Administrative Law Primer

2023 BCCAT Education Conference Series

Karrie Wolfe and Ross Alexander
Legal Services Branch
Ministry of Attorney General
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This presentation is being delivered from the the traditional territories of the lək̓ʷəŋən (Lekwungen) peoples, known today as the Songhees and Esquimalt Nations.

Outline for Presentation

1. Overview of administrative decision-making and judicial review
2. Main grounds for challenging administrative decisions (and why that matters)
3. Overview of Procedural Fairness Requirements
4. Avoiding substantive errors (and other tips) when drafting reasons for decision

1. The history of administrative decision-making

- ***Why do we have administrative law?***
  - Governments could no longer centrally govern and regulate all interactions between the government and the public in an effective way

- ***What happened?***
  - Government began to delegate authority to public officials and collective decision-making bodies (i.e. boards and tribunals) to:
    - ensure efficient decision-making and delivery of social programs; and
    - to avoid overwhelming the courts

The foundations of administrative law

- ***Administrative law:***
  - defines what delegated decision-makers can do (i.e. their authority);
  - establishes the duties and rules by which they are expected to operate; and
  - provides mechanisms to review the actions of delegated decision-makers

- ***Who are administrative decision-makers?***
  - governmental or quasi-governmental authorities with powers derived directly or indirectly from statute
  - part of the executive branch of government (separate from the legislative and judicial branches)

Administrative decision-making in practice

- ***How are administrative decision-makers created?***
  - Legislative branch of govt creates an initiative and a decision-maker by enacting legislation
    - As a result, admin decision-makers are often called “creatures of statute”
  - Executive branch of govt implements the legislation, and creates structure within which the decision-maker operates (i.e. ministerial office, tribunal structure)

- ***What types of decisions do administrative decision-makers make?***
  - **Adjudicative**: decide issues between 2 or more parties, or hear appeals
  - **Regulatory**: deal with regulated activities; issue licences / permits or set policy
  - **Inquisitorial**: investigate and decide or make recommendations about issues

Review of administrative decision-making

- ***How can administrative decisions be reviewed?***
  - some statutory frameworks contain an "internal" review – i.e. a review or appeal to another administrative decision-maker
  - the superior courts have inherent jurisdiction to supervise administrative decision-making through judicial review

- ***What is judicial review?***
  - The process by which the courts ensure an administrative decision-maker:
    - acted within the limits of the decision-maker's jurisdiction; and
    - followed a fair process in making the decision.

An overview of judicial review

- ***When is a decision subject to judicial review?***
  - the decision-maker must be a "public actor", exercising "state authority"
    - decisions of private actors are not subject to judicial review
  - the decision must affect rights, interests or privileges, and must have a "sufficiently public character"
    - decisions of a purely private nature are not subject to judicial review
    - the decision does not need to have a statutory basis

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26;
Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations), 2019 BCCA 207

Judicial review basics

- ***What is the role of the court on judicial review?***
  - The courts supervise the exercise of authority by admin decision-makers by determining if the decision was:
    - incorrect or unreasonable / patently unreasonable (depending on the issue / SOR);
    - made in a procedurally unfair manner.
  - As courts do not sit "on appeal" on judicial review, courts generally:
    - only consider the material that was before the decision-maker (i.e. the "record");
    - do not conduct new hearings or make their own findings of fact or law; and
    - remit the matter back for reconsideration if they find an issue.

2. Main grounds for challenging decisions

1. **Procedural fairness**
   - Were the parties given a right to be heard by an impartial decision-maker?
   - Court owes **no deference**, but more than one process may be "fair"

2. **Substantive errors**
   - Is the decision (reasoning or outcome) unreasonable? ***(deferential SOR)***
   - Is the decision incorrect? (4 exceptions that attract correctness review, including constitutional questions) ***(non-deferential SOR)***
   - If applicable, does the decision meet the appellate standards or the appropriate statutory standard of review under ss. 58 or 59 of the *Administrative Tribunals Act*? ***(SOR varies based on issue)***

How does knowing the grounds help?

- If you make administrative decisions, or advise decision-makers, knowing the most common grounds for challenge helps you to:
  - anticipate and work to address common procedural fairness pitfalls;
  - design, revise or modify processes to meet procedural fairness requirements;
  - ensure you review the relevant statutory frameworks for each decision (and remain alive to their limits);
  - articulate both the analytical pathway and the ultimate outcome for a decision

- ***In short, it helps you to craft processes and decisions that are less vulnerable to being set aside on judicial review***

3. Overview of Procedural Fairness

(1) Background/Overview

(2) The right to be heard and opportunity to respond

(3) Bias

(4) The person who hears must decide

(5) The right to a decision

What is Procedural Fairness / Natural Justice?

Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". - *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para. 79

- At its core, the duty to act fairly has two components:

  1) The right to be heard; and

  2) The right to an impartial hearing by an unbiased decision-maker.

The critical importance of context

- The scope or content of what the duty requires **varies** with the circumstances and the nature of the decision.
    - In other words: **"context is everything"**.

- Even when making the same kinds of decisions, the duty of fairness can vary.

- The more important the decision is and the greater its impact, the greater the procedural protections that must be given

Analyzing the Circumstances – the "*Baker factors*"

1) The nature of the decision and the process followed in making, including the closeness of that process to the judicial process

2) The statutory scheme and the role of the decision within the scheme.

3) The importance of the decision to the individual affected.

4) The legitimate expectations of the person challenging the decision.

5) The procedural choices made by the tribunal itself.

R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission), 2021 BCCA 67 (CanLII) citing *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817

What process is required?

- Subject to the duty of fairness and any statutory requirements, decision-makers have implied common law authority to control their own processes
  - e.g. set timelines for exchange of submissions, establish hearing process, etc.

- It must not be forgotten that **every administrative body is the master of its own procedure and need not assume the trappings of a court.** The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (*Judicial Review of Administrative Action* (4th ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. …

  - *Knight v. Indian Head School Division No. 19,* 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653 at para. 49

- With questions of fairness, "context is everything".

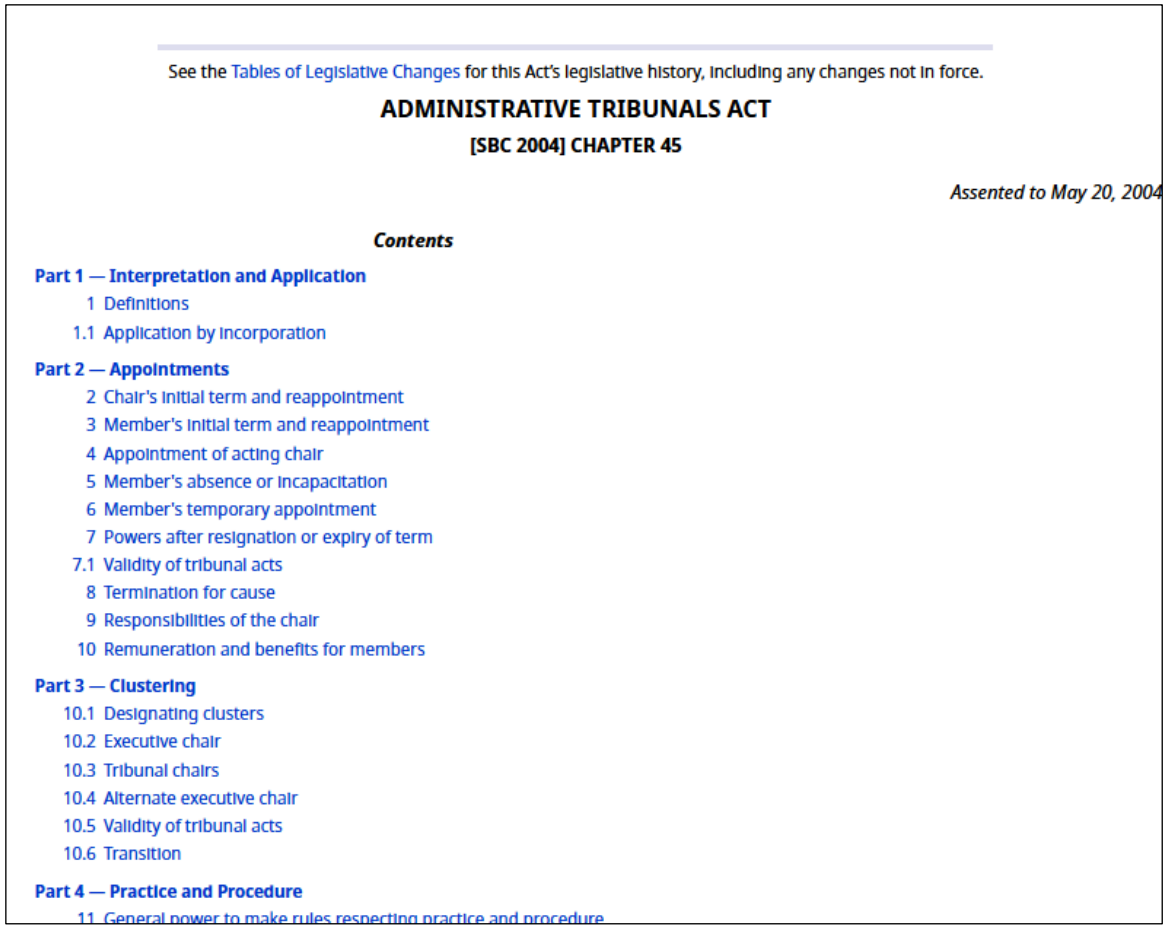
  (e.g. *Patton v. British Columbia Farm Industry Review Board*, 2021 BCCA 75 at paras. 99, 100, 104)

What does the enabling statute say?

Does the statute say anything about the decision-making process?

- If so, it is the starting point.

- This includes whether any provisions of the *Administrative Tribunals Act* have been incorporated into the enabling statute.



See the Tables of Legislative Changes for this Act's legislative history, including any changes not in force.

ADMINISTRATIVE TRIBUNALS ACT

[SBC 2004] CHAPTER 45

Assented to May 20, 2004

Contents

Elements of the duty of fairness

- The duty to act fairly has 4 basic elements, often expressed as rights of the person(s) whose interests are affected by the decision:

  A. A right to be heard (includes a right to notice of the case to be met and an opportunity to respond to it).

  B. A right to a decision from an unbiased decision-maker.

  C. A right to a decision from the person who hears the case.

  D. A right to a decision (whether or not formal reasons are required depends on the context).

A. The right to be heard (i.e. notice and response)

- The “right to be heard” means a person who may be directly affected by a decision has the right to:
  - **notice** that a decision may be made;
  - **understand the matters** that will be decided / “know the case to be met”; and
  - a fair opportunity **to state their case** and to correct or contradict relevant statements or evidence with which they disagree.

- “**Notice**” requires consideration of who is “affected”
  - In some cases, non-parties may require notice – may require balancing their interest vs. what is practical and convenient
- What constitutes adequate notice will depend on the context

The right to be heard, cont'd…

- This right **may** require:
  - disclosure of some or all materials that will be before the decision-maker*
  - an opportunity to:
    - present evidence,
    - make submissions in relation to materials disclosed, and
    - respond to submissions of other parties
  - a reasonable period of time to provide submissions and, where applicable, prepare for any hearing (and notice of any deadlines)

The right to be heard, cont'd…

- The right to be heard **may also** require:
  - a right to challenge or test adverse evidence (e.g. responding submissions or expert reports, or possibly cross-examination)
  - in some cases, an oral hearing, and if so:
    - notice of the time and place of any such hearing, and
    - a right to be present throughout that hearing
  - a right to be represented before the decision-maker
    - this is not the same as a *Charter* right to counsel

Disclosure requirements

- A decision-maker must generally disclose any information it will rely on or consider in making a decision:
  - This includes application materials & background information (studies, policies, guides).
  - It also includes new information, submissions or evidence received during the decision-making process.
- If the decision-maker will base the decision on information that is contrary to the person's interest, the obligation to disclose is higher.
- **But disclosure obligations must be balanced with other interests** (e.g. privacy, security, confidentiality / sensitivity).

Balancing disclosure requirements

To balance disclosure and other interests, consider:

- Is the information relevant and necessary to make the decision?
- What are the other interests involved?
- Are there constraints against disclosure?
- Is there a way to mitigate those concerns? (e.g. redact, summarize)

Is an oral hearing required?

- Unless a statute provides, there is generally no absolute entitlement to an oral hearing. Some decision-makers only conduct written hearings; others have the option to choose between processes.
  - There is nothing inherently unfair about a written hearing process.

- Procedural fairness may require an oral hearing in certain circumstances. Relevant factors to consider include:
  a) Is there conflicting evidence?
  b) Is credibility an issue? (even where it is, an oral hearing may not be required)
  c) Is there a significant interest at stake?
  d) Is there another way for the parties to hear the case against them and respond?

- If there is an oral hearing, that can give rise to other procedural rights (e.g. cross-examination).

The Pre-Hearing Process

1. What are the issues? Can they be narrowed?
2. Do the parties have proper notice?
3. Do the parties have all the information they need? Is additional disclosure required?
4. Do the parties have enough time to prepare?
5. What form should the hearing take? Written submissions? In-person? Combination?
6. If in person, how much time will be required? Will the forum meet the needs of the participants?
7. Will the parties have counsel?
8. Are there any preliminary issues that can be addressed before the actual hearing?
9. How can the case be managed so that the hearing can proceed efficiently?

When can an application or decision be reopened?

- Once a process has completed, and a decision-maker has issued a “final” decision, their jurisdiction is usually considered “spent”.
  - *i.e.* the decision-maker is *functus officio* (has no further authority to act)
  - Need to consider:
    - The stage of the process – is it at an interim stage (i.e. info gathering or recommendations being made to a subsequent level)?
    - If a decision has been made, is it a “final” decision, or perhaps an “interim” or “procedural” decision?

- However, there are certain exceptions that permit a decision-maker to reopen or revisit a decision…

Authority to reopen a decision

In *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), three sources of authority to reopen identified:

1. Where the statute provides an **express power** of review or reconsideration

2. Where statute suggests common law authority to **cure a "jurisdictional defect"**
   - ensures the decision-maker can discharge its function
   - includes denial of procedural fairness, but not concerns about "reasonableness"

     - *Fraser Health Authority v. WCAT*, 2014 BCCA 499, appeal allowed on other grounds 2016 SCC 25

3. Equitable jurisdiction to reopen **where interests of justice and fairness require** (if statutory scheme supports this)

B. The right to an impartial decision-maker

- This rule of procedural fairness is meant to ensure that decisions are both fair and “seen to be” fair. It applies to actual bias and the appearance or “reasonable apprehension” of bias.
  - This protects public confidence in the integrity of the process.

- A decision-maker is presumed to be impartial.
- **Actual bias** = where a decision-maker’s state of mind prevents them from deciding the case objectively and impartially
- May arise where decision-maker:
  - may benefit from a particular outcome
  - has a personal or professional relationship with a party
  - made a decision before hearing the parties

Reasonable apprehension of bias

- Actual bias is not required; perceived bias is sufficient

Reasonable apprehension of bias:

Exists where an informed, reasonable and right-minded person would think it more likely than not that the decision-maker – consciously or unconsciously – would not decide the matter fairly.

- *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 24 at para. 20

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Dimensions of the requirement to be unbiased

- There are both individual and institutional dimensions to the common law requirement that decision-makers perform their duties free from bias or a reasonable apprehension of bias

- The **individual dimension** is captured by the concept of **impartiality**
  - Personal interests, opinions and circumstances of a decision-maker may impact impartiality.

- The **institutional dimension** is reflected by the concept that the decision-maker must have sufficient **independence**, within their structure, to permit them to make the decision without interference.

C. The person who hears the case must decide

- A decision-maker exercising a power cannot delegate the power to someone else or allow another person to dictate how the case should be decided.
- The underlying concern is that "discretionary power must be independently exercised by the administrative decision maker on which it is conferred". (*Nova-BioRubber*, 2022 BCCA 247 at para. 79)
- Concerns about this rule may arise from:
  - use of plenary sessions
  - use of policy guidelines or policy manuals
  - inappropriate pressure by others
  - a decision-maker being presented with conclusory statements instead of relevant facts

Guidelines for Plenary Meetings

- Meetings are voluntary.
- No attendance, vote or minutes are taken.
- No new evidence is introduced or considered.
- Cannot discuss the facts or merits of an individual case:
  - discussion must be limited to questions of law and policy
  - decision-makers must remain free to decide based on their conscience and understanding of the facts and law
  - a decision cannot be based on new grounds raised at meetings unless the parties are informed and can make submissions on the new grounds.

D. The right to a decision (and maybe reasons)

- A person is entitled to a decision (*i.e.* to have the decision-maker discharge their function by determining the merits of the issue).
- A decision is "what" the decision-maker does; reasons are the explanation as to "why" they did so.
- Historically, there was no requirement for an administrative decision-maker to provide reasons.
- But, in *Baker* (at para. 43), the SCC held that, in certain circumstances, procedural fairness will require "some form of" written reasons for a decision.
  - This does not mean reasons that resemble a court decision.
  - In *Baker* (at para. 44), informal handwritten notes were sufficient.

If there is a requirement to provide reasons…

- *Baker* factors may help determine if reasons are required.
  - Considerations may include where the decision has important significance and whether there is a right of appeal.

- In other cases, a statute may prescribe a requirement for reasons.

- If reasons are required, a failure to provide any reasons at all is a matter of procedural fairness.
- Questions about the "adequacy" of reasons that are provided are addressed as a matter of the reasonableness of the decision as a whole.

4. Avoiding substantive errors on judicial review

- After *Vavilov*, most decisions are reviewed for reasonableness
- 6 exceptions to reasonableness review:
  - **legislated standards of review** (BC's *Administrative Tribunals Act* – review per statutory SOR, such as patent unreasonableness)
  - **statutory appeal** mechanisms (review on appellate standards)
  - 4 categories of **correctness review**:
    - 1) constitutional questions;
    - 2) general questions of law of central importance to the legal system as a whole;
    - 3) questions re: jurisdictional boundaries between administrative bodies; and
    - 4) questions where courts and administrative bodies have concurrent first instance jurisdiction.

Common substantive arguments on judicial review

- The decision-maker:
  - acted outside their statutory powers or contrary to statutory objects
  - failed to properly apply principles of statutory interpretation (i.e. “text, context, purpose”)
  - failed to consider relevant evidence or improperly weighed the evidence (by considering irrelevant factors or misapprehending the evidence)
  - failed to consider or address a key argument, and this failure undermines the conclusion
  - failed to consider, or misapplied, a legal rule or principle

Common responses to substantive arguments

- The decision-maker:
  - reasonably interpreted their statutory powers and acted consistently with the statutory objects
  - was not required to expressly mention every piece of evidence or every argument, provided they address the key issues / evidence
    - **minor errors** that have no bearing on the outcome do not warrant relief
  - is entitled to deference in how they weighed the evidence (and the court should not re-weigh the evidence or permit simple re-arguing)
  - is not bound by the rules of evidence or court procedure
  - considered the core legal principles and the conclusion is reasonable

Reasonableness review before and after *Vavilov*

- After *Dunsmuir* (2008 SCC 9), the focus on judicial review was primarily on the "**outcome**" of a decision
  - courts asked whether the **outcome** fell within "a range of reasonable outcomes that were defensible in light of the law and facts"

- With *Vavilov* (2019 SCC 65), the focus shifted to a "**reasons first**" approach
  - reasons = primary mechanism for showing a decision is reasonable
  - even if the **outcome** is justifiable, the reviewing court needs to be satisfied that **the way the decision was arrived at** is also justifiable (para. 96)

Drafting defensible reasons after *Vavilov*

In a post-*Vavilov* world, **reasons must**:

- allow the parties and court to figure out not just what outcome was reached, but why, how and what was considered in getting there; and
- demonstrate that the relevant arguments, evidence and context were considered and assessed

Practically, a person is more likely to be satisfied with the decision and less likely to challenge it if they can:

- understand what issues were decided;
- appreciate how the decision-maker treated the evidence and argument; and
- follow the rationale for the outcome

Draft with a view to the “function” of reasons

- ***What is the function of reasons?***
  - To tell those involved what decision has been made and why (including so they can consider a review / appeal)
  - To demonstrate the evidence and submissions were heard and considered
  - To identify the legal principles the decision-maker relied on
  - To summarize the process used in reaching the decision
  - To provide a reviewing court with the information it needs to evaluate the decision (both the outcome and the pathway) if challenged
  - To support public accountability for decision-making
  - To assist future decision-makers faced with similar issues

What flaws make a decision unreasonable?

Vavilov describes two types of "fundamental flaws" (often overlap):

- a **failure of rationality** internal to the reasoning process
- when the decision is **untenable in light of the relevant legal and factual contraints**

A **rational decision** is based on an "internally coherent reasoning" that is both rational and logical (*Vavilov*, para. 102)

- court needs to be able to trace the reasoning without encountering any fatal flaws in overarching logic (expectation is not perfection)
- must be a "line of analysis" that could lead the decision-maker from the evidence to the conclusion reached
- in short, the reasoning needs to "add up"

Decision must address the relevant context

- Relevant **contextual elements** include:
  - statutory scheme
  - relevant legal principles, including statutory interpretation
  - evidence provided and reasonable inferences
  - submissions made and importance of the decision
  - past practices (and any rationale for departing from them)
- Reasons need to respond to the specific issues and parties at play

- **Statutory scheme** is key context for decision
  - need to understand **powers** and **objects or goals** of the statutory scheme
    - consider how the scheme interacts with any policies or guidelines
  - even if you *can* do something, consider if you *should* in the particular case

Statutory interpretation in reasons post-*Vavilov*

- Before *Vavilov*, some courts thought decision-makers should do the same kind of formal statutory interpretation analysis that courts did
- *Vavilov* confirmed that decision-makers are not required to analyse a statute the same way a court would, but **the analysis must be consistent with** the modern approach to statutory interpretation:

  - …the words of a statute must 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**".

Hallmarks of a reasonable decision: *Vavilov*

- Reasons must be **transparent, intelligible and justified,** as well as tenable given relevant factual and legal constraints
  - **Transparency**: The reasoning is clear; the reader does not have to imply things
  - **Intelligibility:** The reasons are easy to understand. Use of plain English, subheadings, and logical organization help to make reasons intelligible
  - **Justification:** Reasons justify the result – the result is rational in light of the reasons and the factual and legal constraints
- **Bottom line** = cannot just cut and paste the statute or policies, "recite" a summary of the evidence and then state a conclusion
  - A decision-maker needs to grapple with key issues and "show their work"

***Vavilov* in practice: common components of a decision**

- A decision should be a roadmap for those directly involved, as well as others who may be interested (e.g. the public, the press, a manager or the court on JR)

- A well-written decision will often include:
  - some form of **introduction**
  - a statement of the **issue(s) or decision(s)** to be made
  - a neutral summary of the **background** (including legislation / policies), the relevant **facts or evidence**, and the **process followed**
  - an overview of the **positions** of those involved
  - **analysis** (the core of the decision – applies the "law" to the "facts"; deals with conflicts in the evidence)
  - a **conclusion** (and potentially info about next steps)

Tips for writing clearly and effectively

- Use plain language
- Write simply and eliminate adjectives
- Use the active voice where possible
- Focus on point-first writing
- Work hard to be concise
- Spend time organizing the decision

Use plain language (harder than it sounds)

- Avoid trying to make decisions sound “official” or “legal”
  - use plain language – simple phrases and recognizable words

- Tips for plain language writing:
  - Consider your audience (including their language, background)
  - Use familiar words and phrases
  - Explain technical terms simply
  - Eliminate surplus words and omit unnecessary detail (what does your reader *actually* need to know?)

Write simply and eliminate adjectives

- Use simple, short words to the extent possible
- Use simple terms to refer to people and things
  - e.g. consider using “Ministry” rather than an acronym
- Consider using names rather than titles
  - e.g. use “Mx. Smith” rather than “the proponent”
- Focus on short sentences and short(ish) paragraphs with one idea
- Avoid unnecessary adjectives
  - instead of “it is clear that your application does not meet the criteria”, try “your application does not meet the criteria”

Use the Active Voice (avoid passive if possible)

Passive Construction	Active Construction
On October 11, 2023, your application was submitted to the tribunal by your legal counsel.	On October 11, 2023, your lawyer submitted your application to the tribunal.
The board was informed by the respondent that…	The respondent, Ms. West, informed the board that….

Put the point before the details…

- State the point or proposition before you develop it
- Do not save the conclusion until the final paragraph or even the final sentence of the paragraph

- A good example:
  - I refuse to grant your application for [licence, permit, benefit, etc.] under section 123 of the *All Things are Beautiful in BC Act.* As explained further below, your application did not meet the requirements set out in the statute and is not consistent with the Ministry's stated objectives for this program.
  - *Put this statement up front in the decision so your reader knows the outcome!*

Think carefully about organization

- Consider what would be helpful for a reader with no previous background on the issues – what will make it easy to follow?
  - Map out the main points you need to address in advance of writing
  - Does your organization of them make sense?
- Think strategically about what you need to convey
  - Not all details need to be included; work hard to be concise
- Use headings to your advantage
  - Topics and sub-topics will make it easier for a reader to follow
- White space is your friend (and your reader's friend too!)

Questions?

Emails: karrie.wolfe@gov.bc.ca
ross.alexander@gov.bc.ca

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