

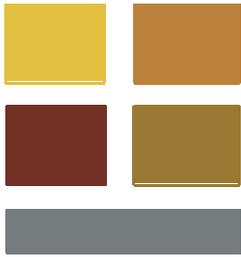
AMM Convention 2014 Winnipeg-November 25, 2014

Changing Times – Changing Tools

Maintaining Critical Relationships
in the Face of Changing Expectations

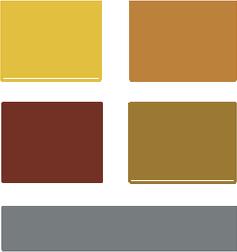


Mel Holley
A/Ombudsman
Manitoba Ombudsman



What's an Ombudsman

- Independent officer of the Legislature
 - Manitoba Office of the Auditor General
 - Manitoba Office of the Children's Advocate
 - Chief Electoral Officer
 - Manitoba Ombudsman's Office
- Security of tenure
- Broad powers of investigation
- Power to recommend (remedy for maladministration)
- Ability to report on findings, to the Legislative Assembly and to the public.



The Ombudsman Act

What do we investigate?

Investigations

15 The Ombudsman may, on a written complaint or on his own initiative, investigate

(a) any decision or recommendation made, including any recommendation made to a minister, or any act done or omitted, relating to a matter of administration in or by any department or agency of the government, or by any officer, employee or member thereof, whereby any person is or may be aggrieved; or

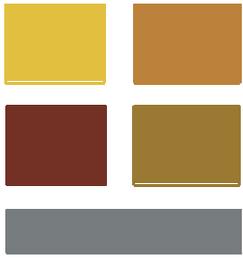
(b) any decision or recommendation made, including any recommendation made to a council, or any act done or omitted, relating to a **matter of administration** in or by any municipality or by any officer or employee of a municipality, whereby any person is or may be aggrieved.



So what is a “matter of administration”?

In my view, the phrase “a matter of administration” encompasses everything done by governmental authorities in the implementation of government policy. I would exclude only the activities of the legislature and the courts from the Ombudsman’s scrutiny.

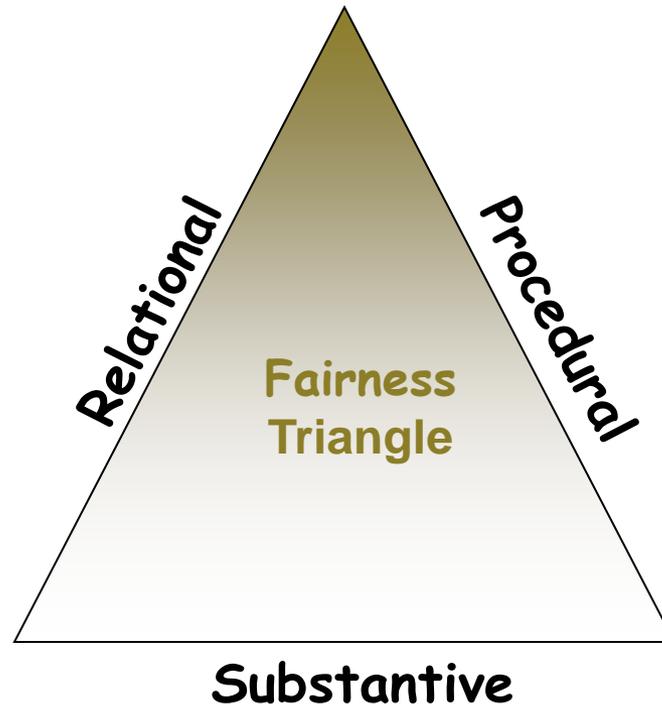
Re British Columbia Development Corporation et al v. Friedmann et al (“BCDC”)
Supreme Court of Canada 1984

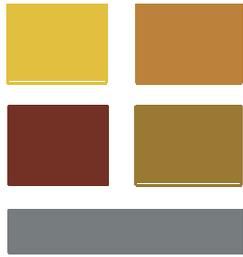


Is there a matter of administration to be investigated?

Here's what we look for:

- a practice, procedure or decision that is inconsistent with or contrary to policy, regulation or statute or by-law.
- an act, decision or omission that is procedurally, substantively, or relationally unfair.
- failure to fulfill a statutory mandate or obligation.





Fairness Triangle

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

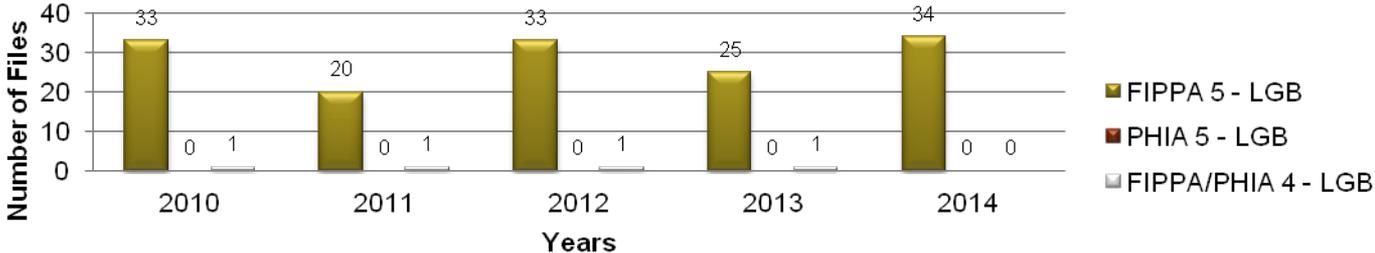
Substantive fairness relates to the fairness of the decision itself; and

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

See more detailed definitions at slides 32 to 36.

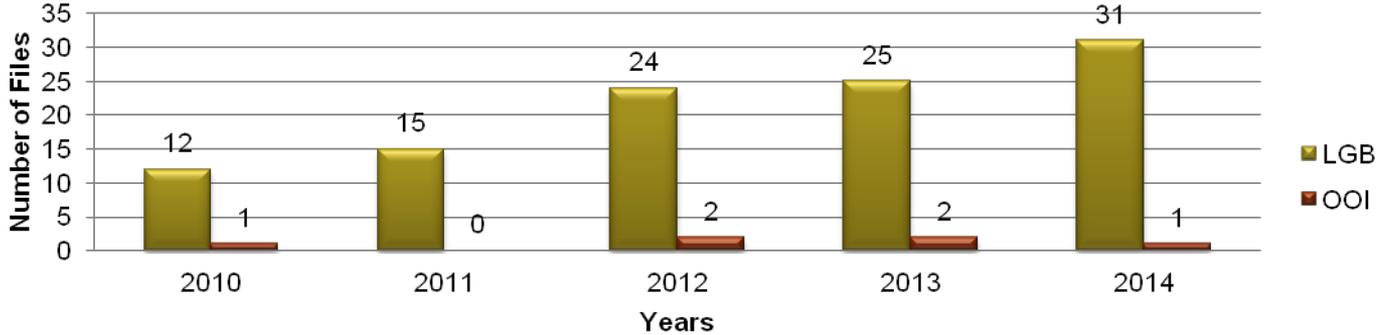
Municipal Investigations 2010 - November 12, 2014

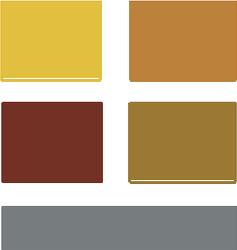
Access & Privacy Division



FIPPA – Top 5 sections of the Act selected - 11, 12, 13, 15 and 17

Ombudsman Division





Most complained-about issues

Most complained-about issues

Local improvement plans for large infrastructure projects (sewer/wastewater/water and others)

Subdivisions

Conditional use decisions

Conflict of interest

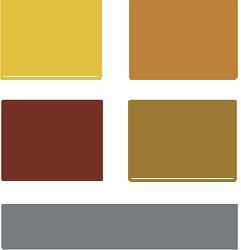
Council meeting procedures
(for example, in-camera meetings)

Development plans

By-law enforcement

Tendering processes

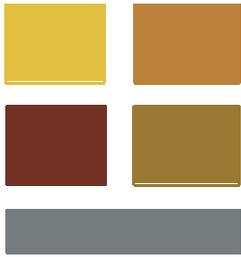
Municipal road and ditch maintenance



Administrative versus Political Function

Municipal Councils perform two important but very different functions. We investigate administrative acts and decisions.

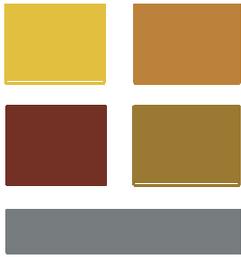
- Development of law and policy.
- Administrative decision making.



Sources of Conflict

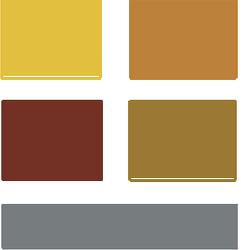
Based on our experience we have identified what we believe to be some of the common sources of conflict between residents and councils.

- Infrastructure deficit.
- Increasing demand for urban services and amenities.
- Recreational uses vs. permanent residential use.
- Increased reliance on extraordinary taxation measures such as local improvement and special services provisions.
- Increased organized scrutiny.



Accountability and Watchdog Groups

- Senior citizens with professional backgrounds.
 - Lawyers
 - Accountants
 - Engineers
 - Politicians
 - Administrators
- Citizen journalists.
- Revised social consciousness in youth:
 - Occupy movement
 - Idle no more
 - Increasing interest in the administration of government in academia, in the media, and in the public at large.



Tools available to watchdogs

Widespread internet access

Publicly available information can be used to assess, judge, and compare every action and decision taken by a council. That analysis can then be shared instantly.

- Smartphones
- Facebook
- Twitter
- Access and privacy legislation



How to get in trouble

Examples of inappropriate responses to citizens. Taken from complaint files:

Dealing with citizen complaints

“Who elected you? I want to know who the members of your group are and I want to see your budget and what rules you have to follow ...”

Responding to access to information requests

“What do you want that for? You don’t need that information. You’re just trying to harass us. That application is frivolous and vexatious.”

Let’s go in camera ...

“That’s internal business, nobody needs to know ...”

Transparent decision making

“We’re not required by law to give reasons for decision ...”

“It’s council’s decision and we’re doing what’s right for the municipality ...”



How not to get in trouble

When we see councils and CAO's exercise good practices:

Dealing with citizen complaints

- Don't be defensive
- Get it in writing
- Delegate administrative responses
- Respond from a place of fact and policy, not from emotion

Responding to access to information requests

- Pre-emptive proactive disclosure
- Delegate. This is an administrative function
- Learn the rules
- We're from the government, we're here to help you...

Transparent decision making

- You've got nothing to hide...
- Don't be afraid
- Make your life easier through standard procedures and practices



Self - Help!

Be proactive:

Know the rules: the legislative requirements and policies that existed before you were elected and will be there when you are replaced or retire.

Think of being a councillor as a second job and a third job, and a ...



Which job am I doing today?

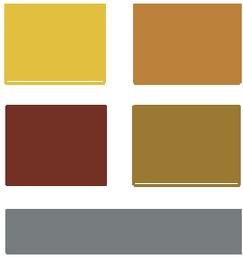
Question:

What is our job?" or "Why are we here?"

Answer:

We are here to...

- debate a drainage policy
- sit as a Board of Revision to hear property assessment appeals...
- conduct a public meeting to review the financial plan...
- hear an application for a variance under a zoning by-law plan...
- hear an appeal of a decision made by our planning district..."
- pass a by-law
- deal with a personnel matter



Context is important

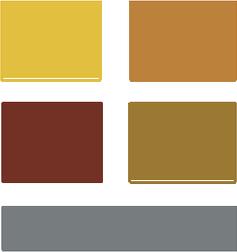
Question:

What is our jurisdiction?

Answer:

The provincial law, municipal by-law or resolution giving us the authority to take action or make a decision.

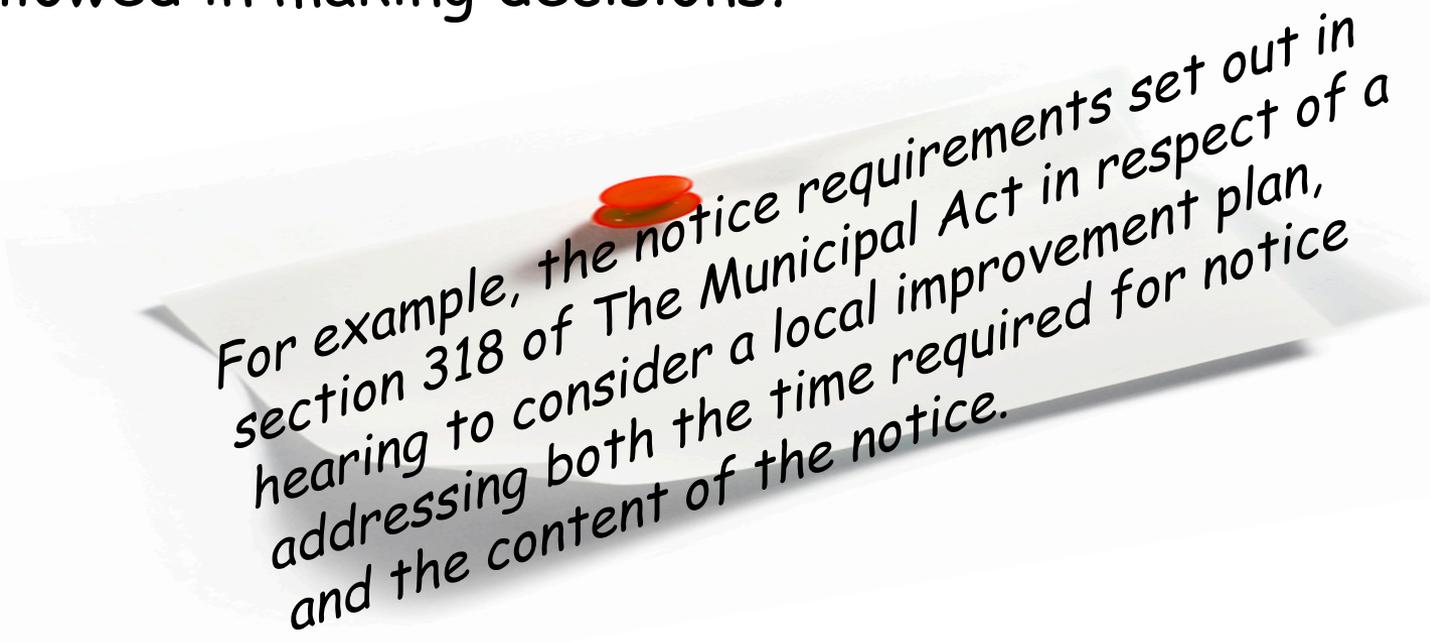
Read it. Understand it. Use it to your advantage.



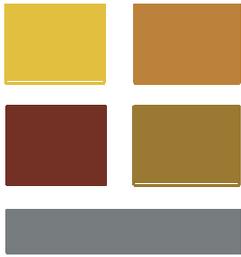
Ask yourself

Question:

What are the procedural requirements that must be followed in making decisions?



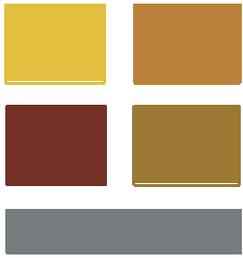
For example, the notice requirements set out in section 318 of The Municipal Act in respect of a hearing to consider a local improvement plan, addressing both the time required for notice and the content of the notice.



Be aware that ...

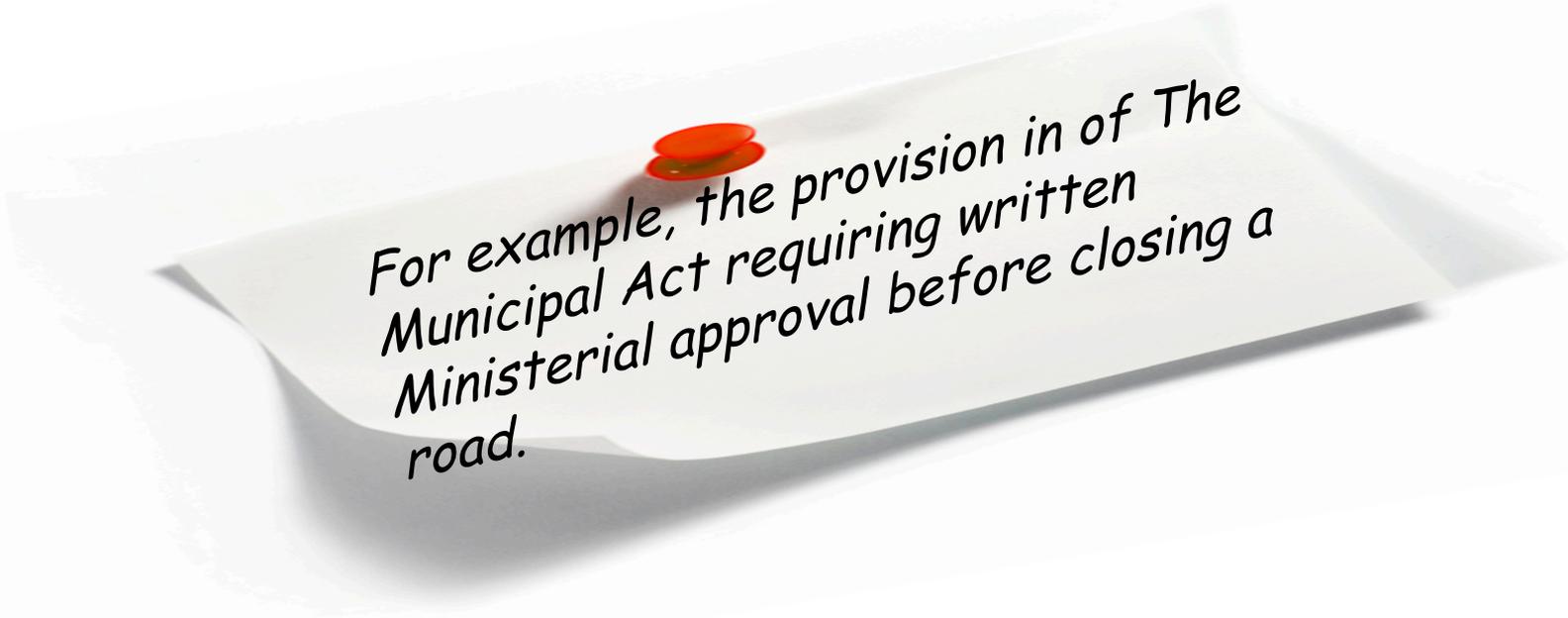
The statute or by-law may set out specific information that must be considered and criteria that must be applied when making a decision.

For example: the criteria to be applied when deciding whether to vary the provisions of a zoning by-law, set out in The Planning Act.

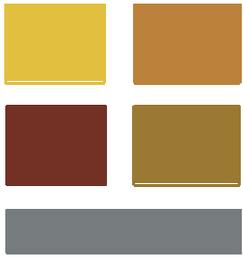


Remember

As well, there may be other procedural requirements other than notice that you need to be aware of.



*For example, the provision in of The
Municipal Act requiring written
Ministerial approval before closing a
road.*

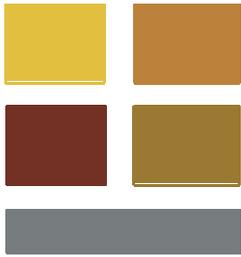


When you do get in trouble

A complaint to the Ombudsman:

Here's what to expect:

- Attempt at informal resolution
- Written notice
- Thorough investigation - impartial and courtesy
- No surprises
- Goal of improved administration



The Ombudsman Act

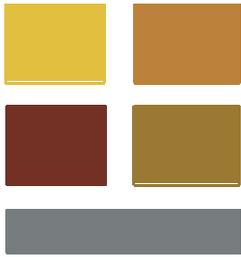
Power to Investigate

Evidence

30(1) Subject to section 31, the Ombudsman may require any person who, in his opinion, is able to give any information relating to any matter being investigated by him

- (a) **to furnish** the **information** to him; and
- (b) **to produce any document, paper or thing** that in his opinion relates to the matter being investigated and that may be in the possession or under the control of that person;

whether or not that person is an officer, employee or member of the department, agency of the government or municipality and whether or not the document, paper or thing is in the custody or under the control of a department, agency of the government or municipality.



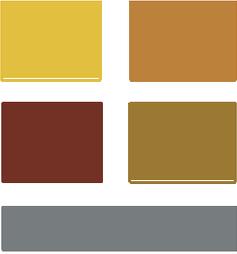
The Ombudsman Act

Power to Investigate

Examination on oath

30(2) The Ombudsman may summon before him and examine on oath

- (a) **any person who is an officer or employee or member** of any department, agency of the government or **municipality** and who in the opinion of the Ombudsman is able to give any information relating to any matter being investigated by him;
- (b) any complainant; and
- (c) **any other person who** in the opinion of the Ombudsman is able to give any information relating to any matter being investigated by him.



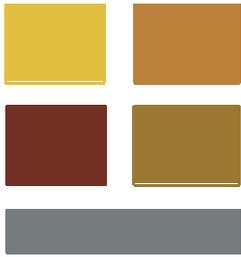
The Ombudsman Act

Findings and Conclusions

Report on investigation

36(1) Where, after making an investigation under this Act, the Ombudsman is of opinion

- (a) that a **decision, recommendation, act or omission** that is the subject matter of the investigation appears to have been
 - (i) contrary to law, or
 - (ii) unreasonable, or
 - (iii) unjust, or
 - (iv) oppressive, or
 - (v) improperly discriminatory, or
 - (vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory, or
 - (vii) based wholly or partly on a mistake of law or fact, or
 - (viii) wrong; or
- (b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised
 - (i) for an improper purpose, or
 - (ii) on irrelevant grounds, or
 - (iii) on the taking into account of irrelevant considerations; or
- (c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation; the Ombudsman shall report his opinion and his reasons and may make such recommendations as he thinks fit
- (d) to the appropriate minister and to the department or agency of the government concerned; or
- (e) to the appropriate head of council.

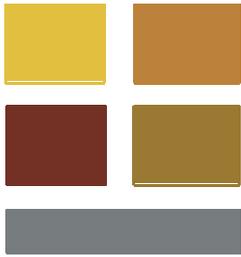


The Ombudsman Act

Power to Recommend

36(2) Without limiting the generality of subsection (1), in making a report under subsection (1), the Ombudsman may recommend

- (a) that a matter should be referred to the appropriate authority for further consideration; or
- (b) that an omission should be rectified; or
- (c) that a decision should be cancelled or varied; or
- (d) that any practice on which a decision, recommendation, act or omission was based should be altered or reviewed; or
- (e) that any law on which a decision, recommendation, act or omission was based should be reconsidered; or
- (f) that reasons should be given for any decision, recommendation, act or omission; or
- (g) **that any other steps should be taken.**



The Ombudsman Act Reporting

Report considered at closed meeting

36(3) Where the Ombudsman reports to a head of council under clause (1)(e), **the head of council shall at the next** meeting of council **close** the meeting to the public in accordance with *The Municipal Act* or *The City of Winnipeg Charter*, as the case may be, and **council shall meet as a committee to discuss the report.**

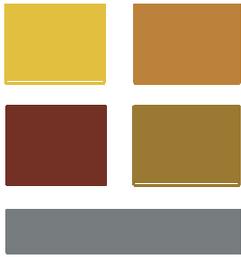
Notice of proposed steps

37(1) Where the Ombudsman makes a recommendation under section 36, **he may request the** department, agency of the government or **municipality to notify him within a specified time of the steps that it has taken or proposes to take to give effect to his recommendations.**

Further report on recommendations

37(2) If within a reasonable time after a request respecting recommendations is made under this section, no action is taken which seems to the Ombudsman to be adequate and appropriate, the Ombudsman, in his discretion, after considering the comments, if any, made by or on behalf of the department, agency of the government or municipality affected, may report the matter, including a copy of the report containing the recommendations,

- (a) in the case of a report under clause 36(1)(d), to the Lieutenant Governor in Council; and
 - (b) in the case of a report under clause 36(1)(e), to the head of council;
- and may mention the report in the Ombudsman's next annual report to the Assembly.



The Ombudsman Act

Reporting (con't)

Comments included in report

37(3) Any report made under subsection (2) shall include any comments made by or on behalf of the department, agency of the government or municipality upon the opinion or recommendation of the Ombudsman.
Report tabled at council meeting

37(4) Where the Ombudsman reports to the head of council under clause (2)(b), **the head of council shall table the report at the next meeting of council** (making it a public document).



Public Reporting

Publication of reports

43 In the public interest, or in the interest of a person, department, agency of the government or municipality, the Ombudsman may publish reports relating generally to the exercise and performance of his functions and duties under this Act or to any particular case investigated by him, whether or not the matters to be dealt with in the report have been the subject of the report made to the assembly under this Act.



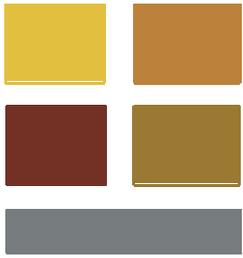
Lets talk about our relationship

This is what the Supreme Court of Canada said about the Ombudsman.

His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. [...]

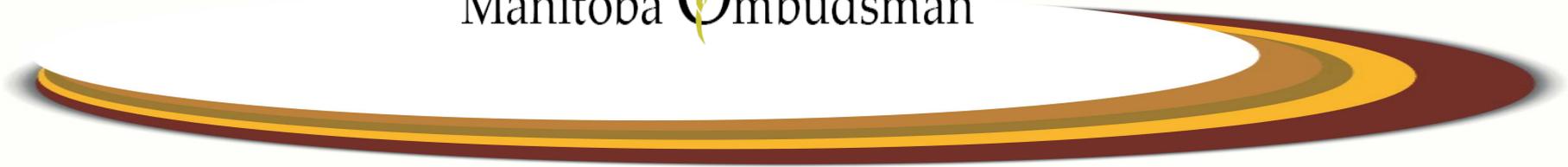
On the other hand, he may find the complaint groundless, not a rare occurrence, in which even his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.

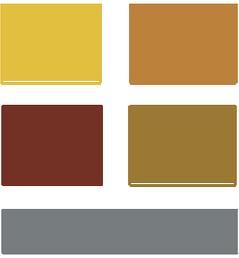
In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.



Questions?

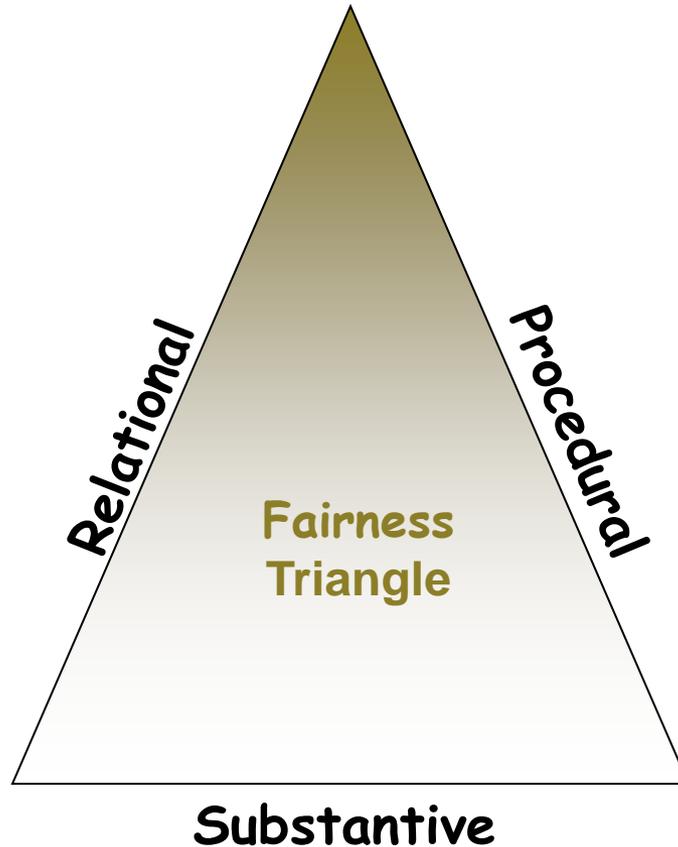
Manitoba  Ombudsman

A decorative swoosh graphic at the bottom of the page, consisting of several overlapping curved lines in shades of yellow, brown, and dark red, curving from left to right.



How we determine fairness

How do you apply these fairness concepts to decision making?





Procedural Fairness

At minimum, procedural fairness requires that:

- The person who will be affected by a decision is given advance notice that a decision will be made.
- The person affected by a decision is given the information that will be considered when a decision is made.
- The person affected by a decision is given a meaningful opportunity to state or present his or her case.
- The person affected by a decision is given an opportunity to respond to any information that might be contrary to his or her position when a decision is being made.



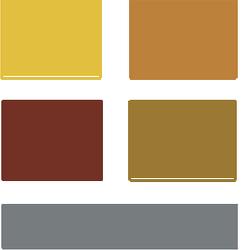
Procedural Fairness Continued

- The decision-maker be thorough and thoughtfully review all the information provided by the person affected by a decision.
- The decision-maker be impartial, (unbiased and without a personal interest in the outcome of the decision).
- The decision-maker gives meaningful reasons for the decision that are understandable to the people affected.



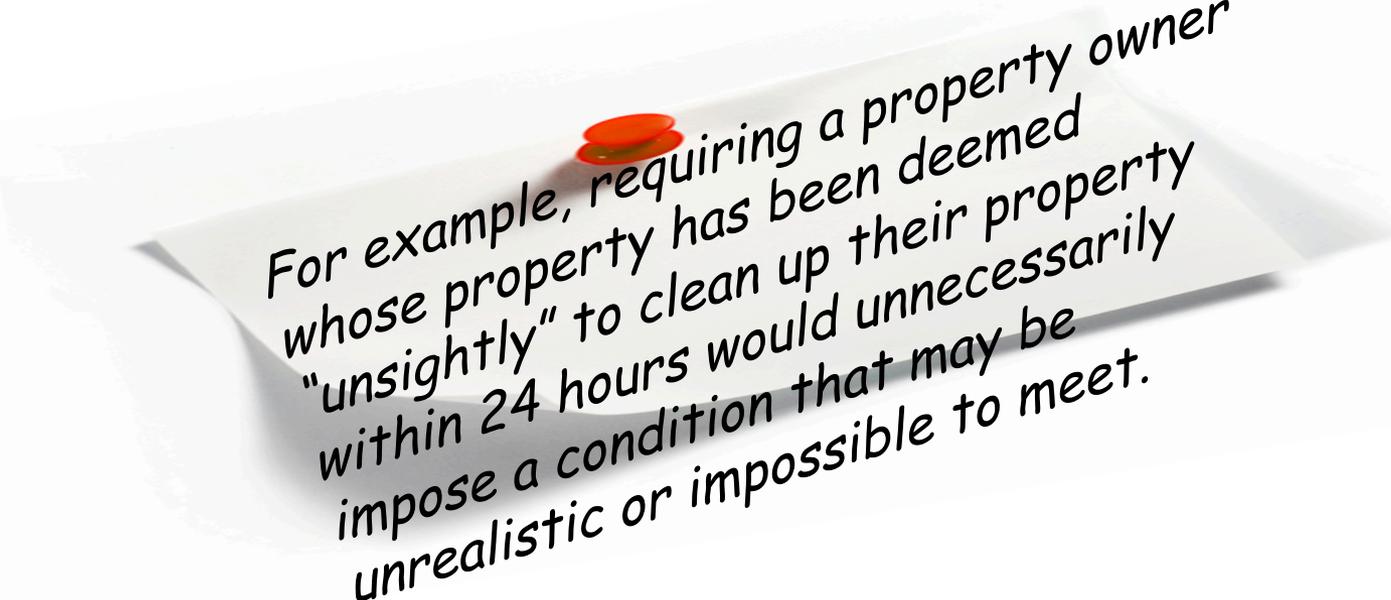
Substantive Fairness

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



Substantive Fairness Continued

- The decision cannot be unreasonable, meaning that the decision should avoid creating unnecessary obstacles for the person affected.



For example, requiring a property owner whose property has been deemed "unsightly" to clean up their property within 24 hours would unnecessarily impose a condition that may be unrealistic or impossible to meet.



Relational Fairness

The "soft" side of fairness

Is:

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