The Fine Art of

Fairness

A Guide to Fair Practice

Public Interest Disclosure Commissioner
Speak out. Safely.

Ombudsman Saskatchewan
Promoting Fairness

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All Roads Lead to Fairness

During this session, we will discuss many different themes and ideas all related to how we assess whether a decision or action is fair. This might seem odd at first, because while most of us have a sense of what fairness is, it is difficult to define in a way that captures everything it encompasses.

To help us understand fairness as it applies to the decisions and actions that the Ombudsman can review, we are going to focus on the following tools, concepts and skills:

- What is an Ombudsman?
- How does Ombudsman Saskatchewan operate?
- The Fairness Triangle
- Ideas about equality
- Power, rights and interests
- Decision-making skills
- How to communicate a decision well

We will also do some exercises that demonstrate how these ideas and skills play out in our interactions at work.

Do you talk about fairness at work? If you do, what do you talk about?

NOTES

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Expectations About Services

Before we explore the idea of fairness, let's get personal. Think about what you expect when getting services and how you decide what is fair or unfair when your expectations are not met. Think about a time when you received services. It can be about any service, such as ordering a meal or buying something at a store. It doesn't need to be connected to your work.

1. What were your expectations about the service?

2. How did you *feel* when you got bad service or didn't get the service you expected?

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3. What was your *reaction* when you received bad service?

4. How did you *feel* when you got good service? How did you respond to getting good service? Did you take any action?

5. What is the most common complaint you deal with in your job?

NOTES

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Ombudsman 101

What is an Ombudsman?

Parliamentary **ombudsman** offices like Ombudsman Saskatchewan are created by legislation to investigate and make recommendations to resolve complaints about the administrative actions and decisions of public sector organizations.

Parliamentary ombudsman offices are **independent**, **impartial**, and **confidential**, and provide a **credible review process**.

They are **independent** from the government and public institutions they oversee, giving them the freedom to offer honest criticism without the threat of being restricted or controlled.

They are **impartial** and do not advocate for complainants or act as apologists for the public institutions they oversee. They are advocates for fairness.

Ombudsman investigations are **confidential**. The information gathered by the Ombudsman's office is not subject to disclosure under freedom of information laws and the ombudsman cannot be compelled to provide information in court. Only the ombudsman can issue public reports if it's in the public interest to shed light on issues that are uncovered.

Ombudsman investigations require a **credible review process**. Legislation establishes what an ombudsman can investigate and provides wide powers of investigation, including the authority to make findings and recommendations and the discretion to resolve matters informally

Thorough and credible investigations that are well communicated to complainants and public institutions are more likely to be understood by both and any recommendations made are more likely to be accepted.

Many other government agencies, municipalities and universities have internal ombudsman. These organizational ombudsman sometimes

"[An ombudsman is] an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about government actions, and, when appropriate, make findings and recommendations, and publish reports."

– United States Ombudsman Association, Governmental Ombudsman Standards, October 2003, Preamble

The election of Sweden's first Parliamentary Ombudsman in 1810 is generally regarded as the birth of the modern ombudsman institution.

Alberta established the first parliamentary ombudsman in North America in 1967.

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have powers similar to parliamentary ombudsman offices, but are usually less independent because they are set up, appointed and employed by the organizations whose decisions they review. SGI's and the Workers' Compensation Board's fair practice offices are examples of organizational ombudsman offices.

NOTES

Cooperative Influence

One criticism of ombudsman institutions is that they can only make recommendations, so they have no teeth. While *The Ombudsman Act, 2012* only allows the Ombudsman to make recommendations, our ability to cooperatively influence allows us to have a broader, more long-lasting effect on how public institutions address issues of fairness than we might have if we simply issued orders.

The theory behind cooperative influence is based on the work of professor Marc Hertogh of Tilberg University in the Netherlands. Professor Hertogh recognized that agencies that conduct reviews, like courts and ombudsman offices, can be problem-solvers by addressing individual complaints and can also be system fixers that influence lasting policy changes.

He studied the impact that orders of the Dutch administrative court had on the policies and practices of the National Tax Authority compared to the impact of the National Ombudsman's recommendations. He found that the National Tax Authority would often just carry out the court's orders – making the change for the one person involved in the court case – but when the Ombudsman recommended a change, it would change its policy or legislation, so the change would be applied to everyone in the future. In other words, even though the ombudsman could not order the National Tax Authority to do anything, the ombudsman's recommendations often had a broader and more lasting impact than the court's orders.

Professor Hertogh theorized the two different approaches of courts and ombudsman offices – coercive control and cooperative control (or influence) – as being at opposite ends of a spectrum. Here are some of the differences between the two:

CHARACTERISTIC	COERCIVE CONTROL (COURTS)	COOPERATIVE INFLUENCE (OMBUDSMAN)
Central Goal	Force change with imposed orders and penalties for non-compliance	Effect change through negotiation and consultation
Central quality	Authoritarian	Consultative (interactional)
Nature of decision	Binding Orders (obligatory)	Recommendations (advisory/ facilitating)
Relationship	Vertical	Horizontal
Orientation	Reactive	Proactive

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He concluded that cooperative influence is effective because the ombudsman (or other reviewing body) takes the time to learn about and tap into the common language and logic of the government institution, so any criticism and advice about how the institution could change is offered using the same language and logic. This makes the ombudsman's opinions easier to understand and makes it easier for public institutions to see how any recommended changes will fit into the existing rationale of their programs and mandate. This tends to create more buy-in.

We use cooperative influence at Ombudsman Saskatchewan. This includes making recommendations that we think will have a broader policy impact, such as improving forms and form letters or improving an agency's complaint-handling or appeal processes. We work to ensure we communicate with public institutions in ways that make sense to them. We also try to be mindful of their policy goals, so that they can see why making a change we recommend will improve their programs. We take the time to understand public institutions so our recommendations are doable, measurable and achievable for them.

Cooperative influence is part of all our work, from intake, to facilitated resolutions, to training, to formal investigations.

NOTES

Structure of Saskatchewan's Public Sector

Before we discuss Ombudsman Saskatchewan's mandate and complaints process, it is helpful to explore the context that shapes and guides your role as public-sector decision makers. This includes:

- the structure of Saskatchewan's public sector.
- the definition of an administrative decisions.
- rules governing how administrative decisions are made.

The Provincial Government

The provincial government has three branches – the legislative branch, the executive branch and the judicial branch. Each branch has different functions and decision-making responsibilities.

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THE CROWN (LIEUTENANT GOVERNOR)		
LEGISLATIVE BRANCH (MAKES THE LAWS)	**EXECUTIVE BRANCH (ADMINISTERS THE LAWS)**	**JUDICIAL BRANCH (INTERPRETS THE LAWS)**
Speaker Members of the Legislative Assembly Officers of the Legislative Assembly (Ombudsman, Auditor, Chief Electoral Officer, etc.)	Premier Cabinet Ministries Agencies Boards Commissions Crown Corporations Health Authority	Courts (Judges)

LEGISLATIVE BRANCH

- **Makes the laws** by passing acts (statutes).
- Made up of the elected Members of the Legislative Assembly, plus appointed officers of the Legislative Assembly such as the Ombudsman and the Public Interest Disclosure Commissioner.

EXECUTIVE BRANCH

- **Administers the laws** by exercising the powers and duties under Acts, including developing and approving regulations, policies, procedures and guidelines, making administrative decisions, and otherwise carrying out government activities.
- Made up of:
  - The Deputy Ministers, and employees who manage and work for the various ministries of the provincial government.
  - The directors, officers, members and employees of the various Crown corporations, boards, commissions and other agencies of the executive government.
  - Administrative tribunals –organizations set up by statutes to make decisions about specific topics (e.g. Labour Relations Board, Highway Traffic Board, Office of Residential Tenancies, Automobile Injury Appeal Commission, etc.) – are an extension of the executive branch. Unlike ministries and Crown corporations, however, their decisions and their decision-making processes are usually more independent and not subject to direct control by the Cabinet or individual Ministers. Many of them can hold hearings and make binding decisions like judges.

JUDICIAL BRANCH

- **Interprets the laws** in keeping with the Constitution and case law. Resolves disputes about legal rights and responsibilities.
- Made up of the Court of Appeal, the Court of Queen's Bench, the Provincial Court, and the judges appointed to all three courts.

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- Judicial independence is a key feature of Saskatchewan's (and Canada's) system. Neither the legislative nor the executive branch can interfere with how cases are decided by the judicial branch.
- Judges are supported by court officials (registrars, deputy registrars, local registrars, sheriffs, clerks, etc.) and staff appointed and employed by the executive branch. Further, the courthouses in Saskatchewan are owned, operated and maintained by the executive branch.

NOTES

Municipal Governments

Cities, towns, villages, resort villages, rural municipalities and northern municipalities are technically part of the executive branch because they carry out authority granted to them in *The Cities Act*, *The Municipalities Act*, and *The Northern Municipalities Act, 2010*. However, under these statutes, municipalities are regarded as a responsible and accountable level of government. Municipalities are governed by elected councils who make decisions they consider appropriate and in the best interests of their residents. In this way, municipal councils make local policy decisions through bylaws and resolutions, just as the Legislative Assembly makes provincial policy decisions through statutes.

Ombudsman Saskatchewan

The Ombudsman is an independent officer of the Legislative Assembly appointed under *The Ombudsman Act, 2012*. Just like the Provincial Auditor audits the government's management of public money, the Ombudsman reviews public sector institutions' decisions and actions to ensure that these have been made and carried out fairly.

We do not advocate for the people who complain to us nor for the **public sector institutions** and officials we investigate. We are neutral, impartial and independent from the institutions we oversee. Our mission is to promote and protect fairness and integrity in the design and delivery of provincial and municipal services.

The Ombudsman's focus is fairness – particularly, fair processes.

Ombudsman Saskatchewan started taking complaints in 1973, receiving 316 of them in our first 7 months of operation. By the end of 2016, we had received over 140,000 complaints.

Public sector institutions are the provincial ministries, agencies of the government, publicly-funded health entities and the municipal entities within the Ombudsman's jurisdiction as defined in *The Ombudsman Act, 2012*.

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Complaints

Our process usually begins with someone contacting us with a complaint. Anyone can contact us free of charge.

Under our Act, we take complaints about the administrative decisions, actions and omissions of the following provincial and municipal organizations, including their board members, council members, officers and employees:

- provincial ministries
- agencies of the government, including most boards, commissions, tribunals and Crown corporations
- the Saskatchewan Health Authority, the Saskatchewan Cancer Agency and most publicly-funded health entities, such as hospitals, special-care homes and ambulance services
- cities, towns, villages, resort villages, rural municipalities, northern municipalities, and their councils, council committees and controlled corporations

We can also take complaints about municipal council members' alleged conflicts of interest or contraventions of codes of ethics.

We cannot take complaints about any other organizations, such as:

- the Legislative Assembly, a committee of the Legislative Assembly, the Lieutenant Governor in Council, the Executive Council or a committee of the Executive Council
- the federal government
- universities
- the courts
- lawyers
- school boards
- band councils
- private companies or private citizens (private landlords, etc.)

While anyone can contact us, we can only take complaints from people and organizations who are personally aggrieved by or affected by a decision, recommendation, action or omission. So if someone calls us to complain about something that happened to someone else, we require the other person to either call us themselves, or give us permission to talk to the person who called us on their behalf.

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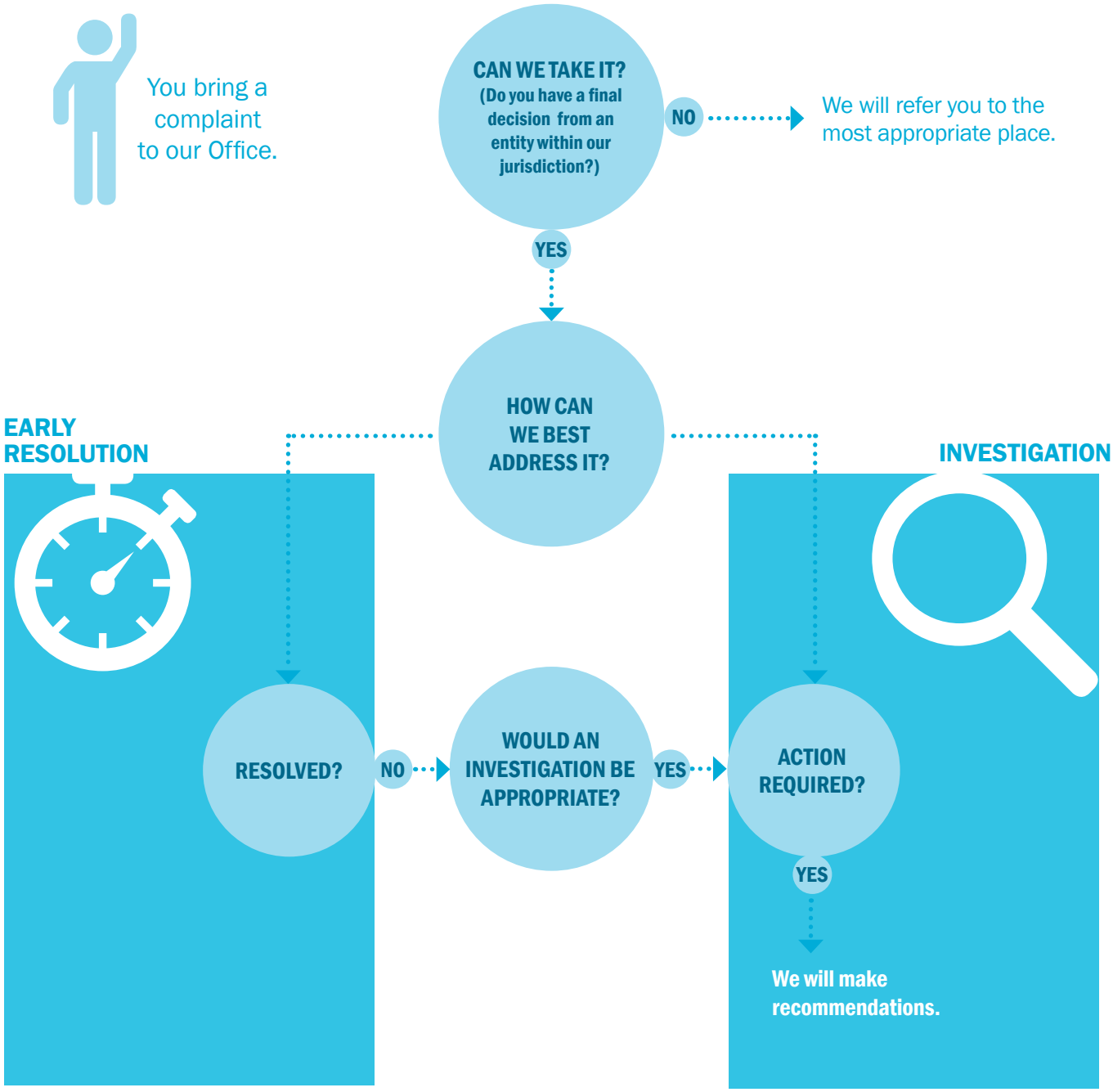
What happens when we receive a complaint?



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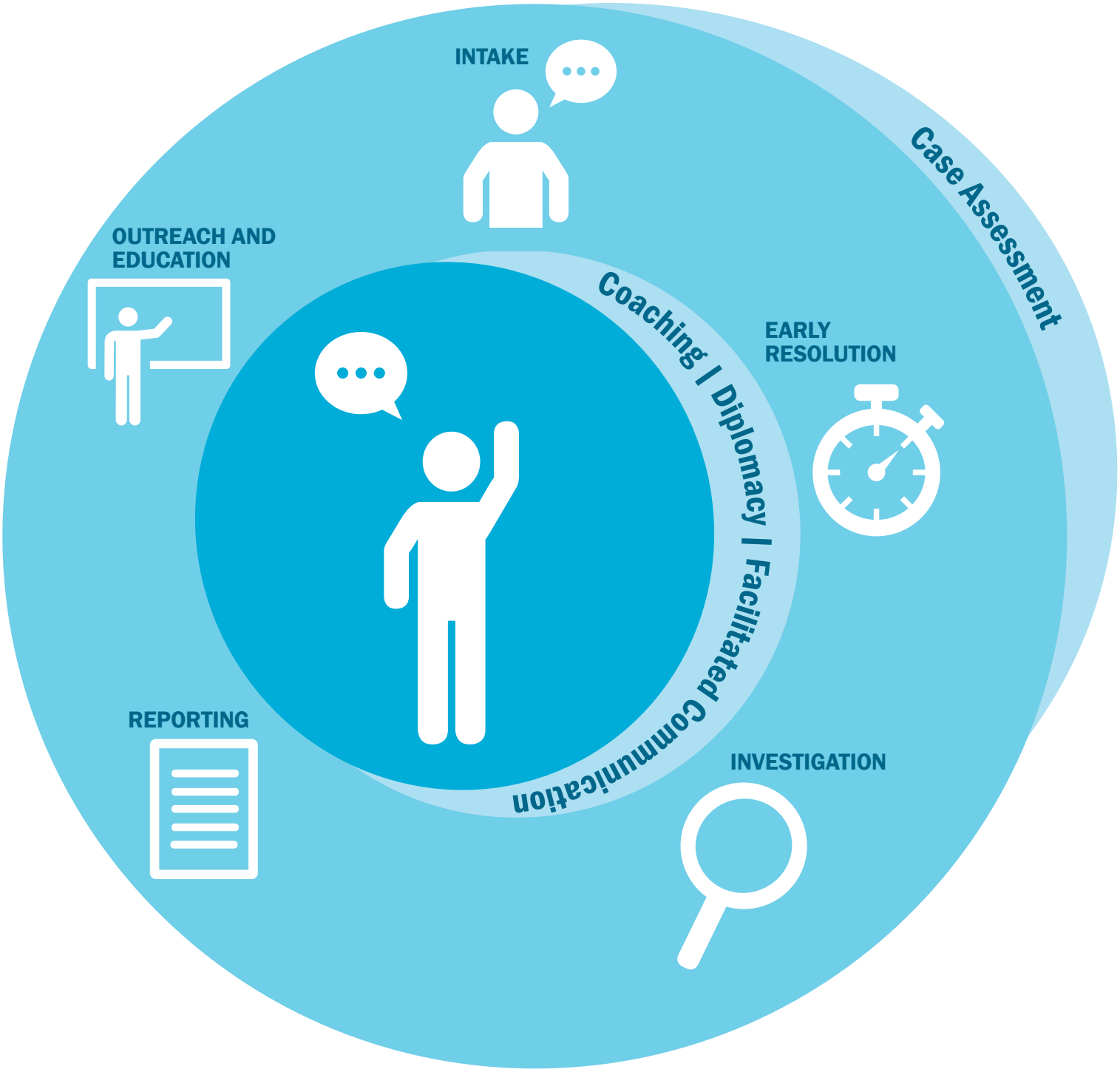
Inside Our Process

While we follow a general process for complaints, we recognize that different steps will be appropriate for different complaints - and not all steps will be used for every complaint. At the end of the process, we may also use what we have learned to promote the Office and reach out to the public, which in turn, can affect the kinds of cases we receive at intake.



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Intake

When a complaint first comes to us, it goes through an intake process, primarily to verify that it is within our **jurisdiction**, and that the complainant has taken advantage of all reasonable avenues of review or appeal and received a final decision.

This is because our Act says that the Ombudsman is not authorized to review complaints for which there is a statutory right of appeal or review to any court or tribunal. If the Ombudsman believes it would not be unreasonable to expect a complainant to take advantage of these appeals or reviews, we cannot take the complaint. And, even if the Ombudsman thinks it would be unreasonable, we cannot take the complaint until the deadline for applying for the review or the appeal is up. Because of this, we often say that complaining to the Ombudsman is an 'avenue of last resort.'

If people complain about an institution or a decision that is outside our jurisdiction, we do our best to refer them to the appropriate agencies.

Early in our intake process we also work with complainants to figure out if there are underlying interests or needs that are driving their complaints that are different from the issues or positions they initially present to us. This process of searching for interests is described in Power, Rights, and Interests beginning on page 42 .

Case Assessment

Sometimes we do a case assessment if it is not immediately clear at intake whether we have jurisdiction or whether there is a potential fairness issue arising from the complaint. Assessments usually involve a more detailed review of the information we gathered during the intake process and a review of other publicly available information about the institution's mandate, programs and processes. Sometimes, we will contact the public sector institution to get its understanding of the events that lead to the complaint. The primary goals of a case assessment are to clarify issues and decide the most appropriate way to address the complaint: referral, early resolution or investigation.

Our Act allows public sector institutions to voluntarily give us information about anyone receiving services from or dealing with them, if they are satisfied the information will assist us in our work.

Early Resolution

Our early resolution processes are focused on outcomes, at quickly identifying problems and potential solutions. Our primary goal is to facilitate the quick resolution of a complaint.

Our jurisdiction is based on the public sector institutions we oversee and the Ombudsman's powers and duties as defined in *The Ombudsman Act, 2012.*

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COACHING

We coach complainants in their interactions with public sector institutions. Coaching helps complainants manage their conflicts effectively themselves. It includes:

- helping complainants to identify and clarify their issues and possible options for resolution.
- helping them to provide the right information to the public sector institution.
- preparing them for conversations with public sector institutions, so they can deliver their message effectively.
- identifying the most appropriate public official for a complainant to contact.

Sometimes, coaching can help defuse emotions that have run high. It can also help identify the complainant's interests. Our goal is to pave the way for further steps in the resolution process.

Coaching often begins at our intake stage. While we are coaching a complainant we might be in contact with the public sector institution to get more information about the complaint. Afterwards, we may follow up to find out whether a complainant's issues have been resolved.

DIPLOMACY

When a complainant and a public sector institution have reached an impasse but do not have an ongoing relationship to repair and maintain, we shuttle information back and forth between them to help them come to a resolution that makes sense for both of them or, at a minimum, helps the complainant understand the institution's decisions or actions. Diplomacy sometimes results in substantive resolutions and the setting of ground rules for how the parties will treat each another in the future.

FACILITATED COMMUNICATION

Sometimes, when communication between the complainant and the public sector institution has broken down to the point where coaching will not work, we facilitate face-to-face meetings so the complainant and the institution can discuss what happened and why. We tend to do this when a complainant and an institution need to continue to have an ongoing relationship (tenant/housing authority, social assistance recipient/social worker, etc.). Our primary goal is to get the two parties working together again so they can move forward in their ongoing relationship. Facilitated communication:

NOTES

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- gives the complainant an opportunity to understand how a decision was made and the factors the public sector institution took into consideration when making it.
- gives the institution an opportunity to understand the impact and implications its decision has for the complainant.
- improves communication by facilitating the complainant and the institution's co-involvement in resolving the complaint.

NOTES

MEDIATION

If our efforts at early resolution are not effective, we might suggest a complainant and a public sector institution try mediation. Mediation is a more formal process in which a mediator (the Ministry of Justice's Dispute Resolution Office provides mediation services) brings the complainant and the institution together for a face-to-face meeting with the objective of determining their interests, identifying issues, clarifying expectations, and coming to a substantive resolution that is outlined in signed agreement. Mediation:

- provides a formal forum for discussion.
- given the complainant an opportunity to be heard.
- focuses on the future; seeks to satisfy the parties' underlying interests.
- encourages and supports the active participation of the parties in resolving their differences.
- assists the parties in building an ongoing relationship, if applicable.
- enables resolution to be achieved in individual and creative ways.

While we suggest mediation in some cases, we do not run mediation processes ourselves.

Investigation

An Ombudsman investigation is a formal process during which we gather relevant information and decide whether the complainant was treated fairly. If, after an investigation, we decide that a public sector institution has acted unfairly, we can make recommendation aimed at correcting the unfairness or preventing the same unfairness from happening to others. Sometimes we stop short of making formal recommendations, but instead make informal suggestions.

Before we start an investigation, we always give formal written notice to the appropriate public official as detailed in our Act (deputy minister, board chair, chief executive officer, mayor/reeve, city manager, chief administrative officer, administrator, etc.).

Our investigations are done impartially (we do not take sides) using a non-adversarial, inquiry-based approach. We have very strong powers of investigation, including the ability to subpoena witnesses and compel the production of documents.

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If we are investigating an issue in your public sector institution, we may ask you for:

- access to information, documents, files, policies or procedures.
- an interview, either by phone or in person with you or others in your workplace that may have information relevant to the issue under investigation.
- a joint meeting with you and the complainant (if a meeting could help lead to a resolution).

Our requests for information during an investigation are not subject to *The Freedom of Information and Protection of Privacy Act,* or *The Local Authority Freedom of Information and Protection of Privacy Act*. If we ask you for a file, you are required to provide the entire file and must not alter it in any way. Hand in hand with this requirement comes our duty under *The Ombudsman Act, 2012* to maintain the confidentiality of all matters that come to our knowledge as we carry out our work.

Sometimes we conduct investigations on our own initiative – not about an individual complaint, but of system-wide issues we uncover during our work. In these cases, we make recommendations with a view to fixing broader problems with systems, policies and procedures to prevent and avoid unfairness for everyone affected by the system, not just individual complainants.

Reporting

Once our investigators have gathered all the relevant information, they prepare an internal report of findings and, if appropriate, tentative recommendations for the Ombudsman to review. If the Ombudsman accepts our investigators' findings, the Ombudsman prepares a draft investigation report, which is shared with the public sector institution and anyone else that might be affected by our findings, to give them an opportunity to make representations to us before the report is finalized.

Once the Ombudsman has reviewed any representations made to us about the draft report, we make any necessary changes to it and the Ombudsman then issues a final report.

If we make formal recommendations, public sector institutions almost always accept them.

Sometimes we make reports public if the Ombudsman thinks it is in the public interest. These reports are available on our website and at our Regina and Saskatoon offices.

Finally, the Ombudsman reports annually on our progress and activities. Our annual reports usually include summaries of some of the complaints we resolved at an early stage and of investigations that resulted in us making recommendations.

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Outreach and Education

In addition to our case work, we also do outreach and education with the public and with public sector institutions. For example, we offer public presentations about the work we do and the services we provide. We offer this "Fine Art of Fairness" training to employees of public sector institutions to explain our role, how we do our work, and to help you practice administrative fairness in your work and to resolve issues before we ever get involved. We believe it is better to prevent unfairness from happening than to correct it.

NOTES

The Office of the Public Interest Disclosure Commissioner

Who is the Public Interest Disclosure Commissioner?

The Ombudsman is also the Public Interest Disclosure Commissioner for Saskatchewan – an officer of the Legislative Assembly appointed under *The Public Interest Disclosure Act.*

What is the purpose of *The Public Interest Disclosure Act*?

The purpose of *The Public Interest Disclosure Act* is to increase the integrity and accountability of our government institutions and to enhance public confidence in those institutions. It allows employees of certain government institutions to seek advice about making disclosures and to make disclosures of wrongdoings, either to their **designated officer** or to the Commissioner. The Act provides reprisal protection to public employees who speak out about wrongdoings in their workplaces from reprisal.

In other words, it provides a process for certain public employees to "blow the whistle."

A designated officer is a senior official of a government institution who is designated to receive and deal with disclosures from employees of that institution and provide advice to employees who are thinking about making a decision.

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What is a Public Interest Disclosure?

A PUBLIC SERVANT

A public servant is an employee of a government institution.

Government institutions include all provincial government ministries and most other provincial agencies, boards, commissions and Crown corporations.

01

WHO MAKES A DISCLOSURE

Public servants can make a disclosure if they reasonably believe that they have information that could show that:

- a wrongdoing has been committed.
- a wrongdoing is about to be committed.
- they have been asked to commit a wrongdoing.

02

OF WRONGDOING

Wrongdoings include:

- a contravention of a provincial or federal act or regulation.
- an act or omission that creates a substantial and specific danger to people or to the environment.
- gross mismanagement.
- directing or counselling a person to commit a wrongdoing.

03

TO AN APPROPRIATE PERSON

Disclosures of wrongdoing and requests for advice about making a disclosure may be made to:

- the designated officer at the public servant's government institution.
- the Public Interest Disclosure Commissioner.

04

IS PROTECTED

Public servants who make a disclosure of wrongdoing or seek advice about making a disclosure are protected from reprisals.

Reprisals can include:

- dismissals, layoffs, suspensions, demotions, transfers, job eliminations, change of job locations, reductions in wages or salary, changes to hours of work or reprimands.
- any other measure that adversely affects the public servant's employment or working conditions.
- a threat of any of these measures.

05

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What are government institutions?

Government institutions include the office of the Executive Council, any department, ministry or similar agency of the executive government of Saskatchewan, and the boards, commissions, Crown corporations, other bodies listed in Part I of the Appendix to *The Freedom of Information and Protection of Privacy Regulations*. Private corporations, officers of the Legislative Assembly, the provincial health authority, school divisions, universities, colleges, and municipalities are not included.

What is a wrongdoing?

The Act protects employees who report or seek advice about reporting something that is happening or has happened within their government institution that the employee honestly believes is improper. However, not all wrongs are wrongdoings under the Act.

Under the Act, a "wrongdoing" includes:

- A contravention of a provincial (Saskatchewan) or federal (Canada) Act or regulation.
- An act or omission that creates a substantial and specific danger to the life, health or safety of persons other than a danger that is inherent in the performance of the duties or functions of a public sector employee.
- An act or omission that creates a substantial and specific danger to the environment.
- Gross mismanagement of public funds or public assets.
- Knowingly directing or counselling someone to commit a wrongdoing.

What is a disclosure?

A disclosure is information that an employee of a government institution reasonably believes could show a wrongdoing has been committed or is about to be committed - or that the employee has been asked to commit a wrongdoing. A disclosure must be written and made in good faith to either the designated officer of the employee's government institution or to the Commissioner.

What is a reprisal?

The Public Interest Disclosure Act also protects employees of government institutions who are retaliated against for seeking advice about disclosing a wrongdoing, making a disclosure, co-operating in an investigation under the Act, or declining to participate in a wrongdoing. To be protected, employees must seek advice from or report a disclosure to their designated officer (see Role of Government Institutions below) or the Commissioner or seek advice from their **permanent head**.

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A permanent head is the deputy minister, president, or other official in charge of the government institution and who is directly responsible to a member of the Executive Council.

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The Act lists several examples of reprisal including dismissal, layoff, suspension, demotion or transfer, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work or reprimand, or threats of any of these actions. Any change to the employee's job could be a reprisal, if it was done in retaliation for them taking action under the Act.

Only the Commissioner can investigate an allegation of reprisal under the Act.

NOTES

Role of the Public Interest Disclosure Commissioner

The Commissioner's role is to:

- provide advice to employees of government institutions who are considering making a disclosure of wrongdoing or a complaint of reprisal.
- provide advice to any permanent head who consults with the Commissioner before determining it is not practical for his or her government institution to have a designated officer or to establish procedures for managing disclosures.
- receive disclosures of wrongdoing made directly to the Commissioner. (Public employees do not need to use internal processes first; they can come directly to the Commissioner.) The Commissioner must take one of the following actions:
  - take steps to resolve the matter within the government institution.
  - refer the matter to the government institution to which it relates.
  - investigate the matter.
- receive and investigate complaints of reprisal from public employees.

If the Commissioner decides to investigate a disclosure of wrongdoing or a complainant of reprisal, the Commissioner has the same powers to gather documents and interview people as under *The Ombudsman Act, 2012*.

The Commissioner has wide discretion to decide how to deal with a disclosure of a wrongdoing or complaint of reprisal. The Commissioner does not have to investigate (or can stop an investigation) if, among other things, in the Commissioner's opinion:

- The disclosure could be more appropriately dealt with using procedures under another Act. (For example, the Commissioner has the specific authority to refer a matter to the Provincial Auditor.)
- The disclosure is frivolous or vexatious, was not made in good faith, or is trivial.

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- Too much time has passed since the events being disclosed happen that investigating would serve no useful purpose.
- The disclosure could be more appropriately dealt with under a collective bargaining agreement or employment agreement.

The Commissioner issues investigation reports to the permanent heads of the institutions involved and may make recommendations to them. He or she can publicly issue special reports about any disclosure if he or she considers it to be in the public interest. The Commissioner also submits an annual report to the Legislative Assembly on the Office's progress and activities during the year.

For more information on the Office of the Public Interest Disclosure Commissioner, please see our website at www.saskpidc.ca.

Role of Government Institutions

The permanent head (Deputy Minister, CEO, etc.) of each government institution must:

- appoint a senior official as the institution's designated officer under the Act, whose role is to:
  - receive and deal with disclosures made by employees of the institution.
  - provide advice to employees who are considering making a disclosure.
- establish procedures to manage disclosures by the employees of the government institution including procedures for:
  - receiving and reviewing disclosures.
  - referring a matter to another government institution if it would be more appropriately dealt with there.
  - reviewing and investigating disclosures in a procedurally fair manner.
  - respecting the confidentiality of the information collected.
  - protecting the identity of disclosers, witnesses and alleged wrongdoers.
  - reporting on the outcome of investigations.
  - enforcing and following up on any disciplinary or corrective actions taken.
- ensure that information about the Act and the disclosure procedures are widely communicated to the employees of the institution.

If the permanent head does not appoint a designated officer, then he or she must perform the designated officer's duties under the Act.

For more information and resources on *The Public Interest Disclosure Act* please see the Public Service Commission's web pages: http://applications.saskatchewan.ca/pida.

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KEY THOUGHTS

Our Work and Approach

- We help provincial and municipal public sector institutions make administrative decisions that are procedurally, relationally and substantively fair.
- We are independent and impartial. We are not advocates for public sector institutions or complainants. We advocate for fairness.
- We believe complaints should be resolved quickly using the most appropriate method such as coaching, facilitated communication, diplomacy, mediation, investigation or other non-adversarial approaches, including any combination of these.
- We educate and encourage public sector institutions to proactively develop fair practices. We provide information to the public and complainants to help them resolve issues at an early stage.
- We are also the Office of the Public Interest Disclosure Commissioner. Under this second mandate, we accept disclosures of wrongdoing and complaints of reprisal from employees of government institutions.

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Fairness

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What does fairness mean to you?

1. What is your definition of fairness?

My Experience of Unfairness

1. Think of a time when you felt you were treated unfairly. It can be a work or a personal example. (You will not be asked to share your example.) What do you think made the situation unfair?

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A Context for Understanding Fairness

The Golden Rule – doing to others what you would have others do to you – is a part of many cultures, religions and philosophies going back thousands of years. It highlights that, at a basic level, each of us has a deeply ingrained sense of **fairness**. We all think we know fairness, or more often unfairness, when we see it. Mostly, what we each think is fair depends on our perspective - on the context. What seems fair from a service provider's perspective might seem unfair to the person receiving the services.

In "The Ombudsman's Guide to Fairness," published in the spring 2011 edition of the *Journal of the International Ombudsman Association,* G.R. Papica discusses the Golden Rule in the context of fairness, and the way several ombudsman offices define fairness.

Administrative Decisions

Administrative decisions are made by the members, directors, officers and employees of public sector institutions when they exercise authority and carry out duties granted under an act. If you are an officer or employee of a public sector institution, you make administrative decisions.

Here are some examples:

- An SGI adjuster reviews information about an accident to determine who was at fault.
- A Ministry of Social Services employee reviews an application to determine whether the applicant is eligible to receive benefits under the Saskatchewan Assistance Program.
- A City of Regina bylaw enforcement officer inspects a property and then issues a clean-up order under The Regina Community Standards Bylaw.
- The director of a long-term care home decides whether a woman who has been inappropriate to staff can still visit her husband who resides in the home.
- An Assistant Deputy Director at the Saskatoon Correctional Centre places an inmate in administrative segregation to protect the inmate from another inmate.

It is important to distinguish administrative decisions – decisions the Ombudsman has authority over – from other decisions over which we do not. One type of decision that the Ombudsman generally does not have authority over is a clinical decision or a decision about someone's health diagnosis or treatment made by a medical professional. A physician's decision about a patient needing surgery is a clinical decision. However, management of the surgery wait list involves making administrative decisions. There are times where the decisions of other professionals — such as lawyers making decisions about how to approach a court proceeding — are also not administrative decisions.

An administrative decision is any decision made by a public official while acting under an authority granted, or a duty imposed by provincial legislation, including decisions made by:

- **delegates of the statutory decision maker;**
- **administrative boards, tribunals and committees created by legislation to deal with specific issues; and**
- **individuals working for the government, from ministers to departmental heads to junior public servants.**

It does not include decisions made by the Legislative Assembly itself, the courts, or individuals in their private capacity.

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Another type of decision commonly made by public sector institutions that we do not have authority over are public policy decisions. For example, we do not have authority over whether a program will be continued, because this is a public policy decision. But we can look at whether the way the program was ended was fair, because these are administrative decisions.

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Rules for Making Administrative Decisions

There are three basic categories of rules that guide administrative decision-making:

- the **common law**
- acts, regulations and bylaws
- policies and procedures

The Common Law – Duty of Procedural Fairness

The duty of procedural fairness is a key common law rule governing how ministries, boards, agencies, tribunals, commissions, municipalities and other similar public sector institutions make administrative decisions and carry out their programs. Whenever a person's rights, interests or privileges will be affected by a decision, then the duty of procedural fairness is triggered.

The common law is established through decisions and rulings made by judges, courts, and similar tribunals. It is also known as judge-made law or case law.

The duty of procedural fairness is intended to ensure that administrative decisions are made using fair and open processes that are appropriate to the kind of decision being made in the context in which it is being made. The duty of fairness ensures that people affected by administrative decisions have a reasonable opportunity to provide the decision maker with information they think is relevant, to put their views forward for consideration, and to have the decision maker fully and fairly consider what they have to say before making the decision. We talk more about the duty of fairness in both *The Fairness Triangle* and the *How Fair is Fair?* sections that follow.

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Acts, Regulations and Bylaws

Public sector institutions make administrative decisions and take administrative actions using the powers, duties and functions conferred or imposed on them by acts, regulations and bylaws. If the acts, regulations and bylaws provide a specific process to be used or provide specific criteria to be considered when making an administrative decision, the process must be followed and the criteria must be considered for the decision to be valid.

A basic rule of administrative decision-making is that decision-makers must have the legal authority to make the decisions they make. This

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seems obvious, but in practice public bodies occasionally overstep their authority and do something or make a decision that they have no legal right to do or make. We talk more about the impact of legislation, regulations and bylaws in both *The Fairness Triangle* and the *How Fair is Fair?* sections below.

Policies and Procedures

The **policies** and **procedures** of a public sector institution explain how officers and employees are to use the powers, duties and functions conferred on them by acts, regulations and bylaws. Simply put, policies and procedures can assist institutions to make consistent decisions in similar circumstances. Consistent decisions are important for predictability and protect against biases or value judgments improperly affecting administrative decisions.

No matter how detailed policies or procedures may be, there are still many times when decisions must be made and actions must be taken to respond to situations that are not specifically addressed in policies the procedures. Just as policies and procedures can help to ensure consistent decisions in similar circumstances, they can also help point out dissimilar or different circumstances that need to be treated differently.

Policies are guiding principles used to establish intent and set direction of a program or department.

Procedures are a series of steps or directions to be followed as a consistent approach to accomplish an end result.

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Fairness Under *The Ombudsman Act, 2012*

At Ombudsman Saskatchewan, we assess the actions and decisions made by members, officers and employees of public sector institutions against a list of specific standards. Section 27 of *The Ombudsman Act, 2012* requires us to consider whether a decision, action, recommendation or omission was:

- **Contrary to law**
  - Contravening an act, a regulation or the common law, or doing something that is not authorized by an act or regulation.
- **Unreasonable**
  - A decision or action that is inconsistent with the known facts – when there is no factual basis for doing so.
  - A decision that is inconsistent with other decisions made in similar circumstances.
  - A decision or action that cannot rationally be explained.
  - The effect of the decision or action was contrary to what was intended.

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- **Unjust**
  - A decision or action is inappropriately punitive or has consequences beyond what is appropriate in the circumstances.

- **Oppressive**
  - When the actions or expectations of the public sector institution overburden a person participating in a program or getting services – imposing requirements or limitations that are out of proportion to the decision or circumstances.

- **Improperly discriminatory**
  - Applying discriminatory criteria that are not necessary to meet the objectives of a program or failing to treat people in similar circumstances equally when there is no justification for differentiating between them.

- **Made in accordance with a rule of law, a provision of an act, or a practice that is unreasonable, unjust, oppressive, or improperly discriminatory**
  - When complying with a statute, regulations or a practice requires making a decision or taking any action that unreasonable, unjust, oppressive, or improperly discriminatory.

- **Based on a mistake of law or fact**
  - Making a decision, taking an action or omitting to act based on a mistaken belief that the law requires it.
  - Making a decision, taking an action or omitting to act based a mistaken belief that certain circumstances exist when, in fact, the circumstances do not exist.

- **Wrong**
  - A decision or action is not necessarily contrary to law, unreasonable, unjust, oppressive, improperly discriminatory or based on a mistake of law or fact, but is nevertheless just wrong.

We also consider whether, in making a decision, or by acting or not acting, a power or right granted to the public body by an act, regulation, bylaw or the common law was exercised:

- **For an improper purpose**
  - Even though an action or decision was made in the exercise of a power or duty granted or imposed under an act, it was made for a purpose other than to further the goals of the act, such as to further the decision-maker's private interests – a conflict of interest.

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- **On irrelevant grounds or by taking irrelevant considerations into account**
  - A decision is made or an action is taken based on statutory requirements that, while in force, are irrelevant or inapplicable to circumstances or by considering circumstances that are irrelevant to the decision being made or action taken, even if true.

Lastly, we consider whether reasons should have been given for a decision, recommendation, action or omission, including whether reasons given were sufficient in the circumstances.

This is our comprehensive, formal definition of "unfairness". If we find that a decision, action, omission or recommendation to a ministry violates any of these principles, the Ombudsman can make formal recommendations aimed at correcting the unfairness.

To help us to apply these principles and to explain how we assess unfairness, we have developed tools such as the fairness triangle.

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The Fairness Triangle

At Ombudsman Saskatchewan, we use a tool we call the fairness triangle to explain and categorize the various fairness principles listed in *The Ombudsman Act, 2012*. The fairness triangle focuses on three basic facets of fairness:

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Substantive Fairness: What was decided? What were the substantive consequences?

Procedural Fairness: How it was decided? What processes were used to make the decision?

Relational Fairness: How were people treated during the decision-making process?

The fairness triangle has its roots in the idea that people affected by a decision have three interdependent needs that must be considered so the decision is reasonable and acceptable to the them. They need to believe that they have received a fair process (procedural), fair treatment (relational) and a fair outcome (substantive). Resolution is incomplete unless all three needs are satisfied.

Let's explore each side of the fairness triangle in more detail.

Substantive: What was decided?

Substantive fairness is about the practical or material outcome of a decision. This means we look at the consequences of the decision, action or omission that was made or taken has on the complainant. Most complainants start off by raising an issue of substantive fairness with us, for example: their benefits were denied, they lost an appeal, they were not given a licence, etc. When we discuss the issues more with complainants, however, we often learn that procedural or relational issues strongly affected their dissatisfaction. This is important for us because if we only focus on the substantive issue and do not uncover and address the related procedural or relational issues, complainants often continue to be dissatisfied even though we resolved their substantive concern.

Also, we seldom recommend that a public sector institution implement what we think the substantive decision or action should be – essentially replacing the institution's assessment with our own. Instead, when we think a decision was substantively unfair, we more often recommend that the institution revisit its decision using a fair process.

A substantively fair decision must meet certain standards:

- **Legal Authority:** The decision cannot require anyone to do something that is illegal or not authorized by law. The person making the decision must have the legal authority to make the decision.

- **Understandable and Reasonable:** The decision must be reasonable and the reasoning behind it must be understandable to

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the person affected. This is another way of saying that the decision must be both fair and seen to be fair.

- **Not Discriminatory:** The decision cannot improperly discriminate against the person affected on any of the prohibited grounds listed in *The Saskatchewan Human Rights Code* or in violation of the *Canadian Charter of Rights and Freedoms*, including marital status, race, religion, sexual orientation, and disability.

- **Not Oppressive:** The decision cannot be oppressive, meaning it should avoid creating unnecessary hardship for the person affected. For example, it would be oppressive to require someone to apply in person for benefits regardless of distances or other hardships, when there is no good reason the application could not be taken by telephone, fax or mail.

Relational: How was I treated?

Another aspect of fairness is relational fairness. Many people who contact us feel they have been treated badly or rudely. These feelings cannot always be measured against any legal or other objective standard. Nevertheless, they may be at the core of a complaint. In many cases, this type of complaint is rooted in a breakdown or lack of communication between the person making the decision and the person affected.

Relational fairness is about being courteous, timely, clear and direct in communication. Decision-makers need to:

- **Listen:** This may mean taking time to fully hear people out. For decision-makers, it may also mean being willing to include additional information in a decision to show that people were listened to and to explain what was done with the information they provided.

- **Be Approachable:** Show appropriate courtesy and friendliness to people accessing services.

- **Maintain Confidentiality:** Confidentiality is often a legal requirement, but it is also a way to demonstrate respectfulness.

- **Be Honest and Forthright:** Be honest and forthright throughout the process. Do not mislead people about what the decision-maker can and cannot do.

- **Be Willing to Apologize:** Decision-makers need to apologize if they make a mistake. A well-timed apology from the right person can quickly diminish a conflict.

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Procedural: How was it decided?

The procedural side of the triangle is about the steps a decision-maker takes before, during and after making a decision. The following is a list of the minimal procedural fairness requirements required whenever an administrative decision will affect individual rights, privileges or interests. As you read through the list, think about the purpose each serves and what would happen if it were not followed.

- **Reasonable Notice:** The person affected by a decision needs to be notified that the decision is going to be made and told what information it will be based on. Whether a notice is reasonable depends on the circumstances. How seriously will it affect the person? The more serious the consequences of the decision and the more complicated it is, the more notice is needed for it to be reasonable.

- **The Ability to Respond:** Once the person has been given notice, he or she needs to be given an opportunity to review the information being considered and to give the decision-maker alternative or contrary information.

- **Free From Bias:** The decision-maker needs to be impartial, free from bias and reasonably seen to be free from bias. Decision-makers cannot have any real or apparent interest in the outcome of the decision. For example, a person who made an initial decision, cannot participate as a decision-maker in an appeal of that decision.

- **Relevant Information:** The decision-maker should consider all relevant information and should not consider any irrelevant information.

- **Adequate Reasons:** The person affected by a decision should be given adequate reasons for the decision, including, at a minimum, a statement of the decision, a summary of the information the decision-maker used to make the decision, and an explanation of how the decision-maker reconciled any contradictions in the information.

- **Reviewable and Correctible:** All decisions should be correctible and open to review.

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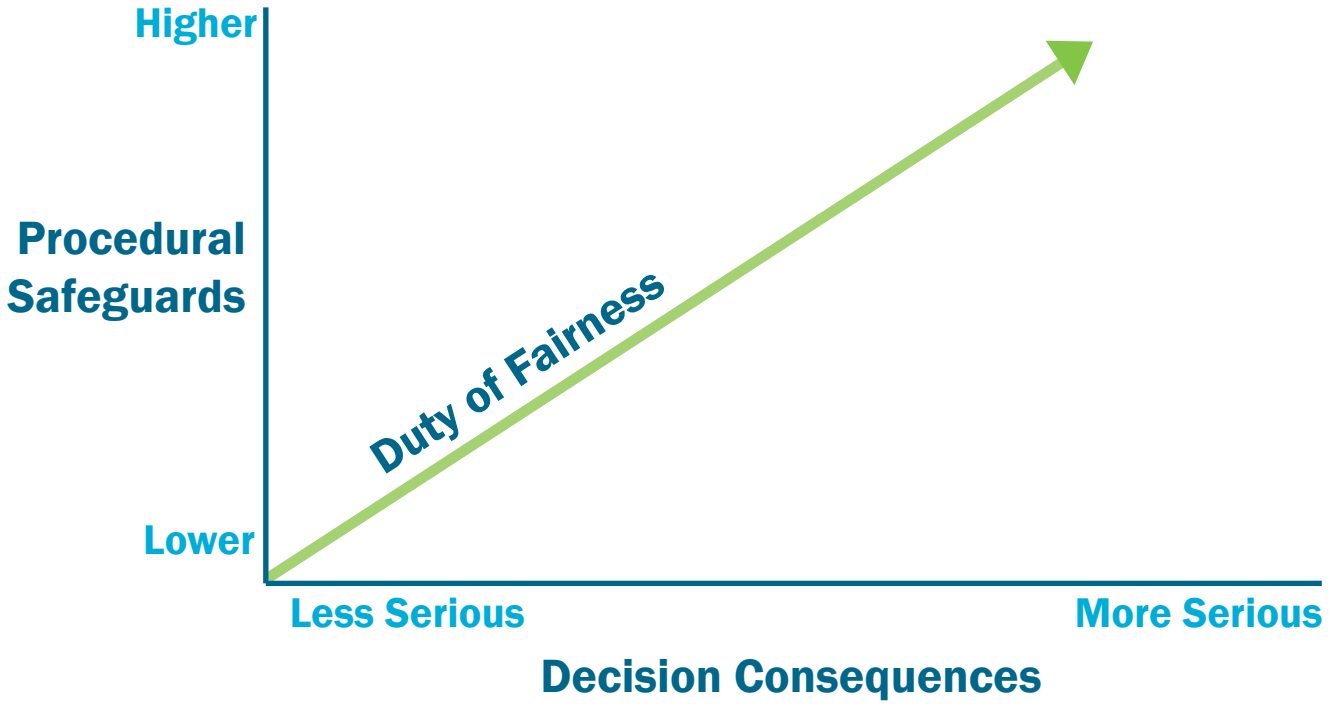
How Fair Is Fair?



Exactly what is necessary to meet the minimum procedural fairness requirements in each specific case depends on the circumstances. Sometimes more procedural protections are required. Other times, the minimal protections will look different. For example, in some situations, a face-to-face hearing is needed. At other times, the people involved need to be allowed to have an advocate to help them. Here are some of the factors to consider when deciding what needs to be done to fulfill the duty of fairness in specific situations:

- **The Nature of the Decision**: Administrative decisions affecting an individual's personal rights or interests usually require more procedural protections than decisions that apply generally to a large number of people. For example:
  - **Benefits Being Cut Off:** Someone who has been receiving social assistance who is no longer eligible and so their benefits will be suspended is affected personally and consequently has been given the right to an appeal before a hearing board and to have an advocate present to help with the appeal.

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- **Drinking Age Going Up:** An 18-year-old who disagrees with the government's decision to raise the legal drinking age might not have the right to be heard by a special appeal panel, because, while the decision may affect him or her personally, it affects all people his age generally in the same way and does not affect their personal rights.

In the first example, the person being cut off social assistance benefits needs personal notice (in person, in writing or over the telephone) that the decision is being considered, the information being considered, and an opportunity to submit relevant alternative information. In the second example, the government would not have to give personal notice to every 18-year-old that the legal drinking age is going up. Instead, a press release might be the appropriate way to notify those affected by the decision.

- **The Impact on the Person:** The more seriously the decision will affect an individual or group, the greater the procedural protections that are required. For example:

  - **Being Sent to Jail:** Someone who might be put in jail has the right to a full court hearing with a lawyer and the ability to cross examine witnesses.

  - **Being Put on a Housing Wait List:** Someone who applies for housing and is put on a wait list has a right to know the reasons for the wait but no right to have a hearing.

- **Rights Created by Law:** Legislation or regulations may dictate how a decision will be made and what process will be followed if there is a disagreement. For example:

  - **Processes under *The Residential Tenancies Act, 2006:*** This act governs how disputes between landlords and tenants are to be handled and sets out a hearing process. It also gives landlords and tenants the right to appeal to the court if they think a hearing officer's decision was unlawful.

  - **The Employment Supplement Regulations:** These regulations create Social Service's Employment Supplement Program. They allow applicants to appeal, among other things, assessments of eligibility (ineligibility) – first to a program manager and then to an adjudicator. In both cases, the regulations explain that the appeals are to be made via written submissions and explain how people can provide their relevant information to the decision-maker.

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- **Legitimate Expectations:** Legitimate expectations are about past practices and customs. People should be able to rely on an agency's promises or past practices to predict how they will be treated. Again, it is important to remember this is about processes not substantive outcomes. For example:

  - **Late Rent:** If the housing authority you rent from always lets you pay your rent three weeks late, you would have a legitimate expectation that next month you would be allowed to pay your rent three weeks late. It would be unfair for the housing authority to use *The Residential Tenancies Act, 2006* rules to evict you because you were more than 15 days late in paying your rent without giving you any warning. It might be fair for the housing authority to give you three months' notice that if you do not start paying your rent on time, it will evict you under The *Residential Tenancies Act, 2006*.

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More on the Fairness Triangle

The Fairness Triangle is a good tool for getting us to think about how different decision-making processes and styles of interaction will affect how fairly people feel they have been treated. However, it is important to recognize that the substantive, procedural and relational sides of the triangle are not as neatly delineated as the triangle suggests. There is considerable overlap. For example:

- **Providing good reasons for a decision:** Not giving reasons for a decision causes procedural problems. For example, without a reason, an appeal body might not be able to determine whether the decision was arbitrary. It likely also means that the substantive decision is in question, as the rationale for the decision is suspect. The person affected is more likely to feel that they have been treated badly because they do not understand why they weren't successful.

- **Timeliness:** If a process takes unreasonably long, the participants will not likely feel that they have been treated respectfully. They might also question whether the decision maker considered all the relevant information. In turn, this raises questions about whether the substantive decision is correct.

Equality and Equal Treatment

Few people would disagree that equality and equal treatment are good things. But consider this:

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Equal treatment does not necessarily mean equality.

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An important landmark human rights case illustrates this concept. In 1980, Michael Huck wanted to go to a movie playing at the Coronet Theatre in Regina. Michael had a disability requiring him to use a motorized wheelchair to get around. When buying his ticket, he was asked if he would be transferring to a regular seat, which he said he couldn't do. He was told he had to park in front of the front row directly in front of the screen. After buying his ticket, he asked about a special viewing area to accommodate his wheelchair, but there was none. Instead of parking in front where staff told him to, he parked in the aisle, where he could see the movie properly. Theatre management told him that he could not park in the aisle because of fire regulations. Michael took his case the Saskatchewan Court of Appeal and won. The case is important because it talked about two very important fairness concepts:

- **Intent:** The theatre said it should not be found to have discriminated against Michael because it did not intend to discriminate or offend. The court said that it is not discriminatory intent that matters but the discriminatory result that does. The resulting discrimination, however unintended, still needs to be corrected.

- **Equality of Opportunity:** The court pointed out that identical treatment does not necessarily result in equal opportunity. In Michael's case, the theatre offered everyone the identical opportunity to sit in a seat and watch a movie. But he could not take advantage of this opportunity because he was wheelchair bound. Having him move into a regular seat was not reasonable, because, among other things, he felt dependent and vulnerable without his wheelchair and moving him was hazardous. And making him sit out in front was not reasonable, because it meant he could not sit with his friends and could not see the movie as well. The court decided that the owner of the theatre had to make it wheelchair accessible -- now the standard for not only theatres, but all places customarily made available to the public.

This is just one example of where a person's differences meant that treating them the same as everyone else did not result in them being treated equally or fairly. It highlights the importance of thinking about how to accommodate people's differences to ensure we treat them equally – to ensure they have equal opportunities. For public sector institutions, this might mean giving an applicant a different way to communicate with you if they have a disability affecting speech, or if they speak a different language. Or it might mean adjusting an application process for someone who is illiterate and cannot fill out the usual required forms.

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Personal Fairness Checklist

This checklist includes some aspects of fairness for you to consider when providing services on behalf of your organization.

Communication

- ❑ Are there options available for communicating with people with disabilities or people who might have trouble understanding?
- ❑ Is information given both in writing and verbally, and in a way that people are able to understand?
- ❑ Have you tried to give difficult decisions in person?
- ❑ Do you explain the reasons for your decision?
- ❑ Do you refer people to advocacy agencies?
- ❑ Do you ensure they know about any deadlines, rights of review, or available appeals?
- ❑ Do you ensure people know your supervisor's name and that they can go to your supervisor if they are not satisfied with your decisions or actions?
- ❑ Do you treat people with courtesy and respect?
- ❑ Do you try to eliminate or reduce power imbalances between you and whomever you are working with? For example, do you sit with them in a way that might make them feel you are working together?
- ❑ Do you try to problem solve with whomever you are working with? Do you ask for their ideas or alternatives to address their situation?
- ❑ If you make a mistake, do you promptly apologize?
- ❑ Do the people you work with have a way to leave you a message?
- ❑ How soon do you return messages from them? Do the people you work with know when they can expect you to call them back?
- ❑ Do the people you work with know with whom they can speak to if you are not available?
- ❑ Has your plan for extended absences been explained to your clients?
- ❑ Do you maintain privacy? Are your files moved off the desk during a meeting?
- ❑ Do you keep information private and ensure that when you are on the phone, others cannot overhear confidential information?

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Decisions

- ❑ Do you know the legislation, regulation and policy rules that support your decision?
- ❑ Do you explain the legal and policy rules to the person affected by your decision? Or do you just say "because it's policy?"
- ❑ Have you taken all relevant information into consideration? Have you heard their story?
- ❑ Have decisions been made in a timely manner?
- ❑ Do you let people know when they can expect a decision?
- ❑ Do you make sure you are available to answer questions after delivering a decision that will have a large impact on a person?
- ❑ Have you considered and used discretion when it is appropriate?
- ❑ When you deal with an unpleasant person, do you make sure ensure your decision is based on the law and policy regardless of person's behaviour?
- ❑ Do you outline in clear language how you expect people to deal with you and when they are rude or threatening? Do you explain what the consequences will be?

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Institution Fairness Checklist

This checklist outlines aspects of fairness that your public sector institution might want to consider to ensure it provides fair service.

Communications

- ❑ Are there interpreters available?
- ❑ Is there information available to the public? And is it understandable, accurate and complete?
- ❑ Are all the agency's programs and benefits fully explained during initial contact?
- ❑ If forms are provided, are they in plain language? Is the reason for the forms provided?
- ❑ Do people receive all the information they need? Are they given copies of signed forms or statements they have given?
- ❑ Are deadlines for applications or programs provided and widely published?
- ❑ Are staff fully aware of the mandate of the program and able to provide services in accordance with good administrative practices?
- ❑ If mistakes occur, are they addressed in a timely and respectful manner?

Environment

- ❑ Are telephones and voice mail answered promptly?
- ❑ Are meeting rooms, washrooms and other locations accessible?
- ❑ Are individuals' rights to privacy respected?

Decisions

- ❑ Is adequate notice provided to those who will be affected by a decision?
- ❑ Do policies ensure people's substantive, procedural, and relational needs are addressed?
- ❑ Are people affected by a decision given a chance to submit information for the decision maker to consider and to otherwise participate in the decision-making process?
- ❑ Are decisions made within a reasonable time?
- ❑ Are meaningful reasons given for decisions?
- ❑ Are the decision-makers impartial?
- ❑ Are the people affected aware how the final decision will be made?

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Appeal and Complaint Handling Processes

- ❑ If people have a right to appeal, are they told about it?
- ❑ Is information made available about advocacy groups that may be able to assist with appeals?
- ❑ Are procedures for filing a complaint fully explained? What about the procedures for appealing?
- ❑ Is the public generally informed about appeal or complaint procedures?

Continuous Review and Improvement

- ❑ What procedures are in place to address repeat problems?
- ❑ Are affected people or groups invited to participate in planning for program changes and initiatives in a meaningful way?
- ❑ Are there methods in place to collect information on the outcome of appeals or complaints that can be used to plan, review, and improve programs?
- ❑ Is statistical information that is collected used only for the purposes necessary and are there methods in place to protect the public's privacy rights?

Key Thoughts

Fairness is complex. As we conclude this section, here are some key thoughts to remember:

- Our definition of fairness comes from *The Ombudsman Act, 2012*.
- Our fairness tool is the Fairness Triangle, which is shorthand for the substantive, procedural and relational standards that have to be met when making decisions or taking actions that affect another's rights or interests.
- Fair decisions are made after allowing those affected by the decisions a full opportunity to provide their information to the decision-maker.
- A fair decision is reached by an impartial decision-maker who is free of bias and seen to be free of bias.
- Fair administrative decisions are not arbitrary or made on irrelevant considerations.

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Power, Rights and Interests

What happens when you are engaged in a conflict with someone? What are the best and most effective ways to deal with conflict?

Conflict can be viewed in terms of **power, rights and interests:**

- as a **power** struggle
- as an assertion of **rights**
- as an opportunity to explore and satisfy each party's **interests**

Depending on how we view conflict and the people we are in conflict with, we can approach the situation in dramatically different ways. By first understanding the power, rights and interests involved, we can discover creative and transformative solutions that might not otherwise be apparent.

Consider how power, rights and interests play out in your role as a public sector decision-maker.

There are "three major ways of resolving disputes: to reconcile the disputants' underlying interests, to determine who is right, and to determine who has more power."

- William Ury,
Jeanne M. Brett
and Stephen B. Goldberg
Getting Disputes Resolved: Designing Systems to Cut the Costs of Confict

Power

What happens when people try to use power to influence others? They use resources they think they have available to them which others involved in the situation do not have or do not have as much of. They access these resources to advance their goals and to stop the other person from meeting their goals. Ultimately, "In human affairs, when we think of power, we think of the ability to have our own way with others."

Power is often at the root of conflict. When the interests, values or needs of one person are at odds with those of another person, conflict arises. Power dynamics come into play. When relying on power to influence the decision-making process, people will use or threaten to use several types or sources of power to get their way.

"...when we think of power, we think of the ability to have our own way with others."

- Douglas E. Noll
Peacemaking: Practicing at the Intersection of Law and Human Conflict

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“Sources of Power” Scenario

1. Consider the scenario described. What are the types or sources of power revealed in the story?

2. What are some other sources of power that are used in similar situations?

Power in your Role as an Employee of a Public Sector Institution

How we perceive our own power and how others perceive our power can dramatically affect our relationships. In a conflict, each person approaches the situation with an idea of the degree of power that each person has. These perceptions may differ and the actual power relationship may play out differently than expected. People can overestimate or underestimate their own and the other person’s sources of power. It can be a self-fulfilling prophecy. By believing the other side has power, you behave as if they do. You give them the power you imagine them to have.

1. As an employee in your public sector institution, what sources of power do you have?

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2. What sources of power do the people you deal with have?

Remember that citizens often see you as more powerful than you see yourself. Given your decision-making authority, you have power, which can be used constructively or destructively. Constructive uses of power can de-escalate conflict while destructive uses will escalate conflict.

Positive Options for Employees of Public Sector Institutions

1. What are the things that you can do as an employee in your public sector institution to use your power cooperatively?

Workplace Scenario: Part 1 – The Power Play

Often when we try to use power to influence someone else, they respond by using power of their own. They may call their friends for help or hire a lawyer. Sometimes, using power is successful. You get your way. The other person is afraid, accepts the threat, and is coerced into going along with you. These victories are usually temporary. No one likes to be coerced.

The following scenario between a supervisor and an employee focuses on using power:

Setting: *The office closes at 4:30. It is now 4:25. A supervisor and an employee are having a dispute over whether the employee should stay late to finish a project the supervisor needs done for the next day.*

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Supervisor: This report needs to be completed by tomorrow. I need you to stay late and finish it.

Employee: I can't stay late. I have a family function to attend at 5:30.

Supervisor: But this report is due tomorrow!

Employee: I promised my family that I would attend this event with them, and I can't let them down.

Supervisor: Look, my request is more important than any "family function" and you'll stay and work late because I'm your supervisor and I told you to.

Employee: I guess I have no choice then! I guess I'm staying late and missing my family event.

2. What might be the longer-term outcome of this exchange?

The employee might succumb to this abuse of power, but the seeds of conflict have been planted. She might fulfill the demand, but this conflict is not over and will most likely manifest itself in other ways in the days and weeks to come.

People – both citizens and employees of public sector institutions - who feel they have been forced to do something against their will because someone else has used power against them are rarely satisfied with the solution. They may go along with it for a while, but they will resent it and resist. They may complain. They may come back with another problem. They may even try to sabotage the solution. Or they may respond to power with the second of the three approaches and rely on their rights.

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Rights

When one person exerts power to impose their solution to a conflict, the other person often exerts their rights. The aggrieved person responds to power by calling upon his or her rights as protection against an abuse of the other person's power. Rights are constitutional, legislative, and contractual protections intended to provide an advantage to someone. A few examples of rights include:

- Human rights as protected within the *Canadian Charter of Rights and Freedoms* or *The Saskatchewan Human Rights Code*
- *Consumer* rights in *The Consumer Protection and Business Practices Act*
- Labour rights in *The Saskatchewan Employment Act*, collective bargaining agreements or employment contracts

Rights can protect us from abuses of power. But we need to ask ourselves: Why do we have rights? Why do we create these protections by writing them down into charters, legislation and contracts?

Rights are intended to protect our personal interests or broader social interests. For example, I have an interest in being paid money from a person to whom I sell my car, so I make a written contract. We all have an interest in our highways being safe, so we create laws to govern road safety.

Workplace Scenario: Part 2 – Playing the Rights Card

Let's look at that same workplace scenario, but in this instance, the employee brings in rights.

Employee: I can't stay late. I have a family function to attend at 5:30. I promised my family that I would attend this event with them, and I can't let them down.

Supervisor: Look, my request is more important than any "family function" and you'll stay and work late because I'm your supervisor and I told you to.

Employee: You may be my boss but I have rights. Subsection 2-12(1) of *The Saskatchewan Employment Act* says you can't force me to work overtime - so I'm leaving!

Rights are entitlements or advantages conferred or protected by law which imply a corresponding duty upon others to honour them.

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1. What might be the longer-term outcome of this exchange?

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Again, the seeds of conflict have been planted. The employee asserted legal rights to protect against an abuse of power. The threat of rights can be similar to using power. As with the power play, this conflict is not over and will most likely manifest itself in other ways in the days and weeks to come.

Although rights can protect against abuses of power, they are still not the best way to resolve a conflict. It is often better to look at ways to meet underlying needs or interests. This is why we suggest approaching conflict using an interest-based approach.

Interests

Interests are what people are striving to promote, satisfy or protect when they leverage their power or rely on their rights. They are the underlying motivations – fears, hopes, concerns, expectations and needs – that drive us. They are what are most important to uncover and understand when dealing with a conflict. Interests are not what people want, but why they want it. However, in the middle of a conflict, people often don't express or even know their underlying interests. It can, therefore, be challenging to first look at how to meet people's interests. Getting to the interests and understanding them takes some patience and skill.

Interests are the underlying motivations (fears, hopes, concerns, expectations and needs) that drive us; they are not <u>what</u> people want, but <u>why</u> they want it.

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Interest-Based Conflict Resolution

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Interest-based conflict resolution focuses on identifying and exploring the parties' interests. Understanding our needs and interests helps us understand others' needs, and the motivation behind the positions each party takes during a conflict. By taking the time to fully explore interests, we are in a better position to find a solution that advances both parties' interests, instead of just responding to their stated positions of power or reliance on rights.

Why should we care about the other person's interests?

In conflict situations, people usually present their issues by putting forward a position or an outcome they hope to reach. Positions are what people say they want, their terms and conditions, or what they will or will not do. People stick to their positions because they believe this will meet their needs or wants. In reality though, positions don't always meet all of a person's interests. Moreover, there are often solutions other than the position that will meet the person's interests. Sticking to a position is often not even an advantage to the person promoting it.

Agreements based on positions tend to be short-lived because they are more likely to address only surface issues, not underlying needs or interests. When underlying needs are not addressed, they will continue to resurface until they are satisfied. This is not to say that everyone should always get what they want, but everyone needs to know that their needs and wants were considered. We have all dealt with someone who keeps coming back with the same issue repeatedly. It is likely that their interests have not been addressed adequately.

By uncovering interests, we are usually able to discover more options for resolution than if we base the options on positions only. Options that address interests tend to be more satisfying and yield a greater commitment than options based on positions only.

How do we uncover interests?

The best way to uncover interests is to ask questions and listen – really listen – to what the other person is saying. By asking lots of questions you have a better chance of understanding the issues. Try to put yourself in their shoes. Try to figure out why this is important to them.

When we probe for information, we may actually help the person understand his or her own interests – an AHA moment. When asking questions, listen for responses that indicate an emotional connection with the issue. You might ask, "What's important to you about this?" to get an understanding of underlying motivations.

Patience and curiosity are key in probing for interests. To get a better understanding of a person's needs, concerns, and fears, ask good questions and listen to understand.

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Practical Tips for Good Listening

- **Put the person at ease**
  - Be friendly, welcoming
  - Have a safe, confidential, comfortable place to meet
- **Remove distractions**
  - Find a quiet place
  - Avoid keyboarding, taking phone calls
- **Pay attention to body language and non-verbal cues**
  - Facial expressions
  - Eye contact
  - Tone of voice
  - Breathing
  - Body/muscle tension and movement
- **Avoid judgment – shift from judgment to curiosity**
- **Show interest in what is being said**
  - Ensure gestures and body language are open and inviting
  - Nod. Acknowledge what is said
  - Use comments like “yes”, or “uh huh” to encourage the conversation
- **Ask questions**
  - To collect information
  - To clarify understanding
  - Open questions are generally better than closed questions
- **Stop talking. You cannot listen effectively if you are talking.**
- **Give the person time to tell their story.**
- **Avoid interrupting; wait to respond.**
- **Concentrate on what the person is saying, not on formulating the next questions.**
- **Listen to:**
  - Get information
  - Discern needs, wants, underlying interests, positions
  - Understand...and remember that understanding is not agreement

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- **Some benefits of effective listening include:**
  - Helps build stronger, deeper connections
  - Clarifies information
  - Saves time
  - Avoids conflicts and misunderstandings
  - Facilitates creative problem-solving
  - Maintains a sense of integrity and respect among parties
  - Helps to deliver information or a decision that the person may not agree with

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Examples of Identifying Interests

Hours of Work Conversation

In this exchange, note how the questioner gets to the underlying interests.

Employee: "I don't want my hours of work to change."

Supervisor: "Why not?"

Employee: "I like my schedule the way it is"

Supervisor: "What is it about your current schedule that works so well for you?"

Employee: "I avoid the worst of the rush hour in both directions."

Supervisor: "What else do you like about your schedule?"

Employee: "Well, I like being here in the morning before switchboard opens, because I get a lot of work done and I don't get interrupted."

This example demonstrates how asking questions and listening can help you draw out interests, even when the person you are questioning may not be focused on their interests.

Workplace Scenario: Part 3: Let Me Understand Your Interests

Let's look at our workplace scenario one last time. In this case, both people are focusing on interests. Note the difference.

Supervisor: This report needs to be completed by tomorrow. Are you able to stay late and finish it?

Employee: I can't stay late. I have a family function to attend at 5:30. Will it work for you if I finish it tomorrow by noon?

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Supervisor: Oh, that puts me in a real bind because I can't complete my presentation for 9:00 tomorrow without your report.

Employee: I promised my family that I would attend this event with them, and I can't let them down. But I could work on the report after the family function is over. It should be done around 8:30. Or I could come in early tomorrow morning and work on it.

Supervisor: How about I do some work on the report right now before I go home. I could email it to you to complete after your family function. I'd like it back to me by 7:30 tomorrow morning so that I can get ready for my presentation at 9:00.

Employee: This is workable for me. It will help me meet the deadline if you can get some of the work done. And I'll make sure you have it in your email by 7:30 tomorrow.

1. What might be the longer-term outcome of this exchange?

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Applying the Fairness Triangle to Interests

At Ombudsman Saskatchewan, we look for interests on all three sides of the Fairness Triangle:

Substantive

- What we decide; our concrete interests
- Example: "I need some form of down payment if you want me to hold the car for you," or "I'm concerned about possible negative impacts the development will have on our neighborhood."

Procedural

- How we decide; how or when a decision is made or carried out
- Example: "It's important to me that we tell the children about this together," or "I need to sleep on it before I make a decision."

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Relational

- How we feel about what we decide; our interpersonal needs
  - Example: fear of rejection, or maintaining cordial relations with the other person

Examples

1. What type of interests are raised in the following examples?

   "Whatever is decided, the decision needs to be made following our Division's ethical guidelines."

   _____

   _____

   "I should have been consulted!"

   _____

   _____

   "I was supposed to be reimbursed $100, but only received $75."

   _____

   _____

Identifying interests changes how we approach a problem or a conflict. Instead of jumping from the problem to the solution as we often do, we should take a bit of time to identify the interests at stake. The advantage of this approach is that more options to resolve the matter may be revealed.

In summary, in an interest-based approach our first goal is to understand both our own and the other party's interests. We clarify and then focus on these interests, looking for solutions to meet them to the greatest extent possible. In using this approach, it is more likely that we can find a mutually agreeable solution and in a more cooperative atmosphere.

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Key Thoughts

We can approach conflict from the different perspectives of power, rights and interests. For the most effective problem solving, it is best to focus on interests. Interests:

- get to the heart of issue
- move people beyond polarized positions
- set the stage for mutual understanding
- allow more creative options to be generated

For people to resolve conflict effectively, they must understand each other's motivations, interests and needs. Effective problem solving examines interests first, rights second, and uses power only as a last resort.

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Decision-Making and Decision-Writing

Decisions and Fairness Challenges in My Work

1. What are some of the decisions you make in your job?

2. What are the fairness challenges you experience

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How to Make Good Decisions

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While we all make many decisions every day, most of us do not put a lot of thought into why we are making decisions in the way we do. When working for a public sector institution and making decisions that affect people, it is important for you to consider your decision-making process. Good administrative decisions are made using fair processes with appropriate consideration for how they will affect people's rights and interests.

Four Steps to Making Good Administrative Decisions

There are four basic steps to making good administrative decisions:

1. Clarifying the issues or questions.
2. Fact finding - based on the information provided or available to you.
3. Determining the relevant policy and law.
4. Applying the relevant policy and law to the facts to reach your conclusion.

These steps are not always done in order. As decision makers, you will frequently begin by looking at the facts and considering relevant policy and law right from the start. This will sometimes help you to clarify the issues. Other times, you will finish collecting evidence and determining the facts before you are done clarifying the issues.

Step 1: Clarifying the Issues

Ask yourself: What do I have to decide? It is useful to clarify the issues before collecting and reviewing information. If you are not clear about the issues you are facing, you might not gather all the relevant information or you might waste time gathering irrelevant information. If you get the questions wrong, the answers will be wrong.

Clarifying the issues also helps the people affected by your decision, especially if they do not understand the issues or are focused on irrelevant matters. If you are clear about the issues, you can help them focus their efforts on providing you with relevant information and submissions.

Often, clarifying the issues is easy because they are obvious: Does the applicant meet the eligibility criteria? Has the person paid the prescribed fee? Other times, clarifying the issues is very complex, especially if those involved have widely differing views of them. Also, if

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the facts are murky, more issues may crop up well into the process as new facts come to light. It is important to make the effort to clarify the issues at the beginning of the process to avoid wasting time later.

As we know, procedural fairness requires giving the parties an opportunity to speak to the issues and to provide their relevant information. If new issues arise after you have given them this opportunity, you might need to re-interview them to give them a chance to speak to the new issue. If your decision-making process involves holding in-person hearings, you might need to reconvene the hearing to ensure that you have heard from the parties on all the relevant issues.

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Step 2: Fact Finding

Getting the facts right is an important step in the decision-making process. If your findings of fact are wrong or irrelevant, your decision is very likely to be wrong or irrelevant.

Fact-finding is the discovery and verification of information related to an issue or situation.

Fact-finding is difficult, especially when there is a conflict. Fact-finding means focusing on and trying to decide what happened in the past. There are two reasons this is difficult: 1) disagreements about the facts often lead to more conflict, and 2) It often means relying on people's memories, which are not always reliable.

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When people are in conflict, looking back to the events in the past when the conflict arose usually further entrenches people and causes the conflict to escalate. Generally speaking, we try to de-escalate conflict, to move people away from the conflict and toward resolution. We try to focus on what everyone can do in the present and in the future to avoid the conflict happening again, not on reliving or rehashing the past. However, in a decision-making process that requires you to decide what happened in the past, it is necessary to engage in fact-finding, even if it escalates the conflict. It is a crucial part of the process and a bit of a "necessary evil."

Having to rely on human memory also makes fact finding complicated. Consider this: Shortly after experiencing an event, people can generally recall 75-80% of the detail of the event. But 24 hours after the event, 80% of that 75- 80% recall is lost. Thus, by the time a hearing takes place, people have lost a lot of information.

Also, each person remembers things differently. Just because two people are giving you very different versions of the same events does not mean that either of them is lying. Sometimes, it just means they are remembering the situation differently. They may have seen and taken in very different information about the same situation. It may be because their values, perceptions and personal experience have coloured their memories. Or it might just be because as they have brought the story to mind several times, they have changed some details in their minds by telling it. All of this means that relying on memories to find facts

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about past events can be difficult and has the potential to create new conflict.

Making "findings of fact" is shorthand for the entire process of gathering information, deciding what is relevant and then analyzing the relevant information to decide the facts and events upon which your decision will be based. It is about assessing evidence to decide what is true and relevant. Fact finding is straightforward if the issues are simple, everyone agrees on the facts, and there are no inconsistencies to resolve. Equally, if the issues are complicated or there is disagreement over the facts, the fact-finding process will be more complicated. Regardless of how difficult the fact-finding process might be, making findings of fact is an essential component of decision-making.

Here are some of the key steps in the fact-finding process:

1. **Gathering evidence:** information provided by people in interviews or hearings, documents (emails, letters, notes, photographs, videos, etc.) and, sometimes, physical evidence.

2. **Identifying the evidence that is relevant to the issues:** Is the evidence logically connected to an issue? Does it help to prove or disprove the issue? Information is relevant if it directly relates to the decision you are making. This is why determining the issues first is important, because you have to know what the issues are if you are to decide whether information is relevant to them.

3. **Resolving conflicts or inconsistencies in the evidence:** Decide what evidence you are going to accept and why: Is the evidence trustworthy and reliable? If it is, why? If not, why not? For information to be reliable it needs to stand up to scrutiny. Reliable information will also often come from credible sources. Part of dealing with conflicting or inconsistent evidence includes deciding how much weight to give certain evidence and why. Reliable evidence should be given more weight. For example, if several people give the same information, that information is usually entitled to more weight unless there is a reason to think they are working together. If several people have credibility issues, then giving more weight to the information of one credible individual might be the best decision. The important thing is to recognize that you are preferring or giving more weight to certain information, so you have to have good reason for doing so.

As a general rule, start with determining the facts that everyone agrees on. Then deal with any facts that are directly linked to the facts that everyone agrees on. Finally, deal with contentious issues like contradictory facts, assessing credibility and assigning weight to evidence.

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ASSESSING CREDIBILITY

It can be challenging to make findings of fact when there are conflicting versions of events. If a person is credible, they are trustworthy and believable. When we say someone is not credible, we are often saying that we think they are lying – that they are telling us things that they know are untrue. But assessing credibility is more than just deciding if someone is lying. Even if a person is trustworthy, even if we are sure they are not trying to be deceptive, differences in perspective or focus and the ability to remember, among many other factors, can affect credibility.

Things to Consider

Two key things to consider when you are assessing credibility are:

- **Internal Consistency:** Are there any gaps or inconsistencies in a person's evidence? If so, do they relate to the issues? Are there a lot of them? Can they be explained?
- **External Consistency:** Does the person's evidence fit with other evidence, like documents or other witnesses' stories? If it doesn't fit, is there a good explanation? Are the differences related to important or trivial details?

Here are some more factors to think about when assessing credibility:

- **Opportunities to Know:** Was the person directly involved in the event? Could he or she personally see or hear the event? Was he or she focused on the event or distracted? Or is he or she relaying events told to him or her by someone else?
- **Powers of Observation and Recall:** Does the person remember the event well? Have a good memory? Did the person make notes shortly after the event? Is the person observant? Was the event so memorable someone would likely remember it? Is the person remembering the event on his or her own? Or based on others' suggestions?
- **Interest in the Decision:** Does the person or a closely connected person (spouse, child, close friend, business partner) have a financial or other interest in your decision?
- **Degree of Detail:** Is the detail offered by the person appropriate? Can the person provide background details about the event that tend to show he or she is recollecting and not fabricating? Each person's ability to remember details varies widely and fades over time.
- **Probability:** Does the person's information make sense? Does it seem unreasonable or exaggerated? Is the person's version of events possible in the circumstances? Are there signs that the information may have been fabricated? For example, is the person using words that do not match his or her normal way of speaking?

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Things Not to Consider

We recommend that you do not rely on the following matters when assessing credibility:

- **Demeanor:** Be cautious about relying on a person's demeanor (body language, tone of voice, choice of words, physical appearance) to assess credibility. Demeanor varies widely from person to person based on things like social status and cultural background. People may seem evasive when they are just nervous. Good actors may look like they are telling the truth when they are not. Most people cannot properly assess someone's truthfulness by observing their demeanor.

- **Social Standing or Occupation:** How credible a person's information is has little to do with their social standing or occupation and more to do with things like their opportunities for knowledge and their interest in the outcome of the decision. Value judgments about who a person is are usually not objective and can lead to unfair decisions.

  For example, Russell Williams was a very successful high ranking member of the Canadian military. He commanded Canada's largest and busiest military airbase, CFB Trenton, and was generally regarded as a model military officer. In 2010, he was convicted of multiple counts of first degree murder, sexual assault, forcible confinement and breaking and entering.

  It is similarly a mistake to assume that your coworkers are always credible or that your clients are never credible.

- **Someone's tendency to lie:** It is natural to consider whether someone has lied to you in the past and rely on this to assess their credibility. Courts do this when assessing credibility. Even if they have lied to you before, they may be telling the truth this time (like the boy who cried wolf), so relying on this alone should be avoided.

ASSIGNING WEIGHT

When two contradictory pieces of information are both relevant and appear to be from generally credible sources, decision-makers still have to decide which information should given the most weight and why. Explaining why is crucial.

Sometimes you might prefer information because more than one person or document supports it. Sometimes one person's information is preferred over ten others because the person had much better opportunities to have the knowledge; for example, because he or she was at the scene of events and the others were further away or heard about the events secondhand.

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Here are a couple guidelines the courts use to weigh evidence:

- **Hearsay:** Hearsay is information given by a person who heard it from someone else who is not available to be questioned – "I heard him say..." – as proof that whatever the person was told actually happened. For example, if you ask a friend whether it was snowing in Saskatoon yesterday, and she says that her brother told her it was – your friend's story is hearsay to the extent you use it to prove it was snowing. In Canada, the courts historically presumed hearsay should not be relied on, and have held that if it is to be relied upon, it should not be given much weight because it is less reliable (that information could have been misunderstood, inaccurately remembered, or explained incorrectly) and cannot be tested by questioning the person who witnessed the event.

  However, some hearsay is now generally considered reliable: for example, certain types of regularly-kept business records. If the person who filled out tax returns is not available to testify about them, they are technically hearsay, but are often accepted as being a reliable assessment of person's income and tax status.

- **Circumstantial Evidence:** Circumstantial evidence is information that is used to infer something happened. For example, if you know it started snowing at 1:30 a.m. and stopped at 3:30 a.m. And the next morning you see your teenager's footprints in the snow leading up to your door, you can infer that he did not get home until after 1:30 a.m. If the footprints are perfectly clear and not covered with any new snowfall, you can infer that he did not get home until after 3:30 a.m. The footprints are circumstantial evidence of how late your teenager came home.

  Historically, the courts gave circumstantial evidence less weight than eyewitness testimony, because you have to infer that the evidence is at the scene because the person left it there. Other inferences can be made. For example, fingerprints on a knife used to stab someone could be on the knife because the person did the stabbing, or because the person used the knife to cut a steak. Today some circumstantial evidence, for example DNA evidence, is regarded as the most weighty evidence that we have, provided that it has been collected and stored properly.

  How much weight should you give information or evidence? It depends. This is an exercise in discretion. You can accept all, some or none of the information provided by a person. What is important is having a reasonable answer for why you did.

"STANDARD OF PROOF" AND "BURDEN OF PROOF"

Unless the act governing your decision-making process requires otherwise, you have to make findings of fact based on the "balance of probabilities." Ask yourself: Is the evidence more likely than not to be

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true? A fact is proven true on the balance of probabilities if the chance of the fact being true is more than 50%. This is the standard of proof.

The burden of proof is about who must meet the standard of proof. In court cases and in many cases before administrative tribunals or appeal bodies, one party must prove their case on the balance of probabilities. If they don't, they lose because they have not proven that their information is most likely correct. Sometimes, the act governing your decision-making process dictates who has the burden of proof. For example, subsection 6-62(5) of *The Saskatchewan Employment Act* states that when an employee alleges that they have been terminated or suspended without a good and sufficient reason, the burden of proof is on the employer to demonstrate that there was good and sufficient reason.

Step 3: Determining the Relevant Law and Policy

Before deciding an issue, you have to know the rules that are relevant to the issue. For administrative decisions, these rules are found in legislation, regulations and policies. Even though we list this as step three, this is often done before the fact-finding process, because knowing the rules up front helps clarify the issues and determine the facts.

- **Statutes and Regulations:** In many cases, the only relevant law you will need to consider is your act or regulations. Keep the following in mind:
  - What is the purpose of your act? What is it trying to accomplish? What goals is it trying to achieve? Provisions of an act should be interpreted with its overall purpose in mind.
  - The ordinary dictionary meanings of words in an act apply unless they are specifically defined in the act. Sometimes, rules in *The Interpretation Act, 1995* apply too.
  - If a rule is not clearly stated or is capable of more than one meaning, use the meaning that best fits with common sense and the purpose of the act.
  - If there are specific sections of your act or regulations that deal with the specific issue at hand, read those sections first. Then consider the broader purpose of the act or regulations or of the program and other surrounding sections.

  Generally, an administrative decision-making process should result in consistent decisions being made in similar circumstances. What guidelines can you use to help you to make consistent decisions in similar circumstances?

- **Common Law:** Sometimes, rules and principles set out in court cases are relevant to your decision. Cases that have similar facts and similar issues to your case are going to be more relevant. Decisions from higher courts are more important than lower courts.

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- **Previous Decisions:** Unless your act says otherwise, you are not required to follow your previous decisions or those made by your colleagues. But you should consider them. It is important for your decisions and your organization's decisions to be consistent over time. Knowing what your organization did in a past case can often help you to decide what you should do in a current case.

- **Policies:** Many public sector institutions have policies to help staff make consistent decisions. Some examples include the Saskatchewan Liquor and Gaming Agency's Special Occasion Permittee Policy Manual, the Saskatchewan Workers' Compensation Board Policy Manual, and the Ministry of Social Services' Children's Services Manual. As with legislation, it is important to consider the overall purpose of the program or policy when in figuring out how to apply policy rules to a certain situation.

  Policies are created to help meet the goals of a program. Following the policy is never the goal. There are always underlying goals or interests being served by a program. Just as individuals always have interests underlying their positions, programs are created to meet certain goals or interests which underlie policy rules and requirements.

  Sometimes following a policy requirement precisely the way it is written will not meet the program goals when applied to specific situations. This is because policies are usually drafted with typical or average situation in mind. In unusual or rare situations where applying the policy rules seems wrong or unfair, the proper use of discretion is the key to resolving the disconnect between the program goals and the policy guidelines. The best policies include processes and rules for dealing with unusual cases, including describing when using discretion should be considered and who within the organization is able to exercise it.

  As administrative decision-makers, you should not apply policy rules slavishly. If applying a policy rule will result in a decision that does not meet the intent of your act or is otherwise unreasonable, you need to use your own judgment (or raise the matter with your supervisor) to decide whether the rule should apply, be ignored or be modified in the specific case. Policy rules cannot be used to justify making unreasonable decisions.

- **Discretion:** Some public employees do not believe they have any discretion. Often they also do not want any discretion. Realistically, most administrative decision-makers have quite a bit of discretion. For example, there can be:
  - **Discretion Built Into a Policy:** Policies often have criteria that must be met, but do not delineate every possible way the criteria can be met. In these cases, it is in the discretion of the person whether the definition has been met. For example, in the Ministry of Social Services' policy for determining income

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assistance support, the guidelines for determining whether a person is living in a spousal relationship are discretionary. Decision-makers are told to ask questions about their living arrangements and accommodations. Not all the questions have to be answered in the affirmative. The decision-maker has discretion to decide, on the balance of probabilities, whether the person is living in a spousal relationship.

- **Discretion Throughout the Decision-making Process:** There is discretion in most of the elements of decision-making. Clarifying what the issues are involves discretion. Finding facts involves using discretion to decide what is relevant, what is credible, and what weight should be given to evidence. There is also some discretion involved in applying the acts, regulations, policy and procedures to the facts of the case.
- **Discretion to Deviate from Policy:** In cases where following a policy rule will result in a decision that does not meet the program goals, you might need to use discretion to not apply the policy rule or to modify it to suit the specific case – to do something outside of the policy rules that will meet the program goals. If, you do not have any personal discretion in your position to deviate from a specific policy rule, when you find yourself in a situation where you think following the rule will not meet the goals of the program, raise your concerns with a superior. Unless your act or regulations specifically prohibits the exercise of discretion or specifically requires a certain result, someone in your organization will have the discretion to consider the situation and make a choice about how to best meet the program's goals in light of or despite the policy rules.

Step 4: Applying the Law and Policy

The final step in every decision-making process is to apply the relevant rules to the findings of fact. If you have done a good job of steps 1, 2 and 3, this step is often straightforward – the conclusion you should reach should be clear to you. If it isn't, you may have missed something in the first three steps.

Six Common Decision-making Pitfalls

Sometimes reaching a decision is difficult, not because you haven't fully completed the steps in the decision-making process, but because you are being influenced by something else. Here are examples of some decision-making pitfalls that can prevent you from making a good decision.

- **Avoidance:** The harder the issue, the more likely you will be tempted to find a reason to avoid making a decision about it. If you're avoiding an issue, you might still be unsure about what the outcome should be, you might need more information, or you might

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just be trying not to upset people. Focus on the decision-making steps and the quality of your reasoning, not the outcome.

- **Compromising:** Avoid trying to balance the "wins" and "losses." While you may be tempted to find a compromise - to make your decision more acceptable to the people affected by it - this breaks an important decision-making rule, having a reasoned basis for your decision. Attempts at compromise can result in arbitrary decisions that are not supported by the facts and the rules.

- **Lack of Independence:** You need to make your decision. Don't let others – government officials, politicians, lawyers, the media, or others in your group who are not making the decision with you – pressure you into deciding in a certain way. Others may help you without making the decision for you. They can: (a) note spelling or grammatical errors in written reasons, (b) check references to acts, regulations or policies for correctness, (c) give you feedback on the internal logic and clarity of the decision, noting gaps and contradictions, either within the decision or compared to earlier decisions.

- **Not Answering "Why?":** Explain your decisions. To accept a decision, people need to know you listened to them, reviewed their information and understood their position, even if you ultimately disagreed with it.

- **Secret Information:** You shouldn't rely on information that the people affected by your decision are unaware of. This is unfair. It is violation of the duty of procedural fairness. Remember, those affected by your decision have the right to be made aware of all information you are considering and have an opportunity to challenge it.

- **Conclusion-driven Thinking:** Your conclusions should flow from the findings of fact, policy and law. Go to where the facts and rules take you, instead of stretching the facts and rules to reach the result you think is right. If applying the rules to the facts leads to a certain result, then this is the result you must find. Decision-makers can't pick and choose when to apply the rules. If following a rule truly results in the wrong decision, consider taking steps to have the rule changed.

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Communicating Your Decision Well

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Reasons for Decisions

There is a difference between a decision and the reasons for a decision. The decision is your conclusion. The reasons for the decision explain why you arrived at your conclusion. People affected by your decision need to know both your decision and the reasons for it.

Regardless of how you normally provide a decision to those affected by it, whether verbal or in writing and whether formal or informal, you will need, at a minimum, to provide a statement of your decision as well as a description of how you reached it.

Reasons for Reasons

There are legal and practical considerations for providing reasons for your decision.

Legally speaking, your act or regulations may require you to give reasons for your decisions and they may require them to be written. If not, the common law duty of procedural fairness sometimes requires decision-makers to give written reasons – especially if the decision has important significance for the person affected by it, or when there is a statutory right of appeal. Even if there is no legal requirement for you to provide reasons, providing reasons for your decisions is always a best practice and a good idea.

Practically, giving reasons protects against arbitrary or illogical decisions – reasons demonstrate the decision-maker considered the relevant evidence and arguments and ensured the "why" question was answered. Reasons also tend to foster higher quality decisions because the decision-maker must think through the decision to explain it. Reasons are very important when a decision is inconsistent with previous decisions in similar cases or when credibility is in issue because these are situations where the answer to the why question is more important than the outcome itself.

Perhaps more importantly, reasons help those affected by a decision to accept it. Without meaningful reasons that connect the dots for people, people connect the dots themselves and frequently in ways that the decision-maker never considered. There is a natural tendency for people to want to make things make sense and in the absence of an explanation for a decision they disagree with, people will make up their own explanation.

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If you are not legally required to provide a written decision, consider whether providing verbal or written reasons will be the most practical. Which will be the easiest for the parties to understand? If you explain your reasons verbally, will it be helpful to the parties to also have a written explanation of the decision and reasons? Even if you only provide a verbal explanation, it is often practical to follow the same thought process that you would use when preparing a written decision. This helps to ensure that you have thought through the decision and the reasons behind it. It will also help you make clear notes for your files in case you or a coworker needs to refer to the decision later.

Conversely, if you are required to provide a written decision, consider whether it may also be appropriate to make yourself available to meet with the parties. This can give you an opportunity to answer questions and to let them know about any avenues of appeal that are available if they disagree with your reasons and conclusions.

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Decision Tips

- **Consider Your Audience:** The main thing when writing your decision is to consider your audience. Write it for the people who will be affected by it, particularly those who are negatively affected by it. They are the ones who need to understand why the decision is not in their favour. The reasons for your decision are first and foremost for them. If the reasons are explained well, people are more likely to accept a decision, even if they disagree with the outcome.

  Writing for your audience means you need to discuss things that you might not otherwise include. For example, if the unsuccessful party relied on irrelevant information to try to make their case, your decision needs to explain why you think their information was not relevant. Also, if you gave a person's information little weight, you need to explain why.

  Think about your larger audience too, including people who may participate in your decision-making process in the future. If your decisions are publicly available, people will use them to understand your processes and to make informed decisions about their chances of success. If your decisions are reviewable or appealable, your reasons will be the focus of the decision-makers on review or appeal.

- **Consider Your Reader:** Documents intended for the public should be written for the average person. Assume your reader is generally informed but has no specialized training. Ask yourself: What does the reader need to know? What will the reader understand? What layout will be easiest for the reader to follow? Of course, if you know that your primary reader is someone who has a lot of knowledge, you can consider that and write to them.

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- **Keep it Short and Simple:** The longer and more complex your decision, the less likely your readers are to understand it. Be as simple and as concise as the facts, issues, law, analysis and conclusions allow. Reasons can be too short, however. For example, just stating, "I have considered all of the matters required under the Act and have decided there is no basis for granting the applicant's request" is not good enough. Again, reasons should answer "why."

- **Decide Only What is Necessary:** It can be tempting to comment on peripheral issues to send a message or to provide guidance. These extras only make the decision longer and less clear. Also, if they are not thoroughly considered, they can form the basis for an appeal.

- **Avoid Criticism, Sarcasm and Humour:** Avoid criticism that is irrelevant to the issues you are deciding. If it is necessary, for example to explain why you preferred one person's evidence over another's, use restrained and professional language. The only purpose of sarcasm is to humiliate. It has no place in a decision. It negatively affects a decision-maker's reputation and tends to make people believe they were not taken seriously or the process was unfair. While humour may help ease tension in hearings or interviews, it can be perceived as disrespectful or dismissive in written reasons.

- **Avoid Irrelevant Sensitive Facts:** Don't include any sensitive facts (like age, weight, marital status) in the decision that are irrelevant to the case and that may be embarrassing. Only include them when necessary to explain why the issues were decided in the way that they were decided.

- **Use Everyday Language:** Don't use a complex word when a simple one will do. Avoid jargon and slang. If you use abbreviations or acronyms, make sure they are well-explained. Obscure words and phrases make decisions harder to read and understand.

- **Use Words Consistently:** Don't use more than one word or phrase to describe the same person or thing – this causes confusion. For example, if you call a person the "physician", don't later switch to "doctor" or "clinician."

- **Use Positive Language and Confident Language:** Use positive language. Write "I agree with person A" rather than "I disagree with person B." Use confident language. Write "I find" or "I accept" rather than timid language like "it seems to me," "it appears," or "I feel."

- **Avoid Unnecessary Formality:** Using antiquated phrases (such as "herein" and "thereon") or unnecessary formality (such as referring to yourself as "the writer") add no meaning to a decision – they just make it harder to understand.

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- **How the Decision Looks Matters:** How a decision looks visually is often overlooked. The more professional it looks, the more obvious its importance will be. A professional-looking document also shows respect for the people affected by it – that some time was spent preparing it. It also helps to make it easy to read – breaking up long paragraphs, using headings, leaving lots of white space, using a readable, properly-sized font, etc.

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Decision-writing Tips

Written decisions take many different forms. They could look like a letter, a memo, a report, or a court judgment.

The Parts of a Decision

There is no one correct way to lay out a decision. There are, however, five standard parts to every decision: (1) an introduction, (2) the facts, (3) the issues, (4) the analysis and (5) the conclusion. These parts often appear in this order, but sometimes the issues are set out before the facts. Sometimes the conclusion comes first. Long decisions might start with a summary.

- **Introduction:** Use the introduction to provide an overview. Who are the people affected by the decision? If it is about a dispute, what is the dispute about? How did the case come to you? Did someone apply to you? Are you sitting in appeal of someone else's initial decision?

- **Facts:** Summarize your findings of fact from Step 2 of the decision-making process. Lay out the facts chronologically in the order that events happened, not in the order you gathered the evidence – this might be easier for you, but it is illogical and confusing for the reader. If you assessed contradictory evidence and chose one version of events over another, this is where you would explain your choices. List only relevant facts - the only exception being when a person affected by your decision relied heavily on irrelevant acts. In this case, you need to explain why they were irrelevant, so the person isn't left thinking you did not consider them. The facts must be accurate. Incorrectly stating even trivial facts makes people lose confidence in your decision – because it will make it seem like you were not paying attention.

- **Issues:** After the facts, set out the issues. The issues are the questions you are answering by making the decision. It is helpful to state issues as questions. For example: Does the applicant meet the prerequisites for funding under the Act?

- **Analysis:** In this part, you show your chain of reasoning. If there is more than one issue, subdivide this part so you analyze each issue separately. For each issue, start off by listing all the relevant legal

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and policy rules. Then apply the legal and policy rules to the facts – that is, explain why and in what way you think the rules should apply. At the end of your analysis of each issue, state your decision on that issue.

- **Conclusion:** Your conclusion should be a short summary of your decision and the reasons for it. Very short and simple decisions do not need to be summarized. Use your judgement.

Editing Tips

- **Edit for Respectful Language:** Remove anything that might be offensive or be seen as discriminatory – whether for gender, racial, religious or other reasons. Use gender neutral language when appropriate (such as chair instead of chairman).

- **Use Consistent Spelling and Phrases:** A good rule of thumb is to spell words the same way they are spelled in your governing Act. If you start off calling someone the supervisor, don't call them the manager later on.

- **Have Someone Else Review and Edit:** If you can, have a colleague read your decision and give you feedback. There may be logical gaps or issues with tone that you cannot pick up on because you are too close to the work. Writers typically read their own work the way they subjectively intended it, not the way it objectively comes across. To make sure a decision reflects what you intended to say, you need a reader-based perspective.

More About Format and Layout

- **Result at the Beginning or the End:** You can state the results of your decision right up front or at the end. Just be consistent. Putting the result at beginning gives the reader a clear answer right away, so they don't have to flip through your decision to find it. Putting the result at the end encourages some to read through the decision and follow your chain of reasoning.

- **Using Standard Paragraphs or Decision Templates:** Having a standard set of paragraphs and decision templates improves consistency between decisions and makes the drafting process faster, but these tools can only assist your writing, not replace it. You still need to make sure the standardized phrases and sections you use are relevant to the specific case. And you still have write whatever unique passages are necessary to address the specific circumstances of each case.

- **Letter Formats**: Simple, straightforward decisions affecting just one party – like a decision on a permit or funding application – can be written in letter format. Letters are less formal and more personal than reports.

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Key Thoughts

Decision-making begins as soon as you are given the task to decide.

- Begin by clarifying the issues.
- Next, gather relevant evidence and information, assess it and make a finding of fact.
- The process ends once you have you have determined and applied the relevant law and policy to the facts and reached your conclusions.
- Following a thorough and fair decision-making process will ensure you avoid the many decision-making pitfalls and that your decision is fair and well-reasoned. Part of making a good decision is providing good reasons for it.
- Prepare your decisions for your intended audience.
- Be as concise and straightforward as you can while still adequately explaining your reasoning.
- Make your decisions easy to read by using easy language following a consistent format and using a sound editing process.

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