



Understanding **FAIRNESS**

A Handbook on Fairness for Manitoba Municipal Leaders

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Understanding Fairness is unique in that it has been produced specifically for municipal leaders and decision makers in Manitoba. We have received cooperation and assistance from the Association of Manitoba Municipalities, Manitoba Intergovernmental Affairs, and the Manitoba Municipal Administrators Association.

Some of the people who have assisted us with this project are Laurie Davidson and Lynne Nesbitt from Manitoba Intergovernmental Affairs, Joe Masi from the Association of Manitoba Municipalities, and Mel Nott, D. J. Sigmundson, Wally Melnyk, and Russ Phillips from the Manitoba Municipal Administrators Association.

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MANITOBA OMBUDSMAN

INTRODUCTION

Municipalities today are operating in an era of accountability. Governing is becoming increasingly complex, and government is subject to ever increasing scrutiny. Citizens have the right to expect that their governments – federal, provincial and municipal – will act in a fair, open and transparent manner.

Successful municipalities work with their citizens, making decisions in a transparent and open manner, ensuring citizens a meaningful role in the decision making process, and using the tools available to them to effectively respond to citizens' demands.

Municipalities govern under the authority of *The Municipal Act* and have autonomy and flexibility to manage their own affairs and to make decisions they think will best meet the needs of their communities. Municipalities have an obligation to govern fairly and equitably.

Municipal Councillors act primarily in a law-making or policy-making capacity. However, because you wear many different hats when performing the duties that fall within Council's jurisdiction, some of the actions you take and decisions you make are subject to the requirements of administrative fairness. It is important to understand which of your actions and decisions have fairness requirements attached, what those requirements are, and how you can best meet them while ensuring that municipal business proceeds in the normal course.

You are also responsible for ensuring that all municipal policies and procedures are fair and fairly applied by staff. Fairness starts at the top.

Every time a municipal council makes a decision, some person or group of people is affected by that decision. Someone may disagree with the decision, and complain about it.

There is a range of options available to citizens unhappy with the actions and decisions of their municipal government including internal complaint mechanisms, statutory appeal or review processes, legal challenges, and external review mechanisms such as the Office of the Auditor General in respect of certain financial matters, and the Ombudsman in respect of matters of administration.

The Office of the Ombudsman investigates complaints from members of the public who believe they have not been treated fairly by government, including municipal government. When we investigate complaints, it is our job to assess the fairness of your actions and decisions. A description of how we do that, and how you can work with us through that process can be found in Appendix E.

It is important therefore, for us to explain our understanding of fairness, and our investigative process, so that we will be operating from a common understanding when complaints are made. That is one of the reasons we have produced this fairness guide, *Understanding Fairness*, specifically for municipal government.

Understanding Fairness is intended to assist you and your administrative staff to achieve fairness in the important and challenging work that you do, and to provide you as municipal leaders with the tools to help promote fairness and make it the standard of practice.

The tools in *Understanding Fairness* include:

- ❖ a fairness framework that recognizes three aspects of fairness: **procedural, substantive, and relational**;
- ❖ standard definitions of some commonly used fairness terms;
- ❖ a guide to meeting the requirements of fairness in municipal decision making;
- ❖ helpful hints for conducting public hearings and meetings;

- ❖ tips for analyzing your own decision-making process;
- ❖ fairness “checklists” for councillors (Appendix A) and municipalities (Appendix B);
- ❖ case examples of action and decisions that are considered unfair;
- ❖ a decision-making checklist (Appendix C); and
- ❖ information on how we investigate and analyze complaints about municipalities from members of the public (Appendix E).

Understanding Fairness has been produced with the support and cooperation of Manitoba Intergovernmental Affairs, www.gov.mb.ca/ia/, the Association of Manitoba Municipalities, www.amm.mb.ca, and the Manitoba Municipal Administrators Association, www.mmaa.mb.ca. In addition to this hard copy, *Understanding Fairness* is available electronically on our website, www.ombudsman.mb.ca, as well as on the websites above.

DEFINING FAIRNESS

We all understand fairness at a very personal level. We know when we have not been treated fairly. But fairness means different things to different people, and our view of whether or not something is fair often depends on the circumstances.

A rate payer might define fairness as equal treatment, receiving the same services and benefits as other taxpayers. You might hear “*It’s not fair that some gravel roads get graded several times a year while my road never sees the grader*”.

Your lawyer might tell you that a decision will not be considered fair by the courts because you did not notify citizens that you would be deciding an issue that affected them, as required by *The Municipal Act*, or that you did not consider all the issues that an Act or a by-law required you to consider before making a decision.

The Ombudsman might look at the fairness of an action or decision in terms of both the procedural requirements, the fairness of the process by which the decision was made, and at the fairness of the decision itself.

As municipal Councillors you want your actions and decisions to be fair, and to be seen to be fair. But what is fairness?

Let’s examine some of the ways we can define fairness, starting with some of the words and expressions we use to describe the concept of fairness.

FAIRNESS CAN BE....

An **EXPECTATION** on the part of people affected by your decisions. Trust and respect got you elected. Implicit in that trust is the expectation that you will be fair in your deliberations and decisions.

An **OBLIGATION** created by law. What is needed to meet that obligation will depend on the circumstances, but the obligation to be fair relates to both a decision itself and the process by which it was made.

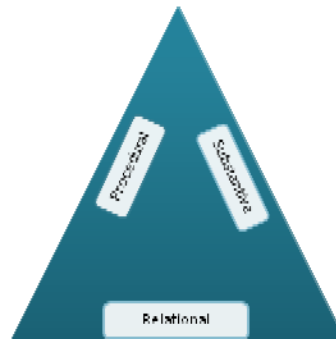
The **STANDARD** municipal decision makers set for themselves and their municipalities.

A **GOOD BUSINESS** practice that can help to maintain public confidence, to avoid or reduce conflict, and to protect you when decisions are challenged.

In addition to all of the above, it is also a **SKILL** that requires combining some procedural knowledge with common sense. It is a skill that you can learn, improve and perfect with regular practice, and pass on to others.

THE FAIRNESS TRIANGLE

We believe there are three aspects to fairness.



Procedural fairness relates to how decisions are made - the steps to be followed before, during and after decisions are made.

Substantive fairness relates to the fairness of the decision itself.

Relational fairness relates to how people are treated during the decision making process, and how they feel about the process and the outcome.

Understanding and achieving each type of fairness requires asking different questions, considering different factors, and applying different skills. Set out below are some of the requirements that need to be met, and some of the things you can do to achieve fairness in each of these areas.

Note

•As we discuss these concepts, remember that fairness requirements differ depending on the context or nature of the hearing or decision being made. For example, fairness requirements may be few when considering an agenda item on a new walking path. The requirements will be much more onerous when council is holding a hearing to decide whether to revoke or cancel a permit or licence, in which case it is an adversarial hearing to which the full principles or rules of natural justice apply.

PROCEDURAL FAIRNESS

Procedural fairness relates to the process by which a decision is made. At a minimum, **procedural fairness requires that:**

- ❖ the person(s) who will be affected by a decision is given advance notice that a decision will be made;
- ❖ the person affected by a decision is given the information that will be considered when a decision is made;
- ❖ the person affected by a decision is given a meaningful opportunity to state or present his or her case;
- ❖ the person affected by a decision is given an opportunity to challenge or dispute any information that might be contrary to his or her position when a decision is being made;
- ❖ the decision-maker be thorough and thoughtfully review all the information provided by the person affected by a decision;
- ❖ the decision-maker be impartial (unbiased and without a personal interest in the outcome of the decision); and
- ❖ the decision-maker give meaningful reasons for the decision that are understandable to the person affected.

Set out below are some comments on each of these procedural fairness requirements that can help you to apply them to the municipal decision-making process.

The person(s) who will be affected by a decision is given advance notice that a decision will be made. The notice period and specific content of the notice may be dictated by law, such as *The Municipal Act* or *The Planning Act*. If not, the goal should be to give the affected person(s) enough information to understand what issue is being considered, and a reasonable time to prepare any submission they want to make to the decision maker.

The person affected by a decision is given the information that will be considered when a decision is made. This can include reports, such as those from a Technical Review Committee, or financial information such as the cost of a proposed municipal project or the property tax implications of a proposed Local Improvement Plan. The goal is to provide people with accurate information they can use to assess the impact on them, and formulate a position. Councils benefit when people respond to real information, rather than what they think or suspect.

The person affected by a decision is given a meaningful opportunity to state or present his or her case. The opportunity may be available because of an existing forum such as a hearing or public meeting required by provincial law. Councils can receive “delegations,” at regular Council meetings, accept submissions in writing, or hold special meetings to share information with the public or to receive public feedback.

The person affected by a decision is given an opportunity to challenge or dispute any information that might be contrary to his or her position when a decision is being made. This issue arises most often when decisions are being made in the context of a hearing. People need to be given a chance to respond to information that is adverse to their interest, even if it means hearing from them a second time.

The decision maker is thorough and thoughtfully reviews all the information provided by the person affected by a decision. This means reading all written submissions, taking the time to listen to presentations and asking the questions necessary to understand a person’s position.

The decision maker is impartial, (unbiased and without a personal interest in the outcome of the decision). It is important to avoid both conflict of interest and the appearance of conflict. ***Conflict of Interest*** occurs when your personal interest conflicts with the public interest, or with your duty as a public official. In Manitoba, *The Municipal Council Conflict of Interest Act* deals primarily with conflict arising from pecuniary (financial) interests, and provides some definitions of the relationships and issues often raised in conflict of interest cases. Conflict, or the

perception of conflict, can occur even when there is no financial interest. This happens in cases where you are seen to be too close to the parties on one side of a dispute, or where you are seen to be at odds with one of the parties.

The appearance or perception of conflict can be as harmful to public confidence as actual conflict. Once a connection between your personal interests and your public decisions is made, it can be difficult to demonstrate that your decision was not influenced by your personal interest.

The decision maker gives meaningful reasons for the decision that are understandable to the person affected. Clear and meaningful reasons can help to successfully conclude a decision making process. Once a decision has been fairly made, there is a greater risk in having people remain unclear about the basis for the decision, or making assumptions about the basis on which it was made, than there is in clearly explaining the basis for it. Stating (or writing) the reasons for a decision can also be an opportunity to confirm that people were heard and understood.

SUBSTANTIVE FAIRNESS

A decision itself must be fair and to be fair it must meet certain criteria. Some of the criteria are required by law. Some are matters of fairness. When we refer to substantive fairness, we are referring to these criteria. The following are some of the more straightforward requirements of fair decisions:

- ❖ the person making the decision must have the authority under law to make the decision.
- ❖ the decision cannot require anyone to do something that is illegal or not authorized by law.
- ❖ the decision must be reasonable, and the reasoning behind the decision must be understandable to the people affected.
- ❖ the decision cannot discriminate against the person affected on any of the prohibited grounds listed in the Manitoba Human Rights Code or the Charter of Rights and Freedoms; for example, marital status, race, religion, sexual orientation, or disability.
- ❖ the decision cannot be oppressive, meaning that the decision should avoid creating unnecessary obstacles for the person affected.

Many of these requirements seem like common sense, but thinking about how to apply them when you are making decisions can help avoid costly or time consuming mistakes.

The person making the decision must have the authority under law to make the decision.

Municipal Councils have authority only over local matters within municipal boundaries. This authority comes from provincial law, such as *The Municipal Act* or *The Planning Act*. Check the relevant statute to make sure that you have the authority to make that decision.

The decision must be reasonable, and the reasoning behind the decision must be understandable to the people affected. This is another way of saying that the decision not only has to be fair but has to be seen to be fair by the person(s) affected.



ASK YOURSELF - “If it were me, how would I feel about it?” You might also ask these questions: “Has my decision been influenced by how I feel about the person affected by the decision?” and “Would the decision be the same for everyone?”

The decision cannot discriminate against the person affected on any of the prohibited grounds listed in the Manitoba Human Rights Code or the Charter of Rights and Freedoms; for example, marital status, race, religion, sexual orientation, or disability. Sometimes discrimination is the accidental result when policies of broad application are applied without consideration for individual circumstances.

The decision cannot be oppressive, meaning that the decision should avoid creating unnecessary obstacles for the person affected. For example, requiring a property owner whose property has been deemed “unsightly” to clean up their property within 24 hours would unnecessarily impose a condition that may be unrealistic or impossible to meet.



ASK YOURSELF - “Why 24 hours?” If there is a good reason, such as health or safety, the decision may be reasonable. If no such serious hazard exists, the decision is likely to be considered unreasonable.

RELATIONAL FAIRNESS

The “soft” side of fairness

We have all been there - the feeling that someone is speaking down to us, or that they are in a hurry and do not have time for us.

While many of the people who contact the Ombudsman are concerned about their right to a fair process or the fairness of a decision, others complain because they feel they have been badly or rudely treated.

The soft side of fairness is about being courteous, timely, clear, and direct in communication. It means:

- ❖ taking the time to listen;
- ❖ being approachable;
- ❖ respecting confidentiality;
- ❖ being clear with people about what you can or cannot do; and
- ❖ apologizing if you make a mistake.

Most of these terms are just common sense, but some also touch on matters of law. For example, **being approachable** is usually a good idea, but if the context is a hearing where there are opposing parties, it is not a good idea to communicate with one of the parties alone any time before the process is over and the decision announced.

Respecting confidentiality and personal privacy is a public expectation and a legal requirement of *The Freedom of Information and Protection of Privacy Act*, the provincial law governing protection of privacy and access to information that applies to all municipalities.

Being clear with people often means explaining the limitations and restraints under which Councils operate. If the reason a Council or councillor cannot do something is lack of jurisdiction or budgetary constraints, make sure people know that these are the issues. The alternative may be that people see you, or your inaction or disagreement, as the issue.

Apologizing is disarming, and can sometimes prevent a mistake from turning into a dispute or a complaint. Under *The Apology Act*, an apology does not constitute an implied or express admission of fault or liability and cannot be taken into account in determining fault or liability.

This “feeling” side of fairness cannot be measured against any legal standard and is often the centre of a complaint. It may result from a breakdown in, or a lack of, communication between the person making a decision and the person affected.

People who feel like they are being treated badly are less likely to believe that an action or decision affecting them is fair. Even if your decision has been made fairly, ignoring the relational side of fairness can result in this feeling of unfairness.

Understanding People

- People will complain when they think they have been treated unfairly, even if they cannot point to a particular procedural defect, or even if their disagreement with a decision is not particularly strong. On the flip side, people who feel like they have been heard and treated with respect are less likely to complain, and more likely to accept a resolution or a settlement that is less than or different from what they initially wanted.

ACHIEVING FAIRNESS IN THE DECISION MAKING PROCESS

INTRODUCTION

Municipal Councillors wear many different hats when performing the different duties that fall within a Council's jurisdiction.

The Municipal Act specifies the duties of Councillors. They must:



- ❖ consider the well-being and interests of the municipality as a whole;
- ❖ bring to the Council's attention anything that would promote the well-being or interests of the municipality;
- ❖ participate generally in developing and evaluating the policies and programs of the municipality; and
- ❖ participate in meetings of Council and Council committees, and any other bodies to which the Councillor is appointed by the Council.

Councillors' general duties require fairness, but there are other duties Councillors perform that have more specific fairness requirements. For example, when Councils hold *public hearings* or when Councils or Councillors sit as *boards of appeal*, there will be a higher duty of fairness.

Generally, Councillors conducting a public hearing must:

- ❖ present and explain the municipality's position;
- ❖ hear presentations from individuals and delegations;
- ❖ respond to questions from individuals and delegations

Examples of such hearings include a hearing for the presentation of the annual financial plan of the municipality under *The Municipal Act* (subsection 162(2)); a hearing to consider a proposal

to adopt or amend zoning by-law under *The Planning Act* (subsection 74(1)); or sitting as a Board of Revision under *The Municipal Assessment Act*. These statutes and other Manitoba laws may be found online at <http://web2.gov.mb.ca/laws/index.php>.

Appendix “D” contains a listing of public hearings Councilors can be expected to participate in under *The Municipal Act*, *The Planning Act*, and *The Municipal Assessment Act*.

Note

- The path to a good decision does not always follow a straight line. You will not always have the luxury of considering each of the three aspects of fairness separately or sequentially, nor will the distinction between procedural, substantive and relational fairness always be crystal clear.

In the following pages, we discuss the decision making process and some of the steps you can take to ensure that decisions are fair. Whenever possible, we have identified which side of the fairness triangle is relevant to the discussion.

Because of the broad scope of the authority vested in municipal government, achieving fairness can mean applying the concepts and principles of fairness to decisions made in different forums with different rules. The **challenge** for municipal decision makers lies first in being aware of which fairness requirements must be met in each of the different decision-making functions you will perform, and then meeting those requirements in a way that is appropriate to the context.

Making yourself aware of the context in which you are about to make a decision will help you to make better decisions and will assist you to respond to criticism and challenge when someone takes issue with your decisions.

Understanding context requires asking two key questions:

1. *What is your role and function in the decision making process?*
2. *What information do you need to fulfill that role and function?*

POINTER:



It is important to remember that the things you can and need to do to achieve fairness are also the tests and standards that will be applied by others when assessing the fairness of your actions and decisions. While fairness can be a subjective concept, it can be measured and judged by the courts, by the media, by ombudsmen, and ultimately by the public.

KNOW YOUR ROLE AND FUNCTION

ASK YOURSELF “*What is my/our job?*” or “*Why are we here?*”

ANSWER: We are here to...

- ❖ sit as a Board of Revision to hear property assessment appeals;
- ❖ conduct a public meeting to review the financial plan;
- ❖ hear an application for a variance under our zoning by-law; or
- ❖ hear an appeal of a decision made by our planning district.

Each of these functions or jobs is undertaken for a different purpose; each has different legal requirements and parameters; each has a different procedure; and each can require a different set of skills.

Being clear about the task at hand is a helpful first step in understanding the requirements and limitations related to the specific function you are performing or to the decision you are making. Hand in hand with identifying the task you are about to perform is identifying your authority to do it.

ASK YOURSELF “*What is our jurisdiction?*”

ANSWER: The provincial law or municipal by-law or resolution giving you the authority to take action or make a decision will provide you with and the boundaries within which, that action or decision can be taken.

**It's
Important**

- If what you are doing is outside of your jurisdiction, months or even years of work can be lost and you may be subject to a successful court challenge.

Here is what the Manitoba Court of Queen’s Bench said in a 2008 decision on a case involving a challenge to a decision made by a municipal Council:



“In conducting a judicial review of a decision made by a municipal Council, the court must first determine whether or not the Council was clothed with jurisdiction to make the decision that is being challenged. If Council did not possess such jurisdiction, that ends the matter.”

In other words, if your decision or action is not within your jurisdiction it can be overturned.

Understanding your jurisdiction goes beyond the question of whether or not you have the authority to act or make a decision. The provincial law or municipal by-law giving you the authority to act or make a decision may also provide a detailed road map for actually making the decision.

The statute or by-law may:

- **set out specific information that must be considered and criteria that must be applied when making a decision;** *For example, the criteria to be applied when deciding whether to vary the provisions of a zoning by-law , set out in subsection 97(1) of The Planning Act)*

97(1) After holding the hearing, the board, council or planning commission must make an order,

rejecting the requested variance; or

varying the application of specific provisions of the zoning by-law with regard to the affected property in the manner specified in the order if the variance

- *will be compatible with the general nature of the surrounding area,*

- *will not be detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area,*
- *is the minimum modification of a zoning by-law required to relieve the injurious affect of the zoning by-law on the applicant's property, and*
- *is generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.*

These criteria should be in front of you when you conduct a hearing and when you make a decision. If you do not make yourself aware of the criteria set by law, you run the risk of making a decision based on the wrong criteria, or missing critical evidence related to the right criteria.

(Substantive fairness)

When you are about to make a decision to approve an application for a variance, you should be satisfied that the criteria set out in *The Planning Act* have been met.



ASK YOURSELF ...

... Is the variance the minimum modification of a zoning by-law required to relieve the injurious affect of the zoning by-law on the applicant's property?

... Is the variance generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law?

The statute or by-law may:

- **impose procedural requirements that must be followed in making decisions within the jurisdiction that you have, such as requirements for detailed notice to the parties who will be affected by your decision.** *For example; the notice requirements set out in section 318 of The Municipal Act in respect of a hearing to consider a local improvement*

plan, address both the time required for notice and the content of the notice. The notice required by section 318 has to include **a summary of the information included in the plan.** However, subsection 315(1) of *The Municipal Act* sets out a lengthy and detailed list of what must be included in a local improvement plan, and it is the information in that list that must be summarized in the notice under section 318. (Procedural fairness)

The statute or by-law may:

- **establish boundaries around the options open to the decision maker, or limit the choices of decision available (approve or disapprove) or the conditions that can be attached to a decision.** *For example, the provisions of subsection 116(2) of The Planning Act restrict the conditions that may be imposed on the approval of livestock operations.*

116(2) Only the following conditions may be imposed on the approval of an application under this Division, and any condition must be relevant and reasonable:

(a) measures to ensure conformity with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law;

(b) measures to implement recommendations made by the Technical Review Committee;

(c) one or both of the following measures intended to reduce odours from the livestock operation:

(i) requiring covers on manure storage facilities,

(ii) requiring shelter belts to be established;

(d) requiring the owner of the affected property to enter into a development agreement under clause 107(1)(c).

Section 116 of *The Planning Act* actually contains three separate types of restrictions on Council's decision making capacity:

- ❖ it establishes conditions that must be met before the conditional use application can be approved;

- ❖ it limits the conditions Council can impose when approving an application, and declares that such conditions “must be relevant and reasonable;” and
- ❖ it specifically prohibits Council from imposing certain other kinds of conditions.

The requirements imposed on Council by section 116 of *The Planning Act* was one of the issues raised in the 2008 court decision quoted from previously. In that case, Council had approved an intensive livestock operation (ILO) as a conditional use. Here is what the court said:

“By operation of law, approval for the granting of the conditional use order cannot be given unless certain tests as set forth in section 116 of the Act are met.”

The court went on to say:



“I find that the relevant law is a very important consideration here because in delegating its authority to municipal Councils, the Legislature placed some limits and conditions on the ability of Councils to make decisions under the provisions of the Act and pertinent regulations... In other words, municipal Councils do not have a free hand in deciding whether or not to approve, as a conditional use, a livestock operation”

The statute or by-law may:

- **create other procedural requirements or hurdles that will impact Council’s authority or how it can exercise that authority.** *For example, the provision in section 290 of The Municipal Act requiring written Ministerial approval before closing a road.*

The statute or by-law may:

- **set requirements for the time it takes to make a decision and how the decision is to be communicated to the interested parties (orally or in writing), including notification of any further right of appeal.** For example, the notice provisions relating to Local Improvement Plans found in *The Municipal Act*. Section 318 of the Act requires Council to give notice and hold a hearing. After the hearing, Council is authorized by subsection 320(1) of the Act to approve the plan and impose taxes as set out in the plan. **However**, although Council may have already held a hearing and made the decision to proceed, subsection 320(4) imposes further requirements. At that point, a Council must:
 - (a) give notice to each person who filed an objection under subsection 319(1) of its intention to give third reading, and of that person's right to object under subsection (5); (to the Municipal Board) and
 - (b) submit the by-law to the Municipal Board for its review and approval.

These further notice requirements are as important as the original notice of the hearing before second reading, and a failure to comply with them can put the local improvement plan at risk.

(Procedural fairness)

Knowing “*What your role and function is?*” also means knowing “*How do you have to do it?*” Is there already a process required by provincial law or a municipal procedures by-law or another by-law? Is there an established practice?

If you are making a decision based on information from the public, in what forum do you receive that information? Will you be:



- ❖ Conducting a public meeting as a committee of Council?
- ❖ Receiving delegations as part of a regular Council meeting?
- ❖ Holding a hearing to consider an application?
- ❖ Hearing an appeal of a decision already made?

Each of these processes and forums has specific procedural requirements. Regardless of the forum in which you receive information from the public, the two primary goals are usually the same: to obtain the information you need to make a decision; and to provide the public with an opportunity to participate.

An understanding of the job you have to do (*the decision you have to make*), and how you have to do it (*the process you must or should follow*) is an excellent foundation for making decisions fairly. It will also put you in a position to think about the second fundamental question for all decision makers: **how do you obtain the information from the public you are required to consider?**

GUIDING PUBLIC PARTICIPATION IN THE PROCESS

The next stage in the fair decision making process is getting and understanding the information you need (*or are required*) to consider when making that decision.

When making a decision, you need sound factual information or evidence that will be part of an application or provided as required by statute. But you must also hear from those who will be affected by your decision.

Impact On The Public

Fair decision makers understand the impact of their decisions on the people affected by those decisions. This involves understanding both the practical (factual) impact of the decision on the people affected, and how they view the impact on them.

If the process includes a direct exchange with the people affected, for instance at a hearing or public meeting, there are questions Councillors can ask to elicit information that is relevant and meaningful.

Pointer:



Asking questions is also one way of asserting or maintaining control of a meeting or hearing. Relevant and timely questions can focus presenters on the topic at hand and help avoid unnecessarily lengthy presentations. Allowing people to speak off topic may create false expectations, such as an expectation that you will make a decision on the basis of something a person has presented when in fact what they have presented is not relevant or within your jurisdiction. Although the goal in this process (formal hearing or receiving delegations) is to understand how your decision will affect the public, there are a number of critical issues that need to be clarified sooner rather than later to ensure that everybody is on the same page.

Preliminary Questions

There are preliminary questions that can be asked to obtain information, but also to establish the ground rules for delegations or presenters.

Why is this person here? What do they want me / us to do?

Does the person understand the decision you are making or the subject matter of the hearing?

Does the person understand your jurisdiction and the options available to you as a decision maker? If not, deal with this right away, as it can help you in keeping people focused and getting the information you need. (Relational Fairness)

Pointers:



Successful chairs often begin a hearing or a meeting by explaining the purpose of the meeting or hearing ... “*We are here this evening to consider an application for...*”



It can also be helpful to inform people about the criteria that you need to consider and they need to speak to: “*In making this decision The Planning Act requires that we consider...*” Stating the criteria being used to make a decision can help you in focusing applicants and presenters. People appearing before you may wish to speak about issues important to them, but not all of those issues will be relevant or helpful to you in determining whether the criteria have been met. Reviewing the criteria with all presenters can be a way of telling applicants the case they have to meet, and telling objectors that their comments must relate to that test.

Is the person there to address the substance of the issue, or to express concern about the process by which the decision is being made?

It can be useful to clarify and separate these two concerns. Sometimes a chair will invite presenters to address any procedural concerns as a preliminary matter. If there is a procedural defect, such as an inadequate notice, it is better to identify this at the beginning rather than try to deal with it after you have conducted a hearing or made a decision. (Procedural and Relational Fairness)

Is their complaint or request based on wrong information or a lack of information?

By the time the decision making process reaches the hearing or public meeting stage, Council will have already been briefed by the CAO on the need for a decision or action. The CAO and municipal staff may have generated information about the cost or benefits of the decision or action being considered. Can this information be shared with the public to better inform them before they make a submission based on rumor and guesswork? (Procedural and Relational Fairness)

Pointer:



Consider starting the meeting by asking your CAO to provide some background information leading up to the decision you are about to make.

Is a person asking you to do something you do not have the power to do?

Jurisdictional issues are complicated for decision makers. They are sometimes even more complicated for members of the public. Early clarification of what you can and cannot do in

response to the information people are providing, or the request they are making, should assist them to make concise and relevant arguments, and allow you to help them stay focused.

For example, explaining that Council’s jurisdiction over land use issues does not include the authority to address water quality issues can save time for both Council and presenters. Directing people to the authority that does have jurisdiction to address collateral issues can be useful for staying on time and on topic. (Substantive and Relational fairness)

These preliminary questions have identified and addressed procedural issues, clarified jurisdiction, and provided information that should focus presenters on information you need to hear and consider.

This clears the way for you to determine how your decision will affect the person before you.

HEARING PUBLIC PRESENTATIONS

The most useful tools at this stage of the process might be your listening skills, rather than your questioning skills.

As an example, let's say you are holding a public meeting. Your municipality wants to impose a modest annual fee to offset increasing costs associated with garbage collection. Council has received and considered information about current costs, cost increases and projections, and alternatives to a single annual fee payment. After some discussions Council has decided to hold the public meeting to hear from the public and gauge their reaction to the proposal. Over 30 people attend the meeting, a significant number for the size of the municipality.

At this stage two kinds of information are being presented to you: factual information about the impact of your decision, and a sense of how the presenter feels about the decision or issue. The ability to separate emotion (how a person feels about the issue) from fact (the actual impact on the person) is a critical skill. It can be a difficult task as an angry or boisterous presenter can disrupt a meeting or distract all of those involved.

Strong feelings may reflect the significance of the impact of the issue on a presenter, which is important, but understanding that impact may involve probing deeper. Using our garbage fee hearing example, you might hear from an elderly person who is complaining loudly and bitterly about a recycling or garbage collection fee they are describing as a hidden tax, but who is really concerned about the impact of that modest fee on their fixed income budget. How do you deal with that?

Having listened carefully you have noted a couple of telling comments. The presenter has said *“While that may not seem like much, for some people it's a lot of money,”* and *“I usually don't even fill up one trash can.”*

It is not reasonable to make assumptions based on age or appearance, or to ask about the presenter's income. It might be reasonable however to ask the presenter if s/he sees the fee as having a disproportionate impact on seniors or people on fixed incomes, or if they are suggesting a fee based on usage rather than a flat fee for all.

Pointer



Experienced chairs and decision makers suggest that the best time to ask questions in this type of meeting is usually after the presenter has had an opportunity to express their opinion. Good decision makers listen for information but also for gaps in information or incorrect information, as providing full or corrected information can be a way of addressing ill-founded concerns. This puts all parties in a better position to address substantive concerns.

Council may have already considered the points being made. If so, you are in a position to provide information that might influence how people feel about your decision by letting them know you have considered various options. If not, you have now been given information that may seem simple or obvious but in fact goes to the core of decision-making: substantive fairness.

You can now frame questions you must consider to help you make a decision that will be fair to the people affected. Are there a large number of people in your community living on fixed incomes? If so, should you do anything about this, such as having a special rate for seniors? Is the proposed fee applicable to residences and businesses alike? If so, is it fair that a person living in a residential area and generating one bag of trash a week pay the same as the restaurant on Main Street?

These are fairness questions. The decision is up to Council and is not one that an Ombudsman or a court would likely review, unless there was some procedural defect in the decision making process. But it is a decision that may be reviewed in the court of public opinion, and the standard of review will be fairness.

Achieving both substantive and relational fairness requires that you both understand and consider the impact of your decision.

Pointer:



Delegations and presentations sometimes raise more questions than they answer. This can happen deliberately if people wish to expand or confuse an issue, or inadvertently because people are unclear about your jurisdiction or they are seeking information. It is sometimes useful in these circumstances to challenge a presenter. Is the question or comment relevant? Do they have an answer they are not telling you? You are in control. When asked “What’s Council going to do about that?” it is appropriate to ask “What would you like us to do about it?” or “What do you think Council has the jurisdiction to do about it?”

MAKING THE DECISION

The impact of your decision on the public is important, and hearing from the public is critical to all aspects of fairness: **procedural, substantive, and relational**. However, there will be circumstances where other information is equally important. There is information you may want to consider, and information you are required by law to consider.

Here are some critical questions successful decision makers frequently ask themselves before making a final decision. Because some of these questions seem similar, we have provided additional comments that should explain why each raises a different point and why each is important.

Are we hearing all sides of an argument? Does Council have enough information to make a decision that considers and balances different and sometimes opposing viewpoints? The risk for Council is that if they do not hear all sides of an issue, the arguments they have not considered may surface after the decision is made.

Is there someone we are not hearing from who will be affected by this decision? If so, Council should ask why they are not there. Did they get notice? Do they understand the impact (has the notice been clear about the decision we are making?) Are there different ways in which Council might receive information other than through delegations or a hearing, such as in writing or by email?

Do you have all of the relevant facts? If not, where can Council obtain that factual information? Your CAO? A planner? An engineer? Your insurance company? Manitoba Hydro? Manitoba Water Stewardship?

Is there information that needs to be clarified or obtained through further inquiry? What does Council do, for instance, if a planner's report or a Technical Review Committee report does not provide the information required? Do you ask them? Council's job is to make decisions. You do not have to start out with all the answers, but are required and well advised to make it your business to get the answers.



Making further inquiries after a hearing is one of the areas where following the rules of procedural fairness is critical to making a decision that will stand up to scrutiny. If you have already conducted a public meeting or hearing and then conclude that you need further information, how do you proceed fairly? If you obtain further information, is it necessary to share that information with the parties before you make a decision, and to allow them to comment on it? Generally, the answer will be yes. If there is information that is adverse to one party's interest, they should have a chance to respond. If the information changes things in a material way, you are really considering a different issue. People should have a chance to speak to that issue.

What do we have to consider in making this decision?

Beyond the impact on the public, what is Council required by statute to consider? Are there applicable statutory criteria that must be met before a decision is made? Is there information that you are required by law to consider, such as the report of a Technical Review Committee?

Are we basing our decision on fact and law or on feelings and opinions?

Have the feelings and opinions expressed been supported by relevant factual information? People are there to tell you how they feel, and to express their opinions. Although this is important, it cannot always be the basis for your decision. Decision makers must separate fact from feeling, and understand the extent to which each is influencing the decision. Sometimes public support for or opposition to a particular course of action will be the deciding factor. However, when the law requires a different decision, or when the facts support a decision different from the majority view, Council must be able to make and defend that decision. At that point, the ability to distinguish fact from feeling, and to articulate that difference, is critical to making a decision that will stand the test of scrutiny.

The questions above have been set out in the form of a decision-making checklist that can be found in Appendix "C". If you want to ensure that you are ready to make a fair decision, go through this checklist.

GETTING FULL VALUE FOR YOUR DECISIONS

The information you have obtained through the decision-making process will not only be the basis of your decision, it can also be used to explain your decision.

Providing reasons for a decision can be a useful tool in achieving “relational fairness.” It can be an opportunity to address concerns that have been raised, or to let people know that they have been heard.

Putting your decisions in writing provides Council with an opportunity to:



- ❖ communicate with the public;
- ❖ explain the reasons for your decision; and
- ❖ prevent unnecessary complaints.

Communicate with the public

A written decision can be an opportunity to revisit the broader context in which the decision has been made; a context that may have been lost in the heat of the argument as people focus on their narrow interest. When Council makes a decision, it has often considered legal requirements or limitations, budgetary constraints, and long term plans. Council will also have considered all points of view on an issue; not just the view of those who may have spoken the loudest. The legal context, the economic context, and the competing positions considered by Council can all be included in a written decision as background.

Explain the reasons for your decision.



A written decision can be an opportunity to say to those people who may be disappointed by the decision that their views were considered. It is an opportunity to set out the evidence considered and relied upon in making the decision. It is an opportunity to explain the logic behind the decision; an opportunity Councillors will not have had until now because it is only at this point that you will have heard and considered all of the evidence. If the evidence and arguments you have accepted and relied upon in making the decision are not explained, people are free to speculate about the reasons for your decision. They are free to second guess your decision on the basis of incomplete information or erroneous assumptions.

Prevent unnecessary complaints

There are two ways in which written decisions can help prevent groundless complaints. If there are people who are disgruntled and looking for a reason to complain, issuing clear and comprehensive reasons for your decision can make it difficult for them to read motives into your decisions, or to argue that you have not considered their views, or speculate about why you decided one way or another. Others will read your decision to see if you have acted fairly and in the best interests of the community, taking into account all sides of an argument. If people know they have been heard and understood, they are more likely to respect your decision and less likely to challenge it.

For people affected by your decisions, and for those who may examine them after the fact such as the courts or the media, written reasons for decisions represent an opportunity to demonstrate Council's decision-making competence and its fairness.



ASK YOURSELF . . .

. . . if you can explain your decision. Would you feel comfortable explaining it to the person affected by it? If you are afraid to explain your decision, or cannot explain it, then you know that decision is probably flawed.

WHAT MAKES A DECISION “UNFAIR”

For decision makers, understanding why people believe something is “unfair” can be as important as understanding the tools and skills used to achieve fairness. We have set out below some of the terms used to describe situations people think are unfair, and our understanding of what those terms mean.



The definitions and comments below are not intended as legal advice and should not be taken as such. Our intent is to provide municipalities with information on how ombudsmen view fairness. Questions of law should be referred to legal counsel.

For some of the definitions below we have added a case example to further illustrate why the Ombudsman might consider a decision or action to be unfair. Each example begins with an explanation of the term we use to describe something as unfair. At the end of the example, the text highlighted in yellow provides the Ombudsman’s analysis of why the action or decision was unfair

Unreasonable

One of the most common complaints is that an action or decision of government is **unreasonable**. In plain language, something is unreasonable if it is not rational, or if it demonstrates a lack of sense or good judgment or if it is unwise. But these words are subjective, and not particularly helpful in explaining why something is unreasonable.

An Ombudsman will often find an action or decision **unreasonable** if it:

- ❖ is inconsistent with other decisions made in similar circumstances;
- ❖ is inconsistent with the weight of the evidence;
- ❖ cannot be rationally explained; or
- ❖ has an effect contrary to what was intended.

Inconsistent with other decisions made in similar circumstances

Common sense suggests that people in similar situations should be treated similarly.

Government decisions are not always this simple or straightforward. Programs are offered to people in a variety of different circumstances. If someone is treated differently, it should be because their circumstances are different and not because the decision maker feels differently about them.

Inconsistent with the Weight of the Evidence

Basically, an action or decision will be unreasonable if the available evidence does not support it. This is, of course, easy to judge when the facts are straightforward but is much more difficult when the evidence does not strongly support any position, or is contradictory.

OMBUDSMAN CASE EXAMPLE

A rural municipality was approached by a private operator seeking permission to build an intensive livestock operation (ILO) within 4 kilometres of a local urban district within the municipality. The operator applied to Council for a conditional use order to establish the feedlot.

The municipality held a public hearing, and several residents of the local urban district attended the hearing to express their opposition to the feedlot on the basis that the operation could contaminate their wells. They claimed that similar livestock operations had resulted in contaminated water in other provinces and noted that the proposed livestock operation had barely

met the minimum separation requirements from a nearby stream. They argued that the Council would be irresponsible to approve the ILO, and they threatened to sue them if their wells became contaminated.

The applicant argued that his waste water management plan had addressed residents concerns, and that it was based on evidence and scientific analysis that had not been challenged. He noted that he had obtained a provincial water rights licence after a review by two provincial departments. Both documents had been attached to his application for a conditional use approval.

The application for a conditional use was denied. Council noted that only the applicant spoke in favour of the proposal while over twenty people appeared in opposition to the proposal.

Ombudsman Analysis

Council's decision in this case was unreasonable because it was inconsistent with the weight of evidence presented at the hearing. Without any scientific or technical support for residents concerns, Council should have given more weight to the evidence contained in the waste water management plan and the water rights license, both of which addressed concerns about water quality.

This is a difficult circumstance. Based on the evidence presented, Council should have approved the application. The purpose of this hearing was not to weigh public opinion but to determine whether the requirements for a conditional use approval had been met. The applicant's evidence was available for examination prior to the hearing and there was an opportunity to challenge it or to offer contrary evidence. Upon review, it was noted that neither of these things had occurred, nor had anyone requested an adjournment to seek contrary evidence.

This is a case where, after denying the application, Council should have considered issuing written reasons for its decision, indicating that it had carefully considered residents’ concerns and stating the scientific evidence it had relied upon in coming to its decision.

Cannot be rationally explained

If a decision or action cannot be rationally explained when challenged, it will be considered unreasonable. A decision must make sense to both the people making it and the people affected by it.

Has an effect contrary to what was intended

Governments make rules and create programs to achieve certain results. Usually they succeed, but occasionally rules or programs have an unintended effect. If the application of a rule or a policy results in a decision that has an impact contrary to the purpose or intent of that rule or policy, it may be considered unfair.

OMBUDSMAN CASE EXAMPLE

The Council of a rural municipality adopted a policy which provided that only one access per quarter section of land would be provided to the property owner at the expense of the municipality. Any additional access would be provided at the owner’s expense.

An area in the municipality had had some ongoing drainage issues. Council undertook a drainage study and determined that construction of a drainage ditch across a privately owned quarter section was required to alleviate the drainage problems.

The landowner agreed and granted an easement for the construction on his property. Council obtained a drainage licence and the ditch was constructed. After the drainage ditch was built, the landowner was unable to access a portion of his property during wet spells because the drainage ditch was full. The landowner approached Council to construct an additional access at the

expense of the municipality. Council refused, citing their policy that only one access per quarter section would be provided at the expense of the municipality.

Ombudsman Analysis

While Council was adhering to their policy, it had the unintended effect of penalizing an individual for cooperating with the municipality in addressing their drainage issues. The decision requiring the landowner to pay for the second access in this circumstance was unreasonable.

Policies of broad application can save time because Councils do not have to make the same decision over and over again, and they can provide clear direction to administration and information for the public. The Ombudsman does not consider it unreasonable to re-visit such policies when they have an unintended and detrimental impact on a citizen. Decisions to vary such a policy should be made fairly, and the reasons documented.

Unreasonable is one of many terms used to describe something that is considered unfair. Decisions may also be considered unfair if they are:

Unjust

A decision or action of government will be unjust if it is inappropriately punitive, has consequences beyond what is appropriate to the circumstances, or imposes inordinate and unnecessary obligations.

OMBUDSMAN CASE EXAMPLE

A municipality had some difficulty in previous years with trucking companies not providing timely gravel deliveries from the municipal gravel pit. This resulted in roads not being re-surfaced before snowfall and further deterioration over the winter. Based on this, Council decided to require all future contracts with gravel contractors to have an “end date” of August

30th, when all gravel had to be applied. The contracts also included a compliance provision that allowed council to impose a 10% monetary penalty for not meeting the date of August 30th.

Council hired and entered into a contract with a local trucking company to undertake the annual Gravel Program for the municipality in February. The contract included the end date of August 30th, along with the compliance provision and penalty.

That summer it rained throughout July. The road to the municipal gravel pit was soft and on a number of occasions in July, it was deemed impassible by the municipal foreman. In fact, a large portion of the pit was under water until early August. The Contractor approached Council for an extension on the August 30th end date, as there was insufficient time to complete the gravel program due to the wet weather.

Council denied the extension. The contractor worked seven days a week and leased an additional truck in an effort to meet the deadline. Despite his best efforts, the work was not completed until September 4th and the municipality retained a 10% penalty for non-compliance with the terms of the contract.

Ombudsman Analysis

Council’s decision in this case was unjust. Imposing the monetary penalty in this case was inappropriate in the circumstances and unnecessarily punitive.

An Ombudsman investigation revealed that the contract did not impose the monetary penalty automatically if the gravel delivery was late. Council could have chosen not to enforce the penalty clause. The penalty clause was added as an incentive for contractors to take their contractual obligations seriously, and to offset any additional costs incurred by the municipality arising from late delivery. In this case, there was no evidence that the contractor had not

behaved responsibly or complied to the best of his ability. More importantly, there were no consequences to the municipality arising from the late delivery.

The Ombudsman is reluctant to make recommendations that might result in interference with a contract between parties. However, based on the facts of this case the Ombudsman would ask the municipality to review its decision.

Oppressive

Government acts oppressively when its actions or expectations overburden a person participating in a government program. For example, it might impose requirements that are out of proportion to the decision or circumstances.

OMBUDSMAN CASE EXAMPLE

A city Council enacted a derelict building by-law to deal with vacant and hazardous properties within the municipality.

A woman who resided out of the province inherited property from her late aunt. The property had an old building on it, and had belonged to the woman’s family for generations.

Council had received complaints from neighbours that the building on the property was a hazard and an eyesore, and was devaluing neighbouring properties. Following these complaints, Council sent a by-law enforcement officer to inspect the building. The officer declared the building derelict and issued a compliance order to demolish the building within 2 weeks.

Upon receiving the order, the woman appealed to Council to extend the compliance period to 2 months, as she told Council that she needed time to return to the Province, visit the property, and make sure that there were no family heirlooms that needed to be taken out prior to demolition.

Council denied the appeal and demolished the building after the 2 week order had expired and prior to the woman being able to visit the building.

Ombudsman Analysis

Council’s actions in this case were oppressive because they failed to provide a reasonable time period for the woman to comply with the order. This imposed too much of a burden on her and she was unable to comply.

Upon review, it was determined that while the decision was lawful, it was still oppressive. In the absence of any immediate hazard identified by the building inspector, there was no reason why the woman could not have been given more time to recover personal items from the building. This situation could have been avoided by applying the law in a common sense way, taking into account the importance of the personal property and the hardship the order imposed upon the person affected.

Improperly Discriminatory

Discrimination is improper if government applies discriminatory criteria that are not necessary to meet the objectives of a government program. Conversely, discrimination is improper if government fails to treat similarly-situated people equally when there is no justification for differentiating.

OMBUDSMAN CASE EXAMPLE

A Town Council has a policy requiring all town employees to have a valid driver’s licence.

One of the town’s Grader Operators failed to pass his health examination, and as a result his driver’s licence revoked. Council placed the operator on leave because he could no longer fulfill his duties.

A short time later, the town’s Assistant Administrator had his licence revoked because he was in arrears of child support payments. He advised Council that the arrears were in dispute and that he had hired a lawyer. He expected the matter to be decided by the courts within a matter of months.

Council had approved the driver’s licence policy unanimously a couple of years earlier after a dispute with another town employee. They felt they had to apply the policy strictly, and suspended the Assistant Administrator.

Ombudsman Analysis

*The decision in this case was **improperly discriminatory**. The application of the policy is reasonable for employees in public works, as these employees are required to operate vehicular equipment as a vital part of their job. However, not having a driver’s license will not impede the Assistant Administrator’s ability to do his work and he should not be subject to the same license requirements as employees who are required to drive to do their job.*

This policy may also unnecessarily discriminate against persons with disabilities who can successfully do administrative work but cannot drive.

*Sometimes a decision can be successfully challenged on a number of bases. While the decision in this case was **improperly discriminatory**, it is also an example of a policy which had an effect that was not intended. As well, some people may say that the decision was simply wrong.*

Wrong

This is another fairness term that can mean different things to different people. It seems to be common understanding that when something is “wrong”, it will likely appear obvious to a neutral or impartial person.

OMBUDSMAN CASE EXAMPLE

A Town Council issued tenders for residential garbage pick-up service for a 3-year term.

The Town issued a public notice of tender, and to ensure timely service to residents, the tender included a requirement that the garbage truck must be no more than 7 years old. The tender also included a clause that stated that “the lowest or any tender may not be accepted.”

Two bids were received. The lowest was from Local Garbage Pick-Up service (LGP), which had a 6 year old garbage truck. The second tender from Generic Waste Management Co. (GWM) was higher; however, the company had a brand new garbage truck. Council awarded the tender to GWM believing that the new truck would be more reliable than LGP’s older vehicle.

Ombudsman Analysis

The decision to award the tender to GWM in this case was wrong because Council applied the tendering criteria in a manner that was not disclosed to the applicants. Had the lowest bidder (LGP) known that preference would be given to a new truck, he might not have wasted his time and money preparing a tender or he may have prepared a tender that included the cost of purchasing a new truck.

Council could have indicated that the age of the equipment would be a factor in the decision, or specified a truck of a lower age. However, once it established the age criteria for the truck at seven years, bidders were entitled to rely upon this.

Based On Irrelevant Considerations

Basing a decision on criteria that you are not permitted to apply, or on evidence that is not relevant, can also make a decision unfair.

ADDITIONAL AREAS OF COMPLAINT

There are two other things that sometimes give rise to complaints - allegations of bias and conflict of interest. Set out below is our understanding of these terms.

Bias/ Apprehension of bias

Bias means having an inclination or a predisposition to decide a matter in a certain way before hearing evidence or information. Most people, including elected decision makers, have an opinion about what is good for a municipality or about the merits of a certain project or proposal.

However, when a person is the decision maker, bias becomes a problem when they no longer have an open mind about the issue and cannot fairly evaluate the information and evidence before them. Because the person with the opposite view would have to overcome the decision maker’s predisposition in order to be successful, s/he cannot get a fair hearing from a decision maker.

An equally important concept is the “reasonable apprehension of bias.” The test for reasonable apprehension of bias is often framed as a question: would a reasonable person, reasonably well informed about the circumstances of the decision, believe there was bias on the part of the decision maker? The perception or belief that there is bias in decision-making can be as damaging to public confidence in government as actual bias.

Keeping an open mind about both sides of an issue, and being willing to listen and seriously consider the merits of both sides of an issue, can help you avoid or respond to allegations to bias.

Providing reasons for your decisions can also help. Your reasons should include an explanation of how you arrived at the decision, clearly set out the issue being decided, and state your authority for making that decision. Reasons can also demonstrate that you did hear and consider a position, and the evidence and information in support of that position, even if you did not accept or agree with that position.

Conflict of Interest

This occurs when your personal interest conflicts with the public interest, or with your duty as a public official.

In Manitoba, *The Municipal Council Conflict of Interest Act* deals primarily with conflict arising from pecuniary (financial) interests, and provides some definitions of the relationships and issues often raised in conflict of interest cases. It also requires disclosure of financial interests, which is a helpful initial step in avoiding conflict and sets out procedures to deal with conflict of interest situations.

Conflict occurs when you are aware of a connection between your personal interests and the public interest (what is in the best interest of the entire municipality), and your decision may be affected by your personal interest. When a conflict of interest exists, you must declare your interest and withdraw from the decision making process.

The appearance, or perception, of conflict can be as harmful to public confidence as actual conflict. Once a connection between your personal interests and your public decisions is made, it can be difficult to demonstrate that your decision was not influenced by your personal interest.

Conflict, or the perception of conflict, can occur even when there is no financial interest. This happens in cases where you are seen to be too close to the parties on one side of a dispute, or where you are seen to be at odds with one of the parties.

CONCLUSION

Fairness has been described as part art and part science. What does that mean? It means that by learning rules and procedures to be followed, a knowledge base can be acquired. That is the “science.” The “art” comes in applying that knowledge base in a skillful way based on your common sense and good judgment.

We have attached a couple of checklists, one for you as a decision maker and one for your municipality that we think can help you make better decisions.

We have also attached a guide to working with the Ombudsman. This guide is a step by step description of what you and your CAO can expect from my office when someone complains about you.

We hope that our tools will help you in understanding and achieving fairness. In the end, the best tool might be the simplest of all: if you are considering whether or not you have treated someone fairly, ask yourself how you would feel if you were in their shoes.

This project is a work in progress. In addition to the text, we anticipate conducting workshops on fairness. Information that we gather at those workshops will help us make necessary changes and improvements. We will also endeavour to provide updates made necessary because of significant changes in the law.

If you have comments, questions or suggestions that would help us improve this project, we would like to hear from you.

APPENDIX A



INDIVIDUAL FAIRNESS CHECKLIST

This checklist encompasses some aspects of fairness for you to consider when making decisions.

Part 1 – Procedural Fairness

- Have I considered what my role is in making this decision and what requirements I must meet in doing so? *Am I sitting as one member of an appeal committee? Am I chairing a Board of Revision? Are there pre-set rules that the hearing must follow?*
- Has the person affected by this decision been given reasonable notice that a decision is being made? *Is notice required by law? How long is reasonable in the circumstances?*
- Is the information I am using to make this decision known to the person who might be affected by the decision? *If not, how can they respond to or comment on that information?*
- Has the person affected by the decision been given an opportunity to state or present their case? *In person at a hearing or meeting or in writing?*
- Has the person affected by the decision been given a chance to challenge or dispute information or evidence they disagree with? *Or to present contrary information?*
- Have I carefully considered all of the information provided by the person who might be affected by this decision?
- Have I been impartial in my decision? *Have I set aside my personal likes and dislikes and considered what is in the best interest of everyone affected by the decision?*
- Have I given honest and meaningful reasons for my decision? *Reasons that will be understood by the person affected by the decision.*
- If the decision can be appealed, have I told the person about the appeal process?

Part 2 – Substantive

- Is the decision I have made within my authority? *Is the decision something that I am authorized to order or decide by law?*
- Is the decision based on relevant criteria? *Have I applied the correct statutory criteria and addressed the questions I am required by law to answer when making my decision?*
- Can the person affected by my decision comply with that decision? *A decision cannot require anyone to do something that is illegal or not authorized by law.*
- Is my decision reasonable? *Will the person affected by my decision understand why I made it? Will others who look at it be able to see that it is reasonable? Can I defend this decision if I am challenged?*
- Does my decision discriminate against anyone or result in an impact that is discriminatory? *Have I made my decision based on the law and the merits of the case rather than on the personal characteristics of the people affected by my decision?*
- Is the decision harsh or oppressive? *Does it require a person to do something that can be done in a more convenient or less intrusive manner?*

Part 3 – Relational Fairness



Being approachable is important but you should be aware that there are limitations on the interaction you can have with constituents in certain circumstances. For instance, if you are conducting a hearing you cannot act in a manner that might suggest bias or conflict of interest. If someone wishes to talk to you about the subject of the hearing the appropriate response is to say no and invite them to make their views known through the hearing process.

- Am I approachable and available? *Do people know how to reach me? Do I return calls promptly and make myself available to people who want to meet with me?*

- Do I listen carefully to people who want to make a point, even though I do not necessarily agree with them? *Do I ask questions to make sure I have all the information I need to understand their point?*
- Do I explain the basis on which I (or we as a Council) have made a decision, or simply tell a person the decision is made? *Does the person understand the limits on Council's authority or the legal requirements behind a decision?*
- Am I getting through to the person I am speaking with? *Am I answering their questions or just repeating my position? Am I sharing as much information as I can? Am I using language they can understand?*
- Am I being respectful of the person's feelings? *Do I appreciate how the decision will affect that person?*
- Am I prepared to apologize if I make a mistake?
- Is there anything else I can or should do for this person? *Do I have any suggestions that will help them deal with the impact of my decision? Can I refer them to someone else who can help or answer their questions?*
- Have I made them aware of any existing appeal or complaint mechanism?

APPENDIX B



MUNICIPALITY FAIRNESS CHECKLIST

This checklist outlines aspects of fairness that your municipality might want to consider to ensure fair service and treatment for municipal residents.

Access and Communication

- Does our procedures by-law require that the public receive notice of regular Council meetings? *Is the agenda published or posted so that people will be aware Council is considering issues that may affect them? If requested, is it available by e-mail?*
- Is the public informed about the decisions of Council? *Are the minutes of Council meetings routinely posted in the municipal office, post office, or community centre? Is a copy sent to the local paper? Are they available by mail or e-mail?*
- Is public information about municipal services, and how to request them, available and understandable? Is this information available on your municipal web site?
- Do we have a policy facilitating routine and proactive disclosure of all information permitted by law? *Information on the application of provincial access and privacy laws is available at the Manitoba Ombudsman web site, and also at the provincial website.*
- Are our municipal premises easily accessible? *Can we accommodate people in wheelchairs or scooters? Can we communicate with people who are hearing impaired or visually impaired? Do we have a private space for people to review minutes, notices, or by-laws?*
- Is correspondence answered in a timely manner?
- Are phone calls and voice mail messages answered promptly?

Customer Service

- Is staff aware of municipal programs and services and able to provide this information by phone? *Does staff have a referral list for other government programs and services?*
- Have municipal staff who are required to deal with the public received customer service training? *Is there a “customer service” policy addressing issues like respectful behaviour and timely response to inquiries?*
- Is there a “complaints” policy setting out how complaints are addressed and disputes with citizens resolved? *If so, is this policy known to municipal residents?*
- If mistakes occur, are they addressed in a timely and respectful manner?
- Is the public's right to privacy respected?

Decisions

- Is there adequate notice provided to those persons who may be affected by a decision of Council or administration? *What steps have been taken to inform the public of Council’s decision making process?*
- Are those affected by a decision given a chance to give information and evidence to support their position?
- Are decisions made within a reasonable time?
- Are meaningful reasons given for decisions?

Appeal/Complaint Procedures

- If people have a right to appeal, are they told about that right at the time a decision is made?
- Are procedures for filing a complaint / appeal fully explained when told of a decision? *Is the public generally informed about appeal or complaint procedures in posters or brochures?*

Ongoing Review / Improvement

- What procedures are in place to address problems that continue to arise?

- Does the complaints or customer service policy contain a method for keeping statistics that can be used to identify common concerns and to plan necessary changes or improvements?
- Is there a mechanism to identify and consult affected individuals or groups when significant program or service changes are contemplated?
- Is there a method for incorporating procedural or service improvements into municipal policy so they remain in place? *Such as in the procedures by-law or other existing by-laws or policies?*

APPENDIX C



DECISION- MAKING CHECKLIST

Review these questions with your CAO prior to making the decision

- What provincial act or municipal by-law gives us authority to make this decision?
- What are the notice requirements, and have they been met?
- What information has to be given to people who will be affected by this decision?
- Are we conducting a meeting, hearing, or appeal?
- Does the law set out any criteria that we must consider?
- Does the law impose any conditions or restrictions on our decision?
- Are we required to issue a written decision?

Ask yourselves these questions prior to making the decision.

- Have we heard all sides of the argument?
- Is there someone we have not heard from who will be affected by this decision?
- Have we obtained and considered all of the relevant facts?
- Is there information that needs to be clarified through further inquiry?
- Are we basing our decision on fact and law or on feelings and opinions?
- Does the decision require anyone to do something that is not authorized by law?
- Does the decision discriminate against anyone?
- Does the decision create or impose any unnecessary obstacles for the person(s) affected?
- Did we take the time to listen to the people who will be affected by this decision?
- Were we clear with people about what we can and cannot do within our authority?
- Is the reasoning behind the decision understandable to the person(s) affected?
- What should we include in our written reasons for decision?

APPENDIX D

PUBLIC HEARINGS

Legislation requires that a municipality must hold public hearings in certain circumstances.

Councillors conducting the public hearing must:

- ❖ present and explain the municipality's position
- ❖ hear presentations from individuals and delegations
- ❖ respond to questions from individuals and delegations

The Municipal Act:

Subsection 160(2) provides that all Councillors must participate in all public hearings convened under *The Municipal Act*, unless they are excused by Council from attending, unable to attend due to illness, or are required to withdraw from the hearing in accordance with *The Municipal Council Conflict of Interest Act*.

Public hearings are required under *The Municipal Act* for:

- ❖ presentation of annual financial plan of the municipality (subsection 162(2))
- ❖ revisions to the operating budget that increases transfers from surplus and reserves, increases tax revenue, or increases estimates in the capital budget (subsection 162(3))
- ❖ intention to spend from a special purpose reserve for a different purpose (subsection 168(2))
- ❖ proposal to close a municipal road (section 290)
- ❖ proposal for local improvements/special services (section 318)

A municipality may also hold a public hearing for any other matter it chooses.

The Planning Act:

Except where the municipality is a member of a planning district, the municipal Council is responsible for the adoption, administration and enforcement of the development plan by-law, the zoning by-law and all other by-laws respecting land use and development in the municipality.

Public hearings are required under *The Planning Act* for:

- ❖ a proposal to adopt or amend development plan (section 46)
- ❖ a proposal to adopt or amend zoning by-law (subsection 74(1))
- ❖ an application to subdivide property which results in the creation of a new public road (subsection 125(2))
- ❖ an application to vary requirements of a zoning by-law (section 96)
- ❖ an application for conditional use (section 105)

Boards of appeal

Legislation requires that the Council act as an appeal body in certain circumstances. In these circumstances, the appeal body is given certain authority.

The Municipal Act:

- ❖ Subsection 244(1) of *The Municipal Act* provides that an individual who has received an enforcement notice may request Council to review the order. Council would sit as an appeal body to review the enforcement order (e.g. derelict vehicle removal order, or unsightly property clean-up order).
- ❖ Members of the appeal body review the order issued by the by-law enforcement officer. Council may confirm, vary, substitute, or cancel the order (subsection 244(2)).

The Municipal Assessment Act:

- ❖ Subsection 35(1) of *The Municipal Assessment Act* provides that Council must annually appoint a Board of Revision consisting of at least 3 members, some or all of whom may be members of Council. In most municipalities, Council as a whole sits as a Board of Revision.

The Board of Revision hears applications for assessment appeals with respect to the amount of assessed value, classification or liability to taxation, listens to evidence provided by the appellant and the assessor, and issues an order. The order is appealable to the Municipal Board (the amount of the assessed value and property classification) or to the court (liability to taxation).

APPENDIX E

WORKING WITH THE OMBUDSMAN

Overview

The Ombudsman is an independent officer of the Legislative Assembly (as are the Chief Electoral Officer, the Auditor General and the Children’s Advocate.)

She is not part of any government department, board or agency. The Ombudsman’s independence from the administrative arm of government is guaranteed by the fact that she is **appointed by the legislature** for a fixed term, and has **security of tenure**.

The Ombudsman **reports to the legislature**, through the Office of the Speaker, and has the power (and the duty) to **report publicly** on her activities.

The Office of the Ombudsman is one means by which the legislature can be assured, and can assure the public, that the administration and application of its laws and policies is both fair and consistent with the intent of those laws and policies.

Jurisdiction

People who feel that they have been treated unfairly by government, including municipal government, can complain to the Ombudsman. Under *The Ombudsman Act*, the Ombudsman may investigate any “matter of administration,” defined broadly by the courts as “*everything done by governmental authorities in the implementation of government policy.*”

In addition to investigating complaints from the public, the Ombudsman can start her own investigations. She can investigate system-wide issues to identify underlying problems that need

to be corrected by government, with the hope of eliminating or reducing the public's need to complain about those issues.

The Ombudsman cannot investigate decisions made by the Legislative Assembly, Executive Council (Cabinet), the Courts, or decisions reflected in municipal policy by-laws.

The Ombudsman Act imposes restrictions on accepting complaints when there is an existing right of review or appeal, unless she concludes that it would be unreasonable to expect the complainant to pursue such an appeal. This can occur in situations when the appeal is not available in an appropriate time frame or when the cost of an appeal would outweigh any possible benefit.

The Ombudsman may decline to investigate complaints that the complainant has known about for more than one year, complaints that are frivolous or vexatious or not made in good faith, and complaints that are not in the public interest or do not require investigation.

Complaints

Intake

All complaints to the Ombudsman go through our Intake Services team. Complaints analysts review each new complaint to determine whether we have jurisdiction over the subject of the complaint and the body being complained about. Where appropriate, they will review referral and appeal options with a complainant and provide information on both how to address concerns informally and how to submit a complaint to the Ombudsman.

Intake staff can sometimes resolve a complainant's concerns immediately by clarifying the authority for an action or decision, based upon their experience and knowledge of law, regulation or government policy. In other instances, intake staff can review information a complainant has already received to ensure that he or she understands it.

Intake staff can attempt early resolution, and that can involve contact with the subject of the complaint usually to confirm or clarify information they have already discussed with the complainant. *At the municipal level, this will usually mean a telephone call to the CAO or his or her designate.*

When a complaint cannot be resolved at Intake, it is opened as an Investigations file.

Investigations

A municipality will be notified in writing of a complaint, but an investigator may call the CAO to advise him or her of the complaint or to clarify something that remains unclear to us, in order to expedite the process.

The municipality will get notice of the complaint either through a written summary of the complaint prepared by the investigator or a copy of the complaint as written by the complainant.

The object at this point is clarity, to provide the municipality with sufficient detail and a clear statement of the administrative action or decision or deficiency being complained about so that the municipality can provide us with a detailed response. *If you receive notice of a complaint and are unclear about any aspect of the complaint or the investigation process, feel free to call the investigator.*

This is also an opportunity for the municipality to do its own analysis of the complaint, by taking a second look at the action or decision complained about in light of the complainant's position as expressed to the Ombudsman. If a complaint can be resolved immediately, either because a municipality does not dispute the complaint or can provide information that will resolve it, *contact the investigator* and the complaint may come to an early conclusion.

Sometimes a letter from an Ombudsman investigator will ask for “...any information that will assist us in clarifying this matter.” This is intended to provide an opportunity to explain what has happened and to provide the background and context of the situation giving rise to the complaint. It can also be an opportunity to educate an investigator about a subject that may be new or technical, if you think that will help resolve a complaint.

Providing sufficient background and detailed information to the Ombudsman during the complaint process puts us in a position to provide a full answer to the complainant. It allows us to respond in a meaningful way after we have done an analysis of the complaint and information provided in the response; and not simply repeat a response that a complainant has already found inadequate.

A factor to consider when responding to a complaint is that *all Ombudsman investigations are conducted in private and the Ombudsman can accept information provided in confidence.*

In some cases an investigation will involve gathering additional information, sometimes from multiple sources. The Ombudsman’s investigative powers include the authority to require people to provide information or documents upon request, to require people to give evidence under oath, and to enter into any premises, with notice, for the purpose of conducting an investigation. Provincial laws governing privacy and the release of information do not apply to Ombudsman investigations.

Witnesses interviewed during an investigation will depend on the circumstances of each case but may include the complainant and any witnesses identified by the complainant, the person who took the action or made the decision being complained about, and the person responsible for the policy or practice giving rise to the decision or action complained about.

For municipalities, our contact person is usually the CAO. Our initial approach is usually to work with the CAO to identify both the people we need to talk to and the documents we need to review. *Investigators will usually be available to discuss a complaint in person with a CAO, and we often meet with a mayor or reeve and CAO together or with an entire Council.*

Investigations can include a review of any relevant public documentation, such as provincial legislation (Municipal Act, Planning Act, etc.), provincial policy, municipal by-laws, resolutions, Council minutes, and procedures by-laws. Other documents reviewed can include items such as correspondence, contracts, and notices. Physical evidence can include structures, photographs, and video tapes, and some investigations involve site visits to examine such items as equipment, culverts, dams, and drainage ditches.

On occasion, an entire municipal file will be reviewed, to obtain additional information or a broader understanding of the context of a complaint.

Analysis

The object of fact finding and document review processes is to obtain the information necessary to complete an analysis of the complaint. The Ombudsman must either support a complaint, and identify the appropriate corrective or restorative action, or provide the complainant with a thorough and reasonable explanation for her conclusion that the complaint cannot be supported.

If a complaint is supported, it will be because after a thorough investigation and impartial analysis, the Ombudsman has concluded that the action or decision complained about is:

- ❖ contrary to law;
- ❖ unreasonable;
- ❖ unjust;
- ❖ oppressive;
- ❖ discriminatory; or

- ❖ wrong.

Or she may have found that something has been:

- ❖ done for an improper reason; or
- ❖ based on irrelevant considerations.

If at the end of an investigation the Ombudsman supports a complaint, she has a wide range of options available in making recommendations to municipal government that it may use to correct a problem.

She can recommend that:

- ❖ a decision be reconsidered;
- ❖ a decision be cancelled;
- ❖ a decision be varied;
- ❖ a practice be changed or reviewed;
- ❖ reasons for a decision be given;
- ❖ an error or omission be corrected; or
- ❖ any other action be taken.

The vast majority of Ombudsman investigations are concluded without the need for a formal recommendation.

The investigative process is an inquiry to determine the extent, if any, to which administrative actions or decisions are at odds with the intent (spirit or the letter) of the laws and policies they were intended to implement. As well, it is a review of whether the complainant has been treated unfairly in the application of those laws and policies or subjected to an unfair result.

The Ombudsman's investigative powers permit the identification of most administrative errors and deficiencies. The impartial analysis and the privacy of Ombudsman investigations permits government bodies to rely upon the validity of our conclusions and to take the necessary corrective action informally as soon as possible. *This process most often results in government reaching the appropriate conclusion and taking the necessary action without further prompting from the Ombudsman.*

In circumstances where it is necessary for the Ombudsman to reach a conclusion and identify a corrective or restorative action, this is usually done informally by investigators through discussions with the CAO or with Council. However, should that process not work, *The Ombudsman Act* sets out a formal reporting process.

When the Ombudsman reports to Council and makes a recommendation in respect of a complaint, the Act requires that Council consider that report and recommendation as a committee, in camera.

The Ombudsman can ask the municipality to notify her within a specified time frame of the steps Council intends to take to implement recommendations.

If, after a reasonable time, no action is taken which the Ombudsman deems adequate and appropriate she may, after considering any comments made by the Council, issue a further report to the head of the Council and that final report shall include any comments Council may have in respect of the opinion or recommendation of the Ombudsman. *Council is required to table that report at the next regular meeting of Council.*

In addition to reporting her findings and recommendations to Council, the Ombudsman, after an investigation, is required to report to the complainant on the results of the investigation.

The Ombudsman may report on any matter in her annual report, or issue a special report if she deems it appropriate.

Collaborative Process

The job of the Ombudsman is to investigate complaints about maladministration and, where warranted, to report upon it and to make recommendations designed to remedy that maladministration. Elected officials are responsible for accepting or rejecting those findings and are accountable to the public.

Despite that clear division of labour, and the enunciation of the rights and responsibilities of both parties in law, the common goal is the better administration of government. That common goal is the basis of the Ombudsman's collaborative approach to investigations.

Pursuit of the common goal means that while the Ombudsman accepts complaints from the public, it may be said that if the Ombudsman has "clients," those clients are not only the people who complain to us but also the government departments and agencies and municipalities whose decisions she investigates.

It is the government "clients" who are ultimately responsible for the good administration of government, and for the legislative and policy decisions that drive government's interaction with the public.

For municipalities, one of the important considerations for us is how you view yourselves. As elected officials, it is important to us that you view yourselves as legislators rather than administrators. We believe this allows you to take a broader view of complaints by citizens, and of our role and our investigative process. It is neither necessary nor helpful to be defensive about a complaint. People complain. We are in the complaint business, but we are also in the solution

business. The solutions that we identify should always involve fixing something that was not done correctly, or as may be the case, could have been done better.

If your municipality accepts the concept of the collaborative investigation process, here are some of the tools and assets the Ombudsman can bring to that process:

- ❖ A cross section of information and knowledge about other jurisdictions, other policies, other complaints, or information that may put us in a position to identify a best practice in a given area.

- ❖ A broader lens with which to view a particular administrative action or decision. For example, a decision may have been made by a person based on a written directive from an immediate supervisor or manager. We will look at the broader context of overall organizational policy, or provincial policy, or the Act or Regulation under which the organizational policy or written directive has been based.

- ❖ Objectivity: We do not have a stake in a specific outcome for the complainant. This is one of the chief differences between an Ombudsman and an advocate. It is not our job to second guess government decisions but to ensure that those decisions are fair and made through a fair process.

- ❖ Curiosity: “Why is it done that way?” As a general rule, if you cannot explain to the public why you are doing something, you may have a problem. Of course sometimes members of the public can be unreasonable, but if you cannot explain to a neutral investigator why you are doing something, or doing it a certain way, you may very well have a problem.

Although we view the investigative process as collaborative, we understand that some may find it intrusive, particularly when we require the production of sensitive information or documents. Ombudsman investigations must be both thorough and impartial.

The Ombudsman cannot simply accept the word of government that something has been done correctly or in accordance with the law or governing policy, any more than she can accept the complainant's word that something has been done wrong. The Ombudsman exists as an independent complaint mechanism. This requires the thorough investigation and verification of facts in dispute, and an impartial analysis of the issues under review. Anything less could undermine confidence in the office and in government. It would also be a disservice to our complainant "clients."

When we close a file, we also report to the person who made the complaint. Fairness requires that when we make a decision not to support a complaint, that decision be made fairly. Although we may have been procedurally fair throughout, and come to a decision that is fair, we understand that achieving relational fairness is also a critical step.

Complainants are entitled to a thorough explanation of the Ombudsman's findings and conclusions. We attempt to provide this in writing but investigators are also available to meet with complainants to review our findings. At that point, we need to be in a position to answer their questions and respond to any points they raise, whether or not those points have been addressed in our closing letter.

It is important to us that everyone we deal with, whether they agree with our conclusion or not, feel as though their concerns have been heard and answered and that they have been treated with respect.

Conclusion

If you have questions about how our office works, or if you need clarification of anything we have said in *Understanding Fairness*, please feel free to contact us.

The Ombudsman can be a resource for municipalities. While we cannot pre-judge any situation that might be the subject of a complaint investigation, we can talk to you about general principles of fairness, accountability and transparency. We can also provide information on previous municipal investigations, without breaching confidentiality, which might be helpful in your decision making process.

Municipalities can refer complainants to the Ombudsman for a thorough and impartial review of a complaint it has been unable to resolve directly with the complainant. Our review will be the same, regardless of the source of the complaint. Because we are neutral and independent of government, a review by the Ombudsman can sometimes satisfy a person that their concerns have been addressed.

Finally, the Ombudsman is just one of the resources available to you. Manitoba Intergovernmental Affairs, the Association of Manitoba Municipalities, and the Manitoba Municipal Administrators Association, all have knowledge and practical experience in addressing municipal issues, and their own tools and resources designed to assist you.