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The following guidelines are for use by adjudicators in reconsideration of a referral to a remedial program. The guidelines are designed to assist the adjudicator in balancing the need for public safety and the need for fairness in the exercise of delegated discretion under the *Motor Vehicle Act* (MVA). Section 25.1 of the MVA provides the Superintendent with authority to refer a driver to remedial programs if the Superintendent or his or her delegate determines that a person's driving record is unsatisfactory or if the Superintendent considers that, with respect to the person's driving skills, fitness or ability to drive and operate a motor vehicle, it is in the public interest to make a referral. Section 117 of the MVA gives the Superintendent authority to delegate powers, duties, or functions to OSMV staff. The role of the adjudicator is to review a driver's referral to a remedial program taking into account all relevant considerations, including the considerations outlined in this document, the legislation, the facts of the case, and the principles of administrative fairness.

## **1.1 Common Referrals**

In the absence of evidence that the remedial purpose of s. 25.1 will not be served by a referral to remedial programs, referrals will generally be to both RDP and IIP where the impaired driving sanction is:

- 1 *Criminal Code of Canada* (CCC) conviction or MVA violation;
- 3 or more administrative impaired sanctions within a 5 year period; or
- Where the driver has previously completed a remedial program and receives a subsequent alcohol related prohibition.

Where the impaired driving sanction is a single 90 day Immediate Roadside Prohibition (IRP) or Administrative Driving Prohibition (ADP), the referral will generally be to RDP with an initial assessment conducted by the service provider to inform the Superintendent's decision as to whether a referral to IIP is also warranted. Where the initial assessment conducted by the service provider indicates a high risk, the Superintendent will generally also make a referral to IIP.

As well, drivers can be referred to remedial programs when the Superintendent or their delegate forms the opinion that referral to remedial programs is in the public interest with respect to the person's driving skills, fitness or ability to drive.

The driver may seek reconsideration of the referral decisions. All reconsiderations of referrals are evidence-based and result from a thorough review of the driver's driving record and other relevant evidence. The reconsideration process is designed to ensure that the remedial programs fulfill their remedial purpose and operate in a manner that is both fair and in the public interest.

## 1.2 General Considerations

The driver has a right, under the principles of administrative fairness, to know the case he or she must meet. Accordingly, an adjudicator can only consider information that is available or has been made available to the driver prior to the reconsideration decision, or that is provided by the driver or the driver's representative. That is, the information relied upon by the adjudicator on reconsideration must be either produced by the driver or disclosed to the driver before the decision is made. With this in mind, in reconsidering a remedial program referral an adjudicator should consider all of the following, if they exist:

- the driver's driving record, consisting of:
  - all administrative impaired driving sanctions within a 5 year period;
  - all alcohol-related driving CCC convictions; and,
  - documentation from previous OSMV remedial programs within a 5 year period;
- the driver's RDP initial assessment (applicable for certain referrals to IIP);
- the driver's application for reconsideration; and
- all of the driver's relevant written submissions and evidence.

## 1.3 Guiding Factors

Reconsideration of referrals to remedial programs provides an opportunity for the driver to provide further evidence as to whether the remedial purpose of section 25.1 will be furthered by a referral in the driver's specific circumstances. This means that the Superintendent provides the driver with a process to ensure that a referral does not place an unreasonable burden upon the driver that would defeat the remedial purpose of the program.

Guidelines are offered to assist adjudicators in making consistent decisions that are neither fettered nor arbitrary. The guidelines are not binding rules and the adjudicator must consider all relevant evidence in the circumstances of each individual case in order to determine whether the referral should be upheld, varied or cancelled.

In reconsidering a referral the adjudicator should consider, in the context of the principles of administrative fairness, whether:

- The driver's impaired driving behaviour demonstrates either an unsatisfactory driving record or shows that the driver poses a high risk to public safety that can be addressed by participation in remedial programs (**Threshold Factors**)
- In the circumstances of the driver's case, the burden of compliance for the individual driver outweighs the benefit of the remedial programs (**Compliance Factors**)

### 1.3.1 Threshold Factors

In order for a referral to remedial programs to be authorized under s. 25.1, the Superintendent or their delegate must determine that:

- the person's driving record is unsatisfactory; or
- with respect to the person's driving skills, fitness or ability to drive and operate a motor vehicle, it is in the public interest for the person to attend or participate in one or more remedial programs.

In making this threshold determination as to whether s. 25.1 applies to the circumstances of a particular driver's case, an adjudicator may consider:

- The seriousness, type, and number of impaired suspensions, prohibitions, or offences ;
- The RDP initial assessment (where applicable);
- Whether the driver is in the graduated licensing program;
- Previous participation in RDP and/or IIP; and
- Participation in similar or, equivalent programs offered in other provinces.

This is not an exhaustive list, and the adjudicator must consider all relevant information disclosed to the applicant and information provided by the applicant.

**Note:** An indication on the driving record that a person has received a 'Fail' IRP that was issued prior to November 30, 2011 cannot be considered as evidence that the driver had a Blood Alcohol Content over .08 or as evidence of impairment of a person's driving skills, fitness or ability to drive. That is, a 'Fail' IRP issued prior to November 30, 2011 cannot form the basis for any further action with respect to the referral to remedial programs. This means that if this is the only type of impaired driving sanction on the 5 year driving record, the referral must be revoked.

### 1.3.2 Compliance Factors

Compliance factors speak to circumstances raised by the driver that make it unreasonable for them to comply with remedial program requirements without suffering a burden that outweighs the benefits of the remedial program itself. If the driver were to bear these burdens in these types of circumstances, the remedial requirements would more likely than not have a punitive, rather than remedial, effect.

Considerations that may be relevant to the adjudicator's decision with respect to compliance factors include:

- Economic impact, such as:
  - loss of job
  - loss of home
  - financial impact on family members;
- Impact on community:

- s.13
- Infeasibility to install the device in vehicle:
  - s.13
- Whether driving prohibition occurred in a commercial vehicle - this may be important in determining an appropriate variance;
- Access issues:
  - E.g. The service provider is unable to offer the course in a timely manner given the driver's residence or location
  - E.g. The service provider cannot reasonably accommodate the driver's work schedule to meet program timelines;
- Safety of driver:
  - s.13
- Medical restrictions of driver:
  - s.13

This is not an exhaustive list, and the adjudicator must consider all relevant information that is before the adjudicator on the reconsideration. The adjudicator must, after accepting into evidence all relevant information, make his or her own decision as to the weight to be accorded to each piece of relevant evidence.

That is, there are two questions that adjudicators must ask themselves with respect to each piece of evidence submitted:

- Is the evidence relevant to the fact-finding process in the context of the purpose and subject matter of the decision (admissibility); and
- How accurate and reliable is the evidence and how important is the evidence to the key facts upon which the decision will turn (weight).

○ s.13

#### **1.4 Service Provider Accommodations**

OSVM generally refers drivers to two different remedial programs: RDP and IIP. The RDP provides drivers with education or counselling depending on their needs. Health professionals administer a specific and comprehensive program; therefore, the service provider must work with the client directly to accommodate any reasonable special requirements.

IIP is a program that provides the public with assurance that a driver is not drinking and driving and serves to reinforce the remedial benefits of the education and counselling



programs. The service provider administers a program specified by the Superintendent. Therefore, any accommodations made by the service provider that could impact the public safety outcomes of the IIP require written approval by an OSMV adjudicator and are considered to be a variance.

## **1.5 Variances**

A variance is an alteration to the referral that has been approved by the Superintendent or his delegate. Adjudicators may consider varying the driver's remedial program requirements, where it is reasonable to do so, in order to:

- Ensure public safety is maintained by having the driver complete remedial programs through a varied process rather than cancelling the referral; and
- Allow for remediation without unreasonable burden by having the driver complete the remedial program through a varied process where, without a variance, the driver would face an unreasonable burden as a result of the requirement to complete a remedial program.

### **1.5.1 General Variances**

An adjudicator may vary the remedial requirements to accommodate the driver's circumstances. These requirements, however, cannot be varied in an arbitrary manner, nor can they be varied in ways that do not comply with legislative requirements or that cannot be operationalized.

Where the adjudicator has confirmed that the referral to remedial programs is reasonable in light of the driving record and public interest considerations, but due to personal circumstances, compliance with remediation requirements would create an unreasonable burden for that driver, an adjudicator may:

- if the burden cannot be overcome, revoke the requirement;
- prohibit the driver from driving for an additional specific term under s. 93 of the *MVA* and revoke the remedial program requirements once the additional prohibition has been served;
- vary the RDP or IIP term or waive the IIP requirement; or
- administer a combination of variances.

### **1.5.2 RDP Variances**

Before seeking reconsideration of the referral, the driver should consult with the RDP service provider to determine whether the program can be delivered in a manner that addresses their particular constraints. Where it does not appear that the driver has first consulted with the RDP service provider to seek accommodation, the adjudicator should direct the driver to seek such accommodation before the reconsideration request will be

considered. If the driver has exhausted available options with the RDP service provider, the adjudicator must consider all relevant information that is before the adjudicator in order to determine whether to uphold the referral as originally made, vary the referral or cancel it.

Accommodations that the adjudicator may consider include:

- Timeframe variances
  - E.g. the adjudicator may extend the 12 month RDP completion term to allow the driver more time to complete the program;
- Substitution of different remedial program
  - E.g. Driver provides evidence that an alternative program will meet the remedial purpose while accommodating their specific circumstances.

**Note:** Substitute counselling or education programs will only be considered at the request of the driver. Adequate information about the substitute program must be submitted by the driver. The adjudicator does not have a duty to seek out additional information to determine if the program is equivalent to the RDP.

### 1.5.3 IIP Variances

The IIP is administered by a service provider through OSMV oversight. Any variances to the program need to be considered by an adjudicator to ensure public safety is maintained. In consideration of the driver's circumstances an adjudicator may request variance to the program from the service provider which may include:

- Modifications to account for medical conditions
  - E.g. Ignition interlock device's required air volume may be lowered to accommodate a respiratory disorder.

**Note:** More variance options will become available when practicable.

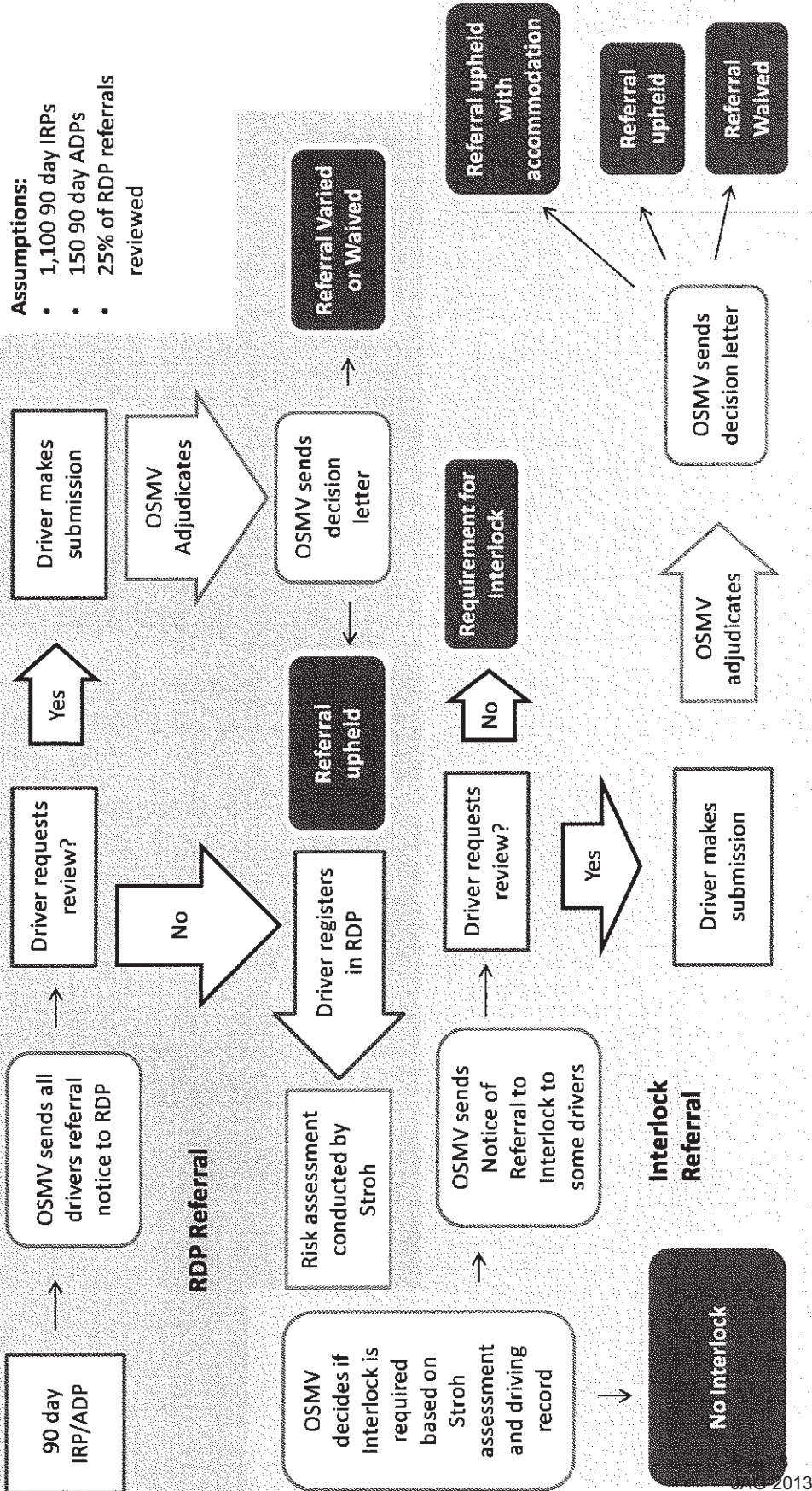
# 90 Day IRP and ADP: RDP & Modified Interlock

## Summary:

- 2 separate referral processes
- Best legal evidence for interlock referral
- Referral process may not be completed within 90 days

## Note on Interlock Volumes:

- Thresholds will determine the number of drivers referred to Interlock
- Assumption is that review rate and % waived or varied will increase as number of drivers referred increases





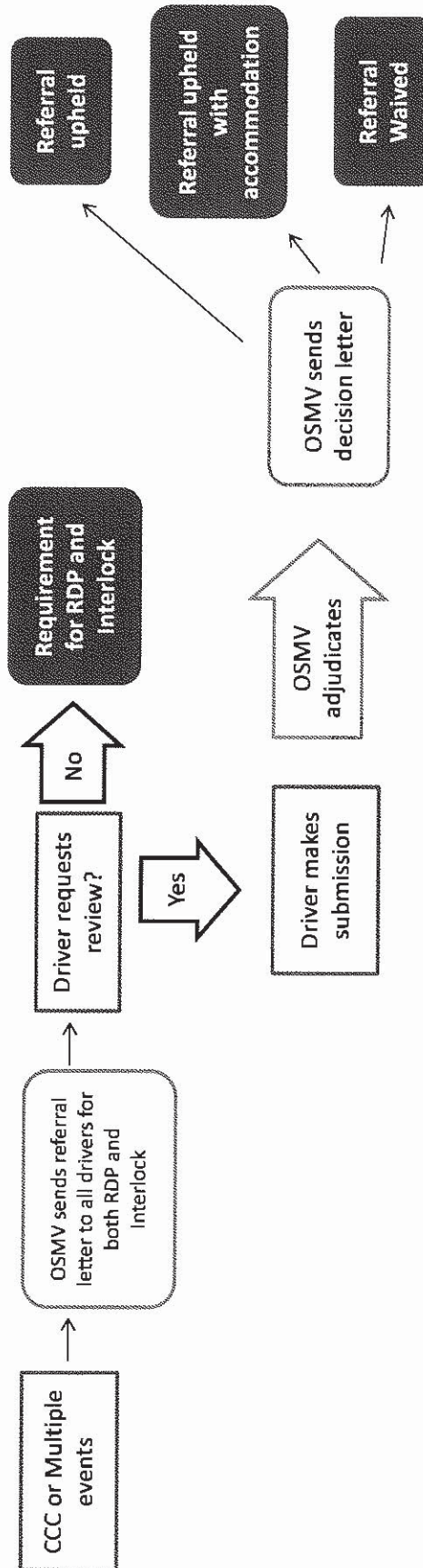
# CCC and Multiple Offences

## Summary:

- Criminal Code convictions and multiple administrative sanctions provide more evidence for referrals
- Post referral review for as these are identified to be higher risk drivers. OSMV will need to complete reviews within referral or prohibition period.

## Assumptions:

- 275 CCC and Multiple Offenders
- 25% of referrals reviewed



## **ADMINISTRATIVE LAW JUDICIAL REVIEW OSMV – APRIL 2013**

### **Topics:**

- Purpose of Judicial Review
- Grounds for Review

### **Objectives:**

- What is judicial review?
- How is judicial review initiated?
- What are the preconditions to judicial review?
- Grounds for review?
- What types of arguments will the court, hearing a judicial review, consider?
- What orders might the court make, following a judicial review?
- What types of arguments will the court, hearing a judicial review, consider?
- Standard of review?
- What happens if the court orders a rehearing?
- Is there an alternative to judicial review?

### **Judicial Review:**

1. The 'general rule' is that disputes between persons, or between a person and government, are resolved by a court.
2. However, the Legislature or Parliament can decide to remove disputes that arise in a particular area from the court's responsibility, and to delegate the responsibility to someone else – such as an administrative tribunal or statutory decision maker.
3. These administrative tribunals or statutory decision makers then have the specific authority that has been given to them by the Legislature - to decide the specific points of dispute that the Legislature has decided, for whatever reason, should no longer be heard by the court.
4. However, we are governed by the 'rule of law'. The court system is the guardian of the rule of law, and so the court maintains supervisory power over everything the Legislature does, including supervisory power over those who resolve disputes on authority delegated by the Legislature.

5. Judicial review is the formal process that permits a court to ensure that those to whom the responsibility of decision-making has been delegated exercise it properly, in a fashion contemplated by the Legislature.
6. The purpose of judicial review of administrative decisions is to ensure that decision makers make their decisions in accordance with the law and that procedural standards are met.
7. Generally internal review processes must be exhausted before an application can be made for judicial review.
8. Judicial review is not the same as appeal. A person can appeal to the court only if the enabling statute specifically provides for an appeal to the court.
9. The courts have "inherent jurisdiction" to review the decisions of all inferior courts and tribunals, which includes all administrative agencies, tribunals and statutory decision makers.
10. In British Columbia, a judicial review is governed by the *Judicial Review Procedure Act*, which says a judicial review must be brought before the court by way of a Petition.
11. The hearing is conducted on the basis of affidavit evidence – the general rule is that the no one is able to give oral evidence, and there is no cross-examination.
12. The *Judicial Review Procedure Act* defines the material the court may consider as the 'record of the proceeding', which is essentially a documentary record of all of the material considered by the decision maker, together with the decision maker's decision.
13. The person who made the decision does not have an opportunity to say anything. Except in rare circumstances, the written decision is the tribunal's last word on the issue.
14. On judicial review the court does not look to see if it agrees with the decision that was made. The court looks only to see if the decision was reached in accordance with the authority given by the Legislature.
15. To be successful on an appeal to court or a judicial review, an aggrieved party usually must establish "grounds". Grounds are the ways in which a decision may be wrong or unlawful.
16. The courts have decided that the basic ground for any judicial review is an error of jurisdiction. However, unlike an appeal, if the court finds the agency's decision contains a jurisdictional error, the court will not substitute its decision for that of the decision maker. Rather, it will "quash" the decision and send it back to the decision maker to do it again.
17. An error in jurisdiction can be committed where:



- a. the decision maker misinterprets its enabling statute – the subject matter, people over whom it has jurisdiction, or remedies;
- b. the decision maker fails to follow the appropriate rules of natural justice or administrative fairness - failing to act fairly is a jurisdictional error because the decision maker only has authority to act in accordance with the rules of procedural fairness; or
- c. the decision maker makes an unreasonable decision. Courts, on judicial review, will consider the merits of the decision – if it is so unreasonable (no evidence, contrary to evidence, no reasonable person would reach the same conclusion) that it exceeds the decision makers authority, it will be quashed.

18. Grounds for review, then, include:

- a. Did the decision maker act within his or her jurisdiction?
- b. Did the decision make act for an improper motive?
- c. Did the decision maker make an error in law?
- d. Did the decision maker consider relevant factors and ignore irrelevant factors?
- e. Did the decision maker refuse to exercise his or her discretion or gether his or her discretion?
- f. Was there some evidence upon which to base the decision?
- g. Did the decision maker act fairly?

19. The Legislature has taken the task of deciding the actual point in issue from the court, leaving the court in a supervisory capacity only, the usual order is to set aside the decision subject of judicial review and direct that the tribunal re-do the hearing and, in the process, correct the error that the court has identified.

20. However, on rare occasions - in 'special or unusual circumstances' - the court may make the decision that was delegated to the tribunal.

21. Although not required to by law, unless ordered otherwise by the Court the standard practice in the Superintendent's Office is to assign the file to a fresh adjudicator.

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22. In the Superintendent's Office, the practice is to seal the material that formed the basis of the first hearing, and to start over by sending out the relevant disclosure material and inviting the applicant/driver to submit whatever he or she feels is necessary to make the case.

# **ADMINISTRATIVE LAW OVERVIEW**

## **CONDUCTING A FAIR HEARING – EVALUATING EVIDENCE**

### **OSMV – APRIL 2013**

#### **Topics:**

Elements of a fair hearing  
Conducting a fair hearing  
Evaluating evidence  
Making good decisions

#### **Objectives:**

What are the requirements of the duty of procedural fairness?  
What are the elements in a pre-hearing process?  
What are the elements of a fair hearing?  
How should evidence be evaluated?  
What processes are recommended for making good decisions?

#### **Pre-hearing process:**

1. Do you have the power to make the decision?
2. Do you have the background material you need for the decision?
3. Does the person who is affected by the decision have notice of the issue or complaint?
4. Has the person affected been provided with all the information that will be considered?
5. Has the person affected enough time to prepare an answer to the matter?
6. Do you come to the matter with an open mind? Would a reasonably well informed person think you can be objective?
7. Is there any reason why you should not participate in the decision? Conflicts of interest?
8. Are there preliminary issues that can be addressed before the actual hearing? How can the case be managed so that the hearing can proceed efficiently?

#### **The Decision Making Process – Conducting a Fair Hearing:**

1. Jurisdiction/scope of authority – what do you have authority to do?
  - a. Who - parties
  - b. What type of decision
  - c. Remedy
2. What is the decision you must make – what are the issues you must decide?



3. Process – have all procedural requirements been met (notice, disclosure, submissions, reasons)
  - a. Independence and impartiality
4. Evidence and findings of fact
  - a. Accepting into evidence – relevance and reliability
  - b. Weight to relevant evidence
  - c. Difference between investigation and adjudication
5. Decision making process
  - a. Fettering
  - b. Arbitrariness
6. Reasons for decision
  - a. Don't have to be perfect
  - b. Allow the person to know why found against them
  - c. Feel heard

#### **Evaluating Evidence:**

1. Evidence is the material that is submitted to establish the factual basis for the decision. The law, policy and logical reasoning are applied to the facts to determine the decision in any given case.
2. Statutory decisions must be based on fact situations within that decision maker's mandate. The facts must be based on evidence. The requirement for evidence promotes accurate fact finding and decision based on sound facts are more likely to be accepted, even by the losing party.
3. Thus the evidence submitted supplies the information that tribunal needs to arrive at the essential factual conclusions on which to base the decision. Some common types of evidence include:
  - oral testimony from witnesses
  - opinion evidence from experts who volunteer the conclusions that they would draw from various factual premises
  - affidavit evidence in written form that someone swears to be accurate, composed for use at the hearing. This should not include arguments or legal assertions.
  - demonstrative evidence – objects, e.g., a photograph – that help prove or disprove a factual assertion
  - documentary evidence – may include written correspondence, a government report, an article published in a technical journal, and may have originally been created for purposes unrelated to the hearing

4. On written reconsiderations of s. 25.1 referrals the evidence before an adjudicator will include the driving record, the police reports, evidence submitted by the driver and his or her legal counsel.
5. The formal rules of evidence used by the courts do not necessarily apply to administrative tribunals and statutory decision makers. However, some rules do apply. The information accepted into evidence must be relevant to the issues to be decided and must be, at least somewhat, accurate and reliable. Some facts directly support key issues, while other facts provide context or deeper understanding.
6. The essential criterion for admissibility of evidence is relevance. Relevant evidence is admissible, irrelevant evidence is inadmissible.
7. Relevance is determined in relation to the purpose and subject matter of the proceeding. Any evidence relevant to the decision/s that must be made is admissible. The question is, "Is the evidence, if believed, capable of creating a factual basis for the decision that must be made?"
8. Failure to admit relevant evidence may impact the fairness of the hearing and may make the decision vulnerable on judicial review. Accordingly, if there is doubt as to relevance, the evidence should be accepted into evidence and the decision maker should then determine how much weight (or importance) the evidence should be given – that is how important it is to the matters to be decided.
9. The most important evidence – that which should be given the most weight – is that that is central to the key facts upon which the decision will turn.
10. And, it should be remembered that some facts will not be contentious and may be admitted by the driver. That is the driver may admit that he or she was drinking and driving, but may claim that the referral does not serve the remedial purpose of s. 25.1 on the basis of some other fact.
11. Once a tribunal is satisfied that the evidence is sufficiently relevant and reliable to be admitted, it must still decide how much weight to give to that evidence. Not all relevant evidence has the same 'probative' value. That is, not all evidence can be given the same weight.
12. Unless there is evidence contrary to that given by a witness, or where evidence is not credible or trustworthy, tribunals normally should believe the evidence.
13. When faced with contradictory or implausible evidence, the adjudicator may look to other evidence to assess whether in the context of all the evidence, the evidence supports a finding that it is more likely than not that a fact is true – or not.



14. Fairness requires that where evidence is rejected as not credible, the reasons for disbelief should be given unless the evidence is inherently improbable.
15. Hearsay evidence (that is evidence not directly provided by the person with the knowledge) may be given less weight than direct evidence. Hearsay is admissible if it is necessary to the determination of the issue in the proceeding and it is reliable. In the case of s. 25.1 reconsideration decisions, legal counsel may present hearsay evidence in their submissions and this evidence may be accepted.
16. If hearsay evidence is accepted over direct evidence, the adjudicator should explain why.
17. The fact that the driver has been convicted of a criminal impaired driving offence is relevant and is admissible as conclusive proof that the person did the acts for which they were convicted (drinking and driving). However, an acquittal is not evidence that the event did not occur.
18. In addition to assessing evidence from the parties, the tribunal may take into account its own specialized knowledge. Before doing so, fairness requires the tribunal to let the parties know about this information to give them a chance to comment and perhaps to adduce evidence that counters or puts the information into perspective. The parties are entitled to "know the case they have to meet," and the decision should not rest on information that was never revealed to them.
19. As well, the expertise of the adjudicator should not be the basis of an essential finding of fact upon which a decision turns.

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## **Use of Evidence**

1. Evidence can establish the likelihood of a past event, e.g., "Is the person's driving record unsatisfactory or does past behavior suggest that it is in the public interest that the person attend remedial programs?"
2. Evidence can also establish the likelihood of an unlimited number of future events, e.g., "Will the remedial purposes of s. 25.1 be furthered in the circumstances of this particular driver?"
3. Generally, argument (submissions) are not considered to be evidence. However, submissions can be treated as hearsay evidence and given weight accordingly. That is, when a driver's legal counsel makes submissions with respect to the facts of the case, that evidence may be treated as hearsay.
4. In more formal proceedings, however, evidence and arguments are treated differently.

5. The standard of proof in administrative proceedings is the 'balance of probabilities'. A simple way of thinking about what this means in relation to any evidence is 'does the evidence make it more likely than not that a fact is true'?
6. When considering evidence:
  - Consider the submissions on the legal criteria and decide the legal criteria. Consider the burden of proof.
  - Identify factual issues necessary for the decision, what is agreed and what has to be decided.
  - Review all of the evidence.
  - Gather the evidence related to the issues.
  - Look for internal consistency in the evidence.
  - Look for external consistency in the evidence.
  - Consider whether there is an appropriate degree of detail.
  - Consider whether there are appropriate admissions.
  - Consider the powers and abilities of witnesses.
  - Consider cultural differences.
  - Consider common sense.
  - Be aware of your own assumptions and biases, avoid projecting and over generalizing.
  - Consider if part of the evidence is reliable.
  - Consider how helpful the evidence is to establishing a fact in issue.

**The difference between adjudicating and investigating:**

1. As OSMV adjudicators, you derive your powers from statute. There are no 'inherent administrative law powers'. You will recall from our discussion of judicial review, that the BC Supreme Court, Court of Appeal and the Supreme Court of Canada have 'inherent jurisdiction' – that is jurisdiction that goes beyond their enabling statutes. This is because of the relationship between the judiciary, as a separate arm of government, and the legislative and executive arms of government.
- 2.

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## **ADMINISTRATIVE LAW OVERVIEW**

### **OSMV – APRIL 2013**

#### **Topics:**

- administrative law, definition and focus
- natural justice and fairness

#### **Objectives:**

- What is the focus of administrative law and how does it relate to the administrative justice system?
- How is administrative law procedure distinct from the content of administrative decisions?
- What are the four basic elements of the duty to be fair?
- What are the potential elements of the right to know the case and reply?
- What is the test for bias in administrative law?
- What is the purpose of “the person who hears the case must decide it” rule and what potential issues may arise?

#### **Administrative Law**

1. Administrative Law is the law that governs public officials and tribunals that make decisions that impact the interests of individual and whose authority to act is derived from statute.
  - Admin law prescribes the rules by which these authorities are expected to operate; and
  - When the rules are not complied with, provides a complaints procedure and remedies.
2. The administrative justice system, of which you are a part, applies administrative law to determine and, if necessary, resolve the rights of an individual in relation to government action.
3. The administrative justice system is intended to provide faster, cheaper and more informal (easier to access) process that brings to bear specialized knowledge to address a high volume of cases and to administer a complex statutory scheme.
4. Sources of authority for administrative decision makers:
  - Statute (jurisdiction and scope of authority)
    - An administrative tribunal or statutory decision maker has no inherent power to make orders or decisions that affect the interests of members of the public.
    - The tribunal or decision maker may only act within the authority conferred upon it by statute – that is by the Legislature or Parliament.



- Common law (procedural fairness – or administrative fairness)
  - Fairness is the cornerstone of the administrative justice process
  - The absence of prescribed rules does not free a tribunal or statutory decision maker from all procedural constraints
  - The courts will require that decisions that affect the rights of individuals be made following procedures that are fair to the parties
  - The duty to be fair is flexible in nature and recognizes that fairness can be achieved in a variety of ways – the main consideration is what is fair in the circumstances of the type of decision. The considerations:
    - Nature of the statutory scheme
    - Nature of the decision and the process followed
    - Importance of the decision to the individual affected
    - Legitimate expectations of parties

#### 5. The Concept of Jurisdiction:

- An agency's jurisdiction is set out in the enabling statute and includes:
  - i. who it can make decisions about,
  - ii. what matters it can decide,
  - iii. what remedies it can provide,
  - iv. what procedures it will follow.

#### 6. Content of the duty to be fair:

- The duty applies to the procedures followed by the tribunals – not to the substance or merits of the decision.
- There is some flexibility to the duty depending on the context - the requirements of natural justice and fairness vary from case to case.
- However, it is important to remember that clear statutory language to the contrary will override any of the common law elements of the duty of fairness, subject of course to the Charter.
- Four basic concepts in the duty to be fair:
  - i. A person affected by an administrative decision has the right to know the case against him or her and must be given an opportunity to reply.
  - ii. A person is entitled to a decision from an unbiased decision maker.
  - iii. The person who hears the case must decide the case. [*Audi alteram partem* rule]
  - iv. The decision maker must give reasons for the decision.

#### 7. Administrative law is body of law that guides administrative tribunals and statutory decision makers in the proper exercise of their statutory powers. The primary considerations are compliance with the enabling statute and procedural fairness. The purpose of the administrative justice system is to provide accessible, efficient and cost effective decision making processes.

# **ADMINISTRATIVE LAW OVERVIEW DECISION MAKING AND WRITING OSMV – APRIL 2013**

## **Topics:**

- Essential elements of good decision making
- Reasons for decisions
- Writing clear, well-reasoned decisions
- Sufficiency of Reasons

## **Objectives:**

- What is the difference between evidence and facts?
- What are some techniques for making sound decisions?
- What are the essential elements of a good decision?

## **Essential Elements of Good Decision Making**

1. Sometimes it is easy to make a decision. If you are certain one party is lying, or if an essential element of one side's case is missing, you will have no difficulty. But what about those more frequent cases where it is very difficult to decide? It may assist to follow a structured decision making process.
2. Think about the decision making process:
  1. What jurisdiction/scope of authority do you have – that is, what do you have authority to do?
    - a. Who
    - b. What type of decision
    - c. Remedy
  2. Decision – what are the issues you must decide?
  3. Process – have all procedural requirements been met (notice, disclosure, evaluation of evidence submissions, independence and impartiality and reasons.)
  4. Evidence and findings of fact
    - a. Accepting into evidence – relevance and reliability
    - b. Weight to relevant evidence
  5. Make the decision – apply the facts to the law
  6. Reasons for decision
    - a. Don't have to be perfect
    - b. Allow the person to know why found against them and to 'feel heard'

### **Decision making strategies:**

1. Clarify for yourself exactly what it is that you are to decide. What is the precise question? Write it down, and then go through the exercise of identifying what facts you need to find to make that decision.
2. Divide a page down the middle and on one side list all the findings of fact you are able to make that support one party and do the same on the other side for the opposite party. This may resolve your dilemma.

OR

3. Set out in a paragraph or two (as briefly as possible) one side's version of the events, then do the same for the other party's (or do both 2 & 3).

OR

4. Another suggestion: a) List all those issues on which there is no dispute. b) List all those about which there is dispute, but about which there is in fact little disagreement. c) List those issues that are hotly contested. Then review these three categories looking for a "thread" or signpost in a) and b) which will point the way to the decision you should make on the difficult c) issues.
5. Credibility: when it is difficult to decide whether a particular witness is truthful, consider the following:
  - is the testimony internally consistent?
  - is the testimony consistent with:
    - other testimony
    - documents
    - agreed facts
  - is the testimony possible given the circumstances:
  - was it a memorable event that one would remember accurately
  - does the person have an interest in the outcome

### **Writing good decisions:**

1. Delivery of reasons for the decision promotes fair and transparent decision making. Writing reasons can also assist the decision maker in thinking through the issues to reach a reasonable result and reduce the chance of arbitrary or capricious decisions.
2. Reasons can demonstrate to the driver that the issues have been carefully considered and can reinforce public confidence in the judgment and fairness of the process.
3. Written reasons will also assist the court in assessing the decision on judicial review.

4. In the absence of statutory requirements, as under s. 25.1 reconsiderations, the duty of fairness requires the delivery of a written explanation of a decision that has important consequences for the individual.
5. It is not sufficient simply to outline the evidence and argument and state the conclusions. Rather the reasons should clarify the rationale for the decision. Reasons should clarify why conclusions were reached with respect to each important conclusion of fact, law and policy.
6. Reasons should:
  - state the findings of fact that support the conclusions and evidence upon which the conclusions are based;
  - where evidence is rejected, this should be explained
  - if an application is dismissed for insufficient evidence, material deficiencies should be identified
  - if the statute requires the consideration of certain factors, as the *MVA* does for IRP reviews, then these factors should be discussed in the reasons.
7. BUT – it is not necessary to provide reasons on every minor point raised or to reference every item of evidence. Following precedents is acceptable so long as it is clear that each decision is based on the facts of that case.

#### **Some advice on structure**

1. Paint the picture in two or three sentences. Journalism's who, what, where, when and how is useful here.
2. State the question or questions.
3. State your answers.
4. Set out the relevant background
5. Explain why you have decided as you have



## **Tips for writing decisions**

- Rule 1      Short, short and shorter. Economy of language is the first rule of writing.
- never use a long word, or a long sentence, where a shorter one will work
  - if you can cut a word, cut it
- Rule 2      Use the active voice; never the passive.
- "The panel decided", rather than "the decision was made by the panel that..."
- Rule 3      Avoid the "backhanded" passive: It would appear... or it was suggested. Simply say what happened.
- Rule 4      Rarely use a foreign or obscure word when a common one will do. If a word attracts attention to itself rather than to the idea it is intended to communicate, one should not use it.
- Rule 5      Never use "insider sections" such as "The member brought a s.7...", or "This is an Article 15 application..."
- Rule 6      Avoid long quotations. Readers skip over them. Your introduction to the quotation may make the point.
- Rule 7      Do not "overwrite". Avoid exclamation marks. Avoid words like clearly, obviously, or without doubt. Such words betray weakness.
- Rule 8      Wait one day, read it over, and edit.



## **Hallmarks of a Good–Quality Adjudicator Decision**

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The following is the list of hallmarks of good quality relating to adjudicative decisions as adopted by the Workers' Compensation Appeals Tribunal in its Statement of Missions, Goals and Commitments, October, 1988 [From BCCAT materials – used with permission].

1. The decision does not ignore or overlook relevant issues fairly raised by the facts.
2. The decision makes the evidence base for the panel's decisions clear.
3. On issues of law or on generic medical issues, the decision does not conflict with previous Tribunal decisions unless the conflict is explicitly identified and the reasons for the disagreement with the previous decision or decisions are specified.
4. The decision makes the panel's reasoning clear and understandable.
5. The decision meets reasonable standards of readability.
6. The decision conforms reasonably with Tribunal standard decision formats.
7. From decision to decision the technical and legal terminology is consistent.
8. The decision contributes appropriately to a body of decisions which must be, as far as possible, internally coherent.
9. The decision does not support permanent conflicting positions on clear issues of law or medicine. Such conflicts may occur during periods of development on contentious issues. They cannot be a permanent feature of the Tribunal's body of decisions over the long term.
10. The decision conforms with applicable statutory and common law and appropriately reflects the Tribunal's commitment to the rule of law.
11. The decision forms a useful part of a body of decisions which must be a reasonably accessible and helpful resource for understanding and preparing to deal with issues in new cases and for invoking effectively the important principle that like cases should receive like treatment.

## Writing Tips

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The following “tips” will assist in writing clearer and more concise decisions.

### 1. Active vs Passive Voice

Verbs convey action in two ways – active or passive voice. If the subject of a sentence performs the action of the sentence (*John caught the ball*), the verb is in the active voice. If the subject receives the action (*The ball was caught by John*), the verb is passive.

Active voice tends to be more forceful and less wordy than the passive. The passive voice always has a helping verb and often contains the prepositional phrase *by* someone or something.

#### **Active Voice**

The lobbyist wrote most of the regulation.

The appropriate authority will notify a member who is about to be dropped from the union rolls.

We are considering your proposal.

The new staff members will implement the guidelines

#### **Passive Voice**

The regulation was mainly written by the lobbyist.

When a member is to be dropped from the union rolls, he will be notified by the appropriate authority.

Consideration is being given to your proposal.

Implementation of the guidelines will be carried out by the new staff members.

### 2. Avoid Weasel Words

Consideration should be given to.....	It seems to me that.....
In my considered opinion.....	It would appear that.....
It should not be forgotten that.....	It might be said that.....
It is worth mentioning that.....	It is respectfully suggested that.....
In terms of.....	

### 3. Some Grammar Commandments

1. Don't use no double negatives.
2. Make each pronoun agree with their antecedent.
3. Join clauses good, like a conjunction should.
4. About those sentences fragments.
5. When dangling, watch your participles.
6. Verbs has to agree with their subject.
7. Between you and I, case is important.
8. Don't use commas, that aren't necessary.
9. Try not to awkwardly split infinitives.
10. Don't write run-on sentences without a period they are hard to read.
11. It is important to use your apostrophe's correctly.
12. It is essential to spel rite.
13. Proofread your writing to see if you any words out.
14. Never use a preposition to end a sentence with.

### 4. Use Simple, Everyday Words

Instead of:	Use:
accordingly	so
additional	added, more, other
address	discuss
adjacent to	next to
advise	recommend, tell
afford an opportunity	allow, let
anticipate	expect
a number of	some
apparent	clear, plain

as a means of  
ascertain  
at the present time

to  
find out, learn  
now

by means of

by, with

cognizant  
comprise  
concerning  
conclude  
concur

aware, responsible  
form, include, make up  
about, on  
close, end  
agree

determine  
disseminate  
due to the fact that

decide, figure, find  
issue, send out  
due to, since, because

employ  
endeavour  
evident  
expedite

use  
try  
clear  
hurry, rush, speed up

facilitate  
finalize  
for a period of  
for the purpose of

ease, help  
complete, finish  
for  
for, to

herein

here

implement  
in accordance with  
in addition  
in an effort to  
inasmuch as  
in a timely manner  
inception  
in conjunction with  
incumbent upon  
in order that  
in regard to  
in the course of  
in the event that  
in the near future  
in view of

carry out, do, follow  
by, following, under  
also, besides, too  
to  
because  
on time, promptly  
beginning  
with  
must  
to  
about, concerning, on  
during, in  
if  
soon  
because

liaise with  
limited number

coordinate, talk with  
few

methodology  
minimize

method  
decrease, lessen, reduce

necessitate  
not later than

cause, need  
by

on a regular basis  
on a timely basis

regularly  
immediately

perform  
pertaining to  
point in time  
possess  
preclude  
prior to  
provided that  
provides guidance for  
pursuant to

do  
about, of, on  
point, time  
have, own  
prevent  
before  
if  
guides  
by, following, under

reason for  
regarding  
relating to

why  
about, of, on  
about, on

shall  
subsequent  
subsequent to

will  
later, next  
after

take action to  
terminate  
time period  
transmit  
transpire

act, do  
end, stop  
time, period  
send  
happen, occur

until such time as  
utilize, utilization

until  
use

viable

practical, workable

with reference to  
with the exception of  
witnessed

about  
except for  
saw



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