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**A GUIDE FOR CONSIDERATION OF A  
PROCESS FOR  
REVIEW OF ADMINISTRATIVE DECISION-  
MAKING**

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The Administrative Justice Office would like to acknowledge its significant reliance on work done by J. Bruce McKinnon in a background paper prepared for the Administrative Justice Project, Ministry of Attorney General, *Reviewing Original Decisions: Guiding Principles and Options*. For a full review of the law in the areas addressed by this Guide, it is highly recommended that reference be made to that paper, available at:  
[www.gov.bc.ca/ajo](http://www.gov.bc.ca/ajo)

In addition, the Administrative Justice Office acknowledges work done by Wendi J. Mackay and others in support of the Administrative Justice Project and the Administrative Justice Office.

## EXECUTIVE SUMMARY

Government and other statutorily empowered officials make a wide range of decisions that can have a profound impact on individuals, businesses and the general public. The nature of those decisions is diverse, and may include determinations about activities and issues affecting the environment, the economy, public health and safety, and an array of other matters. In making those decisions, various authorities may be exercised, and many of these may involve some level of discretion. Inevitably, some persons will disagree with a particular decision, and will look for an opportunity for that decision to be reviewed and changed. The general public may also have a broad interest in appropriate decision review processes being available.

This guide is intended to assist public policy makers in considering what, if any, process may be appropriate for the review of a decision made by a government or other statutorily empowered official. Options include providing for an internal review, review by an external entity, or no review process (simply leaving any decision review to the courts by judicial review). This guide sets out and discusses the broad range of policy, legal and practical factors that may be considered in determining which decision review option may be most suitable and some considerations for the design of internal and external decision review processes, should either of those be the preferred option.

As a secondary function, this guide may also assist public policy makers, program managers, decision-makers and others in evaluating existing decision review processes, to ensure those processes continue to meet program and stakeholder needs. Certain aspects may also be helpful in designing processes for making original decisions.

The guide may also be of interest to persons external to government who are considering a process for review of decisions made by entities outside of government.

The guide sets out a “step by step” process, to try to ensure that critical matters are not overlooked. However, users should be prepared to re-evaluate determinations made at earlier steps as the issues identified and discussed in subsequent steps may impact on those earlier matters.

The four step process is broadly described as follows:

- Step 1:** Determine the policy goals for the program and whether these goals indicate a decision review may be warranted.
- Step 2:** Determine the key characteristics of the program area that may be relevant to the proposed decision review.

**Step 3:** Consider the options:

- *Internal decision review*
- *External decision review*
- *No review / judicial review*

**Step 4:** Consider the technical matters that will impact the determination of which decision review option may be best.

The next step may be to prepare legislation, even if only judicial review is to be available.

If either an internal or an external decision review process is considered desirable, the *Administrative Tribunals Act, S.B.C. 2004, c.45* which provides a consistent legislative framework for BC tribunals and articulates certain policy decisions made by government for its administrative institutions, will be helpful. The Act will also be of assistance for some aspects of judicial review. The Administrative Justice Office is available to assist in considering how that Act might apply in particular circumstances. Contact with that Office early in the process is recommended. Contact information for the Administrative Justice Office is set out on the last page of the guide.

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## **THE PURPOSE OF THIS GUIDE**

### **A principled approach to decision review**

This guide is intended to assist public policy makers when considering whether persons affected by a decision made by government, staff persons, or **public officials**, or an entity empowered by government, should have an opportunity to ask for that decision to be reviewed and as a result, possibly changed. The guide may also be of interest to persons external to government who are considering a process for review of decisions made by entities outside of government.

This guide uses a principled approach to address the policy, legal and practical factors that may help determine what, if any, decision review may be offered, and to set out the range of decision review options available (internal review, review by an external entity, or simply leaving decision review to the courts' inherent powers). The various technical considerations in choosing the option most appropriate for the program circumstances are also discussed.

The intent is that by applying a principled approach, all relevant factors will be considered and the persons affected by the original decision, and the public, will be able to more easily understand why a particular type of decision review, or no decision review, is provided.

If a decision review process is to be provided, this guide sets out the principles that will assist in choosing a structure and processes to meet the parties' and stakeholders' needs in an appropriate and proportionate manner, balancing independence with accountability.

Certain aspects of this guide may also be helpful in evaluating the process for making original decisions, with sound original decisions reducing the need for subsequent review.

### **Why consider providing a decision review process**

Consideration of providing a decision review process may be appropriate if the persons affected by the original decision may reasonably believe:

- they did not have a fair opportunity to present their information about the matter and make their views known to the original decision-maker.
- that the original decision-maker may have given other interests more and possibly unfair consideration when making the decision.
- Or if the persons affected by the original decision did not appreciate or understand the importance of that original decision to them, until after that decision was made. Another opportunity to make their views heard or to provide information may be reasonable in the circumstances.

These and other important factors are set out in the guide.

## **How the guide works**

The guide is intended to provide a framework to evaluate whether to provide an opportunity for review of an original decision or simply leave the review function with the courts, by setting out and asking questions about the various factors that can assist in making that determination. If a decision review is to be provided, the guide also sets out and asks questions about the various elements that will assist in determining an effective structure for such a decision review.

To make the guide easier to use, a Glossary that defines or explains the words and concepts that are bolded in the text, a summary of the advantages and the disadvantages of each review option, a list of central agencies and legislation and a process checklist are all included as appendices.

Much of the process in this guide, and the determinations it suggests be made, are inter-related, with some overlap being inevitable. Setting out the various elements in an order that would “make sense” to all readers in all programs posed a problem, and involved making choices about the order of presentation, not all of which will work for all readers. Some readers may find the guide more beneficial if they start at the third step, decision review structure options, first. In any case, it is expected that it will be necessary to read and consider the whole guide before reaching any conclusions. It is also anticipated that preliminary determinations will need to be re-evaluated, and possibly changed, as other elements, identified later in the process, are considered.

Given the vast range of original decisions, not all factors will apply the same or even at all, to all such decisions. No hard and fast rules could or should be made as to how any factor will apply, or the conclusion that should be reached, without information about the program or policy context of the original decision. Users will need to bring their own evaluative experience and consider the various factors in the context of their applicability in the particular program circumstances. Again, users of this guide are encouraged to contact the Administrative Justice Office about specific circumstances.

## **Getting started – a cross disciplinary team recommended**

The guide assumes the persons using it will bring a comprehensive understanding of the program area within which the original decision was made:

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

For this reason, a cross disciplinary team that brings a variety of perspectives and experiences is recommended. Such a team may include policy analysts, program managers, operational staff and generally also legal counsel, right from the start, with early consultation with the Administrative Justice Office and the Dispute Resolution Office also recommended. Depending on the decision review structure selected, other input and expertise may be required, for example, Court Services may need to be consulted if a court review process is chosen.

## **A PRINCIPLED APPROACH**

*The following general principles are intended to assist in using this guide and, if a decision review process is to be provided, consideration should be given to:*

***Proportionality:*** *Decision review mechanisms should be proportionate to the complexity and impact of the decision and the issues addressed by that decision. For example, if the original decision addresses issues that are relatively straightforward and the impact is less significant, it may be that no review mechanism is required or even desirable; for original decisions that raise complex issues and have a major impact, a more formal and technical review process may be appropriate.*

***Clarity:*** *The applicable legislative or other authority for the review process should be as clearly stated and comprehensive as possible, in order to achieve maximum operating efficiency and avoid the delay, costs and other difficulties that can arise if important elements are not clearly addressed. Clarity also ensures that the procedures are easily understandable and, where possible and appropriate, can be accessed without legal representation.*

***Accessibility:*** *A good decision review process is accessible to the people who may need or want to use it. The decision review process should be:*

- *reasonably affordable from the individual user's perspective, including such costs as out of pocket expenses, time away from work and possibly legal assistance.*
- *understandable to the users, who should be able to obtain easily accessible, clear and understandable information about both the original decision and about the decision review process and how it works.*
- *avoids overly technical legislation and rules and, if possible, is usable without a lawyer.*
- *geographically accessible to the extent reasonable in consideration of all other elements. Options may include providing electronic access to documents and conducting decision reviews in writing, by telephone or means other than in-person hearings.*



- *Coherency within the larger administrative justice system: While all decision reviews should be structured for the best fit in the environment in which they will operate, uniformity with other similar structures and processes or, at the very least, avoiding unnecessary diversity, is desirable. Despite the significant diversity of program areas, the administrative justice system, within which decision reviews operate, should be as coherent a system as possible. Decision review design and processes should not occur in isolation of the broader system perspective.*

## **POLICY GOALS – The First Step**

Consideration of the common policy goals set out below is intended to assist in determining whether to provide for a **decision review process**, and give some context to what a decision review should be designed to achieve. The policy goals set out should be considered in the context of the particular program area and the decisions that will be made in the delivery of the program.

These goals are inter-related and no one goal will likely be definitive of whether a decision review process ought to be provided. In some cases, one goal may compete with another. The goals are probably best viewed as a matrix, all of which should be considered but whose individual importance may vary from program area to program area, with consideration of their relative priority within the program area.

### ***Fairness and justice***

Fair and just decisions are important not just to the individuals affected by the **original decision**, but also to the larger public interest in the proper and fair administration of government programs.

Fair and just decisions:

- *are legally and factually correct, made with an appropriate understanding of the relevant policy factors*
- *made using processes that comply with the applicable rules of **natural justice or procedural fairness**.*

The fundamental rules of natural justice/procedural fairness require that:

- *the person know what is being considered and*
- *have an opportunity to present their own version.*

Some of the considerations on how natural justice/procedural fairness is achieved are set out later in this guide, starting at page 24.

*Questions to consider: Is the original decision-maker likely to have all the required information in order to make the “right decision” – that is, will the decision-maker be likely to have an accurate understanding and appreciation of all relevant facts? Will the original decision-maker have full knowledge of the law and policies that apply in making the decision, including any exceptions that may be allowed?*

*Did the affected persons:*

- *have prior knowledge that a decision that affects them is being made?*
- *understand the impact of the decision on the person?*
- *understand their ability to provide information to the original decision maker that may assist in making the decision?*

*How the answers to these queries may affect consideration of this policy goal will depend, at least in part, on how serious the consequences of the original decision are for the affected persons. (See the discussion on proportionality, below and on page 4.)*

### **Consistency**

Consistency means that cases that are the same should be decided the same, which is an important element of fair and just decisions. Inconsistency can arise:

- *where the same decision-maker reaches different decisions in similar cases, without apparent reason.*
- *where different decision-makers within the same program make inconsistent decisions on like cases.*

*Questions to Consider: Does the original decision-making process have safeguards that will assist in making consistent decisions and/or limit or protect against inconsistent decisions? Is there an ability to provide affected persons with an explanation for seemingly inconsistent decisions?*

### **Proportionality and cost efficiency**

Some issues addressed by original decisions are simpler, more straightforward and of a more limited effect than others which can be more complicated and apply more broadly, with significant impact. The complexity and extent of the structure and process for any decision review should be proportionate to the issues under consideration.

Decision review structures and processes should use individuals' and public resources, only to the extent necessary and do so as effectively as possible.

*Questions to consider: Does the effect of the original decision on the person(s) affected call for a second look at that decision? Are the consequences of the original decision for the affected persons short term or long term? What is the significance of the decision: that is, is it a major impact to a fundamental aspect of life? Do the impacts indicate the additional costs associated with a decision review are warranted? (See the principles regarding proportionality and accessibility on page 4.)*

### ***Timeliness and finality***

At some stage, all decisions must be considered final, and the time within which that finality is achieved may be an important policy goal.

Providing an opportunity for decision review and the extent and nature of the review opportunities will impact on the time to achieve finality. A decision review can usually be heard and decided more quickly if the matters to be considered on the review are limited. How the review is to be conducted (in writing, in person, or some other process) and the evidence that can be considered can also affect the timeframe to achieve finality. Generally, multiple reviews will take longer to complete than a single review.

*Questions to consider: What are the requirements or need for an early conclusion of the matter? How do the benefits of achieving an early final outcome weigh against the benefits of providing an opportunity for review? Can the review process operate effectively with time limits? If time limits are set, what resources may be required to complete decision reviews within such time limits? Can procedural rules, case management and dispute resolution provide opportunities to address issues of timeliness?*

## **PROGRAM CHARACTERISTICS – The Second Step**

Identifying key characteristics of the program and the environment in which the program operates will help successfully determine whether a decision review process is to be offered and, if so, the design elements that need to be addressed for any such review process to be effective. Some common characteristics are set out below, with some overlap between these and the policy goals described above. It is unlikely that any single characteristic will be definitive whether to provide a review and what the review should look like. All relevant characteristics should be considered and determinations made about their relative priority within the program area. Decision review processes that work in one program area will not always be appropriate in a different program area.

Some common program characteristics to be considered include:

### ***Significance of the original decision***

The impact of the decision under review is a critical factor and should be assessed from the perspective of the individuals affected, the public and the government.

- *The effect of the original decision on an individual. For example, does the original decision affect a person's liberty or freedom? A decision with significant impacts for important aspects of a person's life may indicate a need for a review, and for that review to be broader in nature and more accessible. A decision that has minor impact may indicate no review process, or that the review may be more cursory.*
- *The impact of the original decision on public policy. For example, does the original decision have a significant or far reaching impact on public policy? While some broad public interest will likely always be involved, the extent of the public interest will vary. If the public interest in a particular decision is high, this may indicate a more thorough review; if low, no review process or a less rigorous review may be sufficient.*

### ***Nature and quality of the process used in making the original decision***

The extent an affected party is allowed or encouraged to participate in the original decision-making process, and the type and amount of input the affected party is able to make prior to the decision being made, may be indicators whether a review process should be offered, and the type of review that may be appropriate. A related factor is the amount of time and depth of consideration the original decision-maker is able to give to making the decision.

- *Original decisions made with little input from the affected parties, on a tight timeline and/or without the benefit of a full hearing may indicate an opportunity for review should be offered, with perhaps a greater scope and broader grounds for that review.*
- *Decisions made utilizing a thorough and detailed process and a carefully considered hearing may indicate no review is required, or a more limited review with a narrower scope of and fewer grounds for review.*

### ***Available resources***

Providing a review structure and process costs money and involves a commitment of public resources. Once a review process is provided, expectations will likely be that it will be funded as long as the original decision-making program continues.

- *What is the expected availability of resources? Will using those resources to provide a review process be the most effective use of those public funds? Could those resources be used more effectively to improve the decision-making process in other ways?*

### ***Tolerance for changes as a result of review***

Critical to deciding whether to provide a review process is the ability and the willingness to accept that, on at least some occasions, the original decision will be set aside and a different outcome will be the result.

- *What is the tolerance level for a decision review that may result in changes to the original decisions and vary or depart from the policy as it was originally applied? Providing any form of review will require some tolerance for different outcomes.*
- *If a review is to be provided, external reviews involve and provide a higher degree of independence, but may result in greater variation of outcome, and less control over those outcomes. Thus the ability to relinquish control over outcomes may be an important consideration in the type of review to be provided.*

### ***Extent to which the issues that may be in dispute are primarily legal or, conversely, the role of policy in reaching an appropriate decision***

The nature of the issues that may be the subject of a decision review may indicate whether the review should be to the courts, internal, or to a tribunal.

- *Will the original decision be primarily based on the application or interpretation of policy? How important will knowledge of the policy and the reasons for the policy be when reviewing an original decision? An internal review or a review by a tribunal are typically thought to be better mechanisms than a court when applying policy or where there is a need for special knowledge and expertise about the policy and how the program operates.*
- *Was the original decision based principally on the interpretation of a statute or regulation? If the issues to be reviewed are expected to be primarily legal questions, and don't involve policy issues, the court may be the better option for a review, or review may be limited to judicial review.*

### ***The desire to remove requests for decision review from the political arena***

Some decisions may have a political aspect, whereas others will have little or no political significance. The desire or need to reflect or isolate political factors in conducting a decision review will be important. The provision of a decision review process and the nature of that process and the reviewing entity can reflect whether and how political considerations may be a factor; the more independent a decision review process is from the government, the lower the perception and reality of political factors playing a role in the decision made on the review.

- *Providing no review process (and simply relying on the courts) eliminates any opportunity for political factors to play a factor in a decision review.*
- *A review to the minister responsible, or even to Cabinet, is an opportunity to bring political considerations to the forefront, but such reviews are now typically only provided in very rare circumstances. (see page 20.)*
- *An internal review may be perceived as having some, albeit limited, political undertones. These can be diminished by using careful processes.*
- *An arms length external review can enhance both the perception and reality of independence and minimize political considerations as a factor in the review.*

### **Expected volume of cases**

Different choices may be made depending on the number of original decisions expected to be made annually, and also the anticipated rate of reviews that may be requested. Estimating the anticipated rate of reviews that may be requested will involve an evaluation of the quality of the original decision, the nature of the issue and nature of the parties.

- *If only a limited number of original decisions are made and only a few of those are expected to generate requests for review, this may indicate that setting up a review process may not be called for.*
- *A large number of original decisions, with an expected high review request rate, may indicate an internal review, which provides greater opportunity for “error correction”, may be desirable.*
- *An external review may be appropriate if the numbers are lower, and reviews are less likely expected to be simple error correction.*

### **Impact on the workload of the courts if no review is provided**

The lack of any other opportunity for review can result in affected persons more frequently turning to the courts for the traditional remedy of judicial review.

- *In a high volume situation, the lack of any other review process can put a strain on the court system, and may have impacts on the cost and timeliness of resolving matters.*
- *If other opportunities for review are available, the court has the discretion to decline to hear judicial review applications at all or until those other opportunities have been completed.*
- *If appeals to the court are made possible, the availability of judicial review will be even more limited.*

### **Culture or environment of the program area**

The adversarial nature of the process for making the original decision may have an impact on the type of review made available. The use of mediation and other dispute resolution processes, proven highly beneficial in diffusing adversarial

conflicts, can significantly reduce the adversarial nature of a decision review process.

- *A program area that has a history of litigation and involvement by lawyers may indicate a decision review process that is different from a review process created for a program area where lawyers are rarely involved or where the relationship between the parties is generally non-adversarial.*

### **The users**

The financial and other resources of the persons who may be affected by the original decision and who might want to seek a review of that decision may impact on the need for and type of decision review. This factor reflects the principle of accessibility and is related to the significance of the impact of the decision on the person.

- *If typical program users will have easy access to the financial and other resources necessary for complex processes, this may indicate either judicial review or court appeal processes as appropriate.*
- *If typical program users are more likely to be limited in access to the resources necessary for court proceedings, then an internal or tribunal decision review may be indicated.*
- *Expected literacy levels may also have an impact, as lower literacy levels may indicate a need for less complex processes.*

### **The need to be heard**

Providing a person adversely affected by an original decision with an opportunity for a review of that decision can be of value in meeting the person's need to be heard and to feel his or her views and concerns were fully considered, so that "justice is seen to be done". Dispute resolution opportunities can be very effective in addressing this need, and should be considered in any decision review process.

- *If the affected persons did not appreciate or understand the importance of the original decision, they may need another opportunity to make their information known or views heard, once they understand the consequences of the decision.*
- *Affected persons may feel they did not have a fair opportunity to present their information about and views to the original decision-maker.*
- *An additional opportunity to be heard might be appropriate if the affected persons have a belief that the original decision-maker may have given other interests more and possibly unfair consideration when making the decision.*

### ***The need to level the playing field***

Power imbalances between the parties may need to be considered, and any decision review structure and processes should not reinforce or set up such imbalances. For example, a review scheme with multiple layers may result in **review fatigue**, so that a party with fewer resources may be less likely to continue through the review process, thereby effectively eliminating the decision review opportunity. Decision review processes that incorporate dispute resolution mechanisms can be designed to effectively address any power imbalances.

- *A decision review process may be able to address any perception that another person involved in the original decision-making was unfairly “holding all the cards”.*
- *Care may be needed to avoid better resourced persons from using decision review processes to “wear down” other affected persons, so the other persons withdraw from the decision review process.*

### **OPTIONS FOR THE REVIEW PROCESS – The Third Step**

Making a preliminary choice of a decision review structure is the next step. The choices are:

- not to provide any review (recognizing, however, that judicial review by the court will always be available),
- an internal review, or
- an external review to a tribunal or the court.

Some considerations are set out below to assist in determining which decision review option may be most suitable in the particular circumstances. These considerations are summarized at the end of this guide.

Reviewing the policy goals (step one), the environment within which the program area operates (step two), and the legal and practical implications of some of the many technical matters (step four) will help determine the choice whether to provide a decision review and if a decision review is to be provided, which option may be most appropriate and workable.

At the outset, it may be of value to note that providing an opportunity for a decision review does not automatically mean an in-person hearing must be conducted, and dispute resolution mechanisms that do not involve formal hearings should always be considered as part of any effective decision-making or decision review process.

In some limited cases, providing more than one review may make sense and a combination of internal review, external review or judicial review might provide the best option. Issues that may arise when providing more than one type of review are examined later in this guide, after considering the relative merits and disadvantages of each decision review option.



## Internal Decision Review

An internal decision review can be provided by any one, or combination of either the original decision-maker or someone else within the organization

- re-hearing the matter, as if for the first time; or
- reconsidering the original decision, on a more limited basis.

An internal decision review may be most appropriate where the decision is to be made within clearly articulated criteria, with little discretion to be exercised. For example, entitlement to a license, which anyone who meets clear but limited criteria may be entitled to hold, may be a good candidate for an internal decision review process.

An advantage of an internal decision review is that such a review can be an easily accessible, quick and cost effective way of rectifying errors, especially where everyone agrees an obvious error was made.

Other advantages include the reviewer's detailed understanding of the program area, which can achieve the goal of reaching a fair and just decision, and an opportunity to explain the decision more fully and more clearly, which may increase the acceptance level. In many cases, internal decision review can assist in achieving consistency – a second look by the same or another person within the same system may be more likely to lead to similar results in similar cases.

In addition to advantages in individual cases, internal decision review can have a systemic benefit in improving the overall original decision-making process by providing direct and immediate feedback to the original decision-maker, who will become more aware of any oversights or errors in his or her decision-making processes, and improve consistency by the original decision-maker becoming more immediately aware when their decisions have been inconsistent, which should improve the decision-maker's subsequent decision-making generally.

Comments about internal complaint mechanisms, made by the Ombudsman in his report, *Developing an Internal Complaint Mechanism* (Public Report No. 40, page 2, September 2001) may also apply to an internal decision review mechanism.

*An internal complaint mechanism (ICM) [or an internal decision review] gives tribunals a second chance to provide quality service. It allows them the opportunity to correct errors before external tribunals, politicians or the media become involved. At the same time, data gleaned from complaints may highlight opportunities to improve policies, programs or service delivery.*

## Some considerations

**Who should conduct the review:** Should the decision be reviewed by the original decision-maker or someone else within the organization at the same or a different level as the original decision maker?

The quickest and least expensive review may be **reconsideration** by the original decision-maker, especially if there is agreement that the decision contains an obvious, material error or if consideration is to be given to a change of circumstances after the original decision.

However, this should be weighed against the perception that a review by the original decision-maker may appear to and sometimes may in fact lack fairness, due to the decision-maker's potential interest in maintaining that they were right in the first instance, rather than making the right decision on review.

Other options include a decision review by a different but "equivalent" decision-maker (where there is more than one such decision-maker, i.e. in a high volume system) or by a "superior" or supervisor, who conducts decision reviews as part of their responsibilities. A perception of lack of fairness and independence can, however, still arise in these circumstances as some may see the colleagues and/or supervisors as having a greater likelihood of simply supporting the original decision made by their co-worker.

One suggestion to minimize this perception is for the decision review to be undertaken by someone in a different physical location than the original decision-maker, for example, a central review of decisions made at the regional level. This may also reduce the risk of variation and inconsistency on a province-wide basis, however, the need to know about local conditions or the need to reflect local considerations may be a factor that weighs against this.

**What is to be considered:** Should the decision review be based solely on the material available to the original decision-maker when the original decision was made or will additional material be considered?

An advantage of allowing additional material is that the decision reviewer can take into account any relevant change of circumstances since the original decision, as well as comments from the affected parties.

Considering new material may have particular importance in those cases where the original decision was made on the basis of limited information and without direct input from the individual. The issues of what evidence and the grounds for review are discussed in more detail starting at page 25.

**Time limits:** Should there be a time limit for an application for reconsideration or internal decision review? This may depend on the need for finality, in which case a time limit may be beneficial. This aspect is discussed in greater detail at page 23.

**Any pre-conditions:** Should an internal decision review be available as a right, or should the applicant have to obtain permission or meet any conditions before a decision review is permitted?

A right of decision review, simply by asking for a review, may be appropriate where the original decision was made with limited input from the parties, and the party requesting the review wants to make sure that the basis on which the decision was made, was accurate.

If, however, the parties had the opportunity to make substantial submissions before the original decision was made, then it may make more sense to limit the right of review to only where circumstances have changed, or new, previously unknown and/or unavailable evidence has become known and available to the party requesting the review. The significance of that new evidence may also be a factor, such that the availability of a decision review on new evidence would be limited to *only if* that new evidence, if accepted, results in a different decision being made.

However, it may be valuable to consider the time and effort to determine if the evidence is new, was unknown and/or unavailable. Sometimes this can take more time than simply conducting a decision review, so it may make more sense to permit the evidence, whether or not it was previously known and available.

**Process:** Should the decision review be relatively informal and brief or a highly formalized and structured process? If too informal and brief, the perception may be that the decision review is simply no more than a rubber stamping of the original decision. If a highly structured decision review process is created, advantages of an internal review may be lost if the process is no quicker or accessible to the parties than a formal external decision review. Plus, a highly structured internal review/appeal process may not be any less expensive than providing for an external decision review.

The volume of cases that must be decided within a particular timeframe, the number of persons affected by the proposed decision, the need to avoid delay and the likelihood of obtaining useful input are all factors that may be considered in establishing these processes.

A significant consideration should be the best opportunity to provide for dispute resolution processes, which will promote parties' involvement in resolving the issue and avoid the time and expense of often unsatisfying adversarial hearings.

An opportunity for pre-review consultation and an opportunity for the affected party to respond to any perceived defects may enhance the effectiveness of a decision review process.

These and other technical matters are discussed in greater detail below, starting at page 24, and will impact on the type of review chosen.

### **External Decision Review:**

An external decision review is a review conducted by an independent, arms-length entity, typically a **tribunal** or the court, and may be referred to as an “appeal”.

A tribunal is typically comprised of persons appointed by government, based on the person’s skills, knowledge and abilities specifically in relation to the issues that are the subject of the original decision and/or the decision review process. Tribunal members may be lawyers, but that is not always the case. Tribunal members are usually appointed for a fixed term, which can range from 2 to 5 years, and may be re-appointed for additional terms. Members may be full or part time, as the needs of the tribunal warrant. (See sections 2 to 10 of the *Administrative Tribunals Act* regarding appointments to tribunals.)

The court is comprised of judges who are all legally trained and former lawyers, who are appointed until retirement. Decision reviews would be heard by an individual judge as part of his or her ordinary court case load assignment. Although conducted by a judge, an external decision review or appeal is different from judicial review proceedings, which are discussed in more detail below.

Tribunals and courts both carry out their decision review function within the governing legislation and legal principles, **impartially and independent** of government direction in any particular case.

As such, in many situations, an external decision review can maximize the goal of reaching fair and just decisions, as such a review is perceived to provide a high level of independence and impartiality, both in fact and in perception.

An external decision review requires a commitment by government to give an entity outside the direct control of government the authority to make decisions that may affect government policy or operations. This independence is often seen to be the most positive attribute of external decision review, especially where government is an active party to the review proceedings. The degree of tolerance for and the impact of different interpretations of government’s policies may be critically important to whether an external decision review is selected as the best option.

(Tribunals' impartiality and independence is the reason that, in addition to decision reviews, tribunals are also often used to make original decisions where government has a high degree of direct interest in the outcome, but wants those decisions to be made with a high degree of independence and impartiality, for example, human rights issues.)

An external decision review may be conducted on all or specific aspects of the original decision, including the factual findings on which the original decision is based, and/or the application and/or interpretation of the policies, regulations and/or legislation that apply to the facts as determined. If all of these aspects are to be considered and may be changed on a decision review, then the review may be characterized as a "merits review", which focuses on reaching the best possible decision at the time of the review; not simply whether the original decision-maker reached an acceptable decision.<sup>1</sup>

Judicial review, discussed in more detail below, is limited to only legal issues and does not provide for a review on the merits; internal decision review, discussed above, can lack the perception of independence and impartiality of an external decision review.

Despite the benefits of external decision review, it can have the disadvantage of postponing the date when finality will be obtained, simply because it adds an additional process. In addition, external decision reviews can be more costly than internal decision reviews in terms of both money and time: both to the affected persons and to government in its role as provider of the decision review structure. However, to the extent that appeal to an external entity like a tribunal has the practical effect of reducing or eliminating judicial reviews, it can help achieve the goals of timeliness and accessibility. Its cost effectiveness usually depends on the particular characteristics of the program area.

An external decision review does not mean an in-person hearing must be held, and dispute resolution opportunities should always be considered as part of any effective decision review process.

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<sup>1</sup> The Australian Administrative Review Council described merits review in its report, *Better Decisions*, at paragraph 2.18:

*Merits review is the process whereby an administrative decision of the government is reviewed "on the merits": that is, the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision -- affirming, varying or setting aside the original decision -- is made. Merits review is characterised by the capacity for substitution of the decision of the reviewing person or body for that of the original decision-maker.*

An important feature of the Australian merits review is that its primary purpose is not just to reach a correct decision, but to reach the "correct and preferable" decision at the time of the review. The report is available on the Review Council's web site at: [www.law.gov.au](http://www.law.gov.au)

## Some considerations

### *Who should conduct the external decision review*

**An Appeal Tribunal**, whose members are appointed by but independent of government, may be the preferred option where there is a need:

- *for the review to be conducted outside of government;*
- *for special expertise in the subject matter;*
- *for policy considerations to play a greater role in informing or influence the decision;*
- *to resolve issues more quickly and less expensively than in the courts;*
- *to create a more accessible and less formal process than in the courts;*
- *to address a high volume of cases.*

An external decision review may be appropriate where the original decision-maker may want to take a position as a direct and opposing “party” to the review.

A complex statutory scheme or the need for an understanding and appreciation for the context and environment within which the original decision was made may indicate specialized knowledge, exercised with independence and impartiality, is required. If so, a tribunal may be favoured, because a tribunal can be structured to bring that specialized expertise, but is seen to be impartial and independent of government.

If the review is to be a re-hearing, as if fresh, or to permit some new evidence, a tribunal may be able to do this more expeditiously than the courts. Most tribunals are intended to be less formal than the courts, and legal representation should not be required in most cases.

An external tribunal can be given the power to structure its processes, including dispute resolution, in a way that best meets the needs of the parties and the overall program; the court may have less flexibility in adapting its processes to the particular program.

One disadvantage may be the tension that sometimes develops between tribunals and government, due to the tribunals’ need to ensure independence in decision-making and government’s need for tribunals to account for the public resources allocated to conduct their review processes. Some of this tension may be eased by the tribunal chair and the minister responsible for the tribunal entering into a **memorandum of understanding (MOU)** that ensures tribunal decision-making independence and adequate resources are balanced with appropriate accountability. The Administrative Justice Office Web site, noted at the end of this guide, has information about MOU’s.

It should also be noted that government's policy is that constitutional issues are to be decided by the courts and not tribunals, except in very limited, clearly prescribed circumstances. Consultation with the Administrative Justice Office is recommended if constitutional questions, including any related to the *Canadian Charter of Rights and Freedoms*, might arise in the context of the decision review.

**An existing tribunal** may provide an effective solution if an external decision review is determined to be the best option. A number of models exist for one tribunal exercising decision review functions in a variety of areas. Factors to be considered include requisite expertise and specialization, potential procedural similarity or uniformity, and effective use of existing resources leading to cost effectiveness. The Administrative Justice Office may be able to help identify possible options within British Columbia's existing tribunals.

**The Court** may be perceived to provide the highest degree of independence, and decision review by the courts may be indicated where:

- the issues under review are limited to **questions of law**,
- the outcomes are clearly significant to both the parties and the public,
- the parties are highly sophisticated and well resourced, with easy access to legal counsel, and/or
- the anticipated case load volume is low.

Determining questions of law requires legal training, which all judges will have, and about which tribunals are not likely to have higher degree of specialized expertise (which tribunals may bring when the specific policies and programs are critical to the determination of the issue).

If the outcome may have significant and broad application for the public interest, the matter, if heard by a tribunal, may end up in court under judicial review proceedings in any event.

In the course of developing the *Administrative Tribunals Act*, indications were that government's preferred option for review by the courts is judicial review rather than statutory appeal.

An expected low volume of requests for review may indicate the cost of setting up and maintaining a tribunal is not the best use of public resources.

However, decision review by the courts is likely to take longer, cost more and be less accessible, especially for persons without access to legal representation. A high volume of cases may strain court resources, and the court may also lack the flexibility necessary to respond to fluctuations in caseload volume.

Where decisions are reviewed by the British Columbia Supreme Court, a right of appeal to the Court of Appeal will automatically be available, unless expressly removed or limited by statute. An appeal from the Court of Appeal will be available only with the permission (“leave”) of the Supreme Court of Canada. However, the rights of appeal may be removed or limited, to achieve finality more quickly if that is an important goal.

**Review by the Minister and/or Cabinet:** In the past, some processes provided for a review by the Minister responsible or Cabinet, which some viewed as sufficiently removed from the operational program area to be considered an “independent” external appeal. This option is now not generally recommended. The primary advantage, providing for the opportunity to consider the original decision in the context of government’s policy, is also a prime disadvantage. Controversy often arises in appeals to ministers or Cabinet, with some saying that government should address the legal or policy framework directly through its legislation and policies, not through individual decisions.

An additional important factor is that in a decision review, the person who is to undertake the review must in fact undertake and make the decision on the review, and unless expressly provided, that person cannot delegate his or her responsibility. As such, due to heavy ministerial workloads, ministers do not usually have the time to personally consider an appeal. This is especially important if expectations are for a significant number of appeals and if the appeals will involve a significant volume of evidence.

### ***Other considerations***

***What evidence is to be considered:*** An external decision review can be structured to be based solely on the material available to the original decision-maker when the original decision was made or to allow additional material to be considered. See page 17 for a more complete discussion on the issues of what evidence is to be considered and the grounds for review.

***Other matters:*** See the discussion on time limits and other technical matters, also beginning at page 24.

### **Judicial Review**

Judicial review is the process whereby the court exercises its supervisory jurisdiction to review government’s actions to ensure those actions are lawful. In British Columbia, all applications for judicial review are governed by the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Those applications must be made to the BC Supreme Court, with a right of appeal from the Supreme Court to the Court of Appeal also available.



The focus of judicial review is “jurisdictional error”: the lack of authority to act, or an incorrect exercise of authority, as a result of wrongly interpreting a statutory provision or from procedural errors such as a failure to give notice when required by the rules of natural justice and procedural fairness. In some circumstances, the merits of a decision may be reviewable as constituting legal error.

The opportunity to apply for judicial review does not require any express statutory authority, and judicial review can never be entirely removed by legislation.

However, the availability of judicial review can be limited by statute by:

- imposing a time limit within which a person can apply for judicial review, and/or
- providing a **privative clause**, which directs the courts about the extent and nature of any judicial review, by expressly stating the **deference** that the court is to give to the decision under review. The highest level of deference is usually given to findings of fact or other matters within the decision-maker’s special expertise, which in some cases may extend to the interpretation and application of the law. (See sections 58 and 59 of the *Administrative Tribunals Act*.)

The common law also limits the availability of judicial review by requiring that the affected person must exercise any other rights of review, such as an internal or an external review, before applying for judicial review. As such, the availability of judicial review may be limited by providing an internal or external review of the original decision.

Finality is not easily achieved through judicial review, not only because court processes by their nature tend to take longer, but also because the court is limited in what it can do on judicial review applications, even if it finds an error has been made. In those cases, the court can only make a declaration of rights or set aside the earlier decision. It cannot substitute its decision in place of the original decision that is under review. The result is that the original decision-maker may be required to rehear the matter. (Sections 5 and 6 of the *Judicial Review Procedure Act* address the court’s authority to give direction to the decision-maker.)

The cost effectiveness of judicial review will depend in part on the volume of cases; if only a limited number of cases are anticipated annually, judicial review can be relatively cost effective when compared to the cost of establishing and maintaining a tribunal, but judicial review can become less cost efficient as the volume of cases increases because the costs of operating the court system are likely more expensive than the costs of operating a tribunal. And due to the possible outcome being a re-hearing by the original decision-maker, the overall system costs can be high.

Limiting decision review to only judicial review is generally considered to be more appropriate if the original decision is made after a full and fair hearing, and there is no need or desire to provide for a full merits review. If the intent is that the original decision should be reviewable for more than just an error of law, then review by a tribunal or perhaps an appeal to the court (which is broader) may be more appropriate than judicial review. A statutory right of appeal to court is also considered more accessible than judicial review, because parties are usually informed of such appeal rights, whereas judicial review is a process non-lawyers are often not aware of.

Judicial review is also considered the least accessible of the three options due to the standard need to retain legal counsel, but in some tribunals and in appeals to the court, legal counsel has become the norm, so this may be a less significant factor.

If relying solely on judicial review, a determination must be made whether a **privative clause** may be appropriate.

### **More than One Decision Review**

More than one decision review is not typically recommended, as typically taking longer to complete and achieve finality and as being more expensive. Also, accessibility can be adversely affected if **appeal fatigue** sets in, and mandatory participation at the first or lower level may exhaust some parties' resources and/or appetite for decision review, deterring some from proceeding further with otherwise "legitimate" requests for review.

However, in some limited circumstances it may be appropriate to have more than one type or opportunity for decision review. Where a high volume of cases is anticipated, and the original decisions are made with little initial input from the parties, a first level decision review may effectively stream out some of the less contentious or simpler matters, reducing the pressures on the typically more time consuming and more expensive second level review.

A multi-level decision review can be structured as:

- *an internal review followed by an external review by a tribunal or the court, or*
- *an external review by a tribunal followed by a more limited appeal to court.*

In all cases, judicial review will always also be available, but may be limited if other avenues of review are also available.

### ***Combined Internal Review and External Review (“Appeal”)***

The simplest form of multi-level decision review is an internal decision review or reconsideration, coupled with an opportunity for a subsequent appeal to an external body. As discussed above, an internal decision review is a relatively quick, informal and cost effective review of high volume decisions which, when coupled with an appeal to an external entity, can stream out some of the less contentious or simpler matters, reducing the pressures on the typically more time consuming and more expensive external decision reviews.

In this option, consideration should be given to whether the internal decision review should be mandatory or voluntary before an external decision review can be pursued. As noted, concerns have been expressed by some that if the first level of internal decision review is compulsory, “appeal fatigue” may present a barrier to accessing an external review.

Another disadvantage of mandatory internal decision review is that in some cases it will be clear that the only real likelihood of any change in the original decision is by a review by an external entity, so that a mandatory internal review may be an inefficient use of time and resources.

The extent of these impacts will depend, to some extent, on the way in which the internal decision review scheme operates in practice. However, despite these concerns, resolving some matters at an internal review stage may be expected to reduce the number of cases subsequently going to external review, and may result in a more efficient use of time and resources overall.

### ***Review by a Tribunal, followed by an appeal to the Court***

A multi-level decision review system, consisting of a decision review by a tribunal followed by an appeal to the court, is indicated when court oversight of the tribunal is considered necessary or desirable. In making that assessment, consideration should be given to the particular characteristics of the program area including matters such as the complexity of the scheme and the related policy and the specialized legal and other expertise of the tribunal. This will also indicate how much deference the court should give to the tribunal’s decision.

As noted, in the absence of a right of appeal to court, judicial review will be available to deal with certain legal errors, so consideration should be given to which option is preferred. A right of appeal can be structured to be broader than judicial review.

As noted above, a statutory right of appeal to court is considered more accessible than judicial review, because parties are usually informed of such appeal rights, whereas judicial review is something non-lawyers are usually not aware of.

Apart from accessibility, another factor favouring creating a right of appeal to court instead of relying on judicial review is that restrictions can more readily be placed on subsequent levels of appeal within the court system. As noted above, there is an automatic right of appeal to the Court of Appeal from a judicial review decision in the British Columbia Supreme Court, with a further right to apply to the Supreme Court of Canada for leave to appeal to that court. It would be highly unusual to restrict these rights. As such, if the right of appeal might detract from achieving the goals for the decision review (for example: timeliness, reduced costs) a statutory right of appeal to the Supreme Court of British Columbia may be preferable, limiting or prohibiting subsequent appeals.

## **TECHNICAL MATTERS – The Fourth Step**

If an opportunity for a decision review is determined to be desirable, a number of technical matters may be relevant to selecting what type of decision review is to be provided in the particular circumstances. The determination of these matters will often indicate which review entity best suits the program under consideration.

Many of these technical matters are inter-related, with the determination of one often impacting on the choice to be made about a different technical matter. Some of them will be more applicable or only applicable to external decision reviews. In addition, the overarching principle of clarity requires that these issues be considered and expressly addressed. In the past many decision review schemes were silent on these matters, generating much litigation and involving significant time and resources of not only the parties, but also government, the tribunals and the courts.

Many of these matters are addressed by the *Administrative Tribunals Act*, and the application of that Act should be discussed with the Administrative Justice Office.

## What Evidence is the Decision Reviewer to Consider?

The answer to this question is one of most important factors in designing a decision review process and is inter-related to the choices made about many other technical matters.

The facts and, in some cases, the opinions, on which the original decision is based, are established by evidence. Evidence can be oral statements or written material like records, statements, documents, or other things.

Options on the type of evidence that a decision reviewer may consider include:

- *no new evidence – only the evidence that was before the original decision maker (“review on the record”);*
- *all new evidence – the evidence that was before the original decision maker plus any new or additional evidence (“appeal de novo”);*
- *some new evidence – the evidence that was before the original decision maker, plus new evidence, but with limits on the extent or nature of that evidence.*

Each of these is discussed in more detail below.

Related aspects are the grounds on which the decision may be reviewed (the “grounds” are the matters that can be reviewed: decisions of fact, discretion, or law, or a combination of these. A more detailed discussion on the grounds for review follows this discussion on evidence.) For an example of how the two topics are inter-related: if the grounds for decision review are to be restricted to questions of law, it would be unusual if any new evidence would be accepted, as new evidence would not typically have any relevance to a question of law. And if the grounds are to be restricted to questions of law and no new evidence, in the absence of other compelling factors, a decision review by the courts may be the best option. However, if the decision review is to consider new evidence and questions of law and fact, then a tribunal may be a better option for the review.

The issue of what evidence is to be considered also relates to, but does not determine how the decision review should be conducted, i.e., in-person or in writing. New evidence does not always mean an in-person hearing is required, and restricting new evidence does not automatically mean an in-person hearing will not be provided. For example, many court proceedings provide for submissions to be made in-person, even though new evidence is only very rarely admitted. (Submissions are sometimes referred to as argument, and are different from evidence. Submissions do not establish any factual basis for the decision to be made.)

Consideration of these different options requires an assessment of the policy goals (step one in the design process) and in particular:

- *fair and just decisions;*
- *finality in a timely fashion; and*
- *proportionality and cost effectiveness.*

Of the program or environmental characteristics (step two in the design process), the two most important may be:

- *nature and quality of the original decision (including the process used to reach the decision); and*
- *whether this is the type of case where a change of circumstances after the date of the original decision should be taken into account by the appeal body.*

### ***No New Evidence (Decision Review “on the Record”)***

In these circumstances, the decision reviewer is limited to deciding whether, on the evidence before the original decision-maker, that person erred. No new or other evidence can be considered by the reviewer. A review on the record should be shorter and less expensive because no oral evidence is given and the number of potential issues is often reduced because findings of fact will usually not be at issue.

### ***All New Evidence (Review or Appeal “De Novo”)***

A review or appeal *de novo* means the decision reviewer hears the matter as if it is being considered for the first time. Neither party is limited to or has to use the evidence provided to the original decision-maker. The parties can submit whatever evidence they think is necessary (subject to any overarching principles of relevancy and any procedural rules on evidence).

*De novo* hearings may be the appropriate choice in those cases where the overarching policy goals are best achieved by starting fresh. An appeal *de novo* is not appropriate in cases where the review is to be limited to questions of law. A review *de novo*:

- *is likely to be more expensive and take longer than a decision review on the record.*
- *may result in the loss of the benefit of the resources invested in making the original decision (in those cases where the original decision was not summary in nature) since a review *de novo* in effect “ignores” the original decision for all practical purposes.*
- *should be by a reviewer with at least similar or more expertise than the original decision-maker.*

## **Some New Evidence**

Some new evidence would be permitted, but not a complete re-hearing of the matter. Whether a party who wishes to introduce new evidence should have an absolute right to introduce any such evidence or be required to obtain the reviewer's permission before doing so should also be considered and determined. Considerations about this option include:

- *whether new evidence is likely to have become available since the original decision was made.*
- *in the case of evidence that was available at the time when the original decision was made, whether the party has a good reason why he or she did not produce that evidence to the original decision-maker.*
- *whether a breach of natural justice or procedural fairness occurred in the process leading up to the making of the original decision, with much depending on the significance of the procedural irregularity and if it can be corrected by the admission of new evidence. (If, however, the breach is more serious, the more appropriate solution may be to send the case back to the original decision-maker to hear the new evidence or to hold a completely new hearing.)*

## **Some Other Considerations**

Factors to help determine which option will work appropriately in a particular decision review process include:

- *Was the evidence at the original proceeding adequately documented, including any exhibits and oral evidence?*

A review of an original decision based only "on the record" or limited to only new evidence can work well only if the original evidence was adequately documented and/or recorded at the original decision-making proceedings. If not, the decision reviewer will not be able to determine what evidence the original decision-maker considered, or if the proposed new evidence is in fact new. In those cases where oral evidence was given, a transcript of that testimony may not be necessary but there must be some other reliable record of what was said. If there is no adequate record of what was considered in making the original decision, then a decision review "de novo" (based on all new evidence) will usually be necessary.

- *Was there a full and fair consideration when the original decision was made?*

If the issues and evidence were fully considered, with both parties having full advance notice of and the opportunity to present their own and challenge each other's evidence, then restricting the evidence on a decision review may make sense.

A decision review that permits new evidence may be indicated where the original decision was made in a relatively summary way, perhaps with little if any opportunity for input from the affected individual(s), for example, where the original decision-maker processes a high volume of cases, most of which require minimal consideration in order to reach the appropriate decision.

- *The parties' ability to understand the restriction on new evidence, and the reason for it.*

The time and cost efficiencies of limiting the decision review to the record may be reduced or lost entirely if the parties don't easily understand and accept the limitation on submitting new evidence. Otherwise, significant time and effort can be consumed in trying to explain the limitation and keep the decision review limited to the evidence submitted at the earlier proceeding. Plus, if new evidence can't be submitted, even if there is a change in circumstances, it may be difficult for affected persons to understand how the review can be considered fair.

- *The appropriateness of considering new evidence that arose subsequent to the original decision.*

A range of factors in a particular program area may indicate whether a change in circumstances supports a review *de novo*. For example, where a decision depends on a person's medical condition or financial resources, an argument can be made that a review *de novo* (or at least the admission of some new evidence) should be possible. The frequency with which a relevant change of circumstances or fact might occur may assist in determining whether a review *de novo* should be the general rule, or whether it should be merely an option to be made available, perhaps at the discretion of the reviewing entity.

- *A review de novo may be easier to manage than a review with new evidence but otherwise on the record.*

Where only some new evidence is admitted on a decision review, the reviewer must consider how the new evidence should be balanced against the factual findings of the original decision-maker. It may be easier to conduct a review *de novo* rather than deal with a mixture of evidence on the record and fresh evidence.

- *Allowing new evidence on a decision review may result in parties intentionally limiting the evidence they put in front of the original decision-maker.*

Some have suggested that for reasons of costs or time, parties may choose not to submit all their evidence to the original decision-maker, if they know they can add to it later on a decision review, if unsuccessful at the first level. If delay in submitting all relevant evidence becomes an accepted norm, it would likely mean an overall increase in time and costs to reach finality and a "waste" of original decision-making resources.



**Additional Considerations:** Where a decision review on the record is the preferred option, consideration is still required on how to deal with those cases that will inevitably arise where an adequate record is not available for some reason, for example, the tape recording of the oral evidence is lost or faulty. These choices include allowing the reviewer to hear new evidence or to provide for the original decision-maker to re-hear the matter.

### **Grounds for a Decision Review**

The “grounds” are the matters that can be reviewed and can include the original decision-maker’s findings of fact, discretion, or law, or a combination of these. The options range from the reviewer being able to re-hear the entire case and make decisions on all issues, including findings of fact and any discretionary determinations and legal interpretations (sometimes called a full merits review). Or the decision reviewer may be limited to only points of law, without review of the findings of fact or exercises of discretion.

The choice may depend on the relative importance of the different policy goals and an assessment of relevant characteristics of the program area. For example, if the original decision-making process involved only a cursory consideration of the facts, with little scope for input from the affected parties, this may support a full merits review. If the original decision-making process involved a lengthy hearing with submissions on and a careful consideration of all relevant facts, this may favour limiting decision reviews to only questions of law.

As noted above, the nature of the evidence that will be considered on a decision review is related to the grounds for review. For example, if the decision review is to be “on the record” and the original decision-maker heard sworn, in-person testimony, then greater deference should perhaps be given to the original decision-maker’s findings, so those findings are not to be changed, and the grounds for decision review restricted to only questions of the interpretation and application of the law.

Another key factor may be the relative subject matter expertise of the original decision-maker and the decision reviewer. If the original decision-maker has a high level of expertise, and the reviewer is more generalist in nature, it may make more sense to restrict the reviewer from considering (and possibly changing) the original decision-maker’s discretionary decisions, in recognition of that greater and more specific expertise.

The need for early finality, and cost effectiveness will also be considerations. Decision reviews limited to errors of law will usually mean fewer applications made for review. This will mean earlier finality, and lower costs.

The concept of proportionality may support limiting the grounds for decision review where the original decision has a less significant impact on the affected persons.

In some cases, however, efficiency may favour full grounds for review, especially where lawyers are not usually involved. This is because of the difficulty in determining whether an issue constitutes a question of fact, law or mixed fact and law. It may be expecting too much for the parties to understand the distinction as sometimes even lawyers and the courts have difficulty in making the distinction. As a result, much time and effort may be required to explain to the parties why issues that they consider wrongly decided can not be reconsidered.

### **Standard of Review**

In making an original decision, determinations may be required on a variety of competing matters that will each lead to or support the final conclusion. For example: what evidence to accept as the best evidence, what version of the facts should be accepted as correct, how should discretion be exercised, what does the legislation mean? On a review of an original decision, the deference, if any, the reviewer must give to those various determinations made by the original decision-maker is expressed as the **standard of review**.

In a full decision review on the merits, no deference is given to any of the determinations. The reviewer hears the evidence (including possibly new evidence) and forms his or her own conclusions about the facts, any discretionary matters that must be decided, and the interpretation and application of the law to any findings of fact or exercises of discretion. Deference would not be expected or appropriate, and so a standard of review need not be expressed. For example, if the decision is to be reviewed by a tribunal, re-hearing the matter de novo, no standard of review is required to be expressed.

Where, however, the decision review is to be comprised of an appeal to the court, or confined to a review on the record, the appropriate standard of review should be considered. The standard applied typically reflects the level of expertise and the time and attention that is devoted to making the original decision that is under review: the higher the level of expertise of the original decision-maker in relation to that of the reviewer and the greater the time and attention given to making the original decision, the greater the deference to be accorded.

The *Administrative Tribunals Act* provides clear direction on the standard of review by the courts of tribunal decisions, with two such standards available. (See sections 58 and 59 of the *Administrative Tribunals Act*)

For more detail on this issue, readers may wish to also see the Administrative Justice Project background paper, *Standard of Review on Judicial Review or Appeals*, by Frank A. V. Falzon, available on the Administrative Justice Office Web site.

## **Burden Of Proof**

The party with the “burden of proof” has the obligation to establish the facts necessary to support their case. The burden of proof is not the same as the standard of proof, which refers to whether a matter must be established on a balance of probabilities (the usual civil standard) or beyond a reasonable doubt (which is required in a criminal prosecution). A related but separate question is which party should present their evidence first: the party requesting the review (the appellant) or the other party to the issue (the respondent)?

This determination is usually impacted by the choice of a review on the record (or where only some new evidence is admitted) or an appeal *de novo*. On a review on the record, the person asking for the review usually has the obligation to establish that the decision should be reversed or altered in some way. On appeals *de novo*, the law is not as clear. Some suggest that the burden should be on the appellant because if the appeal does not succeed, the original decision will remain in effect. Others suggest that if the primary purpose of an appeal *de novo* is to start afresh, then the burden should be the same as in the original proceeding.

As to which party should present their evidence first, in some situations, for practical reasons, it makes sense for the other party (the respondent) to present its case first, even if the burden of proof remains with the appellant. For example, if the case depends on technical evidence that the respondent will be presenting, it may make sense for the review hearing to start with the respondent setting out their case.

Because court decisions on these issues have varied, this is an area where clear legislative direction would be highly beneficial so the parties (and the reviewing entity) can prepare for the hearing as efficiently as possible, eliminating much time and legal wrangling on these issues.

## **Other Design Matters**

A number of other matters should be considered when a decision review is to be provided.

## **Who may participate in the decision review**

“Standing” is the legal term used to describe who is entitled to participate in a decision review. The persons directly affected and who were involved in the

original decision-making process generally have the right to participate without express provisions being made. However, in some circumstances, a person who has an indirect interest in the outcome of a particular matter may not have been involved when the original decision was made. These persons are often referred to as “interveners”. Consideration should be given whether any such persons are likely to request involvement in a decision review and if so, whether they should have that opportunity and/or whether any limits should be put on their participation on the decision review process. One option is to give the decision reviewer discretion to decide whether the person should be granted intervener status, based on standard legal tests of whether the person can make a valuable contribution or bring a valuable and different perspective to the decision review, and whether the potential benefits of allowing the person intervener status outweigh any possible negative impacts to the parties that may be caused by the person’s participation. (See section 33 of the *Administrative Tribunals Act*.)

### **What powers should a decision reviewer be able to exercise**

The range of options that can be made available includes:

- *the original decision-maker can be given the discretion whether to re-hear or reconsider the matter, including undertaking dispute resolution;*
- *the decision reviewer can be given the power to:*
- *direct the original decision-maker to re-hear or reconsider the matter or apply dispute resolution processes;*
- *confirm, reverse or change the original decision, or*
- *mediate or otherwise use dispute resolution techniques to resolve the dispute;*
- *Various combinations of the above.*

Limits or conditions can also be placed on each option, and dispute resolution mechanisms should always be considered. The option chosen should reflect the kind of evidence to be considered and heard by the decision reviewer.

Consideration should be given to whether reconsideration by the original decision maker should be available only with permission, or as an automatic right. The need for finality and effective use of resources may indicate that permission is desirable as a pre-condition. Typically, reconsideration would be by the same person(s) that made the original decision, but there could be circumstances where different persons within the organization or review entity could undertake the reconsideration. (See discussion above on internal reviews.)

Other related matters are:

- *if imposing a time limit to ask for a reconsideration is appropriate;*
- *if the decision reviewer should be given any authority to extend a time limit in special circumstances, and what those circumstances might be;*
- *if the opportunity for reconsideration should be available only for final decisions or also for preliminary rulings (which would likely have very significant impacts on delaying finality); and*
- *if imposing a limit of only one reconsideration is appropriate.*

Directing the original decision-maker to re-hear or reconsider the decision may be the best option where:

- *new evidence should be considered but the reviewing entity is not structured in a way to easily accept evidence;*
- *there are still significant policy considerations; or*
- *there is a need for specialized expertise that only the original decision-maker has.*

However, this option will mean additional time to reach finality, which may be undesirable from a program perspective.

Limiting the decision reviewer's authority to simply confirming or reversing the original decision may be appropriate where the only possible answer on the issue is a simple yes or no. For example: the original decision was simply whether a licence should be issued in a situation, and there is no discretion about terms or conditions of the licence. In most cases, however, the original decision-maker has a wider choice than a simple yes or no, and to restrict the reviewer's authority to only confirming or reversing the original decision can limit the ability to make the most appropriate decision. In almost all cases, providing for dispute resolution mechanisms will give flexibility that will enhance program goals.

#### **Time limits:**

*On requesting a decision review:* A determination should be made about the time limit within which a decision review must be requested or commenced, especially if the need to achieve finality in a timely way has any significance. Section 24 of the *Administrative Tribunals Act* provides for a thirty day time limit, in the absence of any other time limit being set. That section also permits a tribunal to extend the time limit if special circumstances exist.

*On the decision review process:* Because of the diversity of issues that may arise in any particular case and the steps to be taken in a specific decision review, no time limit is usually set for completing a review. However, section 12 of the *Administrative Tribunals Act* requires practice directives be issued by tribunals, setting out the usual time frames for completing a review, so that parties will know what to expect in terms of timing.

### **The status of the original decision while the decision review is pending:**

Should the original decision remain in effect or should it be held in abeyance (of no effect) pending the decision review (the legal term is “stayed”)? Options include:

- *the original decision remains effective in all cases, despite the decision review being requested or commenced (no discretion);*
- *the original decision is automatically stayed in all cases where a decision review is requested or commenced (no discretion);*
- *the decision reviewer has discretion whether to stay the original decision.*

The appropriate choice depends on the particular program area. A factor that should always be kept in mind, however, is the extent to which someone (whether a private individual or the public) would be prejudiced by the granting of or refusing to grant a stay. In the context of appeals within the court system, the general rule is that the original decision remains enforceable, unless it is stayed by the court. Section 25 of the *Administrative Tribunals Act* provides that an appeal does not operate as a stay, but permits the tribunal to order otherwise. However, giving the decision reviewer discretion to grant a stay will mean an application must be made, which is an additional process.

### **Public access and privacy rights:**

While the public often has an interest in openness of the administrative justice system, a decision review may involve personal and possibly sensitive information about a person. Where this may occur, legislative clarity and statutory guidance about maintaining confidentiality of personal information is highly desirable. Again the *Administrative Tribunals Act* has provisions for public hearings and also when closing hearings to the public may be appropriate. (See sections 41 and 42 of the *Administrative Tribunals Act*.)

### **Rules of procedure and case management:**

All reviewing entities will benefit from clear authority to make rules of procedure to support effective processes, including case management, that suit and meet the needs of the particular scheme. Publicly available rules will make it easier for parties to know what they have to do to participate in the process, and should eliminate wasted time or effort.

The *Administrative Tribunals Act* has some very broad general rule-making powers that should be considered, and the Administrative Justice Office is developing some model generic rules for tribunals to consider adapting to their specific needs and should be consulted on specific authorities to be provided.

## **Dispute resolution:**

Dispute resolution processes bring important benefits to any review process and the opportunities and options for early resolution without an adversarial hearing should be thoroughly canvassed and considered in designing any decision review.

Dispute resolution processes involve the parties playing an active role in how the dispute is resolved, leading to higher satisfaction rates with outcomes, which can be especially critical where the parties have an on-going relationship. In addition to achieving a greater sense of fairness and justice, dispute resolution processes will reduce costs and the time to achieve finality.

A variety of dispute resolution processes can be utilized, and the Dispute Resolution Office (DRO) recommends that opportunities for disputes to be resolved be included at every stage of the process, with those processes being designed and managed to support and lead towards resolution, not adjudication, as the goal.

The DRO has extensive materials on dispute resolution processes and the considerations in selecting the most suitable process, available at: <http://www.ag.gov.bc.ca/dro/>. Those materials should be reviewed in detail, and that Office consulted about best options.

The *Administrative Tribunals Act* provides tribunals with flexibility in establishing dispute resolution processes to meet specific needs, and also provides for the confidentiality which is fundamental to effective dispute resolution processes. (See sections 28, 29 and 61(3)(b) of the *Administrative Tribunals Act*.)

## **Appointment and qualifications of members of the reviewing entity:**

Government has set standards under the *Administrative Tribunals Act* requiring that appointments to tribunal are to be merit based, made using transparent processes and for fixed terms. (See sections 2 through 6 of the *Administrative Tribunals Act*.)

An additional consideration is whether the legislation creating a review tribunal should expressly provide for specific qualifications for some or all of the tribunal members. It may be appropriate to expressly require special expertise or qualifications in the matters to be reviewed, reflecting the complexity of the factual and legal issues as well as the significance of the tribunal decisions on the program area. An additional issue is who should make the appointments: Cabinet or the minister. The choice may depend on how broad or complex the program is in terms of government's interests. Note the *Administrative Tribunals Act* provides for the tribunal chair to be consulted on members' appointments. (See section 3 of the *Administrative Tribunals Act*.)

### **Tribunal management and accountability:**

Government has set standards under the *Administrative Tribunals Act*, giving the tribunal chair the power to manage and be accountable for the tribunal. This clear assignment of responsibility is intended to enhance accountability for tribunal operations while recognizing decision-making independence.

### **OTHER MATTERS**

This guide is directed to the issues relevant to the consideration, selection and design of an appropriate decision review process, as a preliminary step in the development of new or changes to existing programs. All other standard considerations, steps and processes for program development will also need to be undertaken, and all necessary approvals sought and obtained at the appropriate stage.

A range of other matters, such as operational supports for any review process that may be chosen, will also need to be addressed, some of which will be reflected in the enabling legislation, and all can be critical in achieving a successful process.

If an external review by a tribunal is the selected option, a brief and non-exhaustive list of other matters to be considered includes:

- *a memoranda of understanding, setting out the relationship and respective roles and responsibilities of the minister and the tribunal chair with respect to operational matters like reporting, communications, budget and staffing;*
- *provision of adequate staff and financial resources for the review process;*
- *adequate training for tribunal members and staff and for ministry staff;*
- *appropriate appointment processes;*
- *supporting regulations, if any, and other documents such as rules of procedure;*
- *ensuring mechanisms to enable original decision-makers to learn from the review decisions.*

An obvious consideration is to take steps to ensure high quality original decisions, using effective and fair related processes and clear communications. High quality original decisions and treating people with respect and courtesy will improve the system overall and reduce the frequency with which decision reviews are requested or considered necessary.

### **NEXT STEPS**

If a decision review process is to be developed, the Administrative Justice Office recommends a cross disciplinary team of policy analysts, program managers and legal counsel be formed and that the team consult with the Administrative Justice Office early in the process.



The Administrative Justice Office has a variety of other materials that may be of assistance in the early stages of review consideration, and any subsequent design and implementation. And as noted above, the Dispute Resolution Office materials on dispute resolution processes and the considerations in selecting the most suitable process, available at: <http://www.ag.gov.bc.ca/dro/> , should also be reviewed.

If an internal decision review is the selected option, some very good additional information is set out in the Australian Administrative Review Council's Report to the Attorney-General on *Internal Review of Agency Decision-making*, Report No. 44, November, 2000. That report is available at: [http://www.law.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Report\\_Files\\_Report\\_No.44](http://www.law.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No.44).

If an external decision review is the selected option, the Board Resourcing and Development Office will need to be contacted respecting appointments. Their web site is: <http://www.gov.bc.ca/bvprd/>

That report cites several advantages to establishing a legislative framework for internal review, and the *Administrative Tribunals Act*, which articulates certain policy decisions made by government for its administrative institutions, may also be of assistance in developing legislation for an internal review process.

Certain aspects of the *Administrative Tribunals Act* will also be of assistance in developing legislation for some aspects of judicial review.

For an external decision review, the next step may be to prepare legislation, establishing the review and the powers to be exercised. As noted, the *Administrative Tribunals Act* provides a consistent legislative framework for British Columbia tribunals and articulates policy decisions already made by government for the administrative justice sector. The Administrative Justice Office is available to assist in considering how that Act can apply in particular circumstances. All necessary approvals for new legislation should be sought at the appropriate stages. Review by the Administrative Justice Office is an element of the legislative process, so contact with that Office early in the process is recommended, in order to avoid any unnecessary delays.

The Administrative Justice Office is also developing a "Toolkit for Tribunals" which will be comprised of a series of model documents (for example, Model Rules of Procedure) for tribunals to consider adopting and adapting as necessary in order to exercise their *Administrative Tribunals Act* powers. These model documents will also be of interest to new reviewing entities.

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## GLOSSARY

**Administrative Justice Office (AJO)** – Part of the Ministry of the Attorney General, the AJO supports and continues the comprehensive review of British Columbia's administrative justice system. The AJO analyses, reports on and, where appropriate, leads administrative justice reform initiatives to support the best administrative justice system for British Columbians and to ensure that that system presents an effective dispute resolution alternative. The AJO works with the members of the public who look to the administrative justice system for alternative dispute resolution, regulatory and other decisions, BC's independent administrative tribunals that resolve those disputes and make decisions, the provincial ministries that work with and fund BC's administrative tribunals.

**Appeal** – Opportunities for decision review are sometimes called “an appeal”. An appeal may be heard by a tribunal or by the courts, depending on how the decision review process is structured. There is no automatic right to an appeal process; an appeal (or decision review opportunity) only exists to the extent the statutory or other scheme may provide, and as such, an appeal is different from judicial review.

**Appeal de novo** – A review or appeal *de novo* means the decision reviewer hears the matter as if it is being considered for the first time. Neither party is limited to or has to use the evidence provided to the original decision-maker. The parties can submit whatever evidence they think is necessary (subject to any overarching principles of relevancy and any procedural rules on evidence).

**Appeal fatigue** – If a review involves too many levels, affected persons, especially those with fewer resources, may become discouraged or exhausted by the process, such that they are less likely to continue through to completion of the review process, thereby effectively eliminating the decision review opportunity.

**Decision review process** – This simply means the process, if any, for conducting a review of an original decision. The process may be as formal or informal as the circumstances of the program require. This guide is intended to assist in considering whether a decision review process might be called for in any given program, and if so, the considerations in selecting an appropriate process for that program. There is no one or right process for any program. Selection depends on the policy goals and the program environment.

**Decisions of fact, law and/or discretion** – Making a decision often requires a decision maker to make determinations on various elements of that decision. Those elements may relate to the evidence (what evidence is most believable as proof of a fact in dispute), the facts (based on the evidence accepted, what version of the facts is most acceptable), the law (what does the applicable statute or common (judge-made) law provide), discretion (how should the decision maker apply the law to the facts as determined). A decision review can include all or be limited to only some of these determinations.

**Deference** – Deference is a way of expressing a decision reviewer's consideration of the determinations made by the original decision maker, in terms of whether to accept or change those determinations. A high level of deference indicates the reviewer will not be inclined to change a determination. A high level of deference is often given to factual determinations made by the original decision maker, where that decision maker heard in-person evidence and the reviewer did not. A high level of deference may also be given to determinations of policy and law made by an original decision maker who has expertise in the area. The level of deference to be given can be set by using a privative clause (see below).

**Discretion** – The power of a public official or employee, to make a choice in a particular circumstance, based on his or her own judgment of the circumstances, using reason, within the bounds of the program and the law. Not all official actions are discretionary. In many cases an official will have no choice as to what he or she can or must do.

## GLOSSARY

**Error of law** – In its simplest form, an error of law is an error made in determining and/or interpreting the applicable statute or common (judge-made) law. For a full discussion of this complex area, legal advice is recommended.

**Independence and Impartiality** – The principle of independence reflects the requirement of being able to reach decisions in the matters under consideration, based solely upon the merits and the law, in an environment that is free from influence and pressure from executive government, a ministry or other source. The principle of impartiality refers to the state of mind of the decision maker regarding any matter before them. It connotes the absence of bias, actual or perceived.

**Judicial Review** – Judicial review is process used by the court to review government's actions to ensure those actions are lawful. The court's authority to "judicially review" original decisions can be limited, but never completely eliminated. The focus of judicial review is "jurisdictional error" (see below). In British Columbia, applications for judicial review are governed by the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Applications must be made to the BC Supreme Court, with a right of appeal to the Court of Appeal.

**Jurisdictional error** – A statutory entity can only exercise the powers and authority that it is given by express legislation or that can be implied from that legislation or the common law. Jurisdictional error arise where there is a lack of authority to act, or an incorrect exercise of authority, as a result of wrongly interpreting a statutory provision or from procedural errors such as a failure to give notice when required by the rules of natural justice and procedural fairness. Typically the focus of judicial review is jurisdictional error.

**Merits review** – A merits review is the review of an original decision that focuses on reaching the best possible decision at the time of the review; not simply whether the original decision-maker reached an acceptable decision. The reviewer re-hears the entire case and makes decisions on all issues, including findings of fact and any discretionary determinations and legal interpretations.

**Memorandum of Understanding (MOU)** – An MOU is intended to assist tribunal chairs and their sponsoring ministries in clarifying their respective roles and responsibilities. It is intended to support tribunal decision-making independence, strengthen public accountability and establish the level of independence and accountability that is appropriate to the mandates and operating circumstances of individual tribunals. A model MOU is available on the Administrative Justice Office Website.

**Natural Justice and Procedural Fairness** – These are legal concepts that apply to the decision making process (*how* a decision is made, not the substance (merits) of the decision). These court imposed obligations embody the concept of fair treatment, which is also sometimes referred to as the duty to be fair. What may be required to comply with the duty varies depending on the type and nature of the decision, plus the state of the law. Typical requirements include notice and knowledge about the decision that is to be made, and an opportunity to present information to the decision maker (which does not always mean an in-person hearing), but these and other requirements can be limited or modified by clear statutory direction.

**On the record** – The consideration of an original decision based on only the evidence that was put before the original decision-maker, often conducted in writing, because no new or other evidence can be considered by the reviewer. Because no oral evidence is given, a review on the record may be shorter and less expensive. Factual findings made by the original decision maker are not usually reviewable on the record, because the original decision maker, having seen and heard the evidence on which these findings are based, is considered to have been in a better position to make these determinations.

## GLOSSARY

**Original decisions** – An original decision is simply the first decision made in a process: for example, whether to issue a license or whether a person is entitled to a benefit.

**Privative Clause** – A privative clause is statutory provision that may be used to limit the extent of (but never eliminate) judicial review by the courts of a decision made by an original decision-maker or a tribunal. Legislative counsel has developed two such clauses that can be applied to decisions made by tribunals; which of these might be most suitable will depend on the nature of the decision and the expertise of and processes used by the decision-maker or tribunal.

**Procedural Fairness** – See Natural Justice and Procedural fairness, above.

**Proportionality** – This principle reflects the concept that whether to provide a decision review process and, if so, the extent, complexity, and/or costs of any such decision review process should bear a relationship to or reflect the complexity and impact of the decision which is to be reviewed and the issues addressed by that decision. A decision without great impact may not call for a decision review process, or if it does, that process should not be complex or costly.

**Public Officials** – In many cases, the statutory authority to make initial decisions in administrative proceedings is delegated to public officials. Such officials are somewhat sheltered from the daily influence of government policy as their enabling legislation may limit them to address specific factors in rendering their decisions. The nature of decisions for which public officials are responsible typically include those that have a predictable and minimal impact on individuals and public policy such as permits and licence applications.

**Reconsideration** – A “rehearing” or internal decision review, typically conducted by the original decision maker. However, there could be circumstances where different persons within the organization or review entity could undertake the reconsideration. A reconsideration can be limited in scope or process.

**Review Fatigue** – See Appeal fatigue, above.

**Review on the merits** – See Merits review, above.

**Tribunal** – A tribunal is an entity at arms-length from but whose members are appointed by government, based on the person’s skills, knowledge and abilities specifically in relation to the issues that are the subject of the original decision and/or the decision review process. Tribunal members may be lawyers, but that is not always the case. Tribunal members are usually appointed for a fixed term, which can range from 2 to 5 years, and may be re-appointed for additional terms. Tribunals in British Columbia serve thousands of people annually, affecting both individuals and the broader community. Those tribunals are extraordinarily diverse in mandate, scope, composition and size, and they resolve disputes between private parties and also between individuals and government. They may decide questions ranging from individual liberty to property values, regulate complex economic activities or resolve disputes about issues affecting the environment, public safety and other matters. The scope of powers they exercise range from investigative, adjudicative, policy making to regulatory. Some tribunals have only part-time members, supported by a small registry, while others are large agencies with extensive administrative supports. Diverse as they are, BC’s administrative tribunals share substantial common elements, and form a cohesive system.

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### A SUMMARY OF SOME OF THE INFORMATION ABOUT REVIEW OPTIONS

JUDICIAL REVIEW	
<p><i>Judicial review:</i></p> <ul style="list-style-type: none"> <li>➤ <i>is an inherent power the courts have to review government actions.</i></li> <li>➤ <i>is always available.</i></li> <li>➤ <i>can be limited, but not totally excluded by legislation.</i></li> </ul> <p><b>Primary Considerations</b> – Judicial Review may be an appropriate review option if</p> <ul style="list-style-type: none"> <li>➤ few review requests are expected,</li> <li>➤ the original decision was made after full and fair proceedings, and/or</li> <li>➤ the decision review is to be restricted to jurisdictional and other limited legal issues.</li> </ul>	
Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• May be cost effective, if only a limited number of review requests are anticipated</li> <li>• Limited grounds of review and no new evidence means are restricted</li> </ul>	<ul style="list-style-type: none"> <li>• As the most formal and technical option, legal representation is usually necessary, so accessibility is limited</li> <li>• Limited grounds of review, so consideration of the merits not possible</li> <li>• Longer timeframe is likely, so may delay achieving finality</li> <li>• Limited remedies are available, so may simply result in the referral of the original decision back to original decision maker</li> <li>• May be limited opportunity for public interest to be considered</li> </ul>
<p><b>Secondary Considerations</b> <i>if Judicial Review is to be the only option:</i></p> <ul style="list-style-type: none"> <li>• Whether to impose a time limit to apply.</li> <li>• Whether to provide for a privative clause to limit the scope of the review.</li> </ul>	

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INTERNAL DECISION REVIEW	
<p><b>An Internal Decision Review is conducted by:</b></p> <ul style="list-style-type: none"> <li>➤ the original decision-maker or</li> <li>➤ another individual within in the same organization.</li> </ul> <p><b>Primary Considerations</b> – An Internal Decision Review may be an appropriate choice, if:</p> <ul style="list-style-type: none"> <li>• the original decision was made within a limited time frame and/or without significant input from the parties</li> <li>• a high volume of cases is expected</li> <li>• a quick resolution is required</li> <li>• the decision review is to be conducted within clearly articulated criteria</li> <li>• the range of decisions that the reviewer can make will be limited</li> </ul>	
<p style="text-align: center;"><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Specialized subject matter expertise</li> <li>• Easy accessibility</li> <li>• More timely resolution likely</li> <li>• Likely to be most cost effective</li> <li>• Greater consistency may be possible (so that similar cases are decided alike, leading to greater fairness)</li> <li>• May provide an opportunity for a better explanation of original decision, which may increase acceptance level</li> <li>• Direct and immediate feedback may improve overall decision-making</li> </ul>	<p style="text-align: center;"><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Possible perceived lack of independence/impartiality in conducting the review due to perceived vested interest in maintaining the original decision</li> </ul>
<p><i>Specific Advantages</i></p>	
<p><i>Original Decision-Maker:</i></p> <ul style="list-style-type: none"> <li>• Can correct obvious errors without significant time or effort required</li> <li>• May be least costly</li> </ul> <p><i>Other Individual:</i></p> <ul style="list-style-type: none"> <li>• Reduced perception of bias</li> </ul>	<p style="text-align: center;"><i>Specific Disadvantages</i></p> <p><i>If Original Decision-Maker:</i></p> <ul style="list-style-type: none"> <li>• Highest degree of perception of bias</li> </ul>
<p><b>Secondary Considerations</b> if an Internal Decision Review is chosen:</p> <ul style="list-style-type: none"> <li>• Whether the reviewer should be able to consider any new or additional evidence</li> <li>• Whether to impose any time to apply or any pre-conditions, before a review may be available</li> <li>• Whether the process is to be informal or more structured</li> <li>• To provide opportunities for dispute resolution processes</li> </ul>	

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EXTERNAL DECISION REVIEW	
<p><b>An External Decision Review</b> is conducted by an entity at arm's-length from government:</p> <ul style="list-style-type: none"> <li>➤ a tribunal, or</li> <li>➤ a statutory appeal to the court.</li> </ul> <p>(Appeals to the court are different from judicial review - appeal rights can be more limited.)</p> <p><b>Primary Considerations</b> – An External Decision Review may be an appropriate choice</p> <ul style="list-style-type: none"> <li>➤ if government has a high degree of direct interest in the decision under review, which may indicate a greater need for independence.</li> </ul>	
<p><b>Advantages</b></p>	<p><b>Disadvantages</b></p>
<ul style="list-style-type: none"> <li>• Perceived greater independence, impartiality and fairness</li> <li>• Can choose whether to provide for a full consideration of the case on the merits, or if review is to be more limited</li> <li>• Can provide an opportunity for public interest to be considered</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of control over outcome – external entity can make decisions affecting government policy and/or operations</li> <li>• May take longer to conclude than internal review</li> <li>• Likely to be more costly than internal review</li> </ul>
<p><i>Specific Advantages</i></p>	
<p><b>Tribunals:</b></p> <ul style="list-style-type: none"> <li>• Specialized expertise in subject matter</li> <li>• Greater appreciation for policy considerations</li> <li>• Less formal and more accessible, legal counsel not required</li> <li>• More timely than the court</li> <li>• Procedures may be more flexible than court procedures</li> <li>• High volume of cases can be managed more easily</li> <li>• May be more cost effective than the courts</li> <li>• May improve consistency (similar cases are decided alike, leading to greater fairness)</li> </ul>	<p><b>Specific Disadvantages</b></p> <p><b>Tribunals:</b></p> <ul style="list-style-type: none"> <li>• May be perceived as less independent from government than the court</li> <li>• The need to balance decision-making independence with accountability, can on occasion lead to tension between tribunals and government (which can be addressed by Memorandum of Understanding between Tribunal Chair and Minister)</li> </ul>
<p><b>Courts:</b></p> <ul style="list-style-type: none"> <li>• Can address constitutional issues</li> <li>• Highest degree of independence</li> <li>• May be less costly if few cases are anticipated</li> </ul>	<p><b>Courts:</b></p> <ul style="list-style-type: none"> <li>• More formal, which may limit access</li> <li>• Procedures less flexible</li> <li>• Legal representation may be a necessity</li> <li>• May be more costly than tribunal review</li> <li>• May take longer to reach finality than tribunal review</li> </ul>
<p><b>Secondary Considerations</b> if an External Decision Review is chosen:</p> <ul style="list-style-type: none"> <li>• What evidence is to be considered and what grounds are to be reviewable</li> <li>• Whether a privative clause should be applicable</li> <li>• Dispute resolution processes to be provided</li> <li>• Any limits to be imposed on appeal rights</li> </ul>	



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MORE THAN ONE DECISION REVIEW	
<p><b>More than One Decision Review</b> may be comprised of:</p> <ul style="list-style-type: none"> <li>➤ an internal review combined with an external review</li> <li>➤ an external review by a tribunal followed by a limited appeal to court.</li> </ul> <p><b>Primary Considerations</b> – Multiple reviews are not typically recommended, but may be appropriate in certain circumstances – for example, to stream out less contentious from the typically more timely and more costly secondary level review.</p>	
<p style="text-align: center;"><b>Advantages</b></p> <p>If high volume of cases is expected, first level review may stream out less contentious, simpler cases, reducing pressure on the typically more expensive second level review</p> <p>Can bring subject matter expertise</p> <p><i>Specific Advantages</i></p> <p><i>Internal Review Combined with External Appeal:</i></p> <ul style="list-style-type: none"> <li>• Simplest form of multi-level review</li> <li>• Less expensive</li> <li>• More timely</li> </ul> <p><i>Tribunal Followed by Limited Appeal to the Court:</i></p> <ul style="list-style-type: none"> <li>• Appeal to the court more accessible than judicial review</li> <li>• Can restrict further appeals within the court system</li> </ul>	<p style="text-align: center;"><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Greater length of time to complete, which will delay finality</li> <li>• Likely to be more costly than only one review</li> <li>• May cause appeal fatigue – parties with legitimate appeals may be deterred by multiple steps</li> </ul> <p><i>Specific Disadvantages</i></p> <p><i>Internal Review Combined with External Appeal:</i></p> <ul style="list-style-type: none"> <li>• If mandatory internal review:               <ul style="list-style-type: none"> <li>- may not be perceived as unbiased review</li> </ul> </li> </ul> <p><i>Tribunal Followed by Limited Appeal to the Court:</i></p> <ul style="list-style-type: none"> <li>• Likely to be most costly</li> </ul>
<p><b>Secondary Considerations</b> (if more than one review has been chosen)</p> <ul style="list-style-type: none"> <li>• If Internal Review Combined with External Review: should internal review be mandatory or voluntary</li> <li>• All other considerations noted above, under the Internal and External Decision Review Options</li> </ul>	

## **APPENDIX B**

### **Legislation that may be of interest when considering the Design of a Process for Review of Administrative Decision-Making**

(The Queens Printer, Province of British Columbia provides access to the revised statutes and consolidated regulations of British Columbia through the following public Web site: <http://www.qp.gov.bc.ca/statreg/> ).

*Administrative Tribunals Act*, SBC 2004, C. 45

*Auditor General Act*, SBC 2003, C. 2

*Budget Transparency and Accountability Act*, SBC 2000, C. 23

*Financial Administration Act*, RSBC 1996, C. 138

*Financial Information Act*, RSBC 1996, C. 140

*Freedom of Information and Protection of Privacy Act*, RSBC 1996, C. 165

*Interpretation Act*, RSBC 1996, C. 238

*Judicial Review Procedure Act*, RSBC 1996, C. 241

*Multiculturalism Act*, RSBC 1996, C. 321

*Public Sector Employers Act*, RSBC 1996, C. 384

*Ombudsman Act*, 1996, C. 340

## APPENDIX C

### A CHECKLIST FOR THE PROCESS FOR DECISION REVIEW CONSIDERATION, SELECTION AND DESIGN

- Establish a cross disciplinary team** of policy analysts, program managers, operational staff and legal counsel, and consult with the Administrative Justice Office.
- Consider the overarching principles:**
  - ***Proportionality:*** A decision review process should be proportionate to the gravity and complexity of the issues under consideration.
  - ***Clarity:*** Addressing the details by designing a clear and comprehensive scheme will reduce unnecessary costs and other difficulties in the future.
  - ***Accessibility:*** A good decision review process is accessible to the people who may need or want to use it.
  - ***Coherency within the larger administrative justice system:*** Decision reviews should be designed to operate within their own environment but also as part of a coherent, broader administrative justice system.
- Consider policy goals:**
  - Fairness and justice
  - Consistency
  - Proportionality and cost efficiency
  - Timeliness and finality
- Consider program characteristics:**
  - Significance of the original decision from the perspective of the individuals affected, the public and the government
  - Nature and quality of the process used in making the original decision
  - Available resources
  - Tolerance for and the impact of any variations from government's policies
  - Extent to which the issues are primarily legal or, conversely, the role of policy in reaching an appropriate decision
  - Impact on the workload of the courts if there is no review
  - Culture or environment within which the review will operate
  - The desire to remove the decision from the political arena
  - Expected volume of cases
  - The users
  - The need to be heard
  - The need to level the playing field
- Consider the Options for the Decision Review Process and their relative**

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### advantages and disadvantages (see also the summary in Appendix A)

- **Internal Review** by the original decision-maker or by someone else within the organization re-hearing or reconsidering the decision.
- **External Review** by an independent arm's length entity, typically a tribunal or the court. (May also be utilized for original decision making where government has a high degree of direct interest, for example, human rights).
- **Judicial Review** by the court exercising its inherent supervisory jurisdiction to review government's actions, governed by the *Judicial Review Procedure Act*.
- **More than one review** is not typically recommended, but may be appropriate in very special circumstances.

#### **Consider the Technical Matters:**

- *What evidence is to be considered?*
  - None (on the record)
  - All new (de novo)
  - Only some new evidence.
- *Grounds for Review:* should the review be a complete re-hearing or limited to only points of law?
- *Standard of Review:* What, if any, deference should the reviewer give to the various determinations made by the original decision-maker?
- *Burden of Proof:* Which party should have the obligation to establish their case?
- *Who may ask for a review?* Should interveners be permitted and/or any limits placed on their participation?
- *What should the reviewer be able to do?*
  - Re-hearing or reconsideration by the original decision,
  - Directing the original decision maker to re-hear or reconsider the matter
  - Confirming or reversing the original decision
  - Changing the original decision
  - All of the above
- *Time limits:* On requesting a review and/or on the review process itself

## APPENDIX C

- *Dispute Resolution Processes*: Review the materials available at: <http://www.ag.gov.bc.ca/dro/> and consult the Dispute Resolution Office.

### Other Matters

Seek necessary approvals at the appropriate stages.

A brief and non-exhaustive list of other matters includes:

- *provision of adequate staff and financial resources for the decision review process*
- *training for ministry, tribunal and/or other staff*
- *ensuring high quality original decisions and processes to reduce the need for reviews*
- *mechanisms to enable original decision-makers to learn from the review decisions*

### Next Steps

The next step may be to prepare legislation. The *Administrative Tribunals Act* provides a consistent legislative framework for BC tribunals and articulates certain policy decisions already made by government for the administrative justice sector. The Administrative Justice Office (AJO) is available to assist in considering how that Act should apply. Contact with the AJO early in the process is recommended. The Act will also be of assistance in developing legislation for an internal review process and for some aspects of judicial review.

The Administrative Justice Office can be contacted at:

Mail: PO Box 9210 STN PROV GOVT  
Victoria BC V8W 9J1

Phone: (250) 387-0058

Fax: (250) 387-0079

Web site: [www.gov.bc.ca/ajo/](http://www.gov.bc.ca/ajo/)