



## BC Administrative Decision-maker's Manual

[Current to May 1, 2016]

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47.

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## PREFACE

### BRITISH COLUMBIA COUNCIL OF ADMINISTRATIVE TRIBUNALS

The British Columbia Council of Administrative Tribunals (“BCCAT”) was incorporated in 1996 as a non-profit organization with a mission to foster improvements in the administrative justice system. Our membership is comprised primarily of decision-makers, lawyers, and staff of administrative tribunals in BC.

One of the driving forces behind the formation of BCCAT was the realization that the dozens of administrative decision-making bodies had hundreds of members who were isolated from others performing similar functions. There was no established avenue for sharing knowledge and experiences. Since the formation of BCCAT, we have held annual conferences, developed educational programs, issued newsletters, hosted seminars and lunch meetings, and generally brought together members of the administrative decision-making community. In addition, we have participated in the BC government’s reforms of administrative justice (the Administrative Justice Project), responded to government requests for submissions, and been granted intervener status in a case involving the independence of decision-makers. BCCAT has worked closely with sister organizations in other provinces and with the Canadian Council of Administrative Tribunals (CCAT). BCCAT’s work benefits our members, tribunals, and the communities we serve.

BCCAT has developed and established “must have” educational programs for practitioners in the field of administrative justice. Our courses are accredited by the Law Society of BC as educational activities for BC lawyers who must complete and report on their continuing professional development. Our annual conference provides members of the administrative justice community an opportunity to discuss judicial trends, emerging administrative law issues, and new legislation. Our semi-annual newsletter provides our membership with updates on recent activities in the field of administrative justice.

Please visit our website at [www.bccat.net](http://www.bccat.net) for further details about our programs, our committees, and the benefits of BCCAT membership.

#### Caution

The manual’s authors have assumed that users of this manual will exercise their professional judgment regarding the applicability of the material to their decision-making body. For definitive answers, users should refer to the applicable statutes and regulations and relevant case law.

BCCAT publications are offered as an aid to development and maintenance of professional competence, with the understanding that the contributors are not providing legal or other professional advice.



## CHAPTER 1

### INTRODUCTION

This manual is for decision-makers who operate pursuant to the legislative authority in a particular statute and its regulations. It will also be useful for lawyers who advise parties appearing before decision-makers.

There are many types of administrative decision-making bodies in BC. This manual uses the term “decision-making body” to refer to the statutory entity—whether it is known as a tribunal, board, agency, commission, or by some other term. Members of decision-making bodies who operate pursuant to the powers set out in their enabling statute and its regulations are referred to as “decision-makers”. Their decisions may be subject to review, appeal, or reconsideration, and ultimately will always be subject to judicial review. The processes followed by decision-makers must also always be “fair”.

This manual provides a reference for the essential functions of decision-makers and includes guidelines concerning the conduct of decision-makers, the hearing process, evidence in administrative proceedings, witnesses, hearing panels, and decision writing.

The manual deals with general principles. You must also look to the legislation that applies to your particular decision-making body, its policies and guidelines, its history of decision-making, and the specific facts in each matter. Decision-making bodies are flexible, and use an array of processes suited to the matters they decide.

## CHAPTER 2

### ADMINISTRATIVE LAW AND DECISION-MAKERS

This chapter outlines the development of administrative law and explains the meaning of procedural fairness. It deals also with rules and procedures in common law and legislation that govern how administrative decisions are made, and the rights of people affected by those decisions.

#### What is administrative law?

The following quotation provides a useful definition of administrative law:

What is administrative law? It is the law that governs public officials and tribunals who make decisions which affect peoples' interests. Any governmental or quasi-governmental authority that has powers derived directly or indirectly from statute is subject to administrative law requirements. Some obvious examples include immigration and unemployment insurance authorities, parole boards, professional discipline bodies, municipal councils, university committees and utilities regulatory bodies. Administrative law also governs discipline committees of private associations and clubs. The list appears endless. These organizations have in common the power to make rules and decisions that affect people.

Administrative law prescribes the rules by which these authorities are expected to operate and, when these rules are not complied with, provides the complaint procedure and the remedies.<sup>1</sup>

#### The growth of administrative decision-making bodies

Administrative law developed in Canada in the mid-1800s with the federal government regulation of the railway industry. Gradually, the number of administrative structures increased as government regulation extended to various industries and areas of life. Following World War II, with the expansion of population, trade, and commerce came a related expansion of regulatory and adjudicative bodies.

These administrative decision-making bodies were intended to increase the efficiency of the administration of justice for both the state and the individual. They needed to develop and administer policy and resolve disputes between citizens in an expeditious manner. Courts retained the power to review their decisions to ensure that they acted fairly and in accordance with the rule of law.

In this manual, we refer only to administrative decision-making bodies created by statute. Other entities may exist where people have agreed to submit to adjudication but the decision-making body has not been created by statute.

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<sup>1</sup> Sara Blake, *Administrative Law in Canada*, 3rd ed. (Butterworths Canada, 2001), p. 1.

The number of administrative decision-making bodies in British Columbia varies over time, as the executive branch of government chooses to expand or contract the scope of its statutory delegation of authority. For a list of administrative decision-making bodies, see the BC Directory of Administrative Tribunals & Agencies at [www.adminlawbc.ca/tribunals](http://www.adminlawbc.ca/tribunals).

## The rule of law

What does the “rule of law” mean? Simply put, it is the principle that the law governs, and no one is above the law. Laws must be made and enforced in accordance with recognized procedure. In democracies, governments and citizens are governed by, and must act in accordance with, the law. Elected officials are not entitled to act arbitrarily or outside the law. Officers of the law such as judges, lawyers, and the police may not act arbitrarily, or they may have their decisions overturned, be removed from their jobs, disciplined, or even be criminally charged.

## Regulatory branches of government

In addition to decision-making bodies, there are regulatory branches of government that administer policy, programs, and enforcement in areas such as liquor control and licensing, gaming, and residential tenancies. Employees of these offices are also decision-makers as described above, subject to the rule of law, including the rules of procedural fairness.

## Administrative decision-making bodies and government

There are three branches of government: legislative, executive, and judicial. Administrative decision-making bodies are created by the legislature, pursuant to the terms of a statute, but they are not part of the legislature. These bodies are both judicial and executive in their day-to-day operations.

The legislature is comprised of elected officials with the authority to create legislation and pass it into law.

The executive branch is comprised of the cabinet, who are Ministers selected from the legislature. Ministers lead their ministries and the public servants employed by government to carry out the duties delegated by the Minister.

The judiciary is independent from government. The courts of superior jurisdiction in this province are the Supreme Court and the Court of Appeal. They have what is called inherent jurisdiction to see that the rule of law is followed, in regard not only to specific statutes, but also to the common law and overall considerations of fairness. The provincial courts (criminal, family, and small claims) are created by statute, and their judiciaries are appointed by the provincial government. They are accorded the same independence as other courts.

## Independence of decision-making bodies and decision-makers

Independence falls under the general provisions and expectations of the common-law duty of procedural fairness, discussed later. At this point, it is important to understand the concept of independence.

There are two aspects of “judicial independence” which apply to decision-making bodies: (a) impartiality, or freedom from bias, and (b) institutional independence as reflected in the following comments from the Supreme Court of Canada in the *Bell*<sup>2</sup> decision:

The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, *nemo debet esse judex in propria sua causa* [no man may be a judge in his own cause]. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? (See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J., dissenting.)

In this section, we discuss institutional independence. For a detailed discussion of impartiality and bias refer to “The right to an impartial decision-maker”, below.

Institutional independence “is not absence of influence but rather freedom to decide according to one’s own conscience and opinions”.<sup>3</sup>

Most decision-making bodies report to the legislature, and thus the public, through a government ministry. For example, the Property Assessment Appeal Board, which deals with parties who wish to appeal their property assessments, reports to the legislature through the Ministry of Community, Sport and Cultural Development. The responsible Minister and ministry are called the decision-making body’s “host ministry”.

A decision-making body is governed by:

- its enabling legislation (Act and Regulations);
- in BC, the *Administrative Tribunals Act*<sup>4</sup> (the “ATA”), a procedural statute of general application for specified decision-making bodies;
- rules enacted by the decision-making body in accordance with its enabling legislation; and
- the common-law requirements of procedural fairness.

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<sup>2</sup> *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para. 17.

<sup>3</sup> Sara Blake, *Administrative Law in Canada*, 2nd, ed. (Butterworths Canada, 1997), p. 89.

<sup>4</sup> S.B.C. 2004, c. 45.

Administrative law decision-makers are expected to ensure that they are not improperly influenced in their decision-making by other members of the body, the government, or external sources. Both decision-making bodies and individual members must have the independence to decide each case on the basis of the relevant evidence and on its merits. In order to protect independence, there must be safeguards against various institutional pressures, including those resulting from the relationship with a decision-making body's host ministry.

There is ongoing debate about the scope of the institutional independence of decision-making bodies. The degree of institutional independence depends on various factors, including the language of the enabling statute and the adjudicative function of members. However, the independence of individual administrative law decision-makers, as distinct from the institution, must be unfettered.

Many decision-making bodies have a public policy mandate, in addition to their adjudicative mandate, which sets them apart from the judicial branch and from the standard of independence accorded to the courts. In determining which standards of procedural fairness, including independence, are applicable to a specific decision-making body, courts will consider whether the body's main function is closer to adjudication or to implementing government policy. All aspects of the body's structure, as laid out in its enabling statute, must be examined and an attempt made to determine precisely what combination of functions the legislature intended it to serve and what procedural protections are appropriate for a body with those particular functions.<sup>5</sup>

### Differences in processes between decision-making bodies

Decision-making bodies have traditionally been entrusted with public policy mandates. Many have the authority to adjudicate disputes, either between government and the public (individuals, businesses, societies, corporations, etc.) or between individual parties. The courts, on the other hand, are not usually charged with a public policy mandate in the disputes before them, although public policy considerations may be raised.

Decision-making bodies have greater flexibility than the courts. This has led many administrative law practitioners to observe that being a decision-maker can be more demanding than being a judge. For example:

- Courts are bound by rules of evidence; decision-making bodies are not, but they are required to ensure that the evidence before them is relevant and reliable, and that the admission of the evidence accords with principles of procedural fairness.
- Courts are bound by precedent, which means they have to follow the case law set by higher courts. Decision-making bodies are not bound to follow their own prior decisions, but have an interest in maintaining consistency in decision-making. This means decision-makers must be acquainted with former decisions of their members and, if they are departing from the general approach on a particular issue, must indicate why.

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<sup>5</sup> *Bell, supra*, note 2 at para 22.

- Decision-making bodies frequently have ongoing contact with the parties who appear before them and may be involved in regulating an industry. Courts usually see a party only once.
- Administrative law decision-makers are often appointed or hired because they have expertise in a certain area and are expected to bring that expertise to bear in performing their responsibilities. Courts are comprised of legal experts but not usually “substantive issue” experts.

## Understanding your adjudicative mandate

Administrative law decision-makers need to understand fully the legislative context in which they operate. This context prescribes the decision-making body’s jurisdiction and establishes its mandate, powers, and duties.

## Introduction to governing legislation, mandate, powers, and duties

Decision-making bodies are created by statute. The statute will include the power to make regulations. The statute and the regulations are referred to as the decision-making body’s enabling legislation. The enabling statute may establish the purpose or purposes of the particular body. Because a decision-making body is created by statute, it does not have any inherent or equitable powers as the courts do. The decision-making body can do only what the enabling legislation authorizes it to do, including any ancillary powers that are reasonably necessary to fulfill the statutory powers. If applicable, it can also exercise powers granted under the *ATA* (see the discussion below).

In many modern statutes the decision-making body has the statutory authority to establish its own rules and procedures. It is important to go to a particular body’s website to discover its policy, procedures, and statutory interpretations.

In BC, the *ATA* provides a procedural framework for the work of certain decision-making bodies. The statute does not automatically apply to all such bodies. The *ATA* provides a menu of optional powers that may or may not be given to a particular body in its enabling statute. It is essential to know which provisions of the *ATA*, if any, apply to your decision-making entity in order to understand fully the scope of your authority and to understand what is expected of you as a decision-maker.

The main provisions of the *ATA* that affect the conduct of hearings are ss. 1, 16, 17, and 30 to 56. Provisions that you may need to refer to include:

- definitions (s. 1);
- consent orders, withdrawals, and settlements (ss. 16 and 17);
- your duties (s. 30);
- authority of the decision-making body to compel witnesses and order disclosure of documents or other things (s. 34);
- the form of hearings (s. 36);

- granting or refusing adjournments (s. 39);
- admissibility of evidence (s. 40);
- hearings are open to the public; when you might receive information in confidence (ss. 41 and 42);
- maintenance of order at hearings; dealing with uncooperative persons (ss. 48 and 49);
- some requirements for your decisions (ss. 50 and 51); and
- immunity protection for the decision-making body and its members (s. 56).

## Jurisdiction

In addition to setting out the decision-making body's mandate, the enabling legislation establishes its jurisdiction. As a decision-maker, your authority is governed by the "four corners of the statute" and you are bound to follow the rule of law. As discussed in the preceding section, your powers are limited to those conferred by the statute and any ancillary powers necessary to fulfill your mandate. If you act within those powers, you remain within your jurisdiction. If you exceed those powers, you may be found to be acting "without jurisdiction" or "outside your jurisdiction".

The enabling legislation limits jurisdiction. If there is a conflict between a common-law principle and a provision or directive in a statute, the statute always prevails. Unlike the superior courts, decision-making bodies do not have inherent jurisdiction. Therefore, if human rights or constitutional issues arise, you must look to your enabling statute to determine whether you have the authority to decide them or if the parties must bring those issues to the court.

Once a decision-making body has completed a case, for example, by conducting a hearing and issuing a decision, its jurisdiction is ended. The body is said to have exhausted its statutory authority (also referred to as being *functus officio*). A body may have the authority to review or reconsider a decision (see chapter 10). On occasion, one of the participants in a completed hearing may apply to have all or a portion of the case re-heard. This raises the concern as to whether the case has already been determined (*res judicata*). If the issue the participant wants to have re-heard has already been decided, the decision-making body will not have jurisdiction to re-hear it. This is also known as issue estoppel. The tests, or preconditions, for issue estoppel are:

- that the same question has been decided;
- that the judicial decision which is said to create the estoppel was final;
- that the parties to the judicial decision are the same, or essentially the same, as the parties to the proceedings in which the estoppel is raised.<sup>6</sup>

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<sup>6</sup> See *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 27.

## Constitutional questions and the Charter of Rights and Freedoms

A “constitutional question” is one that challenges the validity of a statute or regulation or that requests a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the “Charter”).<sup>7</sup> In BC, the *Constitutional Question Act* requires the Attorney General to be notified when constitutional questions are raised.<sup>8</sup>

Sections 44 and 45 of the *ATA* are optional provisions that may give administrative decision-making bodies authority over constitutional questions. For most decision-making bodies, s. 44 applies and the body does not have jurisdiction over constitutional questions. If s. 45 applies, the decision-making body will have authority over some constitutional questions but not those relating to the *Charter*. For example, s. 45 applies to the Employment Standards Tribunal, Farm Industry Review Board, and Human Rights Tribunal. Check your enabling statute for the application of this *ATA* provision.

## Human Rights Code

Sections 46.1, 46.2, and 46.3 of the *ATA* are also optional provisions that determine a decision-making body’s authority to decide human rights issues. Section 46.3 which provides that the decision-making body does not have jurisdiction to determine issues under the *Human Rights Code*, R.S.B.C. 1996, c. 210, (the “Code”) applies to most bodies. The other sections permit specified bodies to decline jurisdiction under the Code and set out procedural and substantive requirements to do so. Check your enabling legislation to see which of these sections, if any, applies to your particular decision-making body.

We strongly recommend that you contact your chair or the decision-making body’s legal counsel whenever constitutional or human rights issues are raised.

## Immunity for “good faith” acts

Section 56 of the *ATA* grants immunity protection to decision-makers for decisions made in adjudication or dispute resolution processes. The protection applies to the “performance or intended performance of any duty” or the “exercise or intended exercise of any power”, provided the decision-maker acted in good faith.

## Protection from disclosure in dispute resolution processes

Chapter 4 discusses pre-hearing procedures, including dispute resolution processes, and chapter 6 deals with admissibility of evidence; both chapters touch on disclosure. Under ss. 29 and 40(5) of the *ATA*, a decision-maker is protected from being compelled to disclose documents or statements created for the purpose of settlement negotiations, or notes or records made while conducting a dispute resolution process.

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<sup>7</sup> *ATA*, ss. 1, 43, 44, 45, and 46.

<sup>8</sup> *Constitutional Question Act*, R.S.B.C. 1996, c. 68, ss. 3 and 8.



## Appointments to decision-making bodies

Since decision-making bodies are creatures of statute, it follows that there will be a Cabinet Minister, called the “host Minister”, responsible for each body. The enabling statute provides for the selection of a chair, members, and staff for the decision-making body office. Chairs and regulatory branch directors are usually appointed by an order in council (“OIC”)—an order approved by cabinet and signed by the Premier, the Minister, or both. Administrative law decision-makers may be appointed by OIC or they may be hired as part-time contractors or full-time staff members. Some decision-makers are appointed by ministerial order, such as those appointed to the Employment Standards Tribunal. Workers’ Compensation Appeal Tribunal appointments are made by the chair, and other chairs have the power under s. 6 of the ATA to appoint temporary members.

Sections 2 to 8 of the ATA that deal with appointments apply to most decision-making bodies in BC. Appointments for chairs and members are subject to a merit-based process. A chair may be appointed for a term of three to five years, with renewable terms of up to five years. Members may be appointed for an initial term of two to four years, with renewable terms of up to five years. Section 8 provides the authority to terminate the appointment of a chair, vice chair, or member, for cause.

The chairs of most decision-making bodies report to the host Minister; however, in practice, chairs often report to the Deputy Minister. Vice-chairs and members report to the chair or director. Although other staff may be responsible for day-to-day administration, the chair has ultimate responsibility for selecting hearing panels, approving invoices, overseeing professional development and training, and completing performance evaluations.

A decision-making body’s staffing requirements will depend on its mandate. The organization may have a registrar to oversee the caseload. The registrar’s functions may include active case management (see “Pre-hearing procedures” in chapter 4), arranging hearing dates, liaising with decision-makers for hearing availability, ensuring delivery of decisions, and managing staff.

## Duties of decision-makers

Most decision-making bodies will expect their decision-makers to:

- attend orientation sessions that introduce them to the enabling legislation, case law, practices, administrative requirements, etc.;
- engage in continuing professional development and training in order to stay current with the work of the board and decisions of other members and the courts;
- ensure familiarity with the decision-making body’s policies as they evolve;
- ensure familiarity with the requirements of the *Freedom of Information and Protection of Privacy Act*, and the policies adopted by the decision-making body in compliance with that Act;
- understand the role of the office of the Ombudsperson and how its functions apply to the decision-making body;
- develop skills in hearing conduct and decision writing;

- consider issues relating to conflict of interest and bias;
- review the decision-making body's Code of Conduct and Ethics requirements.
- participate in meetings of the body;
- perform their duties in a professional and respectful manner;
- treat the chair, other members, staff and participants of the decision-making body with respect;
- not bring the decision-making body's reputation into disrepute; and
- participate in annual performance evaluations.

### The “models” or “styles” of administrative decision-making

There are three main models of administrative decision-making. Some decision-makers have an adversarial model, in that they decide a matter between two parties. Examples include the Labour Relations Board and the Employment Standards Branch and Tribunal. Others have regulatory functions and deal with the actions of citizens engaged in activities regulated under a statute, such as liquor control and licensing. There are also decision-makers with an inquisitorial model, which means that they will investigate a matter and then decide it.

At one time the courts had a purely adversarial model where they depended on expert counsel to advise them on the law as they presented their case. With the increase in the number of self-represented litigants in the courts, especially in family and wills and estate matters, the courts have had to become more inquisitorial in nature. This is also true of many decision-makers. Without appearing to be an advocate for either side they must elicit sufficient evidence to make the decisions their enabling legislation empowers them to make.

### Decision-making body rules of practice and procedure

Subject to the provisions of a particular body's enabling statute, s. 11(1) of the ATA provides a general power for a decision-making body to control its own processes and to make rules for practice and procedure “to facilitate the just and timely resolution of the matters before it”.

Section 11(2) contains a comprehensive list of the types of rules decision-making bodies may make. Section 11 applies to most bodies. They may make rules respecting the following matters, as well as many others:

- pre-hearing conferences;
- dispute resolution processes;
- disclosure of evidence;
- procedures for preliminary or interim matters;
- adjournments;
- exclusion of witnesses from proceedings; and
- the effect of a party's non-compliance with the decision-making body's rules.

Sections 12 and 13 of the ATA provide for practice directives. Both sections have been incorporated into the enabling legislation of many decision-making bodies. Section 12 requires the body to issue practice directives indicating the usual length of time for completing an application, the procedural steps within an application, and the expected length of time between the completion of a hearing and the release of a final decision and reasons. Section 13 permits the decision-making body to issue practice directives. These practice directives are non-binding, but the fact that they are available to the public provides a strong incentive to meet the expectations set out in them.

## Procedural fairness

### **What is fair is relative and is defined by the nature of the mandate being performed and the individual circumstances involved.**

*Macauley & Sprague, Hearings Before Administrative Tribunals*

(Thomson Canada, 1995), 12-5

Procedural fairness, which used to be referred to as natural justice, refers to the principles that govern the processes to be followed by administrative decision-makers. These principles do not apply to actions of the legislative branch of government but do apply to the executive and judicial branches. They have been described as “fair play in action”.<sup>9</sup> There are four fundamental principles:

- (1) a person has the right to be heard before a decision affecting their interests is made;
- (2) a person has the right to an impartial decision-maker;
- (3) the person who hears the issue must decide (see chapter 8); and
- (4) the decision-maker must provide reasons for the decision (see chapter 8).

Failure to adhere to these principles of procedural fairness might result in the court sending your decision back. Breaching these rights is tantamount to acting outside your jurisdiction, similar to failing to act within the bounds of the enabling legislation (see “Jurisdiction”, above).

There is a broad spectrum of decision-making within government that affects people’s interests and there are standards of procedural fairness that apply across the spectrum. At one end of the spectrum, procedural fairness may dictate that the decision-maker notify a person that a decision might affect their interests, and give the person a chance to comment or make submissions. At the other end are the decisions that require the decision-maker to hold a hearing to provide the person with an opportunity to present evidence and test or challenge the evidence that might be adverse to his or her interests. In any particular case, the requirements of procedural fairness will depend on the “circumstances of the case, the nature of the inquiry,

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<sup>9</sup> *Ridge v. Baldwin*, [1962] 1 All E.R. 834 at 850 (H.L.).

the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth ...”<sup>10</sup>

The discussion that follows is particularly concerned with these principles as they apply to adjudications in a quasi-judicial decision-making body—that is, at the most judicial end of the administrative law spectrum.

## The right to be heard and respond

The purpose of a hearing is to provide the decision-maker with sufficient information to make the decision in accordance with the mandate of the decision-making body. Many people assume that a “hearing” entails court-like processes with parties and witnesses attending in person, giving testimony, and being cross-examined. However, that is not always the case. Essentially, a “hearing” is any kind of proceeding allowing communication between the parties and the decision-maker. The form it takes may be directed by legislation but, if not, can take any form appropriate to the nature of the case.

Hearings take a variety of forms—electronic, in-person, by written submissions, or a combination. There is no right to an in-person hearing unless specifically required by the enabling legislation. Section 36 of the ATA permits “any combination of written, electronic or oral hearings”. The nature of the hearing will depend on the mandate of the decision-making body and will usually be defined in the body’s rules of practice and procedure, if any. One of the goals in selecting the process is to find the appropriate balance between the rights of the individuals and the interests and efficiencies of the body in meeting its public duties.

In choosing a hearing method, the primary objective is to ensure that the parties have a fair opportunity to be heard, which includes:

- knowing the case against them;
- the right to challenge and test evidence that is prejudicial to their interests; and
- the right to present their own evidence and submissions.

The form of hearing will flow from the nature of the decision-making body and its powers, the nature of the interests at issue, and the severity of the consequences to the parties. In each case, the decision-maker may receive submissions from the parties on the most appropriate form of hearing and make a determination on this issue. The greater the impact on the parties, the more extensive the procedural rights will be. For example, a professional regulatory body that has the power to remove a licence to practise one’s profession is required to give a party the full scope of procedural rights.

In order for these rights to be effective, the decision-making body must ensure that the parties have the opportunity to be present throughout the whole hearing, whether physically or electronically, and have access to all the written materials. Without that, a party will not have a full opportunity to know and challenge the case against them, which, in turn, will affect their ability to present sufficient evidence and submissions.

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<sup>10</sup> *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105 at 1113, 1 citing *Russel v. Duke of Norfolk*, [1949] 1 All E.R. 109 at 118.

In order to present their case, parties may need to compel witnesses to attend, give testimony, or produce documents. The power to issue orders to attend and otherwise compel the attendance of a person or the production of documents will be found in either the enabling statute or s. 34 of the ATA. Portions of this section have been applied to many decision-making bodies, so it is important to determine the extent of the power granted through your enabling statute.

## Impact of the Charter of Rights and Freedoms

The *Charter* can apply in a variety of ways. The common-law rule is that an administrative decision-making body has the authority to apply the *Charter* unless its enabling statute states otherwise, or if s. 44 or 45 of the ATA applies.<sup>11</sup>

However, even if the administrative body lacks the authority to apply the *Charter*, the decision-making body's own actions can be subject to a *Charter* challenge. This most commonly arises in claims that a delay in deciding an application has violated s. 7 of the *Charter*—the right to life, liberty, and security of the person. The Supreme Court of Canada has determined that delay can engage s. 7 even in non-penal administrative decision-making, because s. 7 includes freedom from state interference with psychological integrity, and delay may cause psychological harm.<sup>12</sup> However, for delay to cause interference with psychological integrity, the delay must be both state-imposed and serious.

*Charter* law, as applied to administrative decision-making bodies is complex; if a party raises issues involving the *Charter*, consult your chair or the body's legal counsel.

## The right to be represented

The right to counsel or the right to be represented in an administrative proceeding arises from the requirement that parties to the proceeding have adequate opportunity to present their case or make their submissions. This right may involve a party's right to have counsel at an oral hearing, or to provide evidence or submissions to a decision-maker. Section 32 of the ATA contains a similar provision, and may apply to your decision-making body. It is not an absolute right and will depend on the provisions of the enabling statute, the importance of the matter, and possible prejudice to parties if the retention of counsel results in a delay. Some legislation may limit a party's right to representation by counsel, such as s. 20 of the *Civil Resolution Tribunal Act* (expected to come into force in 2016-2017).

As with many matters in administrative law, whether a person should be allowed a delay to seek representation depends on the context of the decision-making. Factors to consider are the seriousness of the consequences of the matter, the formality of the proceedings, the complexity of the issues, and the familiarity of the parties with the proceedings. If a party chooses counsel who will not be available for an extended period of time, the decision-maker may ask them to select alternate counsel.

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<sup>11</sup> *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54.

<sup>12</sup> *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

Some statutes and regulations grant the right to counsel. The enabling statute should always be checked for these provisions. The cost of counsel is usually borne by the person to be represented, unless a statute provides that public funding may be available. There is no obligation for a decision-maker to advise a party to a matter that they may be represented by counsel.

Section 7 of the *Charter* does not create an absolute right to counsel, but in some circumstances representation may be important, such as when a person is detained. If the matter is serious, and the severity of the consequences is explained to the party, the decision-maker may advise them of their right to be represented and note if they decline to be represented. This inquiry may prevent having a decision set aside for failure of the party to be represented.

## Who has a right to be heard? Parties and interveners

### Parties

The parties have a right to be heard, as their interests will be directly affected by the decision. In administrative hearings, there is frequently a “public” interest that might affect members of the public. The decision-making body may have to determine early in the process who is entitled to standing as a party. The factors for determining who is entitled to standing are interest and relevance—whether the person’s interests will be affected and whether the person has relevant information, evidence, or submissions from which the decision-making body’s deliberations would benefit. Generally, the threshold is fairly low, although it is necessary to balance other factors such as the requirements for an efficient and expeditious hearing. It is important that party status be determined as early in the process as possible to avoid duplication of processes and delay. The rights that accompany party status may vary across decision-making bodies, but they usually signify the right to full participation including the right of review or appeal.

The rights of procedural fairness apply to all parties although the content may vary depending on the nature of the interest at stake and the severity of the consequences, as discussed above.

### Interveners

Sometimes people or organizations that do not qualify as parties want an opportunity for their expertise and views to be heard and they apply for intervener status. Section 33 of the *ATA* provides the authority to admit interveners if the decision-making body is satisfied that the interveners can make a valuable contribution or bring a valuable perspective to the application and that the potential benefits of intervention outweigh any prejudice to the parties. Section 33 authorizes the decision-making body to limit an intervener’s participation to one or more issues raised, to written submissions, to time limited oral submissions and in relation to cross-examining witnesses and leading evidence. If the enabling legislation does not specify the power to grant standing to interveners, and if s. 33 of the *ATA* does not apply to your organization, your authority to permit interveners and limit their participation is implicit in your power to control the hearing process.

Decision-making bodies should consider developing rules or guidelines setting out criteria for granting party status and intervener status.

## The right to notice

Participants in an administrative process have a right to notice of a hearing. Notice includes details of the time, date, and place, and sufficient information about the nature of the claim for participants to prepare their case. Participants must be given enough time to prepare, including time to contact witnesses and obtain documents. The decision-making body should consult with the parties to ensure that the necessary people are able to attend.

Providing proper notice ensures that the participants' procedural fairness rights are met and also that the decision-making body has the benefit of the information and submissions it needs to fulfill its mandate.

The method of serving notice may be addressed in the enabling legislation or the body's rules. Sections 19, 20, and 21 of the *ATA* address service of notices and alternative service methods if the usual method is impracticable. The usual way is by ordinary mail, electronic transmission, or another method that provides proof of service.

## The right to an impartial decision-maker

The second principle of procedural fairness is that parties have the right to an impartial decision-maker. Bias, or lack of impartiality, indicates a predisposition to decide the case without taking into account all of the evidence or other factors one is required to consider or apply. Bias is a state of mind or attitude that might apply to the case and the issues or to the parties.

Bias is a basis for challenging a decision-maker's ability to hear a case; if there is reasonable apprehension of bias the decision-maker should withdraw. Most discussions about bias are directed to what amounts to a reasonable apprehension of bias—would a reasonable person apprised of all the relevant facts and viewing the matter realistically and practically conclude that, more likely than not, the person would not be able to decide fairly?<sup>13</sup>

If you, as an administrative decision-maker, determine that something might affect your ability to be neutral and impartial, you should decline to accept the case or, if already assigned, ask to be replaced on the panel. You should discuss these issues with your chair or with your organization's legal counsel.

## Common allegations of bias

An allegation of bias arises most commonly in the following circumstances:

### Financial interest

As a general rule, if a decision-maker or his or her family member has a financial interest in the outcome of a case, that interest will give rise to a reasonable apprehension of bias. If the financial interest is indirect or uncertain or insignificant, it is possible that a court would conclude that the interest is not strong enough to substantiate a claim of bias.<sup>14</sup> In cases where

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<sup>13</sup> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 111.

<sup>14</sup> *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58.

a financial interest may exist, contact your chair. Sometimes insignificant sums can still evidence a connection to a party, which might give rise to a reasonable apprehension of bias.

## Conduct

Numerous types of conduct have given rise to findings of a reasonable apprehension of bias.<sup>15</sup> These include:

- showing hostility or incredulity during a hearing;
- improper questioning of witnesses;
- being “chummy” with a party or counsel, or offering one party an opportunity not given to others;
- having staff counsel who presented the case remain with the panel after the hearing has ended; and
- having the person who investigated and decided to prosecute the matter also select the hearing panel.

If the decision-making body is operating within the scope of its mandate and giving a fair hearing to both parties, there is considerable latitude in questioning parties and witnesses.

## Previously formed views

Decision-making bodies perform functions that may include, for example, investigation and regulation that will necessarily involve some views formed prior to hearing from the Initiating party. A decision-maker having previously formed views or predeterminations will not necessarily give rise to a reasonable apprehension of bias, unless he or she has a “closed mind” that excludes the possibility of other options being considered.<sup>16</sup> A decision-maker must approach a matter with an open mind, not an empty mind. Many administrative decision-making bodies rely on a limited pool of part-time experts drawn from the stakeholder communities who appear before them. Prior exposure to, or involvement in, these stakeholder communities does not, without more, constitute bias.<sup>17</sup>

## Policies and guidelines

A decision-making body may have policies or guidelines that could indicate a bias. To overcome any apprehension of bias, the decision-making body should have policies or guidelines that are not binding in all cases, are open to a consideration of options, and that ensure each case is decided on its merits.

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<sup>15</sup> See Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals* (Thomson Carswell, 1995), chapter 39.

<sup>16</sup> *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

<sup>17</sup> *British Columbia (Forests, Lands and Natural Resource Operations) v. British Columbia (Forest Appeals Commission)*, 2014 BCSC 2192, affirmed 2016 BCCA 80.



## Personal or professional association with a participant

Personal or professional associations with a participant, whether past or present, may give rise to a reasonable apprehension of bias. The more recent or close the relationship, the greater the chance that this concern will arise. Past associations might not give rise to a reasonable apprehension of bias if sufficient time has passed or the connection was remote.

If you have had previous involvement in a case that comes before you, it is likely that there will be a reasonable apprehension of bias. It is fairly common for decision-makers who are lawyers to find that their previous or current firm acts for a participant. Someone in your firm currently acting for one of the parties or representing an opposing party in your hearing is probably sufficient cause for a reasonable apprehension of bias. In that situation, it would be prudent to withdraw from the panel. However, if the association was in the past and you have reason to believe that it will have no effect on your ability to be neutral and impartial, discuss the situation with the chair or legal counsel. If you intend to continue with the case, you must disclose the association to the parties and give them an opportunity to make submissions. If they agree that you should continue, it will be difficult for them to later raise bias on that basis. Be sensitive to the fact that self-represented parties may not believe they have been given a fair hearing if you have had a past association with the other party, regardless of whether your circumstances meet the legal test for bias.

In *Practice and Procedure Before Administrative Tribunals*, the authors provide case citations for a number of situations in which a reasonable apprehension of bias was found due to a connection with one of the participants,<sup>18</sup> including:

- an employee hearing an appeal from the decision of a superior;
- hearing an inquiry involving a competitor where the result could be serious harm to its business;
- a decision-maker being a member of the organization that lodged the complaint;
- a decision-maker acting as investigator, prosecutor, and judge; and
- a Minister appearing as representative of a party before an agency whose members were appointed by a body on which the Minister served.

## Repeat parties before the decision-making body

In some decision-making bodies the same parties appear frequently. The fact that you have adjudicated cases with one party in many hearings does not raise a reasonable apprehension of bias. However, if you have made findings against a person's credibility in the past, consider whether you are able to be impartial in future cases and whether the past cases might present a reasonable apprehension of bias. Be careful to avoid being overly familiar with participants who appear before you on a regular basis.

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<sup>18</sup> Macaulay & Sprague, *supra*, note 15, chapter 39.

## Dealing with an allegation of reasonable apprehension of bias

When confronted with a reasonable apprehension of bias issue, you might want to discuss the situation with your panel colleagues, your chair, or legal counsel. However, the decision whether to continue on the hearing panel rests with you, based on your assessment of the possibility of a reasonable apprehension of bias.<sup>19</sup>

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<sup>19</sup> See *Re Communication, Energy and Paperworkers Union of Canada. Local 60N*, 2008 NLCA 4. See also David Mullan and Martha Boyle, “Raising and Dealing with Issues of Bias and Disclosure” (2005), 18 Can. J. Admin. L. & Prac. 37; and Geoffrey Lester, “Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure” (2001), 24(3) Adv. Q. 326.

## CHAPTER 3

### INTERPRETING ENABLING LEGISLATION— STATUTES AND REGULATIONS

The legislative arm of government speaks through the laws it enacts. Actions or statements that are inconsistent with these laws are said to be made without jurisdiction. The executive arm of government, Ministers and their deputies, and the various ministries and branches of government carry out the intent of government expressed in legislation.

Decision-makers must interpret their enabling statute (Act and Regulations), and on occasion the provisions of related statutes, when making decisions. Statutes can be clear and capable of only one interpretation, capable of more than one interpretation, or unclear and vague with regard to a specific provision or application. Statutes can also be in conflict with constitutional principles set out in the *Constitution Act, 1982*<sup>20</sup> which contains the *Charter*. Application of the Constitution and the *Charter* is usually determined by the courts, although some aspects of these issues may be considered by administrative decision-makers.

Parties often dispute the meaning of statutory provisions. The rules of statutory interpretation have developed to assist decision-makers in interpreting statutes, including their enabling legislation. In Canada, the “modern” rule of statutory interpretation is set out as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>21</sup>

This approach to statutory interpretation was first introduced almost 20 years ago by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*<sup>22</sup> It has been adopted and applied in many cases since then. You may sometimes hear counsel refer to the “plain meaning” or “golden” rule of statutory interpretation, but these are no longer accepted approaches.

When you want to determine if a provision of your enabling legislation applies to a certain set of facts, the following questions may be helpful:

- What is the ordinary meaning of the text?
- What is the scheme of the Act?
- What is the object of the Act?
- What did the legislature intend?
- What are the results of adopting a particular interpretation? Are those consequences reasonable or absurd?

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<sup>20</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>21</sup> Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1983), p. 87.

<sup>22</sup> [1998] 1 S.C.R. 27 at para. 21.

The interpretation of statutes has evolved. The Supreme Court of Canada has recognized that decision-makers have specialized expertise, and the court gives considerable deference to decision-makers who are interpreting their home or enabling statute.<sup>23</sup>

A decision-maker must carry out the intention of the legislature, as expressed in their statute. Sometimes this is difficult to determine. When interpretation is difficult, decision-makers, and in some cases courts, must balance a number of facts and considerations to determine the best interpretation in the circumstances. This will be a difficult exercise if the legislation is capable of two or more plausible interpretations, or if time and circumstance have created issues not contemplated by the legislation.

## Interpretation Act

The *Interpretation Act*<sup>24</sup> provides broad assistance for interpreting many general parts of statutes. Section 8 states that;

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The *Interpretation Act* also provides assistance concerning broad issues of statutory interpretation such as time limits, service, meaning of headings in statutes, and meaning of common words and phrases.

## Changes to a statute

Provisions of statutes that create penalties or adverse consequences to citizens must be clearly set out. Penalty clauses should be interpreted narrowly. If a statute and its regulation appear to be in conflict over such a provision, the statute is paramount. Those whose activities are regulated by a statute must be able to clearly determine the consequences the statute creates for them.

## Legislation is meant to be comprehensive

Most often, legislation is meant to be a comprehensive scheme covering the subject matter to which it relates. This means that common-law concepts are not usually brought in to supplement a statute. Only where a statute clearly fails to cover an issue may reference be made to the common law.

On occasion, there will be no reasonable meaning that can be given to a provision relating to a matter before the decision-maker. Decision-makers cannot rewrite a statute. They must give the provision the most reasonable interpretation available in the context of the statute and the materials they have before them.

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<sup>23</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61.

<sup>24</sup> R.S.B.C. 1996, c. 238.

## Charter values

Even if your organization lacks the jurisdiction to decide *Charter* issues, you still have an obligation to consider *Charter* values in at least two circumstances. The first is where the provision of a statute is ambiguous, and the modern rule of statutory interpretation, discussed earlier, does not assist in resolving the ambiguity. In that case you must interpret the provision in a manner than is consistent with *Charter* values.<sup>25</sup> There is no requirement to consider *Charter* values if legislation is unambiguous.<sup>26</sup> Second, where you have the authority to make a discretionary decision, your exercise of discretion must also be consistent with *Charter* values.<sup>27</sup> The *Charter* values doctrine is an evolving and complex area of administrative law, and you should consider consulting with your decision-making body's legal counsel prior to applying it.

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<sup>25</sup> *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42.

<sup>26</sup> *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

<sup>27</sup> *Doré v. Barreau du Québec*, 2012 SCC 12.

## CHAPTER 4

### PRE-HEARING PROCEDURES

Most administrative decision-making bodies have rules of practice and procedure that include pre-hearing procedures,<sup>28</sup> most often called case management procedures. Frequently, these are administered by the body's registrar or other staff and may be completed before decision-makers are assigned to the case. Sometimes you may be called on to conduct pre-hearing conferences or other processes with the parties. Regardless of the practice in your particular decision-making body, it is important that you understand the purpose and nature of these procedures.

Prior to the commencement of a hearing, there is preparatory work undertaken by the parties and the decision-making body. The focus of this work is usually as follows:

- identifying issues in dispute;
- attempting to settle some of the issues, thus reducing the time required in hearing;
- determining which witnesses will give evidence or what documentary evidence will be submitted; and
- estimating the length of time required for the hearing.

From the decision-making body's standpoint, issues and concerns may include:

- identifying the proper parties and their addresses for service;
- ensuring that parties receive and understand information about the processes before the body;
- ensuring that parties receive appropriate notice of proceedings; and
- identifying who acts for corporate parties.

A party may object to the form of hearing (written or oral). If a party objects to the form of hearing, the decision-making body should treat the objection as a preliminary matter and hear from the parties (see the section on pre-hearing applications). Of particular concern will be whether the objecting party raises issues of substantial prejudice that could flow from being denied an in-person hearing or a written hearing, discussed below. As with all applications, the parties' right to procedural fairness must be balanced with providing an accessible, proportional, and cost-effective process.

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<sup>28</sup> Pre-hearing conferences are provided for in s. 11(2)(a) of the *ATA*.

## Pre-hearing conference

Pre-hearing procedures typically commence with a pre-hearing conference in person or by teleconference, conducted by a representative of the decision-making body. The agenda for a pre-hearing conference may include discussion of the following:

- clarifying and narrowing the issues;
- identifying the evidence, including requests for disclosure, and witnesses to be called;
- explaining the procedures leading to the hearing and the timing of those procedures;
- determining witness availability;
- agreeing to the length of time required for hearing;
- setting date(s) for the hearing;
- explaining the hearing process;
- identifying any assistance the parties and witnesses might require (for example, an interpreter); and
- answering any questions about the process.

Depending on the decision-making body's rules, the person conducting the pre-hearing conference may make orders respecting any of the matters above.

One of the purposes of case management is to set a timeline for the parties to ensure timely disclosure of evidence and settlement discussions. Usually the timeline culminates in the hearing date. A common example of a timeline is:

- a pre-hearing conference;
- disclosure of documents;
- a list of witnesses;
- delivery of expert reports;
- a facilitated dispute resolution process; and
- a hearing, if necessary.

The timing of these steps may be determined, in part, by the applicable rules of practice and procedure. For example, some rules might provide that disclosure of evidence or delivery of expert reports, if any, must occur not less than 60 days before the date set for hearing. Then the specific timing is worked out in the initial pre-hearing conference in discussions between the parties and the decision-making body, following the rules. The rules of most decision-making bodies are usually flexible enough to be tailored to the complexity of the case.

## Facilitated settlement processes

Facilitated settlement processes (see s. 28 of the ATA) involve a variety of techniques that typically are confidential and without prejudice to any subsequent legal proceedings. Their purpose is to facilitate the settlement of one or more issues in a dispute without a hearing. The rules of decision-making bodies frequently include provisions for settlement processes. Some of the commonly used processes include:

- negotiation;
- mediation;
- mediation/arbitration (med/arb);
- conciliation;
- facilitation;
- settlement conference;
- assessment/neutral evaluation; and
- online dispute resolution.

Mediation is a process in which a neutral person with no decision-making power helps people negotiate to settle a dispute. With mediation, disagreements can often be resolved more quickly and in a less adversarial manner than in the court system. Mediation is used to resolve many kinds of legal disputes as well as community issues.

Conciliation is similar to mediation but often includes having the impartial person shuttle between people who are not able or not willing to meet with each other.

Facilitation is a process where a facilitator skilled in communication techniques assists others to communicate effectively thus moving discussions and negotiations towards a successful outcome.

A settlement conference is similar to mediation. The settlement conference is usually facilitated by a decision-maker appointed by the chair, with the objective of settling some or all of the issues in dispute, considering ways of expediting the resolution of the case, and addressing procedural issues for the pre-hearing and hearing.

An assessment/neutral evaluation is a process where a neutral person with expertise in a specific area provides an assessment or opinion of the merits of an issue in dispute.



## Online dispute resolution (ODR)

Online dispute resolution (ODR) uses technology to help resolve disputes, often employing a variety of methods, including negotiation, mediation, and arbitration. One of the benefits of ODR is that it gives parties greater flexibility over how, when, and where they resolve their disputes. In BC there are a number of administrative decision-making bodies using ODR, including the Civil Resolution Tribunal, the Property Assessment Appeal Board, and the British Columbia Utilities Commission. Various provisions of the ATA provide administrative decision-making bodies with the authority to use ODR processes, including serving documents electronically (s. 19) and conducting electronic hearings (s. 36).

Dispute resolution processes may be employed at any time before the decision has been rendered.

## Decision-maker's preparation for hearing

Administrative decision-makers must adequately prepare for a hearing by familiarizing themselves with the issues and materials. Preparation will allow you to identify anything missed in the pre-hearing process, including:

- the need for an interpreter;
- evidentiary gaps;
- security issues;
- mental health issues; and
- possible conflicts or issues of bias.

If you identify any issues or concerns about either conflict of interest or bias, raise this with your chair, or the body's legal counsel or registrar for assistance in determining the appropriate course of action.

The amount of material provided to decision-makers in advance of a hearing, and the time within which you receive it, varies among entities. Be aware of the approximate amount of time needed to prepare, and budget your time accordingly. Failure to prepare adequately can result in a lack of understanding of the nature of the case, incorrect assumptions about the parties' positions, or a misunderstanding of the importance of evidence. That, in turn, can result in a decision that fails to do justice to the issues the parties came before you to have resolved.

When preparing for a hearing, review the material provided by the parties; however, do not go beyond the scope of these materials and undertake your own research into the substantive issues, unless the enabling statute indicates otherwise. Each administrative law matter turns on its own evidence.

## CHAPTER 5

### CONDUCT OF THE HEARING

#### Introduction to hearings

In this chapter, we refer to any hearings conducted verbally as oral hearings, whether they are conducted in-person, over the telephone, or through a video-conference. Similarly, where the parties provide their submissions in writing, whether on paper or electronically, it is referred to as a written hearing.

There is no automatic right to an oral hearing under the common law. Some decision-making bodies hold written hearings only, while many others hold a mix of written and oral hearings.

As masters of their own process, decision-makers usually have the discretion to decide the form of the hearing. Section 36 of the *ATA* permits a body to hold any combination of written, electronic, or oral hearings. Decision-making bodies make their own rules of practice and procedure. They may hear from represented or unrepresented parties. The same parties might appear on a regular basis while others appear only once and are not familiar with their procedures. Some hearings are always recorded, and some are seldom or never recorded. Hearings may be conducted by written submissions or may be oral and heard by one or more decision-makers, usually called a panel. If the panel has two or more decision-makers, one will usually be appointed as a chair.<sup>29</sup>

#### Role of decision-makers

Depending on the enabling statute, a hearing may be conducted by one or more persons. If there are two or more, the panel chair is primarily responsible for the conduct of the hearing, whether oral or written. The panel chair introduces the proceedings, as set out below, sets procedure, maintains order, ensures exhibits are properly admitted, consults with panel members on any issues that have to be decided during the course of the hearing, delivers the oral decisions, if any, and ensures that the hearing is conducted in a fair, efficient, and timely fashion.

All decision-makers must pay close attention to the evidence. Keep a record of the evidence and issues to discuss with other panel members and make notes as the evidence is presented in order to recall the evidence after the hearing.<sup>30</sup> If you develop your own system of identifying evidence on particular issues you can return to it easily. Identifying evidence is key, as it forms part of the record needed when making the final decision. For example, if a witness is testifying to an event that another witness has already testified to and the evidence is contradictory, you may need your notes in order to further question the witness. Or, a witness may provide

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<sup>29</sup> See s. 26 of the *ATA* or your governing statute.

<sup>30</sup> Section 61 of the *ATA* protects hearing notes and draft decisions from disclosure. This section *does not apply* to other internal communications produced outside the hearing process, such as communications between the tribunal staff and adjudicators prior to the hearing.

evidence that requires further clarification because you have not fully understood the evidence or you are not sure what the witness intended to convey.

## Oral hearings

### The hearing room

When setting up a hearing room, there are some considerations:

- the number of parties or participants, and expected observers;
- the degree of formality of the hearing structure;
- whether the parties are usually represented by counsel;
- whether the proceedings are recorded; and
- whether there is adequate safety and security (for example, safety buzzer, two doors).

We recommend that decision-makers carry cellular telephones for emergencies. There is a more detailed discussion of safety issues later in this chapter under the heading “Security at hearings”. Some other factors to consider include:

- party separation and privacy – each party and the panel should have their own space with some distance from the others;
- break-out rooms for consultations and private conversations;
- witness separation, and spaces outside the hearing room for witnesses. Some witnesses, for example, child witnesses, should perhaps have a different space;
- access to and egress from the hearing room;
- the policy regarding electronic devices; and
- cautions to the press and members of the public, if allowed.

In the hearing room there should be jugs of water, with enough glasses for all the witnesses, or bottled water.

### Maintaining control of the process

Decision-making bodies have a common-law authority and duty to control their own processes. In BC, s. 11 of the ATA provides that the decision-making body “has the power to control its own process and may make rules respecting practice and procedure to facilitate the just and timely resolution of matters before it”. Section 48 gives the body authority “to make orders or give directions that it considers necessary for the maintenance of order at the hearing” (see the discussion under the heading “Handling disruptive participants”).

It is important to the whole hearing process that the chair maintains control of the hearing. This does not mean that the chair has to rule with an iron fist. Flexibility is a good quality and a touchstone to good hearing skills. Participants in the hearing need to have confidence in the chair’s ability to control the process. If the process falters or goes off track, there is a danger that the principles of procedural fairness may be compromised or lost.

The attitudes and body language of all panel members are important considerations in the conduct of the hearing. One of the best ways of maintaining control and arresting disruptive behaviour before it begins is to be conscious at all times of being respectful and courteous to the participants. Instilling a sense of impartiality, neutrality, respect, and understanding of the tensions that come with the hearing process will assist in maintaining control.

Remember that these considerations of attitude and body language, respect, and courtesy, apply throughout the hearing. Avoid facial expressions that suggest surprise or rejection of submissions or evidence or any suggestion of pre-judging the case. Avoid discussing the case within earshot of the participants and in public places generally.

The chair will need to respond to situations as they arise. For example, if a witness for the initiating party cannot attend at the time set for the party's witnesses, but can attend later, the chair may canvass how the testimony can be timed to fit into the flow of evidence without denying the parties their opportunity to present and test evidence.

Parties, or counsel, may request a change in the procedure to fit other considerations. A party may want special consideration for personal or other reasons. Flexibility is key. Hearing from the participants on these issues is also important, provided that is balanced with the other interests of a fair and efficient hearing. You have a duty to accommodate the needs of participants if there is any concern about undue hardship because of some aspect of the hearing.

## Recording hearings

There is no mandatory requirement for all decision-making bodies to make recordings of hearings. Some bodies, such as the BC Review Board and the Mental Health Review Board, are required by their statute to record. Section 35 of the ATA, which has been incorporated into the enabling legislation of many bodies, grants discretion to "transcribe or tape record". In that case, the discretion to record hearings is an operational decision made by the chair. Some entities record every hearing as a matter of course and others do so only in exceptional circumstances. When an application is made by a participant or in unusual circumstances, it is the hearing panel that has the responsibility and discretion to decide.

Sometimes participants ask that court recorders attend to record an oral hearing. There is no right to have a recorder present, or to have a hearing recorded. A participant's recording is not an official record for the purposes of a subsequent review. It is within the hearing panel's discretion whether or not to allow it. Some considerations are:

- the decision-making body's ability to accommodate the request;
- sufficient space in the hearing room;
- whether accommodating the request would necessitate an adjournment; and
- whether the recording would be disruptive to, or have any adverse affect on, the decision-making body's official record.

## Introducing the panel and the participants

The first order of business is to introduce the decision-maker or, if there is more than one, the panel, to the participants. Inform the parties, witnesses, and any interveners of the source of your authority to conduct the hearing; for example, that you are appointed under the enabling statute, or that you have been delegated the authority by the chair or some other statutorily mandated official. Once the panel has been introduced, it is the participants' turn. Each person can be asked to identify him or herself and their role, or legal counsel can introduce themselves, their client, and anyone else attending with them. Some decision-making bodies use "appearance forms" that provide the correctly spelled participants' names.

## Introduction of the hearing process

The extent of your description of the hearing process will depend on the participants' level of familiarity with the system. Develop a list or hearing script to refer to in setting out the procedures. The following list contains some points you might want to incorporate into your own hearing script. A sample hearing script is found at Appendix A (Oral Hearing Template Script).

## Order of the hearing

Hearing procedures may vary depending on the circumstances or the rules of a particular decision-making body. Typically, in a matter involving an initiating party and a responding party, the hearing will proceed as follows:

- the panel chair introduces the panel;
  - counsel, if any, introduce themselves (and their client);
  - the parties and other participants introduce themselves;
  - the panel chair provides a brief explanation of the process to be followed; and
  - the panel excludes witnesses, where appropriate, until they are called to give evidence.
- (1) If there are any preliminary applications, the panel will hear them before beginning to hear the evidence (see "Preliminary matters and decisions made in the course of the hearing").
  - (2) The initiating party may make an opening statement. The responding party may also make an opening statement or wait until beginning their own case. (see "Opening statements").
  - (3) If there is an agreed statement of facts or joint books of documents, the panel should receive them and mark them as evidence. When marking a book of documents as an exhibit, clarify whether you will mark each individual document separately.
  - (4) The panel should maintain a record of exhibits as they are being entered. Encourage the parties to do likewise so they can refer to them quickly during the hearing.

The initiating party presents its case first.

- (5) The responding party or respondent's counsel, if any, may ask questions of the initiating party's witnesses in order to test the accuracy and credibility of their evidence and to elicit further evidence.
- (6) The initiating party may ask the witness further questions on points arising out of the respondent's questions.
- (7) On the completion of each witness's testimony, the panel may question the witness. The panel then provides the parties with an opportunity to further question the witness on issues arising from the panel's questions.
- (8) Once the initiating party has completed its case, the responding party may present its case; the responding party may want to start with an opening statement if not previously provided.
- (9) The initiating party, or its counsel, if any, may question the respondent's witnesses to test the accuracy and credibility of their evidence and to elicit further evidence.
- (10) The responding party may further question the witness on points arising out of the initiating party's questions.
- (11) The panel may question the witness on completion of his or her testimony. The parties are then given an opportunity to ask further questions arising from the panel's questions.
- (12) When the responding party has finished its case, the initiating party may call further evidence in reply to evidence presented by the respondent. The same process with respect to questioning applies to any witnesses called to give reply evidence.
- (13) When all of the evidence is complete, the initiating party will make submissions.
- (14) The responding party will make submissions.
- (15) The initiating party may make final submissions in reply to the respondent's submissions.
- (16) The panel will close the hearing. If a decision is made orally, the panel will give its decision. Most decision-making bodies are required to provide written decisions with reasons, so the panel will reserve its decision and provide it in writing later. Be aware of any legislative time limit imposed on rendering your decision.

## Ground rules

In addition to explaining the order the hearing will take, the panel chair may set out some ground rules such as:

- Indicate the timing of breaks and that if someone needs an earlier break, it will be taken at the earliest appropriate time.
- Parties should turn off their mobile devices.
- Parties should be polite and respectful of each other and the panel.

- Parties should refrain from interrupting each other. Ask them to make notes during the hearing so that they can refer to any point they want to return to or ask questions about.
- A party may interrupt to object to the admissibility of evidence. In that event, the decision-maker will hear submissions from both parties on the objection and make a ruling.
- The parties should respect each other's right to submit their evidence and not engage in distracting conduct such as talking in the hearing room.
- Parties should make submissions to the decision-makers, not to each other. This substantially decreases the possibility of arguments arising in the hearing room.

### Preliminary matters and decisions made in the course of the hearing

Before the parties start to present evidence, there may be decisions that the panel is asked to make, generally referred to as “preliminary” matters or applications. Some common applications that may be made at the start of a hearing include applications:

- to dismiss a party's claim or application on the grounds that the decision-making body is without jurisdiction to hear it;
- for an adjournment.;
- for the recusal of a panel member because of an apprehension of bias;
- for the exclusion of witnesses;
- that the hearing be conducted *in camera*;
- to exclude documents or evidence on the grounds it was not produced in accordance with the rules or pre-hearing orders; or
- that the panel should “conduct a view” of a location or building.

Some of these decisions may be deferred until later in the hearing when the panel has had an opportunity to hear some evidence and submissions. Others must be decided at the outset.

At the beginning of the hearing, the panel should ask the parties whether there are any preliminary matters they want to raise. Some self-represented parties may not understand that certain things should be raised at the outset. They should be given the opportunity to ask questions about the process before it begins.

During the course of the hearing, the panel may have to make decisions about whether to receive certain evidence. Objections to evidence may relate to the testimony of a witness or to a document. Refer to chapter 6 for information on admitting and weighing evidence.

Decisions on preliminary matters must be made in accordance with procedural fairness. Preliminary decisions, frequently referred to as “interim decisions”, touch on the fairness of the process and can be the subject of applications for appeal or judicial review.

Always hear from the parties on any issue to be determined and provide reasons, even if brief, for any decision. After hearing from the parties, you may want to adjourn for a few minutes to make notes or to discuss the issue with legal counsel, your chair, or another decision-maker before making your decision. The decision on any preliminary matter, however, rests with you. While not allowing yourself to be pushed into making hasty decisions, you must balance the time you take to decide interim matters with the goal of completing the hearing in a timely fashion. When you are ready, reconvene the hearing and deliver your decision orally. For some preliminary matters it may be sufficient to include your reasons in the final decision rather than providing them during the hearing, in which case you should say that is what you intend to do.

### Opening statements

Opening statements by parties will briefly outline their position, their witnesses, the evidence they will present, and the amount of time they need to do so. Some decision-makers have little information before them about a matter before a hearing. In that case opening statements by the parties may be longer and more detailed. If the decision-maker has received evidence and submissions before the hearing, he or she may limit the opening statements by the parties.

If the party is self-represented, the decision-maker may have to intervene if the party begins to present evidence and submissions in their opening statement. Self-represented parties may also be given the option of combining their opening statement with the presentation of their case. A self-represented party being allowed to “tell their story”, can assist them in putting forward their position.

### Closing Statements

At the end of a hearing, the parties usually have an opportunity to summarize their evidence and indicate how it supports their position. It is not an opportunity for a party to submit new evidence or arguments. If the party is self-represented, the decision-maker may ask them if they want to sum up what they have presented at the hearing.

The panel chair or individual decision-maker will advise the parties what to expect next. If the enabling statute sets out a timeline for rendering a decision, the parties will be advised of that date. If no time is set, the parties should be advised how they will be notified when a decision is made.



In some statutes a penalty phase of decision-making follows a decision on the merits of a complaint or claim. The parties should be advised of how and when this second phase of the hearing will occur.

After a hearing has ended, the decision-maker should receive no further submissions or communications from the parties until the decision is rendered. If the decision-maker does receive evidence or submissions that might affect their decision, this material must be disclosed to all other parties for their response. If a decision has been made, the decision-maker is *functus officio* and without jurisdiction to alter the decision, unless the enabling legislation allows them to reopen the hearing or cancel their decision. If a decision-maker has set a final date for the submission of evidence and submissions, he or she may indicate that they will not consider any material received after that date. Whether to accept such evidence and submissions depends on the decision they have to make, the provisions of their enabling legislation, the relevance and reliability of the material received, and the fairness to all the parties of doing so.

### Assistance to self-represented parties

Due to the burgeoning number of self-represented litigants in the courts, judges have to be more “inquisitorial” with litigants in order to acquire the evidence needed to make decisions. They ask questions more often of such parties to establish a sufficient evidentiary basis and make a sound decision under their enabling statute.

During an oral or written hearing process the decision-maker will have to balance the need to provide assistance to a self-represented party with competing requirements to not prejudice another party, not advocate for the self-represented party, and not appear biased towards the self-represented party.

A useful overview of self-represented parties is found in Dr. Julie MacFarlane’s final report, “The National Self-Represented Litigants Project” at [www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/Self-represented\\_project.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf).

### Testimony by oath or affirmation

The purpose of requiring witnesses to give evidence by oath or affirmation is to ensure honesty and accuracy. It is intended that the oath or affirmation will bind the conscience of the individual to tell the truth. Although witnesses may say they always tell the truth, the solemnity of swearing an oath or affirmation is an added reminder of the importance of being accurate and of not being flippant or reckless in giving evidence. These considerations are buttressed by the fact that it is illegal to give false testimony under oath, affirmation, affidavit, solemn declaration, or deposition, the penalty for which is a prison term not exceeding 14 years.<sup>31</sup>

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<sup>31</sup> *Criminal Code*, R.S.C., 1985, c. C-46, ss. 131 and 132.

Section 34 of the *ATA*, which has been applied to many BC decision-making bodies, provides the power to summon witnesses and require witnesses to give evidence by oath or affirmation.

If your enabling legislation does not require that evidence be taken under oath, the authority will be discretionary. A check of the statute will determine whether you have been granted legal authority to administer oaths and what the decision-making body's normal practice is.

Given the multicultural nature of our society, you may wish to use affirmations rather than religious oaths. An affirmation is simply a solemn promise to tell the truth. See Appendix B (Sample Form of Affirmation (or Oath)).

## Witness Testimony

When a witness is giving evidence for the party who called them, the evidence is referred to as direct testimony. That witness being questioned by another party is commonly referred to as cross-examination or questioning. Unless the decision-making body's legislation or rules dictate otherwise, the hearing panel may ask questions of witnesses. Unless questions are required to clarify the evidence, it is advisable to hold your questions until the other parties have had an opportunity to question the witness.

### Direct testimony

When a party calls a witness to testify, it is common for the party or counsel, if the party is represented, to question the witness in a manner that directs the evidence towards a logical sequence. During this questioning, you need to be alert as to whether the questioner is "leading" the witness by suggesting the desired answer. If the information being elicited is non-contentious, there is no harm in leading questions and, in fact, they may assist in a timely presentation of evidence. However, when it comes to the evidence that goes to the substantive issues, you want to hear evidence from the witness, not from the questioner and, thereby, to guard against leading questions.

An example of a leading question is, "Did you see the blue car last Tuesday?" rather than an open-ended question such as "What, if anything, did you see last Tuesday?"

### Cross-examination or testing evidence

Questioning of a witness by another party is commonly referred to as cross-examination. There is no absolute right to question opposing witnesses, and the decision-maker has the discretion to determine the process and the scope of questioning.

The two central purposes of cross-examination are:

- to challenge the credibility of a witness, and
- to obtain from a witness evidence that will be useful in establishing a point by the party conducting the cross-examination.

A decision-maker may refuse to permit cross-examination, unless it is necessary for a fair hearing, or is required by the enabling statute.<sup>32</sup>

A decision-maker may decide to refuse or limit cross-examination if:

- it is repetitive;
- there are other effective means of testing the evidence or submissions objected to;<sup>33</sup>
- it is an attempted “fishing expedition”. The decision-maker can ask what evidence a party seeks to bring out in cross-examination, or what evidence they wish to test;
- there is no clear purpose to the cross-examination;
- it would unduly lengthen the matter; or
- there is sufficient evidence on the record.

Note that time limits can be set for cross-examination as long as they are consistent with procedural fairness.

Some statutes specifically allow cross-examination. In these cases, cross-examination cannot be denied, but it can be limited if it fails to address relevant matters or is repetitive.

Where the evidence presents credibility issues, fairness may require the decision-maker to allow some form of cross-examination. The decision-maker should allow questioning, either orally or in writing. Where cross-examination is allowed and credibility is in issue, the decision-maker should exclude witnesses from a hearing until they have given their evidence and have been cross-examined. This avoids witnesses altering their testimony after they have heard testimony from other witnesses.

Self-represented parties may cross-examine as an opportunity for presenting evidence or making statements. This process should be limited by the decision-maker. The other parties should be given the opportunity to address any evidence or issues raised in this way.

## Reply questioning

Parties need to be given the opportunity to provide new evidence in response to new issues or evidence arising in cross-examination. Note that in both instances this reply questioning is not an opportunity for full examination of the witness or to reinforce evidence that has been weakened.

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<sup>32</sup> *Khan v. University of Ottawa* (1997), 2 Admin. L.R. (3d) 298 (Ont. C.A.).

<sup>33</sup> *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1279.

## Questioning by the hearing panel

Unless your enabling legislation directs otherwise, you can ask questions of witnesses. The number of questions will be guided largely by common sense and your understanding of the evidence required to reach a fair decision. It will depend on how thorough the witness has been, whether the other party has asked questions and how thorough those were, and your assessment of what further evidence you require. Allow the other parties an opportunity to ask questions before you do, and again after if you raise further questions.

If the decision-making body is operating within the scope of its mandate and giving a fair hearing to both parties, there is considerable latitude when questioning parties and witnesses.

## Delivery of decision and reasons

See chapter 9 for a full discussion of decision writing and giving reasons. Section 52 of the *ATA* sets out the requirements for sending the parties and interveners copies of the decision, and provisions for alternate notice if it is impracticable to send the decision to everyone entitled to receive it. Check the enabling statute to confirm who is entitled to a copy of the decision and how it is to be delivered.

## Applications for adjournment

Applications for adjournment raise difficult issues. They involve balancing many interests: procedural fairness, the parties' rights, the efficiency of the process, and prejudice to the parties. In court procedures it is common to have the parties consent to an adjournment and have the court approve the application. This is not necessarily so with administrative decision-making bodies because of the public interests and mandates involved.

Section 39 of the *ATA* deals with adjournments and has been applied to many BC decision-making bodies. Those entities will be guided by the following considerations:

- the reason for the adjournment;
- whether the adjournment would cause unreasonable delay;
- the impact on the parties of refusing the adjournment;
- the impact on the parties of granting the adjournment; and
- the impact of the adjournment on the public interest.

As discussed in chapter 2, it is a fundamental principle of administrative law that a party must have an opportunity to be heard. A party might request an adjournment because a witness or document is unavailable, they are not well enough to proceed, or for some other reason that prevents a full presentation of their case. An adjournment may be one way of addressing the concern. However, the panel will want to consider whether there are other solutions, such as conducting as much of the hearing as possible and then re-convening, either in the same or in a different format.

When an application for adjournment is received, the other parties should be notified of the application and given an opportunity to comment. They may object to the adjournment for reasons similar to those that prompted the application – prejudice in presenting their case, witness availability, party availability, etc.

For the decision-maker, this is a fact-finding mission and a balancing exercise. Consider the following questions:

- Why is the application being brought now?
- What would be the impact of denying or allowing the adjournment?
- What practical results would be achieved?

You may have to be creative in ensuring that the parties' procedural fairness rights are safeguarded. At the same time you have a mandate and the requirement for a timely, efficient, and fair hearing. Sometimes there are so many parties involved that finding another hearing date is almost impossible, at least within a reasonable period of time. You may want to hear the application for adjournment by telephone conference, or in person. There may be no way to address all of the problems and you may have to take the route that inconveniences the smallest number of participants, or fall back on the original hearing date to which everyone initially agreed.

### Adjournment application: a delay tactic?

The foregoing comments have been based on the assumption that the application to adjourn is made in good faith. However, sometimes applications to adjourn are stalling tactics or attempts to inconvenience or prejudice another party or the decision-making body. Some parties may attempt each and every tactic to indicate their hostility to the process or their unwillingness to be involved. As decision-maker, you have a responsibility to respond to the application. Some relevant considerations include:

- If the adjournment request is for the purpose of retaining a lawyer, has a lawyer been approached yet? If not, why not?
- If yes, and the lawyer is not available on the date of hearing, why this particular lawyer?
- Does the lawyer have a past connection with the case or particular expertise that others do not?
- How long an adjournment is being requested?
- What are the views of the other parties? Was the party consulted originally when the date was set?
- Has anything arisen since the date was set that has caused the party to need counsel?
- Have the parties had ample opportunity to seek counsel?

## Adjournment application: party unavailable

Another difficult situation arises if the reason for an adjournment application is that the party is not available to attend on the date scheduled. A refusal to adjourn in this case could preclude the party from participating in the hearing. Again, you need to investigate the reasons behind the application, consider some creative ways of overcoming the problems, and balance the parties' interests.

## Handling disruptive participants

As an administrative decision-maker, it is your responsibility to ensure that the parties receive a fair hearing; disruptive participants can compromise hearing fairness. Here are some suggestions for handling disruptive parties:

- Ask the party to stop the disruptive behaviour. Clarify your expectations for parties' conduct during the hearing.
- Explain to the party that they will have a turn to present their case, and they might want to use the time until then to take notes.
- Describe the consequences for the party if the behaviour continues.
- If the party persists, you may want to take a recess and invite the party's representative (if there is one) to speak with the party. Invite the parties to resume the hearing once the disruptive party has regained composure.
- If the above suggestions do not work, you might adjourn the hearing and consider whether to limit the party's participation going forward. Section 18 of the ATA provides an administrative decision-maker with the authority to convert the hearing to a written hearing, prohibit the disruptive party from making further submissions, or dismiss the party's claim. These options may have a significant impact on the disruptive party, and you should consult your chair or legal counsel before taking these steps.

Disruptive parties are difficult to manage and can cause you to become flustered or even angry. Don't hesitate to take a break or adjourn the hearing and consider your next steps. Do not feel rushed to make more than an interim decision while the disruptive party is before you. Do seek advice and assistance from others within your decision-making body.

Section 48 of the ATA has been applied to many BC decision-making bodies. This section gives the body the ability to impose restrictions on, and exclude further participation by, a disruptive person. It adds statutory authority to the common-law authority of a decision-making body to control its own process. Sometimes it is helpful to refer participants to the legislation that allows you to take action.

If the disruptive person is a witness, you can call on the party who called the person to take steps to correct the behaviour. You can try the same steps outlined above. In extreme circumstances, you may want to consider requiring the witness to provide their evidence in writing. Section 49 of the ATA, which has been incorporated into the enabling legislation of most bodies, sets out a process to apply to the court for a contempt order. This provision is rarely employed as it is expensive and time-consuming.

Section 47(1)(c) of the Act gives the decision-making body the power to order “the party to pay all or part of the actual costs and expenses of the tribunal in connection with the application”. Note that these costs are the costs of the decision-making body, not those of another party as would be expected in a court proceeding. However, s. 47 has not been incorporated into the enabling legislation of all bodies. The authority to award costs against them provides an additional incentive for people to comply with the hearing process and behave appropriately.

## Security at hearings

Fortunately, decision-makers are seldom confronted with a participant who presents a danger to the board or other participants. However, being prepared for such a possibility is essential. If someone is potentially violent or abusive, it is likely that the staff will have had some prior indication. It is important that staff inform the decision-maker of any concerns prior to the hearing. When reviewing a file prior to a hearing, be alert to indications of erratic or hostile behaviour. No one should be exposed to danger.

If there are safety concerns, you will want to ensure that the hearing room is as secure as possible. For example:

- Ideally, the hearing room should be equipped with alarm buzzers, cell phones, easy access and egress (wheel-chair accessible and more than one door).
- The hearing should be held in a location where there are other offices and many other people, as this may be a deterrent to abusive behaviour.
- You may want to consult legal counsel.
- The decision-making body may want to request police or some other security presence at the hearing, either in uniform or plain clothes.
- Alert other staff and administrative decision-makers in the office of the situation and explain any steps they should take if they see anything that concerns them.

In extreme cases, a resource available to many administrative decision-making bodies is the Ministry of Justice’s Integrated Threat Assessment Unit and Protective Operations Unit at [www.ag.gov.bc.ca/courts/sheriffs/itau.htm](http://www.ag.gov.bc.ca/courts/sheriffs/itau.htm).

Administrative decision-makers must be sure not to allow information about a person’s potential threat hazard to influence or bias their decision-making. If the person is disruptive during the hearing, follow much the same process as discussed in “Handling disruptive participants”. If the person’s conduct is threatening or violent:

- Do not respond in kind; maintain a professional calm and communicate clearly and respectfully.
- Ring the safety buzzer or have a pre-arranged signal, so someone outside the hearing room will contact the police.
- If the situation persists, adjourn the hearing immediately, have the other participants leave the area, and seek police assistance.

- At some point you must tell the person that you are excluding him or her from the remainder of the hearing. You may want to do this with the police present and have them escort the person out.
- Notify your chair and legal counsel immediately.
- As soon as possible, take detailed notes about what happened.

## Other forms of oral hearings

### Telephone or video-conference

Increasingly, administrative decision-making bodies are conducting oral hearings through telephone or video-conference. These methods require the same considerations as in-person hearings, to ensure procedural fairness. However, there are some additional considerations, outlined below.

#### Telephone conference

If the hearing is conducted by telephone conference, the decision-making body will need to ensure that documents are exchanged in advance. Frequently, this means that the parties provide their documents to the office and a staff member sees that they are circulated. If new documents are adduced at the hearing, these can be circulated electronically or submitted for comment after the hearing.

In a hearing by telephone conference, it is important that participants introduce themselves every time they speak and do not talk over others; otherwise there is a danger that evidence will not be communicated effectively. If you are chairing the hearing, ensure that any talking-over is stopped. At the start, make it clear that participants will have ample opportunity to present their case and to ask questions. Ask them to take notes while others are talking so they remember points they want raised. At various times during the conference you can ask if anyone has anything else to add.

The exception to the non-interruption rule occurs when a person objects to the admissibility of the evidence. Then, they must make sure that you know they are objecting. You handle this objection just as you would in an in-person hearing. Also, it is appropriate to interrupt if someone needs a break. It is a good idea to check in with people occasionally to ensure they are still there, that they can hear, to find out if they need a break, etc.

#### Video-conferences

Video-conference hearings are much the same as in-person hearings. One of the advantages of video-conferencing is that a large number of participants and observers can be accommodated without having to travel. Increasingly, software allows participants to easily share documents in conjunction with the video-conference.



## Written hearings

### First instance hearings

This section deals with hearings at first instance. A first instance decision-making body is the first to receive evidence and submissions and render a decision. The considerations in a first instance hearing differ from those in subsequent hearings such as an appeal, a reconsideration, or a review of a first instance decision. Enabling statutes often set out rules for these subsequent hearings.

Similar considerations apply to written hearings as to oral hearings. The evidence and submissions are provided to the parties electronically or by mail. Participants can present their evidence through affidavit or written statement. It is important to ensure that all parties have all submissions and the opportunity to respond to them.

Typically, the decision-maker will set out a timeline for the submission and exchange of evidence during pre-hearing processes. The amount of time required between each step will depend on the amount of documentary evidence each side intends to present. Unless your rules prescribe otherwise, consider tailoring your timeline to minimize delay to the parties. The parties will require time to review the evidence and prepare their own responses.

Unless otherwise provided in the enabling statute, the initiating party will typically provide their submissions and evidence first, followed by the responding party, and an opportunity for the initiating party to reply. In some decision-making bodies, both the initiating and responding parties will submit their evidence and submissions at the same time, and later they will submit the responses to the other parties' submissions and evidence at the same time.

Written hearings have advantages: they save the parties and the decision-making body the time and expense of holding an in-person hearing, and they allow parties and decision-makers to provide and consider evidence and arguments asynchronously, which accommodates other demands on their time.

## CHAPTER 6

### EVIDENCE IN ADMINISTRATIVE LAW PROCEEDINGS

#### What is evidence?

Evidence is anything that proves or disproves a matter at issue in a legal dispute. Evidence can take many forms, including:

- witness statements (written, video, in person);
- written documents;
- photographs;
- video; and
- physical objects.

All evidence on which the decision-maker relies must be disclosed to the parties affected, and those parties must be provided with an opportunity to respond.

Electronic evidence, such as emails, videos, and films, is admissible in the same way as documents and photographs, but its reliability may need to be tested. For example, it may be necessary to inquire whether there have been deletions from an email string or the recipient list. If the decision-maker is persuaded that the content or presentation has been altered, the evidence will be less reliable and this will affect the weight given to the evidence.

#### Relevance and reliability

Not all evidence is created equal. Evidence may be more or less *relevant* to the issue being dealt with by the decision-maker. Evidence may be more or less *reliable*. The more relevant *and* reliable evidence is, the more weight it will be given.

Parties submit evidence; the decision-maker makes findings of facts from that evidence. Those facts are applied to the applicable legislative provisions under which the decision-maker is empowered to decide. The decision will be rendered based on the application of the facts to the statute. There may be a range of possible decisions within the delegated power of the decision-maker on any particular matter.

## The law of evidence, the courts, and decision-making bodies

Administrative law has evolved over 60 years, since the first important administrative law decisions in England. The Supreme Court of Canada has developed a “contextual” approach to the relationships between evidence, facts, and the provisions of statutes and their purposes. Courts will look to see if there is sufficient evidence to support the facts found by the decision-maker, and that those facts support the decision made under the enabling legislation.<sup>34</sup> There must be some evidence to support the decision.

Participants in administrative proceedings often refer to one or more of the rules of evidence. In administrative law, the rule is that decision-makers require sufficient relevant and reliable evidence to support the decision they have made under the statute. Administrative law decision-makers may receive more evidence than they rely on to make their decision; it is best to weigh the evidence as a whole before deciding what is relevant and reliable.

### Admissibility and receipt of evidence

Section 40 of the ATA provides that the decision-making body “may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law”.

In an oral hearing, evidence will be provided through testimony and tendered documents. If the hearing is a dispute between two or more parties, the decision-maker may have to deal with an objection to the receipt of some evidence, or its admissibility. A decision-maker must hear the positions of all parties involved and decide whether to receive the evidence. Submissions about the admissibility of evidence should be heard at the time of the objection and be incorporated in the written decision.

Many administrative law matters proceed without an oral hearing. The decision-maker will request and receive evidence from the parties or their counsel. Often, they receive evidence that is incomplete or does not deal with the issue at hand. Subject to the enabling statute, the decision-maker has the common-law authority to request that the parties provide evidence or submissions on an issue to be heard. Decision-makers must ensure that the exchange of documents and submissions follows a timely schedule.

On occasion, a party will ask for repeated extensions of time to provide evidence. After generous extensions, they should be advised that failure to provide evidence may result in a decision being made without consideration of the evidence, or in an adverse inference being drawn. Parties who fail to produce evidence at the first level of decision-making may attempt to do so in an appeal or reconsideration. If evidence could and should have been introduced at the first level, it is not new evidence and may not be introduced at appeal, reconsideration, or in judicial review.

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<sup>34</sup> *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67.

## Burden of proof

Unless the enabling statute states otherwise, the burden of proof will initially fall on the person seeking to refute an allegation of liability or fault, or seeking a permission, licence, or certification. If there are two parties, this burden may shift back and forth as each person submits more evidence.

The standard of proof is the level to which a party has to prove a matter in issue. In an administrative proceeding that standard is the balance of probabilities.

Enabling statutes have different requirements for the provision of evidence by parties or by the decision-maker. You need to be familiar with these requirements, and who bears what responsibility.

In hearings involving permits, licences, or certifications, the enabling statute often sets out what evidence must be provided. If the decision-maker uses evidence other than that provided by the initiating party, they must provide the person with that evidence and allow them to respond. Parties should be advised of the applicable burden and standard of proof to assist them in submitting evidence that is relevant to the decision. Understanding the burden of proof will also assist you in writing your decision.

## The rules of evidence

Section 40 of the ATA provides that a decision-maker may accept evidence that would not be admitted in a court proceeding. Regardless of whether s. 40 applies, there is a common-law authority to admit evidence regardless of whether it would be admissible in court (unless the enabling statute states otherwise).

The admission of evidence is always guided by relevance. Evidence is relevant if it tends to prove or disprove a matter in dispute in the proceeding. There is no obligation to admit evidence that is clearly irrelevant.

A decision-maker must first determine whether the evidence before them is admissible, and then what weight to give it. There is no need to receive or admit all evidence presented. For example, generally, without-prejudice negotiations or offers from mediation or other settlement negotiations are excluded from the decision-making process. This rule is found in the common law as well as in s. 40(3) of the ATA.

If evidence appears to be irrelevant, parties need an opportunity to make submissions as to why it should be admitted before a decision in this regard is made.

Some evidence will cause unnecessary embarrassment, economic or commercial harm, might destroy valuable confidential relationships, or is abusive or profane. In this case, the decision-maker should weigh the value of receiving the evidence against any potential harm. Parties may produce excessive or repetitive evidence, and control of the process mandates that the decision-maker must decide whether or not to receive it.

## Weighing the evidence

All of the evidence must have been received, then evaluated, before you can render a decision. Some best practices in weighing evidence include:

- Gather the evidence related to each factual and legal issue.
- Set out the legal criteria for the decision, and be aware of the burden of proof and where it lies.
- Identify what is agreed upon and what is in issue. This will allow you to focus on the areas of dispute or difficulty.
- Establish as anchors or reference points items about which there is no dispute or debate.
- Set out the evidence and begin to establish the findings of fact it supports.
- Look for internal consistency in the evidence. That is, does the evidence from a party fit together, or is part of the evidence inconsistent? Is there a reason for this inconsistency?
- Look for external consistency in evidence. Are there events or documents other than those a party has produced that confirm or support their evidence? Does the evidence fit with the anchors or other evidence?
- Was the evidence produced contemporaneously with the relevant events or was it produced much later? Is the evidence spontaneous?
- Consider whether a party's account contains appropriate details of what occurred. If there is an absence of detail is there a reason why? Is there a context provided for the evidence and does it make sense?
- Has the witness made appropriate admissions and expressed reasonable doubts?
- Does the evidence relate solely to the witness's observations or was the witness drawing conclusions? Remember that drawing conclusions is the job of the decision-maker, not a witness or party.
- Consider the motives or bias of the witness. Does the witness have a reason to present a particular view or piece of evidence? Do they have a reason to lie or be untruthful?
- Is the person providing the evidence of diminished capacity? Do they have language difficulties? Do they have intellectual difficulties? Are they a minor?
- Is the manner in which a witness gives evidence affected by cultural differences? Do these differences explain anomalies in the evidence?
- Be aware of your own assumptions and biases and do not over-generalize based on them. In each case, the facts will steer your decision in a particular direction.
- Is part of the evidence reliable and other parts irrelevant or unreliable or both? The reliable part of the evidence may confirm other evidence or result in a finding of fact required to support your decision.

- Consider whether common sense allows that something happened in a particular way or that a party behaved in a particular manner.

If a decision is based on no evidence or insufficient evidence, it may be quashed and referred back to the decision-making body.

## Hearsay

Hearsay is evidence offered from a third party for its truth value. For example, “She told me he was wearing a red shirt”, when the colour of the person’s shirt is an issue to be resolved. Hearsay statements may be oral or in writing. The problem with such statements, oral or written, is that they cannot be tested and as such may not be reliable.

Hearsay evidence is common in administrative proceedings, but it is not admissible on that basis alone.<sup>35</sup> As noted earlier, the rules of evidence used by the courts do not apply to decision-makers. Many documents produced in the ordinary course of business are actually hearsay. Further, many participants will be unable to distinguish hearsay from other evidence. As with all evidence, the key consideration with hearsay is whether it is reliable.

Decision-makers often receive objections to evidence on the basis that it is hearsay. If you admit hearsay evidence, consider how you will be able to test that evidence when the person providing it has no firsthand knowledge of whether it is true. Along with relevance, reliability is one of the two criteria for determining weight of evidence in administrative matters.

In considering hearsay evidence, ask yourself some basic questions:

- Is the information reliable? For example, the information might be considered dependable if it was a record made in the ordinary course of business or a record made by a person with no motive for producing a record that was inaccurate, false, or incomplete.
- Will a party be prejudiced if you admit evidence that they will be unable to respond to or test? If it is a very relevant piece of evidence its importance may increase the prejudice it causes to a party who cannot respond to it.
- Is there a better and more direct way a party can submit the evidence other than by resorting to hearsay. Is there direct evidence that will support the point they are seeking to make?

A party will object to hearsay evidence on the grounds that it is not reliable and should therefore be given little to no weight. In some matters you will admit hearsay because it is necessary to determine one of the issues before you and there are no concerns as to its reliability. However, be wary of double or even triple hearsay, for example, “My friend said her doctor told her this kind of condition is work-related”.

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<sup>35</sup> *Silver Campsites Ltd. v. James*, 2013 BCCA 292.

## Opinion/expert evidence

Under the ordinary rules of evidence, opinions are not admissible unless provided by an expert. An expert is a person qualified to provide an opinion by reason of education, training, or experience in a particular subject. Opinions on matters within the ordinary experience of the average person, such as age, speed, distance, and time of day are an exception to this rule.

Administrative decision-makers should consider expert evidence in the same way as any other evidence—on the basis of relevance and reliability; however independence and impartiality are other considerations (see chapter 2). Experts must be fair, objective, and non-partisan. Decision-makers should not simply rely on the expert's opinion rather than reaching their own decision.

Decision-making bodies may have rules about the delivery of expert opinion in advance of the hearing. Where they do not, ss. 10, 11, and 12 of the *BC Evidence Act*<sup>36</sup> will apply. Most importantly, an expert is required to provide a written copy of their opinion at least 30 days before the start of a hearing (s. 10(3)). An expert may also be called as a witness, but if nothing new arises as a result of the expert being called, the person who required their attendance can be responsible for the costs of doing so (s. 10(6)). Section 11 sets out orders that the decision-maker may make if the expert's opinion was not provided within the requisite 30 days. Section 11 is confined to civil proceedings; it does not apply in proceedings where fines, penalties, or imprisonment may be imposed (s. 12).

The following are some considerations with respect to expert opinion evidence:

- Unlike in courts, expert evidence may be called in areas that are within the expertise of the tribunal.
- An expert must be independent, impartial, and unbiased. They should not be an advocate for the person who has hired them.<sup>37</sup>
- The expert must disclose all of the facts and assumptions on which they based their opinion.
- If a decision-making body is given the power under the enabling legislation to retain its own expert, that expert's opinion must be provided to all the parties to the proceeding for them to examine and respond.

In administrative law proceedings, non-experts often provide opinions. You may have to distinguish fact from opinion, as many witnesses and parties will not perceive a difference between the two. As with any other evidence, you must determine whether non-expert opinion is admissible, and if so, what weight to give it.

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<sup>36</sup> R.S.B.C. 1996, c. 124.

<sup>37</sup> *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 32.

## The record of documents, submissions, and exhibits

Whether an oral hearing is held or a matter is conducted entirely in writing, a complete record must be kept of everything that comes into your possession. Failure to disclose or share a submission, document, or other piece of evidence before you may result in the matter being sent back by the courts for a rehearing.<sup>38</sup>

It is a fundamental breach of fairness not to disclose evidence to a party in a decision-making process.<sup>39</sup> Thorough and timely record keeping of evidence sets the foundation for complete and timely disclosure of that evidence.

Many statutes have appeal and reconsideration provisions. The record that was before the first decision-maker must be produced to the appeal or reconsideration body or person. That record should be complete. Some appeal bodies have said that the record is “everything available” to the first decision-maker, not just what the decision-maker relied on.<sup>40</sup>

A running record—paper or electronic—of what was received and what was sent is very useful in establishing what was before the decision-maker. It also provides a good basis for responding to objections that the record is not complete when provided to appeal or reconsideration bodies or the court.

In an oral hearing, documents that are received are marked as exhibits, and numbered consecutively, by the decision-maker or by a designated member of the decision-making panel.

## What is not part of the record

The following are not part of the record:

- (1) Mediations and settlement discussions: As a general rule, unless the parties to a proceeding consent, a document or record created for a dispute resolution process must not be disclosed or be compelled to be disclosed. Also statements made in a dispute resolution process for the purpose of obtaining a settlement of some or all of the matters in issue may not be disclosed or compelled to be disclosed, absent consent of all of the parties to the dispute. This is generally consistent with s. 29 of the ATA.
- (2) Notes of deliberations and draft decisions: Decision-makers will often make their own notes to guide the process. In an oral hearing they make notes and record impressions. These notes and impressions are not part of the record that is produced to the parties or to the courts if there is a judicial review. There will likely be several drafts of a decision before completion of the version delivered to the parties.

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<sup>38</sup> *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97.

<sup>39</sup> *18320 Holdings Ltd. v. Thibreau*, 2014 BCCA 494.

<sup>40</sup> *Acton v. Super Save Disposal*, [2004] B.C.E.S.T. No. 100 (QI).



- (3) Information subject to legal privilege: Communications between a party and their lawyer are subject to privilege, which privilege cannot be waived without the consent of the party who is the client. Privilege applies to counsel for decision-makers and government bodies just as it applies to private counsel and their clients. Two Supreme Court of Canada decisions confirmed this.<sup>41</sup> Without waiver of privilege this information is not part of the evidence in the record.
- (4) Prejudicial and confidential information: Section 42 of the ATA gives the decision-maker power to receive evidence in confidence. This may be documents or the evidence of a witness. The decision-maker will then consider who may see the evidence and why, and whether the evidence will be admitted and become part of the record of the proceeding. If the evidence is not admitted and not relied on by the decision-maker, it will not form part of the record of evidence. Issues requiring the use of s. 42 very rarely arise in practice.

### Section 40 of the ATA

Section 40 of the ATA sets out a list of information that is admissible in administrative decision-making proceedings. Although the section applies only to those decision-makers whose enabling legislation incorporates it, it is a useful general guide:

- (1) A decision-maker may receive information it considers relevant, necessary, or appropriate, whether or not the information would be admissible in a court of law.
- (2) A decision-maker may exclude anything unduly repetitious.
- (3) Nothing is admissible before a decision-maker that is inadmissible in a court because of a privilege under the law of evidence.
- (4) If there are provisions in an enabling statute that expressly limit the extent to or purposes for which any oral testimony, documents, or things may be admitted or used in evidence, then those provisions apply.

### Limiting public access to the record

#### Closed or “in camera” hearings

Many statutes governing decision-making bodies provide that their proceedings are open to the public. Be aware of these particular provisions. Related to these provisions are ones that provide for publication of decisions. There are exceptions, such as hearings under mental health statutes. This will affect the nature of the record of evidence produced in these matters and to whom that evidence may be given.

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<sup>41</sup> *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44.

## Publication bans

Some statutes give the power to issue a publication ban on evidence produced in a proceeding. This is true for a panel established by the Commissioner of Teacher Regulation who may issue such bans in advance of hearings involving vulnerable individuals such as children. The result would be that certain information does not become part of the record, or is altered to delete personal identifiers (see *Teachers Act*, S.B.C. 2011, c. 19).

## Recording hearings

Section 35 of the ATA provides that if the decision-maker records or transcribes a record of the proceeding, the transcription or tape-recording is considered to be correct and to constitute part of the record of the proceeding for the purpose of review or appeal. A failure to record or transcribe a hearing will not invalidate the proceeding. In BC, the courts have determined that while informal transcripts do not form part of the record, they can be admitted in a judicial review if they are the only source of evidence on a ground of review.<sup>42</sup> Many bodies, including the Human Rights Tribunal and the Workers' Compensation Appeal Tribunal regularly record hearings. Official recordings are part of the record if there is a review or appeal.

## Decision-makers' power to obtain evidence

Many statutes contain provisions allowing specified bodies to obtain certain types of evidence by compulsion. There are three types of such powers given to decision-makers:

### (1) Subpoena or summons

A subpoena or a summons allows the decision-maker to require a person to attend and give evidence, or to provide documents or things, usually within a specified time frame. Failure to attend a hearing is contempt of the process. As contempt proceedings can be dealt with only by the BC Supreme Court, decision-makers are very cautious when using this power. They first determine if they can make accommodations, such as scheduling changes, that will allow the witness to attend voluntarily. They will determine if there is another way to obtain the witness's evidence. Statutes often have fine or penalty provisions for failure to produce a document or thing to the decision-maker. Finally, failure to produce the required evidence will allow the decision-maker to make adverse inferences against the party who failed to produce.

### (2) Inspection or production of business records

Decision-makers who regulate certain types of activity can enter places of business and inspect or seize records that relate to the regulated aspect of the business if their enabling legislation allows it. Examples include employment records under the *Employment Standards Act*, and the premises and activities of those who operate entities where liquor is sold to the public under the *Liquor Control and Licensing Act*.

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<sup>42</sup> *Seli Canada v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353.

### (3) Search and Seizure

If a person has been given the privilege of undertaking certain activities it is expected that they will do so within the rules and guidelines provided. For example, a fishery inspector may seize a person's catch for failing to comply with the rules (*Fisheries Act*, R.S.B.C. 1996, c. 148). This seizure will be evidence of the contravention.

### Evidence from other proceedings

The only way for a witness in a proceeding to prevent their evidence from becoming evidence in a subsequent administrative proceeding is to seek the protection, when testifying, of s. 4 of the *BC Evidence Act*. This will only prevent the evidence from being used in subsequent proceedings in BC. It would not prevent a federal decision-maker or one from another province using the evidence. There is no provision in the *ATA* preventing the use of evidence from other proceedings; however, as with all evidence, this must be disclosed to all of the parties, who must be given an opportunity to respond.

## CHAPTER 7

### THE DECISION-MAKER'S CONDUCT

#### Decision-maker's conduct in a hearing

You represent the public face of your decision-making body. First and foremost, a decision-making body must ensure it meets its obligation to serve the public by rendering fair and timely decisions. This goal can be furthered or hindered by the manner in which you conduct yourself during hearings. Decision-makers have an obligation to behave respectfully at all times, both inside and outside the hearing room.

Be on time. Arriving in sufficient time to organize your materials, to take care of personal matters, and to organize the hearing room shows the participants respect for the process. Timely arrival also allows you to introduce yourself to participants (if appropriate to your decision-making body), talk to colleagues, and collect your thoughts.

Your manner of dress also demonstrates professionalism and respect for the parties, the process, and the decision-making body. Dress codes differ according to the culture of the participants appearing before you. Your responsibility is to dress in a manner that does not distract you, your colleagues, or the participants from the tasks of the hearing.

Frequently, tribunal members are familiar with one of the parties from past hearings. This is typically the case when one party is a branch of government or another institution that appears regularly before the body. Many disputes are between self-represented individuals and the government. The government representatives are usually experienced, more at ease, and likely to be familiar with the process. For the individual, this is usually a first and only appearance before the decision-making body. People may be uncomfortable about having to appear and present their cases. They may be fearful of the process and the outcome. If they see you being familiar with the government representative, they may well assume that the cards are stacked against them. This will colour their view of the decision-making body and affect their ability to present their case effectively.

Avoid appearing too familiar with participants who appear before you regularly. Do not adopt a first name relationship or socialize with parties. Your role as a neutral decision-maker requires that you guard against personal relationships that will undercut your ability to render objective, unbiased, and fair decisions. If you find yourself developing a personal relationship, you may have to withdraw from the hearing or, in extreme cases, withdraw from the decision-making body.

Note taking is a skill developed over time. You may use a computer or pen and paper; either way, find a method that works for you, including short forms for common words. Rarely, the proceedings are recorded and if you miss something you might be able to go back and replay the recording, but for the most part you have to rely on your notes.

Body language is important for conveying attentiveness and respect. Look at the witnesses. Stay alert. Deal with distractions. Avoid nodding your head or saying “okay” during testimony or submissions, as this may suggest you have already made your decision. Avoid eye-rolling, sarcasm, or confrontational behavior. Do not engage in side conversations with colleagues or other participants while a witness is testifying. If necessary, interrupt the testimony and take a break to deal with whatever has come up.

Be attentive to the need for breaks. Talk about breaks at the beginning of the hearing and assure participants that they can request breaks during the process. If a witness is becoming emotional, it is appropriate to offer a short break to allow the witness to regain composure.

Be careful not to be drawn into conversation in the nature of gossip about the decision-making body or the parties, or to be drawn into discussions about the correctness or otherwise of decisions that have been issued.

You must treat the information you receive in the course of the hearing as confidential and not disclose it, or discuss the hearing, with anyone outside the hearing or the decision-making body, other than as necessary to produce your written decision.<sup>43</sup>

### Decision-maker’s conduct outside the hearing

Many of the points raised above, such as maintaining confidentiality, guarding against over-familiarity with participants, and discussing decision-making body business apply outside the hearing as well.

During breaks in the hearing or after the hearing, maintain a professional distance between yourself and the parties. When you have reserved a decision, you may be in a hearing with some of the same people before your decision is completed, or you may see them at a conference. Avoid discussing any cases currently before you.

When on a break, do not engage in discussion about the hearing, evidence, witnesses etc. with anyone other than decision-making body members or staff. Conversations with colleagues should be outside the hearing of anyone associated with the case. There have been embarrassing instances of hearing panel discussions being overheard in restaurants and in telephone conversations. Remember that a voice carries a long distance. Conversations can be easily misunderstood. There can be serious repercussions if a party has reason to believe that the decision-maker is being influenced or has already made some determinations before the evidence is completed.<sup>44</sup>

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<sup>43</sup> See s. 30 of the *ATA*.

<sup>44</sup> *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4.

The use of social media presents unique challenges for judges and other decision-makers. The Workers' Compensation Appeal Tribunal (WCAT) has produced a leading policy in this area, included as Appendix C (WCAT Employee Social Media and Social Networking Policy). Here are some general tips, adapted from the policy:

- Use good judgment, discretion, and decorum. If you have any doubt about a posting or other activity, err on the side of caution. Avoid personal attacks, online fights, and hostile communications.
- Maintain professionalism, honesty, and respect. Do not behave in a manner or encourage behaviour that is illegal, unprofessional, or in bad taste. Even on a personal site and using your personal computer or device, do not vent about work matters online.
- Do not identify yourself as a decision-maker on social media sites, as this may reflect on your organization, or you may be used as a portal for others to post about your decision-making body. While you may control what you post, you cannot predict or control what others, even family members, might post on your site, or how your materials are reposted.
- Be mindful of your security and that of your colleagues. Do not post personal information about yourself or anyone you work with. Learn about privacy settings and use the most stringent settings available.
- Do not contact parties, representatives, or witnesses on social media, and do not include them as "friends" or "connections". If you are connected to them on social media, put them on your conflicts list.
- Do not give advice to anyone about matters within your organization's jurisdiction. This applies both to general questions and most forcefully to questions relating to specific cases.
- Do not express views for or against any law or policy that is a matter of current political debate that touches on your organization's jurisdiction.
- Do not use your work email address on social media sites.

### Communicating with the media

If you are contacted by a member of the media by phone or email, do not reply to them unless your chair has authorized you to do so.

If your decision-making body has given you permission to communicate with the media, it is essential to prepare yourself in advance. If you receive a telephone call, it is strongly recommended that you arrange to speak at a later time, and that you find out what the reporter's questions are, or have those questions provided to you in advance. Courses in handling the media are useful to avoid future embarrassment to yourself or your decision-making body.

Familiarize yourself with the “media guidelines” or “media policy” of your organization. If there is no guideline or policy, raise the question with your chair so that you are confident you know what is expected of you.

### Media and public hearings

If your hearing is open to the public, as most are, the media may attend unless your enabling legislation has provisions to limit media attendance. Assuming they may attend, you have the authority to control the process and that includes instructing the media on their conduct so as to cause the least disruption possible to the hearing and, hopefully, to avoid distracting and unnerving the participants. Your tribunal may want to develop a policy on media attendance at hearings.

### Public speaking or writing articles

Generally, the chair, or their designate, is the only person who speaks on behalf of the administrative decision-making body, whether to the media, in public gatherings, or in written publications. This ensures that conflicting information is not inadvertently conveyed to the public, and it allows the body to speak with one voice. If asked to speak or write about your administrative decision-making body, speak with your chair beforehand to determine whether you are authorized to do so.

## CHAPTER 8

### DECISION-MAKING

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have *decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.*<sup>45</sup> (emphasis added).

There are many factors that go into developing the skills of a good decision-maker. These include:

- understanding and applying the principles of procedural fairness;
- maintaining impartiality;
- ensuring that your determination is not influenced by external pressures;
- being able to assess credibility;
- being able to weigh evidence for relevance and reliability;
- being aware of the desirability for consistency with court-decided cases and other decisions from your decision-making body;
- developing strong decision-writing skills; and
- being able to weigh and balance the often competing interests of parties' rights and the decision-making body's needs.

#### The person who hears must decide

The principle that the person who hears the evidence and arguments must make the decision serves to ensure that panel members are present throughout the whole of the evidence and submissions and that non-panel members do not affect the determination.<sup>46</sup> Procedural fairness requires that the decision-making body give the parties an impartial hearing. Being properly heard requires that only the decision-maker who heard the case makes the final decision. A party may choose to waive the right to be heard by not attending the hearing or not presenting evidence or submissions. This waiver will not relieve the decision-maker from the duty to make a decision on the evidence before them.<sup>47</sup>

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<sup>45</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 28.

<sup>46</sup> *Iva v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

<sup>47</sup> *Doyle v. Canada (Restrictive Trade Practices Commission)*, [1985] 1 F.C. 362 (C.A.), leave to appeal refused (1985), 7 C.P.R. (3rd) 235n (S.C.C.).



## Discussions of policy and law with non-panel members

Although the general rule is that decision-makers must not allow others to influence their decisions, the Supreme Court of Canada has recognized a role for decision-making bodies to have general discussions in the interests of consistency.<sup>48</sup> There is a tension between maintaining the independence of individual decision-makers and ensuring that decisions are consistent. It is not in the interests of fairness to have radically different results from the same fact pattern, depending on who is assigned to the case.

To this end, panel members may have informal discussions about policy and legal issues with the whole or part of the decision-making body in order to canvass important policy considerations. Discussions such as these occur on a voluntary basis. If the hearing panel does not want to engage in discussion prior to rendering a decision, they have no obligation to do so.<sup>49</sup> Non-panel members must not participate in fact-finding or making determinations on those facts; those tasks belong to the hearing panel.

If, as a result of consultations with other tribunal members, the panel wants to consider policy or law that was not before the parties at the hearing, it will be necessary to reconvene the hearing (orally, in writing, by teleconference or other means) to give the parties an opportunity to become aware of and understand the policy or law. The panel must give the parties the opportunity to lead evidence, if appropriate, and to make submissions to the panel.

## Lawyers and consultants

Some decision-making bodies employ lawyers to consult with non-lawyer members on legal issues.<sup>50</sup> Similarly, bodies may have a non-panel member act as a consultant on issues of substantive expertise.<sup>51</sup> In both instances, although the lawyer and the consultant may be present during the hearing and consult with the hearing panel, neither may take part in the conduct of the hearing or in the decision-making.

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<sup>48</sup> See *Consolidated-Bathurst*, *supra*.

<sup>49</sup> *Consolidated-Bathurst*, *ibid*.

<sup>50</sup> See *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 85 B.C.L.R. (2d) 85 (C.A.).

<sup>51</sup> See *Kranz v. British Columbia (Assessor of Area #10 - Burnaby/New Westminster)* (1994), 94 B.C.L.R. (2d) 277 (S.C.), leave to appeal refused (1994), 53 B.C.A.C. 69 (C.A.).

## CHAPTER 9

### DECISION WRITING

#### Written reasons

What is the distinction between “reasons” and “decision”? The decision tells the parties what you have decided and the reasons tell them why.

Though not always required, written reasons serve the following purposes: (a) they focus the decision-maker’s mind on the relevant issues and evidence, and help them to provide a clear justification for the decision; (b) they help the parties to understand how the decision was reached; and (c) they allow a reviewing court to determine whether the decision-maker adhered to the requirements of the enabling statute and administrative law generally.

At the conclusion of the hearing, the panel usually advises the parties that it is reserving its decision and will provide a written decision with reasons. The timing of the decision and reasons depends on the nature of the decision-making body, the length of the hearing and number of witnesses, and whether the legislation or the rules impose a time limit within which the decision must be provided. You should not give the parties a specific date for the decision unless you are certain it can be met. Regardless of whether the statute or rules mandate a maximum time, ensure that the decision is timely. The sooner the decision is written after a hearing, the more accurately you will be able to recall the evidence and arguments.

The requirement to give reasons depends on the provisions of the enabling statute. If s. 51 of the ATA applies, you are required to make your “final decision in writing and give reasons for the decision”.<sup>52</sup> In certain circumstances, the common law may also require written reasons. In *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>53</sup> the Supreme Court of Canada found that, in some cases, failing to provide reasons amounts to a violation of procedural fairness.

#### What do “reasons” require?

While the inadequacy of reasons is not by itself a breach of procedural fairness, reasons must still meet the requirements of justification, transparency, and intelligibility within the decision-making process.<sup>54</sup> The reviewing court must be able to determine from your reasons the analysis behind your decision.

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<sup>52</sup> ATA, s. 51.

<sup>53</sup> *Supra*, note 45.

<sup>54</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61.

## Findings of fact

It is insufficient to say only: “I have considered all of the relevant evidence, and have determined that the claim has/has not been substantiated” or “that X wins and Y loses”. You must indicate what evidence you found relevant and reliable, and why. When facts are disputed, you should state your findings of fact with details as to why you have made those findings. For example, it may be that there was corroborative evidence or that the weight of the evidence and witnesses supported this view of the facts. If there was competing evidence, you will probably need to say which version you found most convincing and why. Once you have set out your findings of fact, it is important to show how those facts justify your decision, with reference to the applicable legislation.

## Judicial (or administrative) notice

Taking “judicial or administrative notice” of particular facts means employing your own knowledge of facts that are so commonly known that there could be no reasonable challenge to them, or relying on “any fact or matter which can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned”.<sup>55</sup> An example would be that November 4, 2015 fell on a Wednesday. Under s. 24 of the *Evidence Act*,<sup>56</sup> judicial notice must be taken of all statutory instruments within Canada and Great Britain. You may not use your own knowledge in coming to a decision unless it falls within the very narrow judicial notice provisions.<sup>57</sup>

## Decision writing with other panel members

Sometimes writing as a panel can seem more difficult than writing as a single decision-maker. Remain respectful of the other members’ viewpoints throughout, even when raising opposing views. Be open to changing your views in light of cogent arguments expressed by your colleagues. Sometimes it may be necessary to come to the best decision possible even though you may not totally agree with all the component parts.

It is important, particularly with part-time members who hold other jobs and interests, to establish a schedule for writing and for meetings to discuss the drafts. The sooner the panel can meet after the hearing, the better. Don’t discuss the decision without the whole panel present.

Coming to agreement on issues can be difficult. However, that is the purpose of the meetings—to canvass views and to hear from each other on the interpretation of evidence, the application of legal principles and the statute, and any other relevant considerations. Sometimes panel members differ on their recollection of a piece of crucial evidence. You may need to go back through volumes of evidence to follow the trail of that evidence. It is desirable to have one person do that and provide information on where the evidence is to be found and what that person believes the evidence establishes. Then the other members can look at it and see if they agree.

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<sup>55</sup> *R. v. Potts* (1982), 36 O.R. (2d) 195 (C.A.).

<sup>56</sup> R.S.B.C. 1996, c. 124.

<sup>57</sup> *R. v. Bomyk*, 2015 BCCA 28.

If the panel fails to agree, the disagreement may rest with the outcome, or the reasons. If the latter, the member may indicate agreement with the result but not the reasons and not feel the need to provide dissenting reasons. However, if a member strongly believes that the other panel members have erred in their reasoning, he or she may set out dissenting reasons.

Where the panel is in agreement, there are different approaches to writing a panel decision, including dividing the writing by areas of expertise, or by assigning the writing to a single member. However the decision writing is accomplished, it should read as though written by a single author. Also, each member must ensure that the decision accurately reflects the panel's opinion.

### Consistency in decision-making

Decision-making bodies are bound to follow the decisions of superior courts. Generally speaking, they are not bound to follow their own prior decisions but this is not an absolute rule. Decision-making bodies should strive for consistency and predictably. To the extent that previous decisions are persuasive, they should be considered and followed. However, it is good practice to note in your reasons that you are not bound by previous decisions of your body, as otherwise it may appear that you believe you are bound, which may be a reviewable error of law. If you are not following a previous decision, you need to explain why.

Inconsistency in an interpretation of the enabling legislation can be an independent ground for judicial review. A court can consider whether conflicting decisions represent—in both outcome and analysis—a reasonable interpretation of the legislation.<sup>58</sup>

### Credibility findings

All findings made by a decision-maker must be based on some evidence. If the proceeding is written or oral, there will be statements or documents that support, or fail to support, the position or application of a party. When assessing credibility, all of this evidence should be contained in the decision. You will set out why, based on the totality of the evidence, you find the evidence of one party more relevant and reliable than the evidence of another party or participant.

It is not necessary to make blanket findings of credibility. Your findings need only to relate to the evidence required to decide the issues before you. If nothing turns on evidence presented by a party, note this in your decision. Often findings of credibility are based on assembling the evidence in a way that illustrates to the persons affected by your decision its inconsistency or weakness. References to contradictions in evidence are also useful in discussions of credibility.

Sometimes you do not need to make a finding of credibility at all. Where there are credibility issues, ask yourself if they relate to an issue that you must decide. If not, avoid making a determination on the credibility issue.

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<sup>58</sup> *Aspen Planers Ltd. v. Assessor of Area #23*, 2015 BCSC 1573.

## Format of Decision

A decision should be logically organized and should include the following elements:

- **Cover page.** Identifies the decision-making body, parties, counsel for the parties, and hearing panel, and indicates the dates of the hearing and the decision.
- **Introduction: a brief statement of the nature of the case.** It may include a brief description of the parties and some basic facts to “hook” the reader.
- **Issue statement.** This clearly identifies the issues to be decided. An issue statement should appear early on in the decision.
- **Applicable legislation or policy.** If the case involves the application of legislation or policy, it should be referenced. Try to accurately paraphrase or summarize applicable legislation or policy instead of including lengthy quotes, unless the interpretation of the precise words of the legislation or policy are in issue.
- **Preliminary applications.** If you heard any preliminary applications and rendered decisions in the hearing, they may be included, particularly if a decision on a preliminary matter is likely to be a basis for appeal or review.
- **Evidence.** Organize the evidence in a way that makes sense. It is not necessary to include in detail all of the evidence—you are not writing “minutes”. Summarize the evidence that is relevant to the issues and questions of fact that must be decided.
- **Facts.** Evidence that is undisputed may be set out as fact. Where evidence on a relevant factual issue is disputed, you need to make a finding of fact.
- **Submissions.** It is sufficient to summarize the key submissions of the parties. Submissions may be also discussed in your analysis.
- **Analysis and Reason.** Provide reasons for your decision, including why you accept certain evidence over other evidence, your findings of credibility, and your conclusions respecting the interpretation or application of law or policy. Your analysis should be clear and logical. The reader must understand why you reached your conclusions.
- **Conclusion.** A clear statement of what you have decided. Your conclusion may appear at the beginning of the decision as part of the introduction but should also appear at the end. If you have made decisions on a number of issues, it is helpful to summarize these.
- **Orders.** Where required.

Unless you are required to follow a specific template, consider an organizational structure that is appropriate for the particular decision you are writing and one that will assist with a logical progression of thought towards a conclusion on each issue.

## Writing for the Reader

Your decisions may have many readers, including the parties, other decision-makers, future parties, the court, the media, academics, and government bodies. Each time you write, consider who will read your decision. Arguably, the most important reader of your decision is the losing party. Put yourself in that person's shoes and be attentive to writing for their particular needs so that they will feel respected and understand the decision, even if they do not agree with it.

Writing for your reader involves:

- using plain language;
- paying attention to whether and how you describe personal characteristics and cultural components; and
- paying attention to the “tone” of your decision.

## Plain language

Use clear understandable language. Ask yourself two questions: “Is this precisely what I want to say?” and “Is there a clearer way of saying it?” Be concise. Using too few or too many words creates ambiguity. Use the most direct way to make your point. Avoid using the passive voice, unnecessary nominalizations, excess wordiness including “fill” phrases, and unnecessary adjectives. Avoid legalese and jargon. Take the time to explain concepts that your readers may not readily understand.

There are many books on writing, decision writing, and plain language, including those referred to in the bibliography to this manual. BCCAT offers a decision writing workshop aimed at writing clear, well organized, and well-reasoned decisions. The Canadian Council of Administrative Tribunal's (CCAT) website has an online literacy course that links to documents to assist decision-makers in communicating with low literacy participants.

## Personal and cultural sensitivity

Writing for your readers includes being sensitive to their personal and cultural characteristics and writing with respect. Here are a few pointers:

- Avoid reference to personal characteristics unless they are actually relevant to an issue you must decide. For example, in a human rights dispute alleging discrimination on the basis of race, the complainant's race is a relevant factor, but in most other disputes it would not be.
- Avoid language that might convey prejudice with respect to certain personal characteristics, or descriptors that imply judgment. For example, “He had only one arm”.
- Use appropriate terminology when referring to relevant personal characteristics. For example, “Indigenous” not “Indian”, or “person with a disability” not “disabled” or “handicapped”.

- Be aware of how people refer to themselves. For example if a woman refers to herself as “Mrs. Smith”, it is appropriate to refer to her that way – otherwise use “Ms.” when referring to women.
- Keep current on appropriate, culturally acceptable terms. If in doubt, ask people how they would like to be referred to.
- Make sure you spell names correctly.

Some decision-making bodies are required to protect individual privacy, including names, while others are not. Even if you are not required to make decisions anonymous, be sensitive to an individual’s privacy and avoid disclosing unnecessary private information such as name, age, address, and occupation. Decision-making bodies have adopted various practices to meet the mandates of their enabling legislation with respect to both public accountability and transparency and privacy requirements. Be aware of the requirements of your own legislation and the policies adopted by your organization with respect to personal privacy.

## Tone

The tone of your decision may be hard for you as the writer to detect, but it can have an enormous impression on the reader and affect the reader’s response to the decision. Tone is the product of various aspects of a decision, but pay particular attention to the tone set in making findings of credibility and rejecting an argument. For example, writing that a witness’s evidence “strains credulity” conveys a different message than saying that their recollection of events is not supported by the evidence. Tone is also an important consideration when an initiating party is really the only party and the decision-maker is relying on information from a government department or agency, the police, or another institutional source. It is important to treat information from the initiating party and the institutional source equally to avoid a perception that the decision-maker is on the “side” of the institution and will inevitably find its evidence more reliable.

## CHAPTER 10

### REVIEW OF DECISION-MAKING BODY DECISIONS

The fact that a decision is challenged suggests that there is an issue of substantial importance to your parties. If a court makes a decision on judicial review, it will be precedential, in that it must be followed. A precedent will provide guidance to the decision-making body in future cases involving the same issues. Although they can make us anxious, appeals, reconsiderations, and judicial reviews should be welcomed as part of the administrative justice process.

There are a number of ways in which a decision may be reviewed after it has been released. This discussion is intended only as a brief introduction to decision review.

#### Reconsiderations and appeals

Statutes often provide for more than one level of decision-making. The first decision made under a statute, often called the “decision of first instance”, may be subject to appeal or reconsideration pursuant to provisions in the enabling legislation. If there is no right of appeal under the enabling legislation, then no such right exists and the decision-maker cannot create one, although decisions are always subject to judicial review pursuant to the court’s inherent supervisory jurisdiction. As a general rule, only final decisions of decision-making bodies, not interim decisions, can be reviewed by the courts. There are some limited exceptions. A few enabling statutes contain provisions for appeals to the courts. In these cases, the enabling statute sets out the scope of any appeal and the required process.

The parties to an appeal are those whose rights are affected by the decision-maker’s final decision.<sup>59</sup> The nature of parties to an appeal or reconsideration may also be set out in the enabling statute.

Enabling statutes may also provide for the reconsideration of final decisions of a lower level decision. A statutory right of reconsideration will indicate who will conduct the reconsideration, and may set out what issues may be reconsidered. For example, reconsideration may be by a decision-maker who is internal to the decision-making body or by an independent decision-making body.

There is also a general common-law right of reconsideration of administrative decisions.<sup>60</sup> The limits of this right have been considered by the courts in this province.<sup>61</sup>

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<sup>59</sup> *Berg v. Police Complaint Commissioner*, 2006 BCCA 225, leave to appeal refused [2006] S.C.C.A. No. 300 (QL).

<sup>60</sup> *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

<sup>61</sup> *Fraser Health Authority v. Workers’ Compensation Appeal Tribunal*, 2014 BCCA 499, appeal heard and reserved 2015 S.C.C.A. No. 58 (QL).



The Supreme Court of Canada has heard an appeal on that issue, but has not yet issued a decision, so the limits of the right to reconsider administrative decisions at common law are still unsettled.

The filing of an application for appeal or reconsideration may or may not result in a stay of your decision. Be aware of the provisions of your enabling statute.

It is usually the responsibility of the lower level decision-maker to provide the record on which the appeal or reconsideration will be decided. Most appeals and reconsiderations under statute are on the record. There are very few statutes that grant a *de novo* hearing on appeal or reconsideration, in which all issues will be re-examined and new evidence will be taken.

Enabling statutes often set out the orders or decisions that can be obtained on appeal or reconsideration.

### Correcting errors in your decisions

In addition to reconsideration powers, a decision-maker always has the authority to correct typographical, mathematical, or other such errors in their decisions. This authority is found in s. 53 of the ATA, the provisions of many enabling statutes, and in the common law.

### Judicial review

The provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 240 (the “JRPA”) and the ATA provide a framework governing judicial reviews. While s. 11 of the JRPA does not set a deadline for judicial reviews, s. 57 of the ATA sets a 60-day limit from the date of the final decision for a judicial review to be commenced, subject to the provisions of the tribunal’s enabling statute or a court extending that time for reasons specified in the section.

Sections 58 and 59 of the ATA set standards for review, depending on whether the enabling legislation contains a privative clause. These sections specify circumstances under which all three of the traditional standards of review—patent unreasonableness, reasonableness, and correctness—will be applied.

While the Supreme Court of Canada removed the patent unreasonableness standard of review from the common law in *Dunsmuir*,<sup>62</sup> this standard continues to be applied by BC courts because it has been codified in ss. 58 and 59 of the ATA.

### Other forms of review

The Office of the Ombudsperson of BC may contact a BC decision-making body to investigate a complaint filed by a participant in a proceeding before it.

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<sup>62</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9.

Sometimes a party to a decision may contact the Office of the Information and Privacy Commissioner if there is a concern that the decision-making body might have information it did not disclose that could affect the outcome of a decision, or if there is a concern about the way the body collected or handled personal information.

A party to a proceeding may complain about you to your chair or to the Minister who appointed you. Most decision-making bodies have a process for dealing with those types of complaints and you should know yours. If there isn't one, speak to the chair about what, if anything, is expected of you in response to a complaint. Usually, complaints will not be dealt with until you have completed work outstanding on an application

## APPENDICES

### Appendix A

#### Oral Hearing Template Script

##### 1. INTRODUCTION

***(remember to ensure recording is on, if applicable)***

My name is \_\_\_\_\_. I am a member of the Civil Resolution Tribunal, and I'll be hearing your dispute today.

If at any time you need me to slow down or repeat something, please let me know.

The hearing is being recorded and this recording will become part of the file.

Because of the recording, I need to state a few administrative details.

This is a hearing of the Civil Resolution Tribunal held in **[IN PERSON/BY TELEPHONE/BY VIDEO]** on **[DATE]** with respect to the claim of **[APPLICANT PARTY(IES)]** under CRT claim # **[FILE NUMBER]**.

I would like to advise you that the Civil Resolution Tribunal is an independent decision-making body.

**[APPLICANT]**, is present.

Good afternoon **[APPLICANT]** *(important to get voice print, for recording)*

*(if representative)* Representing the applicant (or their name) is **[REP NAME]**

Good afternoon **[REP NAME]** (get voice print)

*(Continue for all other applicants)*

The respondent is **[NAME]**

Good afternoon **[RESPONDENT]** (get voice print)

*(in case of corporation, also identify corporate contact person present)*

*(if representative)* Representing the respondent is **[REP NAME]**,

Good afternoon **[REP NAME]** (get voice print)

*(Continue for all other respondents)*

*(Identify any others present).* If you will be giving evidence, I will ask you to leave now. We will call on you when needed. *(confirm best way to contact them)*

## **2. PRELIMINARY MATTERS**

After the hearing, I will consider your evidence and submissions and send you my decision in writing. For this reason, **I need to confirm your preferred contact method** (*refer to top sheet and confirm email or mailing addresses*)

- **Does either party have any documents that have not already been submitted?**
- **Are there any other expenses that you are seeking?**

I have reviewed the contents of the claim file, including the evidence in preparing for the hearing today.

As I understand it, there are **[NUMBER]** issues in this claim:

**1. [ISSUE]**

**2 [ISSUE]**

Do the parties agree that these are the issue?

*(confirm with each party. If new issue raised, get submissions from parties, and decide whether you will add it, or whether it needs to be raised in a separate claim)*

And what remedy are you seeking?

*(Confirm with each party. If a party asks for something you think is outside the CRT's jurisdiction, make sure to get submissions on whether this remedy is or is not within your jurisdiction and either make a decision, or let the parties know you will deal with this issue in your written decision)*

*(If parties are represented, ask whether the reps are familiar with our hearing procedures. If both are familiar, turn to applicant rep and ask them to start with a brief opening statement ... then carry on ... If not, explain as below.)*

### **OPENING STATEMENTS**

- APPLICANT
- RESPONDENT

### **EVIDENCE (for each witness)**

- DIRECT
- CROSS EXAM
- PANEL QUESTIONS
- RE-DIRECT

### **CLOSING SUBMISSIONS**

- APPLICANT
- RESPONDENT
- APPLICANT REPLY

Now, before we begin, I must warn you that I will likely have some questions as we go along because I may need to ask for clarification at certain points.

Also, I will be taking notes as we go.

*(If only one party in attendance.)* In a moment, I will ask you to present your evidence. This may be documents you have for me to consider or it may be your statements about why you believe the claim should be accepted. I will have some questions for you and if you have any other comments afterward, I will give you time for that.

I will ask each person giving evidence to affirm that the evidence they give will be the truth. (An affirmation is a solemn promise to tell the truth.)

### 3. **SWEARING IN**

*(Swear in everyone who will be giving evidence)*

\_\_\_\_\_ Do you wish to swear or affirm?

Will \_\_\_\_\_ be giving evidence? (if so, swear them in) Do you wish to swear or affirm?

### 4. **OPENING STATEMENTS**

*(Appellant)* \_\_\_\_\_, just briefly, in a few sentences, what is your position on the issues?

And (rep), does the employer take a position on the issues at this time?

### 5. **EVIDENCE**

*Appellant direct*

*Respondent cross*

*Appellant re-direct (do you have any comments arising out of the Respondent's questions of you?)*

*Shannon's questions*

*Appellant re-direct*

*Respondent direct*

*Appellant cross*

*Respondent re-direct*

*Shannon's questions*

*Respondent re-direct*

### 6. **SUBMISSIONS**

*Submissions*

*Appellant*

*Respondent*

*Appellant - final comments on Respondent's submission?*

## **7. CLOSING**

This concludes the hearing.

Deal with any written submissions or outstanding business.

Thank you for participating. I will consider the evidence and submissions and provide you with my decision as soon as possible.

The due date for my decision is \_\_\_\_\_, subject to an extension of time if I should need extra time due to complexity.

Thank the parties ...

Escort them to the door.

State, "We are off the record"

*(Turn tape off)*

## Appendix B

### Sample Form of Affirmation (or Oath)

- (i) Court Reporter : “I \_\_\_\_\_, swear that I will faithfully and accurately, to the best of my skill and ability , report or accurately record the proceedings of this case and will transcribe or have transcribed my notes, or the record of them, should that be required”. (When administering an oath add the words “So help me God”.)
- (ii) Witness: “I solemnly promise, affirm and declare the evidence given by me in this hearing shall be the truth, the whole truth and nothing but the truth”. (Add “So help me God” for an oath.)
- (iii) Translator: “I \_\_\_\_\_, solemnly swear that I will accurately translate from the \_\_\_\_\_ language to the English language, and the English language to the \_\_\_\_\_ language”. (Add “So help me God” for an oath.)

**WCAT** Workers' Compensation  
Appeal Tribunal

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**WCAT Employee  
Social Media and  
Social Networking Policy**



Human Resources Policy #15a	Last Modified: April 8, 2015
Effective Date: February 1, 2012	

## **Introduction**

Social media and social computing refer to the wide array of internet-based tools and platforms that increase and enhance the sharing of information. They allow users to create and edit "profiles" that can be viewed by others. Facebook, LinkedIn, YouTube, blogs, Twitter, and public forums are examples of social media. Most if not all are searchable, and capable of being tracked as well as traced.

The policy on Appropriate Use of Government Resources applies to all online activities using WCAT equipment.

WCAT employees, of course, can use social media outside of work hours. But, it is important to recognize that what you publish on the Internet may reflect on WCAT.

The use of social media comes with risks and challenges that are particularly important for people who work in a position where discretion and confidentiality are very important. Therefore, it is important for WCAT employees to recognize that what they publish on the Internet may reflect on WCAT. All use of social media must be in accordance with the policy outlined below.

## **Policy**

### **(a) General Principles**

You are responsible for what you post.

**The policy on Appropriate Use of Government Resources applies to all online activities using WCAT equipment.**

**The BC Public Service Agency Standards of Conduct apply to all online activities, including social media.** The Standards of Conduct state, in part:

Employees will exhibit the highest standards of conduct. Their conduct must instill confidence and trust and not bring the BC Public Service into disrepute. The honesty and integrity of the BC Public Service demands the impartiality of employees in the conduct of their duties.

...

### **Loyalty**

Public service employees have a duty of loyalty to the government as their employer. They must act honestly and in good faith and place the interests of the employer ahead of their own private interests. The duty committed to in the Oath of Employment requires BC Public Service employees to serve the government of the day to the best of their ability.

Confidential information that employees receive through their employment must not be used by an employee for the purpose of furthering any private interest, or as a means of making personal gains. (See the Conflicts of Interest section of this policy statement for details.)

### **Consequently, keep the following points in mind when accessing or posting on social media:**

- **Think before you post.** Postings on the Internet are often very easy to find and remain accessible long after they may be forgotten by the user. Nothing is truly "private" on the Internet. Do not post anything you would not want to read on the front page of the newspaper. Consider carefully whether you should post something you would not want your supervisor to see.
- **Always use good judgment.** If you have any doubt about a posting or other activity, err on the side of caution. If you have any doubt about anything you are considering posting, speak to Tribunal Counsel first. In addition, if you see something online that causes concern, speak to the Chair and Tribunal Counsel immediately.
- **Maintain honesty and respect.** Do not behave in a manner or encourage behaviour that is illegal, unprofessional, or in bad taste. Even on a personal site and using your personal computer or device, beware of venting about work matters online. If you have a concern, raise it with your supervisor or employee services. Recognize that if you publish inappropriate comments that reflect badly on WCAT in your personal space, disciplinary action could follow. For example, you should not make derogatory comments about another WCAT employee or a member.
- Ensure that your social media activity does not interfere with your work commitments. Access your personal social media on your breaks.

- Avoid identifying yourself as a WCAT employee on your personal social media sites. If you identify yourself as a WCAT employee, you become, to some extent, a representative of WCAT and everything you post has the potential to reflect upon WCAT. While you may control what you post, you cannot predict nor control what others, even family members, might post on your site. If your connection to WCAT is apparent, make it clear you are speaking for yourself and not WCAT. Consider adding "The views expressed on this [blog, website etc.] are my own and do not reflect the views of my employer" to your profile.
- Behave in a manner that promotes a safe and healthy workplace and supports the well-being of other employees and members. Discrimination or harassment of other WCAT employees or members is prohibited, whether during work-time or on personal time. This includes any such activities using social media. WCAT employees and members must treat each other with respect and dignity.

**(b) Confidentiality and Privacy**

WCAT employees have access to extensive personal information about the parties that appear before us. The obligations to keep material confidential that bind all WCAT personnel also apply to all online activities. It is very important that everyone who works at WCAT complies with the *Freedom of Information and Protection of Privacy Act*, and with the confidentiality provisions in the *Workers Compensation Act* (Act). Section 260 of the Act states that members, officers, employees and contractors of WCAT must not disclose any information obtained by them or of which they have been informed while performing their duties and functions, except where disclosure is necessary to perform their duties.

The Public Sector Code of Conduct states:

**Confidentiality**

Confidential information, in any form, that employees receive through their employment must not be disclosed, released, or transmitted to anyone other than persons who are authorized to receive the information. Employees with care or control of personal or sensitive information, electronic media, or devices must handle and dispose of these appropriately. Employees who are in doubt as to whether certain information is confidential must ask the appropriate authority before disclosing, releasing, or transmitting it.

The proper handling and protection of confidential information is applicable both within and outside of government and continues to apply after the employment relationship ends.

WCAT employees:

- Must maintain confidentiality.
- Must avoid discussing WCAT business on a social media site with anyone. This includes discussing WCAT business with another WCAT employee or member.
- Must not disclose or publish sensitive work-related information.

Keep your social media participation personal. Learn about privacy settings. It is strongly recommended that you use them to set your privacy settings as tightly as possible. Think carefully about Facebook or other "friend" requests, especially from someone you do not know.

Be very careful not to disclose any confidential personal information, even if it is harmless.

**(c) Security**

There are also security considerations that must be taken into account when posting on or accessing the Internet.

WCAT employees must take all necessary precautions to avoid creating security risks for themselves and other WCAT personnel.

Do not mention WCAT members or employees without their express consent and even then, do not identify them as WCAT members or employees.

Be very aware of your own and others' security. An employee's or member's social media site could provide information to someone who is dissatisfied with a decision and wants to do harm. If your role involves interaction with the public, consider not posting a picture of yourself. Consider using your first name only.

Do not post personal information such as your address or telephone number or if you do, ensure that the information is kept as private as possible.

Do not reveal more personal information about yourself than is necessary.

Even if you do not identify yourself as a WCAT employee, be aware that others may make the connection. For example, a party to an appeal could search for your name.

Do not post pictures or video recordings of WCAT premises, WCAT events, or other WCAT employees or members.

Be aware that one of the key security issues with social media sites such as Facebook is their very popularity, which makes them attractive as targets for hackers and unscrupulous marketers. There are viruses and worms, and “bots” (fake profiles) designed to breach Facebook security.

If you see a contravention of this policy that involves a health and safety risk to any individual, report it to your supervisor immediately.

**(d) Maintaining WCAT’s independence, integrity, and impartiality**

The Public Sector Code of Conduct states:

**Political Activity**

BC Public Service employees may participate in political activities including membership in a political party, supporting a candidate for elected office, or seeking elected office. Employees’ political activities, however, must be clearly separated from activities related to their employment.

If engaging in political activities, employees must remain impartial and retain the perception of impartiality in relation to their duties and responsibilities. Employees must not engage in political activities during working hours or use government facilities, equipment, or resources in support of these activities.

Partisan politics are not to be introduced into the workplace; however, informal private discussions among co-workers are acceptable.

**Public Comments**

BC Public Service employees may comment on public issues but must not engage in any activity or speak publicly where this could be perceived as an official act or representation (unless authorized to do so).

Employees must not jeopardize the perception of impartiality in the performance of their duties through making public comments or entering into public debate regarding ministry policies. BC Public Service employees must not use their position in government to lend weight to the public expression of their personal opinions.

WCAT employees:

- Must not detract from the dignity of WCAT or publish anything that may reflect adversely on WCAT.
- Must not engage in restricted political activities.
- Must not comment on WCAT matters.
- Must avoid association with issues that come before WCAT or organizations that frequently come before WCAT.

Consider whether joining certain networks would give the appearance of undermining your integrity.

Do not give advice to anyone about workers' compensation matters, the appellate process or anything in relation to WCAT's work on a social media site or network. This applies both to general questions and most forcefully to questions relating to specific cases.

Do not express views for or against any law or policy that is a matter of current political debate that touches on WCAT's business. The Standards of Conduct for the public service states that employees must not jeopardize the perception of impartiality in the performance of their duties through making public comments or entering into public debate regarding ministry policies. BC Public Service employees must not use their position in government to lend weight to the public expression of their personal opinions. For example, do not express views about matters in the area of workers' compensation.

Do not discuss your job responsibilities at WCAT on the Internet.

Avoid sharing WCAT or government material in a personal space. Try and keep your personal online presence separate from your work.

Your social media name, handle, and URL should not include WCAT's name.

Be careful to avoid the perception that your communications represent WCAT, or you may adversely affect perceptions about WCAT's role as an independent and impartial decision-maker.

**(e) Fairness**

Do not use a social networking site to obtain information regarding a matter before WCAT.

Be aware of changes and new features of social media technology so that you can assess whether they may present additional ethical issues.

**(f) Use of WCAT email addresses**

The use of a WCAT email address to engage in social media or network activity clearly identifies association with WCAT. Therefore, the use of WCAT email addresses to engage in social media or networking activity is prohibited.

Subject to the common law, WCAT employees should not have an expectation of privacy when using WCAT equipment.

**(g) Effect of non-compliance**

If you do not comply with this policy, it may affect your employment, up to and including dismissal. See the Standards of Conduct for the B.C. public service.

## REFERENCES

1. BC Laws at [www.bclaws.ca](http://www.bclaws.ca)
2. The Canadian Legal Information Institute (CanLII) at [www.canlii.org](http://www.canlii.org)
3. Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham, ON: LexisNexis Canada, 2011).
4. *British Columbia Administrative Law Practice Manual*, 3rd ed. (CLEBC, 2015).
5. Macaulay, Robert W. and James L.H. Sprague, *Hearings Before Administrative Tribunals*, 4th ed. (Scarborough ON: Carswell, 2010).
6. Workers Compensation Appeal Tribunal *Rules of Practice and Procedure*, at [www.wcat.bc.ca/research/MRPP/mrpp.html](http://www.wcat.bc.ca/research/MRPP/mrpp.html)