The processes involved are often unfamiliar and intimidating and outcomes uncertain. When the parties understand what the hearing will involve, what you expect of them, and what the roles of the participants in the process will be, they will be more prepared and comfortable with the hearing itself. The more at ease participants are with the process, the more likely they are to feel the hearing is fair.

Hearing Models

The first step in conducting a fair hearing is determining the type of hearing model that is appropriate for your tribunal. There are different types of hearing models for tribunals and a variety of processes related to each.

Although there are a variety of ways to hold a hearing, there are typically two primary hearing models – the adversarial model and the inquiry-based model. There is also a third model which is a hybrid of the other two.

ADVERSARIAL HEARING MODEL

The process used by **courts** in Canada is known as the **adversarial hearing model**. In an adversarial model, parties are set in opposition to one another. The **decision-maker** depends on this opposition between the parties to reveal information necessary to decide the case. The parties present **evidence** and **argument** to the decision-maker who uses it to decide what happened in the case and what the outcome should be.

INQUIRY-BASED HEARING MODEL

An **inquiry-based hearing model** is an alternative to an adversarial hearing model. In an inquiry-based model, the decision-maker actively seeks out the evidence to decide the case by questioning parties who may have relevant information. The decision-maker is responsible for leading the questioning and gathering the evidence.

Inquiry-based hearings have many advantages over adversarial hearings. They depend less on the ability of the parties to prepare and present a case and more on the ability of tribunals to conduct the necessary inquiry. They also offer greater flexibility in the hearing structure. Inquiry-based hearings are a good option where the parties have significant differences in their ability to access hearing resources (such as legal assistance) or where there are significant power imbalances between the parties. An inquiry process tends to level the playing field in the hearing room.

There are also some disadvantages with inquiry-based hearings. These hearings are often less structured which can make the process more difficult to control. There is a much heavier responsibility on the tribunal to effectively lead and manage the process. Inquiry-based hearings can also take a longer period of time to conduct as the tribunal's focus is not restricted by the parties' view of the case.

HYBRID HEARING MODEL

The inquiry-based and adversarial hearing models are not completely separate. Many tribunals adopt a model with process steps that look more like the adversarial model, but with characteristics of an inquiry-based model such as the tribunal leading the questioning process. This model is known as a **hybrid hearing model**.

CHOOSING A HEARING MODEL

The primary difference between hearing models is how the hearing process is structured. Some tribunals use an adversarial model very similar to the courts; others conduct hearings using an inquiry-based process. Many tribunals run hearings that are a blend of adversarial and inquiry-based models.

Your **governing statute** may specify the hearing model to be used by your tribunal. If your **statute** does not provide this guidance, your tribunal will need to adopt a hearing model that is an appropriate fit for the types of **decisions** you make, the cases you deal with and the parties involved. Keep in mind that you may need to have statutory authority for some parts of your process depending on the type of model you choose. It is a good idea to seek legal advice about your hearing model to ensure that any legal requirements are met. Regardless of the model you use, the goal for your tribunal is to conduct a fair hearing process for the parties appearing before you.

The process information that follows applies to all hearing models unless otherwise stated.

The Hearing

ROLES

The people involved in an administrative tribunal all have different roles that support the hearing process – some have roles that are broad in scope and some have very limited involvement.

The Tribunal

The Chairperson

Hearings are conducted by one or more tribunal members who are often referred to as the **hearing panel**. One member of the panel sits as the panel chairperson. The chairperson is typically responsible for leading the hearing process, making opening remarks, maintaining order in the hearing room, and

handling basic procedural matters.⁵⁵ Questions from parties or their representatives in the hearing should be directed to and answered by the chairperson after consultation with the other panel members. The chairperson is also responsible for controlling the administration of the proceedings, such as determining the pace of the hearing and when to have breaks.

When deciding which panel members are the best candidates for the role of chairperson, these are some factors to consider:

- The extent of the panel member's knowledge of tribunal processes and procedures.
- The ability of the panel member to control proceedings and keep the hearing on track.
- The ability of the panel member to effectively manage potentially difficult participants and deal with challenges from parties and their representatives.

Panel Members

Panel members are responsible for assisting the chairperson in the conduct of the hearing. It is important for panel members to review the issues in the case and any information that has been filed prior to the start of the hearing. It is also a good idea for panel members to meet before the hearing to decide how questions will be asked, how panel discussions will occur, and who will take the responsibility for various tasks. This step is particularly useful if you have a large tribunal with many different people and different styles involved.

The chairperson's primary role is to lead the hearing process and, in doing so, he or she may miss other things going on in the hearing room. Panel members can step in to bridge this gap by:

- Being alert to hearing room dynamics.
- Keeping track of information or evidence given.
- Being prepared to ask questions when things are not clear.
- Assisting the chairperson with administrative tasks such as administering **oaths** or **affirmations**, marking **exhibits**, and operating recording equipment.

After the hearing, the role of panel members is to review the evidence and help decide the outcome of the hearing.

Variations in Tribunal Roles

An adversarial hearing model generally involves the tribunal receiving information presented by the parties and their **witnesses** and making decisions based on the information provided.

In an inquiry-based hearing, the tribunal conducting the inquiry has both an investigative and an adjudicative role. The tribunal gathers the evidence necessary to decide the issues and determines what evidence to consider rather than relying on the parties to decide how best to present the case. The tribunal itself is responsible for gathering enough evidence to make a decision.

Many tribunals use a combination of these two approaches in which the parties have an opportunity to present their information to the tribunal with the tribunal panel having a wide scope to ask questions and gather information.

Administrative Staff

Prior to the hearing, administrative staff for the tribunal can assist in many ways, including:

- Answering parties' questions about procedure and previous tribunal decisions.
- Assisting parties in completing and filing applications or other information.
- Setting hearing dates and arranging **pre-hearing conferences**.
- Booking suitable hearing facilities and arranging for necessary equipment.
- Providing notice to the parties about hearing dates and times.
- Receiving and exchanging pre-hearing submissions.
- Making arrangements for the viewing of information filed prior to the hearing.
- Preparing hearing information for the panel members.
- Setting up the hearing room.

During the hearing, administrative staff can help control party interaction outside of the hearing

room, find space for parties to discuss matters in private with their representatives, locate material required by panel members, operate recording equipment, administer oaths and affirmations, and mark exhibits.

After the hearing, administrative staff can put the decision into the format used by the tribunal, correct grammar and spelling mistakes in the decision, point out gaps or inconsistencies in reasoning, circulate draft decisions to panel members, and send the decision to the parties.

It is important to remember that while administrative staff can provide hearing assistance to the tribunal, it is the members of the hearing panel and not the administrative staff who must make the decisions that are the subject of the hearing.

Experts

Panel members may occasionally require the services of an expert to assist them in gathering and understanding information in specific areas where the tribunal lacks expertise. The expert's opinion does not replace the decision-making role of the tribunal. Lawyers are one common type of expert used by tribunals.

Legal Counsel for the Tribunal

Many tribunals use the services of a lawyer. Some tribunals rely on lawyers in the Civil Law Division of the Ministry of Justice for assistance. Others retain private lawyers as counsel for the tribunal. The role of legal **counsel** for the tribunal is to assist the tribunal with its decision-making process.

Prior to a hearing, legal counsel can assist the tribunal with establishing appropriate procedures, outlining the applicable law and identifying potential issues.

During the hearing, counsel can be present to provide assistance and advice to the tribunal, although in practice this rarely occurs. If the tribunal adopts this practice, the assistance and advice provided by counsel must not give the impression that the lawyer is the decision-maker or is guiding the decision. Lawyers do not make decisions for the tribunal. It is up to the panel whether to accept legal opinions.

Practice Suggestion

Do not lightly disregard advice from your legal counsel but do not apply it without fully considering it either – decision-making is your job. You should thoroughly assess legal advice given before making a decision whether to accept it and how to apply it.

After the hearing, counsel can assist the tribunal by providing legal advice on the issues as directed by the tribunal. Counsel can also assist the tribunal in reviewing draft decisions and pointing out legal errors or inconsistencies with previous cases.

Other Experts

In addition to lawyers, other experts can be hired by the parties or by the tribunal itself, where it has the authority to do so. Examples of other kinds of experts include medical doctors, psychologists, actuaries, accountants, accident reconstruction specialists, economists, scientists and engineers.

The role of the expert is the same regardless of who has provided the expert. Tribunals are not obligated to accept the opinions of their own experts and should apply the same assessment factors to all experts in the case to determine which experts and opinions should be given the most weight. If the tribunal intends to rely upon information from its own expert, it must disclose that information to the parties and allow them an opportunity to respond.

Parties

In an adversarial hearing model, the role of the parties is to provide evidence and argument to the tribunal to support the case they are attempting to advance or defend.

Parties in an inquiry-based model are not in direct competition with one another to advance or defend a position. Although parties may have competing interests, their primary role is to assist the tribunal in obtaining the information

the tribunal needs to make a decision on the issue.

Depending on the circumstances, parties in inquiry-based and hybrid hearing models may be permitted to question other parties or witnesses, but often to a much more limited degree than in an adversarial model.

Regardless of the type of hearing model involved, parties have a responsibility to arrive at the hearing prepared and ready to proceed.

Practice Suggestion

Parties who do not appear before the tribunal regularly and who are not assisted by someone with experience are likely to be unprepared. You can help them prepare with a process orientation provided by your administrative staff in advance of the hearing. You can help them at the hearing by explaining the steps in the hearing process and any rulings you make.

Counsel or Other Representatives for the Parties

In an adversarial model, the role of a representative for a party is to present the party's case and to argue for a particular result. In an inquiry-based process, representatives typically take on more of a support role for the process itself.

Representatives can be lawyers, **agents** such as community advocates who are not legally trained (anti-poverty advocates, worker's advocates, union representatives) or other people assisting the parties (counselor, social worker, family friend). Ideally, representatives should be familiar with the tribunal's procedures and governing statute, although in practice this is not always the case.

In any hearing model, the responsibilities of representatives include protecting the rights and interests of their clients and ensuring their

clients receive a fair hearing. Keep in mind that it is appropriate for representatives to challenge questions asked and rulings made by your tribunal if they are doing so to promote **fairness**.

Dealing with representatives can be challenging and you need to be mindful of the following:

- Evidence should come from parties or witnesses, not their representatives.
- Do not assume that because a party is represented, the representative will adequately present the party's case. Although you should not intervene in this situation too quickly, you may need to ask questions to fill in gaps in the case.
- Be careful and tactful in criticizing representatives – if you are critical of a representative and you decide against that representative's client, the client may believe that he or she did not succeed because your dislike of the representative biased your view of the client's case.
- Representatives have good and bad days just like everyone else. If a representative's conduct is an issue in one hearing, give that individual the benefit of the doubt that he or she may be simply having a bad day.

PRE-HEARING PROCESSES

Preparation for the hearing begins when the parties notify you that they intend to appear before your tribunal. This notice may involve the parties completing and submitting an application form. Notice may be as informal as the parties sending your tribunal a letter outlining their issues and requesting a **remedy**.

Applications

When parties send an **application** form or letter to your tribunal, it is a good practice to let them know that their application has been received. It is also a good idea to provide them with a copy of their application as they frequently do not keep a copy and it is important for them to remember the information they gave you.

It is not unusual for parties to make errors in completing application forms. As a result, it is also a good practice to review all applications

to ensure the required information is included. Notify the parties immediately if they have omitted essential information or made a critical error in the application form and give them an opportunity to correct the error or provide the missing information.

Party Status

Your governing statute may specify who the parties are in the cases before you or this may be a matter for your tribunal to determine. **Party status** is implied for those entitled to receive notice of the case. The parties are people who will be directly affected by your decision. These people are entitled to fully participate in your tribunal's decision-making process. People who merely have an interest in the outcome of the proceedings do not have the type of substantial connection to the case necessary for party status.

Notice

Your tribunal must provide notice of the hearing to all known parties whose rights or interests will be directly impacted by your decision. Depending on the circumstances and the type of case, appropriate notice may involve providing letters to specific parties or small groups of people or it could mean advertising notice of the hearing in a local newspaper or trade publication in the subject area dealt with by the hearing.

For example, Social Services Appeal Board hearings dealing with denials of financial assistance directly impact a small number of parties who participate in a **closed hearing** process. Given the narrow impact of these hearings, notice in these cases is provided only to the party who applied for assistance and the party responsible for providing assistance.

The impact of Water Appeal Board drainage hearings, however, can be far more widespread and potentially affect many landowners in a community. As a result, in addition to providing notice to the landowners who are most directly involved, the Board may also provide notice to the Rural Municipality in which the land is located and sometimes to the community as a

whole through a public hearing notice published in a local newspaper.

Your tribunal must make reasonable efforts to identify and contact potential parties. As a result, if you are aware of additional interested persons from previous proceedings or an earlier stage of the case, it is a good idea to provide those persons with notice of the hearing and information about how they may become a party or an **intervenor** in the case.

The notice should contain sufficient information about the case to allow the parties to prepare for the hearing (see “Adequate Notice” in Chapter One). Adequate notice generally includes:

- the date, time and location of the hearing
- the reason for the hearing
- the parties and issues involved
- the types of decisions that may be made
- the potential consequences or outcomes

The notice should be sent in sufficient time for parties to adequately prepare and arrange for their representatives and witnesses to attend the hearing.

Sharing Information

Ensure the parties have been provided with copies of any information filed in advance of the hearing date and provide them with an opportunity to view the material.

If the parties do not have representatives, it can also be helpful to provide them with copies of previous tribunal decisions in similar cases to give them an idea of the case they will have to meet, the factors you consider, the tests you apply, and the kind of evidence they should think about presenting.

Parties may not have easy access to copies of the relevant **legislation**. You can provide them with a copy. You can also direct them to the Office of the Queen’s Printer for Saskatchewan where they can purchase a paper copy of the legislation for a small fee. Alternatively, parties can access the Queen’s Printer web site and view an online copy of the legislation on Freelaw without charge.⁵⁶

Orientation to the Tribunal’s Procedures

Consider providing a procedural orientation for parties in appropriate cases. An orientation is particularly useful if the parties are self-represented, if your pre-hearing and hearing processes are complex or formal, or if the case is complicated. An orientation will let the parties know what to expect and what will be expected of them at the hearing. Your staff can provide the orientation over the phone or in person. You can also conduct an orientation as part of a pre-hearing conference. The orientation may cover:

- Any pre-hearing steps the parties must comply with.
- The steps in the hearing process.
- An overview of the relevant legislation in plain language.
- Appeal or review options.
- Available advocacy or legal information services.
- Tribunal pamphlets, brochures, or information sheets that may provide additional guidance.

Pre-Hearing Conferences

Many tribunals hold **pre-hearing conferences** or meetings with the parties in appropriate cases in order to make sure that the parties and the case are ready for the hearing and to determine whether settlement opportunities are present.

The pre-hearing conference can accomplish a number of goals including:

- Estimating how long the hearing will take.
- Obtaining agreement on procedural matters.
- Assisting the parties in exchanging information.
- Identifying and narrowing the issues, including any preliminary matters.
- Determining if there is agreement on any of the facts or issues.
- Determining if the parties require any special-needs accommodations or hearing resources such as an interpreter.

Pre-hearing conferences can make the hearing more efficient by ensuring that the parties understand what is expected of them and have the information they need about the case so that there are no surprises at the hearing. These meetings can be particularly helpful in complex cases where there will be numerous witnesses called, or where there are a large number of documents to deal with. The more complex the issues and the more formal your process, the more likely it is that a pre-hearing conference will be beneficial. In deciding whether to hold a pre-hearing conference, you will need to weigh the likely benefits to be gained against the time it will take to arrange for and conduct the conference.

Pre-hearing conferences are most effective when everyone is prepared for them. Parties and their representatives should arrive at the pre-hearing conference with a good understanding of their case, the information or evidence they will present at a hearing, the arguments they will make, and the outcome they would like to achieve.

Practice Suggestion

Lengthy hearings can often be shortened or made more effective with the use of a pre-hearing conference.

Pre-hearing conferences can also be used to determine whether the parties would like the opportunity to mediate the issues in dispute.

Mediation

Mediation is one type of dispute resolution process that is an alternative to a hearing in appropriate cases. It is a process in which an impartial third party assists people in conflict to identify and resolve their issues.

As an impartial third party, the mediator's role is to help the parties have a discussion and make decisions about their case. The mediator does not take sides or make decisions for the parties. Instead, the mediator helps the parties make

their own decisions. No decisions are made in mediation unless all parties agree.

During mediation, the mediator works with the parties to:

- define the issues
- clarify concerns
- develop, understand and evaluate solutions
- if possible, reach practical and mutually beneficial agreements

The time required for the mediation process depends on a variety of factors such as the number and complexity of the issues, and the degree to which the parties are prepared to work toward settlement.

The benefits of mediation include improved communication between the parties, confidentiality of the process, party control over decision-making, and greater flexibility of outcomes. Parties are also more likely to follow through with decisions made in mediation as they have been involved in reaching the resolution. Mediation is also often faster and more cost-effective than a hearing.

A mediation process can be formally implemented through legislation or it can be set up informally. Tribunals do not require statutory authority to implement an informal, voluntary mediation process. You can offer mediation to the parties in advance of the hearing either as part of a pre-hearing conference or as a separate step.⁵⁷ Consent of the parties is required in order to use an informal process. If the parties consent, then either a member of your tribunal or a third party mediator can conduct the mediation session.⁵⁸

Practice Suggestion

If members of your tribunal will be acting as mediators, they need to take formal mediation training. There is a specific process and a particular skill set required for mediation.⁵⁹

Prior to a mediation session, tribunal members acting as mediators should enter into mediation agreements with the parties which set out the terms and conditions of mediation and provide confidentiality protection for the process. In addition, the tribunal member who acts as a mediator should not sit on the hearing panel in the event mediation is unsuccessful in resolving the issues.

For information on other common types of **appropriate dispute resolution** processes, see Appendix F.

HEARING PROCEDURES

Many tribunals are uncertain about the procedures they can or should use when conducting a hearing. A number of hearing procedures may be set out in your governing statute. You will likely have to add additional procedures as well because statutes rarely cover all of the details you will need for your process.

The Law Reform Commission of Saskatchewan has developed a basic set of procedures tribunals can use as a guide to structure their hearing process.⁶⁰ These procedures can be adopted for use by your tribunal.

Preparing for the Hearing

There are a number of questions to ask yourself as you prepare for the hearing process. These questions include:

- What type of hearing model are you operating under (inquiry-based, adversarial or a hybrid of the two)?
- Do you have the authority to make the decision?
- Has everyone who should have received notice of the hearing been notified?
- Has there been sufficient time for the parties to prepare for the hearing?
- Are there any potential conflict-of-interest concerns or other reasons for you not to participate in the decision-making process?
- Are there any preliminary issues that can and should be dealt with prior to the hearing?

- What steps can you take to efficiently manage these preliminary issues?

Choosing the Panel

Some smaller tribunals conduct hearings with all members present. Others have a single assigned **adjudicator**. Many tribunals conduct hearings with small groups or panels of adjudicators. Regardless of the size of the panel, it is a good idea to use an odd number of panel members to ensure a majority decision.

Tribunals select panel members in a variety of ways. In some tribunals, the head of the tribunal assigns members to cases. In others, this task is carried out by staff members. Factors to take into account in the selection of panel members for a case include member availability, location, caseload, and expertise in the subject area of the case.

Quorum

Your governing statute may identify the number of members required for tribunal hearings, also known as a **quorum**. If your statute does not contain this information, then the default for your tribunal is found in section 18 of *The Interpretation Act, 1995* (the Interpretation Act), which sets out a process for determining the number of members required for quorum.⁶¹

Substitutions

Sometimes a panel member has to step out of the decision-making process given illness or an emergency. If quorum is maintained, the remaining panel members can continue with the hearing. If quorum is an issue, your tribunal can consider substituting another tribunal member into the hearing process.

Substituting a member presents few difficulties if evidence has not been presented by the parties at the time of the substitution. If the hearing is either underway or has concluded, the substitution of a panel member will generally require the agreement of the parties. This practice is only advisable if the tribunal member can catch up by reviewing the record of the hearing (reading a transcript, listening to a recording of the hearing, viewing the

exhibits filed). If the parties do not agree to a substitution, then a re-hearing will be necessary.

Statutory Powers

Your governing statute will often set out specific powers that can assist you with the hearing process. These powers may include the ability to **order** a party to produce certain documents, the ability to order a party to pay costs, and the authority to re-hear a matter.

Your governing statute may also provide you with the powers of a commissioner under *The Public Inquiries Act*.⁶² These powers include the ability to **subpoena** witnesses to testify at the hearing and to attend the hearing and bring certain documents.

You do not have these kinds of higher level powers unless your statute gives them to you.

Common Law Powers

In addition to your statutory powers, you also have a number of powers that arise from the **common law**. These straightforward procedural powers include:

- determining the date, time and place for the hearing
- granting adjournments
- determining the type of hearing to hold (electronic, oral)
- deciding who should receive notice and what form the notice should take

You have these kinds of straightforward procedural powers regardless of whether they are expressly set out in your statute, unless your statute provides otherwise (for example, your statute may require an **oral hearing**).

You generally have those powers that are considered reasonably necessary to carry out your duties. If you are unsure about whether you have the power to do something, seek legal advice before you do it.

DIFFERENT TYPES OF HEARINGS

Hearings may take a variety of forms: written, telephone, videoconference, and oral. Hearings by telephone conference and videoconference are known as **electronic hearings**.

The hearing format for your tribunal will also be influenced by whether you follow an adversarial, an inquiry-based or a hybrid hearing model.

Written Hearings

The process for **written hearings** is essentially an exchange of written information between the parties and the tribunal. Instead of personally attending the hearing, the parties submit written statements or **affidavits** to give their evidence.

Generally, the party who initiated the proceedings submits his or her evidence and position first. The responding party then submits his or her evidence and position in response. The initiating party then has an opportunity to reply, followed by both parties providing the tribunal with written argument. In a written hearing, the tribunal is responsible for setting timelines within which each step must be completed.

Written hearings have the advantage of saving the parties and the tribunal the time, expense and inconvenience of travel.

Written hearings also have some significant disadvantages. These hearings:

- Can be time-consuming as it takes time to exchange and review written information.
- Do not permit extensive questioning of the evidence or certain types of evidence, such as demonstrations.
- Depend on the ability of the parties to communicate effectively in writing.

Practice Suggestion

A written hearing format is a good fit where the facts are already established. Written hearings are not a good idea in cases where there are significant credibility issues as there is at best a limited opportunity to ask questions and obtain answers in written form.

Conducting Hearings by Telephone

Telephone hearings can bridge the physical distance between parties and tribunal members, which can save the parties and the tribunal the time, expense and inconvenience of travel. Telephone hearings can also increase access to your hearing process for financially challenged individuals if your tribunal can absorb the long distance charges involved. A telephone format works well for pre-hearing conferences and many types of **preliminary applications**.

There are also some disadvantages to telephone hearings:

- Parties tend to feel removed from the hearing.
- There are more opportunities for negative behaviour.
- There are also more opportunities for you or the parties to lose focus and miss issues or evidence.
- There can be logistics issues that arise relating to the type of evidence involved and the number of parties participating.

Parties tend to treat telephone hearings as informal processes. They often do less preparation and think less about what they are saying which can impact on their ability to present their case. As a result, if the outcome of the case may have serious consequences for a party, it is better to have the party appear in person where focus issues are less likely to cause difficulty with the presentation of the case and your ability to follow it.

Your attention and the attention of the parties may wander during a lengthy telephone hearing. It is particularly difficult to follow a complex argument or a lengthy cross-examination over the phone. It is important for you to be aware of the danger of losing focus during a telephone hearing and to take steps to guard against this danger such as concentrating on taking notes.

Difficult parties are not good candidates for telephone hearings as behavioural issues are often magnified. When these parties feel distanced from the hearing, they are more likely to be obstructive or withdrawn. They are generally much more manageable in person.

Some issues are better dealt with in person. For example, if credibility is a major issue in a case, it is better for parties to provide their evidence in person. It is generally easier for you to assess evidence provided by the parties in person and more difficult for them to be evasive or untruthful.

Certain types of evidence are also a challenge to deal with over the phone. For example, you cannot conduct a demonstration or reference a physical object that other parties cannot see. It can also be confusing to reference numerous documents and have people attempt to follow what you are referencing.

It is also difficult to manage multiple party hearings by telephone. If people talk over one another, conference lines may cut in and out and some comments may get missed. It can also be a challenge for you to determine who is speaking and when the speaker has changed.

Practice Suggestion

Telephone hearings are not good substitutes for in-person hearings in all cases. It is not a good idea to hold a telephone hearing in cases where there are serious potential consequences for parties, credibility issues, numerous parties and witnesses giving evidence, large volumes of **document evidence**, lengthy cross-examination processes or parties with significant behavioural issues.

Tips for managing telephone hearings are set out in Appendix G.

Dealing With Requests for Telephone Hearings

Given the potential challenges of telephone hearings, it is not a good idea to routinely grant them solely on the basis of convenience for either the parties or the tribunal. It is important for you to develop criteria to determine if and when telephone hearings will be granted. Factors that you may consider are as follows:

- the length and complexity of the hearing
- the issues involved
- the type of evidence likely to be presented
- the number of parties involved
- the potential consequences of the hearing
- the ability to manage the parties

Hearings by Videoconference

Hearings by videoconference have all the advantages of a telephone hearing with fewer disadvantages. Travel costs are minimized, multiple parties can be accommodated, and there are fewer logistical issues.

The disadvantages of videoconferencing include the expense of the equipment, the need to ensure everyone has copies of documents in advance of the conference, and the potential difficulty of having the parties in the same room at the videoconference location without tribunal members being physically present to manage their interaction.

Oral Hearings

Oral hearings are the traditional type of hearings in which the parties, the tribunal panel members and staff all personally attend at the same location for the hearing. These are the best option for lengthy or complex cases, cases involving numerous witnesses or documents, cases dealing with credibility issues and cases that may result in serious consequences for individuals.

In oral hearings the parties are generally permitted to obtain representation to assist them with the hearing process and to call

evidence and cross-examine witnesses. However, these are not absolute or unlimited rights in an oral hearing and may be subject to reasonable restrictions imposed by the tribunal in appropriate cases.

RECORDING HEARINGS

Unless your statute requires you to record the hearing, this is an optional step in an oral hearing. The advantages to recording the hearing are as follows:

- You can refer back to the recording if necessary to clarify evidence given.
- It provides a record of the hearing that can be used to prepare a transcript for appeal.
- Parties tend to behave better if they are being recorded.

Practice Suggestion

Recording a hearing is not a substitute for note-taking. Take notes even if the hearing is being recorded. It is far easier to refer to your notes than to spend several hours listening to the recording after the hearing has concluded. Note-taking also keeps you focused on the proceedings.

ADMINISTERING AN OATH OR AFFIRMATION

Unless your statute requires **testimony** to be given under **oath**, this step is also optional. The advantages to requiring an oath are that it provides a greater sense of formality to the process of giving evidence and encourages the telling of the truth. The main disadvantages are that it adds another step to the process and a higher level of formality than may be warranted under the circumstances.

People with different religious backgrounds may not want to swear on a Bible. You can use other religious texts instead or have the witness

swear a solemn **affirmation** to tell the truth. The procedure for affirming a witness is relatively simple. Have the witness raise his or her right hand. Ask the witness: “Do you solemnly affirm to tell the truth?”

The procedure for administering an oath is also relatively simple. Have the witness hold a Bible or other religious text in his or her right hand or put his or her right hand on the holy book. Ask the witness: “Do you swear that the evidence you are about to give shall be the truth?”

OPENING REMARKS

The hearing process generally begins with an introduction of the panel and opening remarks by the panel chairperson. Information that you may want to include in the introduction is as follows:

- the names of the panel members
- the authority for the hearing
- the reason for the hearing
- the order of the steps in the hearing
- process rules for the hearing

It is a good idea to have the parties and their representatives introduce themselves at the outset of the hearing.

It can also be helpful to reassure the parties that the hearing will not be any more formal than necessary and that all parties will be given an opportunity to present their view of the issues.

PROCESS RULES

Setting out some basic rules for the conduct of the hearing can provide the parties with guidance about what is expected of them. These rules may include:

- Addressing the panel rather than other parties.
- Minimizing interruptions by letting one person speak at a time (unless other parties have objections to raise with the panel).
- Turning off cell phones and pagers.
- Avoiding distracting conduct such as talking or texting.

- Using respectful language.
- Returning promptly from breaks.

CONDUCT DURING THE HEARING

Keep in mind that your conduct in the hearing room can influence:

- the behaviour of the parties
- their perception of the fairness of the proceedings
- the way the hearing unfolds

It is important for you to arrive at the hearing on time in appropriate attire for the formality of your process. Aim for a friendly but firm approach with the parties at all times. You may be tempted to engage in some social chit-chat with the parties in order to make them feel comfortable. This is a common situation that can give rise to a perception of **bias** unless it is open and balanced. It can be difficult to avoid social conversations with parties who may frequently appear in front of you. Try to limit these conversations as the longer they go on, the more it may appear to others that you know and prefer these parties.

Try to be mindful of your body language when parties are speaking. You should ensure that you do not turn your back on parties, shake your head, or behave in any way that suggests to the parties that you are not open to their arguments. You need to give your full and undivided attention to everything that is being said. It is not a good idea to speak with another panel member or one of the parties while a witness is testifying. It is also best to avoid meeting with one party in the absence of the other parties.

ABSENT PARTIES

Unless your statute provides otherwise, you can proceed with a hearing in the absence of a party if the party was given appropriate notice of the hearing and an opportunity to participate. In these circumstances, you should ensure that:

- The party was advised of the correct date, time and place of the hearing.

- The party was properly served with the hearing notice in the manner provided for in your governing statute.
- You made efforts to reach the absent party on the day of the hearing to attempt to determine the reason for the absence.
- You waited at least a half hour before proceeding with the hearing to determine if the absent party was merely running late.

Many tribunals will provide an absent party with one further opportunity to appear rather than proceeding with the hearing, particularly if there is little impact on the other parties.

Practice Suggestion

If your tribunal may proceed with a hearing in the absence of a party, this possibility should be clearly stated in written form in the hearing notice.

SELF-REPRESENTED PARTIES

Although lawyers or other support people may appear with parties in more formal or complex hearings, many tribunals deal with parties who represent themselves.

Self-represented parties can face many challenges during the hearing process. They may not understand the format of the hearing, the type of evidence they can or should provide, the law that applies to their case, or limitations in the remedies you can provide. It can be equally challenging for tribunal members to try to assist self-represented parties with the hearing process without appearing to become their advocate.

You can generally provide the following types of assistance to self-represented parties during the hearing process:

- Providing an overview of the steps in the hearing.
- Explaining the meaning of legal terms you refer to.

- Providing examples of process issues such as **leading questions** and **hearsay**.
- Explaining the difference between evidence and argument.
- Providing information about evidence requirements.
- Pointing out when questions have strayed into irrelevant areas.
- Identifying the legal tests you will be applying and the remedies you can grant.
- Explaining rulings that you make in simplified language.

When tribunals know that parties appearing before them will be representing themselves, it is particularly important to ensure that tribunal processes are clear, transparent and understandable. Even in cases where parties have someone representing them, it is still important to make sure that the parties themselves understand the process.

PRELIMINARY APPLICATIONS

The hearing generally begins with the panel asking whether there are any **preliminary applications** the parties would like to make. Some common types of preliminary applications include:

- challenges to jurisdiction
- allegations of bias
- adjournment requests
- exclusion of witnesses
- parties seeking to intervene
- consolidating cases

The panel will usually hear preliminary applications prior to hearing evidence in the case. Preliminary matters can either be dealt with on the day of the hearing or, if they are known in advance and will take time to hear and consider, they can be heard on a separate day prior to the hearing.

The same hearing panel considering the main issues in the case hears and decides preliminary matters. Generally the party raising the preliminary issue will speak to the issue first and then the opposing party will respond. If the issue is straightforward and the panel is

in agreement, you can provide your decision to the parties immediately in oral form. Where the panel disagrees or the issues are complex, you may want to adjourn the proceedings to have an opportunity to review the issues and deliberate on the outcome. You can provide your decision orally or in writing as preliminary issues arise during the hearing process or, where appropriate, include your decision as part of the final written decision in the case.

Challenges to Jurisdiction

Challenges to **jurisdiction** are a common preliminary matter that can take many forms. It may be that one of the parties does not believe the tribunal has the authority to consider a particular issue, or that a time period has been missed, or that a hearing application is not properly before the tribunal.

Start by hearing argument from the parties on the issue. After argument, you will have to determine if you can make an immediate decision about jurisdiction or if you will need to reserve your decision. If you reserve your decision on jurisdiction, you may want to go ahead with the balance of the case at that time. It is a good idea to hear the balance of the case if the jurisdiction issue is unclear and there are parties or witnesses who have travelled a significant distance for the hearing. Having them provide their evidence may avoid the potential necessity of them travelling back again for a hearing if you ultimately decide your tribunal has jurisdiction in the case.

Depending on the type of jurisdiction issue raised, keep in mind that you may need to hear some evidence in the case before you can make a decision (for example hearing evidence from the parties on the steps they took to meet any procedural requirements necessary to trigger a hearing).

Practice Suggestion

If you have any doubts about a jurisdictional question, reserve your decision and seek legal advice.

Allegations of Bias

Another common preliminary issue is an allegation of **bias**. If you are aware of potential bias concerns in your case, the safest thing to do is to disqualify yourself from the case in advance of the hearing.

If you have previously met a party or other people associated with the case, it is a good idea to alert all parties to this fact at the outset of the hearing. You can then ask them if they have any issues about you proceeding to hear the case under those circumstances, giving them the opportunity to raise any objections they might have. If they are aware of the potential issue and they do not object, it will be difficult for them to object at a later point if they do not like the outcome of the hearing.

You may not recognize potential bias issues until you are in the hearing process. At that point, you may realize that you have a connection to someone involved in the case. If at any time during the hearing process you become aware of circumstances that could be seen as affecting your neutrality, you need to make the parties aware of the issue and give them an opportunity to object to your participation in the hearing.

An allegation of bias does not automatically mean that you are biased and have to disqualify yourself. You need to apply the test for bias set out in Chapter One – could a reasonably informed person looking at all the facts and having thought the matter through reasonably conclude that you are biased? If the answer is “no,” then you do not need to disqualify yourself.

Adjournments

One of the most common preliminary matters is a request for an **adjournment**. Subject to any limits in your statute, there are a number of factors you can consider with this type of request, including:

- Is this the first adjournment request made by the party?
- Has the party had insufficient time to prepare for the hearing?
- Was the hearing set on short notice?

- Would the adjournment inconvenience the other parties?
- Was the adjournment request made at the earliest opportunity?
- What is the reason for the request (for example to obtain documents or seek legal advice)?
- Will granting the adjournment cause unreasonable delay in the hearing process?
- Is the request being made in good faith or is it a delay tactic?
- Are there complex issues involved in the case that would justify an adjournment to allow the parties more time to prepare?

In deciding whether to grant an adjournment, you need to balance fairness to the individual requesting the adjournment with the impact of the adjournment on the other parties. If an adjournment is requested for a good reason, there are no objections to it, and other parties are not significantly impacted by it, then consider granting the adjournment for a reasonable period of time.

Also consider if there are other ways to proceed rather than adjourning the hearing. If some witnesses have traveled a significant distance for the hearing and the reason for the adjournment does not relate to their evidence, then you may consider hearing their evidence prior to adjourning so that they do not have to return on a further date.

When you receive an adjournment request, advise all parties about the request and give them an opportunity to respond. It is important to remember that even if the parties agree to an adjournment, the tribunal has an interest to consider as well given that the tribunal has an overall responsibility to run a timely hearing process.

Practice Suggestion

If one of the parties requests a lengthy adjournment to obtain the services of a particular lawyer, keep in mind that it is unreasonable for parties to significantly delay a hearing process to await the availability of their lawyer of choice. Parties will be expected to find a lawyer able to meet the tribunal's hearing timelines.

Exclusion of Witnesses

Witnesses are often excluded from the hearing room until they testify to ensure that the evidence they give is not influenced by the version of events presented by other witnesses. Witnesses can consciously or unconsciously adjust their evidence to fit the evidence of other witnesses.

While witnesses may be excluded from the hearing room, the parties themselves should be present at all times, regardless of whether they will be testifying in the case.

Practice Suggestion

Excluding witnesses from the hearing room is particularly important in cases involving credibility issues. As a result, if the parties do not request an exclusion of witnesses, do it for them.

Intervenors and Standing

At the outset of a hearing, you may be asked to grant third party individuals or groups **standing** in the case, which means being allowed to participate in the hearing. These individuals or groups are seeking to intervene in the case. **Intervenors** are people who do not have a sufficient connection to the case to be

included as parties, but who have a significant interest in the outcome and should be allowed to participate in order for them to protect or advance those interests. These participants generally have information that will assist you in making your decision. You have the authority to decide whether and to what extent they will be permitted to participate as intervenors.

As a general rule, if additional people or organizations have useful contributions to make to the proceedings and their participation will not significantly delay the proceedings or be unfair to other parties, then you should consider granting the request. Some questions you may want to keep in mind in making this decision include:

- Do the proposed intervenors have a substantial interest in the outcome of the case?
- Do the proposed intervenors bring a unique perspective or expertise to the case that would be of assistance to the tribunal in deciding it?
- Will the participation of the proposed intervenors result in any harm to the parties?
- To what extent should the proposed intervenors be permitted to participate in the case? Should they be permitted to ask questions or conduct a cross-examination?

Generally, people seeking to intervene will make their case to the panel, and then the parties will be given an opportunity to provide any comments or objections that they have to the request.

Consolidating Cases

If you are hearing cases that involve similar facts or issues, it can be more efficient for the tribunal to combine the cases and hear them together in a joint hearing process. It is generally a good practice to provide the parties with notice that you are considering a consolidation of the cases and give them an opportunity to consent or raise any objections they may have.

If combining the cases will delay or significantly complicate the hearing or will have a negative

impact on a party, then it is not a good idea to hear the cases together.

Constitutional Challenges

A constitutional challenge is an uncommon type of preliminary application. Tribunals rarely deal with constitutional issues. When they arise, they frequently relate to the *Canadian Charter of Rights and Freedoms* referred to in Chapter One. Parties who raise Charter arguments will generally be questioning your tribunal's policies and procedures, the manner in which you have acquired or propose to acquire evidence, or the validity of a portion of your governing statute or **regulations**.

Some tribunals have the authority to decide constitutional questions. Others do not and must rely on the courts to address these issues. This area of the law is complex and evolving. There are specific procedural requirements for the raising of constitutional questions and the issues themselves often involve the application of complicated legal tests.

Given the complexity of this area, it is a good idea for your tribunal to be prepared for a constitutional challenge. The first step is to seek legal advice on whether your tribunal has the authority to consider constitutional questions. If you have this authority, the next step is to decide whether your tribunal should be dealing with constitutional matters. Factors you may want to consider are:

- Do your tribunal members have sufficient knowledge to deal with constitutional questions?
- Does your tribunal have ready access to legal advice?

Many tribunals take the view that this is an area that is best left to the courts.

If a constitutional challenge is raised before your tribunal and you are uncertain about your jurisdiction, you can deal with the issue in the same way as other types of challenges to your jurisdiction. You can hear argument from the parties on both the constitutional question and your authority to decide it and then determine if you can make an immediate decision. If you need to more fully consider the issues

and obtain legal advice, you can reserve your decision on the constitutional matter and then decide whether to go ahead with the balance of the case (if, for example, parties or witnesses have travelled a significant distance to attend the hearing). Alternatively, you can reserve your decision and wait to proceed with the remainder of the case at a later time.

It is helpful to have notice that a constitutional issue will be raised prior to the hearing.⁶³ Although it is not required, if you know that a constitutional issue will be raised at a hearing and your tribunal deals with constitutional matters, it is also a good practice to ensure that notice is provided to the Attorney General.

Practice Suggestion

It is a good idea to require parties who wish to raise a constitutional issue to inform the tribunal, the opposing parties, and the Attorney General prior to the hearing. Consider providing information about this procedure in your tribunal's public materials or during an orientation session.

ORDER OF PROCEEDINGS

In an adversarial model, the order of proceedings is fairly standard and generally proceeds as follows:

1. Opening Remarks by the Tribunal
2. **Opening Statements** by the **Parties**
3. **Applicant's Case** (the party seeking the change):
 - **Witness** Called
 - **Examination-in-Chief** by Applicant
 - **Cross-examination** by **Respondent**
 - Questions from the **Panel**
 - Questions by Respondent arising from Panel's Questions
 - **Re-examination** by Applicant (re: cross-examination or panel questions)

- Repeat with other Witnesses for the Applicant
4. Respondent's Case:
 - Witness Called
 - Examination-in-Chief by Respondent
 - Cross-Examination by Applicant
 - Questions from the Panel
 - Questions by Applicant arising from Panel's Questions
 - Re-Examination by Respondent (re: cross-examination or panel questions)
 - Repeat with other Witnesses for the Respondent
 5. **Final Argument** by Applicant and Respondent
 6. Closing Remarks by the Tribunal

Inquiry-based models tend to be more flexible and less formal. In an inquiry-based process, the tribunal determines the order of proceedings that will best ensure the hearing unfolds in an orderly and logical way. Some tribunals begin inquiries by hearing from witnesses with the most critical evidence necessary to decide the issue. Others group witnesses according to the issue they will be testifying about or by similar interests in the proceedings. Some tribunals begin by hearing from witnesses who are seeking a change.

In hybrid models that currently exist in Saskatchewan the order of proceedings tend to follow the adversarial model but with less emphasis on the cross-examination process and a wider scope for tribunal members to ask questions during the hearing.

From Opening Statements to Closing Remarks

The hearing process generally starts off with introductory remarks by the tribunal followed by **opening statements** made by the parties – this is an optional step that can provide a quick summary or description of the case to the panel and the parties.

In an adversarial hearing model, most often the party seeking a change – commonly known as the applicant, appellant or claimant – presents

his or her case first. As an alternative, it may make sense to have the party with the most information or the background information present first.⁶⁴

The party proceeding first may call witnesses to give evidence about the case. This is called the **examination-in-chief** or **direct questioning**. The purpose of the examination-in-chief is to put before the tribunal any knowledge the witness has of the facts and matters in dispute. Questions asked during the examination-in-chief should generally be **open questions** rather than questions that suggest the answer, also known as closed or **leading questions**. A question that can be answered by a yes or no is likely a leading question. Leading questions in the examination-in-chief should be limited to non-controversial background questions.

Once the applicant has finished asking the witness questions, the respondent can then ask questions of the applicant's witnesses. This is referred to as the **cross-examination**. The purpose of cross-examination is to test the credibility, accuracy and reliability of the evidence and to obtain additional information. The respondent can ask leading questions in the cross-examination.

The applicant can then **re-examine** the witness by asking the witness further questions about matters arising out of the cross-examination. This allows the applicant to clarify information and clear up any misconceptions in the earlier statements of the witness. The applicant can then call other witnesses.

Panel members may also ask questions of the witness. In the adversarial model, questions from the panel are generally limited to questions of clarification.

When the applicant has completed his or her case, the respondent then presents his or her case and the process repeats. If there is more than one respondent, then prior to any evidence being given, the tribunal must decide the order to be used by the respondents. If there are any intervenors they often present after the parties.

When the parties have finished presenting their evidence, they then make their **final arguments** to the tribunal. During argument the parties or their representatives will present their view on

what the evidence is, what it means, and how any policies, previous cases, or the legislation and regulations affect the interpretation of the evidence.

Practice Suggestion

During argument, the parties are generally not permitted to present any new evidence. Be careful that you do not rely on evidence that you heard the first time in argument.

In an inquiry-based hearing model, the hearing proceeds following the order determined by the tribunal. The flexibility in the order of proceedings in an inquiry-based model allows the tribunal to fit the process to the case and to gather all of the relevant information necessary to decide the issues. Witnesses are called and provide their evidence about the case. Cross-examination may or may not be permitted by the tribunal. The **onus of proof** is generally on the tribunal to collect enough evidence to answer the questions or issues that are the focus of the inquiry.

In an inquiry-based model, the panel members generally take a more active role to ensure that the information necessary to make a decision is gathered from the parties. It is important that questions from panel members in an inquiry-based process be open questions that gather information rather than leading questions that suggest a particular answer.

Regardless of the model that is chosen, the tribunal generally concludes the hearing process with closing remarks to the parties. The chairperson of the panel typically makes the closing remarks on behalf of the tribunal.

EVIDENCE

As a decision-maker, you have to determine what the facts are in the case. The difference between facts and **evidence** can sometimes be confusing. The evidence in a case is typically the information you receive from the parties.

Your job as a decision-maker is to consider the evidence given and, from that evidence, determine the facts.

Administrative tribunals are generally not bound by the formal rules of evidence that apply in a courtroom. Keep in mind that while you have wide latitude to admit evidence, you also have a duty to be fair. Rules of evidence were developed in part to ensure fairness. The more that you stray from basic principles of evidence, the more likely you will run into fairness issues.

Evidence deals with proof – it is the information used by the parties to prove or disprove the case. Evidence may consist of:

- the testimony of the parties in an oral hearing
- the written statements or affidavits of the parties in a written hearing
- documents (statements, charts, contracts)
- demonstrations (how equipment operates)
- physical objects (clothing, DNA)
- photographs, videotapes, audio recordings
- expert opinions (testimony, reports)

The following items are not evidence:

- The **submissions** or arguments of the parties – They have moved beyond telling you what happened into an analysis of what happened.
- Earlier decisions – If a decision has been appealed to you, the decision is not evidence; it is a part of the record. It is not something that the parties have to establish.

Hearsay Evidence

Witnesses are generally limited to giving evidence about matters they saw or heard themselves. Any information they share about what another person told them they saw or heard is second-hand information, referred to as **hearsay**.

Hearsay can be and often is admitted as evidence by administrative tribunals. However, it is typically less reliable than something a witness saw or heard directly. The accuracy of hearsay evidence cannot be tested by cross-

examination, because the person who obtained the information first-hand is not a participant at the hearing.

In determining whether to admit hearsay evidence, consider the following factors:

- Is it likely the information is accurate?
- Is there a reason to suspect it is not truthful?
- Is there a good reason the person with first-hand knowledge is not at the hearing?
- Is the hearsay evidence supported by other evidence?
- Is there another more reliable source for the evidence?
- Does the hearsay evidence relate to a minor or a significant part of the case?
- Will admitting the hearsay evidence be unfair to another party?

Common examples of more reliable forms of hearsay include government records, business records, invoices and receipts.

Admitting Evidence

As the decision-maker, you are required to decide what evidence can be admitted. When you are deciding whether to admit evidence, ask yourself the following questions:

- Is the evidence **relevant**? (Does it relate to the issues?)
- Is the evidence reliable? (Can you trust it?)
- Is the evidence necessary? (Do you need this evidence or does it simply repeat other evidence given that is not in dispute?)
- Would it be fair to admit it? (Is the value of the evidence greater than any harm that may be caused by admitting it?)

Evidence is relevant if it tends to prove or disprove a matter you must decide. Evidence is reliable if it comes from a credible, preferably first-hand source. The more relevant and reliable the evidence, the greater the weight you can give it. Evidence that is unnecessary and that is likely to make a hearing lengthier should not be admitted. Evidence that may cause more harm than the value it will provide should also not be admitted.

Witnesses

Witnesses should testify about their observations, not their opinions or conclusions. An exception to this rule is if the conclusions relate to matters that are within the knowledge of the average person (for example how old someone appears to be or whether someone looks upset).

If you have concerns about gaps or inconsistencies in witness testimony and the questions asked by the parties do not address your concerns, it is a good practice to ask the witnesses questions to give them an opportunity to explain the inconsistency.

In an adversarial hearing, it is a good idea to wait until after the examination-in-chief and cross-examination have been completed to ask any questions you may have. This ensures your questions will not interfere with either party's presentation of the case. Also, if you wait, you may find some of your questions will be asked by other parties.

Expert Evidence

Expert evidence can be challenging for administrative tribunals. Experts provide specialized knowledge or opinions in a case. Their opinions are an exception to the general rule that witnesses are to testify about their observations, not their conclusions.

Experts who are permitted to testify about their opinions generally need to be qualified to provide an opinion unless the opinion relates to matters that are within the knowledge of people without specialized expertise. Experts also need to be qualified to provide the specific opinion given. For example, a handwriting expert may be qualified to provide an opinion about who may have written a document, but may not be qualified to comment on how old a document appears to be.

Tribunals frequently deal with experts' reports rather than hearing testimony from the experts themselves. While it is better to have the expert attend the hearing in person so that he or she can be cross-examined on the opinions given, the reality is that a personal attendance by

experts is often too expensive for the parties or too difficult to arrange.

Qualifying an Expert

A person must be qualified as an expert if he or she is going to provide the tribunal with expert testimony. It is up to you to determine whether to qualify someone as an expert. To make this decision, you will want to know about the person's qualifications including relevant skills, education and experience. You will need this information to determine if the person has expertise in a particular area. You should also have the expert outline his or her opinions and how they relate to the issues in the hearing to determine if the expert's testimony will be relevant to the issues.

In an inquiry-based hearing, the tribunal is responsible for ensuring that expert witnesses are qualified to give their opinion. In an adversarial hearing, the parties may agree on an expert's qualifications to provide an opinion in a case, or one party may oppose the qualifying of a witness as an expert.

If a party is opposing an expert, the party calling the expert will usually submit the expert's curriculum vitae (c.v.) or résumé and will ask the expert a number of questions to establish the expert's qualifications on a particular subject or in a specific field. The opposing party is then permitted to ask the expert about his or her qualifications. Each party then has an opportunity to make an argument about whether and to what extent the witness should be qualified as an expert. You can then make a decision about whether to qualify the witness as an expert.

If you decide that the witness may testify as an expert, you must also identify the specific areas in which the witness will be permitted to provide expert opinions.

As a general rule, an individual who can demonstrate he or she has comprehensive knowledge of a particular area or matter due to education, training, skill or experience may be qualified as an expert. For example, a doctor may be an expert on a patient's health.

Keep in mind, however, that certain experts may be better witnesses than others. For example,

the family doctor who has been treating a patient for many years may be a better expert witness on that patient's health than another family doctor who has never seen the patient and has only reviewed the patient's file. Similarly, a medical specialist may be a better expert witness than the patient's family doctor if the issue is within the specialist's area of expertise (for more on this subject see "Step 2: Fact Finding" and "Assessing Expert Evidence" both in Chapter Four.)

Practice Suggestion

Simply because someone is qualified as an expert does not necessarily mean you should give their opinion more weight than other information before the tribunal. When considering information provided by an expert, the weight you should give the information should be based on the expert's knowledge of the subject area and awareness of the case being considered by the tribunal.

Once an expert has been qualified, the hearing proceeds and the expert can provide an opinion in the areas in which he or she has been qualified. Keep in mind that an expert opinion is an exception to the hearsay rule as the expert can provide an opinion based on information that has been provided to the expert by others and that the expert did not necessarily see or hear directly.

Handling Exhibits

During the hearing, the parties or their representatives may refer to **documents** or physical objects (such as maps, contracts, reports, photographs) to support their case. For you to consider this evidence, the parties need to make it an **exhibit**.

The first step is for the parties to provide some background information to link the documents or physical evidence to the case – for example,

asking a witness who took a photograph to confirm that it accurately depicts the scene and asking when it was taken and what it shows. Copies should be provided to the other parties for their review. You can then ask the other parties if they have any objections to the evidence being made an exhibit. If they object, allow the parties to make an argument, consider the arguments and then rule on whether the item should be admitted into evidence.

The hearing panel is responsible for accepting and marking exhibits and keeping a record of them throughout the hearing.⁶⁵ Many tribunals use rubber stamps called exhibit stamps for this purpose. Exhibit stamps provide a consistent and time-saving format for marking exhibits and have blanks for information such as the exhibit number, the date it was filed, and the name of the case. You can use an identifying letter to indicate the exhibit was filed by a particular party, such as using A-1 to refer to the first exhibit filed by the Applicant and R-2 to refer to the second exhibit filed by the Respondent. You can either mark an exhibit directly or attach an exhibit notation to it. One of the panel members or the tribunal's staff person should keep a running list of all exhibits including a brief identifying information next to each exhibit number.

While exhibits are in your possession, it is a good idea not to write anything on the exhibit except the exhibit number or exhibit stamp. If you write notes on an original exhibit, a reviewing body may mistakenly assume that the notes were part of the exhibit provided by the party. Also, parties may want some types of exhibits returned in an unmarked condition at the end of the decision-making process.

Practice Suggestion

Original exhibits should remain free of any markings except the exhibit stamp or number.

Site Visits

Sometimes tribunal panels decide to view a particular site related to the issues in the case (such as an accident site or a construction site). If your tribunal has the authority to conduct a site visit, keep the following general rules for site visits in mind:

- The logistics of site visits can be difficult to manage and can be disruptive to third parties – only conduct them if there is an important purpose for them (for example the descriptions provided by parties are difficult to follow without seeing the site).
- Parties and their representatives must be given notice of the site visit and the opportunity to be present for it unless they have waived that right.
- The visit's purpose is to better understand evidence, not to gather additional evidence unless you have express statutory authority to do so.
- There should be no discussions about the case at the site – arguments about the case should be confined to the hearing room.

DEALING WITH A DIFFICULT HEARING

Tribunals often have information beforehand about potentially difficult participants. These participants tend to make themselves known early in the process. Your staff are the primary contacts for these participants and need to handle them carefully to help ensure they arrive at the hearing in a calm state.

It is important to set the right tone at the outset of the hearing process in a potentially difficult hearing. You need to project a confident and professional appearance. Outline basic rules of conduct for the parties and enforce them. Ensure that there is some degree of formality to the process – a greater level of formality often discourages behavioural issues. Keep in mind that it is easier to relax formality levels if warranted than to impose a greater level of formality on the parties at a later point in the hearing.

Take a “no surprises” approach as surprises can trigger disruptive behaviour. You should attempt to ensure that all parties including their representatives understand:

- what your procedures are
- the tests you will be applying
- the remedies you can provide
- the case that has to be met

If matters start to escalate during the hearing, taking a break is a simple approach to calm parties down and get the hearing back on track. Be clear about the timeline for the break and strictly enforce it.

If difficult parties pose a potential threat to the safety of tribunal members or other participants, you can deal with safety issues in the following ways:

- Sit with a hearing panel rather than a single adjudicator if your tribunal is able to do so.
- Take a cell phone into the hearing room.
- Use a hearing room that has two exits.
- Ensure that staff can see into the hearing room.
- Move the hearing into a more secure environment.
- Arrange for security in the hearing room.
- Consider the installation of panic buttons on tribunal premises or in permanent hearing rooms.
- Be prepared to provide conduct warnings to parties where appropriate.
- Consider training in de-escalating volatile parties and in general conflict management.

If a safety issue arises in a hearing that you are unable to manage, then as a last resort you can end the hearing process and either leave the premises or remove the disruptive parties from the hearing room (with the assistance of security or the police if need be). You may also consider continuing the hearing in an alternate form (such as written submissions).

Practice Suggestion

During the hearing process, you have the authority to remove any person whose behaviour interferes with the conduct of a fair hearing.

CLOSING THE HEARING

At the end of the hearing, your panel chairperson should thank all parties for their contributions to the hearing process.

You can provide your decision orally at the conclusion of the hearing or you can reserve your decision. It is generally a good idea to reserve your decision to give you some time to review and reflect on the evidence given, to consider the relevant law, and if you are sitting as a panel, to deliberate. It is also a good idea to prepare written reasons for the decision, which requires some time.

If you reserve your decision, ensure that you let the parties know when they can expect it and how they will receive it (for example by mail or courier). If it takes longer than you expect to release your decision, follow up with the parties to let them know the reason for the delay and the anticipated completion date.

Summary

Conducting a fair hearing starts with ensuring the parties are informed about the hearing process, understand the roles of the various participants, and are ready for the hearing.

There are several different types of hearing models that can be used by administrative tribunals. There is the traditional adversarial model most often associated with the courts in which parties in opposition lead the questioning. There is also the inquiry-based model in which the tribunal leads the questioning. Finally there is also what is known as a hybrid model which is a blend of the other two processes. You need to adopt a hearing model for your tribunal that is

an appropriate fit for the types of decisions you make, the cases you deal with, and the parties involved. Regardless of the model you use, the goal for your tribunal is to conduct a fair hearing for the parties who appear before you.

There are many pre-hearing processes for your tribunal and the parties. Your tribunal is responsible to provide notice of the hearing to all known parties whose rights or interests may be substantially impacted by the tribunal's decision. The parties are responsible to share information between themselves and with your tribunal and to become familiar with the tribunal's procedures, which may require your tribunal to provide orientation information. Your tribunal may also consider whether the case is appropriate for a pre-hearing conference or mediation.

There are numerous issues the parties may raise as preliminary applications. Once these applications have been dealt with, the hearing proceeds, following an order of proceedings appropriate to the type of hearing model adopted by your tribunal.

In an adversarial model, the parties will present evidence and argument to the hearing panel, with the panel responsible for determining if the evidence is admissible, relevant, reliable, and appropriate. In an inquiry-based model, the panel will direct the gathering of evidence and make determinations about whether the evidence is relevant and what it means. In many hybrid models, the hearing process will resemble the adversarial model, but with less emphasis on cross-examination and a wider scope for panel members to ask any questions they have throughout the hearing to gather the evidence they need to make a decision in the case.

Decisions about evidence, which often begin during the hearing, are part of the decision-making process set out in Chapter Four. Chapter Four also outlines the writing of reasons for decisions which completes your tribunal's decision-making task.

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Chapter Four

Making and Writing Good Decisions



Making and writing good **decisions** are the final and often the most challenging and important part of your tribunal's responsibilities. The process involves reviewing and weighing **evidence**; assessing credibility; determining the facts, **policy** and the law; and applying policy and law to the facts to arrive at your conclusion.

Decision-Making

THE DECISION-MAKERS

The **decision-makers** in the case are the tribunal members who conducted the **hearing**. Other tribunal members or third parties should generally not be involved in the decision-making process unless they have statutory authority to do so. Two exceptions to this general rule are full board meetings with other tribunal members to discuss legal and policy issues raised by the case (see "Full Tribunal Meetings" in Chapter One) and substitutions of tribunal members into the decision-making process by consent of the **parties** (see "Substitutions" in Chapter Three).

GETTING STARTED

The key to making a good decision is to start assessing the evidence and arguments made in the case right after the hearing. By starting right away, the issues and evidence are fresh in your mind. It is generally a good idea to spend time talking about the issues immediately following the hearing to try and reach a consensus on them. It can be difficult to get a **hearing panel** back together again to deliberate. It can also be difficult to deliberate with other panel members by telephone, particularly if the discussions will be lengthy or will involve references to numerous documents.

DECISION-MAKING GUIDELINES

When you are making decisions, keep the following general guidelines in mind:

- You must have a reasoned basis for your decision.
- You must consider all of the **relevant evidence** and information. Ultimately, you do not have to accept it all, but you must at least consider it all.
- You cannot delegate your decision-making responsibility to others unless you have statutory authority to delegate. The decision and the reasons for the decision are ultimately yours to determine.

Tribunal staff members can help you in a variety of ways including:

- Noting clerical, spelling or grammatical errors in written reasons.
- Checking references to **exhibits** and legal citations for correctness.
- Checking for internal logic and clarity in decisions.
- Noting gaps and contradictions either within the decision or in comparing the decision with others made by the tribunal.

Your legal **counsel** can also assist you by providing advice as to the relevant law and the existence of other decisions dealing with similar issues.

Practice Suggestion

While your staff and legal counsel can provide assistance in the drafting and editing of your decisions, they cannot make the decisions for you or provide the reasons for the decisions – that is your job.

DECISION-MAKING STEPS

There are four basic steps to the decision-making process:

1. Clarifying the issues you have to decide.
2. Making findings of fact based on the evidence.
3. Determining the relevant policy and law.

4. Applying the relevant policy and law to the facts to reach your conclusion.

This is generally a straightforward process when the facts and policies are clear and the law is settled. It can be a difficult process if the facts, policies or law are unclear.

You start the process by clarifying the issues. Ask yourself what it is that must be decided.

STEP 1: ISSUE CLARIFICATION

Clarification of the issues starts before the hearing. If you do not pay attention to the issues until after the hearing, you can end up in a difficult situation if it turns out the issues are unclear or they are not really the right issues. The reason for the difficulty is that after the hearing process has concluded, it is generally improper for you to significantly alter the issues identified by the parties or to take into consideration new issues. To do so would contravene the fair hearing rule – the right to notice of the case and an opportunity to reply. The parties have not had an opportunity to address the altered or new issues.

Issues are often murky at the outset of a hearing. Self-represented parties in particular may have misunderstood the issues or be focused on irrelevant matters. The best way to deal with parties who are on the wrong track is to get them back on track during the hearing, preferably before evidence is heard so that the issues are properly stated, everyone knows what they are, and the parties have the opportunity to fully address them.

If you do not clarify the issues and you discover a problem with the issues after the hearing, you will have to decide whether you can safely make a minor adjustment to them. Major adjustments to issues at that point can create a potential problem as significant changes can alter the focus of the case and contravene the fair hearing rule.

A minor adjustment to an issue may consist of narrowing the question you are considering. For example, if the question is whether a party is a “farmer” within the meaning of an act which defines a farmer as a producer and a Canadian citizen, a minor adjustment to this issue may be

narrowing the question to whether the party is a producer. Re-defining the issue to this limited extent would not likely present a problem as you will have already heard evidence and argument about it when considering the broader definition of “farmer” at the hearing.

A major adjustment to the issue would be changing the question to whether a party is a resident of Saskatchewan. This question is a substantial departure from the previous question. You will likely have little or no evidence from the parties on the issue because they will have provided information about Canadian citizenship rather than Saskatchewan residency. The parties will also not have had an opportunity to present argument on that question.

If you can adjust the issues after the hearing by altering them minimally, then you can proceed to do that at the decision-making stage.

If the issues need more than a minor adjustment, then you generally have two choices, neither of which are good options:

- Option One: Decide the case as presented using the murky issue, which generally results in a murky decision.
- Option Two: Recall the parties, restate the issue and invite further evidence and argument on the new or altered issue, which is more time-consuming and costly for all concerned.

The key to dealing with this problem is to prevent it from occurring. Clarify the issues right up front – start working on them before the hearing. Make sure any problems with the issues are dealt with prior to evidence being presented, if possible, and in any event, prior to the conclusion of the hearing.

While getting a sense of the issues in advance of a hearing is important, keep in mind **procedural fairness** requires that you be open to additional issues raised by the parties during the hearing process that you may not have anticipated in advance.

STEP 2: FACT FINDING

Fact finding is the primary focus for most tribunals. Fact finding is straightforward if the parties agree on the facts. If the parties disagree, you have to determine what the facts are based on the evidence presented by the parties.

The exception to this rule relates to facts that are so well known they are undisputed and do not require evidence to establish them (for example, that Regina is the capital city of Saskatchewan). You can accept these types of facts without evidence – it is called taking **administrative notice** of them (also referred to as **judicial notice**). You will have to determine most facts, however, by assessing the evidence given by the parties.

The steps in the fact-finding process are as follows:

- Identify the relevant evidence – the evidence that relates to the issues.
- Assess whether there is a conflict in that evidence.
- Resolve the conflict by identifying which evidence you prefer and why.
- Make your findings of fact based on the evidence you have found to be persuasive.

The facts are the findings you make based on an assessment of the evidence, taking into account:

- Relevance – Does the evidence have a logical connection to the issue? Does the evidence assist in proving or disproving the issue?
- Reliability – Is the evidence trustworthy?
- Weight – How much consideration should be given to a particular piece of evidence?

For example, if the issue in dispute is whether a contract exists between two parties and a **witness** produces a copy of the contract signed by the parties, that evidence would be relevant to the issue. You would likely give this evidence a great deal of weight as it is persuasive in demonstrating that a contract exists. However, if the document produced is a photocopy of an unsigned contract marked “draft for discussion,” this evidence would be given less weight

because it is less helpful in pointing to the existence of a contract.

Evidence that is relevant and might otherwise be given significant weight may be discounted or ignored if it is unreliable. For example, if a witness produces a signed copy of a contract in order to prove that the contract exists, the trustworthiness of that evidence might be questioned if an expert from the RCMP Crime Lab testifies that the signature appears to be a forgery.

It is your responsibility as the decision-maker to consider the relevance and reliability of the evidence presented and to determine the weight that should be given to it.

It can be difficult to determine what the facts are when there are conflicting versions of events – your job is to resolve the conflict and that can be a challenge.

Practice Suggestion

You cannot assume that if there is a conflict in the evidence, some people must be lying. Keep in mind that witnesses have different powers of observation and levels of recall and that can account for different versions of events. People have different perceptions about events and for each of them, their perception is the truth.

Recall

People can generally recall 75-80% of the detail of items learned within a short period of time of the learning event. However, 80% of that 75-80% recall is lost within 24 hours of the event.⁶⁶ Most of the detail goes into the brain’s “trash compactor” – it never makes it to long-term memory.

As a result, by the time a hearing takes place, witnesses have lost a lot of information. Each of the witnesses may also initially have recalled a different part of an event or have different memory and recall abilities. These factors can

account for conflicting **testimony**. Your job is to resolve these conflicts in the evidence and that step generally involves assessing credibility.

Practice Suggestion

The key to assessing credibility is to know what factors you can consider and which of those factors are the most reliable indicators of the truth.

The factors that you can consider in assessing credibility include the following:

- **Internal Consistency:** Are there any gaps or inconsistencies in the evidence given by the witness? If there are gaps and inconsistencies, do they relate to the main issues? Are there many of them? Can they be explained? Did the witness give any prior inconsistent statements or provide different answers in **cross-examination** than in **direct questioning**?
- **External Consistency:** Does the evidence of the witness fit with other evidence in the case including any documents filed and testimony given by other witnesses? If it does not fit, is there a good explanation for any differences? Do the differences relate to important or trivial details?
- **Opportunities for Knowledge:** Did the witness have direct involvement in the event? Could the witness see or hear the event? How long was the witness watching or listening? Was the witness focused on the event or distracted?
- **Powers of Observation, Recall and Articulation:** Does the witness remember the event well? Does the witness have a good memory? Did the witness make notes within a short period of time following the event? Has the witness reviewed those notes? Is the witness an observant person? Can the witness clearly describe what he or she observed? Was it a memorable event that someone would likely remember accurately? Does the witness remember

the event spontaneously or appear to be recalling the event in keeping with suggestions given by others? Keep in mind that it is common for witnesses to express some doubt about their memory of an event.

- **Interest in the Outcome:** Does the witness have a financial or other interest in the outcome of the case? Does the witness have a close business or personal relationship with one of the parties that may influence answers given?
- **Degree of Detail:** Is the amount of detail offered by the witness appropriate? Is the witness able to provide background details about the event which tend to indicate recollection rather than construction? Keep in mind that the level of detail recalled by witnesses varies with age and decreases over time. Unusual or significant details are also easier to recall than ordinary or minor details.
- **Probability:** Does the evidence given by the witness make sense? Does it seem unreasonable or exaggerated? Is the version of events given by the witness possible under the circumstances? Are there elements present that indicate the evidence may have been constructed rather than recalled such as the use of words that are inappropriate to the witness's general communication level?

Practice Suggestion

The most reliable factors in assessing credibility are internal and external consistency. Base your assessment of credibility primarily on these two factors where possible.

Considering Credibility as a Whole

When you assess credibility using the above factors, keep in mind that they are not intended as a checklist. It is important that you assess these kinds of factors as a whole rather than

considering one factor in isolation from the others. You need to carefully weigh the mix of factors that apply in the case before you when making your decision.

Demeanor Caution

Be careful about placing too much emphasis on a witness's body language, tone of voice, choice of words, physical stature and appearance and other subjective aspects of demeanor when assessing credibility. You should be cautious about relying on a party's demeanor in assessing credibility because:

- It is difficult to determine what a party's demeanor may mean as it can be influenced by many factors including a party's cultural background.
- Witnesses can appear to be evasive when they are really just nervous.
- Witnesses who are good actors can appear to be telling the truth when they are not.
- Your decision should not depend on the best actor or least nervous person among the witnesses heard.

Assessing Expert Evidence

During the hearing, parties may have used an expert in a particular subject area to provide a report to support their case or give evidence at the hearing about the report. Your tribunal may also have hired an expert to provide an opinion relating to the case.

In assessing this **expert evidence**, the factors you can consider include:

- The expert's qualifications (including formal education, training, work experience or research) – Is the expert qualified to provide the opinion?
- The expert's credibility – Does the expert have a financial interest in the outcome? Does the expert appear to be neutral or has the expert become an advocate for a particular party? Is the expert frank about limitations and margins of error relating to the opinion given?
- The relevance of the expert's opinion – Does it relate to the issues?

- The facts or assumptions the expert's opinion is based on – Are they accurate? What is the extent of the expert's research or inquiry into the issue? Did the expert use accepted scientific techniques or investigation methods?
- The expert's findings – Are they reasonable? Are they supported by the facts?

You can reject the opinion of an expert if the opinion is not relevant to the issues, is based on inaccurate facts or incorrect assumptions, or is not needed to decide the case.

Evidence Guidelines

Keep the following general guidelines in mind when considering evidence given by witnesses:

- Be careful with the weight you give to hearsay evidence – as a general rule, the further the information is from its source, the less reliable it is likely to be.
- You can choose to accept all, part or none of a witness's evidence (this guideline also applies to expert evidence and reports).
- Focus less on the number of witnesses testifying and more on the weight of individual testimony given – you may prefer the evidence of one witness over several others if that witness's evidence appears more accurate and credible.
- When it is difficult to determine which version of events is correct in an adversarial hearing model, consider who has the onus of proof and whether that onus has been met to the appropriate standard.

Onus and Standard of Proof

The **onus of proof**, also known as the burden of proof, refers to the obligation on one of the parties to establish a particular fact or present a particular kind of evidence. Typically in the **adversarial hearing model**, where the **statute** is silent as to which party has the onus of proof, it falls on the party making the **application** – the party seeking a change. That party generally has the overall burden of persuading the

tribunal of the correctness or merit of the party's position. In the **inquiry-based hearing model**, the onus of proof is typically on the tribunal rather than the parties as the parties are not leading the presentation of evidence.

The **standard of proof** refers to the level of certainty to which a fact must be demonstrated. The civil standard is generally "the balance of probabilities" which means a fact is proven if it is more likely to be true than not. This standard is sometimes referred to as the 51% rule. Whoever has the onus of proof will not succeed if the evidence presented fails to establish the relevant facts on a balance of probabilities.

In cases where the evidence is evenly balanced between the parties (50-50), the onus of proof acts as a tie-breaker against the party with the onus as that party has not met the standard of proof (the standard being 51% or more likely than not).

Sometimes uncertainty about whether parties have proven their case can influence your decision about the **remedy** or penalty you provide. If it is unclear whether the parties have successfully made their case, do not try to counter-balance this uncertainty by providing a greater or lesser remedy or penalty than you would otherwise give.

For example, if you are uncertain about whether parties have made an adequate case for financial relief, and you end up finding they have minimally met the requirement, it would be an error for you to award a reduced amount of relief because you remain unsure about whether they have fully established their entitlement to it.

STEP 3: DETERMINING THE RELEVANT POLICY AND LAW

Once you have made your findings of fact, you can move on to assessing the relevant policy and law. The parties may have conflicting views about the policies or law you should consider, the interpretation you should give to them, and how they apply to the case.

In many cases, the only relevant law that you will need to consider is your **governing statute**. Become very familiar with your statute and do not skip parts of it – you may have difficulty

understanding how the parts fit together if you do not read it all.

Statutory Interpretation

Determining the relevant law may involve interpreting your statute. A detailed review of interpretation rules is beyond the scope of this manual and likely of little practical assistance to the majority of tribunals. For difficult interpretation tasks, seek legal advice.⁶⁷ For straightforward interpretation tasks, keep the following tips in mind:

- Consider the spirit or purpose of the statute when interpreting the meaning of a particular section. In other words, what is it that the statute is trying to accomplish? What goals is it trying to achieve? Sometimes the preamble or beginning of a statute will provide a statement of its purpose.
- If something is clearly stated, apply it as stated. Ordinary meanings of terms apply unless they are defined in a specific way in the statute, its accompanying **regulations** or in the Interpretation Act.⁶⁸
- If something is not clearly stated and is capable of more than one meaning, adopt the meaning that best fits with common sense and the policy behind the statute.
- Read the section you are interpreting with other nearby sections or parts of the statute and with the statute as a whole. This will help you determine how the section fits in with the rest of the statute and will often help you understand what the section is designed to do.

Common Law

Determining the relevant law may involve considering cases already decided by the courts. When you are considering court cases, look for cases that have the most similar facts and similar issues to be the most persuasive. Also, stick to the higher courts for guidance. As set out in Chapter One, the Supreme Court of Canada is the highest authority. If the Supreme Court has resolved a conflict in the law or decided on a particular interpretation of the law,

its view will govern. Cases from the Court of Appeal or the Court of Queen's Bench may also be helpful as these levels of Court often review decisions made by administrative tribunals. Keep in mind that your tribunal is required to abide by the decisions of these superior courts.

Previous Tribunal Decisions

While you are not required to follow previous legal or policy decisions made by your tribunal, you can and should consider them. It is important for your tribunal's decisions to be reasonably predictable and consistent over time, although temporary inconsistencies may occur while your tribunal's approach in various areas is evolving.

Practice Suggestion

For the public to have confidence in your decision-making process, like cases need to be decided alike.

Ideally, all of your decisions should line up next to one another with no unexplained variations. It should be clear to someone reading decisions with different results why the results were different. When you make a decision, carefully consider the previous approaches taken by your tribunal on similar issues and ensure that you do not take a different path without good justification and clear explanation.

Decisions of Other Tribunals

You may also consider the decisions of other administrative tribunals for guidance, particularly if you have a difficult legal issue to decide. It can help to see what tribunals similar to your own have done with similar issues. While you cannot let other tribunals make your decision for you, it can be helpful to see what their analysis was in similar cases.

Be careful, however, with the extent to which you rely on decisions from other agencies or other jurisdictions. Keep in mind that the law

varies from province to province and between tribunals. Other tribunals may be governed by a different set of legal rules than you are, and that can account for differences in the result.

STEP 4: APPLYING POLICY AND LAW

Once you have determined the relevant policies and law, the final step is applying them. The parties may have different positions on how the policy or law applies to the facts. If so, you need to resolve this conflict by making your findings on what the correct approach should be in the case. You can then use that approach to apply the policy or law to the facts to reach your conclusion.

This final step is often straightforward as the conclusion is generally clear. If the conclusion is unclear, it may be a sign you missed something in the first three steps.

DECISION-MAKING PITFALLS

There are six common decision-making pitfalls.⁶⁹

Avoidance

Do not avoid having to decide the issues. The tougher the issue, the more likely you will be tempted to find a reason to avoid having to make a decision. Deal directly with the issues before you.

If you find yourself attempting to avoid the issue, it is generally an indication you:

- are uncertain about what the outcome should be
- lack sufficient information to make a decision
- want to avoid being appealed
- want to avoid upsetting people

Focus on the decision-making steps rather than the decision outcome. Make sure you are prepared for hearings and are attentive during the hearing process so that by the end of the hearing, you have the information you need to make a decision. Ensure your decision is

well-reasoned and clear as that is your best opportunity to avoid being appealed and, if appealed, to avoid being overturned. Finally, as a decision-maker, you need to get used to the fact that no matter what you decide, some people will be unhappy with your decision. Keep in mind that the parties have come to you seeking a resolution and your job is to provide that resolution for them.

The Compromise

Do not add things up and divide by two to reach a decision, or decide that because one party has won on one point, the other party should win the next point. While you may be tempted to adopt a compromise to make the decision more acceptable to the parties, this approach contravenes an important decision-making guideline – having a reasoned basis for your decision.

Lack of Independence

You need to make your decision. Do not let third parties pressure you into making a decision in a certain way. Third parties include your legal counsel, government officials, politicians, members of the media, and any tribunal member who was not part of the hearing panel.

Not Answering the “Why” Question

Provide reasons for your decisions – preferably written reasons. Parties need to know that they were heard and understood in order to accept your decision. You can accomplish this goal with reasons that explain why you reached the result you arrived at.

The “Secret Source” and Subsequent Information

Getting information through a “secret source” means you did not use proper channels to obtain it. It is not a good idea to take anything into account in your decision that did not come through the hearing process. Also, you should not be considering information that the parties are unaware you have obtained. Considering

information from a “secret source” contravenes fairness principles, specifically the right to know the case and reply. The parties have not been made aware of this information or been provided with an opportunity to challenge it.

This pitfall generally relates to information that is filed by one of the parties after the hearing or comes to your attention from a third party at that point. You should not be considering this subsequent information unless you bring it to the parties’ attention and give them an opportunity to respond to it.

Practice Suggestion

You are not entitled to obtain evidence between the end of the hearing and your decision without notifying the parties about the information and giving them an opportunity to comment on it.⁷⁰

Conclusion-Driven Thinking

This pitfall is the most difficult to avoid. Keep in mind that your job is to make findings of fact and findings of relevant policy and law and to let the result flow from these findings. Do not try to direct the result. Go to where the case takes you, rather than trying to take the case to whatever result you think would be fair.

Decision-makers often encounter this pitfall because of their sense of what justice should be in a case. Keep in mind that all decision-makers are subject to the **rule of law** and must apply the law as they find it. You cannot pick and choose when to apply the law and it is not your role to re-write, bend or overrule the law.

If you have a difficult case, one where you think the law is getting in the way of justice, and you bend the rules one way to get the “right” result and then you bend the rules in the other direction to get the “right” result in the next case, before long you no longer have a consistent set of rules. The difficulty is that your tribunal needs a consistent set of rules for the public to perceive your process as fair. If you do not

have consistency, decisions become arbitrary – predictability is lost and your credibility is impacted. You need to have one set of rules for everyone in order to maintain public confidence in your tribunal’s decision-making process. You also need to make your decisions based on facts, policy and law rather than on your feelings and beliefs about what justice should be in the case.

This does not mean that you should ignore the goals of the program administered by your tribunal when you are making a decision. Consideration of these goals should take place in Step 3 of the decision-making process when you:

- interpret the purpose of your statute
- determine the relevant policy and law that should guide your decision
- determine how to apply the relevant policy and law to the case before you

Practice Suggestion

If the result you reach in a case seems unfair, you can go back over the decision-making process to see if you committed an error, but do not try to direct the result.

CONSENSUS AND DISSENTS

Some tribunals have statutes that set out specific methods of determining the result when the decision-making process involves more than one decision-maker. For example, your statute may indicate that a majority decision is the panel decision or that in the event of a decision deadlock, the panel is to find in favour of the applicant. In the absence of guidance from your statute in this area, generally the majority view of the panel determines the outcome.

As a panel member, you need to consider opposing positions and be open to persuasion when your panel colleagues provide well-reasoned alternatives to your view of the case

(see “Being a Team Member” in Chapter Two). The goal is to try to reach a consensus.

If you disagree with the decision made by the majority of the panel, you need to assess how much you disagree.

Minor or Major Disagreement

If you question some specifics of the decision, but agree with the result, then consider accepting the majority opinion. You need to develop a bit of a tolerance zone so that you will not be constantly dissenting.

If you feel strongly about your disagreement (either with the reasons or the result), you can choose to **dissent**.

Frequent Dissents

In practice, you should not be dissenting frequently. Pick and choose your dissents carefully. If you disagree too frequently, you will become known as “the person who always dissents” and they will lose their impact.

If you feel the need to dissent on a frequent basis, you need to ask yourself the reason why. Do you and your colleagues have a fundamental disagreement about tribunal policy or legal issues? If the problem is a legal issue, seek legal advice to resolve it. If the problem is policy – something you strongly disagree with but a majority of the tribunal has agreed on – you may need to consider accepting the majority view.

Different perspectives and collegial debate provide helpful checks and balances in the development of a tribunal’s policy and legal approach and should be encouraged in the short term. However, longstanding disagreements between tribunal members on policy or law can create instability and conflict and ultimately inconsistent outcomes for members of the public. Keep in mind that your process will not feel fair to the parties appearing before you if like cases are not being decided alike and the outcome in their case depends on the particular tribunal members sitting on the panel.

Decision-Writing

REASONS AND DECISIONS

There is a distinction between a decision and reasons for a decision. The decision is the result you have reached and the reasons explain why you arrived at that result. It is important to provide the parties with both your decision and the reasons for your decision at the conclusion of your decision-making process.

Reasons for Reasons

There are legal requirements and practical considerations for providing reasons for a decision.

Legal Requirements

Your governing statute may specify a requirement to provide reasons for decisions and whether those reasons must be in written form. There are also certain circumstances in which the duty of fairness requires tribunals to provide written reasons for decisions. These circumstances include:

- where the decision has important significance for the individual
- when there is a statutory right of appeal

Practical Considerations

There are also a number of practical considerations for providing reasons for a decision. Reasons guard against arbitrary decisions – they demonstrate that the decision-maker has considered the relevant evidence and arguments and ensure that the “why” question is answered for the parties. Reasons also assist the parties in accepting the decision. Parties are more likely to feel that they were given a fair hearing and were understood if reasons are given. Reasons also tend to encourage a higher quality of decision-making as they ensure that the result arrived at has been fully thought through.

Practice Suggestion

Given the many important benefits of reasons, it is a good idea to provide written reasons for your decision regardless of whether you have a legal requirement to do so.

Reasons are particularly important in cases where the decision is not consistent with previous decisions made by the tribunal in similar cases and where findings of credibility are being made.

YOUR MAIN AUDIENCE

Your main audience for the decision is the parties involved in the hearing. Your primary focus in writing your decision should be on the parties and the best way to communicate the result to them.

Practice Suggestion

The most important party you are writing for is the unsuccessful party – this party in particular needs to understand why he or she did not succeed in order to accept the decision.

There is a larger audience for your decisions as well, the most important of which are people who may participate in your process at a future point. If published, your decisions can provide information about your process (such as the practices you follow, the tests you apply). Potential participants can use this information to make informed assessments about their chances of success early in the process before everyone has begun to prepare for a hearing. This can result in your tribunal receiving fewer and more fully considered applications.

Practice Suggestion

To function as a guide and an educational resource, your decisions must include enough information to be understood by people unfamiliar with the case and not in attendance at the hearing.

THE DECISION-WRITERS

Determining who writes decisions is often a policy choice made by the tribunal. The choice is usually made based on writing ability. A single tribunal member may volunteer or be assigned to write the decision or this task can be divided up between members of a hearing panel. It is generally more efficient for one person to draft straightforward decisions dealing with simple issues. If a decision is likely to be lengthy and deal with numerous complex matters, the drafting process can be split between panel members. If more than one person is writing the decision, it is important to ensure that the final version reads as a cohesive whole.

DECISION-WRITING GUIDELINES

The following guidelines can assist you with the decision-writing process:

- Schedule your writing time – this helps to avoid procrastination.
- Circulate your drafts to other panel members and schedule meetings to discuss drafts.
- Try to follow any decision-writing format guidelines set by the tribunal unless there are good reasons for another format.
- Get the decision out quickly, ensuring you are within any statutory or policy guidelines (see “Timeliness” in Chapter Two) – keep in mind that there are few decisions that cannot be made within a three to five month timeframe from the hearing date.

- If you cannot meet a decision timeframe that you previously gave to the parties, advise them at the earliest opportunity and provide them with an alternate timeframe.

DRAFTING TIPS

Consider your Reader

You need to write with the reader in mind. You should be writing for the average person appearing in front of you. Assume that your reader is generally well-informed but without specialized training in the area being written about. Ask yourself:

- What does the reader need to know?
- What words and terms will the reader understand?
- What language will be unfamiliar?
- What layout will be easiest for the reader to follow?

Keep Decisions Short and Simple

Many parties appearing in front of you will not be represented by legal counsel. They may not fully understand what your role is or what the law is. The longer and more complex your decision, the more likely it will be that the parties will not understand it.

There are some general guidelines that can help you with writing a concise decision. Start by using short paragraphs, each paragraph consisting of 3 to 4 sentences on average. Try to keep paragraphs under 10 lines. Use short sentences as well – try to keep sentences under 20 words. Use simple language and sentence structure. Try not to crowd too many ideas into a sentence – avoid too many complex sentences that have more than one idea. There is nothing wrong with a complex sentence but if you simplify it by breaking it into two sentences, it is easier to understand.

Short and simple are relative terms – the more specialized the area, the harder it is to be simple. The general rule is to be as simple as you can given the area you are dealing

with. As far as short goes, short means that the facts, the issues, the law, your analysis and your conclusions have been set out as concisely as possible. Whether that takes two or twenty pages depends on such factors as the complexity of the law or the case and the number of issues involved.

Practice Suggestion

While short sentences and paragraphs are best, there should be some variation in length to improve the flow or readability of the decision – otherwise the decision will sound awkward.

When you are ready to begin writing, keep in mind that the key to writing concise reasons is to start with a rough draft or outline and then to do at least one re-write to pare it down. Your rough draft is the ideas draft – put all of your thoughts about the case into it without worrying too much about organization.

When you have your thoughts down on paper, you can then go through your draft and start to organize it, removing irrelevant content until you are down to only those things that are essential for the decision.

Your rough draft should be the longest version of the document. If your final version is the longest version, you may need to pare it down further.

If you are dealing with a straightforward, relatively simple case and your decision is going to be quite short, a rough draft and a final version may be all that you need.

Keep in mind that it is possible for reasons to be too short. For example, merely stating, “I have carefully considered all of the matters which the statute requires me to consider and have determined there is no basis for granting the applicant’s request in these circumstances” is inadequate as it does not answer the “why” question. You need to fully explain the decision.

Practice Suggestion

As a decision-writer, you need to find the balance between being concise and providing too little information to reasonably explain the decision.

Decide Only What is Necessary

Avoid deciding issues that you do not have to decide. It can be tempting to make a few comments in the decision about other issues to send a message to the parties or to provide guidance. It is generally not a good idea to do this. These kinds of extras add unnecessary length to a decision and make the decision less clear. Also, if these extras are not thoroughly considered, they can end up causing difficulties in future cases (see “Trying to Do it All in One Case” in Appendix I).

Avoid Criticism, Sarcasm and Humour

Reasons for a decision should have an air of professionalism about them – including criticism, sarcasm or humorous remarks detracts from this goal.

As a general rule, avoid any critical remarks that are irrelevant to the issues before you. Where it is necessary to make these kinds of remarks, do so in restrained and professional terms as criticism in written decisions can have serious consequences for the reputations of individuals. Decisions are rarely the appropriate place for criticism.

Sarcastic comments have no place in a decision. These comments will reflect negatively on you as the decision-maker and there is no purpose served in humiliating the parties. It will just tend to make them believe that you did not take them seriously and that the process was unfair.

Humour may help make the parties comfortable in the hearing room but avoid its use in the

reasons. It can be disrespectful if not handled carefully. Also, your process was likely a stressful matter for the parties and they are not likely to find it, or your decision, funny. They are also unlikely to appreciate any humour being made at what may appear to be their expense.

Avoid Sensitive Facts

Do not include any sensitive facts in the decision that are irrelevant to the case and that can be embarrassing for the parties (for example age, weight, marital status). Only include them if it is necessary given the issues to be decided.

Use Everyday Words

Use plain language in your decisions (see “Accessibility” in Chapter Two). Never use a complex word when you can use a simple word. Avoid jargon and slang – their meaning can be unclear and may be difficult for the average person to understand. Identify what abbreviations and acronyms mean and use them as little as possible. Your reader may not know what they refer to and they can be distracting if they are used frequently in a decision.

Use Words Consistently

Try not to use two or more names when referencing the same item – this can cause confusion. For example, if you start off using “fee” in your reasons, do not switch to referring to “fee” as a “charge” later in the decision.

This practice applies to the parties as well. The parties should be given a consistent designation throughout the reasons. If you have been referring to one party as Mr. Jones, it can be confusing to suddenly start referring to him as the applicant or claimant for the remainder of the decision.

Also, try to keep your wording consistent with the language found in your statute and regulations – if your statute refers to “fee” then use the word “fee” instead of “charge.”

Use Positive and Assertive Language

Where you can, try to use positive language in the decision such as, “I prefer the evidence of witness A,” rather than “I disbelieve the evidence of witness B.” Also, use assertive language such as “I find” or “I accept” rather than weak language such as “it seems to me,” “it appears,” “I believe,” or “I feel.”

Avoid Repetition and Unnecessary Formality

Legal writing is full of repetitious phrases (due and owing, null and void) and unnecessary formality (wherefore, herein, and thereon). Do not use these kinds of words and phrases. They do not add meaning to the decision – they just tend to make the decision less clear.

Be Mindful of How the Decision Looks

The appearance of the decision is often overlooked. Keep in mind that the more professionally finished it looks, the more obvious it will be to the parties that the document is important, they need to pay attention to it, and you had sufficient respect for them and the process to spend some time in preparing it.

Make the Document Easy to Read

Use frequent paragraph breaks to divide up text on the page. Keep in mind that solid text can be very difficult to read. Consider using headings, particularly in longer decisions. Headings can make the decision easier to scan and can pull the different parts of the decision together for the reader.

Use wide margins and leave a fair amount of white space on the page – this makes the document easier to read. Choose a solid, readable typeface (such as Times New Roman) and ensure that it is big enough to be read easily (at a minimum, use a 12 point font).

Organize Your Text

You need to build a framework for your decision so that you can communicate the reasons for the result in an organized way. There is no single correct format for writing decisions. It depends on personal style and the type of proceedings your tribunal conducts. Although there is no particular model that you must follow, keep in mind that there are six fairly standard parts to a decision. These essential parts or elements of a decision are:

- the introduction – setting out the nature of the application
- a statement of the issues
- the relevant facts
- the arguments of the parties
- the analysis – including the relevant law
- the conclusion or result

These elements typically appear in this order although the relevant facts are sometimes set out before the issues.

THE ELEMENTS OF A DECISION

Introduction

The introduction section is the opportunity to capture the reader's attention and provide a brief overview of the case. Typically, this includes identifying who the parties are, what the dispute involves, what relief the parties are seeking, and the statutory authority the proceedings are based on. You may also want to include a brief statement of the procedural background – how the case ended up before the tribunal.

Preliminary Decisions and Process Matters

At the outset of the decision, note any **preliminary applications** you have previously decided in the case, such as decisions about any challenges to your **jurisdiction** made by the parties. Also, include any process matters that are important to reference. For example,

if a party did not appear at the hearing and you made a decision to proceed in the party's absence, it is a good idea to include all of the relevant process information involved (such as how and when the party received notice of the hearing, any relevant contact with the party and efforts made to reach the party on the date of the hearing).

Issues

At the beginning of the reasons, set out the issues. The issues are the questions you need to answer in the case. Keep in mind that something is only an issue if there is a dispute about it. Put the issues into your own words.

Many tribunals state the issues in the form of direct or indirect questions. For example:

Direct: "Is the applicant a farmer within the meaning of the Act?"

Indirect: "The issue is whether the applicant is a farmer within the meaning of the Act."

The issues can be included in the introduction or in a separate section. Setting out the issues near the beginning of the decision provides some direction for the decision. As a general rule, include all issues raised by the parties. If you ultimately found it was unnecessary to decide some issues, be sure to explain why. Listing the issues raised will let the parties know they have been heard and you did not forget anything.

Facts

The facts are the findings you make based on the evidence given by the parties. All facts should be based on relevant evidence that supports the facts. If evidence given is not contradicted and there is no reason to question its reliability, then you can accept it as a fact.

The facts can be set out either before or after the issues. One benefit of having them follow the issues is that once the issues have been stated, it becomes clearer as to the reason certain facts are relevant.

Facts should be presented in an order that will make sense to the reader. Facts are usually

best recorded in chronological order but can be dealt with by subject matter or issue where you have multiple issues. It is generally not a good idea to set out facts in the order of the evidence given at the hearing. While this may be the order in which you recorded the evidence in your notes, it typically does not provide a logical progression for the reader to follow.

As a general rule, include only the relevant facts. There is an exception to this rule – the only time that irrelevant facts should be included is when they were heavily relied upon by one of the parties. In that case, refer to them briefly and indicate why they were not relevant. If you do not include them the parties may get the impression that you missed those facts and that the decision might have had a different result if those facts had been considered.

Make sure that you state the facts accurately. You may cause the parties to lose confidence in the decision if you incorrectly state even trivial facts.

You may also cause significant prejudice to the parties as a result of inaccurate facts if these inaccuracies cannot be corrected on appeal – appeals from many tribunals are permitted solely on questions of law. Your ability to correct the facts after a decision has been made is also very limited. As a result, it is important to be careful with the facts.

When you are dealing with a large amount of paper evidence, avoid putting lengthy quotations in your facts. Instead, paraphrase the main points unless the precise wording is critical. Also, if you are dealing with technical terms in the facts, it may be helpful to your reader if you define those terms.

Where there is no conflict in the evidence, set out the relevant facts as a series of events rather than stating that “Party A testified that” or “Party B stated that.” Where there is a conflict in the evidence, describe the contradictory points and then state which evidence you preferred and why.

Arguments of the Parties

Setting out the **submissions** or **arguments** of the parties is a good way to lead into your analysis section. The arguments of the parties may be about what the facts are, what the relevant law is, or how the law should apply to the facts.

Summarize the arguments of the parties in one or two paragraphs – you do not need to go into as much detail as the parties did in the hearing process. Put the parties’ arguments into your own words – this avoids embarrassment for parties who have used awkward wording. Include all of the arguments, even those without merit. Again, this lets the parties know that they were heard. You can dismiss meritless arguments in the analysis part of the decision with a short statement about why they were not persuasive.

Analysis

The analysis section of the decision shows your chain of reasoning. It typically includes a review of the relevant policy and law, and the application of the policy and law to the facts. Where these are well-established, set them out briefly and move on. If there is a conflict in the policy or law, set out the conflicting positions, and then explain why you have accepted one position over the other. You may have to interpret the law or determine which policy is relevant or what the applicable legal principles are. You generally do not need to consider the law in great depth – stick to a few cases and focus on applying the law to the facts rather than on reviewing the development of the law.

Practice Suggestion

The reader should not read the analysis part of your decision and then be surprised by the conclusion. Your conclusion should be apparent from the chain of reasoning in your analysis.

Conclusion

In short decisions, briefly summarize the result you have reached. In longer decisions, you may also want to include a brief summary of your analysis as well. Try to be concise with the summary – you want to give the reader some incentive to read the full decision.

COMMON PITFALLS TO AVOID

Conclusions Without Explanations

If you set out the arguments and the law and then state the result without connecting the arguments and the law, you have not been clear about the reason for the result. You cannot assume the reader will make all the necessary connections. You need to clearly explain the connections and how they relate to the result.

Quotations Without Explanations

If your analysis consists of numerous quotations from various sources followed by a statement of your conclusion, you have missed a step. You are making an assumption the reader will get your point from the quotations you have referenced. Quotations are not replacements for reasoning. You need to include information about how the quotations apply to the case before you and how they led you to the result you reached.

Too Many Quotations

Limit the number of quotations you include in the decision. Quotations break up the flow of the decision and can make it difficult to read and understand. As a general rule, do not quote anything that can just as easily and accurately be paraphrased. Two exceptions to this rule are when the specific wording of a quotation is important to your reasons or when you are dealing with statutory provisions that the parties may be unfamiliar with and do not have easy access to.

Evidence or Facts Arising in the Analysis

Always check the evidence and facts you reference in your reasons to make sure they are identified in the facts section first. Evidence and facts should generally not make their first appearance in your analysis section. The only time you may want to make a finding of fact in your analysis is when a conflict in the evidence is the central issue in the case and the conflict is resolved in the analysis section.

Overuse of Cases

You usually do not need to refer to numerous cases to support your decisions. You may not have to refer to other cases very often. If and when you do, keep in mind that most areas of the law have one or two leading cases that you can use as support. If you need to quote cases, then stick to the leading authorities.

Narratives of Process or Evidence

You may be tempted to summarize all processes or evidence in the decision – resist this temptation. Your decision is not intended to be a narrative of the evidence or a summary of the order of proceedings. The parties will likely have given you a lot of information and your job is to sift through it and focus on the relevant information. Not only will including a lot of irrelevant detail in the decision be time-consuming for you, it generally adds unnecessary length to the decision and reduces clarity for your reader.

EDITING

There are a number of tips to keep in mind when you are editing the final version of your decision.

The first tip is to use the standard tools of the editing trade. These tools are:

- A dictionary to check spelling and word meanings – do not assume that computerized spell checks are foolproof.

- A thesaurus to help you find simpler words than you might be tempted to use otherwise.
- A style manual to help you with grammar.

Edit your decision to check for respectful language, removing any terms that could be a potential issue for particular ethnic, racial, or religious groups. Also, try to use gender neutral language (such as Chairperson instead of Chairman).

Use Canadian spelling throughout the decision. A good rule to follow is to use the spelling of words used in your governing statute.

If you can, have a tribunal colleague read the decision and provide constructive criticism. Keep in mind that you bring a writer-based perspective to the decision. Once you have written it, you are too close to it to be objective about what it really says. There may be some obvious gaps or issues with the tone of the decision that you cannot see because you know what you meant to say and when you read the decision, your mind is making all of the right connections to reflect your intended meaning. To make sure the decision actually reflects what you intended to say, you need a reader-based perspective on it. To do this, have a colleague read the decision and give you feedback about it.

Ideally, it is a good idea to have all tribunal decisions go through one common person for review and editing as this will ensure that inconsistencies are flagged and fully explained, particularly if you have many people writing decisions.

Remove all unnecessary paragraphs, sentences, words and thoughts and set the decision aside for a short time for reflection. This gives you a fresh look at it and an opportunity for second thoughts. This can also assist you with the clarity of your reasons.

COMMON FORMAT ISSUES

Writing Dissents

If you have chosen to formally dissent in a case, you will need to write a dissent. If you are not a

decision-writer in the case, you should prepare your dissent in consultation with the decision-writer. It is a good idea to read the majority view first to determine exactly where you and the majority disagree and to avoid repeating the portions that you agree on. In the dissent, you can simply reference the areas where you disagree with the majority and explain your reasoning for your alternate view of the case.

Result at the Beginning or End

It does not matter if you state the result of the decision at the beginning or end of the decision – just be consistent from decision to decision. There are advantages and disadvantages to both formats. Some decision-writers like to put the result at the front of the decision so the parties will have a clear answer right away – they do not have to go digging through the decision. Many parties will flip to the last page immediately to find out the result without reading through the decision. Other decision-writers like to put the result at the end to encourage the parties to read through the decision and follow the tribunal's chain of reasoning in arriving at the result.

Use of Standard Paragraphs or Decision Templates

Many tribunals have a standard set of paragraphs and decision templates developed over time to improve consistency in format between decisions and to make the drafting process faster and easier. There is no rule against using these items in your decision-writing. However, make sure you are using these items as tools to assist your writing, not to replace it. You cannot simply put all of the standard paragraphs into a decision and be finished with it. Any paragraphs you include need to be relevant to the case. Also, you will have to do some drafting of additional paragraphs to address the specific circumstances of each case.

Use of Letter Format

Some tribunals send decisions out to parties in the form of a letter. Use of a letter format

is generally only advisable for simple, straightforward decisions. It is not a good idea to use this format for longer, more complex reasons as it often results in a loss of clarity in the decision. This format can make the decision much less clear as there are often many correspondence conventions and process extras added which can negatively impact the focus. A letter format is also very informal which can weaken the impact of the decision. It is generally more effective to write the decision separately and to put all the process extras in a covering letter to be sent with the decision.

POST-DECISION PROCESSES

Circulating the Final Decision

It is a good practice for all decision-makers involved in a case to read the final decision and any dissents to ensure the decision accurately reflects their view of the case. All of the decision-makers involved should also be identified in the decision.

Communicating the Result

The first people you should advise of the result are the parties themselves. Try to ensure that all of the parties receive the decision at roughly the same time. Issues can arise with enforcement and other processes if you provide one party with the decision right away and there is a delay in the other party receiving it. A significant delay in receipt of the decision can also result in the awkward situation of one party finding out the result from other parties or the media.

You may receive a request from one of the parties to be sent a copy of the decision by fax or other method of immediate transmission once the decision is down. Given the issues that can arise with this request, you may want to consider agreeing to it only if you can immediately provide the decision to the other parties as well.

Public Comments on Decisions

For reasons already noted, it is generally not a good idea to make public comments about your

decisions (see “The Media” in Chapter Two). Your decisions should speak for themselves.

The parties may attempt to contact you to talk about the decision, particularly if it was not in their favour. It is not a good idea to have a conversation with them about the decision – these types of conversations often become unhelpful debates about what the decision should have been. As a result, if the parties contact you directly, it is best to politely re-direct the call to your staff for information about appeal or review options.

Publishing Decisions

It is a good idea for you to publish your decisions unless your governing statute restricts this practice. Many tribunals publish their decisions on their websites or use the publishing services of free case databases such as the Canadian Legal Information Institute (CanLII).⁷¹ Publishing your decisions will provide you with a means of communicating with potential parties and the legal community about tribunal practices.

Tribunals generally have the ability to make decisions about publication as part of their **discretion** to determine their procedures.⁷² If you decide to publish, you should consider removing personal identifiers from the decisions before making them public (see “Privacy” in Chapter Two).

It is important to keep in mind that if you will be making your decisions available to the public, the decisions should not include personal or private information or any information that might expose the parties to identity theft.

Correcting Errors

When a tribunal has made a final decision, it generally cannot go back into the decision to change the substance of it without specific statutory authority to do so. For most decision-makers, you are finished with the decision when it is released. With few exceptions, you cannot then revisit your decision because you have changed your mind or because the parties have had a change in circumstances. However, it is perfectly acceptable for you to correct clerical

mistakes, technical errors and accidental slips or omissions within a reasonable period of time after the decision has been issued. Whether you decide to do so will depend on the type of error involved.

Minor errors can be left alone. For example, if you referred to Mr. Smith as being 38 years old, but he is actually 39 and nothing in the case turns on that fact – leave it alone.

Major errors should be corrected. For example, if you refer to Mr. Smith throughout the decision as Mr. Jones or date a decision with the wrong year, correct these errors as these kinds of mistakes can affect appeal timeframes and the enforcement process.

Summary

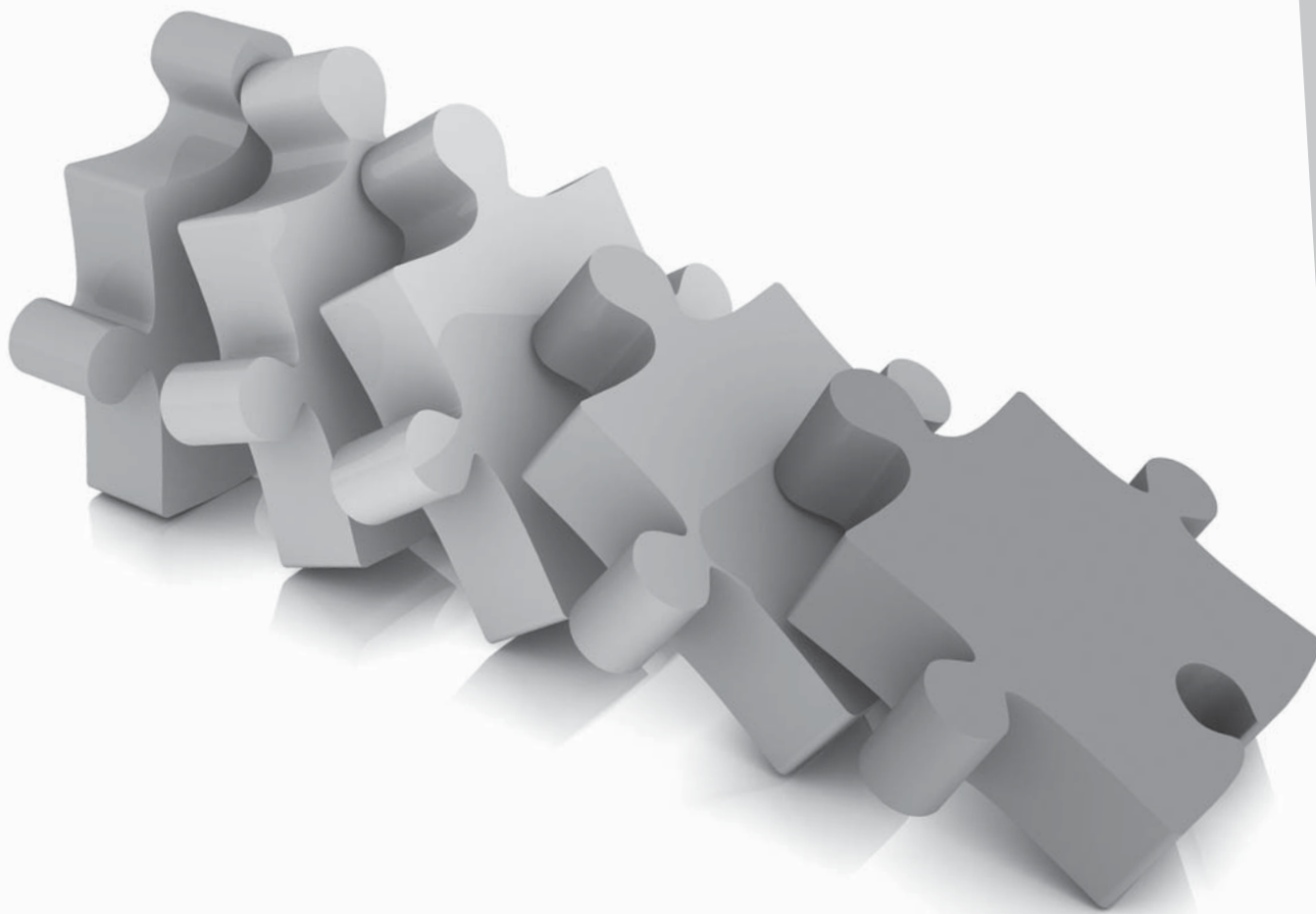
After the hearing, your most important role as a tribunal member begins – making a decision in the case and writing the reasons for the decision. Conducting a fair hearing forms the framework for the completion of this critical task.

Decision-making is a process that begins at the outset of the hearing with clarification of the issues. It continues through the hearing, with fact finding and assessing evidence, and is not completed until you have determined and applied the relevant law and policy to the facts of the case to reach your result. There are many common decision-making pitfalls to avoid to ensure the decision is fair and well-reasoned.

Part of making a good decision is providing sound written reasons for it. Your decisions should be written for the appropriate audience, be as concise as possible while providing sufficient information to adequately explain the result, and be well-organized and easy to read. Good decisions should follow a consistent format that will assist in ensuring your decisions meet these goals.

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Appendices



Appendix A

RESOURCES FOR TRIBUNALS

Plain Language

The Council of Canadian Administrative Tribunals (CCAT) has developed a number of plain language literacy materials including a publication entitled *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language* which outlines a process for developing a tribunal literacy program.⁷³ CCAT also offers an inexpensive plain language literacy course that is available online.⁷⁴ These resources are designed to assist tribunals in identifying plain language techniques and implementing plain language practices in their operations.

The CCAT literacy resources also explain how to conduct a literacy audit and provide some straightforward techniques for improving the readability of tribunal materials.⁷⁵

Training

Training for tribunal members is available from organizations such as the Foundation of Administrative Justice, the Canadian Institute for the Administration of Justice (CIAJ), The Dispute Resolution Office of the Saskatchewan Ministry of Justice and Attorney General, the British Columbia Council of Administrative Tribunals (BCCAT), and the Society of Ontario Adjudicators and Regulators (SOAR). The Council of Canadian Administrative Tribunals (CCAT) also offers an online decision-writing course.

Conferences, workshops, and seminars covering topics of interest to administrative tribunals are also periodically sponsored by the above-mentioned bodies as well as the Canadian Institute, the Pacific Business and Law Institute, the Saskatchewan Law Society, and various Colleges of Law across Canada. Written materials are often available for purchase from these organizations following the

conclusion of the events. Additional resources for tribunals can be found on the websites for a number of these organizations.

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Appendix B

RESOURCES FOR THE PARTIES

Free Legal Clinics

www.pblsask.ca/clinicprogram.shtml

There are free legal clinics located throughout the province of Saskatchewan. Lawyer volunteers provide free legal assistance in all areas of the law to people who cannot afford a lawyer and do not qualify for Legal Aid. Income testing does apply. Lawyers at the clinics generally do not represent clients at hearings but do provide ongoing legal advice and help clients prepare for the hearing process. Lawyers may also make referrals for further assistance. Clinics are located in Regina, Saskatoon, and Prince Albert. Telephone appointments are available for individuals not located in these areas.

PRINCE ALBERT

Prince Albert Free Legal Clinic

1409 1st Ave E Prince Albert SK S6V 2B2

Tel: (306) 764-3431 **Fax:** (306) 763-3205

Hours: Wednesdays 1:00 p.m. – 4:00 p.m.
(appointment required)

The Prince Albert Free Legal Clinic operates every Wednesday from 1:00 p.m. – 4:00 p.m. at the Prince Albert Indian Métis Friendship Centre in downtown Prince Albert. Lawyers provide assistance in criminal, family and civil law during hour-long appointments. Appointments are required and are scheduled by telephoning (306)764-3431 during normal business hours.

REGINA

Regina Free Legal Clinic

2240 13th Avenue Regina SK S4P 3M7

Tel: (306) 757-4711 **Fax:** (306) 757-4712

Hours: Saturdays 9:00 a.m. - 12:00 p.m.
(appointment required)

The Regina Free Legal Clinic is located at the Salvation Army Correctional and Justice Services Office in downtown Regina. Lawyers provide assistance in all areas of the law during hour-long appointments. Appointments are required and are scheduled by telephoning (306) 757-4711 during normal business hours.

Aboriginal Family Service Centre Clinic

1102 Angus Street Regina SK S4T 1Y5

Tel: (306) 525-4161 **Fax:** (306) 525-1283

Hours: Thursdays 12:00 p.m. – 2:00 p.m.
(appointment required)

The Aboriginal Family Service Centre Clinic is located in Regina's North Central neighbourhood. Lawyers provide assistance in all areas of the law during hour-long appointments every second Thursday. Appointments are required and are scheduled by telephoning (306) 525-4161 during normal business hours.

SASKATOON

Legal Advice Clinic

602 20th St. W. Saskatoon SK S7M 0X7
Tel: (306) 653-7676 **Fax:** (306) 384-0520
info@classiclawn.ca

Hours: Tuesdays 1:30 p.m. – 4:00 p.m.
(appointment required)

The Legal Advice Clinic, coordinated by Community Legal Assistance for Saskatoon's Inner City (CLASSIC), operates every Tuesday afternoon between 1:30 p.m. – 4:00 p.m. at White Buffalo Youth Lodge in Saskatoon. Lawyers provide assistance in criminal, family and civil law during half-hour appointments. Appointments are required and may be scheduled by telephoning (306) 653-7676 during normal business hours.

Walk-In Advocacy Clinic

602 20th St. W. Saskatoon SK S7M 0X7
Tel: (306) 653-7676 **Fax:** (306) 384-0520
info@classiclawn.ca

Hours: Mondays & Wednesdays 1:00 p.m. – 5:00 p.m. (walk-in clinic)

The Walk-In Advocacy Clinic is operated by Community Legal Assistance for Saskatoon's Inner City (CLASSIC) every Monday and Wednesday between 1:00 p.m. and 5:00 p.m. at White Buffalo Youth Lodge in Saskatoon. This clinic is run by law students under the supervision of a practicing lawyer. Appointments are not required and walk-ins are welcome. Advocacy services are provided in areas that include, but are not limited to: Canada Pension Plan, correctional services, disciplinary and parole hearings, Employment Insurance, employment law, estate law, human rights, immigration, labour relations, labour standards, landlord tenant, SGI, small claims court, social assistance, and workers' compensation.

Self-Help

The following resources are available to help parties understand their rights and the justice system.

Public Legal Education Association of Saskatchewan (PLEA)

www.plea.org

Tel: (306) 653-1868 (Saskatoon)

Email: plea@plea.org

Public Legal Education Association of Saskatchewan (PLEA) provides free publications to the public on a wide variety of legal topics. It may be helpful for parties to consult these publications to become familiar with the area of law that most affects them. PLEA publications also suggest resources available in the community.

Courts of Saskatchewan

www.sasklawcourts.ca

This website is a portal to the three courts of Saskatchewan: the Provincial Court, the Court of Queen's Bench and the Court of Appeal. The site provides court schedules, information on the judicial system, and information on proceedings before the courts.

Saskatchewan Ministry of Justice & Justice Canada

www.justice.gov.sk.ca // www.justice.gc.ca

The Saskatchewan Ministry of Justice and the Canadian Department of Justice websites provide information on branches, programs and services offered provincially and federally as well as access to publications, forms and legislation.

Freelaw (Saskatchewan)

www.qp.gov.sk.ca

Freelaw provides free online access to current Government of Saskatchewan legislation including acts and regulations. Paper copies of legislation are available for a fee. The site

also provides access to the Rules of Court and legislated forms.

Canadian Legal Information Institute (CanLII)

www.canlii.org

CanLII provides free access to Canadian full-text court decisions available on the web.

Office of the Worker's Advocate

www.labour.gov.sk.ca/wao

3rd Floor, 1870 Albert Street

Regina, SK S4P 4W1

Toll Free: (877) 787-2456

Phone: (306) 787-2456

Fax: (306) 787-0249

The Office of the Worker's Advocate provides help to workers needing assistance with their workers' compensation claims.

Welfare Rights Centre

1042 Albert Street

Regina, SK S4P 2P8

Phone: (306) 757-3521

The Welfare Rights Centre offers a range of services to the public, such as advocacy, housing and trusteeship.

Regina Anti-Poverty Ministry

2330 Victoria Avenue

Regina, SK S4P 0S6

Phone: (306) 352-6386

Fax: (306) 352-5866

The Regina Anti-Poverty Ministry provides public information on poverty issues and advocacy services to low income persons needing assistance.

Saskatoon Anti-Poverty Coalition

antipoverty@sasktel.net

Phone: (306) 653-2662

The Saskatoon Anti-Poverty Coalition is a group of concerned citizens and organizations dedicated to addressing the causes and effects of poverty.

Equal Justice for All

ejainc@sasktel.net

Room 321, 230 Avenue R South

Saskatoon, SK S7M 2Z1

Phone: (306) 653-6260

Fax: (306) 653-6264

Equal Justice for All provides advocacy services to disadvantaged and low income people in matters involving Social Services, SGI, WCB, CPP, EI, the Office of Residential Tenancies and other government agencies.

Community Low Income Centre (CLIC)

www.weyburnclic.com/

404 Ashford Street

Weyburn, SK S4H 1K1

Phone: (306) 842-5126

Email: clic@sasktel.net

The Community Low Income Centre provides social services advocacy in the Weyburn area.

Appendix C

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

PUBLIC ACCESS & MEDIA POLICY

July 31, 2006

Introduction

The Tribunal is accountable to the public and, by extension, to the media. It has a responsibility to assist the public, including the media, in obtaining the access to Tribunal proceedings to which it is entitled.

The media plays a crucial role in informing the general public about developments in the area of human rights in BC and across Canada. In fact, the primary source of information on human rights for Canadians is through the words and images conveyed in news reports.

Both the Tribunal and the public are well-served when media coverage of hearings and decisions is accurate and complete.

This being said, the Tribunal also has a responsibility to the parties to a human rights dispute and to the human rights process to ensure that public access does not interfere with or compromise procedural fairness. As such, there must be guidelines on how and when the public, including the media, will have access to the Tribunal.

Tribunal proceedings are public. The *B.C. Human Rights Code* (the *Code*) and the Tribunal's Rules of Practice and Procedure (the *Rules*) set out the parameters for Tribunal proceedings and disclosure of information. The relevant sections of the *Rules* are attached to this policy as Appendix A.

Access to Information

Access to Tribunal Documents

The public, including the media, has access to Tribunal documentation on a complaint

file in the Tribunal Registry. Rule 6(2) sets out the circumstances in which a complaint file, including personal information, may be disclosed to members of the public.

In addition, certain documentation is made available to the public three months prior to the hearing: Rule 6(3). This does not include members' notes or information received in the course of trying to settle a complaint: Rule 6(1).

Participants actively engaged in settlement discussions may make a written request to the Registrar to defer the application of Rule 6(3).

A participant can also make a preliminary application for an order limiting public disclosure of their personal information setting out the reasons why their privacy interests outweigh the public interest in access to the Tribunal's proceedings: Rule 6(5).

It should be noted that even if public disclosure is limited, the hearing itself could still be held in public.

Access to Exhibits

Exhibits are a part of the public record of a hearing. Requests for access to exhibits during a hearing are at the discretion of the Tribunal member hearing the case. All other requests by members of the public must be made in writing to the Registrar.

Access to Transcripts

The Tribunal does not record its proceedings, unless an accommodation is made under Rule 35(2). As such, there are no transcripts.

Rule 35(5) allows participants to record a hearing at their own expenses after obtaining the consent of the Tribunal and the other

participants, and upon agreeing to provide a copy to the Tribunal and the other participants.

Any recording made under Rule 35(5) does not form part of the official record of the Tribunal: Rule 35(6).

Should a member of the public wish to obtain a copy of any recording or transcript made under Rule 35(5), they must contact the owner of the recording or transcript directly.

Access to Information Requests

Requests under the *Freedom of Information and Protection of Privacy Act* must be made in writing to the Registrar.

Alternative Dispute Resolution and Settlement

The Tribunal offers settlement meetings in the form of mediations and other types of alternative dispute resolution for the purpose of assisting the parties to achieve resolution of all or part of a complaint.

Under s. 40 of the *Code* and Rule 21(8), any information received by any person in the course of attempting to reach a settlement of a complaint, including at a settlement meeting is confidential and may not be disclosed except with the consent of the person who gave the information.

Tribunal Hearings

Attendance at Hearings

The general rule is that Tribunal hearings are open to the public. Seating space available to the public is limited by the size of the hearing room. Public seating cannot be reserved, and is available on a first-come first-served basis.

While public access is the presumption, under Rule 35(3) the Tribunal member hearing the case can order all or part of a hearing closed.

In addition, Section 48 of the *Administrative Tribunals Act* grants the Tribunal the authority to make orders or give the directions it considers necessary for the maintenance of order at a hearing. This includes orders restricting the continued participation or attendance of any

person at a hearing. This is reflected in Rule 35(13).

The Tribunal will consider factors such as public safety, the vulnerability of a particular participant, and sensitivity of the evidence in making such orders.

Communications Devices

Cameras

Filming or photographing a hearing room is not permitted from inside or outside the hearing room without the permission of the Tribunal. Specifically included in this restriction is filming through open hearing room doors or through windows in hearing room doors. Cameras – including television cameras – are not allowed in any hearing rooms during the conduct of a hearing without the express permission of the designated Tribunal member. Cameras are not permitted in mediations at any time due to the confidentiality of this process.

Cameras are generally permitted in the public areas of the Tribunal. Television camera operators or still photographers must check in upon arrival at the Tribunal to enquire where they may locate. To ensure public safety and unimpeded access to and exit from hearing rooms, Tribunal staff may direct where camera operators may locate in the public areas of the Tribunal.

Where space is limited or the presence of cameras in public areas is disruptive to a hearing, the designated Tribunal member or Registrar may disallow the presence of cameras in public areas.

Tape Recorders

Generally, members of the public may not tape record Tribunal proceedings. The media, however, may tape record Tribunal proceedings for the limited purpose of verification of their notes of the proceedings, but not for broadcast.

Computers

Laptop computers are generally permitted in Tribunal hearings provided there is no disturbance to the proceedings and the

computers are used solely for the purpose of note-taking.

Cell Phones

The public may take their cell phones with them into the hearing room, however the phones must be turned off and never used in the hearing room. Cell phones with camera features may not be used for the purpose of taking pictures.

Going In and Out of the Hearing Room

Members of the public are requested to limit going in and out of the hearing room while the hearing is in session. Given the size and layout of hearing rooms, such disturbances can be distracting or disruptive to the proceedings.

The Tribunal may direct that members of the public will not be permitted to enter and leave hearing rooms while the hearing is in session.

Media Interviews and Publication Bans

Interviews

The media may hold interviews in the public areas subject to direction by Tribunal staff to ensure that public traffic is not impeded. The media should check in advance with respect to an appropriate location for interviews.

Bans on Publication

While the media is, in general terms, constitutionally entitled to publish information about hearings, there are some exceptions to this right. The Tribunal may (and sometimes must) impose publication bans to protect the fairness and integrity of the hearing, or the privacy or safety of a participant.

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Appendix D

MEDIA DOS AND DON'TS

Keep these tips in mind when dealing with the media:

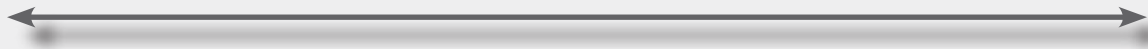
- If you are going to release copies of your decisions to the media, ensure that the parties directly involved in the case are informed of the decision in advance of the release.⁷⁶
- Consider designating one person who will speak to the media on behalf of the tribunal – the more people you have involved, the more difficult it will be to ensure your tribunal is providing a consistent message.⁷⁷
- Consider media training for your tribunal spokesperson or use a communications expert for interviews.⁷⁸ The more controversial the topic, the more you should consider involving a professional. At a minimum, a professional can coach you on your communication skills in advance of an interview. Remember that giving a good interview is a learned skill.
- Never lose your temper with a member of the media, particularly during an interview.⁷⁹ If you do, it will be your loss of control rather than your message that will become the focus of the interview. Concerns about the conduct of a particular media representative can always be taken up with a news director afterward.⁸⁰
- Assume all microphones are “live” – it is better to err on the side of caution than to have your private comments become public because you thought a microphone was turned off.
- If a reporter calls and you are not prepared to deal with an information request at that time, take the reporter’s contact information, note the information requested and the deadline involved, provide a time when you will return the call, and then get back to the reporter once you have had a chance to consider the request.
- Keep in mind that there really are no “off the record” discussions with the media. Do not make any comments to media representatives that you would not want to hear on the air or see in print.⁸¹
- Get the details about an interview before you agree to do one. The details should include the name of the person conducting the interview, the topic involved, the quantity of information required and the format that will be followed.
- Decide on one or two key points you want to make in the interview and then develop short 6-8 second explanations to cover them.⁸²
- Keep interviews short and simple. The longer an interview goes on, the more likely it will be that questions will stray off topic into areas that you may not be prepared to deal with. The more complex an interview, the less likely your message will be understood by the public.
- Remember that members of the media operate under very short deadlines – you need to get back to them quickly. If you provide a delayed response, your information may not be reported or media representatives may use other and potentially less accurate sources of information to meet their deadlines.⁸³
- Honesty is always the best policy when it comes to the media – ensure that the information you are providing to the media is accurate. If you do not have the requested information or you do not know the answer to a question raised, then say so.⁸⁴
- “No comment” is generally not a good comment to make to the media. Provide an explanation for why you cannot comment on information the media is looking for.⁸⁵

- Share your tribunal's media policy with the media so they will know what information they can access, how they can access it, and what will be expected of them if they attend a hearing. Providing this kind of information to the media is particularly important if your tribunal does not permit the media to record hearings.

Appendix E

LEADERSHIP STYLES FOR THE CHAIRPERSON

There is a range of potential leadership styles a chairperson can take on. These styles or roles fall into three general categories along a continuum:



Just One of
The Panel

First Among
Equals

Dictator

Just One of the Panel Members

At one end of the continuum is the chairperson who is “just one of the panel members.” This type of chairperson has no greater responsibility for the running of the hearing than other panel members.

The concern with this type of chairperson is that little structure is provided for the hearing. Hearing processes can become chaotic when no one has the responsibility to control the proceedings.

The Dictator

At the other end of the continuum is the chairperson who is a “dictator”. This type of chairperson controls every part of the process and has a tendency to make decisions without consulting with the other panel members.

The concern with this type of chairperson is that potentially valuable contributions from panel members get missed. The skill set of the panel is also not fully utilized. This can increase the potential for errors. It can also be awkward if the chairperson makes a procedural decision without consulting other panel members and one of the panel members then disagrees with the decision.

First among Equals

The best approach and middle ground is for the chairperson to take a “first among equals” role. As the first among equals, the chairperson leads the hearing process, maintains order in the hearing room, and handles basic procedural matters in consultation with other panel members.

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Appendix F

APPROPRIATE DISPUTE RESOLUTION

Many tribunals offer participants various processes to resolve their disputes prior to a hearing. These processes are often collectively referred to as appropriate dispute resolution, alternative dispute resolution, or ADR. Your tribunal can make appropriate dispute resolution processes available to parties if your governing statute allows. If appropriate dispute resolution is not raised in your legislation, then you can make it available to parties informally, provided they voluntarily agree.

One of the main types of appropriate dispute resolution processes is mediation. Mediation is a collaborative problem-solving process led by a trained neutral third party as described in Chapter Three.

Similar to mediation is negotiation. Negotiation also involves communication between the parties to a dispute. Unlike mediation, negotiation often is not facilitated by a trained neutral third-party. Rather, negotiation often just involves the parties, with or without representation, discussing the matters in dispute and attempting to come to a resolution of the issues through agreement. Like mediation, the parties to a negotiation will not reach a remedy in their matter unless they all agree to the remedy.

Another common type of appropriate dispute resolution process is arbitration. While arbitration is a form of appropriate dispute resolution, it frequently involves a hearing before a neutral third-party decision-maker (arbitrator), very similar to a court or adversarial model administrative tribunal hearing. Arbitrations use an adversarial hearing process and the decision-maker determines the facts, makes determinations about the evidence (such as whether the evidence is relevant or credible), and makes a final decision including remedies. The arbitrator's decision is generally presented in writing with reasons and is imposed on the parties, being either binding or subject to appeal.

In spite of its similarities to court and administrative tribunal hearings, arbitration is a form of appropriate dispute resolution because the parties voluntarily agree to participate in the process and to abide by the decision of the arbitrator. In Saskatchewan *The Arbitration Act, 1992* can be used to guide and govern arbitrations.

Conciliation is yet another common form of appropriate dispute resolution process that is somewhere between mediation and arbitration. It is especially common in the labour context. In a labour conciliation, a neutral third-party conciliator will attempt to facilitate discussions between parties who are often in a highly volatile state. Frequently the conciliator will be required to go between parties in separate physical spaces to attempt to reach an agreement. Unlike arbitrators, conciliators usually do not have any authority to call or hear evidence. Parties can agree to binding conciliation, in which they must follow any recommendations made by the conciliator as to remedy. More often a conciliator's proposals on remedy are only recommendations and the parties still have the power to determine whether they will agree to the recommendations. Conciliators may or may not write decisions.

Conciliation in other fields is often used as a method to get people into negotiation or mediation processes.

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Appendix G

TELEPHONE HEARING TIPS

If your tribunal has decided to permit a hearing by telephone conference, the following tips can help ensure you run an orderly and fair process:

- It can be a challenge to arrange to swear a witness under oath in a telephone hearing. As an alternative, have witnesses appearing by telephone swear an affirmation rather than an oath.
- Require advance submission of any of the materials the parties appearing by telephone intend to submit into evidence. You can accept documents at the hearing if everyone has access to a fax machine or email to receive copies of the documents. It is a good idea to only accept documents at the hearing if the parties could not submit them in advance or could not reasonably have known they would be necessary or relevant in advance.
- Consider numbering the material submitted and providing a photocopy back to the parties prior to the hearing so that everyone is working from the same numbers rather than descriptions of documents – it is far easier to reference numbers than to try to describe a document.
- Keep the hearing as short as possible and direct all parties to minimize interruptions.
- Have speakers clearly identify themselves each time the speaker changes.
- Concentrate on taking notes to keep your focus on what is being said.
- Be wary of tendencies to relax evidence standards in telephone hearings.
- While it is best to have parties participate from controlled environments with good acoustics (such as court houses, government buildings), in practice this is rarely possible. At a minimum, however, direct the parties to participate from a location that is quiet and free of distractions.
- Check in with the participants at various points to ensure that everyone is still connected and can hear what is going on.
- Use of cellular telephones is not a good idea as the transmission can be lost at critical times and may not be secure.

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Appendix H

SAMPLE EXHIBIT LIST

FILE NUMBER:

HEARING DATE:

PLACE:

PANEL MEMBER IN CHARGE OF EXHIBITS:

PARTIES IN ATTENDANCE:

EXHIBITS – Party

EXHIBIT NUMBER	DESCRIPTION	MARKED (✓)	IN FILE (✓)

EXHIBITS – Party

EXHIBIT NUMBER	DESCRIPTION	MARKED (✓)	IN FILE (✓)

Sample Exhibit Statement or Stamp

This is Exhibit “_____” referred to at the hearing of _____ (party name) and _____ (party name) held at _____ (place) on _____ (month and date), _____ (year).

****** The lines indicate the blanks to be filled in. Descriptions of the information that needs to be filled in follows the blanks and these bracketed words would not appear on the Exhibit Statement or Exhibit Stamp.

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Appendix I

DECISION-MAKING AND WRITING PITFALLS FOR LAWYERS

Lawyers learn many advocacy skills that help them with the practice of law. Some of these skills, however, can present challenges for lawyers in the decision-making and writing process. The most common pitfalls for lawyers include:

Trying to Do it All in One Case

It is a good idea to stick to deciding only what you need to decide in the case before you rather than trying to do it all in one case. Adding extras to a decision can result in difficulties for your tribunal.

Extras often take the form of hints about what you may have decided if the facts or law had been slightly different. The problem is that the parties have not provided you with any input on that situation – that was not their situation. Also, as it is not something that you have to consider to decide the case, you will likely not consider it in depth – it becomes an extra comment added into the decision that does not directly relate to the issues before you.

Potential parties may read these extras as providing a strong indication of what your tribunal may do in different circumstances. If they appear before you under those circumstances, they may expect the result you hinted at. After having the benefit of their input and an opportunity for thorough consideration, you may find that your previous thoughts on the issue were ill-considered and incorrect. You are then in the awkward position of having to step away from the outcome you previously hinted at. Parties may be upset you did not do what you previously suggested you would and they may question the fairness of your process.

Given the downside of putting in extras, you should give careful consideration to your reasons for adding them to the decision. Are you trying to clarify the law to provide guidance in an area where not much guidance exists? If so, you may want to include these kinds of extras despite the risks. However, avoid adding extras when your reasons for doing so include attempting to strengthen a weakly reasoned

conclusion, expanding the development of the law in a particular area, or pointing out issues with the relevant policy or law.

Adding Research

You may be tempted to add your own legal research into the decision. You are more likely to take this step when parties are unrepresented and may be unaware of the law that applies to their case. The main advantage for doing your own research is that it ensures the relevant law is fully canvassed prior to making a decision in the case. However, several potential issues can arise with this practice.

The first issue is that research tends to happen after the hearing. If you find and rely on a case at that point, the parties or their counsel have not had an opportunity to comment on it prior to your decision being made, creating a fairness issue. Secondly, even if you do your research before the hearing and alert the parties to the cases you have found, you need to be open to their arguments as to why the case may or may not apply. Just because you found the case does not mean the parties are unable to challenge it and perhaps change your mind about its relevance.

There is a distinction between referencing supporting cases that are not central to the main arguments and leading cases that are central to the issues. The parties should have an opportunity to respond to anything central to the case. As a result, if you feel strongly that you must do your own research, do it before the hearing, put the cases you find to the parties at the hearing, and give them an opportunity to respond so that there will be no surprises for the parties in your decision.

Criticizing Counsel or the Law

As a decision-maker, you need to keep in mind that counsel appearing before you are not the end users of the process – the parties are. Any critique you may be tempted to make about the behavior of counsel is likely irrelevant to the case and should not be included in your decision. Depending on the seriousness of the behavior, your concerns may be more appropriately directed to the Law Society of Saskatchewan.

It can also be very tempting to criticize the law or the legislators – decisions are not the appropriate place for this kind of critique. Instead, raise the issue with your tribunal head so that the issue with the law can be noted for appropriate government staff to review.

Using “In The Alternative” Reasons and Appeal Proofing

While practicing as a lawyer, it is quite appropriate for you to build lines of offence or defence in a case – using alternate approaches just in case some do not work. As clients are results-oriented, you typically start from the result your client wants to reach and then find a way to take the case there. Using this type of approach as a decision-maker, however, can be an issue.

Using “in the alternative” reasons refers to providing more than one set of reasons for the decision reached. This approach may signal to parties that, regardless of the merits of the case, this was the conclusion you wanted to reach and you were less concerned with how you got there. Given the message that this approach may send to the parties, it is best to avoid it unless you have good reasons for using it.

Appeal proofing a decision refers to attempting to write the decision in a way that hampers the ability of the parties to successfully appeal it. It is not a good practice. Appeal proofing can involve the use of “in the alternative” reasons but more often takes the form of minimal or vague reasons that do not clearly set out explanations for the conclusions reached. Some decision-makers feel that if they provide less information, there will be less for the reviewing

body to criticize. In addition to being unfair to the parties and reflecting negatively upon you as a decision-maker, this practice is generally ineffective in preventing your decisions from being appealed. Your decisions are far more likely to be appealed and overturned if your reasons are insufficient or unclear.

As a general rule, you should look to review by the courts or appeal bodies as an opportunity for support or guidance about your decision-making skills.

Writing Style and Level

One of the most frequent criticisms of lawyers as decision-writers is the formal writing style they use and the high readability level needed to understand the decisions. Keep in mind that you need to write to your primary audience – the parties appearing in front of you. It is not enough to write the decision so that you can understand it. The parties need to be able to understand it without hiring a lawyer to explain it to them.

Appendix J

25 RULES TO LIVE BY FOR MEMBERS OF DISCIPLINE HEARING PANELS

April 11, 1997

1. Treat the participants at a hearing the way you would want to be treated.
2. Keep an open mind at all times.
3. Maintain your independence, and the appearance of independence from all outside influences.
4. Treat the participants equally. Do not convey the impression that you are familiar with or favor one of the participants at the expense of the other.
5. Show courtesy to the participants.
6. Disclose all potential conflicts of interest in advance of the hearing.
7. If there are facts which could cause a reasonable person to believe that you might be biased, do not act (unless there is an explicit consent by all participants with full knowledge of the facts).
8. Be prepared. If written materials are available before the hearing, read them.
9. Try to make participants who are unfamiliar with the hearing process comfortable. Explain to such persons the procedures which you follow and the reasons for such procedures.
10. Maintain control of the hearing. Take appropriate steps to ensure that the participants address the relevant issues and present their positions with decorum and respect for you and the other participants.
11. Where there have been previous decisions in similar matters, or where there has been a policy developed dealing with an issue before you, make the participants aware of that decision or policy. However, do not slavishly follow that decision or policy but keep an open mind and be amenable to persuasion.
12. Do not receive or act on information unless that information is available to all participants.
13. Do not act on information unless all participants have had a full opportunity to contradict or explain that information.
14. If possible, prior to final arguments, advise the participants of concerns you have respecting the positions which they are taking. Provide the participants with a fair opportunity to persuade you of their point of view.
15. Provide reasons for your decision. Remember that your reasons will explain to the losing participant the reason that they have lost. This maintains respect for the integrity of the system.
16. Make your decision in a timely fashion.
17. If your decision provides a remedy, ensure that it is clearly stated so that there can be no confusion.
18. Refrain from expressing opinions during the course of the hearing.
19. Avoid contact/discussion with persons involved in the investigative stage.

20. Take no role in the investigative stage.
21. Avoid sitting on a panel with respect to a professional if you have previously been involved in a panel dealing with prior proceedings against the same professional.
22. Do not interfere with, or interrupt the examination of witnesses by the parties. As much as possible, save your questions until the end, or until a convenient time (seek permission to interrupt to clarify). Ask questions in a measured and fair manner.
23. Do not allow persons who are not members of the hearing committee to participate, or appear to participate in the decision-making process.
24. Do not meet with or contact witnesses without the professional present and do not consider evidence without revealing it to the professional or all counsel.
25. Do not consult in any way with the same legal counsel who will be the prosecutor at the disciplinary hearing.

Developed by Bryan Salte, Counsel for the College of Physicians and Surgeons of Saskatchewan. Reproduced with the permission of Mr. Salte, February 2009.

Glossary



Glossary

Act	See statute .
Adjournment	Delaying a hearing to a later time or date. Frequently will be a preliminary application .
Adjudication	See decision .
Adjudicator	See decision-maker .
Administrative notice	The ability of an administrative tribunal or other administrative decision-maker to make findings of fact on well-known and generally uncontroversial matters without having evidence of that matter put before the decision-maker. Also known as judicial notice .
Administrative tribunal	Boards, commissions, appeal committees and other administrative bodies created by government to assist in carrying out the various decision-making responsibilities of government.
Adversarial hearing model	A hearing model in which the parties in opposition present the evidence and argument to the decision-maker in an effort to convince the decision-maker that the party's position is correct. In an adversarial hearing the decision-maker determines the facts of the case from evidence presented by the parties. Contrasted with the inquiry-based hearing model .
Affidavit	A written statement of evidence , made voluntarily and under oath or affirmation by the person making the declaration before a person having the authority to administer oaths or affirmations.
Affirmation	A solemn and formal declaration given by a person promising to tell the truth when giving testimony as a witness or making an affidavit . An affirmation has no religious basis and is substituted for and contrasted with an oath .
Agent	A person who acts on behalf of another; used to signify a representative who is not counsel .
Appeal	Having a superior court or administrative tribunal review a decision of an inferior court or administrative decision-maker . Appeals are only allowed where expressly provided by statute . Contrasted with judicial review and reconsideration .
Applicant	The party who initiated the proceedings. Applicants usually call their evidence first in an adversarial hearing model . Contrasted with the respondent .

Application	Request made by a party to an administrative tribunal, court or other decision-maker asking them to order something. Also known as a motion .
Appropriate Dispute Resolution	Using means other than a hearing to resolve disputes, including negotiation, conciliation, and mediation. Also known as Alternative Dispute Resolution or ADR.
Argument	Oral or written points presented to the decision-maker intended to convince the decision-maker to decide the case a certain way. Contrasted with evidence . Argument is usually made after the evidence has been presented. New evidence is not generally permitted to be introduced during argument. Also known as a submission .
Authority	See precedent .
Bias	A lack of neutrality.
Burden of proof	See onus of proof .
Canadian Constitution	Statute that is the highest law in Canada, governing all other law. Includes the <i>Constitution Act, 1867</i> , formerly known as the <i>British North America</i> or <i>BNA Act</i> and the <i>Constitution Act, 1992</i> , the first section of which is the <i>Canadian Charter of Rights and Freedoms</i> .
Closed hearing	See in camera hearing .
Common law	The law that arises from cases decided by judges in the court system over time. Consists of precedent .
Counsel	A person with legal training who represents a party . Another term for a lawyer.
Cross-examination / cross-examine	Questioning of a witness in a hearing by a party who did not call the witness. Cross-examination is done for the purpose of testing the truth, credibility, accuracy and reliability of the testimony given in examination-in-chief and to obtain additional information. Leading questions are permitted during cross-examination..
Court	An official body that has the authority to hear legal cases, resolve disputes and decide on other matters in accordance with the law. In Saskatchewan there are three levels of court: the Provincial Court of Saskatchewan, the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal.
Decision	A determination arrived at by a court or an administrative decision-maker after consideration of the facts and law. Can also be called an order .
Decision-maker	The court, administrative tribunal or other individual or individuals who are responsible for making a decision in a dispute between people. Also known as an adjudicator .

Direct questioning	See examination-in-chief .
Disclosure	Obligation of parties in a legal or administrative matter to reveal relevant documents and information to the other parties so they can respond or prepare for a hearing .
Discretion	Freedom or authority given to a decision-maker to decide how to resolve a dispute.
Dissent	When a decision-maker does not agree with the majority decision , that person may provide an alternate opinion or reasons known as a dissent.
Document evidence	Written or printed evidence submitted to prove a fact. Also known as an exhibit .
Duty of fairness	A legal concept describing a set of requirements that must be observed when a decision-maker is making certain statutory decisions . At a minimum, the duty of fairness requirements include notice of the case, an opportunity to reply, and a decision from an unbiased decision-maker. These are the basic requirements of natural justice . Also known as procedural fairness .
Electronic hearing	Hearing held by a telephone conference call or a video conference. Contrasted with an oral hearing or written hearing .
Evidence	Information or things presented to a decision-maker to prove a fact. Evidence can include such things as videotape or documents, affidavits , visual demonstrations, witness and expert testimony .
Examination-in-chief	Initial questioning of a witness by the party who called the witness to put the knowledge he or she has of the facts and matters in dispute before the decision-maker . Leading questions are not generally permitted during examination-in-chief. Also known as direct examination .
Exhibit	See document evidence .
Expert evidence	Evidence given by an individual who can demonstrate he or she has comprehensive knowledge of a particular area or matter due to education, training, skill or experience. Expert witnesses can give opinion and evidence, and use hearsay to reach an opinion, although this is often not permitted for other witnesses . Expert evidence can be given through testimony or a written report.
Fairness	Provides for rights to specific procedures in administrative decision-making (opportunity to be heard and respond, unbiased decision-maker , etc.). Related to procedural fairness and the duty of fairness .
Final argument	Argument made by parties to a decision-maker at a hearing after the parties have presented their evidence . During the final argument, parties explain how the law and the evidence show that they have established their case.

Governing statute	The statute that creates an administrative tribunal . It generally outlines aspects of the tribunal's powers, jurisdiction, procedures and remedies. The governing statute will often include not only the statute, but also the regulations . Also known as an "enabling statute."
Hearing	Proceedings conducted by a decision-maker to formally hear or go over the parties' evidence and argument. Hearings can be open to the public or closed. There are oral hearings , written hearings and electronic hearings .
Hearing panel	See panel .
Hearsay	A second-hand account of events. If a witness provides information about something that he or she was told by a third party or read about rather than experiencing it directly, this information is hearsay evidence . Contrasted with direct evidence.
Host ministry	Most administrative tribunals are "hosted" within a ministry of government and have an assigned cabinet minister who is responsible for reporting back to the legislative assembly about the tribunal.
Hybrid hearing model	Any hearing model that blends the adversarial hearing model and the inquiry-based hearing model .
In camera hearing	A hearing held in private. Also known as a closed hearing .
Inquiry-based hearing process	A hearing model in which the decision-maker investigates the matter and through that investigation determines the facts and decides the outcome. Contrasted with the adversarial hearing model as the parties do not lead the presentation of evidence and argument . Instead, the parties answer the decision-maker's questions as the decision-maker seeks out the evidence. Also known as the inquisitorial hearing model .
Inquisitorial hearing process	See inquiry-based hearing model
Intervenor	Person or group of persons who, although not party to a proceeding, have a significant interest in the subject matter or outcome of a dispute and who may be given standing to protect their interests or provide information to the decision-maker .
Judicial notice	See Administrative notice .
Judicial review	When a court reviews a decision made by an administrative tribunal . Judicial review is often a much more limited type of review than an appeal and will typically involve ensuring that the tribunal did not exceed its jurisdiction or make an error in interpreting the law. Contrasted with an appeal or reconsideration .

Jurisdiction	Limits within which decision-making power may be exercised. A decision-maker's jurisdiction is the area in which a decision-maker is entitled to make decisions .
Leading question	Question which invites a particular response or puts words into the mouth of a witness . Contrasted with an open question .
Legislation	See statute .
Motion	See application .
Natural justice	See duty of fairness .
Oath	A solemn and formal religious declaration given by a person promising to tell the truth when giving testimony as a witness or when signing an affidavit . An oath is normally sworn on a Bible or other religious text. See affirmation for comparison.
Onus of proof	The obligation on one of the parties to establish a particular fact or present a particular kind of evidence . In an adversarial hearing model , one party generally has the onus of proof to establish the case. Also known as the burden of proof .
Open question	A question directed to a witness that does not suggest or contain the answer to the question. Contrasted with a leading question .
Opening statement	An introduction that parties give at the beginning of a hearing , before giving their evidence , to explain the issues in dispute and the evidence that they will present.
Oral evidence	See testimony .
Oral hearing	When the parties , their counsel or agent , and witnesses go to a hearing in person to present their evidence and argument in a formal face-to-face meeting. Contrasted with a written hearing or electronic hearing .
Order	See decision .
Panel	The members of the administrative tribunal who hear and decide a particular matter. Also known as a hearing panel .
Party/parties	Person or organization, company or government agency with a significant interest in the outcome of a dispute that will be decided by an administrative tribunal or court . Witnesses , counsel and agents are not parties.
Party status	People or organizations who are entitled to fully participate in a decision-making process or hearing , due to the fact that they are a party .
Policy	A set or code of guidelines for reference by a decision-maker when trying to determine the appropriate procedure, course or method of action from among alternatives.

Precedent	A decision establishing the legal principles and appropriate outcome for a certain set of facts to be followed from that point forward when similar or identical facts are before a decision-maker . Also known as authority and related to the common law .
Pre-hearing conference	A meeting of the parties and the administrative tribunal, court or mediator before the formal hearing of the case to decide on the issues in dispute, to set dates for steps (like disclosure of evidence), to set the length of time for the hearing, and to try to reach a settlement on issues or facts.
Preliminary application	Matters that are dealt with either prior to the commencement of a hearing or at the very beginning of the hearing.
Procedural fairness	See duty of fairness .
Quasi-judicial	Describes a decision-maker or administrative tribunal with decision-making authority and processes similar to a court .
Quorum	The number of decision-makers who are required to make a decision on a particular matter.
Reconsideration	When administrative tribunals or decision-makers review their own decisions to check whether the decisions are correct. Contrasted with an appeal or judicial review .
Re-examination / re-examine	Questioning of a witness a second time by the party who initially called the witness and following cross-examination of that witness. Re-examination can generally only take place on matters raised during cross-examination that were not raised during examination-in-chief .
Regulations	Rules made to provide detail to statutes and passed by the executive branch of government. Most acts have accompanying regulations and some acts have several related regulations.
Rehearing	When a decision-maker (either the original decision-maker or on appeal) reviews a matter, hearing all of the evidence again and making determinations of fact and law.
Relevant evidence	Information or thing linked to an issue in dispute.
Remedy / remedies	A possible outcome that can be reached in a dispute before a court or an administrative tribunal . Examples of remedies include a fine or damages, an injunction, or an order requiring that some act be performed (such as the acceptance of a license or the granting of an application). A remedy can be ordered or reached through agreement of the parties .
Respondent	The party who is responding to an application or proceeding. In an adversarial hearing model , respondents will usually call their evidence after the applicant .
Rule of law	A principle that states that the law is the highest authority – no one is above the law and everyone is equal before the law.

Standard of proof	The level of proof or degree of certainty required to establish that a statement of fact is true. The civil standard of proof is generally “the balance of probabilities”, which means it is more likely to be true than not.
Standing	Legal right of an individual or organization to participate in a hearing as a party or intervenor .
Statute	An enactment of the government that is passed by the legislative branch and becomes law. Often the term statute includes both the legislative enactment and regulations . Also known as legislation or act .
Stay	To suspend or put off until later.
Submission	See argument .
Subpoena	Instrument used to notify individuals that they are required to appear at a hearing on a named day and answer questions and/or bring specified documents with them. There are different types of subpoenas. A subpoena <i>ad testificandum</i> requires the individual to provide testimony at a hearing. A subpoena <i>duces tecum</i> requires a witness to bring documents to court . May also be referred to as a summons or witness summons.
Testimony	Evidence given by word of mouth by a witness to prove a fact. Testimony is often given by a witness under oath or affirmation . Also known as oral evidence .
Witness	Person who has information about a proceeding or dispute and is called to a hearing to orally answer questions under oath or affirmation .
Written hearing	A type of hearing in which the decision-maker examines written evidence and argument of the parties to make a decision on their dispute. Contrasted with an oral hearing or electronic hearing .

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Endnotes



Endnotes

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- ² Gerald Gall (2004). *The Canadian Legal System* (5th ed.). Scarborough, Ontario: Thomson Canada Limited, p. 1.
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- ⁴ *Ibid.*, pp. 26, 83.
- ⁵ *Ibid.*, pp. 81-83.
- ⁶ *Ibid.*, pp. 80-83.
- ⁷ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.
- ⁸ Lisa Braverman (2001). *Administrative Tribunals: A Legal Handbook*. Aurora, Ontario: Canada Law Book Inc., pp. 17-18.
- ⁹ *Ibid.*, p. 17.
- ¹⁰ Jessie Horner (2006). *Canadian Law and the Canadian Legal System*. Toronto: Pearson Education Canada, p. 318.
- ¹¹ Sara Blake (2006). *Administrative Law in Canada* (4th ed.), Markham, Ontario: LexisNexis Canada Inc., p. 117.
- ¹² Patrick Fitzgerald and Barry Wright (2000). *Looking at Law: Canada's Legal System* (5th ed.). Toronto: Butterworths, p. 38.
- ¹³ Gall, 2004, p. 113.
- ¹⁴ Society of Ontario Adjudicators and Regulators (SOAR) (2000). *A Manual for Ontario Adjudicators* (Rev. 1st ed.). Etobicoke, Ontario: Society of Ontario Adjudicators and Regulators, p. 17.
- ¹⁵ Jones and de Villars, 2004, p. 69.
- ¹⁶ *Donoso v. Canada (Minister of Employment and Immigration)* (1989), 30 F.T.R. 241; 38 Admin. L.R. 219 (T.D.).
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- ²¹ Blake, 2006, p. 19.

- ²² *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817.
- ²³ *Barrett v. Glynn*, 2001 NFCA 70; 209 D.L.R. (4th) 735.
- ²⁴ *Re Public Utilities Board Act* (1985), 67 A.R. 251; 42 Alta. L.R. (2d) 48 (C.A.).
- ²⁵ *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301.
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- ²⁸ *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282.
- ²⁹ Macaulay and Sprague, 2007, p. 3-24.
- ³⁰ Adapted from the work of Christopher Moore and CDR Associates, Boulder, Colorado. See for example Moore's discussion of procedural, psychological and substantive needs in his 2003 publication *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed.). San Francisco: Jossey-Bass Publishers, pp 75-76.
- ³¹ Council of Canadian Administrative Tribunals (CCAT) (2007). *Introduction to Administrative Justice and to Plain Language*. Ottawa: Council of Canadian Administrative Tribunals, pp. 6-11.
- ³² There are a variety of resources that can assist you in determining appropriate reading levels and improving the readability of your materials, some of which can be found in Appendix A.
- ³³ William DuBay (2002). *Using Readability Tools*. Retrieved March 23, 2009, from <http://www.plainlanguagenetwork.org/conferences/2002/usetools/1.htm>.
- ³⁴ Michèle Asprey (2003). *Plain Language for Lawyers* (3rd ed.). Annandale, New South Wales: Federation Press, p. 37.
- ³⁵ For assistance in developing a basic set of procedures for your tribunal, see the Law Reform Commission of Saskatchewan's November 2006 publication *A Model Code of Administrative Procedures for Saskatchewan Administrative Tribunals*. Regina: Law Reform Commission of Saskatchewan. Retrieved June 22, 2009, from <http://sklr.sasktelwebhosting.com/Papers.htm>.
- ³⁶ At a minimum, an informal process should be used to provide members with feedback in such areas as meeting tribunal deadlines (timeliness), handling caseloads (caseload management), conduct at hearings (presiding skills), and the ability to write clear, well-reasoned decisions (decision quality). Feedback in these areas is important for tribunal members and does not affect the principle of independent decision-making.
- ³⁷ There are free legal clinics located in Regina, Saskatoon, and Prince Albert. See Appendix B for contact information for these clinics and additional advocacy resources.
- ³⁸ See for example comments made by the Canadian Judicial Council in 2007 on the public service the media performs in reporting on legal proceedings in *The Canadian Justice System and the Media*. Ottawa: Canadian Judicial Council. Retrieved March 2, 2009, from http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_other_en.asp, p. 1.
- ³⁹ See for example the "Public Access & Media Policy" developed by the British Columbia Human Rights Tribunal reproduced in Appendix C.
- ⁴⁰ Robert Macaulay and James Sprague (1988). *Practice and Procedure Before Administrative Tribunals* (looseleaf). Toronto: Thomson Canada, p. 16-29.

- ⁴¹ See for example Macaulay and Sprague's comments on the impact of video recordings, p. 16-36.
- ⁴² See for example Section 3.2(b) of the British Columbia Human Rights Tribunal's "Public Access & Media Policy" in Appendix C.
- ⁴³ SOAR, 2000, p. 127.
- ⁴⁴ *Ibid.*, p. 173.
- ⁴⁵ *Chretien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802; 333 F.T.R. 157 at para. 105, online: Retrieved June 23, 2009, from <http://www.canlii.org/en/ca/fct/doc/2008/2008fc802/2008fc802.html>.
- ⁴⁶ See *Chretien v. Canada, Ibid.* for examples of comments made to the media that gave rise to concerns that the decision-maker had pre-judged issues and demonstrated a lack of impartiality towards one of the witnesses involved in the proceedings.
- ⁴⁷ For an overview of the open court principle, see the reasons of Cory J. (as he then was) in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, online: Retrieved June 22, 2009, from <http://www.canlii.org/en/ca/scc/doc/1989/1989canlii20/1989canlii20.html> and *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, online: Retrieved June 22, 2009, from <http://www.canlii.org/en/ca/scc/doc/1991/1991canlii90/1991canlii90.html>.
- ⁴⁸ Gary Dickson (2009). *Administrative Tribunals, Privacy and the Net*. A Presentation for the Canadian Bar Association, January 30, 2009. Retrieved June 22, 2009, from <http://www.oipc.sk.ca/resources.htm>.
- ⁴⁹ For more information about privacy and records management, contact the Access and Privacy Branch of the Saskatchewan Ministry of Justice and Attorney General and the Government Records Branch of the Saskatchewan Archives Board.
- ⁵⁰ The Society of Ontario Adjudicators and Regulators (SOAR) (1996). *Code of Professional and Ethical Responsibilities for Members of Adjudicative Tribunals: A Model*. Etobicoke, Ontario: Society of Ontario Adjudicators and Regulators.
- ⁵¹ The Law Society of Saskatchewan (1991). *Code of Professional Conduct*. Retrieved March 23, 2009, from www.lawsociety.sk.ca/NewLook/Publications/Code2003/CodeCompleteNov03.pdf.
- ⁵² The Canadian Bar Association (2006). *Code of Professional Conduct*. Ottawa: Canadian Bar Association, p. 99.
- ⁵³ *Ibid.*, p. 99.
- ⁵⁴ Law Society of Saskatchewan, 1991.
- ⁵⁵ The chairperson of an administrative tribunal can use different styles in carrying out his or her role. Appendix E outlines these many styles on a continuum that represents a best practice for the role of the chairperson.
- ⁵⁶ See Appendix B for more information on Freelaw.
- ⁵⁷ If your tribunal is considering a mediation process, the Administrative Justice Office (AJO) of the British Columbia Ministry of Attorney General has developed "A Guide to Implementing Dispute Resolution Into Tribunal Processes" which provides a dispute resolution implementation framework for tribunals. You can locate a copy of the guide on the AJO website at <http://www.gov.bc.ca/ajo/>.
- ⁵⁸ Third party mediators can be located through organizations such as Conflict Resolution Saskatchewan, the ADR Institute of Saskatchewan and The Dispute Resolution Office of the Saskatchewan Ministry of Justice and Attorney General.

- ⁵⁹ Mediation training is available from The Dispute Resolution Office of the Saskatchewan Ministry of Justice and Attorney General.
- ⁶⁰ Law Reform Commission, 2006.
- ⁶¹ *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, s. 18.
- ⁶² *The Public Inquiries Act*, R.S.S. 1978, c. P-38.
- ⁶³ When constitutional issues are raised in the courts, there is a requirement to notify the Attorney General of Saskatchewan and the Attorney General of Canada prior to having the issue heard. This is required under *The Constitutional Questions Act*, R.S.S. 1978, c. C-29.
- ⁶⁴ For example, in cases where individuals have been dismissed from employment and make a claim under *The Labour Standards Act*, the employer will usually be required to present its evidence first at the hearing since the employer has the bulk of the information about the dismissal, even though it is the former employee who made the application.
- ⁶⁵ A sample Exhibit List and Exhibit Statement or “Exhibit Stamp” are provided in Appendix H.
- ⁶⁶ Tony Buzan (1995). *Use Your Memory* (Rev. ed.). London: BBC Books, pp. 79-84.
- ⁶⁷ Other resources for statutory interpretation include Ruth Sullivan’s 2002 text *Sullivan and Driedger on the Construction of Statutes* (4th ed.). Markham, Ontario: Butterworths; Elmer Driedger’s 1983 text *Construction of Statutes* (2nd ed.). Toronto: Butterworths; and Pierre-André Côté’s 2000 text *The Interpretation of Legislation in Canada* (3rd ed.). Scarborough, Ontario: Carswell.
- ⁶⁸ *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2.
- ⁶⁹ There are some additional decision-making and decision-writing tips for lawyers who are on administrative tribunals, which are outlined in Appendix I.
- ⁷⁰ *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105.
- ⁷¹ See Appendix B for further information about CanLII.
- ⁷² *Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106; 71 C.C.L.I. (4th) 185.
- ⁷³ Council of Canadian Administrative Tribunals (CCAT) (2005). *Literacy and Access to Administrative Justice in Canada*. Ottawa: Council of Canadian Administrative Tribunals.
- ⁷⁴ The online registration for the CCAT literacy course can be located at <http://www.ccat-ctac.org/en/literacy/registration.php>.
- ⁷⁵ *Literacy and Access to Administrative Justice in Canada* (CCAT, 2005, pp. 19-26) and *Introduction to Administrative Justice and to Plain Language* (CCAT, 2007, pp. 13-17). Both of these resources are also available online at <http://www.ccat-ctac.org/en/literacy/publication.php>.
- ⁷⁶ SOAR, 2000, p. 163.
- ⁷⁷ Ed Shiller (1994). *The Canadian Guide to Managing the Media* (Rev. ed.). Scarborough, Ontario: Prentice Hall Canada Inc., p. 42.
- ⁷⁸ William Carney (2008). *In the News: The Practice of Media Relations in Canada* (2nd ed.). Edmonton: The University of Alberta Press, p. 96.
- ⁷⁹ Shiller, 1994, p. 72.
- ⁸⁰ *Ibid.*, p. 74.

⁸¹ Carney, 2008, p. 158.

⁸² *Ibid.*, pp. 163-164.

⁸³ *Ibid.*, p. 19.

⁸⁴ Shiller, 1994, p. 160.

⁸⁵ Carney, 2008, p. 158.