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THIRD
EDITION

The BCCAT Manual for Decision-Making

A Guide to Making, and Writing,
Clear and Defensible Decisions



BC COUNCIL OF
ADMINISTRATIVE
TRIBUNALS

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The BCCAT Manual for Decision-Making:

A Guide to Making, and Writing, Clear and Defensible Decisions

by

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Authors and Acknowledgments

2024 Edition

The BCCAT Manual for Decision-Makers was updated in 2024 by three administrative law experts. This edition of the manual is written in modern language and its new layout, updated content, and helpful precedents have all contributed to ensure it is a valuable reference. BCCAT extends its thanks to Mark Mancini, Ben Naylor, and Kiarash Izadifar for their dedication and hard work.

2016 Edition

Adele Adamic, Barbara Buchanan, KC, Shannon Salter, KC, and Cheryl Vickers spent valuable time editing the first edition of BCCAT's Decision-Maker's Manual in 2016.

2005 Edition

Gwendolynne Taylor wrote BCCAT's original Decision-Maker's Manual in 2005 and is a founding director of BCCAT

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. Its membership is composed 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 its formation, BCCAT has held annual conferences, developed educational programs, issued newsletters, hosted seminars and roundtables, and generally brought together members of the administrative decision-making community. In addition, BCCAT has 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 its members, tribunals and the communities it serves.

BCCAT has developed and established “must have” educational programs for practitioners in the field of administrative justice. Its 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. BCCAT’s annual education conference provides members of the administrative justice community an opportunity to discuss judicial trends, emerging administrative law issues, and new legislation.

Please visit BCCAT’s website¹ for further details about programs, the benefits of membership, and how to become involved with BCCAT.

¹ www.bccat.net.

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, regulations and relevant case law, and should seek legal advice where necessary.

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.

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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 decision-making body—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 at 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 also covers rules and procedures in common law and legislation that govern how administrative decisions are made, and the rights of people affected by those decisions.

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.²

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.³

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. If they do so, they may have their decisions overturned, be removed from their jobs, disciplined, or even be charged with a criminal offence.

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

² Sara Blake, *Administrative Law in Canada*, 3rd ed. (Butterworths Canada, 2001), p. 1.

³ For a list of administrative decision-making bodies, see the BC Directory of Administrative Tribunals & Agencies at www.adminlawbc.ca/tribunals.

licensing, gaming, and residential tenancies. Decision-makers in these offices also exercise administrative decision-making powers 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. Administrative decision-makers are part of the executive branch, and this is a key distinction between administrative decision-makers and judges in the superior courts.

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 judicial branch is independent from the legislative and executive branches. 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 are not superior courts with inherent jurisdiction. However, Provincial Court Judges are accorded the same independence as other courts.

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 *Administrative Tribunals Act* (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 fully understand 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 sections 1, 16, 17, and 30 to 56. Provisions that you may need to refer to include:

- definitions (section 1);
- consent orders, withdrawals, and settlements (sections 16 and 17);
- your duties (section 30);
- authority of the decision-making body to compel witnesses and order disclosure of documents or other things (section 34);
- the form of hearings (section 36);
- granting or refusing adjournments (section 39);
- admissibility of evidence (section 40);
- hearings are open to the public; when you might receive information in confidence (sections 41 and 42);
- maintenance of order at hearings; dealing with uncooperative persons (sections 48 and 49);
- some requirements for your decisions (sections 50 and 51); and
- immunity protection for the decision-making body and its members (section 56).

Statutory Authority

In addition to setting out the decision-making body's mandate, the enabling legislation establishes its statutory authority. 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 (this is called "jurisdiction by necessary implication"). If you act within those powers, you remain within your authority.

Administrative decision-making bodies that have the power to decide questions of law are presumed to have the power to decide constitutional and human rights issues. This is because, where a decision-maker has the power to decide questions of law, they are presumed to have the power to apply the law as a whole to the matter before it. However, the legislature can also take away the power to decide constitutional and human rights questions.

Constitutional Questions including questions arising under 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*”).⁴ In BC, the *Constitutional Question Act* requires the Attorneys General of BC and Canada to be notified when constitutional questions are raised.⁵

Deciding whether an administrative decision-maker has constitutional jurisdiction can be a complex inquiry. If a statute says nothing, then the administrative decision-making body likely has constitutional and/or human rights jurisdiction. However, the scheme and purpose of a statute can evince a legislative intent to remove constitutional jurisdiction, without a legislative provision explicitly removing constitutional jurisdiction.

Sections 44 and 45 of the *ATA* may either grant or take away authority over constitutional questions, but as set out above the *ATA* only applies if it is incorporated into a tribunal’s enabling legislation. S. 44 of the *ATA* provides that an administrative decision-making 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.

Human Rights Code

As set out above, the presumption is that a tribunal has human rights jurisdiction, unless that jurisdiction is removed by the legislature. Sections 46.1, 46.2, and 46.3 of the *ATA*, if they apply, may remove or alter a decision-making body’s authority to decide human rights issues. Section 46.3 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*”). This provision applies to many administrative bodies in the Province. 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 you seek legal advice if a constitutional or human rights issue is raised.

Immunity for “Good Faith” Acts

Many legislative schemes either contain an immunity clause or incorporate by reference section 56 of the *ATA*. 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

⁴ *ATA*, ss. 1, 43, 44, 45, and 46.

⁵ *Constitutional Question Act*, R.S.B.C. 1996, c. 68, ss. 3 and 8.

“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. This section of the *ATA* reflects common law principles of deliberative secrecy and the presumption of regularity.

Appointments to Decision-Making Bodies

Since administrative decision-making bodies are part of the executive branch, 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* address appointments to many 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, etcetera;
- 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;
- be alive to 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.

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". However, even if this section does not apply, tribunals have a common law power to control their process and may make rules and practice directives to ensure the efficient adjudication consistent with the statutory mandate.

Section 11(2) contains a comprehensive list of the types of rules decision-making bodies may make. Section 11 applies to many (but not all) administrative bodies in BC. 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* allow tribunals to make practice directives. Both sections are 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.

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 about a specific provision or application. Statutes can also conflict with constitutional principles set out in the *Constitution Act, 1982*⁶, which includes the *Charter*. If a decision-maker has constitutional jurisdiction, then they may have to resolve this issue.

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.

This approach to statutory interpretation was first introduced more than 30 years ago by the Supreme Court of Canada and is still the governing approach.⁷

How to Interpret Statutes

Though the modern approach to interpretation is well-accepted, there remains confusion about what it means in practice.⁸ In general, the *Vavilov* decision outlines how you should interpret statutes.⁹ The formula is simple: text, context, and purpose. In all cases, you must show that you considered the text, context, and purpose of the statute being interpreted. These principles apply both to statutes, and regulations.

In addition, decision-makers should be aware of section 8.1 of the *Interpretation Act*, RSC 1996 c. 238 that requires every enactment 1) be construed as upholding and not abrogating aboriginal and treaty rights and 2) be construed as consistent with the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019 c. 44.

⁶ Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁷ *Rizzo and Rizzo Shoes Ltd. (Re)*, 1991 CanLII 7316 (ON SC), <<https://canlii.ca/t/g1604>>.

⁸ See, *La Presse inc. v. Quebec*, 2023 SCC 22 (CanLII), <<https://canlii.ca/t/k0hhn>>.

⁹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), <<https://canlii.ca/t/j46kb>>.

a. Text

The text of the statute is the starting point. The Supreme Court of Canada (the “SCC”) has confirmed that legislatures seek to achieve their objectives through the text it enacts.¹⁰ For that reason, in rendering decisions, the SCC has cautioned that you cannot “rewrite” the law or reverse-engineer a desired result. Paying close attention to the statutory text can help prevent this result.

Where the language is narrow and circumscribed, your range of possible options will be narrower; but in cases where legislation is written broadly—for example, giving you power to make decisions “in the public interest”—your discretion will be broader.

b. Context

The context in which you make a decision will play an important role in your decision-making. Consider the various forms of “context” that you may be asked to rely upon in making a decision:

- Other elements of the statute: sometimes other parts of the statute will help to shed light on an interpretive question in front of you. For example, if you cannot determine the meaning of a word in one provision of the statute, that word may appear in other places, and it should be given the same meaning throughout the statute. This is the “same word same meaning” rule, and is a legislative drafting convention.
- Other Statute Law: terms across the statute book should generally be interpreted in the same way; however, be cautious: this presumption is weaker when interpreting statutes dealing with different subject matter.
- Administrative and Judicial Precedents: previous decisions rendered by the administrative body of which you are a member are persuasive, especially if they pertain to the statutory provision in front of you. This means that they should generally be followed, unless you can explain and justify why the precedent should not apply. The same is true of judicial precedents.

c. Purpose

The purpose of a statutory provision is the reason why it was enacted. The reason why a provision was enacted might shed light on what it means. The *Interpretation Act* instructs that all statutory provisions should be interpreted with their purposes in mind.¹¹

¹⁰ *MediaQMI inc. v. Kamel*, 2021 SCC 23 (CanLII), <<https://canlii.ca/t/jg40v>>.

¹¹ *Interpretation Act*, RSBC 1996, s.8.

Sometimes the purpose of a statutory provision will have been settled by a previous judicial decision or a decision of your own administrative body.¹² In such cases, the purpose will likely not be a matter of debate between the parties.

In other cases, you may be asked to interpret a statutory provision where the purpose of the provision is unsettled, and the parties will advance different views about its definition. Recall that the guiding interpretive principle is that text, context, and purpose should be interpreted *harmoniously*. For this reason, the SCC has said that purpose cannot be defined so as to create “unexpressed exception[s]” to a statutory scheme.¹³ Purpose should be defined with evidence from the statutory text, so that the definition of purpose does not drive the text higher than it can bear.

Outside of the text, parties may also point to other evidence of purpose. When deciding which purpose should guide your interpretation, you may be asked to consider various sources:

- A statement of purpose in a statute may disclose the purpose of the statute as a whole, which could be probative in determining the purpose of a particular provision. Note that modern legislative drafters no longer include purpose statements.
- Parties may sometimes rely on legislative history—speeches in the legislature—to justify their reading of a purpose of a provision. You may consult legislative history to help define why a statute, or a particular provision, was adopted. However, the SCC has noted that this should be done with caution, considering that legislative history does not carry the same weight as the statutory text.¹⁴
- Parties may seek to rely on external context—for example, well-known social facts giving rise to the adoption of a law.

All of these sources can bear on your description of a purpose. Keeping in mind these sources, whatever purpose you ascribe to a provision should be defined precisely and succinctly, with due respect for the statutory text and the strictures on your authority.

Finally, the correct interpretation of a statutory provision may be unclear even after the above tools of statutory interpretation are employed. In this circumstance, the SCC has said that other rules of statutory interpretation, such as *Charter* values, may be employed.

¹² Although it is important to keep in mind that tribunals are not bound by the principles of *stare decisis*, so a tribunal cannot be bound by a prior administrative decision (although the decision may be persuasive).

¹³ See, *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 (CanLII), at para 23, <<https://canlii.ca/t/1nb6r#par23>>.

¹⁴ *MediaQMI*, at para 37, <<https://canlii.ca/t/jq40v#par37>>.

How to Demonstrate Your Interpretation

The *Vavilov* case describes how you are expected by courts and parties to demonstrate your interpretation of a statute. In general, and where required, you must justify your interpretation of the statute through your reasons, paying due attention to the text, context, and purpose:

- You are not required to “engage in a formalistic statutory interpretation exercise in every case,”¹⁵ but you must nonetheless explain how your result is connected to these principles of interpretation.
- Be careful about context.
- There is some margin for error: if you omit consideration of the text, context, or purpose of the provision, it will not necessarily render your decision unreasonable. Nonetheless, if this omission is a major aspect of the case in front of you, it may cause a court to lose confidence in your reasoning and result.

In writing your reasons, you can rely on your expertise as an administrative decision-maker. Your interpretation can be guided by your knowledge of the policy context, the history of the proceedings in front of you, and the submissions of the parties. However, be aware of the following rules:

- When reaching a result that may be driven by your expertise, but may be unintuitive to a non-expert (like a judge), be sure to explain your reasoning clearly.
- Your decision must nonetheless, even if guided by your expertise, be consistent with the principles of interpretation. This means that you must still turn your attention to the text, context, and purpose of the statute even if your reasoning is guided by your own expertise.

Charter Rights and Values

In addition to situations where a party claims that a statutory provision should not be applied because it violates a *Charter* right, you are always bound to exercise your discretion in accordance with the right and its underlying values. This area of law is sometimes confusing and is in flux. What follows is a best approximation of the current state of the law.

When a party raises a *Charter* right, or where it arises on the facts, the Supreme Court of Canada has insisted you must analyze the *Charter* right correctly.

This means that, as decision-makers, you will receive no deference in deciding whether a *Charter* right is live on the facts.

¹⁵ *Vavilov* at para 119, <<https://canlii.ca/t/j46kb#par119>>.

Since the *Charter* is “sacrosanct”, decision-makers must properly decide whether the *Charter* is engaged in a particular case: see *York Region District School Board v Elementary Teachers’ Federation of Ontario*, 2024 SCC 22 at para 68.

Once you have decided that the *Charter* is engaged on the facts, you must turn your attention to application and balancing.

In this exercise, you must work with *Charter* values.

As the SCC reiterated in *Commission scolaire*, “*Charter* values are those that ‘underpin each right and give it meaning.’”¹⁶ *Charter* values can be directly analogous to a right (ie) the value/right of freedom of expression.

They can also be broader than the rights protected in the *Charter* itself. For example, “autonomy” is a potential *Charter* value. Whatever the definition of *Charter* values, you are required to consider them in three circumstances:

- (1) The statutory scheme specifically incorporates *Charter* values.
- (2) A party raised a *Charter* value before you.
- (3) There is a “link between the value and the matter under consideration.”¹⁷

A party does not need to demonstrate that a decision would infringe their *Charter* right; they need only raise a *Charter* value, imposing a duty on you to consider it. The easy case is where a party raises a *Charter* value before you. In that case, your reasons must be written to demonstrate that you engaged with the *Charter* value and balanced it against any countervailing statutory objectives. This is the same posture you must adopt when a party raises any argument before you. Your reasons should be clear enough to demonstrate that you engaged with the value.

Courts will also expect that you are aware of situations where *Charter* values must be considered, even where the party has not raised them. One of these situations is where the statute calls for a consideration of *Charter* values: this requires close attention to your statutory grant of authority. Another situation is where there is a purported link between the matter and a *Charter* value. An example of this is *Commission scolaire* itself: there, “it is obvious that the development of policies and the making of decisions that are likely to have an impact on a minority language educational environment require consideration of the values underlying section 23 of the *Charter*.”¹⁸ This will require you to identify situations in which *Charter* values must be considered, even if a party does not argue them.

¹⁶ *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para 75; citing *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, at para 36, <<https://canlii.ca/t/k1kct#par75>>.

¹⁷ *Commission scolaire*, at para 66, <<https://canlii.ca/t/k1kct#par66>>.

¹⁸ *Ibid.*

The best way to do this is to pay close attention to the facts and the matter before you. Think clearly about whether the facts touch any protected *Charter* interests. If they do, or you think they do, there is no harm in considering a purported *Charter* value. This is especially so if an individual's claim emphasizes the severity of a potential decision upon their life, liberty, or other closely protected interests.

A second, independent situation where you must consider *Charter* values is when interpreting your legislation under the method described above. In most cases, questions of statutory interpretation can be resolved without any consideration of the *Charter* at all. Rarely, however, statutory terms may be "ambiguous," admitting of more than one answer. In such a case, you can refer to *Charter* values; you should resolve the ambiguity with the interpretation that best gives meaning to these values.¹⁹

However, in most cases, a purposive interpretation of the statute properly conducted will obviate the need to consider *Charter* values when interpreting statutes.

The difference between these two situations can be stated as follows. Exercises of discretion do not necessarily involve interpretations of your enabling statute. In that context, *Charter* values must always be considered. Where a party advances an understanding of the statute that requires your interpretation, you first interpret the statute according to the accepted *Rizzo* approach. If, after that interpretation, you are left puzzled by the meaning of the provision, *Charter* values can assist.

¹⁹ *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), at para 62, <<https://canlii.ca/t/51s6#par62>>.

Chapter 4 - Pre-Hearing Procedures

Many administrative decision-making bodies have rules of practice and procedures that include pre-hearing procedures,²⁰ sometimes called case management procedures. Often, 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, as the decision-maker, may be called on to conduct pre-hearing conferences or other procedures with the parties. Regardless of the practice in your decision-making body, it is important that you understand the purpose and nature of these procedures.

Prior to the commencement of a hearing, preparatory work is 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 hearing time;
- 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, as well as their preferred pronouns or modes of address;
- 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.

The decision-making body's rules establish the form of the hearing (e.g. written, or oral), and how the form of the hearing may be established. A party may object to the form of hearing and, if so, the body should treat the objection as a preliminary matter and hear from the parties before determining the form of hearing. 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. As with all applications, the parties' right to procedural fairness must be balanced with providing an accessible, proportional, and cost-effective process.

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 a discussion of the following:

²⁰ Pre-hearing conferences are referred to in s. 11(2)(a) of the *ATA*.

- 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 the hearing;
- setting date(s) for the hearing;
- explaining the hearing process and answering any questions; and
- identifying any assistance the parties and witnesses might require (e.g., interpreter).

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. Typically, 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. 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. While the rules must be investigated to establish who, ultimately, is responsible for establishing the deadlines for the submission of documents, the exchange of arguments, and the dates for a hearing, the decision-making body is usually the party that has the authority to make these decisions.

Facilitated Settlement Processes

Facilitated settlement processes involve a variety of, typically confidential, techniques that occur without prejudice to any subsequent legal proceedings.²¹ Their purpose is to

²¹ See e.g., s. 28 of the ATA.

facilitate the settlement of one or more issues in a dispute without the need for a full hearing. The rules of decision-making bodies often include provisions for settlement processes. Common processes include:

- negotiation;
- mediation;
- mediation/arbitration;
- 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 over the issue before them 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 like mediation but often includes having the impartial person act as a go-between for 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 toward a successful outcome.

A settlement conference is like mediation. The settlement conference is usually facilitated by a decision-maker appointed by the chair, with the objective of settling some or all 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

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, several administrative decision-making bodies are using ODR, including the Civil Resolution Tribunal, the Property Assessment Appeal Board, and the British Columbia Utilities Commission. Various provisions of the ATA, which have been incorporated into the enabling legislation of many BC decision-making

bodies, provide administrative decision-making bodies with the authority to use ODR processes.²²

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

Decision-Maker's Preparation for Hearing

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

- the need for an interpreter;
- 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 body's chair, legal counsel, or registrar for assistance in determining the appropriate course of action.

The material provided to decision-makers in advance of a hearing, and the time allotted for their review, varies among bodies. Be aware of the approximate time needed to prepare and budget your time accordingly. Failure to adequately prepare 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 research into the substantive issues, unless the enabling statute indicates otherwise.

²² See *e.g.*, s. 19 of the ATA (serving documents electronically) and s. 36 (conducting electronic hearings).

Chapter 5 - Conduct Of the Hearing

Introduction to Hearings

The *ATA* has been incorporated into the enabling legislation of many British Columbian decision-making bodies and permits a body to hold any combination of written, electronic, or oral hearings.²³ However, even where the *ATA* does not apply, an administrative decision-maker may have discretion to hold a variety of types of hearings. In this chapter, we refer to any hearings conducted verbally as oral hearings, whether they are conducted in person, by telephone, or by videoconference. Written hearings occur where the parties provide their submissions in writing.

Administrative matters may be 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.²⁴

Decision-making bodies make their own rules of practice and procedure. Decision-makers sometimes have the discretion to decide the form of the hearing within the limits of the legislation and the rules. It is important to note that, while there is no automatic right to an oral hearing under common law, decision-makers must reasonably consider the totality of the circumstances before exercising their discretion in setting the method of hearing.²⁵

Role of Decision-Makers

If there are two or more decision-makers, it is normally the panel chair who is primarily responsible for the conduct of the hearing, whether oral or written. The panel chair introduces the proceedings, sets procedures, maintains order, ensures exhibits are properly admitted, consults panel members on any issues that must be decided during 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. As a decision-maker, identifying evidence is key, as it forms part of the record needed when making the final decision. 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.²⁶

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 to further

²³ See, s. 36 of the *ATA*.

²⁴ See, s. 26 of the *ATA* or your governing statute.

²⁵ See, *Khan v. Ottawa (University of)*, 1997 CanLII 941 (ON CA), <<https://canlii.ca/t/6hd1>>.

²⁶ 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.

question the witness. Alternatively, a witness may provide 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

An oral hearing may be required under the enabling legislation. If the legislation defers to the decision-maker's discretion, the principles of procedural fairness may require an oral hearing in some cases (e.g., when a decision depends on findings of witness credibility).²⁷ This section deals with oral hearings. The next section of this manual discusses written 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 (e.g., 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 pitchers of water, with enough glasses for all the witnesses, or bottled water.

²⁷ See, *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), <<https://canlii.ca/t/1fv22>>.

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, the staff will likely have had some prior indication. Staff must inform the decision-maker of any concerns before the hearing. When reviewing a file before 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 (wheelchair 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 about the situation and explain any steps they should take if they see anything that concerns them.

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 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.

In extreme cases, a resource available to many administrative decision-making bodies is the Ministry of Attorney General's Integrated Threat Assessment Unit and Protective Operations Unit.²⁸

Maintaining Control of the Process

Decision-making bodies have both the common-law authority and the duty to control their processes. In BC, section 11 of the *ATA* has been incorporated into the enabling legislation of many decision-making bodies and 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 of the *ATA* gives the body authority “to make orders or give directions that it considers necessary for the maintenance of order at the hearing.”

It is important to the whole hearing process that the chair maintains control of the hearing. This does not mean 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 a 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 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.

²⁸ <https://www2.gov.bc.ca/gov/content/justice/courthouse-services/courthouse-roles/sheriff-service/sheriff-service-ita>

Handling Disruptive Participants

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

- Establish a “Code of Conduct” that will apply to all participants that appear before the decision-making body and ensure that these are distributed to all parties in advance of a hearing.
- Ask the party to stop the disruptive behaviour. Clarify your expectations for the 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, to prohibit the disruptive party from making further submissions, or to 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. Do not 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*, if incorporated by the decision-making body’s legislation, 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 ATA 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. The authority to award costs against them provides an additional incentive for people to comply with the hearing process and behave appropriately.

The Right to An Impartial Decision-Maker

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?²⁹ Parties have an obligation to raise concerns about bias directly with the decision-maker at the earliest available opportunity.

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.

Assistance to Self-Represented Parties

Due to the increased number of self-represented litigants in the courts, judges now have a heightened obligation to ensure these litigants can meaningfully participate.³⁰

In an administrative hearing, the decision-maker will have to balance the need to assist a self-represented party against the competing requirements to not prejudice another party, not advocate for the self-represented party, and not appear biased (or to be biased) towards the self-represented party.³¹

²⁹ *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, at para. 111 <<https://canlii.ca/t/1fr05>>.

³⁰ In *Pintea v. Johns*, 2017 SCC 23 (CanLII), <<https://canlii.ca/t/h3993>>, the Court endorsed the Canadian Judicial Council’s Statement of Principles on Self-represented Litigants and Accused Persons (2006) (<https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf>).

³¹ A useful overview of self-represented parties is found in Dr. Julie MacFarlane’s final report, “The National Self-Represented Litigants Project” at <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>.

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 hearings before them. Section 35 of the *ATA* 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.

Sometimes participants ask that court recorders attend to record an oral hearing. There is no general 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 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 effect on, the decision-making body’s official record.

Introduction of the Hearing Process

Some tribunals have a standard introduction that the decision-maker is expected to read in every case. Where there is no formal script, the description of the hearing process at the outset can be tailored to the participants’ level of familiarity.³²

Introducing the Panel and the Participants

Of note, many administrative decision-making bodies have incorporated, or are in the process of incorporating, a respectful land acknowledgement at the commencement of each hearing, regardless of hearing format, to stress the importance of reconciliation with the Indigenous Peoples of BC.³³

The first order of business is the introduction of the decision-maker or, if there is more than one, the panel, to the participants. The introduction includes the source of the decision-maker’s authority to conduct the hearing (e.g., appointment under the enabling statute, or delegated 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 themselves and their role, or legal counsel can introduce themselves, their

³² See e.g., Appendix A: Oral Hearing Template Script.

³³ See e.g., The BC Employment and Assistance Appeal Tribunal’s Pathway to Reconciliation: [Pathway to Reconciliation.EAAT .2021.pdf](#)

client, and anyone else attending with them. Some decision-making bodies use “appearance forms” that provide the correctly spelled participants’ names.

All participants should provide their name, title (e.g. “Mr./Ms./Mx./Counsel Jones”) and their preferred pronouns to be used in the hearing.

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.

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:

- (1) The panel chair provides a brief explanation of the process to be followed.
- (2) The panel excludes witnesses, where appropriate, until they are called to give evidence.
- (3) 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”).
- (4) 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”).

- (5) 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 document separately.
- (6) 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.
- (7) The initiating party presents its case first, unless an alternative order of presentation has been determined by the decision-making body.
- (8) The responding party, or respondent's counsel, if any, may ask questions of the initiating party's witnesses to test the accuracy and credibility of their evidence and to elicit further evidence.
- (9) The initiating party may ask the witness further questions on points arising out of the respondent's questions.
- (10) 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.
- (11) 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.
- (12) 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.
- (13) The responding party may further question the witness on points arising out of the initiating party's questions.
- (14) The panel may question the witness on completion of their testimony. The parties are then given an opportunity to ask further questions arising from the panel's questions.
- (15) In certain circumstances, if allowed by the panel, when the responding party has finished its case, the initiating party may call further evidence in reply to or rebuttal of the evidence presented by the respondent. The same process with respect to questioning applies to any witnesses called to give reply evidence.
- (16) When all of the evidence is complete, the initiating party will make submissions.
- (17) The responding party will make submissions.
- (18) The initiating party may make final submissions in reply to the respondent's submissions.
- (19) The panel will close the hearing. If a decision is made orally, the panel will give its decision. Many decision-making bodies are required to provide written decisions with reasons, so the panel will often reserve its decision and provide it in writing later. If you are not sure whether written reasons are required, consult with your legal counsel or review your enabling legislation. Be aware of any legislative time limit imposed on rendering your decision.

Preliminary Matters and Decisions Made During the Hearing

Before the parties present evidence, there may be decisions that the panel is asked to make. These are 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, or portion thereof, 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 or a portion of it be conducted in private or *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 must be raised at the outset of a hearing. They should be given the opportunity to ask questions about the process before it begins.

During the hearing, the panel may have to decide whether to admit 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 touch on the fairness of the process and can be the subject of applications for appeal or judicial review.

As a decision-maker, 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 stand the matter down for a few minutes to make notes or to discuss the issue with the body’s chair, legal counsel, 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 to complete 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 the reasons in the final decision rather than providing them during the hearing, in which case, the decision-maker will explain this process to the parties.

Applications for Adjournment

Applications for adjournment raise difficult issues. They involve balancing many interests: procedural fairness, parties' rights, 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, procedural fairness requires that a party 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 or holding a portion of the hearing 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 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 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 a 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 the 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 when deciding on the application to adjourn.

Opening Statements

Opening statements by parties will briefly outline their position, their witnesses, the evidence they will present, and the amount of time they anticipate they will 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 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.

Witness Testimony

The right to call and cross-examine witnesses is normally a part of the right to an oral hearing.³⁴ 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 for the decision-maker to hold their questions until the other parties have had an opportunity to question the witness. This is because it is important for the parties to be able to present the evidence they want the decision-maker to hear, and the decision-maker does not want to influence what evidence, or arguments, that the parties have decided to present. However, if there is evidence the decision-maker needs in order to make their decision, or if clarification is needed, it is entirely appropriate to ask those questions.

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.³⁵

Section 34 of the *ATA* 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.³⁶

³⁴ See, *Innisfil Township v. Vespra Township*, 1981 CanLII 59 (SCC), <<https://canlii.ca/t/1txdn>>.

³⁵ *Criminal Code*, R.S.C., 1985, c. C-46, ss. 131 and 132.

³⁶ See e.g., Appendix B: Sample Form of Affirmation (or Oath).

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 toward 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. Denial of a party’s right to cross examine will likely lead to a breach of the rules of natural justice and procedural fairness.³⁷ Such an outcome should be avoided, where possible. However, each situation must be considered on its own merits, and there may be a compelling reason to depart from this general proposition.

Where the evidence presents credibility issues, fairness may require the decision-maker to allow some form of cross-examination, even if full oral cross-examination is not possible or practical. The decision-maker should allow questioning, either orally or in writing, and be clear what scope of questioning is allowed. Where cross-examination is allowed and credibility is at issue, the decision-maker should exclude witnesses from a hearing until they have given their evidence and have been cross-examined. This prevents witnesses from altering their testimony after they have heard testimony from other witnesses.

The two central purposes of cross-examination are:

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

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.

Self-represented parties may cross-examine as an opportunity to present evidence or make statements. This process should be limited by the decision-maker. The other

³⁷ See, *Djakovic v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2010 BCSC 1279 (CanLII), <<https://canlii.ca/t/2cjh1>>.

parties should be given the opportunity to address any evidence or issues raised in this way.

Re-direct or Re-examination

After the cross-examination of its witness, a party may ask the witness to explain and clarify relevant testimony which may have been confused in cross-examination.

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. Nor is this an opportunity for parties to provide evidence that they could have presented previously, but chose not to.

Questioning by the Hearing Panel

Unless the enabling legislation directs otherwise, the panel can ask questions of witnesses, similar to an inquisitorial system. 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.

The number of questions will be guided largely by common sense and the panel's 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. The panel must allow the other parties an opportunity to ask questions both before and after the panel inquiry.

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 on what to expect next. If the enabling legislation 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 legislation, 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.

End of the Hearing

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 submissions, they 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 must 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.

Delivery of Decision and 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 impractical to send the decision to everyone entitled to receive it. Check the enabling legislation to confirm who is entitled to a copy of the decision and how it is to be delivered.³⁸

Other Forms of Oral Hearings

Increasingly, administrative decision-making bodies are conducting oral hearings through telephone or videoconference. These methods require the same considerations as in-person hearings, to ensure procedural fairness. However, there are 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. Often, 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.

³⁸ See *also*, Chapter 9 for a full discussion of decision writing and giving reasons.

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, etcetera.

Videconference

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

Written 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 may differ from those in subsequent hearings such as an appeal, a reconsideration, or a review of a first-instance decision. Enabling legislation often sets 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 an 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-making body 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. When possible, the timelines are tailored to minimize delay to the parties. The parties will require time to review the evidence and prepare their responses.

Unless otherwise provided in the enabling legislation, 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

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

- witness statements (written, video, and 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. It is possible that expert evidence will be required to test the reliability of this type of evidence.

Burden and Standard of Proof

Unless the enabling legislation states otherwise,³⁹ the burden of proof is normally on the person who brings a claim in a dispute.

The standard of proof is the level to which a party has to prove a matter in issue. Unless the enabling legislation states otherwise,⁴⁰ in most administrative proceedings the standard is the balance of probabilities.

Enabling legislation may have different requirements for the provision of evidence by parties or by the decision-maker. Decision-makers 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 party 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.

³⁹ See e.g., *Motor Vehicle Act*, RSBC 1996, c 318, s 215.3, <<https://canlii.ca/t/847n#sec215.3>>.

⁴⁰ See e.g., *Corrections and Conditional Release Act*, SC 1992, c 20, s 43, <<https://canlii.ca/t/7vr2#sec43>>.

The Law of Evidence, the Courts, and Decision-Making Bodies

Administrative law has evolved 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. There must be some evidence to support the decision.⁴¹

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.

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. The rationale behind it is that this facilitates the informal and expeditious nature of administrative hearings. Regardless of whether section 40 has been incorporated by the enabling legislation, there is a common law authority to admit evidence regardless of whether it would be admissible in court (unless the enabling statute states otherwise).⁴²

However, this does not mean that all evidence a party wishes to submit can, or should, be accepted. The admission of evidence is always guided by relevance. Evidence is relevant if it tends to prove or disprove an issue 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, without-prejudice negotiations or offers from mediation or other settlement negotiations are generally excluded from the decision-making process. This rule is found in 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 it is admitted or excluded.

Some evidence may cause unnecessary embarrassment, economic or commercial harm, 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 to receive it.

⁴¹ *Vavilov* <<https://canlii.ca/t/j46kb>>.

⁴² See, *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 ABCA 276 (CanLII), at para 63, <<https://canlii.ca/t/1tbmw#par63>>.

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 the evidence is, the more weight it should be given.

Parties submit evidence, which allows the decision-maker to make findings of facts from that evidence. Those facts are then applied to the applicable legislative provisions and scheme that establishes the ambit of the decision-maker's jurisdiction and what remedies they can provide. The decision is therefore based on the application of the relevant facts to the statutory authority. There may be a range of possible decisions within the delegated power of the decision-maker on any particular matter.

Admissibility and Receipt of Evidence

In an oral hearing, evidence will be provided through witness testimony and through accepted documents. A decision-maker may have to deal with an objection to the receipt of some evidence, or to 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 may be incorporated in the written decision.

Many administrative law matters proceed without the need for an oral hearing. The decision-maker will request and receive evidence from the parties or their counsel in written form. 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 that 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 judicial review, unless the enabling legislation provides for a hearing *de novo*.

Weighing the Evidence

All of the evidence in a matter must be received and evaluated before a decision is rendered. Some best practices in weighing evidence include:

- Consider whether you have the evidence necessary to decide 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 items about which there is no dispute or debate as anchors or reference points.
- 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?
- 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 to be untruthful?
- Is the person providing 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. However, be alive to implicit bias which may cause you to interpret a person's behaviour inaccurately. For example, while a person from one culture might interpret maintaining eye contact as indicative of truthfulness, a person from another culture may interpret this as disrespectful.

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 by a third party for its truth. 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 written or oral. The problem with such statements is that they cannot be tested and, as such, may not be reliable.

Hearsay evidence is regularly admitted in administrative hearings, but may be given less weight.⁴³ As noted earlier, the rules of evidence used by the courts do not apply to administrative bodies, unless the enabling legislation says otherwise.

Many documents produced in the ordinary course of business are 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 the weight of the evidence in administrative matters.

In considering hearsay evidence, ask yourself some basic questions:

- Is the information reliable? For example, a contemporaneous email from a friend of the applicant describing a conversation about events at issue.
- 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? Using the same example above, the applicant could likely provide direct evidence about the events in question.

A party may object to hearsay evidence on the grounds that it is not reliable and should therefore be given little to no weight. Be wary of double or even triple hearsay, for example, “My friend said her doctor told her this kind of condition is work-related”.

⁴³ See, *Silver Campsites Ltd. v. James*, 2013 BCCA 292 (CanLII), <<https://canlii.ca/t/fz8rd>>.

Opinion/Expert Evidence

Under the ordinary rules of evidence, opinion evidence is not admissible unless provided by an expert. An expert is a person qualified to provide an opinion based on their 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—based on relevance and reliability; however, independence and impartiality are other considerations (see Chapter 2). Experts must be fair, objective, and non-partisan. Decision-makers cannot rely on the expert's opinion rather than reaching their own decision.

Further, it is impermissible for an expert to give evidence on the ultimate issue to be decided by the tribunal. For example, if the ultimate issue in a hearing was to determine if Jack was wearing a red shirt, it would not be permitted for an expert to provide evidence on Jack wearing a red shirt. An expert could provide evidence on the construction of a shirt, including the nature of the fibers and the dying process, but this evidence cannot extend to whether or not Jack was wearing a shirt, or if it was red.

Decision-making bodies may have rules about the delivery of expert opinion in advance of a hearing. If not, sections 10, 11, and 12 of the BC *Evidence Act*⁴⁴ 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 (section 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 (section 10(6)). Section 11 sets out orders that the decision-maker may make if the expert's opinion is 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 (section 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.⁴⁵
- The expert must disclose all the facts and assumptions they based their opinion on. This includes the letter from counsel to the expert requesting their opinion.

⁴⁴ RSBC 1996, c 124.

⁴⁵ See, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), at para 32, <<https://canlii.ca/t/ghd4f#par32>>.

- 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 a non-expert opinion is admissible, and if so, what weight to give it.

The Record of Documents, Submissions, and Exhibits

Regardless of whether a hearing is oral or written, 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 the decision-maker may result in the matter being sent back by the courts for a rehearing.⁴⁶

It is a fundamental breach of fairness not to disclose evidence to a party in a decision-making process.⁴⁷ Thorough and timely record keeping of evidence sets the foundation for complete and timely disclosure of that evidence.

Many statutes contain 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.⁴⁸

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 if such a record is provided in an appeal or reconsideration.

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

⁴⁶ See, *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 (CanLII), <<https://canlii.ca/t/287x5>>.

⁴⁷ *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 (CanLII), <<https://canlii.ca/t/gfp23>>.

⁴⁸ See, *Super Save Disposal Inc. (Re)*, 2004 CanLII 94399 (BC EST), <<https://canlii.ca/t/jcpss>>.

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 the consent of all of the parties to the dispute. This is generally consistent with section 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 to assist them in determining the issue before them. These notes and impressions are not part of the record 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, which are similarly not produced to any other party.
- (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.⁴⁹ Without explicit 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 the power to receive evidence in confidence, where this is incorporated into the decision-maker's enabling legislation. 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 section 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.

⁴⁹ See, *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), <<https://canlii.ca/t/1h2c4>>; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), <<https://canlii.ca/t/1zhmr>>.

- (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. It is important that all parties to these proceedings are 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.

Publication Bans

Some statutes provide the authority to issue a publication ban on evidence produced in a proceeding, typically after a party has applied for such a ban to be issued. 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. When a publication ban is made, certain information does not become part of the record where it otherwise would have been or is altered in such a way as to delete personal identifiers (see *Teachers Act* ⁵⁰).

As these publication bans contradict the principle of open court proceedings, each instance in which they may be issued should be closely scrutinized in order to ensure that individual rights are protected, while affording the public the greatest access to court proceedings that is possible.

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 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.⁵¹ Many bodies, including the Human Rights Tribunal and the Workers’ Compensation Appeal Tribunal, regularly record hearings. Official recordings form part of the record if there is a review or appeal.

⁵⁰ RSBC 2011, c 19.

⁵¹ See, *SELI Canada Inc. v. Construction and Specialized Workers’ Union, Local 1611*, 2011 BCCA 353 (CanLII), <<https://canlii.ca/t/fmncg>>.

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, as a power distinct from the ability of parties to apply for a subpoena to be issued, 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 should use this power cautiously. They first determine if they can make accommodations, such as scheduling changes, that will allow the witness to attend voluntarily. They will also determine if there is another way to obtain the witness's evidence.

Statutes often provide for fines or penalties to be issued against an individual who fails to produce a document or thing to the decision-maker after being ordered to do so. Finally, failure to produce the required evidence may allow the decision-maker to make adverse inferences against the party who failed to produce it.

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 BC *Employment Standards Act*⁵², and the premises and activities of those who operate entities where liquor is sold to the public under the BC *Liquor Control and Licensing Act*⁵³.

3 - Search and Seizure

If a person has been given the privilege of undertaking certain activities, it is expected 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*⁵⁴). This seizure can 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

⁵² RSBC 1996, c 113.

⁵³ RSBC 1996, c 267.

⁵⁴ RSBC 1996, c 148.

testifying, of s. 4 of the BC *Evidence Act*⁵⁵. 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 from 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.

⁵⁵ RSBC 1996, c 124.

Chapter 7 - The Decision-Maker's Conduct

Decision-Maker's Conduct Inside 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 how 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, take care of personal matters, and 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. You should dress in a manner that does not distract you, your colleagues, or the participants from the tasks of the hearing.

Often, tribunal members will be 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 the first and only appearance before the decision-making body. Individual litigants 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.

Your 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 behaviour. 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, (either inside the hearing room or in social situations), 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.⁵⁶

Decision-Maker's Conduct Outside a 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 your voice can carry 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.⁵⁷

⁵⁶ See, s. 30 of the ATA.

⁵⁷ See, *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 (CanLII), <<https://canlii.ca/t/523k>>.

The use of social media presents unique challenges for judges and other decision-makers.⁵⁸ Here are some general tips, adapted from the Workers' Compensation Appeal Tribunal's 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 permitted you 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.

⁵⁸ The Workers' Compensation Appeal Tribunal (WCAT) has produced a leading policy in this area, included in Appendix C (WCAT Employee Social Media and Social Networking Policy).

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 in order 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

So. This is it. This is what the past seven chapters have been leading up to. The big payoff.

We're just going to go ahead and rip the band-aid off quickly here. There is no one way to make a decision. There is no predetermined process that you must follow to arrive at the right decision. In fact, there is very rarely a "right" decision to be made at all.

Well, that about wraps things up, albeit on a sour note.

Or, perhaps we can interest you in reading on with the knowledge that while everything we just said above is true, it is also a very good thing that it is true. As we have seen in the preceding chapters, there are a great many choices that decision-makers are faced with at every stage of an administrative proceeding. Many of those choices are appropriate for decision-makers to make, even contradictory ones. What makes for an appropriate decision involves looking at the individual circumstances that impact on that decision and applying your judgment to them. It is the role of the decision-maker to filter the law and the facts through their personal experience to arrive at a reasonable decision in the matter before them. However, there are steps that you can take to assist you in coming to a reasonable decision.

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.

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.⁵⁹ This principle holds true for non-review decisions (that is, decisions

⁵⁹ *Iwa v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), <<https://canlii.ca/t/1fsz2>>.

made by statutory decision-makers) as well. While it is certainly true that a statutory decision-maker need not collect all the data and information they rely on themselves (as this would be impossible in many, if not most, situations), they still need to ensure that they have all of the information that the parties want them to have, and that they have sufficient and accurate information. If the decision-maker is relying on a summary created by another person (such as an investigator), the decision-maker should have access to the information that underpins the summary.

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. However, this waiver will not relieve the decision-maker from the duty to decide the issue on the evidence before them.⁶⁰

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.⁶¹ 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, decision-makers may have informal discussions about policy and legal issues with the whole or part of the decision-making body, or with their colleagues, to canvass important policy considerations. Decision-makers may also discuss issues with legal counsel, where available, as counsel will assist the decision maker in coming to a decision without prejudicing the outcome. 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.⁶² Regardless of whether a decision-maker engages in these discussions, they remain responsible for making decisions on the issue before them. It is not permissible to have another individual make any findings of fact or any decisions on a matter that is not assigned to them. This is true even if this is not the ultimate decision on the matter—a decision-maker must consider each finding of fact in the matter before them.

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 by 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

⁶⁰ *Re Doyle and R.T.P.C.*, 1985 CanLII 5573 (FCA), <<https://canlii.ca/t/g95fn>>.

⁶¹ See, *Consolidated-Bathurst*, <<https://canlii.ca/t/1fsz2>>.

⁶² *Id.*

submissions to the panel. It is procedurally unfair to make a decision based on information that the parties did not have the opportunity to comment on, and to make argument as to whether the information should or should not be applied to the current decision.

Lawyers and Consultants

Some decision-making bodies employ lawyers to advise members on legal issues.⁶³ Similarly, bodies may have a non-panel member act as a consultant on issues of substantive expertise.⁶⁴ 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, absent specific authority that allows them to do so and which defines their role in the hearing. As set out above, any individual who performs this role is similarly prohibited from deciding any of the issues before the decision-maker.

⁶³ *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, 1993 CanLII 1366 (BC CA), <<https://canlii.ca/t/1dbqc>>.

⁶⁴ See, *Kranz v. British Columbia (Assessor of Area #10 - Burnaby/New Westminster)*, 1994 CanLII 1838 (BC SC), <<https://canlii.ca/t/1dmhp>>.

Chapter 9 - Decision Writing

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

Though there are some statutory obligations placed on certain decision-makers to provide written reasons, written reasons are always helpful. 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 understand how the decision was reached; and, (c) they allow a reviewing court to determine whether the decision-maker followed both the requirements of the enabling statute and administrative law generally.

When a decision-maker in the first-instance comes to a decision on the issue before them, they need to be able to articulate why they have come to that decision. The best way to accomplish this is by producing written reasons. In a similar way, when a tribunal has finished hearing an issue, the panel usually advises the parties that it is reserving its decision and will provide a written decision with reasons at a later date.

The timing of the decision and the 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. It is unwise to provide the parties a specific date for the decision unless you are certain it can be met. Even if you are confident that you can meet this deadline, it is advisable to refer to this as a ‘target’ or a ‘goal’. Regardless of whether the statute or rules mandate a time by which reasons must be provided, all decision-makers should strive to ensure that the decision is issued in as timely a manner as possible. The sooner the decision is written after a hearing, the more accurately you will be able to recall the evidence and arguments.

As discussed in Chapter 6, a court on judicial review will consider if there is evidence to support the facts found by the decision-maker, and whether the facts support the decision. There must be some evidence to support the decision.⁶⁵ The same holds true for decision-makers exercising their authority under statute. When making a decision, the decision-maker must, whenever possible, record the reasons for that decision. These reasons do not need to be lengthy, nor do they need to be in any formal decision format. What they do need to do is to accurately convey how a decision-maker arrived at the decision they did, in sufficient detail that a reader who is not intimately familiar with the subject matter could understand the logical reasoning process that was followed.

⁶⁵ *Vavilov*, <<https://canlii.ca/t/j46kb>>.

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”. Written reasons must indicate what evidence the decision-maker found relevant and reliable, and why.

When facts are disputed, the opposing accounts should be set out in sufficient detail to explain the differences, and the findings of fact should include an explanation as to why you have made those findings. For example, it may be that there was corroborative evidence from another source that was before the decision-maker, or that the weight of the evidence and the assessment of the trustworthiness of the witnesses supported this view of the facts. In setting out findings of fact, a decision-maker must keep in mind the necessity to demonstrate how the facts lead to the decision that is made, 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”.⁶⁶ An example would be that November 4, 2015, fell on a Wednesday. Under s. 24 of the *Evidence Act*,⁶⁷ 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.⁶⁸ Judicial notice should be used sparingly and can only be used for the most uncontroversial facts. It remains the responsibility of the party seeking to introduce evidence to demonstrate that it should be accepted, on the balance of probabilities.

Decision Writing with Other Panel Members

Occasionally, if there are many diverse issues that arise in an appeal of an administrative decision, a reviewing tribunal will sit as a multi-member panel, typically composed of three people. Sometimes writing decisions as a panel can seem more difficult than writing as a single decision-maker.

When determining how the appeal will be resolved, it is vital to remain respectful of the other members’ viewpoints throughout, even when raising opposing views. Be open to changing your views after hearing the arguments and positions expressed by your

⁶⁶ *Regina v. Potts*, 1982 CanLII 1751 (ON CA), <<https://canlii.ca/t/g1k0t>>.

⁶⁷ R.S.B.C. 1996, c. 124.

⁶⁸ *R. v. Bornyk*, 2015 BCCA 28 (CanLII), <<https://canlii.ca/t/gg1rf>>.

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, as the evidence and arguments of the parties will be fresh in the panel's minds. 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 follow this evidentiary chain to determine if they agree with what the evidence was, and what that evidence either proves or disproves.

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, they may set out dissenting reasons.

Where the panel agrees on both the outcome and the rationale of the decision, 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. While there are many ways to approach writing a panel decision, the most important factor to keep in mind is that all panel members must know, and agree to, the plan for writing the decision. Regardless of the manner in which the decision writing is accomplished, it should read as though it was written by a single author. Also, each member is individually responsible to 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 within the jurisdiction they operate. For example, in British Columbia, tribunals are bound to follow applicable decisions of the BC Supreme Court, the BC Court of Appeal, and the Supreme Court of Canada. While decisions of, for example, the Alberta Court of King's Bench may be instructive for decision-makers and can assist in coming to a decision, these decisions do not need to be followed.

Generally speaking, tribunals are not bound to follow their own prior decisions; however, this is not an absolute rule. Decision-making bodies should strive for consistency and predictability between their decisions wherever possible, noting the differences in outcome where applicable and outlining how the factual differences led to a different outcome.

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 is considered to be fettering of the decision-making authority and may be a reviewable error of law. If you are not following a previous decision, you need to clearly set out why this is so in the reasons for decision.

Inconsistency in a tribunal's interpretation of its 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.⁶⁹

Credibility Findings

All findings made by a decision-maker must be based on evidence. Regardless of whether the proceeding, or application, is written or oral, there will be statements or documents that support, or fail to support, the position or argument of a party.

When assessing credibility, all relevant and available evidence should be contained in the decision, whenever possible. Statutory decisions often involve the assessment of extensive evidence, and setting all of this down in a decision can be impractical or unhelpful. In written reasons, a decision-maker should ensure that they have set out the evidentiary basis for the findings that are made in the decision. In assessing credibility, written reasons must set out why, based on the totality of the evidence presented, the decision-maker finds 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. Findings need only to relate to the evidence required to decide the issues before you. If evidence presented by a party does not relate to proving or disproving an issue before the decision-maker, this should be noted in the reasons for 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 a finding of credibility is not necessary to make a decision. Where there are credibility issues that arise in a decision, the decision-maker must determine if those

⁶⁹ *Aspen Planers Ltd. v. Assessor of Area*, 2015 BCSC 1573 (CanLII), <<https://canlii.ca/t/gkz79>>.

credibility issues relate to an issue that you must decide. If they do not, then the decision-maker should not make any determination on that matter.

Format of Decision

A decision of any administrative decision-maker should be logically organized and should include the elements below. Make sure to put your point first, which will help the reader understand the decision. The level of detail and formality required in a decision depends on the context. For example, a decision from the Workers Compensation Appeal Tribunal on whether a worker will receive a loss of earnings award should be much more detailed and lengthier than a decision of a liquor inspector deciding whether to suspend a liquor licence for seven days.

- **Cover page.** Identifies the decision-making body, parties, counsel for the parties, and hearing panel, and indicates the dates of the hearing and of 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 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 any preliminary applications were heard and decisions were rendered 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. If a preliminary application was previously determined, but the decision-maker indicated that reasons would follow that determination, the reasons for the preliminary determination should be included in the reasons.
- **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 in a manner that allows a reader who is unfamiliar with the issue to understand what is being discussed, and why.
- **Facts.** Evidence that is undisputed may be set out as fact, though it is important that the reasons establish their undisputed nature. Where evidence on a relevant factual issue is disputed, a finding of fact must be made.
- **Submissions.** It is sufficient to summarize the key submissions of the parties. Submissions may also be discussed in your analysis.
- **Analysis and Reason.** Provide a rationale for your decision, including why you accepted 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 multiple issues, it is helpful to summarize these in the conclusion, for the ease of the reader.
- **Orders.** If any orders are made as a result of the decision, these should be set out at the conclusion of the reasons.

Unless you are required to follow a specific template, consider an organizational structure that is appropriate for the particular decision you are writing - 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. Due to the requirement that most decisions be accessible to the public, and the ease with which decisions are disseminated on the internet, it is helpful to bear in mind that the decision you are writing will remain in circulation for a long time.

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 they feel respected and they 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 words - or too many - 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 (including latin phrases) and jargon. It is also important to take the time to explain concepts your readers may not readily understand, such as important technical or scientific concepts.

There are many books on writing, on decision writing, and on the use of plain language. A small selection of these is included in the bibliography to this manual. BCCAT offers a decision writing workshop aimed at writing clear, well organized, and well-reasoned decisions, which can be helpful for individuals. The Canadian Council of Administrative

Tribunal's ("CCAT") website has an online literacy course that links to documents to assist decision-makers in structuring their decisions in a way that is accessible to individuals who have a lower fluency in the English language.

Personal and cultural sensitivity

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

- Avoid reference to personal characteristics unless they are both relevant and necessary to an issue under appeal. 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. Be respectful of the personal pronouns chosen by individuals mentioned in a decision. It is good practice for tribunals and statutory decision-makers alike to have an intake form or other device that allows individuals to indicate their preferred pronouns.
- 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 an anonymous decision, 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.

If an individual is referred to within a decision and they have not had the opportunity to present evidence, it is important to protect that person's identity to the extent possible. This is especially true if there are adverse findings made against that individual, or if there are references to previous adverse findings, or allegations, against that individual.

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 can be particularly influenced by findings of credibility and through the process of 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.

In determining if a decision-maker has achieved the correct tone in their reasons, the assistance of an editor or trusted colleague (who also is permitted to know the information contained in the submissions) is extremely helpful. Having someone edit the decision who is not as familiar with it as the drafter, can assist to identify errors in reasoning as well as ensure the reasons convey the correct tone.

Chapter 10 - Review of Decision-Making Body Decisions

The fact that a decision of a tribunal is challenged suggests there is an issue of substantial importance to your parties. There are numerous ways a decision may be reviewed after it has been released. This discussion is intended only as a brief introduction to decision review.

As set out below, one method of having a tribunal's decision reviewed is through initiating a proceeding under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 240 (the "JRPA"). If a court, on judicial review, makes a determination that is different from what the tribunal decided, the court's decision will be the one that has legal force and effect. This effectively 'overwrites' the decision of the tribunal. Unlike decisions from tribunals, that provide guidance to subsequent decision-makers, decisions from the court have legal precedence, which means that the reasoning and determinations **must** be followed in other appropriate decisions.

As a general rule, only final decisions of decision-making bodies will be reviewed by the courts. While there are some limited exceptions; the courts will generally decline to hear a judicial review of an interim or interlocutory decision of a tribunal. 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.

Reconsiderations and Appeals

Statutes sometimes provide for more than one level of decision-making through an internal appeal or reconsideration mechanism. The first decision made under a statute, often called the "decision of first-instance", may be subject to appeal or reconsideration, if such authority is provided in the statute. If there is no right of appeal established under the relevant legislation, then no such right exists and the decision-maker cannot create one. The decision-maker's decision is final and must be complied with. However, such statutory decisions are always subject to judicial review. This is because the Supreme Court, unlike tribunals, has inherent supervisory jurisdiction and can review, under the *JRPA*, decisions rendered by statutory decision-makers.

The question of standing to bring an internal appeal or reconsideration will depend on the statutory scheme. The parties to the proceeding before a first level decision-maker will usually have standing to bring a further review/appeal. Other persons whose rights are affected by the decision-maker's final decision may also have standing.⁷⁰ The legislation that the decision was made under may set out who can appeal a decision.

Enabling statutes may also provide for the reconsideration of final decisions of a lower-level decision, though this is less commonly seen. A statutory right of reconsideration will explicitly set out who has the authority to conduct the reconsideration, and may set out what issues may, or may not, be reconsidered. For example, reconsideration may be

⁷⁰ *Berg v. Police Complaint Commissioner*, 2006 BCCA 225 (CanLII), <<https://canlii.ca/t/1n6xs>>.

conducted by a decision-maker from the same decision-making body, or by an independent appeal tribunal.

The filing of an appeal or reconsideration does not always result in a stay of the appealed decision. Whether a decision is automatically stayed when an appeal is filed will be set out in the enabling legislation. It is, however, usually possible for an application for a stay of the decision to be made at the start of an appeal process.

It is usually the responsibility of the lower-level decision-maker to provide the record of decision to the person who is reviewing that decision. Many appeals and reconsiderations of statutory decisions are “on the record.” This means these appeals and reconsiderations won’t accept new information or evidence from the parties but are rather made on the basis of the information and evidence that was available to the decision-maker in the first-instance. There are some statutes that grant a *de novo* hearing on appeal or reconsideration, in which all issues may be re-examined, and new evidence may be received and considered.

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 both s. 53 of the *ATA*, the provisions of many enabling statutes, and in the common law.

Judicial Review

Judicial review is governed by Rule 16-1 of the Supreme Court Civil Rules, the *JRPA*, and the common law. Additionally, some provisions in the *ATA* set out the standard of review and a time limit for bringing a judicial review.

Judicial review is meant to be a summary and speedy process. Often, a tribunal’s enabling statute will either include a time limit for bringing a judicial review or will incorporate section 57 of the *ATA*. Section 57 of the *ATA* sets a 60-day limit to bring a judicial review, subject to a court extending that time for reasons specified in the *ATA*. Even where a tribunal’s enabling legislation does not include a time limit for bringing a judicial review, the courts will generally decline to hear a judicial review if the petitioner unreasonably delays in bringing the proceeding.

A court sitting in judicial review plays a supervisory role. This means that the court is not retrying the case that was before the tribunal. Rather, the court’s role is to consider whether the tribunal’s decision meets the applicable standard of review.

At common law, the presumptive standard of review is reasonableness.⁷¹ This presumption can be rebutted in a number of circumstances, including where the

⁷¹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 23.

legislature has prescribed the applicable standard of review.⁷² In BC, sections 58 and 59 of the *ATA* prescribe the patent unreasonableness standard of review and have been incorporated into the enabling legislation of a number of tribunals.

Whether section 58 or 59 of the *ATA* applies should be clear from the tribunal's enabling legislation. The legislation will expressly incorporate, or cross reference, one of these provisions. Additionally, section 58 only applies where the tribunal's enabling legislation contains a privative clause.

A privative clause, as defined by the *ATA*, “means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court.” Essentially, this is the legislature's attempt to limit the applicability of judicial review of tribunal decisions.

However, despite the presence of these privative clauses, the courts still maintain the ability to review decisions arising from these acts. It is the standard of review of these decisions that differs as a result of the presence of these privative clauses. These sections specify circumstances under which all three of the traditional standards of review—patent unreasonableness, reasonableness, and correctness—will be applied.

Other Forms of Review

The Office of the Ombudsperson of BC may contact a BC decision-making body for the purpose of investigating a complaint filed by a participant in a proceeding before that decision-making body.

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.

Concluding Remarks

Well. That was a lot. It may seem like too much, if you are just embarking on your path of decision-making (or even if you have been on that path for a long time). And it is a lot, to be fair. There is a great deal that goes into making a good decision, and much of that effort is never seen by anyone other than the decision-maker. This is, in no small way, due to the long history of administrative law, and the processes and procedures that have built up around it over that time.

However, don't let that discourage you. Thousands of statutory decisions are made every day in BC, and they will continue to be made, regardless of whether the decision-maker

⁷² *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), <<https://canlii.ca/t/1vxsm>> and *Vavilov* at para. 35.

has read every case we refer to in this manual. The fact you are reading this at all (and that you made it this far!) is a great indication that you are committed to improving your decisions. As we hope we have set out in this manual, there are a few key considerations to keep in mind when hearing about an issue and when making a decision. There are plenty more considerations that can be applied to a decision and its attendant reasons, but they all turn back to those few key considerations.

Did everyone who needed to say something about the issue get to say it? And in a way that helps them be understood?

Did everyone who needed to say something about the issue get all of the information that others were relying on, or that were crucial to the issue?

Did the decision-maker have sufficient, correct, information before them in making their decision?

Were the reasons for the decision clear and detailed enough to allow someone who isn't really familiar with the issue to follow the logical path from the evidence to the conclusion?

And really, that is it. Keep these considerations in mind, and you will be well positioned to make logical, defensible decisions that can benefit the parties who brought those issues before you. Also, keep this manual as well! It isn't expected that after reading through this you would be able to go off and make a perfect decision (especially because, if you were paying attention, you would know that there is no such thing!). Rather, this manual can serve as a reference for you as you make decisions and as you get more familiar with administrative law.

So, what is next? Well, make decisions! Talk to trusted and appropriate people about them. Read other decisions from other decision-makers to see how they structure their reasons and how they convey complex topics. You will find that you both think about, and convey, your reasoning differently than anyone else, and you might also find that you disagree with decisions that others have made when you evaluate the evidence yourself. That is ok too. In fact, that is the heart of administrative law. Reasonable people can reasonably differ in what they think is an appropriate decision. Just make sure that you write down why you come to that different conclusion.

You've got this.

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 issues?

(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 the 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?)

Panel Member's questions

Appellant re-direct

Respondent direct

Appellant cross

Respondent re-direct

Panel Member's questions

Respondent re-direct

6. 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."

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

**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.

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