

QUICK TIPS

LEADING PRACTICES IN CONDUCTING APPEALS



OMBUDSPERSON
BRITISH COLUMBIA

Administrative decisions made by public sector employees can significantly impact an individual or group's rights, interests or privileges. Those individuals or groups who receive a decision they believe was unfair, unreasonable or incorrect may wish to appeal the decision to the administrative decision maker. While the right to appeal such decisions will vary depending on the nature of the administrative decision and the organization's governing statute, it is important that public organizations have a clear, accessible and fair appeal or review process available for decisions that impact the people they serve. This quick tip guide provides information for public organizations on some leading practices for establishing a fair and effective appeal process.

"Administrative decisions" are those decisions made by public sector employees, on behalf of government or other public bodies, under specific authority granted through legislation or public policy.

WHY HAVE A REVIEW OR APPEAL PROCESS?

- Helps to ensure that administrative decisions are made fairly, consistently, and in accordance with the organization's applicable legislation, policy and decision-making criteria
- Instills public confidence in the decision-making processes followed by administrative decision makers on behalf of government
- Supports transparency and accountability on the part of the public organization

Those who appeal an administrative decision are often referred to as "appellants"

WHAT ARE THE KEY ELEMENTS OF A FAIR APPEAL PROCESS?

1. Accessibility

An accessible appeal process is one that is easily found and understood by individuals who wish to access it in a format and language they understand. Ideally, public organizations should establish an appeal process that is not onerous and does not deter potential appellants. It is leading practice for information about the appeal process to be publicly posted to the organization's website and communicated in any decision letters to those who are accessing the service. This accessibility also helps to ensure transparency, an integral aspect of fairness.

2. Clear right of appeal established in legislation or policy

An organization's relevant legislation may outline how appeals of administrative decisions can be requested and will be considered. In addition to any right of appeal provided by legislation, or where there is no statutory right of appeal, public organizations should establish a clear appeal process for administrative decisions that impact people's rights, interests or privileges. This appeal process should be set out in policy, clearly reference any statutory right of appeal, and state who in the organization has the legal authority to review decisions. It is leading practice to establish this right of appeal in policy to allow decisions to be reviewed and reconsidered by a higher decision maker within the organization.

When creating and implementing a fair appeal process, public organizations should also be mindful of the significance of the original decision on the person or persons impacted. Access to a fair and robust appeal process should be proportional to the impact of the decision on those affected. This means that the greater the impact of the decision, the higher duty of fairness is owed to provide an avenue of appeal.

3. Clear and fair appeal procedures

The appeal process itself must be clear and fair to potential appellants and should address:

- who may request an appeal
- what kinds of administrative decisions can be reviewed or appealed, including any specific grounds for appeal
- whether an appeal should automatically be available as a right, or whether there must be specific conditions met in order to proceed with an appeal – for example, new information becoming available which could have affected the outcome of the original decision
- who has the authority to consider an appeal under the applicable legislation or policy, including the name of the position or committee who will conduct the review
- how a person can request an appeal and the specific steps involved, including how to submit information to the decision maker on appeal
- how the appeal will be conducted, such as through an in-person hearing, written submissions (or both), and how the person will have an opportunity to be heard in the process
- how your organization will ensure an unbiased decision maker will be assigned to consider the appeal
- relevant information about confidentiality and information sharing during the appeal process
- the possible outcomes of an appeal (for example, will the reviewer have authority to confirm, reverse or amend the original decision, or will they send it back to the original decision maker for reconsideration?)
- any time limits associated with the appeal process, such as when an individual must request an appeal, and when they must submit all evidence to be considered by the decision maker

COMPLAINTS VS. APPEALS

It is important to distinguish, in policy and in practice, between a general complaint about an organization's services to the public versus a person's right of appeal of an administrative decision made by an organization or their staff. While an appeal process can evaluate and reconsider an administrative decision on the basis of clear grounds for appeal set out in legislation or policy, a general complaints process can respond to concerns from service users about other matters, such as complaints about staff conduct, delays in process, or other service quality issues. Ideally, organizations should have both an appeal process for any administrative decisions that impact people's rights, interests or privileges, as well as a complaints handling process formalized by policy to receive general feedback and seek continuous improvement on the quality of the organization's services to the public.

4. Clear grounds for appeal

Grounds for appeal are the reasons for the appeal. Appellants must have a valid reason for appealing an administrative decision beyond just disagreeing with the decision, and must be able to outline their specific concerns about the substantive decision or process followed by the original decision maker. A good appeal process is one that has identified grounds for appeal listed in a way that is clear and accessible. The grounds for appeal may be either provided by the relevant legislation and/or formalized in policy. In the absence of a legislated right of appeal, some considerations to keep in mind when deciding on what basis an appeal may be initiated include:

- whether an appeal is automatically granted when new information or evidence comes to light that was not available at the time the original decision was made
- whether a fair process was followed in making the original decision – for example, if the person can

demonstrate they did not have an opportunity to be heard or have access to an unbiased decision maker in the original decision, they should have an opportunity to appeal the decision

- the extent to which your organization will permit appeals based on procedure or process followed, or only on points of law – for example, the possibility of an incorrect interpretation or application of the governing statute or policy

5. An impartial decision maker

The decision maker on appeal must be impartial to the parties to the case and the issue being decided. They should not have had any prior involvement with the original decision and should not pre-judge the matter. They should come into the appeal process with an open mind and no preconceptions of the preferred outcome of the appeal.

6. Adequate reasons

Decisions that impact a person or group's rights, interests or privileges, whether these decisions are interim, final, or appeal decisions, should be communicated promptly to the affected party, along with understandable reasons for the decision. Failure to provide adequate reasons for administrative decisions may be grounds for appealing the decision to a higher decision maker.

Reasons for administrative decisions and final decisions on appeal must clearly state:

- a list of all of the evidence considered by the decision maker relevant to the decision
- how it was analyzed in accordance with the applicable legislation, policy and decision-making criteria
- how the decision maker resolved any conflicting evidence
- the decision that was ultimately reached based on this analysis

Providing adequate reasons helps the individual or group who is impacted to understand the decision. If individuals understand the reasoning behind an administrative decision, they are more likely to accept it, even if they do not agree with the outcome.

ADDITIONAL LEVELS OF APPEAL OR OPTIONS FOR EXTERNAL REVIEW

If an appellant continues to be dissatisfied with the decision at the conclusion of an appeal process, they should be provided with written information about further review options available. These additional options may include an appeal to a higher level of the organization, an option for external review such as through a tribunal or court, and/or a referral to the Office of the Ombudsperson or other applicable oversight body.

Judicial review, when a court is asked to review decisions made by government decision makers, is an option that may be available to some appellants; however, this avenue can often be complex, costly and time consuming.

WHAT IS JUDICIAL REVIEW?

Judicial review is the way in which courts supervise the decisions of administrative decision makers. Canadian courts generally limit access to judicial review of administrative decisions to whether the decision maker failed to fulfill their duty of procedural fairness or whether there was a substantive error with the decision, such as an error of legal interpretation, an error in a finding of fact, or a jurisdictional error. When completing their review, there are two general ways in which courts will assess the administrative decision, also called "standards of review".

A recent case at the Supreme Court of Canada, *Canada (Minister of Citizenship and Immigration) v. Vavilov*,¹ determined that courts will begin with the presumption that reasonableness is the appropriate standard of review to use in all cases. However, courts can use the correctness standard of review in certain situations. The difference between the two standards of review is:

- **Reasonableness** – Courts will look to whether the administrative decision was reasonable, considering both the outcome of the decision and also the process followed by the decision maker in reaching it. Reasonable decisions are transparent, intelligible, and justified. The reasoning and chain of analysis used to make the decision should be clear and understandable. Courts will begin a review of the reasonableness of a decision by looking at the reasons for it.
- **Correctness** – This standard of review may be used when the applicable legislation requires a higher level of review, such as by a court. It may also be used when a court determines that certain legal questions arise in how the legislation was applied in a case and the court must have the final word on the matter.² When using the correctness standard, a court will complete its own analysis to determine whether the administrative decision was correct.³ They will do so by reviewing the facts and the relevant law.

It is also important to note that in British Columbia, the *Administrative Tribunals Act* may provide important guidance to courts about which standard of review to use when reviewing a particular administrative decision.

More information and additional resources are available on our website: www.bcombudsperson.ca.

¹*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 441 D.L.R. (4th) 1.

²*Ibid.*

³*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.



CHECKLIST FOR APPEALS OF DECISIONS

On appeal, decisions may be reviewed to determine whether the decision was substantively fair, as well as whether a fair process was followed in making and communicating the decision to those impacted. How a decision maker on appeal will evaluate the original decision may depend on the organization's relevant legislation and policy. However, the following is an example of some steps that a decision maker on appeal should take to assess whether the original decision was substantively and procedurally fair.

- Did the original decision maker have the authority (via legislation or policy) to make the decision?
- Was the affected individual provided with information on the decision-making criteria and process in advance?
- Did the decision maker gather all of the evidence necessary to make their decision?
 - Was the evidence used by the decision maker relevant to the issue to be decided?
 - Did the decision maker explain how they resolved any conflicting evidence?
- Was the individual provided with the opportunity to present their evidence to the original decision maker and be heard in the process?
 - Did the decision maker consider the information provided to them by the individual?
 - Were they given an opportunity to review and respond to all relevant information and evidence the decision maker used to make the original decision?
 - Was the person's information reflected in the decision?
- Was the decision maker impartial to the parties to the case and the issue(s) to be decided?
 - Could someone reasonably perceive bias on the part of the decision maker?
- What was the decision-making criteria the decision maker applied to the evidence to make their decision?
 - Was the appropriate criteria used, as provided in the rules (i.e. legislation, policy)?
 - Was the individual's unique circumstances reasonably considered by the decision maker? Was any discretion the decision maker had exercised in a fair and reasonable manner, considerate of the individual's specific situation?
- Was the individual provided with adequate reasons for the decision?
 - Were the reasons understandable to the affected person and did they clearly explain and justify the decision made?
 - Was the decision-making criteria and evidence used to make the decision explained in a clear and understandable way?
- Was the original decision reasonable, given the evidence available and criteria used by the decision maker? Consider whether the original decision was justifiable, transparent and understandable (intelligible) to the person receiving it.

If it is determined that there was an unfair process which lead to the original decision, the decision may be sent back to the original decision maker for reconsideration. If, on appeal, the original decision appears to be unreasonable or unfair based on the criteria and evidence assessed by the decision maker, consider whether the decision should be changed.