

***GIVING REASONS FOR DECISIONS:
A GUIDE TO BEST PRACTICES FOR
STATUTORY DECISION-MAKERS***

**Ministry of Attorney General
Province of British Columbia
PO Box 9210 STN PROV GOVT
Victoria BC V8W 9J1**

www.gov.bc.ca/ajo/

Table of Contents

Introduction	1
How this Guide was Developed	2
Written Reasons for Decisions – A Summary	3
Legislating the Obligation	5
Specific or Generic Legislation	5
Related Issues	6
The Need to be Clear About What Decisions the Obligation will Apply to	6
The Need to be Clear About Who is to Make the Decision	6
Setting a Time Limit for the Reasons to be Issued	6
Effective Date of the Decision	7
Requirement to Send a Copy of the Decision	7
Ability to Correct Obvious Errors	7
Consequences of a Failure to Give Reasons or to Give Sufficient Reasons	7
Public Access to Decisions	8
Privacy Considerations.....	8
Enforcing Decisions.....	9
Legislative Alternatives	9
Legislating to Clarify that Written Reasons are not Required	9
Limiting the Obligation to Give Reasons Only if Requested	9
Limiting the Obligation to Give Reasons to Only Where the Rights of a Person are Adversely Affected	10
No Legislation – Leaving it to the Court to Decide if Reasons are Required ...	10
How to Make the “Right” Choice	11
Advantages to Giving Reasons.....	12
Fairness and Transparency.....	12
Increased Consistency	12
Increased Efficiency	12
Improved Regulatory Compliance	12
Improved Quality	12
Fostering Decision-Makers’ Professional Competence	13
Assisting in Determining Whether to Exercise the Right to Review.....	13
Earlier Resolution	13
Disadvantages of Giving Reasons	13
Lack of Added Value	13
Loss of Flexibility	13
Additional Resources will be Required	14
Becoming too Court-like	14
Lack of Candour	14
Meeting a Legal Obligation to Give Reasons.....	14
Who Must Make the Decision and Give the Reasons?	14
Content of the Reasons.....	15
Conclusion and Reference Materials	16
Appendix A – Checklist of Considerations for Giving Reasons for Decisions	17

Introduction

Government and citizens alike want a civil justice system where problems can be resolved simply, quickly and affordably, achieving earlier solutions and faster justice. Government's statutory decision-makers (SDMs)¹ are a critical component of that justice system, every day making hundreds of decisions in individual circumstances about licences, permits and benefits, compliance with regulations, and sometimes imposing penalties. The courts simply could not make all of these decisions, nor would it be an appropriate use of resources for them to do so. But like the courts, SDMs must make their decisions fairly and in accordance with the law.

For this reason, and also because these decisions can have significant impacts on the affected individuals and businesses, it is important that the affected persons not only understand *why* a particular decision was made, but can also accept the decision as fairly made, even if they do not agree with the outcome.

If decisions made by SDMs are perceived to be arbitrary or unfairly made, the persons affected may feel the need to request the court or a tribunal review the decision or the decision-making process. These reviews take time and resources, not just for the individual, but also for the justice system – time and resources that may be better used elsewhere. One way to avoid or reduce the perceived need for court or tribunal review may be for the SDM to give written reasons for their decisions.

However, easy as that may sound, factors such as time and resources may make providing written reasons less desirable in some circumstances. As such, knowing *when* or *if* to give written reasons can be a critical step in allocating scarce time and resources. In some instances, it may be appropriate to legislate when the requirement to provide written reasons will apply

This Guide sets out some of the best practises to consider when determining whether a SDM should give written reasons for a decision. It is meant to be used as a tool by SDMs and those who support SDMs in their decision-making role and also by policy makers when establishing or reviewing a decision-making scheme. It is intended to assist these persons, and perhaps others, in setting practices and obligations that reduce the demands on the court system.

¹ For the purposes of this guide, the term *statutory decision-maker (SDM)* refers to individuals, excluding tribunals, who have authority under a statute to make administrative or quasi-judicial decisions. "Administrative decisions" are those decisions made by SDMs about the exercise of a public power that affects the rights and interests of specific parties that typically do not involve much discretion on the part of the SDM. In contrast, "quasi-judicial decisions" more closely resemble the decision-making process of the courts and generally involve detailed findings of fact, higher levels of discretion, higher stakes and greater procedural protections for the parties. However, the distinction between administrative decisions and quasi-judicial decisions can be a fine one and many SDMs will make both kinds of decisions.

The Guide starts with a summary, then sets out what should be considered when determining if the obligation to give reasons is to be addressed by legislation. The alternative, leaving the determination of the obligation up to the common law, is also reviewed. Following that, how to make the “right” choice (the advantages and disadvantages of giving reasons) is discussed and some factors to satisfy the legal obligation are identified. The Guide concludes with a list of reference materials and other resources on the duty to give reasons as well as a checklist of considerations.

By using this Guide, readers should be able to consider the best practice considerations in determining whether a SDM should give written reasons for a decision. Once that determination is made, this Guide can provide the tools to make an informed decision as to when written reasons should be required and whether a legislated obligation to provide reasons is appropriate.

How this Guide was Developed

The Ministry of Attorney General has undertaken a systemic review of the procedures and processes used by SDMs and the authorities they exercise, to try to ensure they are clear, consistent, and proportionate to the nature and impact of the decisions they make. One of the first issues considered in this review was the obligation of SDMs to give reason for their decisions.

This Guide reflects the research and consultation that has taken place. It is based on a 2008 Discussion Paper,² feedback from various government ministries in response to the Discussion Paper, and the valuable input of the Project Advisory Committee, consisting of:

- Guy Brownlee, Ministry of Forests and Range;
- Hilary Vance, Ministry of Finance; and
- Cary Chiu, Ministry of Housing and Social Development.

The Project Advisory Committee collectively represent a range of SDMs and a broad range of users, regulations and enforcement schemes.

² Statutory Decision-makers and the Obligation to Give Reasons for Decisions, A Discussion Paper: http://www.gov.bc.ca/ajo/down/reasons_paper092008.pdf

Written Reasons for Decisions – A Summary

Written Reasons are required:

- If expressly required by the applicable legislation*

Written Reasons may be required or desirable:

- If a person directly affected by the decision asks for written reasons.
- If there is a statutory right of review or appeal – so the person affected can assess whether to ask for a review or appeal and, if a review or appeal is then requested, the person conducting the review or appeal of the decision can understand the rationale for why the decision was made.
- When conducting a review, appeal or reconsideration of a decision, to explain why the decision is, or is not, changed on the review, appeal or reconsideration.
- If the decision denies a person's entitlement to an important benefit or their right to do a thing or carry on a business or other activity of significance, or imposes unusual or stringent conditions on a permit or licence.
- If the decision imposes negative sanctions on a person, like revoking a licence or permit, or imposing additional stringent conditions on the licence or permit, or imposing a penalty, monetary or otherwise.
- The public has a high degree of interest in individual outcomes that cannot be satisfied by simply reporting on statistics or other more general data.
- If a person directly affected by the decision has or appears to have comprehension problems. Written reasons allow this person to potentially have others help explain the decision.

Written Reasons may not be required or even desirable:

- If there are no other persons involved, and the outcome is what that affected person requested – for example, they are granted the licence, permit or benefit and any conditions on the licence or permit are standard.
- The person will clearly know the reasons, without written reasons being given – for example, the matter is simple, the decision-maker has little or no discretion in the matter or in some limited cases, an essential criterion is clearly not met – and oral reasons or a simple, one line explanation can be and is given.

- The decision is only an interim or preliminary determination and the person will have a chance to provide more or other information before a final decision is made and that is communicated to them.
- Other equally effective means of communicating the decision are available – for example, policy directives, advance rulings, position papers.

* If considering whether legislation *should* require the giving of reasons, consider the Advantages and Disadvantages set out below, and see the discussion starting at page 12.

Advantages of Giving Written Reasons	Disadvantages to Requiring Written Reasons
<ul style="list-style-type: none"> • Enhances the fairness and transparency of both the decision and the decision-making process. • Acts as a means to better communicate how program policies and legislation are applied. • Increases potential for consistency (so “like cases are treated alike”). • Improves the overall quality of the decisions. • Improves the ability to assess the need for appeal or review. • Simply providing an explanation can reduce the likelihood of being overturned on review by a tribunal or court, so provides for earlier resolution. • Responsibility to issue reasons can provide an additional impetus for SDMs to acquire the knowledge and experience necessary to competently decide matters. 	<ul style="list-style-type: none"> • Other less onerous means might be better to provide fairness and transparency and communicate to users – for example, directives, policies, and annual reports. • Writing concise, understandable reasons can be time-consuming and impractical, leading to delays, backlogs and other bureaucratic inefficiencies. • A potential for loss of flexibility, especially where decisions are supposed to be based on deliberately flexible legislative or policy standards. • SDM may simply issue safe, truncated and formulaic reasons, to avoid having their decisions disturbed on appeal or judicial review. • Applies court-like standards and processes to processes meant to be an alternative to the courts.

Other Considerations

- The literacy needs and abilities of the persons involved.
- The availability of training on how to write reasons.
- The application of the *Freedom of Information and Protection of Privacy Act* and the potential need to anonymize decisions to protect sensitive private information/

The Obligation to Give Written Reasons

The outcomes of the hundreds of decisions made every day by SDMs have a significant impact on the individuals and businesses directly involved, as well as the general public. Providing written reasons for making a particular decision can help those affected by it to understand why the decision was made, especially if the person is dissatisfied with the decision. Reasons for decisions can also provide important information to the public and others within the program area.

However, not all SDMs are obliged to give reasons, and giving reasons for decisions in all circumstances is not without some challenges. It is sometimes difficult to determine whether: to impose an obligation to issue written reasons; written reasons are simply desirable; or if written reasons should not be required at all. This Guide is intended to help make that determination, by providing a basis for understanding when and how an obligation to give reasons might be imposed.

Legislating the Obligation

Setting out the obligation to provide written reasons expressly and clearly in legislation³ removes any doubt whether reasons are required. The advantages and disadvantages of a legislated obligation are discussed in more detail below, to help in making this determination.

Specific or Generic Legislation

A number of British Columbia statutes already expressly require a SDM to give written reasons for the decisions they make in individual cases. These requirements may be set out in the specific legislation that applies to a particular SDM, or in more generic legislation that applies to a number of SDMs.⁴

An example of specific legislation is section 94.6(3) of the *Motor Vehicle Act*, which requires the Superintendent of Motor Vehicles to provide written reasons for a decision:

94.6 (3) Subject to subsection (4) [an extension of time] , the decision of the superintendent, and the reasons for the decision, must be in writing and a copy must be sent to the applicant within 21 days of the date the notice of driving prohibition was served on the applicant under section 94.1.

³ An additional consideration – not discussed in any detail in this Guide – is whether any legislated obligations need to be in a statute, passed by the Legislature, or if that should be done in a regulation, enacted by the Lieutenant-Governor in Council (Cabinet) or a Minister under authority granted by a statute. Legal advice will likely be required to address this preliminary issue, but the considerations on content, discussed below, will be similar. For that reason, the term “legislation” is used to encompass both statutes and regulations.

⁴ *Motor Vehicle Act* R.S.B.C. [1996] c. 318. See also section 104.8 of that Act.

An example of generic British Columbia legislation that imposes an obligation to give reasons is section 51 of the *Administrative Tribunals Act (ATA)*⁵, which provides a framework of consistent, modern powers for British Columbia tribunals, and includes a requirement to give written reasons for decisions.

51 The tribunal must make its final decision in writing and give reasons for the decision.

Other provinces also use generic legislation to impose the obligation to give written reasons for decision. For example, section 7 of Alberta's *Administrative Procedures Act* requires SDMs to give written reasons if their exercise of a statutory power adversely affects the rights of a party, and section 17 of Ontario's *Statutory Powers Procedure Act* requires SDMs to give written reasons for their decisions if requested by a party.⁶

Related Issues

If legislation is to be used to impose an obligation to issue reasons, there are some related issues that should also be considered, to ensure the legislation leaves no unintended gaps.

The Need to be Clear About What Decisions the Obligation will Apply to

If a SDM makes a number of different kinds of decisions and legislation is to be used to require written reasons for only some of those decisions, it will be important for the legislation to be absolutely clear about which decisions it will apply to.

If a number of preliminary or interim decisions might be made by the SDM, it may be a good idea to be absolutely clear if the obligation is to apply only to final decisions. For example, section 51 of the *ATA* makes it clear that written reasons are only required for decisions that determine the final outcome.

The Need to be Clear About Who is to Make the Decision

Where legislation requires a SDM to make an administrative decision, that decision can only be made by that SDM unless clear legislative authority permits the SDM to delegate this obligation. If the intent is to permit delegation of the actual decision-making or a substantial role in that process – like making recommendations – consideration should be given to making this clear in the legislation.

Setting a Time Limit for the Reasons to be Issued

It can be helpful to set a clear timeline for reasons to be given, so persons affected can know when they can reasonably expect to be notified of the

⁵ S.B.C. 2004, c. 45. This provision applies to nine different tribunals, with many other tribunals having their own specific provisions requiring written orders. See:

http://www.gov.bc.ca/ajo/down/application_of_ata_to_individual_tribunals.pdf

⁶ See the *Administrative Procedures Act*, R.S.A. 2000, c. A-3 and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22

outcome. However, care will need to be exercised in setting any timelines to ensure sufficient resources will be available to meet them. In some cases, legislation will expressly say that a statutory timeline for issuing a decision can be extended and a SDM's failure to meet the timeline does not mean having to start the process over again.

Effective Date of the Decision

Depending on the statutory scheme, it may be a good idea for legislation to clearly provide when the decision is to take effect: the date the decision is issued or a later date. If it is to take effect on a prior date, express legislation may be required – legal advice on this point may be necessary.

Requirement to Send a Copy of the Decision

If written reasons are to be required by legislation, most legislative schemes will also make it clear that a copy of the decision is to be sent to the persons directly impacted. See section 94.6(3) of the *Motor Vehicle Act* as set out above. Also see section 52 of the *ATA*, which includes a provision that may be helpful if there are a large number of persons who may be impacted and should be notified.

- 52** (1) Subject to subsection (2), the tribunal must send each party and any interveners in an application a copy of its final decision.
- (2) If the tribunal is of the opinion that because there are so many parties to an application or for any other reason that it is impracticable to send its final decision to each party as provided in subsection (1), the tribunal may give reasonable notice of its decision by public advertisement or otherwise as the tribunal directs.
- (3) A notice of a final decision given by the tribunal under subsection (2) must inform the parties of the place where copies of that decision may be obtained.

Ability to Correct Obvious Errors

Sometimes clerical, arithmetic or typographical errors or similar mistakes can be made when issuing a written decision. It can be important to provide the ability to correct these kinds of things, but when doing so, not “leave the door open” for a full review⁷ and perhaps also put time limits on when corrections can be made. Section 53 of the *ATA* is an example of such a provision.

Consequences of a Failure to Give Reasons or to Give Sufficient Reasons

It may be advisable to require a person affected by a decision to ask the SDM to provide reasons before taking any legal action, to make sure the failure to give reasons is not an oversight.

⁷ To consider whether a decision should be subject to a review, see the Guide for Consideration of a Process for Review of Administrative Decision-Making at:
http://www.gov.bc.ca/ajo/popt/consideration_process_for_review.htm

It may also be advisable to set out what the court can do if reasons are not given or are considered insufficient – that is whether the court can order the decision-maker to provide sufficient reasons for its decision or can set aside the decision and send the matter back to the SDM for a re-determination, or simply substitute its own decision.

Public Access to Decisions

Where there is a larger public interest in particular cases within a statutory scheme, public access to those decisions may be desirable. Section 50(4) of the *ATA* imposes such an obligation:

50 (4) The tribunal must make its decisions accessible to the public.

A related issue is the need to limit public access to the decision-maker's notes, used in preparing the reasons. Notes can be a valuable tool to develop ideas and test and revise initial impressions about a case which, in turn, helps SDMs make better decisions. Section 3(1)(b) of the *Freedom of Information and Protection of Privacy Act (FOIPPA)*⁸ provides that *FOIPPA* does not apply to "a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity". In addition, section 61 of the *ATA* expressly states that *FOIPPA* does not apply to the personal notes, communications or draft decisions of a SDM to which section 61 applies.⁹

Privacy Considerations

A critical issue to address is the need to limit public access to sensitive personal information. Reasons for decision that are posted on the internet or that are otherwise accessible by third parties require the removal of "personal information"¹⁰ unless there is specific legislation that provides an exemption from this requirement.¹¹ Many recommend that SDMs take steps to eliminate from their decisions any private information that is not critical to the decision and where such information is critical, to take steps to "anonymize" it.¹²

⁸ RSBC [1996] c. 165.

⁹ Except for sections 44(2), (2.1) and (3). Section 61 of the *ATA* only applies to those decision-makers whose enabling legislation incorporates the section by reference. As well, see http://www.gov.bc.ca/ajo/popt/app_of_foi_admin_tribunals.htm for the AJO Information Bulletin on the application of *FOIPPA* to administrative tribunals.

¹⁰ Schedule 1 of *FOIPPA* defines "personal information" as "recorded information about an identifiable individual other than contact information".

¹¹ See *FOIPPA* ss. 33, 33.1 and 33.2.

¹² The Supreme Court of Canada has a policy that limits the inclusion of "personal information" in that court's records "unless it is required for the disposition of the case" that may provide guidance on the information appropriate (or inappropriate) to include in a written decision. See <http://www.scc-csc.gc.ca/court-cour/rec-doc/pol-eng.asp>.

Enforcing Decisions

After a decision is made, additional processes may be required to enforce the decision and, at this stage, using the court processes may make sense.¹³

Consideration should be given to including a provision like section 54 of the ATA. You may want to obtain legal advice on whether to use the processes of BC's Provincial Court or Supreme Court.

54 (1) A party in whose favour the tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the court.

(2) A final decision filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

Legislative Alternatives

Legislating to Clarify that Written Reasons are not Required

As will be discussed below, changes to the common law may now mean it is unclear whether written reasons will be a legal requirement (if not expressly required by legislation). Determining whether the common law will apply to require reasons can take time and resources to resolve. If the conclusion is that reasons should not be required, then consideration might be given to setting that out, expressly and clearly in the legislation.

In making that determination, careful consideration should be given to the advantages and disadvantages set out below, plus any program specific objectives and goals.

If the obligation to give reasons is expressly removed or limited by the legislation, care should be taken to ensure that the legislation applies to all of the decisions that might be made - otherwise there might be an implication that any decisions not referred to will require reasons. If the conclusion is to require written reasons only for final decisions, it may be better to simply state this (as was done in section 51 of the ATA, set out above).

Limiting the Obligation to Give Reasons Only if Requested

Another option may be to limit the obligation to give reasons to only when a party requests reasons, as is done in Ontario's *Statutory Powers Procedure Act*. This can be an effective way to reduce the potential of using up resources unnecessarily – for example where the person will clearly know why the decision was made and accepts the basis for the decision without a need for reasons –

¹³ The ability to enforce interim decisions may also be desirable. For example, section 18 of the *Administrative Tribunals Act* allows for dismissing an application if an interim order is not complied with, and in more serious cases section 48(2) provides an application can be made to the court for a person to be found in contempt for failure to comply with an order. See also: http://www.gov.bc.ca/ajo/popt/tribunal_tool_kit.htm#obtaining

but can also have some downsides. For example, if reasons are only given after the decision has already been made, the potential for increasing the quality of decisions will be missed. See the Advantages and Disadvantages discussed below, starting at page 12.

Limiting the Obligation to Give Reasons to Only Where the Rights of a Person are Adversely Affected

Yet another option may be to limit the obligation to give reasons to only when a party is adversely affected by the decision, as is done in Alberta's *Administrative Procedures Act*. This can be another effective way to limit the need for reasons to only where there is "value added". For example, where the outcome is what the person asked for, they typically will not need reasons to explain the outcome or to assess whether to ask for a review. However, in some situations, the giving of reasons is not just for the person affected, but also to show the public that the decision was reached in a fair way and on a proper basis. See the Advantages and Disadvantages discussed below, starting at page 12.

No Legislation – Leaving it to the Court to Decide if Reasons are Required

The legal obligation to give reasons, without any express legislative requirement to do so, is relatively new.¹⁴ In its 1999 decision in *Baker*,¹⁵ the Supreme Court of Canada (SCC) concluded that SDMs could be required to give written reasons for their decisions without any express legislative requirement. The SCC concluded that this duty is an element of procedural fairness – that is, part of an individual's right to a fair process when an administrative decision is made that affects them. This common law obligation applies "where the decision has important significance for the individual, where there is a statutory right of appeal, or in other [unspecified] circumstances."¹⁶

The SCC was also very clear that what is necessary to satisfy the requirements of procedural fairness, including the obligation to give reasons, depends on the particular circumstances. What will satisfy the obligation will vary and, in some circumstances, reasons may not be required at all. However, it has been suggested that the practical effect of the *Baker* decision is that the giving of reasons may now be required in more circumstances.

It remains an option to not address the obligation to give reasons in legislation and leave it to the courts to decide if reasons ought to be given should the issue arise. However, a downside to not providing clear legislative direction is that

¹⁴ Some earlier notable exceptions include *Future Inns Canada Inc. v. Nova Scotia Labour Relations Board* (1997), 97 CLLC 220-089 (N.S.C.A.), where reasons were required so the court could review the original decision and *Orlowski v. British Columbia (Attorney General)* [1992] B.C.J. No. 1692 (CA) (QL) where reasons were required based on the existence of a statutory right of appeal and the importance of the decision. And other courts have certainly commented that the lack of written reasons made the exercise of appeal or review rights very difficult.

¹⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

¹⁶ *Ibid.*, at para. 43.

neither the SDMs nor the persons affected will know what is legally required. If the SDM decides not to give written reasons, and a person affected believes the SDM is wrong in that determination, significant time and resources can be taken up to have the matter determined by the courts. And, as noted in the Introduction, government and citizens alike want problems to be resolved simply, quickly and affordably. Leaving this matter up to the courts to determine may not be the best use of scarce resources. Balanced against this is the time and effort to develop appropriate legislation.

If reasons are not given, the court can order the decision-maker to provide sufficient reasons for its decision or set aside the decision and send the matter back to the SDM for a re-determination. In some cases, the court may simply substitute its own decision, without a full appreciation of the impacts for a program or scheme.

How to Make the “Right” Choice

Making a determination about whether to impose a legislative requirement to give written reasons can be difficult. In many cases there will be no “right” choice.

Making the choice of whether to impose the obligation may be more critical when a new decision-making authority is being established by legislation. For SDMs who are already operating within an established legislative scheme, an option may be to include this issue on the list of items to be considered the next time the legislation is amended.

Some of the Advantages and Disadvantages of legislation expressly setting out the requirement to give reasons can be found at page 12. These should be considered within the context of the program within which the decisions are being made.

Given the vast range of statutory decision-making, not all factors will apply the same or even at all, to all decisions. No hard and fast rules could or should be made as to how any factor will apply, or the conclusion that should be reached, without information about the program or policy context of the decision. Users will need to bring their own evaluative experience and consider the various factors in the context of their applicability in the particular program circumstances.

The Guide assumes the persons using it will bring a comprehensive understanding of the program area within which the decisions are to be made, including:

- 🕒 the context in which the decisions are made;
- 🕒 the persons impacted by the decisions; and
- 🕒 the consequences of the decision to those persons, to the public and to government.

For this reason, a cross-disciplinary team that brings a variety of perspectives and experiences is recommended. Such a team may include policy analysts, program managers, operational staff and legal counsel.

Advantages to Giving Reasons

Reasons provide the explanation or justification for a decision and can help those persons affected by the decision to understand the basis on which the decision was made. Advantages include:

Fairness and Transparency

Simply put, persons affected by a decision that is adverse to a significant personal interest should have the ability to know why the decision was made.¹⁷ Giving written reasons helps affected persons ensure his or her concerns were heard and considered by the decision-maker. Even where the decision is in the person's favour, giving written reasons provides the public an opportunity to see that the decision was reached in a fair way and on a proper basis.

Increased Consistency

One of the goals of many administrative programs is to ensure that 'like cases are treated alike'. Reasons given by one SDM can provide a useful guide for other SDMs within the same or similar programs. This can, in turn, increase the consistency of decisions made within a program area.

Increased Efficiency

Reasons for decisions can clearly communicate to individuals and user groups how specific program policies and legislation will be applied and can set out the parameters for how decision-makers should exercise their discretion. In this way, people can know what is expected of them and can take the steps necessary to meet those requirements, which can mean less time and effort by the parties to achieve compliance.

Improved Regulatory Compliance

In a program with regulatory aspects, clear reasons can help parties know what they need to do to meet the requirements. This will enhance program compliance and potentially reduce the need for enforcement activities.

Improved Quality

An obligation to put the reasons for making a decision in writing can help the decision-maker focus on and give careful consideration to all the issues raised and any evidence and submissions made by the persons affected. In the course of writing reasons, the decision-maker must determine what is (and what is not) relevant; what, if any, evidence is acceptable; which evidence is (most) persuasive; and must decide whose views or positions most accurately reflect the legislation and policy that governs the decision to be made. Simply by doing

¹⁷ See *Baker*, *supra* note 15 : "It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached."

this, the quality of decisions should improve. This may be of more importance if the decisions being made are more complex, involve a variety of issues and possibly contradictory evidence or submissions. Decisions that are less complex, have little discretion to be exercised, or have little impact, may not require this kind of thoughtful reflection.

Fostering Decision-Makers' Professional Competence

The responsibility to provide reasons can provide an additional impetus for SDMs to acquire the knowledge and experience necessary to competently decide the matters under consideration.

Assisting in Determining Whether to Exercise the Right to Review

Reasons can help persons who are negatively impacted by a decision to assess whether to trigger any rights they may have to a review (for example an internal review or reconsideration, judicial review, or an appeal to a court or tribunal). Reviews can be costly and time-consuming for both the parties and for the justice system as a whole. Carefully assessing reasons can help in making a well-informed decision about exercising review rights and may limit unnecessary time and expense that may be associated with reviews that have no reasonable chance of success.

Earlier Resolution

If better initial decisions are made, resulting in fewer decisions being overturned on review, it is possible that eventually fewer reviews will be requested. As a result, final decisions will be made faster, with less time and resources spent on complex review proceedings.

Disadvantages of Giving Reasons

Imposing an obligation to give reasons for SDMs' decisions may have some drawbacks. (Remember, however, it may not always be a choice whether to give reasons – the common law may impose an obligation, unless the legislation is clear that reasons are not required). Some of the disadvantages may include:

Lack of Added Value

Requiring reasons may be unnecessary to ensure fairness and transparency. A requirement to give detailed reasons in each case may simply not provide much additional value. SDMs could instead publish policy papers, annual reports, practice directives and even hypothetical rulings, to help give individuals affected by SDMs' decisions, and the public, a good understanding of the basis on which those decisions are made.¹⁸

Loss of Flexibility

While an obligation to give reasons may increase consistency, it may mean a loss of flexibility to address individual circumstances, which is often a primary

¹⁸ R.A. MacDonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123 at 158.

goal of statutory decision-making schemes. If flexibility within the scheme is important, it may be critical for the legislation to ensure that the decisions are to be based on deliberately flexible legislative or policy standards such as community interest or convenience.¹⁹

Additional Resources will be Required

Requiring SDMs to give written reasons for their decisions is almost certain to mean additional work. Writing concise, understandable reasons can be time-consuming and may require skills that not all SDMs will necessarily have. Additional training or access to other resources (such as lawyers to help with the writing process) may be needed. This may take away from other higher priority program goals.

Becoming too Court-like

Imposing an obligation on SDMs to give reasons for their decisions can make the scheme too much like the courts. One reason SDMs are used is to be a less formal alternative to the courts, not to mimic the courts. Also, SDMs should not be held to the same expectations or standards as courts, and requiring reasons is one way that can happen.

Lack of Candour

Because of concerns related to lack of resources and becoming too court-like, SDMs may simply issue “safe”, ‘truncated’ and ‘formulaic’ reasons to avoid having their decisions reviewed or criticized, so no real advantage is gained by imposing an obligation to give reasons.²⁰

Meeting a Legal Obligation to Give Reasons

Various factors must be met to satisfy the legal obligation to give reasons. Care should be taken when implementing a new obligation, or meeting an existing obligation, to make sure processes are in place to effectively meet the legal requirements.

Who Must Make the Decision and Give the Reasons?

As noted above, where legislation requires a SDM to make an administrative decision, that decision must be made by that SDM unless clear legislative authority permits the SDM to delegate this obligation. However, while the SDM has the legal responsibility to make the ultimate decision, participation by the SDM’s staff in the process of preparing reasons will not, by itself, be viewed as improper.²¹ The test for whether such assistance is legally acceptable is whether it compromises either the fairness or the integrity of the decision-making process.

¹⁹ Ibid, 157.

²⁰ Ibid, 151.

²¹ *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 9 O.R. (3d) 642 (CA); See the discussion in Robert W. McCauley and James L.H. Sprague, (in *Practice and Procedure Before Administrative Tribunals* Volume 3, p. 22-66.1); *IWA v. Consolidated-Bathurst Packaging Ltd.*,

Content of the Reasons

To satisfy a legal obligation to give reasons, the reasons must be sufficient, but what will be sufficient will vary depending on the circumstances. Merely reciting the evidence and stating a conclusion will not meet the test for sufficient reasons. Generally, to be sufficient, reasons are expected to:

- set out the key findings of fact relevant to the decision that is being made;
- set out the principal evidence on which those findings of fact are based;
- address the major points in issue;
- reflect a consideration of the main factors relevant to the decision;
- set out the law or policy relied on to reach the decision; and
- set out the reasoning process followed by the decision-maker.²²

In addition, if the decision involves the exercise of discretion, the reasons should:

- indicate that the decision-maker understood the nature of the discretion and that he or she could choose from a range of possible outcomes; and
- set out the factors that were considered in exercising the discretion.²³

Generally, a decision-maker's reasons do not need to:

- explain in great detail why one witness's evidence was found to be more credible than the conflicting evidence of another witness; or
- specifically refer to each item of the evidence.

The general trend is that the courts will set aside a decision that lacks sufficient reasons,²⁴ regardless of whether the court considers the decision to be correct.

For many SDMs, additional training in effective decision-writing will be required to meet their legal obligation to give reasons.²⁵ Another important factor the decision-maker may need to consider when writing reasons is the literacy ability of the party or parties involved.

[1990] 1 S.C.R. 282; *John Witness v. Canada (Royal Canadian Mounted Police)*, [1997] F.C.J. No. 1509 (QL).

²² *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25; See also McCauley and Sprague, *supra* note 21, at 22-77.

²³ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650; See also David J. Mullan, *Administrative Law: Cases, Texts and Materials* 5th Ed. (Toronto: Edmond Montgomery Publications Ltd.) 2003, at 471.

²⁴ Where the courts decide to set aside the decision, they usually do so on the grounds that the failure to give reasons is a breach of procedural fairness (*Lee v. Canada (Correctional Service)*, [1994] 1 F.C. 15 (T.D.); *Megens v. Ontario (Racing Commission)*, 64 O.R. (3d) 142 (Div. Ct.).

²⁵ An example of such training is the Council of Canadian Administrative Tribunals Online Decision-Writing Course that can be found at <http://www.ccat-ctac.org/en/resources/profdev/index.php>

Conclusion and Reference Materials

Like many issues, the public policy considerations respecting the requirements for SDM to give reasons are inter-related and complex. Careful thought and analysis of those considerations will be required, and different approaches may be required for different SDMs. Given the vast range of decisions, no one approach will apply to all decisions.

If written reasons for decisions are to be issued, here are some useful resources that can be used as reference materials.

Articles

Edward Berry, *Writing Reasons: a Handbook for Judges*, E-M Press, Victoria, 1998.

S.R. Ellis, Carole Threthewey, and Frederika Rotter, *Tribunals – Reasons, and Reasons for Reason*, *CJALP* (1990-1), 4. p. 105.

Bryan A. Garner, *The Elements of Legal Style*, Oxford University Press, 1991.

Ronald L. Goldfarb and James C. Raymond, *Clear Understandings: A Guide to Legal Writing*, Goldenray Books, Tuscaloosa, 1988.

Louise Mailhot and James D. Carnwath, *Decisions, Decisions: A Handbook for Judicial Writing*, Les Editions Yvon Blais Inc., Quebec, 1998.

Michael H. Morris, *Administrative Decision-Makers and the Duty to Give Reasons: An Emerging Debate*, *CJALP* (1997-8), 11 p. 155.

William Strunk, Jr. and E. B. White, *The Elements of Style*, 4th ed. Allyn & Bacon, Massachusetts, 2000.

Richard C. Wydick, *Plain English for Lawyers*, 3rd ed., Carolina Academic Press, Durham, 1994.

Joseph M. Williams, *Style: Toward Clarity and Grace*, University of Chicago Press, 1995.

Course

Council of Canadian Administrative Tribunals – Online Decision-Writing Course, <http://www.ccat-ctac.org/en/resources/profdev/index.php>

Appendix A – Checklist of Considerations for Giving Reasons for Decisions

1. THE OPTIONS

- No Legislation – Leaving it to the Court to Decide
- Legislating to Clarify that Written Reasons are not Required
- Legislating the Obligation – Some Choices
 - Specific or Generic Legislation
 - Limiting to only if Reasons are Requested
 - Limiting to only Where the Rights of a Person are Adversely Affected
- If legislating, you will also need to consider
 - What Decisions the Obligation will Apply to
 - Who is to Make the Decision
 - Time Limits for the Reasons to be Issued
 - Effective Date
 - Requirement to Send a Copy of the Decision
 - Ability to Correct Obvious Errors
 - Consequences of a Failure to Give Reasons
 - Public Access to Decisions
 - Privacy Considerations
 - Enforcing Decisions

2. MAKING THE “RIGHT” CHOICE

- Potential Advantages of Giving Reasons
 - Promotes Fairness and Transparency
 - Increases Consistency
 - Increases Efficiency
 - Improves Regulatory Compliance
 - Improves Quality
 - Fosters Decision-Makers’ Professional Competence
 - Assists in Determining Whether to Exercise the Right to Review
 - Helps achieve Earlier Resolution
- Potential Disadvantages to Giving Reasons
 - Lack of Added Value
 - Loss of Flexibility
 - Need for Additional Resources
 - Unwelcome Judicialization
 - Lack of Candour