

***STATUTORY DECISION-MAKERS AND THE
OBLIGATION TO GIVE REASONS FOR
DECISIONS***

A DISCUSSION PAPER

**Administrative Justice Office
Ministry of Attorney General
Province of British Columbia
PO Box 9210 STN PROV GOVT
Victoria BC V8W 9J1
Phone: 250 387-0058
Fax: 250 387-0079**

Website: <http://www.gov.bc.ca/ajo/>

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Executive Summary

Purpose - to prompt discussion about SDMs giving reasons

The purpose of this paper is to prompt discussion about the nature and extent of statutory decision-makers' (SDMs) responsibility to give reasons for the decisions they make. It is intended to be used as a tool for existing SDMs to assess their need to give reasons and to possibly develop a framework to be used by policy makers when establishing a new decision-making scheme. Other readers may also find the discussion to be of interest.

Context

Every day, literally hundreds of SDMs apply laws and policies to make decisions in individual cases. The outcomes of their decisions—often about such things as licensing, permits, or benefits and other entitlements—can have a significant impact on the individuals directly involved, as well as businesses and the general public. Providing written reasons for making a particular decision can help those affected to understand why that decision was made - especially if the person is dissatisfied with the decision - and also provide important information to the public. However, not all SDMs are obliged to give reasons, and a requirement to give reasons is not without some challenges.

The information presented in this paper is intended to encompass the broad range of decisions made every day by various SDMs, as well as the differing impact of those decisions on the individuals and businesses directly involved, and on the general public. The paper also reflects the broad range of authority the various SDMs may exercise in making their decisions, from very limited, narrow discretion to broad discretion similar to that of the courts and of many tribunals.

This paper is part of a larger project, more fully described in the Introduction.

Overview of Contents

This paper poses a series of questions; highlights some of the advantages and disadvantages of providing written reasons for decisions; and describes the current legal requirements to give written reasons for decisions, as well as some of the legal consequences of failing to give reasons when legally required to do so. Some related issues are also identified.

- ***Advantages and disadvantages of giving reasons***

Advantages discussed include:

- improving the quality of the decisions being made;
- enhancing the fairness and transparency of the decision and the decision-making process;
- facilitating the exercise of any rights to have the decision reviewed;
- increased consistency and increased efficiency;
- improved regulatory compliance and earlier resolution; and

- fostering decision-makers' professional competence.

Potential disadvantages identified include:

- inefficiency;
- undesirable “judicialization” of SDMs decision-making process;
- a lack of candour;
- loss of flexibility; and
- lack of added value.

- ***Legal obligation to give reasons***

The paper provides an overview of how the legal obligation to give reasons may be imposed: by legislation or by the common law, with the following factors considered under the common law:

- the nature of the decision;
- the nature of the specific legislative provision and of the statutory scheme as a whole under which the decision is made;
- the importance of the decision to the individual affected;
- the legitimate expectations of the person challenging the decision; and
- the choice of procedures made by the decision-making agency.

- ***Pros and cons of options of Legislation and the Common Law***

The advantages and disadvantages of using legislation or relying on the common law are reviewed, with legislation generally considered to provide greater certainty, to be more cost-effective and timely, but perhaps less flexible in responding to changing circumstances. In contrast, the common law may be more flexible and more nuanced, but less clear and may result in costly and time-consuming referrals to the courts.

- ***Legal consequences of failing to give reasons***

The consequences of the failure to give reasons when legally required to do so are also examined. Sometimes providing a right to request re-consideration or review will be enough, while in other circumstances, the decision may be set aside and the entire matter sent back to the decision-maker for a re-determination, which can be onerous both for the decision-maker and for the parties to the decision.

- ***Other related matters –FOIPPA, Automation and Training needs***

Other related matters that may arise are the application of *The Freedom of Information and Protection of Privacy Act* respecting disclosure of notes and drafts and the potential need to remove private information from decisions, and the opportunity to use automated decision-making systems.

Questions for Discussion

Questions that can arise when considering SDMs' obligations to give reasons include:

1. Do SDMs know if and when they are legally required to give reasons for their decisions? Is there an easy way for SDMs to assess that obligation? If not, what might assist them to do that?
2. Is the legal obligation to give reasons any different from the public interest in reasons being given? And if so, how is it different and what might that mean for SDMs?
3. Is the common law respecting SDMs' obligation to give reasons clear enough? Is it flexible enough? Or is it too onerous and should it be restricted? If so, in what circumstances, and how?
4. Can legislation address some of the problems that might be associated with the common law obligation to give reasons? Which problems could be addressed, and how? Could legislation give greater clarity and enhance flexibility to that obligation?
5. Are there circumstances where SDMs should be expressly required by legislation to give reasons for their decisions? Are there criteria that would assist in identifying those circumstances? What might those criteria be?
6. Are there circumstances where the disadvantages of giving reasons support legislation to expressly exempt SDMs from giving reasons? Are there any common criteria that might apply to identify which SDMs should be exempt from an obligation to give reasons? What might those criteria be?
7. Should any legislated obligation to give reasons set different requirements for different types of SDMs? How, and on what basis?
8. Should any such legislation set out the effects of a failure to give reasons? What should those effect(s) be? Should those effects differ depending on the nature of the failure? How and on what basis?
9. Should any such legislation specify the type or level of assistance the SDM can receive from others when writing the reasons or making the decision?
10. Is legislation required to expressly address the obligation to keep private information confidential? If not, what other options might help support the need for privacy?

11. Should legislation allow for automated decision-making systems to be used? Should there be any criteria or restriction for the use of automated decision-making systems?
12. Would a single legislative framework, similar to the *Administrative Tribunals Act*, be useful to set out the responsibilities of SDMs to give reasons? Or would legislation specific to each SDM be better and why?
13. What skill and training would assist SDM in meeting their obligation to give reasons? Would checklists or guidelines be helpful?

This list does not purport to be all-inclusive; there will no doubt be other questions and, hopefully, answers that readers may identify.

You are invited to share your thoughts, ideas and comments on these issues, or any others you may have on this topic, with the Ministry of Attorney General's Administrative Justice Office (AJO) at:

PO Box 9210 Stn Prov Govt
Victoria, BC V8W 9J1
Fax: 250-387-0079

Or you can use the Feedback option on the AJO Web site at: www.gov.bc.ca/ajo

Submission of comments by **October 1, 2008** would be appreciated.

Introduction

Government wants a civil justice system where citizens can solve their problems simply, quickly and affordably, achieving earlier solutions and faster justice in all aspects of the justice system.

Statutory decision-makers (SDMs)¹ are a critical component of the justice system. The outcomes of their decisions can have a significant impact on individuals, businesses and the public. For those impacted to accept these decisions as having been fairly made, it is critical that the procedures and processes used, and the authorities exercised, are clear, consistent, accessible and proportionate to the nature and impact of the decision.

Decisions need to be fair and just for both individuals and the wider public who benefit from them. Fair and just decisions save time and expense by reducing the need for review by a tribunal, court or other oversight body, such as the provincial ombudsman.

To this end, the Ministry of Attorney General, through the Administrative Justice Office (AJO), is leading a systemic review of SDMs' powers, procedures and authorities. The review involves research, consultation and recommendations to ensure SDMs have appropriate and proportionate powers, procedures and authorities that achieve earlier solutions and faster justice within their respective mandates. Recommendations for broad-based, systemic reform legislation may be a result, similar to the standard framework provided for tribunals by the *Administrative Tribunals Act*.

This paper is the first of a series of research papers from the AJO and is intended to prompt discussion about the nature and extent of SDMs' responsibility to give reasons for the decisions² they make, with a view to developing policy, and possibly legislation, on this issue. To provide some context for the discussion, this paper

- poses a series of questions (set out at the end of the Executive Summary);
- highlights some of the advantages and disadvantages of providing written reasons for decisions;

¹ For the purposes of this paper, 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.

² Reasons can be given many ways: in-person, by informal written notice, or by more formal, written explanations. In this paper, "reasons" is intended to mean formal, written explanations.

- describes the current legal requirements to give written reasons for decisions;
- discusses some of the legal consequences of failing to give reasons when legally required to do so; and
- identifies some related issues.

Your thoughts, ideas and comments on these issues, or any others you may have on this topic, will be valuable in assessing what future policy in British Columbia ought to be.

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. Every day SDMs apply laws and policies to make decisions in individual cases but not all SDMs are obliged to give reasons for those decisions.

The principal advantages of giving written reasons for decisions are generally considered to be:

- improving the quality of the decisions being made,
- enhancing the fairness and transparency of the decision and the decision-making process, and
- facilitating the exercise of any rights to have the decision reviewed.³

Improved Quality

The actual process of setting out the reasons for a decision in writing is considered by many to be a highly valuable tool in helping a SDM arrive at a better decision, as the task of putting the reasons in writing makes the decision-maker focus on and give careful consideration to all the issues 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 and 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.

Also, the knowledge that the reasons will be scrutinized by the people directly affected by the decision (especially the “losing” party), and possibly others such as the public, the courts, professional colleagues or others in a particular

³ In the leading Canadian case on the obligation to give reasons, the Supreme Court of Canada gave a concise summary of how reasons can achieve all three of these goals: “Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review [citation omitted] Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given.” (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

business or industry, is thought by some to "reduc[e] to a considerable degree the chances of arbitrary or capricious decisions."⁴

Fairness and Transparency

Simple fairness and respect may be reason enough to give those who are affected by a decision the chance to know why the decision was made, especially when the decision is adverse to a significant personal interest.⁵ In addition, the giving of written reasons provides affected persons and others with an opportunity to see that the decision was reached in a fair way and on a proper basis, which can, in turn, lead the parties to accept the decision-making process as legitimate, even when the decision is unfavourable to them.

Giving written reasons can increase the transparency of the decision-making process, and help to ensure that every party knows his or her concerns were heard and considered by the decision-maker. In other words, reasons can help the parties (and most importantly the unsuccessful party) see "not only that the conclusion reached was correct, but that it was reached only after due and impartial deliberation."⁶

In contrast, where decisions are made without providing any justification for the decision, the parties may be more likely to question the legitimacy of the decision-making process itself and the integrity of the government and the justice system as a whole.

Right to Review

Reasons can provide a basis for considering whether to request any additional review process that may be available (for example an internal review or reconsideration, judicial review, or an appeal to a court or tribunal). For instance, written reasons can help a person who is dissatisfied with a decision make an informed evaluation about whether the decision-maker made an error, or whether there is some other reasonable basis for requesting a review.⁷ And since reviews can be costly and time-consuming for both the parties and for the justice system as a whole, being able to make an informed decision about whether to initiate review proceedings can save unnecessary time and expense associated with reviews that have no reasonable chance of success.

If a decision is reviewed by the court or a tribunal, the written reasons will typically be the only source of information about the decision-maker's analysis of the issues, evidence and submissions looked at by the reviewer.⁸ And if reviewing a decision for its reasonableness, the court:

⁴ *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684.

⁵ See *Baker*, *supra* note 3: "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."

⁶ R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990) 3 C.J.A.L.P. 123 at 146.

⁷ Not all decisions are reviewable. Some decisions are only reviewable on limited matters like errors of law, so reasons can be especially important in those cases.

⁸ See *supra* note 6, at 146.

.... inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.⁹

Clearly, judicial review is based on the idea that the court will be able to examine the reasons for the original decision.¹⁰

Other advantages of giving reasons may include:

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, which 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 making decisions. 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 which will improve the system as a whole.

Improved Regulatory Compliance

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

Earlier Resolution

Providing reasons may make it less likely that SDMs' decisions will be overturned by the courts because, as noted above, the process of writing the reasons can help SDMs avoid errors and those reasons will allow the reviewing court or tribunal to better understand the basis of the decision.¹¹ If fewer decisions are

⁹ *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47. Note: this case substantially changed the law relating to the amount of deference to be given by the courts to a decision by another, also known as the "standard of review".

¹⁰ Only when applying the correctness standard of review may the court conduct its own reasoning process to decide on the 'correct' result.

¹¹ Robert W. McCauley and James L.H. Sprague, (in *Practice and Procedure Before Administrative Tribunals* Volume 3, p. 22-66.1), for example, note that even where there is "no legal responsibility on the original decision-maker to give reasons, the absence of reasons will

overturned on review, it is possible that eventually fewer reviews will be requested and, as a result, final decisions will be made faster, with less time and resources spent on complex review proceedings.

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. Reasons can also be a means for SDMs to demonstrate their competence and in this way earn the respect of the parties and the deference of the courts.¹²

Disadvantages of Giving Reasons

The responsibility to give reasons for SDMs' decisions may have some drawbacks. Some of the disadvantages may include:

Inefficiency

The most commonly expressed concern about requiring SDMs to give written reasons for their decisions is that doing so will create significantly more work. Writing concise, understandable reasons can be time-consuming. If SDMs are required to spend significant time writing their decisions, there will be less time available for other work which could lead to delays, backlogs and other bureaucratic inefficiencies. These are serious concerns since one of the primary reasons for giving SDMs the power to make decisions is that they are thought to be able to do so in a quick and efficient manner. Hiring additional SDMs in order to avoid delays or backlogs creates both funding and personnel problems. Further, crafting good reasons requires skills that not all SDMs necessarily have so additional training or access to other resources (such as lawyers to help with the writing process) may be needed.¹³

Undesirable Judicialization of SDMs' Decision-Making Process

Some commentators express concerns that imposing a responsibility on SDMs to give reasons for their decisions will bring into the administrative justice sector a requirement that was created specifically for the courts. Some have suggested that the giving of reasons by judges is motivated by individual rights rhetoric that is hostile to the collective goals and institutional policies that apply to SDMs' decision-making.¹⁴ Another commentator has noted that many of the screening or pre-hearing investigative decisions of SDMs, which are often based on open-ended policy considerations, are "difficult to review with reference to a fixed

have a negative impact on the reviewing court's determination of the correctness or propriety of the decision under review."

¹² See David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 C.J.A.L.P. 59.

¹³ As with efficiency, concerns over costs are most acute where the SDM faces a high volume of cases.

¹⁴ MacDonald and Lametti, *supra* note 6, at 150-1.

adjudicative standard.”¹⁵ Further, “some kinds of judgments simply do not lend themselves to explanation by a traditional set of reasons.”¹⁶

Lack of Candour

Concerns have also been expressed that the requirement of court-like, archival reasons for what are often policy-based administrative decisions will mean that SDMs’ reasons for decisions “will almost always be false to the logic which supports them,”¹⁷ downplaying the full range of considerations which were actually brought to bear. It is suggested that, to make matters worse, SDMs may simply adopt the habit of issuing “‘safe’, ‘truncated’ and ‘formulaic’ reasons to avoid having their decisions disturbed on judicial review.”¹⁸ If this happens, many (and perhaps most) of the benefits that are theoretically achieved by giving reasons will be lost.

Loss of Flexibility

While some see the giving of reasons as providing a guide for other decision-makers that can help achieve consistency, others think reasons can mean a loss of flexibility, especially where decisions are to be based on deliberately flexible legislative or policy standards such as community interest or convenience.¹⁹ In addition, using reasons as a precedent for other cases may seriously compromise the decision-making process, as reasons can often “draw subtle factual distinctions... which, not surprisingly, then require the services of a lawyer to untangle.”²⁰

Lack of Added Value

An overarching criticism of a requirement for reasons to be given for SDMs’ decisions is that reasons are often unnecessary to ensure fairness and transparency. SDMs often publish policy papers, annual reports, practice directives and even hypothetical rulings, which can help give individuals affected by SDMs’ decisions a good understanding of the basis on which those decisions were made.²¹ As such, especially in mass-adjudication situations where the facts underlying an SDM’s decision are straightforward and the decision-making process is transparent (for example, where an applicant is denied a benefit because they do not meet the age or residency requirements), written reasons may not be necessary to help the applicant understand the decision.

Legal Obligation to Give Reasons

Some SDMs may already be legally obligated to give reasons for decisions either under express direction by the Legislature or where the courts impose the

¹⁵ Michael H. Morris, “Administrative Decision-makers and the Responsibility to Give Reasons: An Emerging Debate,” (1997) 11 C.J.A.L.P. 155 at 175.

¹⁶ *Ibid.*

¹⁷ MacDonald and Lametti, *supra* note 6, at 154.

¹⁸ *Ibid.*, 151.

¹⁹ *Ibid.*, 157.

²⁰ *Ibid.*

²¹ *Ibid.*, 158; Morris, *supra* note 15, at 174.

requirement under the common law.²² An understanding of when and how the obligation to give reasons can be imposed and met, and the advantages and disadvantages of each, may be helpful in considering potential reforms.

Legislation

A number of British Columbia statutes expressly require SDMs 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. Examples of specific British Columbia legislation that require a particular SDM to provide reasons include the *Motor Vehicle Act*, which applies to the Superintendent of Motor Vehicles,²³ and the *Liquor Control and Licensing Act*, which applies to the General Manager of the Liquor Control and Licensing Branch.²⁴ An example of generic British Columbia legislation is the *ATA*, which provides a framework of consistent, modern powers for British Columbia tribunals, and includes requirements to give written reasons for decisions and to make those decisions publicly accessible.²⁵

Although specific legislation is typically more common, other provinces also use generic legislation to impose the responsibility to give reasons for decision. Examples include:

- Alberta's *Administrative Procedures Act* requires SDMs who exercise a statutory power that adversely affects the rights of a party to provide each party with a written statement setting out "the findings of fact on which it based its decision" and "the reasons for the decision."²⁶
- Ontario's *Statutory Powers Procedure Act* requires all SDMs to give written reasons for their decisions if requested by a party to the decision.²⁷
- Quebec's *An Act Respecting Administrative Justice* requires that an "administrative authority" must give reasons for any unfavourable decision it makes, and that every decision of an "adjudicative body" "must be communicated in clear and concise terms to the parties and to every other person that the law indicates."²⁸

²² The legal requirements for SDMs to give reasons (and various other legal obligations), have been described by David Mullan, a leading administrative law scholar, as forming part of the *due process explosion* in Canadian administrative law over the last forty years. See "Tribunals Imitating Courts -- Foolish Flattery or Sound Policy?" (Spring, 2005) 28 Dalhousie L.J. 1.

²³ R.S.B.C. [1996] c. 318, sections 94.6 and 104.8.

²⁴ R.S.B.C. [1996] c. 267, sections 12, 12.1 and 20. (First enacted in 1968, this is the earliest example of this responsibility.)

²⁵ *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 51 and s. 50(4).

²⁶ *Administrative Procedures Act*, R.S.A. 2000, c. A-3, s. 7.

²⁷ *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 17.

²⁸ *An Act Respecting Administrative Justice*, R.S.Q., c. J-3.

Common Law

Until quite recently, the common law did not generally require SDMs to give reasons for their decisions.²⁹ However, the Supreme Court of Canada (SCC) changed the law in its 1999 landmark *Baker* decision;³⁰ the Court found that SDMs are required to give written reasons for their decisions “where the decision has important significance for the individual, where there is a statutory right of appeal, or in other [unspecified] circumstances.”³¹

The common law duty to give reasons for a decision has developed as an element of procedural fairness, a term used to describe an individual’s right to a fair process when an administrative decision affecting him or her is made. The type or extent of the processes that must be made available will depend on the particular circumstances in which the decision is being made. In fact, for some decisions no procedural protections will be given at all.

In *Baker*, the SCC set out the following five factors to be considered in determining the extent of the procedural fairness protections to which an individual is entitled:

- the nature of the decision;
- the nature of the specific legislative provision and of the statutory scheme as a whole under which the decision is made;
- the importance of the decision to the individual affected;
- the legitimate expectations of the person challenging the decision; and
- the choice of procedures made by the decision-making agency.

Case law suggests that in deciding whether an obligation to give reasons applies in a particular case, and in determining the extent of that duty, the courts will consider these five factors, and not simply the importance of the decision or the existence of review rights (the two factors specifically mentioned by the SCC in *Baker* as capable of giving rise to a common law obligation to give reasons).³²

As such, where the administrative decision-making process is similar to a judicial process (for example where the decision is made after an oral hearing), or where the individual affected by the decision has a legitimate expectation that they will be given reasons based on past practices, the courts are more likely to find that

²⁹ Some notable exceptions were *Future Inns Canada Inc. v. Nova Scotia Labour Relations Board* (1997), 97 CLLC 220-089 (N.S.C.A.), where reasons were required to let the court 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.

³⁰ *Baker*, *supra* note 3. Ms. Baker, a woman with Canadian-born dependent children, was ordered deported from Canada. Her application for an exemption under the *Immigration Act*, to allow her to apply for permanent resident status while in Canada, was declined, without reasons being given. Her lawyer was eventually given the notes made by an immigration officer that had been subsequently used by a senior officer in making the decision.

³¹ *Ibid.*, at para. 43.

³² *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650.

the duty to give reasons applies, and will also demand more from the decision-maker in terms of the type of reasons required.

In *Baker*, the SCC did not conclude that reasons would be required for all exercises of statutory power. Nonetheless, one administrative law expert has suggested that the practical effect of the *Baker* decision is that procedural fairness now “require[s] the giving of reasons where a real need or purpose for those reasons can be identified which is not offset by some other factor ruling them out or making them impractical”.³³

Pros and Cons of Legislation and the Common Law

There are advantages and disadvantages to using legislation or to relying on the common law to set out SDMs’ obligations to give reasons. Using legislation to set requirements, as opposed to having them determined by the common law, is generally considered to provide greater certainty, in a cost-effective and timely manner. But the common law is thought by some to have more flexibility in responding to changing circumstances.

By using legislation to set out any obligations to give reasons, the Legislature can address the various issues that may arise in advance, and, in doing so, can provide clear direction about what is to be expected in terms of reasons for decisions not only to the SDM, but also to the individuals directly affected by the SDM’s decisions and the public.

Well-drafted legislation can also be tailored to provide the flexibility necessary to address program-specific needs such as timelines. In addition, legislation can accommodate the different day-to-day realities of SDMs by allowing some variance in the content of the reasons that they must provide.

In contrast, the common law may not be as clear about exactly when reasons are required, or the content they must have. There can also be disagreement about whether a particular court decision applies or whether it is confined to its specific circumstances. Interpreting the application of the common law to a new or different set of circumstances can require a new hearing to be held, which can be costly and time-consuming. Additionally, any changes to a program may trigger the requirement for new directions from the court.

However, since changing legislation after it is enacted is a somewhat onerous process, using legislation to set SDMs’ obligations can result in a loss of the flexibility needed to respond to changes in the public’s expectations. The common law can be better able to respond to such changes. The nuanced, flexible nature of the common law also helps address the fact that it may be desirable to give reasons for a decision that an SDM makes one day—because of various personalized factors, such as the parties’ legitimate expectations or

³³ McCauley and Sprague, *supra* note 11.

the importance of the decision to the individual affected—yet, reasons may be completely unnecessary for a similar decision made by the same SDM the next day.

Further, if legislative language is at all unclear, inconsistent or incomplete, there may still be a need for the court to interpret and apply the legislation.

Meeting the Legal Obligation to Give Reasons

If there is a legal obligation to give reasons, a number of factors must be met in order to satisfy that obligation.

Who must make the decision and give the reasons?

The courts have made it clear that where a statute authorizes an SDM to make an administrative decision, that decision must be made by the SDM, unless clear legislative authority permits the SDM to delegate this obligation. Further, the reasons given for the decision must be those of the decision-maker; if someone else makes the decision, or provides the reasons for it, the decision can be set aside by the court as giving rise to an apprehension of bias, or as offending the non-delegation rule.³⁴

However, the courts have also recognized that while the SDM has the legal responsibility to make the ultimate decision, assistance from others (such as lawyers) can be sought during the process of drafting the decision; participation by the SDM's staff in the process of preparing reasons will not, by itself, be viewed as improper.³⁵ As the Ontario Court of Appeal stated, consultation with staff should be encouraged where it promotes the ultimate aim of the drafting process: to create a set of reasons that accurately and fully reflects the thought processes of the SDM.³⁶

The test for whether such assistance is acceptable is whether it compromises either the fairness or the integrity of the decision-making process.³⁷ When

³⁴ The legal rule is that a person who has been delegated responsibility to do a thing cannot delegate that responsibility to another person.

³⁵ *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 9 O.R. (3d) 642 (CA); See the discussion in McCauley and Sprague, *supra* note 11; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *John Witness v. Canada (Royal Canadian Mounted Police)*, [1997] F.C.J. No. 1509 (QL).

³⁶ See *Khan*, *ibid.* Allowing SDMs to seek help writing decisions recognizes that many SDMs and tribunals may simply not have the time to record all aspects of their decision, especially where the decision was made after a lengthy process of consultation or where the SDM is responsible for making a very large number of decisions or has considerable non-administrative responsibilities. A good example of this last type of SDM is a Cabinet Minister who can generally rely on greater staff involvement in the preparation of reasons for decision than other SDMs (*Baker*, *supra* note 3; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1).

³⁷ *Ibid.* Fairness was described by the court as including the protections of procedural fairness. Integrity was defined as including “the broader need to ensure that the body charged with the responsibility of making the particular decision in fact makes that decision after a proper consideration of the merits”. (at 672 O.R.); see also *Consolidated Bathurst*, *supra* note 35.

determining whether fairness or integrity has been breached, the courts have shown considerable willingness to take into account the particular circumstances in which the SDM's decision is made,³⁸ and have expressly rejected imposing “the judicial paradigm of reason writing” on all administrative decision-makers.³⁹

Despite this flexibility, in order to ensure that the process of preparing a decision is legally acceptable, SDMs should always carefully review any staff suggestions, and should make it clear that they have thoroughly considered the issues and that the final decision, and the reasons supporting that decision, are their own.⁴⁰

Content of the Reasons

In order to satisfy the legal obligation to give reasons, the reasons must be sufficient. However, what counts as sufficient will vary depending on the circumstances.⁴¹ For example, the SCC has specifically said that the courts must consider “the day-to-day realities of administrative agencies” when determining whether an SDM's reasons are sufficient.⁴²

The Federal Court of Appeal has also set out a general test for the sufficiency of reasons:

What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the responsibility to provide them was imposed.⁴³

Applying this test is not always easy. The functions for which the obligation to give reasons is imposed will vary.⁴⁴ Further, determining the content that reasons must have in order to serve those functions is, as with all legal interpretation, not an exact science.⁴⁵

However, case law indicates general agreement on many of the specific features that reasons must possess in order to be sufficient. Sufficient reasons are expected to:

- set out the SDM's findings of fact,

³⁸ Factors that will be considered include the SDM's workload, the enabling legislation, the nature of the decision and the support structure available to the SDM (*Khan, supra* note 35).

³⁹ *Khan, supra* note 35.

⁴⁰ McCauley and Sprague, *supra* note 11, at 22-111.

⁴¹ This is because the responsibility to give reasons is an element of procedural fairness, which, as the SCC put it, “is eminently variable, and its content is to be decided in the specific context of each case” (*Knight v. Indian Head School Division No. 19* [1990] 1 SCR) 653.

⁴² *Baker, supra* note 3.

⁴³ *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25.

⁴⁴ For example, reasons may be necessary to facilitate the right to an appeal, while in other cases no such right may exist.

⁴⁵ For example, where the SDM's decision is challenged on appeal or judicial review, the court will ask whether the reasons are sufficient to enable it to effectively review the decision. However, it is less clear how a court should determine whether the reasons given actually achieve the more intangible goals of the responsibility to provide reasons, such as fairness and legitimacy.

- set out the principal evidence on which the findings of fact are based,
- address the major points in issue,
- reflect the 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.⁴⁶

In addition, if an SDM's 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.⁴⁷

However, to meet the test of sufficiency, an SDM's reasons do not always have to look like those issued by the courts. The reasons do not need to:

- be lengthy,⁴⁸
- explain why every piece of evidence was or was not accepted,⁴⁹ or
- mention every point that was considered in the decision-making process.⁵⁰

Further, an SDM will not generally be required to explain in detail the reasons why he or she found one witness's evidence to be more credible than the conflicting evidence of another witness.⁵¹ Also, the courts will generally presume that SDMs have considered all of the evidence submitted, even where their reasons do not refer specifically to each item.⁵² However, merely reciting the evidence and stating a conclusion will not meet the test for sufficient reasons.⁵³

In addition, when considering the sufficiency of reasons, the courts will apply a less stringent test to reasons given by SDMs for routine administrative decisions and a more stringent test to the reasons of an administrative tribunal after an adjudicative hearing.⁵⁴ And while the test will be stricter when the decision-

⁴⁶ *Via Rail*, *supra* note 43; See also McCauley and Sprague, *supra* note 11, at 22-77.

⁴⁷ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, *supra* note 32; See also David J. Mullan, *Administrative Law: Cases, Texts and Materials* 5th Ed. (Toronto: Edmond Montgomery Publications Ltd.) 2003, at 471.

⁴⁸ *Gismond v. Ontario (Human Rights Commission)*, [2003] O.J. No. 419 (Div. Ct.) (QL).

⁴⁹ *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1646 (QL).

⁵⁰ *City Furniture (Y.T.) Ltd. v. Yukon Liquor Corp.*, [2000] Y.J. No. 62 (QL); *Orlowski*, *supra* note 30.

⁵¹ *Nassar v. College of Physicians & Surgeons (Manitoba)*, (1994), 96 Man. R. (2d) 141 (Q.B.), however, a decision-maker may be obliged to explain why they rejected the direct evidence of one party in favour of the hearsay evidence of another. (*Hilo v. Minister of Employment and Immigration*, (1991), 130 NR 236 (FCA)).

⁵² *Ozdemir*, *supra* note 49; *Kindler v. Attorney General of Canada*, [1987] 2 FC 145 (CA).

However, at least one commentator argues that SDMs who do not explain their decisions with reasonably detailed reasons are increasingly at risk of being found by the courts to have failed to consider relevant factors, and advises SDMs looking to avoid this risk to explain not just why they made the decision they did, but also why "they did not make the decision the parties wished them to make" (McCauley and Sprague, *supra* note 11, at 22-78.3).

⁵³ *Via Rail*, *supra* note 43; *O'Donnell v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (1997), 183 N.B.R. (2d) (CA).

⁵⁴ *Ozdemir*, *supra* note 49; *Gismond*, *supra* note 48.

maker is performing a quasi-judicial function similar to the courts, it will not be the same standard as applied to judges' reasons.⁵⁵

For many SDMs, additional training in effective decision writing will be required to meet their legal obligation to give reasons. The availability of and/or access to high-quality training may be problematic for some SDMs.

Consequences of a Failure to Give Reasons

A failure to give reasons when legally required to do so does not automatically mean the decision has no effect. For example, where the responsibility to give reasons is imposed by the common law, a person affected by a decision will usually be expected to ask the SDM to provide reasons before taking any legal action.⁵⁶ If reasons are still not given, the court can order the decision-maker to provide sufficient reasons for its decision or it can set aside the decision and send the matter back to the SDM for a re-determination.⁵⁷

Where the duty to give reasons is imposed by the common law, the general trend is that the courts will set aside a decision that lacks sufficient reasons,⁵⁸ regardless of whether the court considers the decision to be correct.⁵⁹ However, sending the entire matter back to the decision-maker for a re-determination can be onerous both for the decision-maker and for the parties to the decision, especially where the court has found nothing substantively wrong with the decision.⁶⁰

⁵⁵ *Sunshine Coast Conservation Assn. v. Assn. of British Columbia Forest Professionals*, 2007 BCSC 193.

⁵⁶ Unless the obligation to provide reasons is so obvious in the circumstances that no explicit request is necessary. *Marine Atlantic Inc. v. Canadian Merchant Service Guild*, 2000 CarswellNat 1574 (Fed. C.A.).

⁵⁷ Mullan, *supra* note 47, at 482. The court can also send the matter back for reconsideration of only those aspects of the decision not adequately dealt with by the reasons.

⁵⁸ 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.); however, in some cases the courts have also decided to set aside a decision on the basis that the failure to give reasons made the decision patently unreasonable (*Future Inns, supra* note 29, using pre-*Dunsmuir* standard of review language), or amounted to a jurisdictional error (*Mantei v. Morris*, [1996] S.J. No. 536 (QB) (QL)).

⁵⁹ See, for example, *Polaris Resources Ltd. V. Canada-Newfoundland & Labrador Offshore Petroleum Board*, [2006] N.J. No. 265 (SC) (QL); See also McCauley and Sprague, *supra* note 11, at 22-71; and Mullan, *supra* note 47, at 482. However, a court can exercise its discretion and accept a decision that it believes is correct, but is not supported by sufficient reasons (See, for example, *Re Don Howson Chevrolet Oldsmobile Ltd. And Registrar of Motor Vehicle Dealers and Salesmen* (1974), 51 DLR (3d) (Ont. Div. Ct.))

⁶⁰ Mullan, *supra* note 47, at 482. While the court can express limit the matters to be reconsidered to only those aspects not dealt with sufficiently by the reasons, it is generally thought that such reconsideration should be done by the original SDM (as he or she is already familiar with the circumstances related to the issues for re-determination). Of course, the original decision-maker, for any number of reasons, may be unavailable to make the re-determination.

However, the alternative of simply ordering the SDM to provide adequate reasons for his or her decision is also problematic.⁶¹ If reasons are considered an essential element of procedural fairness which helps ensure that the SDM's final decision is well-reasoned and fair, merely requiring reasons to be provided after the decision has been made does nothing to ensure that the original decision was made fairly, with due process. Further, simply ordering reasons to be given *post hoc* may invite the SDM (who may not wish to admit, at this late stage, that he or she made the wrong decision) to simply rationalize his or her earlier decision.⁶²

Where there is a statutory requirement to give reasons, a court will typically look to see if the legislation sets out, or if the Legislature otherwise indicated, the consequences of failing to give adequate reasons, and then it will apply those consequences. If there is no indication of the intended consequences, the court will usually treat the situation as if the responsibility to give reasons were imposed by the common law (and 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).⁶³

Giving Reasons: Other Matters

The Freedom of Information and Protection of Privacy Act

Section 3(1)(b) of the *Freedom of Information and Protection of Privacy Act* (FOIPPA)⁶⁴ states 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 that section applies.⁶⁵

The basis for exempting SDMs' notes and draft decisions from the disclosure requirements of FOIPPA is the belief that SDMs' use of these documents allows them the freedom to develop ideas and to test and revise their initial impressions about a case which, in turn, helps them make better decisions. As such, allowing the public access to these documents is thought to have a potentially chilling effect on the ability of decision-makers to reach independent and informed decisions, as forced disclosure may constrain the decision-making process and force SDMs to carefully ensure that their preliminary notes are acceptable to those who may eventually see them.

⁶¹ A court (or other reviewing entity) is normally asked to change the *decision*, and not the *reasons* for the decision. Thus, if a party agrees with the outcome, but not the reasons for the outcome, he or she cannot ask the court to simply overturn or otherwise change the reasons without also asking for the result to be changed; See also Mullan, *supra* note 47, at 484.

⁶² *Ibid.*

⁶³ McCauley and Sprague, *supra* note 11, at 22-66.3.

⁶⁴ RSBC [1996] c. 165.

⁶⁵ 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.

In addition, the need to protect sensitive private information from wide public access is becoming more topical.⁶⁶ There has been an increase in the posting of reasons for decision on the Internet as an effective tool to enhance transparency. This gives rise to related concerns about the inclusion of sensitive private information in those decisions, with many recommending that tribunals and others 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 by using initials and other techniques. Decision writers may need some training and guidance on how to best accomplish this.

Automated Decisions

Some jurisdictions are now using automated computer systems to assist in making high-volume, relatively straightforward administrative decisions. These systems are considered to be helpful in ensuring that decisions are more accurate and consistent, and are made in a timely, cost-effective manner.⁶⁷ For example, where an SDM is responsible for making thousands of decisions annually, an automated system has been used to screen applicants to make sure they meet basic requirements, such as residency or age. However, where the decision to be made is more complex in that it involves, for example, the making of fine factual distinctions or the application of complex legal rules, an automated system may lack the ability to make, or provide reasons for, subtle judgment calls, thus decreasing the transparency of the decision-making process.

However, an obligation to give reasons does not rule out the possibility of automated decision-making; automated systems may be able to incorporate transparency and accountability principles.⁶⁸ For example, the Australian Government’s practice guide on the use of automated assistance in administrative decision-making suggests that “an automated system should be able to automatically generate a comprehensive audit trail of the decision-making path”.⁶⁹ Audit trails can help make sure that the relevant law, policy and procedures are properly applied in the particular circumstances of the decision,⁷⁰ and can be incorporated into a statement of reasons, or can even, in cases where only informal reasons are required, be provided as the reasons for the decision.

Further, even where the decision-making process involves the exercise of human judgment and discretion, an automated system can be useful to help ensure that such judgment is only exercised in appropriate circumstances, and can outline

⁶⁶ See, for example, Berzins, Christopher, Personal Information in the Adjudicative Decisions of Administrative Agencies: An Argument for Limits, 34 *Advocates Quarterly* 261; Also, the federal Privacy Commissioner, Jennifer Stoddart, is expected to issue a report on this topic, in October, 2008.

⁶⁷ Automated Assistance in Administrative Decision-Making: Better Practice Guide (Government of Australia), 9. See <http://agimo.gov.au/publications/2007/february/aaadm>

⁶⁸ *Ibid*, 44.

⁶⁹ *Ibid*, 46.

⁷⁰ *Ibid*, 48.

the factors the human decision-maker should consider when exercising his or her discretion.⁷¹

Conclusion

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.

Your thoughts and ideas about these, and any other issues you may identify, are important to assist the AJO in considering possible reforms to SDMs' responsibilities to give reasons for their decisions and you are invited to share those thoughts and ideas with the AJO at:

PO Box 9210 Stn Prov Govt
Victoria, BC V8W 9J1
Fax: 250-387-0079

Or you can use the Feedback option on the AJO Web site at: www.gov.bc.ca/ajo

Submission of comments by **October 1, 2008** would be appreciated.

⁷¹ Ibid, 14.

APPENDIX A: Statutory Provisions Requiring Reasons

British Columbia

Administrative Tribunals Act, S.B.C. 2004, c. 45:

1. ...

"tribunal" means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act;

Final decision

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

Alberta

Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c. A-3:

Written decision with reasons

7. When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out

- (a) the findings of fact on which it based its decision, and
- (b) the reasons for the decision.

Ontario

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22:

Decision

17.(1) A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party.

Quebec

An Act Respecting Administrative Justice, R.S.Q., c. J-3:

Reasons.

8. An administrative authority shall give reasons for all unfavourable decisions it makes, and shall indicate any non-judicial proceeding available under the law and the time limits applicable.

CHAPTER II

RULES SPECIFIC TO DECISIONS IN THE EXERCISE OF AN ADJUDICATIVE FUNCTION

...

13. Every decision rendered by the body must be communicated in clear and concise terms to the parties and to every other person that the law indicates.

Australia

Administrative Decisions (Judicial Review) Act 1977:

Reasons for decision may be obtained

- (1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Magistrates Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.
- (2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request.
- (3) Where a person to whom a request is made under subsection (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request:
 - (a) give to the second-mentioned person notice in writing of his or her opinion; or
 - (b) apply to the Federal Court or the Federal Magistrates Court under subsection (4A) for an order declaring that the person who made the request was not entitled to make the request.
- (4) Where a person gives a notice under subsection (3), or applies to the Federal Court or the Federal Magistrates Court under subsection (4A), with respect to a request, the person is not required to comply with the request unless:
 - (a) the Federal Court or the Federal Magistrates Court, on an application under subsection (4A), declares that the person who made the request was entitled to make the request; or
 - (b) the person who gave the notice under subsection (3) has applied to the Federal Court or the Federal Magistrates Court under subsection (4A) for an order declaring that the person who made the request was not entitled to make the request and the court refuses that application;and, in either of those cases, the person who gave the notice shall prepare the statement to which the request relates and furnish it to the person who made the request within 28 days after the decision of the court.
- (4A) The Federal Court or the Federal Magistrates Court may, on the application of:
 - (a) a person to whom a request is made under subsection (1); or
 - (b) a person who has received a notice under subsection (3);make an order declaring that the person who made the request concerned was, or was not, entitled to make the request.
- (5) A person to whom a request for a statement in relation to a decision is made under subsection (1) may refuse to prepare and furnish the statement if:
 - (a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request—the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or
 - (b) in any other case—the request was not made within a reasonable time after the decision was made;

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him or her and giving the reason why the statement will not be so furnished.

- (6) For the purposes of paragraph (5)(b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Federal Court or the Federal Magistrates Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made.
- (7) If the Federal Court or the Federal Magistrates Court, upon application for an order under this subsection made to it by a person to whom a statement has been furnished in pursuance of a request under subsection (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons.
- (8) The regulations may declare a class or classes of decisions to be decisions that are not decisions to which this section applies.
- (9) Regulations made under subsection (8) may specify a class of decisions in any way, whether by reference to the nature or subject matter of the decisions, by reference to the enactment or provision of an enactment under which they are made, by reference to the holder of the office by whom they are made, or otherwise.
- (10) A regulation made under subsection (8) applies only in relation to decisions made after the regulation takes effect.
- (11) In this section, **decision to which this section applies** means a decision that is a decision to which this Act applies, but does not include:
 - (a) a decision in relation to which section 28 of the *Administrative Appeals Tribunal Act 1975* applies;
 - (b) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or
 - (c) a decision included in any of the classes of decision set out in Schedule 2.