



**ALBERTA  
OMBUDSMAN**

**ADMINISTRATIVE  
FAIRNESS GUIDEBOOK**

# Introduction

This guidebook has been created to help you learn how the Alberta Ombudsman investigates complaints of unfair treatment by Alberta government departments, agencies, boards, commissions, designated professional organizations and the patient concerns resolution process of Alberta Health Services.

As a public servant or member of a professional body, you may be required to make an administrative decision. If this decision affects the rights, privileges or interests of an individual, it triggers what's called a "duty of fairness."

Natural justice and administrative fairness are at the core of Ombudsman investigations. Natural justice is to administrative fairness what due process is to criminal law. For example, if an accused is not informed of his or her rights, there is an error in process. Similarly, if an individual is denied a service but is not informed of their right to appeal, the process is flawed.

The application of administrative fairness in decision-making affects people in a variety of ways. They range from administrative tribunal decisions (including workers' compensation benefits, income support benefits, or disciplinary sanctions for inmates in provincial correctional centers), to situations where there is a less formal (or no formal) process.

The Alberta Ombudsman uses the following guidelines to assess whether a situation has been dealt with in an administratively fair manner.

## Chain of Legislative Authority

What legislation created the authority or power to make a decision? And who can make that decision?

The powers of government departments, agencies, boards, commissions, designated professional organizations and the patient concerns resolution process of Alberta Health Services are derived from statute. Legislation may grant the organization the ability to make decisions, or it may grant the decision-maker the authority to exercise discretion based on parameters set out in legislation or in policy.

Another element of chain of legislative authority is the understanding of the decision-maker. The decision-maker must be able to understand he or she has authority to make a decision, and that the decision is consistent with legislation, regulation or policy.

## Duty of Fairness

Duty of fairness means there must be procedural fairness in decision-making. Greater procedural protection is required if there is:

- *no right of appeal established within a statute;*
- *no further appeal mechanism within a department, agency, board or professional body; and*
- *a substantial effect on an individual's rights (such as loss of financial benefits).*

Decisions made by administrative bodies often have a more immediate and profound impact on people's lives than a court decision. Flowing from these decisions is a duty to act fairly and to make procedurally fair decisions.

The duty of fairness is flexible, depending on the statute involved and the nature of the decision. The degree of fairness depends on the effect of the decision on the rights of the individual, and whether legislation established an avenue of appeal.

## Participation Rights

Was the individual given a full and fair opportunity to present his or her case to the decision-maker?  
Was there full disclosure of the case against the person, to the person?

A decision-maker should ensure a person has sufficient time to respond when requesting information. A tribunal should also invite all parties to provide written submissions or present orally at a hearing. These actions provide a meaningful opportunity to be heard.

## Adequate Reasons

Canadian courts impose a common law obligation on administrative decision-makers to provide adequate reasons.

There must be a rational connection between the evidence presented and the conclusions reached by the decision-maker. The decision-maker should be able to answer the question, “Why did you make that decision?”

It is not enough to outline the evidence and arguments made by the parties. There must be a rational connection drawn between evidence and conclusions, including a clear explanation of how relevant legislation, regulation or policy was applied. Decision-makers should also be able to explain what evidence was rejected, and why it was rejected. A well-written decision must address the major arguments raised by all parties. While decision-makers are not required to address every point or piece of evidence, they must address the major evidence they relied on (or rejected) to make the decision.

## Apprehension of Bias

Decision-makers must demonstrate impartiality and independence when making decisions. “Impartial” applies to the state of mind or attitude of the decision-maker so there is no bias, either real or perceived. Impartial decisions are based on objective criteria. To be “independent,” the decision-maker must be free from interference by the executive and legislative branches of government and from other external forces such as business interests, corporate interests or other pressure groups.

Decision-makers should declare real or perceived conflicts of interest. The appearance of impartiality is necessary to maintain confidence in the decision-making process. In cases where it appears decision-makers are not objective, even when they feel they could make an unbiased and fair decision, they must disclose the potential conflict or excuse themselves from the case.

Decision-makers should guard against forming opinions about the person or the case before reviewing the documentation and hearing from

all parties. An appearance of bias might result from the behaviour of a decision-maker at a hearing, such as repeatedly silencing a party, or behaving in an aggressive or sarcastic manner. If the decision-maker was involved in the case prior to the hearing, it may appear they have prejudged the matter.

## Legitimate Expectation

The principle that regular practices or promises of an administrative decision-maker should be considered forms the basis of legitimate expectation. For example, a person has a legitimate expectation that a submitted application form will be processed.

When a person challenges a decision, it is administratively fair for the decision-maker to honour promises made about following procedure, unless the decision-maker is unable to do so. In that case, the decision-maker must ensure the decision is made as procedurally-fair as possible. Failing to meet legitimate expectations may be as simple as an official failing to follow through after agreeing to take action or write a decision letter; it becomes more complex if the authority fails to follow what may be considered a regular process without explanation, therefore treating an individual in an unfair manner.

## Exercising Discretionary Power

Discretionary decision-making can be established in policies, legislation and guidelines. Discretionary decisions cannot be made in bad faith, for an improper purpose, or based on irrelevant considerations. Although decision-makers enjoy considerable deference which allows them to make their own decisions and determine the scope of their jurisdiction, discretion must still be exercised within a reasonable interpretation of legislation.

When exercising discretionary decision-making powers, the decision-maker must do only what he or she is authorized to carry out.

## Was the decision reasonable?

This final fairness guideline is one that flows through all our investigations. A reasonable decision does not equate to whether the decision is wrong, or whether a different conclusion could have been reached. Rather, a reasonable decision shows how the decision-maker considered and assessed the arguments and evidence. If this does not appear in the decision, the complainant is left wondering how their circumstance was considered.



# WRITING A GOOD DECISION



## Writing A Good Decision

When writing a decision, the Alberta Ombudsman recommends using the following guide to prepare decisions that reflect administrative fairness, professionalism and accuracy. Your decision should also provide the recipient with a complete and clear account of the decision.

### Plain language

- *Use plain and understandable language, presented in an organized and clear format.*
- *Write short sentences.*
- *Say what you have to say, and no more. This means avoiding flowery or unnecessary language.*
- *Write with an active, not passive, voice.*
- *Use simple, everyday words, spell acronyms, and avoid technical terms and jargon.*

### Common pitfalls

As a decision-maker, you can encounter stressful and emotional situations. Still, it's necessary to keep those feelings and emotions out of your decision. Remember, decisions are made based on the application of legal and administrative principles to the facts in a case.



- *Decisions should avoid relying on irrelevant considerations, emotionally-charged statements and comments.*
- *Avoid accusatory or demeaning language, and maintain a professional tone. Use proper names and titles, and avoid first-name references.*
- *Read your letter several times before sending it, and don't be afraid to re-write it if it doesn't seem clear to you, or if it raises other questions.*
- *Check your grammar and spelling, and always double-check your facts. Is the legislation titled correctly? Are dates accurate? If possible, ask a co-worker to review your letter. Another pair of eyes can spot mistakes or errors you might have missed.*

Finally, a well-written decision should also draw on the following elements:

### **Decision-maker**

The name and title of the decision-maker must be clearly identified in the decision document, and the decision-maker should sign his or her name to the document.

If the decision is the result of a panel hearing, it must outline the people in attendance at the hearing, including the chair and panel members, authority representative(s), their witness or lawyer, the appellant, their lawyer or advocate, and any witnesses. Observers should also be identified.



### **Preliminary Issues (these are more typical in tribunal situations)**

This section of the decision should cover a number of important steps that should have occurred at the hearing, including:

- *Determining whether there were objections to the members of the panel, or its jurisdiction to hear the appeal;*
- *Ensuring all parties are provided with the same information; and*
- *Ensuring all parties have had sufficient time to prepare, and are ready to proceed with the hearing.*

### **Findings of Fact**

This part of the decision should summarize, in chronological order, the events that occurred and evidence presented. Findings of fact should indicate what the decision being reviewed was based on, and the reasons why the applicant believes the decision is wrong.

Findings of fact must be balanced, and reflect all the important evidence presented. The reader should be able to easily understand why the decision was made, and why the complainant believes a different decision would be more appropriate.



## Reasons for Decision

The most common problem with written decisions is that they do not provide reasons or rationale. Instead, they often reach a broad conclusion without supporting rationale. In situations where there is conflicting evidence, the reasons should identify the decision-maker's rationale for giving one piece of evidence more weight than another. Ask yourself these questions: "Why did the decision-maker accept this piece of evidence over another? Why was a certain piece of evidence more relevant in relation to the specific legislation?"

As Sara Blake, a recognized expert on administrative law, points out, "it is not sufficient to simply outline the evidence and argument and to state a tribunal's conclusion.

"Reasons should state the finding of fact that support the conclusions and identify the evidence on which they are based. The rejection of important items of evidence and findings of credibility should be explained. If an application is dismissed by reason of insufficient evidence, the material deficiencies in the evidence should be identified. If a statute requires the consideration of certain factors, they should be discussed...However, reasons need not be given on every minor point raised during the proceeding nor must reference be made to every item of evidence."<sup>1</sup>

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<sup>1</sup> Sara Blake, *Administrative Law in Canada, Fourth Edition (2006)*, pp. 90-91.



## Legislative References

Where possible, legislative references should be specific, and clearly indicate the relevant provisions considered in legislation and/or policy.

For example, in a case of eligibility under the *Workers' Compensation Act* in relation to compensation for a work-related accident, the references could include:

- *Section 1(1)(a) of the WCB Act; and*
- *Section 24(1)(a) and (b).*

## Documents

All the materials the decision-maker and parties had considered should be itemized. Documents should be labeled in such a way that they can be readily accessed by the reader.

## Recourse

If there are available avenues of review or appeal, statutory or otherwise, they should be included in the decision document.