

Fair Decisions, Fair Process, Fair Treatment

In the November issue of *Municipal World*, I told you about an ombudsman review that resulted in 27 recommendations for Saskatchewan's administrative tribunals.¹ In 2009, Ombudsman Saskatchewan followed up that review with *Practice Essentials for Administrative Tribunals*, a training manual that maps out the details from a tribunal's first contact with a party to the day the party has the written decision in hand.

The Regina Development Appeals Board is a municipal tribunal that had an opportunity to review the guide. The board has a wealth of experience and has been operating for years. They are also representative of many other tribunal members in Canadian municipalities who serve on a part-time basis. For this reason, the Ombudsman's office saw them as ideal for providing feedback on the new guide and they agreed to do so. I met with the board earlier this year to talk about their experience with the new guide and their commitment to serving the public. The board is composed of Chair Leah McDonald, and members Brian Harris, Debbie

Scriver, and Luigi Mazzotti. Their assistant is Elaine Gohlke.

Tell me about your tribunal. What kinds of cases do you deal with?

Harris: There are a lot of development standards in the zoning by-law and it's really about variances from the standards.

Mazzotti: This includes, for example, relaxations for the number of parking spaces required for restaurants, businesses or apartments, the number or size of signs for buildings or strip malls, how close a building is to property lines, or building size or configuration on the property.

What was your reaction when you read the Ombudsman manual?

Scriver: It was kind of a rewarding experience for us because we went into it with a bit of trepidation. It was refreshing to find out we were on the right track.

What did you like about the guide?

McDonald: We like how it's set up, and how you can flip from one reference to the next.

Harris: It's easy to use and some of the underlying principles are spelled out: what is the basis in law and how do we give effect to that in the work we do as an administrative tribunal? I think it's a really good tool and I think it would be exceptional for a board like ours that perhaps was in a smaller place, didn't meet very often, and didn't have the structural supports that we have.

What sorts of changes did you suggest?

Mazzotti: We asked to change some of the vocabulary from legal to layman's terms.

Gohlke: We suggested a glossary for certain terms that were unfamiliar, and I think the tips as well.

McDonald: I think with a smaller board, I would recommend a workshop to have someone guide them through it.²

You had the unique opportunity of having a former member of your tribunal, Melissa Wallace, actually write the guide. What was it like to have her review the guide with you?

Harris: Well, we had this expert going through it with us and if we



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1 Ombudsman Saskatchewan (2007). Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals.

2 A workshop based on the training manual is available through the Dispute Resolution Office at Saskatchewan Justice <disputeresolutionjustice@gov.sk.ca>.

A Broad Concept of Fairness

Fairness is foundational to effective tribunal services. Here is an excerpt from Practice Essentials for Administrative Tribunals that defines a fair decision-making process:

You can think of a fair decision-making process as having three different parts:

- ▶ the procedures involved
- ▶ the treatment provided
- ▶ the resolution reached

For a process to be fair to the parties involved, your tribunal must satisfy fairness requirements on all three of these aspects.*

Fair procedures refer to the processes your tribunal uses to make decisions. At a minimum, fair procedures include the duty of fairness that provides the individual with the right to notice that an adverse decision could be made, the right to respond to the decision maker, and the right to an unbiased decision maker. It also may include additional requirements such as:

- ▶ Were parties provided with sufficient information to know the case against them?
- ▶ Were the parties given an appropriate opportunity to reply?
- ▶ Were the parties provided with a hearing and a decision within a reasonable period of time?
- ▶ Were the parties provided with sufficient reasons for the decision?

Fair treatment refers to the way the parties were treated by tribunal members and staff throughout their contact with the tribunal. For example:

- ▶ Was the tribunal easily accessible?
- ▶ Were tribunal staff approachable and helpful?
- ▶ Were the parties treated with courtesy and respect?
- ▶ Were the parties provided with appropriate guidance throughout the process?

A fair resolution refers to the final decision made by the tribunal:

- ▶ Was the decision based on relevant information?
- ▶ Were the facts and the law relied upon in the decision correct?
- ▶ Was the decision consistent with previous decisions made in similar cases?

In short, fairness means much more than just providing parties with a fair hearing. It also means providing information and services that are easy to find, use, and understand; treating participants with courtesy and respect; providing an open, accountable, and timely dispute resolution process; and producing well-reasoned decisions prepared by skilled decision makers.

*Adapted from the work of Christopher Moore and CDR Associates, Boulder, Colorado. See for example Moore's discussion of procedural, psychological and substantive needs in his 2003 publication *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed.). San Francisco: Jossey-Bass Publishers, pp 75-76.

said "Hmm what's that about?" we had the answer immediately – or she would give a little preamble and put it into context for us.

When you compare the way you operated several years ago to now, what sort of differences do you see?

Mazzotti: Many years ago, we didn't have a manual. Things were much more loose. Evidence presented was very short, decisions were one-liners, and not a lot of rationalization or explanation – but that keeps changing. We continue to evolve and try to make things better.

So, what kinds of things are you doing to make the process fair for people?

First, keep people informed.

McDonald: We always let them know how long it will be before they get a copy of the decision.

Second, be patient and encourage people to state their cases well.

McDonald: When we ask our questions, we try to make them at ease because sometimes they are nervous and they don't know what kind of information they have to tell us. One thing that Melissa really helped us with was to try and draw out the information, to probe a little bit more.

Mazzotti: It's very difficult, you know, when you ask them the question. You are listening to them and thinking: What are they trying to say? So, it's instinct to say, "Do you really mean 'this'?" But you can't put words in their mouths. It's a question of patience, because you actually have to get them to say it.

Third, give city administrators some discretion.

McDonald: One of the examples was if you had a house that was built 50 years ago. At that time, the side-yard setback was two feet and now it is four feet. When a new building permit is issued for an extension to this house, in order to meet the by-law, they would have to jog over two feet to start their extension. To most homeowners, that doesn't make a lot of sense because this house has



Good substantive decisions are only fair if they are accompanied by open, transparent, and inclusive processes that involve the people who are most directly affected by the decisions being made. ~ Kevin Fenwick, Saskatchewan Ombudsman³

existed for 50 years with a two-foot sideyard and it's been fine.

Mazzotti: Another example is the frontyard parking pads. Before, if they wanted to build a parking pad that was 22 square metres ... well, the maximum is 20. Generally, you don't notice two square metres on a parking pad, so we said to the city, "You should have some tolerance in there so you can make a decision."

Harris: If I'm a citizen and I'm trying to get something done, this is another hoop I have to jump through. If it's a very minor thing, the city officials have a little more leeway to grant it.

How often will you make use of the new training manual?

Harris: We were really fortunate in having Melissa as our on-the-spot reference. We have the majority of

the knowledge, but we have to be refreshed every once in a while – either when a particular case comes up or during our annual meeting. You have to review it on a regular basis to make the process better. [MW](#)

³ Ombudsman Saskatchewan (2009). Annual Report 2008, page 5.

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