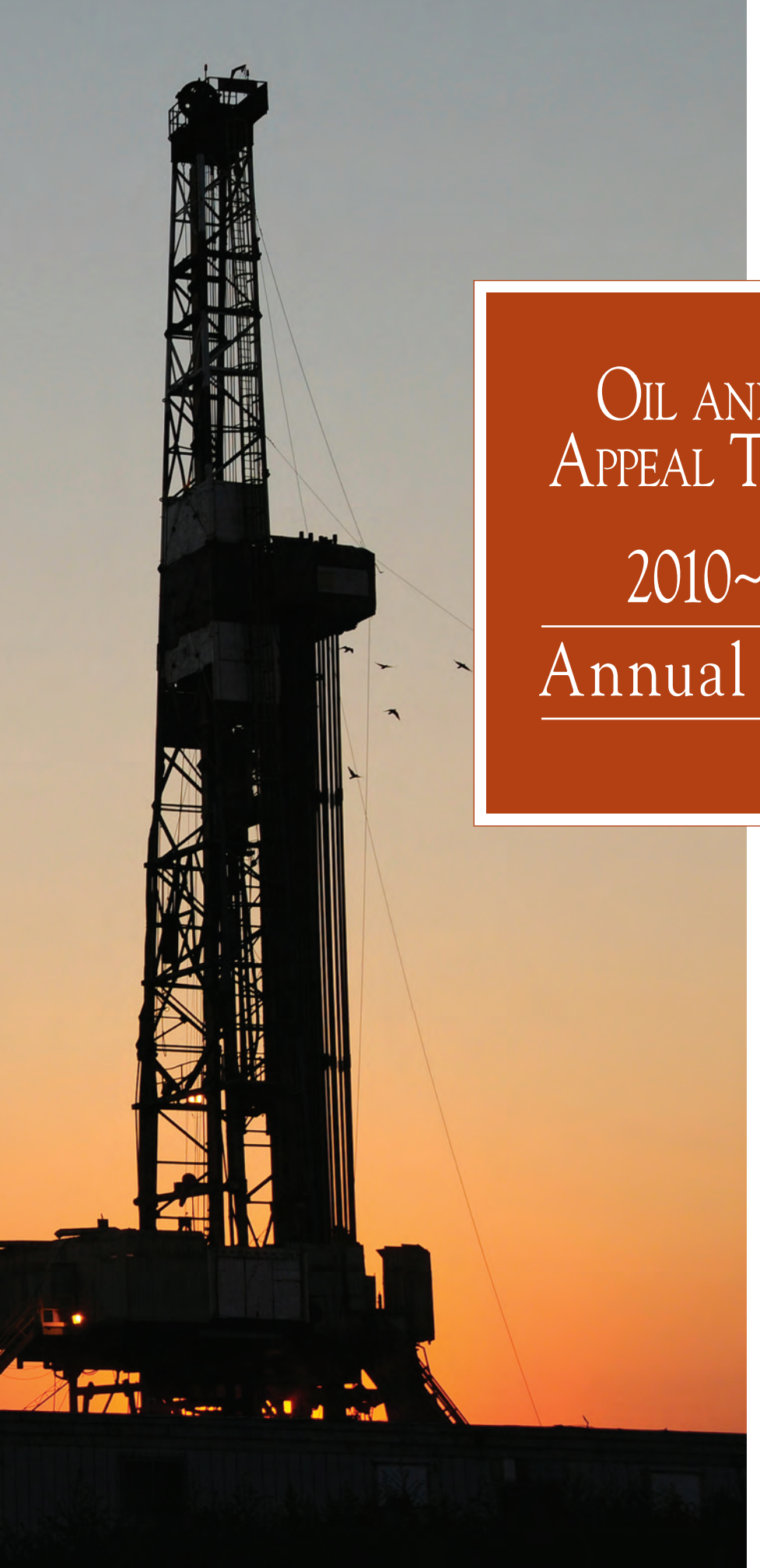

Oil and Gas Appeal Tribunal

2010~2013

Annual Report

BRITISH COLUMBIA

Oil and Gas Appeal Tribunal

Fourth Floor, 747 Fort Street
Victoria, British Columbia
Telephone: 250-387-3464
Facsimile: 250-356-9923

Mailing Address:
P.O. Box 9425
Stn Prov Govt
Victoria, British Columbia
V8W 9V1

The Honourable Suzanne Anton
Minister of Justice and Attorney General
Parliament Buildings, Room 232
Victoria, British Columbia
V8V 1X4

The Honourable Rich Coleman
Minister of Natural Gas Development, Minister Responsible for Housing and Deputy Premier
Parliament Buildings, Room 128
Victoria, British Columbia
V8V 1X4

Dear Ministers:

I respectfully submit the first Annual Report of the Oil and Gas Appeal Tribunal for the period October 7, 2010 through December 31, 2013.

Yours truly,

Alan Andison
Chair
Oil and Gas Appeal Tribunal

AR 2010 TO 2013

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Message from the Chair

I am pleased to submit the inaugural annual report of the Oil and Gas Appeal Tribunal. The Tribunal was established on October 4, 2010, when section 19 of the *Oil and Gas Activities Act* was brought into force. The first members of the Tribunal were appointed by Order-in-Council on October 7, 2010, for three year terms expiring December 31, 2013. This report provides an overview of these first three years of the Tribunal's operation.

Appeals during the Reporting Period

During this reporting period, the Tribunal received and decided its first appeals. A total of 23 appeals were filed with the Tribunal, all but two of which were filed by owners of land on which oil and gas activities were authorized by the Oil and Gas Commission.

Of those 23 appeals, I am pleased to report that 21 of them were closed within the reporting period. Of the appeals closed during the reporting period, 33% were withdrawn or resolved which meant that they did not require a hearing. The Tribunal encourages parties to resolve appeals without the need for a hearing.

Thirteen of the appeals ultimately proceeded to a hearing on their merits. These appeals involved complex legal questions, including the fairness of the Oil and Gas Commission's procedures in relation to land owners, the nature of the Tribunal's powers and procedures in appeals by land owners, and the interpretation of the Tribunal's enabling legislation. These appeals also involved complex factual issues and matters of significant interest to the public, the oil and gas industry and the Government. These issues included the environmental and safety risks associated with well drilling, hydraulic fracturing, flaring and access road construction and appropriate pipeline routing. In addition, several of those decisions led to changes in the Oil and Gas Commission's policies and procedures regarding the information it provides to owners of land on which oil and gas activities are authorized. As this is the first report for the Tribunal, and it covers the first three years of the Tribunal's operation under a new legislative scheme, all of the published decisions of the Tribunal issued during this period are summarized in this annual report.

Reducing Cost to Government

As Chair of three tribunals, the Oil and Gas Appeal Tribunal, the Environmental Appeal Board and the Forest Appeals Commission, I have appreciated the various benefits of, and actively encouraged, the "clustering" of tribunals with similar processes and/or mandates. The Tribunal's office now

supports a total of eight administrative tribunals. This model has numerous benefits, not only in terms of cost savings, but also in terms of shared knowledge and information. Having one office provide administrative support for several tribunals gives each tribunal greater access to resources while, at the same time, reducing costs and allowing the tribunals to operate independently of one another.

Adding to these efficiencies, the Tribunal has developed its Rules of Practice and Procedure, standard Notice of Appeal application forms for filing appeals, and a series of information sheets on specific topics to make the appeal process more accessible and understandable to the public. All of those documents are available on the Tribunal's website. The Tribunal office is also improving its information systems to facilitate greater access and information sharing with both the public and parties to appeals before the Tribunal.

In addition, the Tribunal has the jurisdiction to conduct mediation and has other procedural tools to facilitate the early resolution of appeals. Should an appeal proceed to a hearing, these procedures will ensure that the hearing proceeds as quickly and efficiently as possible.

Tribunal Membership

The Tribunal's membership was stable during the past three years. However, four members' appointments concluded on December 31, 2013. Those members are Dr. Robert Cameron, Bruce Devitt, Jagdeep Khun-Khun and Loreen Williams. I sincerely thank each of these distinguished members for their exemplary service as members of the Tribunal during their terms.

I am very fortunate to have on the Tribunal a wide variety of highly qualified individuals including professional biologists, foresters, agrologists, engineers, and lawyers with expertise in the areas of natural resources and administrative law, and mediation. All of these individuals, with the exception of the Chair, are appointed as part-time members and bring with them the necessary expertise to hear matters ranging from procedural fairness to the environmental impacts of oil and gas activities. Throughout this reporting period, the members of the Tribunal were also cross-appointed to the Environmental Appeal Board and the Forest Appeals Commission, providing further opportunities for efficiency and greater use of member expertise.

Finally, I would like to take this opportunity to thank the members of the Tribunal and the staff for their continuing commitment to the work of the Tribunal.

Introduction

The Oil and Gas Appeal Tribunal hears appeals from certain determinations or decisions issued by the Oil and Gas Commission or a review official under the *Oil and Gas Activities Act*. The information contained in this first annual report covers the period from October 7, 2010 to December 31, 2013.

This report provides an overview of the structure and function of the Tribunal and how the appeal process operates. It contains statistics on appeals filed, hearings held and decisions issued by the Tribunal within the reporting period. It contains the Tribunal's recommendations, if any, for legislative changes to the *Oil and Gas Activities Act* and its regulations, and summaries of the decisions issued by the Tribunal during the reporting period. Sections of relevant legislation are also reproduced at the back of the report.

Decisions of the Tribunal are available for viewing on the Tribunal's website, at the Tribunal office, and at the following libraries:

- Ministry of Environment Library
- University of British Columbia Law Library
- University of Victoria Law Library
- West Coast Environmental Law Library

Detailed information on the Tribunal's policies and procedures can be found in the Tribunal's Rules of Practice and Procedure, which may be viewed on the Tribunal's website or obtained from the Tribunal office. If you have any questions or would like additional copies of this report, please contact the Tribunal office. The Tribunal can be reached at:

Oil and Gas Appeal Tribunal
Fourth Floor, 747 Fort Street
Victoria, British Columbia
V8W 3E9
Telephone: 250-387-3464
Facsimile: 250-356-9923

Website Address: www.ogat.gov.bc.ca

Email Address: ogatinfo@gov.bc.ca

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria, British Columbia
V8W 9V1

The Tribunal

The Oil and Gas Appeal Tribunal is an independent appellate tribunal established under section 19 of the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36, which came into force on October 4, 2010.

The Tribunal is independent, in that it is not part of the Ministry that regulates the oil and gas industry, nor is it part of the Oil and Gas Commission that issues permits, orders and administrative penalties in relation to oil and gas activities. The Tribunal was created as a separate entity to ensure that appeals from Oil and Gas Commission decisions would be decided independently and fairly. The Tribunal is responsible for accepting, screening, mediating and adjudicating appeals filed under the *Oil and Gas Activities Act*. The Tribunal is committed to providing a fair, impartial and independent process for resolving appeals.

Parties may settle/resolve an appeal on their own at any time in the appeal process. A party may also ask the Tribunal to arrange a settlement meeting (mediation) to try to resolve the appeal issues. Settlement meetings are confidential and without prejudice to the positions that the parties may take in a hearing. If the parties do not resolve the appeal, the Tribunal will hold a hearing.

Tribunal Membership

Tribunal members are appointed by the Lieutenant Governor in Council (Cabinet) under the *Administrative Tribunals Act*, after a merit based process. The Tribunal has a full-time chair, part-time vice-chair and a number of part-time members. Its members are appointed on the basis of their specific knowledge and experience with the oil and gas industry, natural resource matters and administrative justice. They include professional engineers, geoscientists, biologists, foresters and lawyers. These members apply their respective technical expertise, adjudication skills, and mediation skills to resolve appeals in a fair, impartial and efficient manner. In addition, the chair is responsible for the effective management and operation of the Tribunal, and the organization and allocation of work among the members.

Members appointed to the Tribunal are also cross-appointed to the Environmental Appeal Board and the Forest Appeals Commission to take advantage of the specialized technical and adjudicative expertise required for these tribunals, maximize professional development resources and enhance the overall functioning, flexibility and effectiveness of the Tribunal in responding to significant fluctuations in workload.

The first Tribunal members were appointed by Order-in-Council on October 7, 2010 for 3-year terms expiring December 31, 2013. Three additional members were appointed in October 2011 and one other member was appointed in May 2012 to fill a vacancy left by a retiring member.

The Tribunal members during this reporting period were as follows:

THE TRIBUNAL	EXPERTISE	FROM
Chair		
Alan Andison	Lawyer	Victoria
Vice-chair		
David H. Searle, CM, QC	Lawyer (retired)	North Saanich
Members		
R. O'Brian Blackall	Land Surveyor	Charlie Lake
Carol Brown (to June 20, 2012)	Lawyer/CGA/Mediator	Sooke
Robert Cameron	Professional Engineer	North Vancouver
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Cindy Derkaz (from October 20, 2011)	Lawyer (retired)	Salmon Arm
Bruce Devitt (from October 27, 2011)	Professional Forester (retired)	Esquimalt
J. Tony Fogarassy	Lawyer/Geoscientist	Vancouver
Les Gyug	Professional Biologist	Westbank
James Hackett	Professional Forester	Nanaimo
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Jagdeep Khun-Khun (from October 20, 2011)	Lawyer	Vancouver
Gabriella Lang	Lawyer (retired)	Campbell River
E. Blair Lockhart	Lawyer/Geoscientist	Vancouver
Kenneth Long	Professional Agrologist	Prince George
James S. Mattison (from May 3, 2012)	Professional Engineer	Victoria
Douglas VanDine	Professional Engineer	Victoria
Reid White	Professional Biologist (retired)/ Professional Engineer	Telkwa
Robert Wickett, QC	Lawyer	Vancouver
Loreen Williams	Lawyer/Mediator	West Vancouver

Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting people's rights and interests. It applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. The goal of this type of law is to ensure that officials make their decisions in accordance with their enabling legislation and the principles of procedural fairness and natural justice, by following proper procedures and acting within their jurisdiction.

The Tribunal is governed by the principles of administrative law and, as such, must treat all parties involved in an appeal before the Tribunal fairly, giving each party a chance to explain its position.

Appeals to the Tribunal are decided on a case-by-case basis. Unlike a court, the Tribunal is not bound by its previous decisions; present cases before the Tribunal do not necessarily have to be decided in the same way that previous ones were.

The Tribunal Office

The office provides registry services, legal advice, research support, systems support, financial and administrative services, professional development and communications support for the Tribunal.

The Tribunal shares its staff and its office space with the Environmental Appeal Board, the Forest Appeals Commission, the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Hospital Appeal Board, the Industry Training Appeal Board and the Health Professions Review Board.

Each of these tribunals operates completely independently of one another. Supporting eight tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, reducing administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Tribunal by one party must also be provided to all other parties to the appeal, subject to certain exceptions that are addressed in the Tribunal's Rules of Practice and Procedure and the *Administrative Tribunals Act*.

The Tribunal is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act, as modified by section 61 of the *Administrative Tribunals Act*. If information is requested by a member of the public regarding an appeal, that information may be disclosed, unless the information has been excluded under Rule 50 (Restriction of Public Access to Oral Hearings and Documents) or falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act* and/or section 61 of the *Administrative Tribunals Act*.

Parties to appeals should be aware that information supplied to the Tribunal is subject to public scrutiny and review. The names of parties, representatives and witnesses in an appeal appear in the Tribunal's published decisions which are posted on the Tribunal's website, and may appear in this Annual Report. Some decisions of the Tribunal may also be published in legal journals or on law-related websites.

The Appeal Process

Overview

The *Oil and Gas Activities Act* provides a framework for regulating the rights and activities of persons carrying out oil and gas activities in the province. Oil and gas activities are defined in the *Act* to include geophysical exploration, the construction or operation of a pipeline, road construction, and the production, gathering, processing, storage or disposal of petroleum, natural gas or both.

This *Act* was designed to take the place of all or part of three other enactments; specifically, the *Oil and Gas Commission Act*, the *Pipeline Act* and portions of the *Petroleum and Natural Gas Act*. It was designed to consolidate regulatory requirements, streamline the permitting processes for oil and gas activities, and consolidate the powers and responsibilities of the Oil and Gas Commission. It also created the new appeal Tribunal under section 19 of the *Act*.

A summary of the appeal provisions in the *Oil and Gas Activities Act* and applicable sections of the *Administrative Tribunals Act* is provided below.

Who can file an appeal? What can be appealed?

The Tribunal hears appeals from certain decisions of the Oil and Gas Commission and decisions of review officials. Under section 72 of the *Oil and Gas Activities Act*, appeals may be filed by "eligible persons". "Eligible persons" are defined in section 69(1) of the *Act* as: applicants for permits or authorizations; permit holders; owners of land on which oil and gas activities are permitted to be carried out under the *Act*; persons who are subject to orders issued under section 49(1) of the *Act*; and persons who have been found by the Commission to be in contravention of the *Act*.

Section 69(1) of the *Act* also specifies the "determinations" – the types of decisions – that may be appealed. It distinguishes between those decisions that may be appealed by land owners and those decisions that may be appealed by other eligible persons. The decisions that may be appealed by eligible persons other than the land owner include certain orders, declarations, findings of contravention, administrative penalties and permitting decisions in relation to an "oil and gas activity" such as geophysical exploration, the construction or operation of a pipeline, road construction, and the production, gathering, processing, storage or disposal of petroleum, natural gas or both. The decisions that may be appealed by land owners are limited to the issuance or amendment of a permit to carry out oil and gas activities on the land owner's land.

Commencing an Appeal

Notice of Appeal

To commence an appeal, a person with the right to appeal must prepare a notice of appeal and deliver it to the Tribunal office within the time limit specified under the *Oil and Gas Activities Act*. For land owners, the appeal must be filed within 15 days of the date of the decision being appealed. For eligible persons other than land owners, the appeal must be filed within 30 days of the date of the decision being appealed.

If the Tribunal does not receive a notice of appeal within the specified time limit, the person will lose the right to appeal unless the Tribunal grants an extension of time to file the appeal. Under the *Administrative Tribunals Act*, the Tribunal may extend the time to file an appeal, even if the time to appeal has already expired, if the Tribunal is satisfied that special circumstances exist.

In addition, the notice of appeal must comply with the content requirements of the *Administrative Tribunals Act*. It must contain the name and address of the person appealing (the appellant), the name of the appellant's counsel or agent (if any), the address for service upon the appellant, grounds for appeal, details of the decision being appealed, and a statement of the outcome requested. Also, the notice of appeal must be signed by the appellant or on his or her behalf by their counsel or agent. Finally, the Tribunal requires a copy of the decision being appealed.

If the notice of appeal is missing any of the required information, the Tribunal will notify the appellant of the deficiencies. The Tribunal may refrain from taking any action on an appeal until the notice is complete and any deficiencies are corrected.

Once a notice of appeal is accepted as complete, the Tribunal will notify the Oil and Gas Commission. The Oil and Gas Commission is considered the respondent in the appeal.

Third Party Status

Section 72(5) of the *Oil and Gas Activities Act* provides that, in addition to the appellant and the Oil and Gas Commission, certain persons may be a party in an appeal depending on both who filed the appeal and the subject matter of the appeal. For instance, if a land owner files an appeal against a permit, the permit holder will be added as a party to the appeal. Alternatively, if an applicant for a permit appeals a refusal to issue the permit, the owner of the land on which the activity was intended to occur may be a party to the appeal. These additional parties are referred to as "third parties" to the appeal.

Third parties have all of the same rights as the appellant and respondent to present evidence, cross examine the witnesses of the other parties, and make opening and closing arguments.

Interveners

An intervener to an appeal is different than a party to an appeal; an intervener does not have an automatic "right" to participate in the appeal. The Tribunal may permit an intervener to participate in an appeal under section 33 of the *Administrative Tribunals Act*.

To intervene in an appeal, a person must make a request to the Tribunal. If the Tribunal receives a request, it will consider whether the proposed intervener can bring a valuable contribution or bring a valuable perspective to the appeal, and how the potential benefits of the intervention outweigh any prejudice to the other parties. The Tribunal will then decide whether the person should be granted intervener status and, if so, the extent of that participation. For example, the Tribunal may limit the participation of an intervener and, unless specifically authorized by the Tribunal, an intervener may not be permitted to submit evidence in the appeal.

Pre-hearing Procedures

Stays

A stay has the effect of postponing the legal obligation to implement all or part of the appealed decision until the Tribunal has issued its final decision on the appeal.

If an administrative penalty is appealed, it is automatically stayed pursuant to section 72(4) of the *Oil and Gas Activities Act*. However, a party may apply to the Tribunal for an order removing the stay of an administrative penalty.

For all other decisions that may be appealed, the Tribunal has the power to order a stay pending the Tribunal's final decision on the appeal. A stay is discretionary, and the person seeking the stay must apply to the Tribunal and meet a three-part test.

Dispute Resolution

The Tribunal encourages parties to resolve the issues underlying an appeal at any time in the appeal process. The Tribunal's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences; and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Tribunal for its approval. Alternatively, the appellant may withdraw the appeal at any time.

Pre-hearing Conferences

On its own initiative or at the request of a party, the Tribunal may schedule a pre-hearing conference by written notice to the parties and any interveners, and may direct them to deliver documents or submissions prior to the conference.

Pre-hearing conferences provide an opportunity to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the parties and interveners, their representatives, one Tribunal member and one staff member from the Tribunal office. It will be less formal than a hearing and will usually follow an agenda which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

If a Tribunal member conducts a pre-hearing conference and confidential settlement matters are discussed, that member will not sit on the panel that hears the merits of the appeal unless all parties agree in writing.

The Hearing

A hearing is a more formal process than a pre-hearing conference, and allows the Tribunal to receive the evidence it uses to make a decision.

The Tribunal is committed to providing a fair, timely and effective avenue of appeal. The Tribunal's Practice Directive No. 1, available on the Tribunal's website, sets out the usual time periods for a hearing to be completed. Those time periods range from five to nine months from the date that the notice

of appeal is received by the Tribunal, depending on: (1) whether the appeal is heard by way of written submissions or oral hearing; and (2) in the case of oral hearings, the total number of hearing days required to complete the hearing.

Evidence

The Tribunal has the authority to hear the same evidence that was before the original decision-maker, as well as receive new evidence that is relevant to an issue in the appeal. The Tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

The rules of evidence used in a hearing are less formal than those used in a court. The Tribunal has full discretion to receive any information that it considers relevant, and it will then determine what weight to give the evidence.

Evidence at an appeal hearing will be accessible to the parties and any interveners unless the Tribunal directs that all or part of the evidence be received in confidence to the exclusion of a party or intervener because, in the opinion of the Tribunal, its nature requires that direction to ensure the proper administration of justice. Similarly, the Tribunal may order that all or part of the evidence be received to the exclusion of the public in certain circumstances.

Type of Hearing

An appeal may be conducted by way of written submissions, oral hearing or a combination of both. If the Tribunal decides that an oral hearing is appropriate, it may be conducted in person, by teleconference, videoconference, or any other means determined to be appropriate by the Tribunal. In other instances, the Tribunal may find it appropriate to conduct a hearing by way of written submissions. Prior to ordering that a hearing will be conducted by way of written submissions, the Tribunal may request the parties' input.

Written Hearing Procedure

If it is determined that a hearing will be by way of written submissions, the Tribunal will invite all parties to provide submissions. The appellant will provide its submissions, including its evidence. The other parties will then have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

Oral Hearing Procedure

When the chair decides to hold an oral hearing, the chair will set the date, time and location of the hearing, and notify the parties and any interveners.

An oral hearing may be held in the locale closest to the affected parties, at the Tribunal office in Victoria or anywhere in the province. The Tribunal will decide where the hearing will take place on a case-by-case basis.

Once a hearing is scheduled, the parties and any interveners will be asked to provide a statement of points to the Tribunal and all other participants in the appeal.

Statement of Points and Document Disclosure

To help identify the main issues to be addressed in an oral hearing and the arguments that will be presented in support of those issues, all parties to the appeal, and any interveners, are asked to provide a written statement of points and produce all relevant documents. A statement of points is a summary of the person's case – the evidence that

will be presented at the hearing and the main points or arguments that will be made in support of that person's case.

Expert Evidence

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert," the person must have knowledge that goes beyond "common knowledge".

The Tribunal is not bound by the provisions relating to expert evidence in the British Columbia *Evidence Act*. However, unless the Tribunal orders otherwise, a party who wishes to submit expert evidence at a hearing must provide notice 60 days in advance of the hearing that an expert will be called to give an opinion. The notice must include a brief statement of the expert's qualifications and areas of expertise, a written summary of the opinion to be given at the hearing, and the facts on which the opinion is based.

Obtaining an Order for Attendance of a Witness or Production of Documents

Section 20 of the *Oil and Gas Activities Act* and subsection 34(3) of the *Administrative Tribunals Act* provide the Tribunal with the power to require the attendance of a witness at a hearing, and to compel a witness to produce for the Tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Tribunal to make an order requiring the person to attend an oral or electronic hearing to give evidence and to bring with them documents and other things in their possession or control relevant to the appeal.

In addition, if a person refuses to voluntarily produce a document or other thing in that person's possession or control that is admissible and relevant to an issue in an appeal, a party may apply to the Tribunal for an order requiring production of the documents, or other thing, either prior to or during a hearing.

At an Oral Hearing

In an oral hearing, each party will have the opportunity to present evidence, call witnesses and explain their case to the Tribunal. In addition, any interveners will have the opportunity to present their evidence and/or submissions, subject to any limitations that the Tribunal has imposed on the intervener's participation.

Although hearings before the Tribunal are less formal than those before a court, some of the hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation, and witnesses are subject to cross-examination.

Participants in the appeal may have lawyers representing them at the hearing, but this is not required. The Tribunal makes every effort to keep the process open and accessible to participants not represented by a lawyer.

Hearings before the Tribunal are generally open to the public. However, the Tribunal may make an order to restrict public access to the hearing and evidence.

The Decision

In making its decision, the Tribunal is required to determine, on a balance of probabilities, what occurred and to decide the issues raised in the appeal. In appeals filed by land owners, the Tribunal must decide whether the Oil and Gas Commission's determination was made without due regard to:

- a submission previously made by the land owner under section 22(5) or 31(2) of the *Oil and Gas Activities Act* [i.e., a written submission to the Oil and Gas Commission in response to notice of a proposed permit, authorization or permit amendment], or
- a written report submitted under section 24(1)(c) or 31(6) of that *Act* [i.e., a written report submitted by the applicant for a permit or permit amendment, to the Oil and Gas Commission, regarding the results of consultation and notice].

The Tribunal will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing following the hearing. The Tribunal endeavours to provide the participants with its final decision and written reasons as soon as practicable after the completion of the hearing.

The Tribunal's Practice Directive No. 1, available on the Tribunal's website, sets out the usual time periods to release the final decision on an appeal. The time periods range from three to nine months from the close of the hearing, depending on the total number of hearing days required to complete the matter. Copies of the decision will be given to the parties and any interveners. All of the Tribunal's final decisions are available to the public on the Tribunal's website.

There is no right of appeal to the courts from a Tribunal decision. However, a participant dissatisfied with a decision of the Tribunal may apply to the British Columbia Supreme Court for judicial review of the decision pursuant to the *Judicial Review Procedure Act*. A participant must commence an application for judicial review within the 60-day time limit specified in section 57 of the *Administrative Tribunals Act*.

Costs

The Tribunal has the power to award costs under section 47 of the *Administrative Tribunals Act*. In particular, it may order a party or intervener to pay all or part of the costs of another party or intervener in connection with the appeal.

In addition, if the Tribunal considers that the conduct of a party has been frivolous, vexatious or abusive, it may order that party to pay all or part of the actual costs and expenses of the Tribunal in connection with the appeal.

The Tribunal's policy is to only award costs in special circumstances. A summary of a decision on an application for costs after an appeal is included in this report and provides further guidance on this issue.

Legislative Amendments Affecting the Tribunal

During this report period, there were no legislative changes that affected the types of appeals the Tribunal hears, or that affected the Tribunal's powers or procedures.

However, as part of the government reorganization that occurred on October 25, 2010, the Attorney General (Minister of Justice) was given the statutory authority under the *Constitution Act* as the Minister responsible for the activities of the Tribunal.

Recommendations

Several of the appeals that came before the Tribunal during this reporting period involved issues of procedural fairness and information disclosure in relation to land owners. As a result of those appeals, the Tribunal found that some of the Oil and Gas Commission's pre-existing policies and procedures did not comply with the new *Oil and Gas Activities Act* and its regulations, or the principles of administrative fairness. In some cases, this resulted in land owners receiving inadequate disclosure of information that was relevant to their statutory rights to receive notice of, and an opportunity to comment on, oil and gas activities proposed to occur on their land. In another case, this resulted in the Commission failing to give due regard to a land owner's submission regarding oil and gas activities proposed to occur on their land, contrary to the *Oil and Gas Activities Act*.

The Tribunal is pleased to report that those issues have been addressed by the Oil and Gas Commission. Specifically, the Oil and Gas Commission has changed its policy towards submissions received from lawyers representing land owners, and it no longer requires land owners to transfer their rights under the *Oil and Gas Activities Act* to their lawyer in order for the Oil and Gas Commission to give "due regard" to their submission in relation to the proposed oil and gas activity.

In addition, the Oil and Gas Commission has changed its policy not to disclose permit applications to land owners who are entitled to notice of, and an opportunity to comment on, oil and gas activities proposed to occur on their land, as that policy conflicted with the *Oil and Gas Activities General Regulation*.

Given that those issues have been addressed by the Oil and Gas Commission, the Tribunal has no recommendations to make at this time.

Statistics

The following tables provide information on the appeals filed with the Tribunal, appeals closed by the Tribunal, and decisions published by the Tribunal during the reporting period. The Tribunal publishes all of its decisions on the merits of an appeal, and most of the important preliminary and post-hearing decisions. The Tribunal also issues unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

Between October 7, 2010 and December 31, 2013, a total of 23 appeals were filed with the Tribunal against 21 decisions, and a total of 25 decisions were published. The Tribunal issued thirteen final decisions. In addition, seven appeals were withdrawn or abandoned without the need for a hearing and one was rejected for lack of jurisdiction. Thus, a total of 21 appeals (91%) were closed during the reporting period.

October 7, 2010 – December 31, 2013

Total appeals filed	**23**
Total appeals closed	**21**
Appeals abandoned or withdrawn	**7**
Appeals rejected lack of jurisdiction	**1**
Hearings held on the merits of appeals	
Oral hearings completed	5
Written hearings completed	6
***Total hearings held on the merits of appeals**	**11**
Total oral hearing days	**9**
Published decisions issued	
Final decisions	
Appeals allowed	2
Appeals allowed, in part	2
Appeals dismissed	9
Total final decisions	**13**
Decisions on preliminary matters	
Extension of time to file appeal	5
Standing to appeal	1
Interim Stay pending appeal	4
Total preliminary decisions	**10**
Decisions on post-hearing matters – costs	**2**
Total published decisions issued	**25**

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This table provides an overview of the total appeals filed, hearings held, and published decisions issued by the Tribunal during the report period.

It should also be noted that two or more appeals may be heard together.

Note:

* Most preliminary applications and post-hearing applications are conducted in writing. However, only the final hearings on the merits of the appeal have been included in this statistic.

Summaries of Tribunal Decisions

Appeals are not heard by the entire Tribunal; they are heard by a "panel" of the Tribunal. After an appeal is filed, the chair of the Tribunal will decide whether the appeal should be heard and decided by a panel of one or by a panel of three members of the Tribunal. The size and the composition of the panel (the type of expertise needed on a panel) generally depends upon the subject matter of the appeal and/or its complexity. The subject matter and the issues raised in an appeal can vary significantly in both technical and legal complexity. The chair makes every effort to ensure that the panel hearing an appeal will have the depth of expertise needed to understand the issues and the evidence, and to make the decisions required.

In terms of its decision-making authority, a panel has the power to confirm, vary or rescind the decision under appeal. In addition, a panel may send the matter back to the original decision-maker with directions. When an appellant is successful in convincing the panel, on a balance of probabilities, that the decision under appeal was made in error, or that there is new information that results in a change to the original decision, the appeal is said to be "allowed". If the appellant succeeds in obtaining some changes to the decision, but not all of the changes that were requested, the appeal is said to be "allowed in part". When an appellant fails to establish that the decision was incorrect on the facts or in law, and the Tribunal upholds the original decision, the appeal is said to be "dismissed".

Not all appeals proceed to a hearing and a decision by the Tribunal. Some cases are withdrawn or abandoned by an appellant before a hearing. In other cases, an appellant's standing to appeal may be challenged, or the Tribunal's jurisdiction over the appeal may be challenged, resulting in the Tribunal dismissing the appeal in a preliminary decision. Some examples of these types of preliminary decisions are provided in the summaries below.

It is important to note that the Tribunal encourages parties to resolve the issues under appeal either on their own or with the assistance of the Tribunal. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a consent order and ask the Tribunal to approve the order. The consent order then becomes an order of the Tribunal.

It is also important to note that the Tribunal issues many decisions each year, some that are published and others that are not. Therefore, not all of the decisions made by the Tribunal during this reporting period have been included in this Annual report. Rather, only those decisions that have been published on the Tribunal's website are summarized in this Annual Report. The subject matter and the issues considered in these decisions can vary significantly in both technical and legal complexity.

Finally, these summaries are an interpretation of the decisions by Tribunal staff, and the decisions may be subject to a different interpretation. For a full viewing of the Tribunal's published decisions, please refer to the Tribunal's web page.

Preliminary Decisons

The Tribunal heard five applications for extensions of time to file an appeal, one application regarding standing to appeal, and four applications for an interim stay pending a decision on the merits of the appeal. Summaries of these preliminary decisions are set out below.

Extensions of Time to Appeal

Under section 24(2) of the *Administrative Tribunals Act*, the Tribunal has the authority to extend the time to file an appeal, even if the time limit has expired, if the Tribunal is satisfied that special circumstances exist.

Failure to notify land owner's legal counsel

2011-OGA-006(a) and 007(a) Marilyn Gross v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: June 15, 2011

Panel: Alan Andison

Marilyn Gross applied for an extension of time to file two appeals against two separate permits issued by the Oil and Gas Commission. The permits authorized Murphy Oil Company Ltd. ("Murphy") to drill, operate and flare two exploratory horizontal wells on land that is owned by Ms. Gross. The appeals were filed on May 16, 2011, and after the expiry of the 15-day limitation period applicable to land owners under the *Oil and Gas Activities Act*.

Ms. Gross submitted that an extension of time should be granted because special circumstances existed in this case. Specifically, she argued that the Commission did not notify her legal counsel that the permits were issued until May 3, 2011, despite her legal counsel notifying the Commission several months prior that he represented Ms. Gross and that she had concerns about the applications for the permits.

Both the Commission and Murphy opposed the application for an extension of time.

The Tribunal found that there were special circumstances in this case that justified granting the extension of time. The Commission notified Ms. Gross directly when the permits were issued, but it failed or refused to communicate with her legal counsel, despite receiving notice several months prior that he had been retained to represent her interests with respect to the permit applications. The Commission provided Ms. Gross' counsel with notice of its decision on May 3, 2011, after he learned from another agency that the permits had been issued, and he requested information from the Commission. In addition, the Commission did not send copies of the permits that were being appealed to Ms. Gross when it notified her that they had been issued, and it did not send copies to her legal counsel until May 3, 2011. The Tribunal noted that Ms. Gross would lose her right, as an owner of land on which oil and gas activity was permitted, to appeal the permits to the Tribunal if the application for an extension of time was denied. The Tribunal found that the principles of procedural fairness and administrative justice would not be served by adhering to the 15-day appeal period in these circumstances. The Tribunal found that refusing an extension of time in this case would be an injustice, especially given that the appeals were filed within 15 days after the Commission notified her legal counsel that the permits had been issued.

Failure to include information on the right to appeal

2011-OGA-009(a) Loiselle Investments Ltd. v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: October 21, 2011

Panel: David Searle, CM, Q.C.

Loiselle Investments Ltd. applied for an extension of time to file an appeal against a permit issued by the Commission. The permit authorized Encana Corporation to construct and operate a pipeline on an area that includes Loiselle's land. The appeal was filed on August 31, 2011, approximately 12 days after the expiry of the 15-day appeal period applicable to land owners under the *Oil and Gas Activities Act*.

Loiselle submitted that special circumstances justified an extension of time in this case. Specifically, Loiselle submitted that it did not receive notice of the permit in a timely manner. It also submitted that its president/manager, who is solely responsible for its business dealings and management decisions, was out of town at the material time, was on leave due to health issues, and there was no one else to file an appeal on Loiselle's behalf.

The Commission took no position on the application, but provided submissions on the notification procedures set out in the legislation. The Commission acknowledged that its letter notifying Loiselle about the permit failed to include information about Loiselle's right to appeal, contrary to section 25(5)(b) of the *Oil and Gas Activities Act*. The Commission notified Loiselle of its right to appeal on August 22, 2011, after the appeal period had expired.

Encana opposed the application. It submitted that there were no special circumstances that warranted an extension of time, and there was no evidence that Loiselle's president/manager was incapacitated by health issues.

The Tribunal found that the Commission's notice to Loiselle was sent by regular mail, which was not the most expeditious manner. Given the short appeal period for land owners, the Tribunal concluded that the Commission should ensure that land owners are notified in the most expeditious manner. Moreover, the notice did not contain information about Loiselle's right to appeal. In addition, the notice did not contain a copy of the permit, which contains important information that is relevant to a land owner's decision to file an appeal. These facts, in addition to the health issues of Loiselle's president/manager, constituted "special circumstances" that justified an extension of time to file the appeal.

Misunderstanding by Legal Counsel constitutes special circumstances

2012-OGA-002(a) Willis Shore v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: September 17, 2012

Panel: Alan Andison

Willis Shore applied for an extension of time to file an appeal against a permit issued by the Oil and Gas Commission. The permit was issued to Murphy Oil Company Ltd. ("Murphy") and authorized Murphy to construct and operate a pipeline on land that is owned by Mr. Shore. The appeal was filed on August 17, 2012, ten days after the expiry of the 15-day appeal period that applies to land owners under the *Oil and Gas Activities Act*.

Mr. Shore submitted that an extension of time should be granted because special circumstances existed in this case. Specifically, he argued that he had instructed his legal counsel to appeal the permit on August 7, 2012, but there was either a misunderstanding or a miscommunication, and Mr. Shore's legal counsel thought he was referring to

ongoing proceedings before the Surface Rights Board, a separate administrative tribunal with a different mandate. During a telephone conversation on August 15, 2012, Mr. Shore's legal counsel realized that Mr. Shore's August 7, 2012 instructions were regarding an appeal to the Tribunal. Mr. Shore's legal counsel then filed the appeal on August 17, 2012, after Mr. Shore sent supporting documents, and after the conclusion of the 15-day appeal period.

The Commission took no position on whether the application should be granted. Murphy opposed the application. It argued that granting the application would be prejudicial.

The Tribunal found that, had the appeal been filed on August 7, 2012, as requested by Mr. Shore, the appeal would have been filed in time. Once Mr. Shore's legal counsel realized that there had been a misunderstanding or miscommunication in receiving instructions from Mr. Shore, he filed the appeal within two days. The Tribunal noted that, if the application for an extension was denied, Mr. Shore would lose his right to appeal as a result of a miscommunication or misunderstanding with his legal counsel. That would be so despite the fact that Mr. Shore was actively engaged in the consultation process before the permit was issued, and he was diligent and timely in requesting that his legal counsel file an appeal of the permit. Conversely, there was no evidence that granting the extension would result in any prejudice to Murphy, and if there was any prejudice it would be minor given the relatively short 10-day delay in filing the appeal. Consequently, the Tribunal concluded that there were special circumstances in this case that justified granting an extension of time to appeal.

Failure to disclose a permit amendment in a timely manner

2012-OGA-004(a) Mike and Aspen Fraser v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: January 10, 2013

Panel: Alan Andison

Mike and Aspen Fraser applied for an extension of time to file an appeal against a permit amendment issued by the Oil and Gas Commission. The amendment was issued to Encana Corporation and authorized certain changes to a well permit that was issued on May 3, 2011.

The well permit originally authorized the drilling, operation and flaring of a vertical well, and the construction and operation of an access road, on land that is owned by the Frasers. The original well permit was appealed by the Frasers to the Tribunal. Following an oral hearing, the Tribunal allowed that appeal and sent the matter back to the Commission with directions to amend the permit (Decision No. 2011-OGA-008(a) issued January 19, 2012).

The amended permit authorized the well to be drilled horizontally, and also authorized a new emergency management plan and changes in H2S (sour gas) data. The Frasers appealed the amendment on the basis that it resulted in a substantial increase in activity at the well site, including hydraulic fracturing or "fracking", and increased road traffic. They also submitted that the amendment was made without due regard to recently completed professional reports addressing impacts on flora, fauna, and habitat impacts that were not before the Tribunal during the Frasers' previous appeal.

The amendment was issued on October 3, 2012, and the appeal was filed on December 6, 2012. Consequently, the appeal was filed 49 days after the expiry of the 15-day appeal period that applies to land owners under the *Oil and Gas Activities Act*.

The Frasers submitted that an extension of time should be granted because special circumstances existed. Specifically, they submitted that they did not receive a copy of the amendment until November 29, 2012, and only after their second request to the Commission for information about Encana's activities on their land.

The Commission took no position on whether the application should be granted. It acknowledged that it had not provided a copy of the amendment to the Frasers until November 29, 2012. However, the Commission submitted that the Tribunal should take submissions from the parties on the issue of whether the amendment, and an associated amendment to a cutting permit, which was also appealed by the Frasers, are amendments that change "the effect of the permit on the land of the land owner" for the purposes of sections 31(9), 69, and 72 of the *Oil and Gas Activities Act*.

Encana opposed the application. Among other things, it submitted that there was no statutory requirement to notify the Frasers of the amendment, because it related to changes in underground activities and did not affect the Frasers' land. Encana also argued that the amendment was not an appealable determination under section 72 of the *Oil and Gas Activities Act*.

The Tribunal found that the issues raised by Encana and the Commission regarding whether the amendments are appealable determinations could not be decided based on the limited information before the Tribunal, and should be decided by the Tribunal after receiving evidence and submissions on those issues. Consequently, the Tribunal concluded that it should consider the preliminary matter of whether to grant an extension of time, based on the assumption that the well permit amendment was an appealable determination.

The Tribunal noted that it has previously held that it is important that the Commission's notices to land owners are provided expeditiously and include all relevant information, which should generally include a copy of the determination that may be appealed. Without a copy of the amendment, which was only one page long but contained relevant information about what Encana is authorized to do, it was difficult for the Frasers to evaluate whether or not to file an appeal. In this case, the appeal was filed five days after the Frasers received a copy of the amendment. The Tribunal found that the Frasers acted promptly once they received a copy of the amendment.

The Tribunal also considered the need for finality, so that oil and gas operators may proceed with authorized activities without being concerned that an appeal may be filed after the expiry of the appeal period. The Tribunal found that a delay of 49 days after the expiry of the appeal period was somewhat longer than in past cases where the Tribunal had granted an extension of time. However, there was no evidence that granting the extension would result in any prejudice to Encana. In contrast, denying the extension would result in the Frasers losing their right, as owners of land on which oil and gas activities are permitted, to appeal to the Tribunal, despite the fact that the Frasers were successful in having conditions added to the original permit as a result of their previous appeal.

For all of those reasons, the Tribunal concluded that there were special circumstances that justified granting an extension of time in this case.

Standing to Appeal

Can a neighbouring owner of land be considered a "land owner" under the *Act*?

2012-OGA-003(a) James Bell v. Oil and Gas Commission (Painted Pony Petroleum Ltd., Third Party)

Decision Date: April 29, 2013

Panel: Alan Andison

James Bell appealed a well permit issued by the Oil and Gas Commission to Painted Pony Petroleum Ltd. The well permit authorized Painted Pony to drill and operate a horizontal well on Crown land that is adjacent to land that is owned by Mr. Bell and his family. The horizontal drilling also involved underground fracturing, also known as "fracking." The well would be located 100 metres from the boundary of the Bells' property, and drilling could be conducted up to the boundary of Mr. Bell's property lines. Mr. Bell grows certified organic grains and conducts trapping activities on his property, and there is a cabin, a natural water source, and wildlife habitat on the property.

Before the well permit was issued, Mr. Bell provided two submissions to the Commission objecting to the proposed permit. However, his second submission was not received by the Commission before the well permit was issued, due to an error in an email address. Nevertheless, the well permit contained conditions regarding noise control, a requirement that Painted Pony conduct a noise impact assessment, and a requirement that Painted Pony discuss certain matters with the Bell family, including potential concerns about traffic and dust.

Mr. Bell appealed the well permit to the Tribunal on the grounds that the Commission failed to properly consider his concerns about the potential effects of the permitted oil and gas activities on the Bells' property.

Subsequently, the Commission became aware of Mr. Bell's previously undelivered second objection to the proposal. Shortly thereafter, the Commission suspended the permit, and then amended the permit. The amendment includes conditions requiring Painted Pony to conduct water quality sampling on the Bells' property, and to monitor seismic activity in the vicinity of the well.

After the amendment was issued, the Commission requested that the Tribunal dismiss Mr. Bell's appeal on the basis that he had no standing to appeal the permit, and that the Tribunal had no jurisdiction over the appeal, based on the language in sections 69(1) and 72 of the *Oil and Gas Activities Act*.

Specifically, Sections 69(1) and 72(2) of the *Act* state that an appeal may be filed by a land owner of land on which an oil and gas activity is permitted to be carried out. The parties did not dispute that Mr. Bell is an owner of land, but they disagreed on whether he is an owner of land "on which" the permitted oil and gas activity was to be carried out. Specifically, the Commission and Painted Pony submitted that the permitted oil and gas activity would be carried out only on the Crown land where the well project area is located. In contrast, Mr. Bell submitted that seismic activity and the contamination of soil and water are an integral part of the permitted activity. He further submitted that the permitted oil and gas activity would have a direct effect "on" his property, given the close proximity of the well to the property, and given that the permit conditions expressly addressed the potential effects of the oil and gas activity on the Bells.

The Tribunal compared the language in sections 69(1) and 72 of the *Act* to the language in other sections of the *Act* and its regulations. The Tribunal found that the appeal provisions do not state that land owners may appeal if they own land within "the project area", "the proposed project area" or "the

proposed site of an oil and gas activity." Nor do the appeal provisions use site-specific phrases such as "well site," "oil and gas road," "facility area," or "operating area," which are found in other sections of the *Act* and its regulations. The Tribunal also found that, if the Legislature had intended for the right of appeal to be limited to owners of land within the project area or some other more site-specific area, it could have used more site-specific language in the appeal provisions, but it did not. Consequently, the Tribunal held that the phrase "land on which an oil and gas activity is permitted to be carried out" is not limited to the proponent's intended project area, the proposed site of the oil and gas activity, or any of the other more site-specific words and phrases found in the *Oil and Gas Activities Act* and its regulations.

Additionally, the Tribunal noted that the appeal provisions state that land owners may appeal a permit amendment "if the amendment changes **the effect of the permit on the land of the land owner**…" [boldface added]. Based on that language, the Tribunal found that by necessary implication, a permit which is appealable must also have, or be likely to have, an effect on the land of the land owner. The Tribunal found that this conclusion was supported by the language in section 31 of the *Act*, which includes a requirement that the Commission must provide a land owner with notice of an amendment if the amendment "changes the effect of the permit on the land of the land owner."

Finally, the Tribunal found that there was a strong *prima facie* case that the permit and the amendment would, or would likely, have specific effects on the Bells' property, given that the permit and the amendment contain conditions that expressly relate to their property and family. The conditions implied that the property would, or would likely, be affected by noise, dust, seismic activity, and a risk of water contamination as a result of the permitted oil and gas activity. Further, the Tribunal found that, in imposing those conditions, the Commission was carrying out its responsibilities in compliance with the Commission's purposes set out under sections 4(a) and (b) of the *Act*; namely, regulating "oil and gas activities" and the environmental effects of permitted oil and gas activities, in relation to both the Crown land on which the well is located, and in relation to the Bells' property.

In summary, the Tribunal concluded that Mr. Bell had standing to appeal the permit as "a land owner of land on which an oil and gas activity is permitted to be carried out" within the meaning of sections 69(1) and 72(2) of the *Act*, and consequently, the Tribunal had jurisdiction over the appeal.

Applications for a Stay

An appeal of a decision, except a decision imposing an administrative penalty, does not automatically prevent the decision under appeal from taking effect. Rather, the decision under appeal remains in force unless the Tribunal makes an order to temporarily "stay" the decision under section 72(3) of the *Oil and Gas Activities Act*. A stay prevents the appealed decision from taking effect until the appeal is decided or otherwise resolved. However, an appeal with respect to an administrative penalty operates as a stay of the penalty unless the Tribunal orders otherwise under section 72(4) of the *Oil and Gas Activities Act*.

A party seeking a stay must apply to the Tribunal. In determining whether a stay ought to be granted, the Tribunal applies a three-part test that is set out in the Tribunal's Rules of Practice and Procedure, and is based on the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*. To satisfy the three-part test, the party applying for a stay must address the following issues:

- whether the appeal raises a serious issue to be decided by the Tribunal;
- whether the applicant for the stay will suffer irreparable harm if a stay is not granted; and
- whether there will be any negative consequences to property (real or economic), the environment or to public health or safety if the decision is stayed until the appeal is concluded (the balance of convenience test).

When addressing the issue of irreparable harm, the party seeking a stay must explain what harm it would suffer if the stay was refused and why this harm is "irreparable" (i.e., it could not be remedied if the party ultimately wins the appeal). "Irreparable" has been defined by the Supreme Court of Canada as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision …, where one party will suffer permanent market loss or irrevocable damage to its business reputation …, or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

In addressing the issue of "balance of convenience", the party seeking a stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties if a stay is granted.

Stay denied – regulatory safeguards protect water from contamination pending a final decision on the appeal

2011-OGA-005(a) Daniel Kerr v. Oil and Gas Commission (Canadian Natural Resources Limited, Third Party)

Decision Date: June 27, 2011

Panel: Alan Andison

Daniel Kerr appealed a decision of the Oil and Gas Commission to issue a permit. The permit authorized Canadian Natural Resources Limited to drill and operate a well, and construct and operate road access, on land that is owned by Mr. Kerr. Mr. Kerr appealed the permit on several grounds, including that the fracturing process used to recover oil and gas may contaminate ground and surface water on his property, and that the issue of Canadian Natural Resources paying appropriate financial compensation to Mr. Kerr for its use of, and potential damage to, his property was unresolved.

As a preliminary matter, Mr. Kerr requested a stay of the permit pending the Tribunal's decision on the merits of the appeal. Mr. Kerr advised that he was seeking a stay of the permit because he was negotiating with Canadian Natural Resources about compensation through a process administered by the Surface Rights Board, which is a separate agency from the Tribunal. Land owners can apply to the Surface Rights Board for assistance in resolving disputes on the terms of entry onto their land and associated compensation, and for a determination of damages from oil and gas activities caused by entry onto their land.

Both the Commission and Canadian Natural Resources opposed the application for a stay.

With respect to the first part of the three-step test, the Tribunal found that the appeal raised serious issues to be decided, which were not frivolous, vexatious or pure questions of law. Section 72(2) of the

Oil and Gas Activities Act provides that a land owner may appeal "only the basis that the determination was made without due regard to" a submission previously submitted by the land owner to the Commission, or a report on consultation and notification submitted to the Commission by the permit applicant. The Tribunal found that the question of whether the Commission gave due regard to Mr. Kerr's submissions before it issued the permit was, on its face, a serious issue.

Regarding the second part of the test, the Tribunal found that Mr. Kerr failed to establish that his interests would likely suffer irreparable harm unless a stay was granted. The Tribunal found that his submissions regarding the risk of water contamination on his property were speculative. Also, the Tribunal noted that regulatory safeguards are in place to protect water resources from contamination by oil and gas activities, and Canadian Natural Resources intended to isolate the well from surrounding aquifers by casing the well to a depth of 400 metres. In addition, the Tribunal found that Mr. Kerr's concerns were not "irreparable" in nature, because the asserted harm to his interests as a land owner appeared to be compensable, either by an agreement with Canadian Natural Resources or through the Surface Rights Board's process.

Turning to the third part of the test, the Tribunal found that a stay would prevent Canadian Natural Resources from commencing the permitted activities until after the Tribunal decided the merits of the appeal, and the delay would likely harm Canadian Natural Resources' financial interests, whereas Mr. Kerr had not established that his interests would suffer irreparable harm if a stay was denied. Weighing the balance of convenience, the Tribunal concluded that Canadian Natural Resources would suffer greater harm if a stay was granted, than Mr. Kerr would suffer if a stay was denied.

Stay denied – the harm claimed by the Applicants was speculative and compensable

2012-OGA-001(a) Ken and Arlene Boon v. Oil and Gas Commission (Terra Energy Corp., Third Party)
Decision Date: March 20, 2012
Panel: Alan Andison

Ken and Arlene Boon appealed a decision of the Oil and Gas Commission to issue a permit. The permit authorized Terra Energy Corp. to drill and operate a water supply well, and construct and operate road access, on land that is owned by the Boons. The water supply well and access road were constructed on the Boons' property in 2001 by a previous operator. At that time, the operator was not required to obtain a permit for the well or the access road. Subsequently, the water supply well was deactivated. In 2011, Terra decided to reactivate the well and access road, and it applied for the permit as required by the *Oil and Gas Activities Act*. The Commission issued the permit in January 2012, subject to several conditions that relate to water quality and quantity on the Boons' property, and the use and maintenance of the access road.

The Boons appealed on the basis that the Commission made several errors in issuing the permit, and they requested a stay of the permit pending the Tribunal's decision on the merits of the appeal. The Boons submitted that a stay was required to avoid irreparable harm due to safety issues and potential environmental degradation associated with the access road.

Terra opposed the application for a stay, and the Commission took no position.

The Tribunal found that the appeal raised serious issues to be decided, which were not frivolous, vexatious or pure questions of law. For the purposes of deciding the stay application, the Tribunal concluded that the appeal raised serious issues about whether the

permitted use of the access road poses a risk to safety and the environment.

Regarding the second part of the test, the Tribunal found that the Boons failed to establish that their interests in the environment or as land owners would likely suffer irreparable harm unless a stay was granted. The Tribunal found that the Boons' submissions regarding the alleged safety and environmental issues associated with the access road were too vague. In addition, the Tribunal found that the alleged harm to the Boons' interests as land owners were not "irreparable" in nature, because the asserted harm to their interests appeared to be compensable.

Turning to the third part of the test, the Tribunal found that a stay would prevent Terra from commencing the permitted activities until after the Tribunal decided the merits of the appeal, and Terra had provided affidavit evidence that the delay would harm Terra's financial interests. Conversely, the Boons' claim of harm was speculative and vague, and the Boons had failed to establish that their interests would suffer irreparable harm if a stay was denied. Weighing the balance of convenience, the Tribunal concluded that Terra would suffer greater harm if a stay was granted, than the Boons would suffer if a stay was denied.

Interim stay rescinded

2012-OGA-002(b) Willis Shore v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: October 9, 2012

Panel: Alan Andison

Willis Shore appealed a decision of the Oil and Gas Commission to issue a permit authorizing Murphy Oil Company Ltd. ("Murphy") to construct and operate a pipeline on land that is owned by Mr. Shore. Once built, the pipeline would consist of three flow lines situated in a 15-metre right of way.

Mr. Shore appealed on the basis that the Commission failed to: (1) consider that Mr. Shore had presented a reasonable alternative route for the pipeline; and, (2) require Murphy to fully consider all reasonable alternatives.

As a preliminary matter, Mr. Shore requested an immediate stay of the permit, pending the Tribunal's decision on the merits of the appeal. Mr. Shore submitted that an immediate stay was required because Murphy was about to commence construction of the pipeline, and allowing Murphy to do so would render the appeal moot.

Murphy opposed the application for a stay, and the Commission took no position.

Following a teleconference with the parties, the Tribunal issued an interim stay of certain activities authorized by the permit, to allow time for the Tribunal to receive full submissions on the stay application. Specifically, Murphy was permitted to carry out staking, surveying, and material mobilization as authorized by the permit, but all other activities authorized by the permit were stayed pending a final decision on the stay application. The Tribunal heard the stay application on an expedited basis.

With respect to the first part of the three-part test, the Tribunal found that the appeal raised serious issues to be decided, which were not frivolous, vexatious or pure questions of law. Under section 72(2) of the *Oil and Gas Activities Act*, a land owner may appeal "only the basis that the determination was made without due regard to" a submission previously submitted by the land owner to the Commission, or a report on consultation and notification submitted to the Commission by the permit applicant. The Tribunal found that Mr. Shore had made submissions to the Commission regarding Murphy's permit application, and there was no mention of Mr. Shore's submissions in the Commission's decision to issue the permit. Consequently, the Tribunal found that there

was a serious issue regarding whether the Commission gave due regard to Mr. Shore's submissions.

Regarding the second part of the test, the Tribunal found that Mr. Shore failed to establish that his interests would likely suffer irreparable harm unless a stay was granted. The Tribunal found that Mr. Shore's submissions revealed that any alleged harm to his interests as a land owner was quantifiable in monetary terms, and that although he and Murphy disagreed on the amount of compensation he should receive for the pipeline on his property, there was no evidence that he would not be compensated by Murphy. The Tribunal found, therefore, that the alleged harm to Mr. Shore's interests was not "irreparable" in nature.

Turning to the third part of the test, the Tribunal found that a stay would prevent Murphy from commencing the permitted activities until after the Tribunal decided the merits of the appeal, and Murphy provided affidavit evidence that the delay would harm its financial interests. Conversely, Mr. Shore failed to establish that his interests would suffer irreparable harm if a stay was denied. Weighing the balance of convenience, the Tribunal concluded that Murphy would suffer greater harm if a stay was granted, than Mr. Shore would suffer if a stay was denied. Regarding Mr. Shore's concern that the appeal would be rendered moot if a stay was denied, the Tribunal noted that, if Mr. Shore's appeal was successful, Murphy would have no authority to be on his property, and Murphy was taking a risk in proceeding to construct the pipeline before the Tribunal issued a final decision on the merits of the appeal. The interim stay was rescinded, and the application for a stay was denied.

No "irreparable harm" established – stay denied

2013-OGA-005(a) Shallan Hauber v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: July 12, 2013

Panel: Alan Andison

Shallan Hauber appealed a decision of the Oil and Gas Commission to amend a permit authorizing Murphy Oil Company Ltd. ("Murphy") to construct and operate a pipeline.

In October 2011, the Commission issued a pipeline permit to Murphy. The pipeline was constructed in late 2011, and consists of three flow lines within a 15-metre right of way.

In September 2012, Murphy notified the Commission that the pipeline had been bored under part of Ms. Hauber's land, instead of under the adjacent Crown land. The error involved 0.01 hectares, and resulted in no disturbance to the surface of Ms. Hauber's land.

In October 2012, the Commission ordered Murphy to comply with its pipeline permit, or apply for an amendment to the permit. Subsequently, the Commission issued two further orders to Murphy in relation to the misplacement of the pipeline.

Meanwhile, Murphy applied for an amendment of its pipeline permit. As part of the statutory requirements regarding its application for the amendment, Murphy conducted notification and consultation with Ms. Hauber. She provided written submissions on three occasions expressing concerns about Murphy's conduct and its trespass onto her land.

In May 2013, the Commission issued the amendment, which identifies the correct location of the pipeline in relation to Ms. Hauber's land and adds a number of conditions that pertain to Ms. Hauber's land.

On or about June 3, 2013, the Surface Rights Board decided to issue an order that gave Murphy a right of entry to, and access across, Ms. Hauber's land, subject to certain conditions. One of those conditions was that Murphy had to pay Ms. Hauber $1,000 as "partial compensation" for the access.

On June 3, 2013, Ms. Hauber appealed the amendment to the Tribunal on the basis that: the Commission did not consider that Murphy was trespassing on her land, as stated in her written submissions before the amendment was issued; the Surface Rights Board ignored the fact that Murphy was trespassing; and, the amendment issued by the Commission and the order issued by the Surface Rights Board allow Murphy to contravene the law and disregard Ms. Hauber's rights as a land owner.

As a preliminary matter, Ms. Hauber requested a stay of the amendment, pending the Tribunal's decision on the merits of her appeal.

Murphy opposed the application for a stay, and the Commission took no position.

With respect to the first part of the test, the Tribunal found that the appeal raised serious issues to be decided. The Tribunal noted that the issues raised by Ms. Hauber regarding the Surface Rights Board are outside of the Tribunal's jurisdiction. However, the Tribunal found that her appeal raised issues related to the permit amendment which were within the Tribunal's jurisdiction and were not frivolous, vexatious or pure questions of law.

Regarding the second part of the test, the Tribunal found that Ms. Hauber had the onus of establishing that her interests would likely suffer irreparable harm unless a stay was granted. However, Ms. Hauber conceded that she did not meet the tests for either irreparable harm, or the balance of convenience. In addition, the Tribunal noted that a stay of the amendment would not result in the removal of the pipeline from Ms. Hauber's land, and Murphy acknowledged that Ms. Hauber is entitled to compensation for the pipeline being under her land. The Tribunal found, therefore, that any harm to Ms. Hauber's interests, if a stay was denied, was compensable and was not "irreparable" in nature.

Turning to the third part of the test, the Tribunal concluded that the balance of convenience weighed in favour of denying a stay. The Tribunal noted that a stay is an extraordinary remedy. Murphy obtained the amendment to the permit through the process established under the legislation, and therefore, the amendment was valid on its face. Consequently, Murphy should not be prevented from exercising its rights under the amended permit unless it would lead to irreparable harm to Ms. Hauber.

Final Decisions on the Merits of the Appeals

The Tribunal held eleven hearings in regard to the merits of thirteen individual appeals. Summaries of the final decisions issued during the reporting period are set out below.

Tribunal clarifies the nature of its procedures and powers when deciding appeals filed by land owners

2011-OGA-005(b) Daniel Kerr v. Oil and Gas Commission (Canadian Natural Resources Limited, Third Party)

Decision Date: December 12, 2011

Panel: Alan Andison

Daniel Kerr appealed a determination of the Oil and Gas Commission to issue a permit authorizing Canadian Natural Resources Limited to drill and operate a well, and construct and operate road access, on land that is owned by Mr. Kerr in the Peace River District of BC.

Before Canadian Natural Resources applied for the permit, it notified Mr. Kerr of its intention to apply for the permit and it invited him to provide comments on the proposal to Canadian Natural Resources and/or the Commission. In response, Mr. Kerr provided written and oral comments to the Commission. He expressed concern about the location of the well site and a borrow pit on his land, the disturbance that would occur on his land, the potential for contamination from the well site, the sufficiency of the information provided by Canadian Natural Resources, and the sufficiency of the financial compensation offered by the Canadian Natural Resources. In support of its permit application, Canadian Natural Resources submitted a report to the Commission that outlined the steps it took to provide notice and consultation regarding the proposal, as is required by the legislation.

Mr. Kerr appealed the permit on several grounds, including that the fracturing process used to recover oil and gas may contaminate ground and surface water on his property, and that the issue of Canadian Natural Resources paying appropriate financial compensation for its use of, and potential damage to, his property was unresolved.

The Commission and Canadian Natural Resources opposed the appeal. They submitted that appeals filed by land owners are limited by section 72(2) of the *Oil and Gas Activities Act*, which states that "A land owner… may appeal… only on the basis that the determination was made without due regard to (a) a submission previously made by a land owner under section 22(6) or 31(2) of this *Act*, or (b) a written report submitted under section 24(1)(c) or 31(6)." They also submitted that the Commission gave "due regard" to the submissions Mr. Kerr had provided, and to Canadian Natural Resources' consultation report, before deciding to issue the permit. They also argued that the Legislature did not intend for land owners' appeals to be conducted as appeals *de novo*; rather, they should be conducted as reviews on the record before the Commission, and the Tribunal should give deference to the Commission's determination.

First, the Tribunal considered its jurisdiction in relation to appeals filed by land owners. The Tribunal reviewed the sections of the *Oil and Gas Activities Act* and the *Administrative Tribunals Act* that provide the Tribunal's powers and procedures in relation to conducting and deciding appeals. The Tribunal found that sections 69(1) and 72(2) of the *Oil and Gas Activities Act* limit the types of determinations that may be appealed by land owners, and the basis on which land owners may initiate appeals. However, the Tribunal found that its powers and procedures in appeals filed by land owners are the same as in appeals filed by other eligible persons, and that there is no difference in the procedural rights of any party to an appeal. Further, the Tribunal found that its statutory powers and procedures are inconsistent with the notion that its jurisdiction is limited to reviewing the Commission's determinations for errors on the record. Moreover, the remedies available to the Tribunal under section 72(6) of the *Oil and Gas Activities Act* do not limit the Tribunal to conducting appeals as hearings on the record. The Tribunal concluded that its powers and procedures are indicative of a hybrid appeal process that is more like an appeal de novo than a true review on the record before the Commission, and the Tribunal need not show deference to the Commission's determinations.

Next, the Tribunal considered the merits of Mr. Kerr's appeal. The Tribunal found that most of Mr. Kerr's submissions addressed the question of appropriate compensation from Canadian Natural Resources for its activities on his land, and those matters are not within the jurisdiction of the Tribunal or the Commission. Rather, they are within the

jurisdiction of the Surface Rights Board. The Tribunal also found that Mr. Kerr did not specifically advise the Commission of his concerns about the fracturing process until after the permit was issued. Regarding the submissions that were within the scope of the appeal, the Tribunal found that the Commission gave due regard to the submissions that Mr. Kerr had provided, and to Canadian Natural Resources' consultation report, before the permit was issued. In particular, the Tribunal found that the Commission had addressed Mr. Kerr's concerns about compensation and the location of the borrow pit, and had inquired into Canadian Natural Resources' rationale for its chosen location for the well and whether the well could be moved to address his concerns. The Tribunal also found that there was no evidence that the permitted activities would cause contamination of water resources. Accordingly, the appeal was dismissed.

Appellant's objections to a pipeline route were given due regard despite the Appellant's lack of response to the invitation to consult

2011-OGA-009(b) Loiselle Investments Ltd. v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: January 13, 2012

Panel: Alan Andison

Loiselle Investments Ltd. ("Loiselle") appealed a permit issued by the Oil and Gas Commission that authorized Encana Corporation to construct and operate a pipeline on an area that includes part of the Loiselle's land. The approved pipeline route ran along the eastern boundary of Loiselle's land, parallel to a public road allowance. Encana applied for an 18-metre wide easement over part of Loiselle's land that was included in a subdivision plan approved in 1998 but not registered on the title of the land. The pipeline would also cross the public road allowance in two places.

Encana initially contacted Loiselle in November 2010 about its intention to apply for the permit, and advised that it was considering a pipeline route that included Loiselle's land. Between then and late March 2011, Encana had meetings and telephone conversations with Mr. Loiselle, Loiselle's president/manager, about the proposed pipeline route and the compensation that Encana would pay to Loiselle. Encana inquired about routing the pipeline on the public road allowance, but the Ministry of Transportation and Infrastructure rejected that proposal. On March 25, 2011, Encana advised Mr. Loiselle by telephone that Encana had chosen a final route that included the Loiselle's land.

In mid-April, 2011, Mr. Loiselle, who is solely responsible for Loiselle's business dealings, was advised by his doctor to take medical leave for at least two months. Encana was notified of his medical leave, and that no one else would be responsible for the Loiselle's business affairs during that time.

On May 12, 2011, Encana sent a letter and associated documents to Loiselle via email, advising Loiselle of its intention to proceed with the permit application, and inviting Loiselle to provide comments to Encana or the Commission if it had any concerns or questions about the proposed pipeline. Encana received a confirmation of email delivery on May 12, but Mr. Loiselle claimed that he received the documents on May 31, 2011.

On May 18, 2011, Mr. Loiselle attended the Commission's office and inquired about the status of Encana's application. He was advised that Encana had not yet filed an application, and he was offered assistance in reviewing documents relating to the permit application once it was filed.

On June 20, 2011, Encana submitted a finalized permit application to the Commission. Encana's application package included a report summarizing its notification and consultation in relation to certain persons who may be affected by the pipeline, pursuant to section 24(1)(c) of the *Oil and Gas Activities Act*.

On August 4, 2011, the Commission issued the permit to Encana, subject to certain conditions including a requirement to complete a Site Assessment for lands within the Agricultural Land Reserve that would be affected by the pipeline, which included some of Loiselle's land that was excluded from the subdivision plan.

On August 18, 2011, Encana applied to the Surface Rights Board for an order allowing it to enter Loiselle's land to conduct the permitted activity, and for mediation assistance to determine the amount of compensation that Encana should pay to Loiselle for acquiring the pipeline easement and using Loiselle's land. The Surface Rights Board granted the right of entry order to Encana on October 4, 2011.

On August 31, 2011, the Tribunal received Loiselle's initial notice of appeal, which was filed outside of the 15-day statutory appeal period, and was deficient because it did not address the grounds for appeal that are required for appeals by land owners under section 72(2) of the *Oil and Gas Activities Act*.

On October 21, 2011, after receiving submissions from all parties, the Tribunal issued a decision granting Loiselle's request for an extension of time to file the appeal. The Tribunal also offered Loiselle an opportunity to file an amended Notice of Appeal, to correct the deficient grounds for appeal in the initial Notice of Appeal.

Loiselle subsequently filed an amended Notice of Appeal that included several grounds for appeal, most of which related to Loiselle's ability to develop the land in or adjacent to the pipeline easement, and Loiselle's costs to develop a road and build a subdivision on its property.

The Commission and Encana opposed the appeal. They submitted that none of the issues raised by Loiselle in the appeal proceedings were raised before the permit was issued, and therefore, the grounds for appeal did not fall within the ambit of section 72(2) of the *Oil and Gas Activities Act*.

The Tribunal found that section 72(2) allowed Loiselle to appeal on the basis that the Commission issued the permit without due regard to either: a submission previously made by Loiselle under section 22(5) of the *Oil and Gas Activities Act*; or the consultation report filed by Encana under section 24(1)(c) of the *Oil and Gas Activities Act*.

Regarding Loiselle's first ground for appeal, there was no dispute that Loiselle had to file its submissions regarding Encana's permit application to Encana or the Commission before the permit was issued. The Tribunal found that Mr. Loiselle's attendance at the Commission's office in May, when his doctor recommended that he be on medical leave, conflicted with his assertion that he was completely unable to conduct Loiselle's business affairs during that time. The Tribunal also noted that the recommended medical leave ended on June 14, 2011, and there were two months between May 31, when Mr. Loiselle received Encana's consultation letter and documents, and August 4, when the permit was issued, for Loiselle to provide submissions to Encana or the Commission. There was also no evidence as to why Mr. Loiselle did not avail himself of the Commission's offer to assist him in reviewing Encana's documents. Based on the evidence, the Tribunal concluded that Loiselle received the required notice and invitation to consult in regard to the permit application, and Loiselle had the capacity and a reasonable opportunity to make submissions, but did not do so. Accordingly, the Tribunal dismissed that ground of appeal.

The remaining basis for the appeal was whether the Commission issued the permit without due regard to Encana's consultation report. The Tribunal found that the Commission properly considered the consultation report, as well as other relevant information that was available, including Encana's rationale for choosing the route that included Loiselle's land, Loiselle's objection to the pipeline route, Encana's consultations with the Ministry of Transportation and Infrastructure and other affected land owners, and Mr. Loiselle's attendance at the Commission's office. The Tribunal concluded that, in the circumstances, it was not a breach of procedural fairness for the Commission to proceed to consider the permit application in the absence of submissions from Loiselle, and there was no evidence that the Commission failed to give due regard to Loiselle's interests that were set out in Encana's consultation report and other available information.

The Tribunal concluded that the appeal failed on that basis alone, but for greater certainty, the Tribunal went on to consider the specific issues that were raised by Loiselle during the appeal proceedings. The Tribunal held that some of those issues had been addressed by the Commission in the permit conditions. The Tribunal also held that Loiselle's other issues were under the jurisdiction of the Surface Rights Board, or were matters relating to the public road allowance administered by the Ministry of Transportation and Infrastructure. Accordingly, the appeal was denied.

Permit Holder ordered to disclose environmental study results to land owners

2011-OGA-008(a) Mike Fraser and Aspen Fraser v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: January 19, 2012

Panel: Alan Andison, Monica Danon-Schaffer, Tony Fogarassy

Mike and Aspen Fraser appealed a permit issued by the Oil and Gas Commission that authorized Encana Corporation to drill, operate and flare a vertical well, and construct and operate an access road, on the Frasers' land. The well site is on the north eastern corner of the Frasers' land, approximately 850 metres away from the Frasers' home. The land is within the Agricultural Land Reserve, and much of it is covered in natural vegetation that supports birds, deer and other wildlife. The property also has two dugouts, one of which is used to water the Frasers' horses.

Before the permit was issued, Encana and the Frasers had several meetings about the proposed permit, and the Frasers provided three separate written submissions to the Commission regarding their concerns about the proposed permit. Their concerns included: noise, disturbances to plants and wildlife, and potential water contamination on their property. In response to the Frasers' concerns, Encana agreed to conduct studies on the ambient noise level on the property, the water quality in the dugout, and the vegetation and wildlife habitat on the property.

Encana's application package to the Commission included a report summarizing Encana's notification and consultation with persons who may be affected by the proposed activities, including the Frasers.

The Commission issued the permit, and the Frasers appealed on the basis that: the ambient noise study had been completed, but Encana had refused

to provide them with a copy of the study; the forest health study had not been completed; and the water testing had not been done. The Frasers requested that Encana provide them with copies of the three studies before drilling commenced. The Frasers also requested that the well be moved to a neighbour's property.

The Commission and Encana opposed the appeal. They submitted that the Commission's determination to issue the permit was made with due regard to the Frasers' submissions, as required by the *Oil and Gas Activities Act*. They also argued that the *Act* limits the scope of appeals made by land owners, and that the Tribunal had no jurisdiction to conduct the appeal as a new hearing of the matter.

With regard to the nature of appeals by land owners, the Tribunal adopted its findings in *Daniel Kerr v. Oil and Gas Commission* (Decision No. 2011-OGA-005(b), issued December 12, 2011). In that case the Tribunal held that regardless of whether an appeal is filed by a land owner or another eligible person, the Tribunal's statutory powers and procedures allow for a hybrid appeal process that is more like a new hearing of the matter than a review on the record before the Commission. The *Oil and Gas Activities Act* limits the basis on which a land owner may file an appeal, but the legislation does not limit the Tribunal's powers or procedures in relation to appeals filed by land owners.

Next, the Tribunal considered whether the Commission's determination to issue the permit was made without due regard to a previous submission by the Frasers or Encana's consultation report. The Tribunal found that the Commission had no obligation to consider new concerns that were raised by the Frasers after the permit was issued. However, the Tribunal found that the Frasers' concerns about the potential impacts of Encana's activities on noise levels, water quality and vegetation and wildlife habitat on their property were raised several times in their previous submissions to the Commission, as were their requests that Encana provide them with copies of the three studies. Although those reports are not required to be filed with the Commission as part of Encana's application package, the Tribunal noted that the Commission has broad powers under section 25(2)(b) of the *Oil and Gas Activities Act* to impose conditions in permits. The Tribunal also noted that section 38 of the *Oil and Gas Activities Act* provides the Commission with the discretion to order a permit holder to prepare and produce reports, which the Commission must then disclose to the public, subject to the regulations. Further, the Tribunal held that the Commission's mandate under section 4(b) of the *Oil and Gas Activities Act* specifically requires that it consider the public interest in the environment when issuing permits.

Based on the relevant legislation and the evidence, the Tribunal found that the Commission wrongly concluded that it had no authority to add a condition to the permit requiring Encana to complete the studies and provide the results to the Frasers. In addition, the Tribunal found that the results of the studies were likely to have been relevant to the Commission's determination and useful to the Frasers, and that the Commission ignored potentially relevant information that it knew was either available or would soon be available. For those reasons, the Tribunal concluded that the Commission failed to give due regard to the Frasers' submissions, contrary to section 72(2) of the *Oil and Gas Activities Act*.

As for the appropriate remedy, the Tribunal rejected the Frasers' request that the well be moved to a neighbour's property. The Tribunal found that it would be unfair to grant that remedy, because the Frasers did not request it until near the end of the hearing, and the Tribunal had no information on how changing the well's location might affect Encana, the neighbouring property owner, or other neighbouring

property owners. The Tribunal concluded that in the circumstances it was appropriate, and not contrary to the regulations, to send the matter back to the Commission with directions to amend the permit by adding a condition requiring Encana to complete the studies and provide copies of the results to the Frasers and the Commission before road construction and drilling of the well could commence.

Full hearing before the Tribunal corrects procedural defects and leads to changes in the Commission's policies and procedures

2011-OGA-006(b) and 007(b) Marilyn Gross v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: March 22, 2012

Panel: Alan Andison, Monica Danon-Schaffer, Tony Fogarassy

Marilyn Gross appealed two permits issued by the Oil and Gas Commission. The permits authorize Murphy Oil Company Ltd. ("Murphy") to drill, operate and flare two horizontal wells on unoccupied land that is owned by Ms. Gross. The permits authorized Murphy to use an existing well pad and access road that it constructed on Ms. Gross' property under a previous permit. In 2008, Murphy received a permit to drill a vertical well and build an access road, and signed a surface lease agreement with Ms. Gross providing her with compensation for using her land.

In mid-2010, Murphy decided to apply to drill two horizontal wells using the existing well pad and access road. In August 2010, Murphy notified Ms. Gross of its proposal, and in September 2010 representatives met with her lawyer and her daughter. In October 2010, Murphy invited Ms. Gross to provide written comments regarding the proposal.

In November 2010, Ms. Gross' lawyer sent a letter to Murphy, with a copy to the Commission, stating several concerns or questions, including: a request for information about the well that was drilled in 2008; a request for relocation of the access road; certain requests in relation to a surface lease; concern about whether the existing well pad could accommodate the new wells; whether Murphy had completed an environmental assessment, given that the watershed around the well site runs into a river that supplies local municipal water; request for limits on flaring; and disclosure of future plans for pipelines that may connect to the well.

In response, the Commission advised Ms. Gross' lawyer that he should have Ms. Gross sign an agreement to "transfer" her rights under the *Oil and Gas Activities Act* to her lawyer. In reply to the Commission, Ms. Gross' lawyer clarified that Ms. Gross was not transferring her rights to him, and that he was acting as her legal counsel. Neither Ms. Gross nor her lawyer heard from the Commission again until May 2011, and after the permits were issued. Meanwhile, in January 2011, Murphy sent a letter to Ms. Gross' lawyer responding to the concerns listed in his November 2010 letter.

In March 2011, Murphy submitted its permit applications to the Commission. Murphy's applications included a consultation report containing copies of the lawyer's November 2010 letter to Murphy and the Commission, and Murphy's response.

In mid-April 2011, the Commission issued the permits to Murphy, and notified Ms. Gross directly that the permits had been issued. Her lawyer was not notified.

In early May 2011, Ms. Gross' lawyer learned from another agency that the permits had been issued. He immediately contacted the Oil and Gas Commission, to request copies of the permits and ask why the Oil and Gas Commission had not responded to the concerns in his November 2010 letter.

On May 15, 2011, Ms. Gross' lawyer appealed the permits, on her behalf, to the Tribunal. The appeals were filed after the expiry of the 15-day statutory appeal period for land owners, the Tribunal issued a decision granting the request for an extension of time to file the appeals because of the Commission's failure to provide proper notification.

The Tribunal conducted an oral hearing on the merits of the appeals. Ms. Gross submitted that the Commission failed to accept her lawyer's November 2010 letter as her official submission regarding the permit applications, and failed to give her submission "due regard" in making its determinations to issue the permits. She also argued that the Commission's procedure was unfair because it failed to provide her or her lawyer with copies of Murphy's permit applications, and failed to notify her lawyer when the permits were issued. Ms. Gross requested that the permits be cancelled, and that there be a full and fair reconsideration of her concerns before the Commission could make any further determinations on the permit applications.

Both the Commission and Murphy opposed the appeals. They submitted that the concerns in the November 2010 letter were either given due regard by the Commission, or were outside of the Commission's jurisdiction. They also submitted that the *Act* limits the scope of appeals filed by land owners, and that the Tribunal has no jurisdiction to conduct a new hearing of the appeals. Murphy further submitted that the Tribunal is limited to reviewing the Commission's determinations based on a standard of "patent unreasonableness", which would require the Tribunal to give deference to the Commission's determinations. As a separate issue, the Commission requested that certain evidence be received by the Tribunal to the exclusion of the public.

First, the Tribunal addressed the nature of its powers in deciding appeals filed by land owners. The Tribunal adopted its findings in *Daniel Kerr v. Oil and Gas Commission* (Decision No. 2011-OGA-005(b), issued December 12, 2011), where it concluded that the Tribunal's powers and procedures in appeals filed by land owners, and the procedural rights of land owners, are no different than in appeals filed by other eligible persons. The Tribunal's powers and procedures are indicative of a hybrid appeal process that is more like a new hearing of the matter than a review on the record that was before the Commission. Based on its statutory powers and procedures, the Tribunal is not required to defer to the Commission's determinations.

Next, the Tribunal considered whether the Commission's determinations to issue the permits were made without due regard to the submission previously made by Ms. Gross. The Tribunal found that the Commission made two procedural errors in making its determinations: it failed to ensure that Ms. Gross or her lawyer were provided with copies of Murphy's permit applications so that they could properly respond to the proposal; and, it failed to recognize that Ms. Gross was represented by a lawyer who had made a submission on her behalf. Regarding the first error, the Tribunal held that the Commission's policy not to disclose permit applications conflicted with section 17(6)(b) of the *Oil and Gas Activities Act General Regulation*, which requires the Commission to make all permit applications publicly available. Regarding the second error, the Tribunal found, based on the evidence, that the Commission disregarded the November 2010 letter that had been submitted on her behalf by her legal counsel. The letter was Ms. Gross' only written submission before the permits were issued. By disregarding the letter, the Commission made its determinations as if she had made no submission, and it failed to give "due regard" to her submission contrary to section 72(2) of the *Act*.

The Tribunal then considered each of the concerns or questions in the November 2010 letter. With two exceptions, the Tribunal concluded that they were either beyond the scope of the Tribunal's jurisdiction, were addressed in the Commission's determinations, or were without merit. The exceptions were: Ms. Gross' request for disclosure of Murphy's Emergency Response Plan, which the Tribunal ordered to be disclosed to Ms. Gross; and, the lack of a baseline assessment of water quality in a lake on Ms. Gross' property, which drains into a river which is the local municipal water supply, and which the Tribunal ordered Murphy to complete.

The Tribunal also found that, although the Commission made errors in reaching its determinations, the full hearing of the appeals before the Tribunal, including the consideration of Ms. Gross' submission to the Commission, cured the defects in the Commission's procedures. In addition, the Tribunal found that sending the matter back to the Commission with directions to start the decision-making process afresh would duplicate what had been achieved through the appeal process. The Tribunal held that, in these circumstances, the appropriate remedy was to confirm the permits, subject to the Tribunal's directions to make amendments.

Finally, the Tribunal considered the Commission's application that certain portions of Murphy's consultation report be received by the Tribunal to the exclusion of the public. The Tribunal denied the request, on the basis that the Commission already had an obligation under section 17(6)(b) of the *Regulation* to make the information available to the public.

Oil and Gas Commission has authority to issue a permit for a "water source well"

2011-OGA-010(a) and 2012-OGA-001(b) Ken and Arlene Boon v. Oil and Gas Commission (Terra Energy Corp., Third Party)

Decision Date: September 27, 2012

Panel: David Searle, C.M., Q.C.

Ken and Arlene Boon appealed two determinations issued by the Oil and Gas Commission. The first was a permit amendment authorizing Terra Energy Corp. ("Terra") to reactivate a pipeline, and the second was a permit authorizing Terra to reactivate a water source well and access road, all located on the Boons' property. Terra sought to use the pipeline to convey fresh water from the water source well to an oilfield injection facility some distance away.

The pipeline, water source well and access road were constructed in early 2001 by a previous operator. At that time, the operator was not required to obtain a permit for the water source well or the access road. Subsequently, the water source well was deactivated. In 2004, Terra purchased assets that included the water source well and pipeline.

In 2011, Terra decided to reactivate the pipeline, water source well and access road so it applied for a permit amendment to operate the pipeline, and a permit to operate the water source well and access road. Terra notified the Boons of its plans. In September 2011, the Commission issued the amended permit to operate the pipeline. However, as a result of the Boons' comments about the permit for the water source well and access road, the Commission wrote to Terra requesting further information. In response, Terra hired a consultant to conduct an impact assessment, but the Boons refused to answer written questions about their domestic water source or to let Terra or its consultant onto their property. Nevertheless, Terra's consultant prepared an impact

assessment report with several recommendations. In January 2012, the Commission issued the permit subject to a number of conditions.

The Boons appealed on the basis that the Commission made several errors in issuing the amended permit and the permit. In particular, they submitted that the Commission lacked the statutory authority to issue the permit for the water source well. They also argued that the Commission showed bias in favour of Terra by failing to fully consider the history of the water source well.

The Tribunal considered whether the permit and the amended permit were issued without due regard for the concerns expressed by the Boons. In considering that main issue, the Tribunal also decided a number of sub-issues.

The Tribunal found that the *Oil and Gas Activities Act*, together with the *Petroleum and Natural Gas Act*, contemplate the use of ground water in oil and gas activities, and the issuance of permits to use ground water.

The Tribunal also found that the requirement in section 24(4) of the *Oil and Gas Activities Act* that an applicant for a permit to drill or operate "a well" must have an agreement with "the owner or the holder of the location" in respect of the well, authorizing the drilling or operation, did not apply. Specifically, the Tribunal held that the *Act* distinguishes between a "land owner", "an owner of petroleum or natural gas rights", and a "holder of a location". In section 24(4), "owner" means the owner of the petroleum or natural gas rights, and not a land owner. Similarly, in section 24(4), "holder of the location" in respect of a well does not mean a land owner. Consequently, the Tribunal concluded that section 24(4) did not require Terra to have an agreement with the Boons authorizing the operation of the water source well before they applied for the permit.

However, this did not resolve the jurisdictional issue, which was whether the word "well" in section 24(4) of the *Act* includes water source wells, and therefore, whether the Commission had jurisdiction to consider Terra's application for a permit. The Boons argued that water source wells may only be permitted where the well is in, or contiguous to, a designated oil or gas resource for which the permit applicant holds title, and Terra did not meet that criteria. In contrast, the Commission and Terra argued that the word "well" in section 24(4) means wells other than water source wells. The Tribunal held that section 24(4) does not apply to water source wells, because it would lead to an absurd result if a person who wanted to use water had to hold petroleum or natural gas rights in either the same or an adjacent location.

Turning to the main issue, the Tribunal found that the Commission gave due regard to the Boons' concerns before it issued the permit and the amended permit. In particular, the Tribunal found that the Commission requested further information from Terra in response to the Boons' concerns about potential impacts on their domestic water supply and fields on their property. Terra responded by hiring a consultant to conduct further analysis, and the consultant provided a credible report with recommendations, but the consultant's conclusions were limited due to the Boons' refusal to cooperate. The Commission adopted the consultant's recommendations, and imposed conditions on Terra to protect the Boons' interests. The Tribunal also found that there was no indication that the Commission was biased in favour of Terra. Finally, the Tribunal found that the Commission took an integrated approach in reviewing Terra's permit application for the water source well and access road, and any shortcomings in the Commission's determination to issue the amended permit for the pipeline, which did not specifically reference the Boons' concerns, were addressed in the Commission's determination with respect to the permit.

Pipeline permit upheld

2012-OGA-002(c) Willis Shore v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: May 22, 2013

Panel: Alan Andison

Willis Shore appealed a decision of the Oil and Gas Commission to issue a permit authorizing Murphy Oil Company Ltd. ("Murphy") to construct and operate a pipeline on parcels of land owned by Mr. Shore. The pipeline consists of three flow lines situated in a 15-metre right of way.

Portions of Mr. Shore's land contain sand and gravel deposits. In May 2012, Mr. Shore received a permit under the *Mines Act* authorizing a sand and gravel quarry on part of his land. However, the land is within the Agricultural Land Reserve, and the Agricultural Land Commission must approve the gravel removal before work can commence at the quarry. In addition, Mr. Shore advised that he planned to subdivide a portion of the land, but he had no approvals to do so.

In May 2011, Murphy approached Mr. Shore about the possibility of the pipeline crossing his land. Murphy and Mr. Shore attempted to negotiate an agreement on the matter, but were unsuccessful. Murphy then considered several alternate pipeline routes, but it ultimately decided that none of the alternate routes were viable.

In January 2012, Murphy notified Mr. Shore that it intended to apply for a permit to construct and operate a pipeline that would cross his land. In response, Mr. Shore made several written submissions to the Commission, expressing his concerns that the pipeline would prevent the development of part of the quarry, would interfere with his subdivision plans, and could affect natural drainage and waterways. Murphy responded to each of Mr. Shore's written submissions.

In March 2012, Murphy applied for the pipeline permit. In support of its application, Murphy provided the Commission with a consultation report that included Mr. Shore's written submissions, Murphy's responses, and comments received from other land owners who would be affected by the alternate routes.

The Commission issued the permit, subject to a condition that Murphy Oil ensure a minimum three-metre distance between the outside edge of the pipe and the boundary of the quarry.

Mr. Shore appealed the permit on the basis that the Commission failed to: (1) consider that Mr. Shore had presented a reasonable alternative route for the pipeline; and, (2) require Murphy to fully consider all reasonable alternatives. He also submitted that the Commission was biased or acted in bad faith. He requested that the permit be cancelled, and that there be a full and fair consideration of his concerns before a new determination is made. He also requested that the Tribunal order the Commission to pay his costs in relation to the appeal.

Both the Commission and Murphy opposed the appeal. They submitted that the concerns raised by Mr. Shore were given due regard by the Commission, and there was no evidence that the Commission was biased or acted in bad faith towards him.

The Tribunal considered whether the Commission's determination to issue the permit was made without due regard to each of Mr. Shore's submissions and the viability of alternate pipeline routes. The Tribunal found that the Commission gave due regard to the quarry that was the subject of the *Mines Act* permit, and the fact that no further approvals had been sought or issued to develop the quarry or any other deposits on the land.

The Tribunal noted that developing the quarry would require approval from the Agricultural Land Commission, which may or may not grant

approval. Further, the Tribunal noted that the issue of compensation for the impact of the pipeline on the development of sand and gravel resources on the land was a matter for the Surface Rights Board. Similarly, the Tribunal found that the Commission considered Mr. Shore's submissions regarding his subdivision plans and that it was appropriate for the Commission to consider the existing land use on that portion of the land, given that no subdivision approvals had been sought or issued. Further, the issue of compensation for any impact that the pipeline may have on subdivision potential was a matter for the Surface Rights Board. The Tribunal also found that the Commission gave due regard to Mr. Shore's concerns about natural drainage and waterways, as well as the risk of erosion arising from the construction of the pipeline.

Next, the Tribunal considered each of the alternate pipeline routes. The Tribunal noted that, in response to Mr. Shore's concerns, the Commission had sent questions to Murphy about the alternate routes, and Murphy had responded. The Tribunal concluded that the Commission had carefully considered Mr. Shore's objections, Murphy's responses, and the correspondence from other land owners who would be affected by the alternative routes. The Tribunal found that the permitted pipeline route was chosen as the most viable option, after carefully weighing information from consultations, maps, site visits, surveys, and the social, economic, and environmental risks associated with each potential route. Further, the Tribunal found that there was no evidence that the Commission was biased or acted in bad faith, or failed to consider the social, economic or environmental impacts of the pipeline. The Tribunal concluded that Mr. Shore was most concerned about receiving compensation from Murphy, which was a matter for the Surface Rights Board, and not the Tribunal.

Finally, the Tribunal held that there was no basis to award costs to Mr. Shore, given that his appeal was unsuccessful and there were no special circumstances that would justify awarding costs.

Amendments to a permit are not so substantial as to amount to a new permit

2012-OGA-004(b) and 2013-OGA-005(a) Mike and Aspen Fraser v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: October 15, 2013

Panel: Tony Fogarassy

Mike and Aspen Fraser appealed two permit amendments issued by the Oil and Gas Commission in 2012. The amendments were made to a well permit that was issued to Encana Corporation in 2011. The well permit originally authorized the drilling, operation and flaring of a vertical well, and the construction and operation of an access road. The well pad and part of the access road were to be built on the Frasers' land. Another part of the access road was to be built on a neighbour's land.

In 2011, the Frasers appealed the original well permit. Following an oral hearing, the Tribunal allowed the appeal and sent the matter back to the Commission with directions to amend the permit to require Encana to complete certain studies on the Frasers' land, and to disclose the results of the studies to the Frasers and the Commission. Subsequently, the results of the studies were disclosed as required.

In July 2012, Encana notified the Frasers that it intended to change the location of part of the access road. Rather than crossing the neighbour's land, Encana proposed to develop part of a road allowance located on Crown land along the boundary of the Frasers' land.

Also, in July 2012, Encana notified the Frasers that it intended to apply for a permit amendment that would authorize a horizontally drilled well, rather than a vertically drilled well, on the Frasers' land.

Between August and November 2012, the Frasers provided several submissions to the Commission and/or Encana. Among other things, the Frasers expressed concerns about a mineral lick on their land that was used by wildlife within the proposed well site. They requested that the mineral lick not be destroyed.

In October 2012, the Frasers, representatives of the Commission, Encana, and others attended two site visits on the Frasers' land at the proposed well site. A mineral lick was identified near the proposed well site, and Encana retained a consultant to assess moose habitat in the vicinity. The consultant's report recommended measures to mitigate the potential impacts of Encana's well development on the mineral lick.

Subsequently, Encana advised that it would commit to certain mitigation measures, had revised its construction plan for the well site, and would move the southern boundary of the well site to create a 40 metre buffer from the mineral lick.

In October and November 2012, the Commission issued the well permit amendments sought by Encana.

The Frasers appealed on the basis that the amendments were so significant that they amounted to a new permit, and would result in a substantial increase in activity at the well site, including hydraulic fracturing or "fracking" and increased road traffic. The Frasers also submitted that the amendments were made without due regard to the report on moose habitat. In addition, they submitted that the road allowance was previously deemed "unviable" by a Commission witness at the hearing of the Frasers' previous appeal to the Tribunal. They requested an order rescinding the amendments and/or the original well permit.

The Tribunal found that its jurisdiction was limited to deciding whether the Commission granted the amendments without due regard to the Frasers' submissions to the Commission regarding those amendments. The Tribunal also found that it had no jurisdiction to consider matters relating to the original well permit, which was the subject of the Frasers' previous appeal, or to rescind the well permit in its entirety.

Next, the Tribunal considered whether the amendments were so substantial that they resulted in a new well permit, such that the Commission and Encana must carry out anew their respective obligations under the *Oil and Gas Activities Act*. Based on the Tribunal's review of the legislation, the original well permit, and the amendments, the Tribunal found that the amendments did not make such substantive changes to the activities authorized in the original well permit that the amendments constituted a new permit.

Regarding the amendment that authorized the change from vertical drilling to horizontal drilling, the Tribunal found that most of the Frasers' concerns were in regard to potential impacts from surface activities authorized in the original permit; i.e., potential impacts on wildlife, wildlife habitat, and Aboriginal cultural activities on their land. The Tribunal found that the October 2012 amendment was limited to subsurface activities; namely, drilling horizontally rather than vertically. Therefore, any potential effects arising from the previously authorized surface activities were beyond the scope of the Commission's considerations in granting the amendment, and were outside of the scope of these appeals.

In regard to the Frasers' concerns about wildlife, the Tribunal noted that, although Encana had committed to certain mitigation measures, including a 40 metre setback between the well pad and the mineral lick, there was no evidence that Encana had provided a rationale for using a 40 metre setback, rather than a 100 metre setback as recommended in the Commission's Environmental Protection and

Management Guide. The Tribunal expressed concern that the Commission did not incorporate Encana's mitigation measures into the conditions in the well permit, as amended, which would have made the mitigation measures enforceable.

Finally, on a review of the evidence, the Tribunal found that the Frasers' concern that horizontal drilling would result in more road traffic and noise had not been raised in their written submissions to the Commission. The Tribunal held that the Commission is obliged under section 31(7) of the *Act* to consider a written submission made by a land owner regarding a proposed amendment. However, the Commission is not obligated to consider, and give due regard to, concerns that are not expressed to it before an amendment is issued.

For all of those reasons, the Tribunal found that the Commission gave due regard to the Frasers' submissions regarding the proposed amendments.

Commission considered impact on property and conducted a detailed comparison of alternate routes

2013-OGA-001(a) Melvin Hogg v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: September 19, 2013

Panel: Blair Lockhart

Melvin Hogg appealed a decision of the Oil and Gas Commission to issue a permit authorizing Murphy Oil Company Ltd. ("Murphy") to construct and operate a pipeline. The pipeline consists of three flow lines situated in a right of way. A 0.1 acre portion of Mr. Hogg's land is covered by the pipeline and its right of way.

Before Murphy applied for the pipeline permit, it notified Mr. Hogg of its proposal, and consulted with him regarding the proposed route for the pipeline. Murphy met with Mr. Hogg four times, and spoke with him by telephone several times. In June 2012, Murphy applied for the pipeline permit.

In July 2012, Mr. Hogg provided a written submission to the Commission regarding Murphy's proposal. In his submission, he raised concerns about the impact of the pipeline on his property, which he claimed was in a natural state, and he indicated that there was an alternate route available to Murphy on a neighbour's land. He submitted that the alternate route would be shorter, and would have minimal impact on the neighbour's property.

In response, Murphy provided a submission to the Commission in which it addressed Mr Hogg's concerns. Regarding the alternate route suggested by Mr. Hogg, Murphy advised that although the alternate route would be shorter, it would have a more significant impact on the neighbouring land owner, as the footprint for the pipeline would be larger and a portion of the neighbouring property would be "severed" by the pipeline.

In January 2013, the Commission issued the permit to Murphy. The pipeline was constructed in April 2013.

In the appeal, Mr. Hogg submitted, among other things, that Murphy should have used the alternate pipeline route.

Both the Commission and Murphy opposed the appeal. They argued that the Commission gave due regard to Mr. Hogg's submissions before it issued the pipeline permit. The Tribunal considered Mr. Hogg's submissions to the Commission, and the Commission's reasons for its decision.

The Tribunal concluded that the Commission gave due regard to Mr. Hogg's concerns about the impact of the pipeline on his land as required by the *Oil and Gas Activities Act*. Before the Commission issued the permit, it conducted a detailed comparison of the two proposed pipeline routes, and

considered the potential impacts on the land owners as well as the environment. The Tribunal found that the physical impact of the pipeline on Mr. Hogg's land is minimal, as only 0.1 acres is affected and there is no requirement for an emergency protected zone around the pipeline on his land. In contrast, the alternate route would have had a larger footprint, would have isolated a portion of the neighbour's land, and the pipeline would have been closer to a creek that is a tributary to a municipal drinking water source.

Accordingly, the appeal was dismissed.

Land owner's health issues considered in an appeal

2013-OGA-002(a) Ben and Frieda Unruh v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: October 8, 2013

Panel: David Searle, C.M., Q.C.

Ben and Frieda Unruh appealed a decision of the Oil and Gas Commission to issue a permit authorizing Encana Corporation to drill and operate a 'sweet' natural gas well, and to construct and maintain a road, on land owned by the Unruhs. The Unruhs reside on an adjacent parcel of land. Their home is 387 metres north of the well site. They operate a cattle ranch and there are already 11 natural gas wells on their property.

Encana notified the Unruhs of its proposal to drill the new gas well. Encana considered five possible sites for the well. The other four locations included one that was deemed to be too close to the Unruhs' home, one that would have negatively affected their cattle operations, and two to north of the Kiskatinaw River. The latter two locations were considered by Encana to be unacceptable, because one site had slope and terrain issues, and the other site was considered to be too far for drilling and would risk missing four portions of Encana's gas tenure.

The Unruhs provided a written submission to the Commission regarding Encana's proposal. In their submission, they objected to the location of the well on the basis that it was too close to their residence, and that the resulting smell, exposure to gas, and air quality associated with the well would adversely affect Mr. Unruh's health, because he has a serious lung disease. They preferred that the well be located at one of the sites to the north of the Kiskatinaw River. They also expressed concern that vibrations from the drilling activity would cause large cracks and sink holes on the surface of the land around their home.

In the appeal, the Unruhs submitted that the Commission had failed to give due regard to their written submissions, particularly with respect to Mr. Unruh's health concerns. They submitted that he has suffered from serious lung infections when previously exposed to gases and odours from oil and gas activities on their land. They also submitted that the land surface is unstable near their residence, and the instability may be caused by vibrations from drilling.

Both the Commission and Encana argued that the Commission gave due regard to the Unruh's submissions. The Commission submitted that it had addressed the Unruhs' concerns by imposing specific conditions in the permit that: limit gas flaring; require Encana to prepare a site specific emergency response plan; require Encana to prepare a geotechnical report assessing terrain, drainage, and stability issues at the well site and around the Unruhs' residence; require Encana to report seismic events above magnitude 2 in the vicinity of the well site during fracturing operations, and to suspend fracturing operations if there is a seismic event greater than magnitude 4; and require Encana to reduce impacts from noise and light, and utilize hospital grade mufflers.

The Tribunal considered the parties' evidence including: the Unruhs' written submissions to the Commission; Mr. Unruh's uncontested

testimony as to the effects on his health, including hospitalization, when he was previously exposed to gas and odours from oil and gas activities; the Commission's rationale for its decision; and, the testimony of Encana's witnesses regarding the various well sites it considered. The Tribunal found that the Commission had attempted to accommodate the Unruhs' concerns by adding several conditions to the permit. However, the Tribunal found that, due to the potential negative impact to Mr. Unruh's health from the permitted activities, giving "due regard" in this case must include a more thorough review of alternative well sites. The Tribunal held that the Commission should have required further and better justification from Encana regarding possible well sites that are further from the residence; specifically, the sites to the north of the Kitkatinaw River. The Tribunal also found that section 4 of the *Oil and Gas Activities Act* places importance on health and safety in the regulation of oil and gas activities.

For these reasons, the Tribunal concluded that the Commission failed to give due regard to the written submissions regarding the potential effects of the permitted oil and gas activities on Mr. Unruh's health. In these circumstances, the Tribunal found that the matter should be sent back to the Commission with the following directions:

- the site is unacceptable for the reasons provided above, and should not be included in any future permit;
- additional well site locations should be examined, including sites to north of the Kiskatinaw River, to determine their acceptability for the extraction of natural gas from Encana's tenures; and
- health and safety shall be the paramount concern.

Neighbouring land owner not affected by oil and gas activities

2012-OGA-003(b) James Bell v. Oil and Gas Commission (Painted Pony Petroleum Ltd., Third Party)

Decision Date: December 12, 2013

Panel: David H. Searle, CM, Q.C.

James Bell appealed a permit and amended permit issued by the Oil and Gas Commission authorizing Painted Pony Petroleum Ltd. to drill and operate a well for the purpose of exploring for and developing natural gas, and to conduct fracturing and flaring, on Crown land adjacent to land owned by Mr. Bell and his two brothers.

Prior to the hearing, the Commission challenged Mr. Bell's standing to appeal on the basis that he is not "a land owner of land on which an oil and gas activity is permitted to be carried out" under the *Oil and Gas Activities Act*; rather, his land is adjacent to the permitted activity. The Tribunal granted standing as the issue is whether the permitted activity has an effect "on" his "land", which depends not on the property boundary, but on the nature and effects of the activity.

Mr. Bell engages in organic farming, uses the property as a "Dark-sky Preserve" for astronomical observations, and conducts trapping activities with a Youth Wildlife Trapper Study. The property has several buildings that were built in the past, including one 1700 square foot structure that was moved to a new foundation and restored to a usable condition. No one lives on the property year-round, however, this building acts as a temporary residence for the Bell family approximately every second weekend, and in the winter. It is located 2.3 kilometers from where the well site is to be located. There are two other infrequently used structures on the Bells' property referred to as trapper's cabins. Mr. Bell moved those cabins to their

present locations, just 256.2 meters from the proposed well site, shortly after receiving notification that Painted Pony intended to apply for a permit.

Mr. Bell provided submissions to the Commission regarding the application for a permit in May 2012. With the consent of the Commission, counsel for Mr. Bell provided further submissions in September 2012; however, the Oil and Gas Commission did not receive those submissions due to an error in an email address that was not detected until after the permit had been issued.

Mr. Bell identified numerous concerns including: proximity of the well site to the trapper's cabins, the organic garden and the domestic water site; increased noise which denies the Bell family the quiet enjoyment of their land; lights at the wellsite that will impact the use of the land as a "Dark-sky Preserve"; pollution and dust which will impact the organic certification of the farming operations and human health; impacts to privacy and access to and egress from the residence; impacts to trapping activities and wildlife; and concerns that fracturing may jeopardize personal safety and health by causing earthquakes, and by contaminating the water supply.

The Commission issued the permit with a number of terms and conditions regarding noise, traffic and dust.

Mr. Bell appealed the permit, and argued that the conditions in the permit did not adequately address his concerns, and that it was unclear whether the Commission considered the written submissions provided by his counsel. When it became clear that the Commission had not received his counsel's submissions, they were resubmitted to the Commission. These submissions caused the Commission to suspend the permit and issue the amended permit, which included conditions that relate expressly to water quality sampling, and reporting and responding to seismic activity.

The Tribunal found that Mr. Bell's movement of the cabins to a location that was close to the wells was a deliberate attempt to prevent the well site from being located near his property boundary and that his actions were designed in such a way as to require the movement of the well site to another location.

The test on appeal, however, is not whether Mr. Bell's concerns were addressed to his complete satisfaction. Rather, the land owner's reasonable and legitimate concerns must be given "due regard" by the Commission. In making this determination the Tribunal found that the standard of proof in an appeal before the Tribunal is the civil standard of a "balance of probabilities". Further, the Appellant has the initial burden of proof, i.e. he must prove, on a balance of probabilities, the facts that he asserts are true, and only then does the burden shift to the other.

The Tribunal found that the issues in land owner appeals must relate to the failure to have "due regard" to the land owner's written submissions. There must be some evidence to establish that the decision-making process below was flawed in some way and should now be changed.

Mr. Bell led no evidence regarding the potential impact of fracturing and flaring that the Tribunal could consider as sufficient to rely upon to make a different decision. The Tribunal found the amended permit conditions and Painted Pony's commitment for the baseline testing and monitoring provided an adequate response to the concerns expressed by Mr. Bell about seismic activity and contamination of natural water sources.

The Tribunal also found that no one actually resides on the Bells' property; the trapper's cabins do not constitute a "residence" as the use of the cabins is less than occasional. If there is a "residence" located on the property, it is the 1700 square foot structure located 2.3 kilometers south of the proposed

well site. The distance of the well site from this structure is an adequate buffer against any of the disturbances of concern to Mr. Bell. Ultimately, the Tribunal found that the Commission gave due regard to Mr. Bell's concerns by imposing the conditions that it did in the permit and the amended permit.

In regard to the trapping activities on the property, Mr. Bell admitted that the Youth Wildlife Trapper Study had yet to be implemented, and the wildlife that Mr. Bell referred to as being of particular concern had not been seen recently. Further, a declaration of the property as a "Dark-sky Preserve", which is an umbrella of protection from light pollution designated by the Royal Astronomical Society of Canada, cannot be made for privately owned land in any event. Also, Painted Pony submitted that any flaring will be limited in volume and duration, and there will be no permanent flare stack or other light source.

Therefore, the Tribunal found that the terms and conditions of the permit and amended permit adequately addressed Mr. Bell's reasonable concerns.

Decisions on Post-hearing Matters

Application for costs – Tribunal concludes that the circumstances did not warrant an award of costs

2011-OGA-006(c) and 2011-OGA-007(c) Marilyn Gross v. Oil and Gas Commission (Murphy Oil Company Ltd., Third Party)

Decision Date: December 24, 2012

Panel: Alan Andison, Monica Danon-Schaffer, Tony Fogarassy

Marilyn Gross appealed two permits issued by the Oil and Gas Commission. The permits authorized Murphy Oil Company Ltd. ("Murphy") to drill, operate and flare two horizontal wells on land that is owned by Ms. Gross. The permits also authorized Murphy to use an existing well pad and access road that it constructed on Ms. Gross' property under a previous permit.

Following an oral hearing of the appeals, the Tribunal issued a decision allowing the appeals, in part. The Tribunal found that the Commission made procedural errors in reaching its determinations to issue the permits. However, the Tribunal held that the full hearing of the appeals before the Tribunal cured the defects in the Commission's procedures. The Tribunal held that, in these circumstances, the appropriate remedy was to confirm the permits, subject to the Tribunal's directions to make two minor amendments to the permits.

After the hearing, Ms. Gross' legal counsel applied to the Tribunal for an order that Murphy pay Ms. Gross' costs associated with the appeals. Ms. Gross submitted that costs should be granted because the Commission's issuance of permits is part of a process in which oil and gas companies may expropriate rights from land owners, and awarding costs would help to "level the playing field" for land owners. Ms. Gross also submitted that the Tribunal's Rule 32(3), which states that the Tribunal will only order party-to-party costs in special circumstances, is inconsistent with sections 11 and 47 of the *Administrative Tribunals Act*, which authorize the Tribunal to make rules of practice and procedure, and to order a party to pay the appeal costs of another party.

Murphy objected to the application for costs. The Commission made no submissions.

The Tribunal held that its discretion to award costs under section 47(1)(a) of the *Administrative Tribunals Act* is broad, and is not expressly limited to circumstances where the conduct of a party has been improper, vexatious, frivolous or abusive. However, for policy reasons, the Tribunal has adopted an approach to award party-to-party

costs only in special circumstances. This approach is intended to discourage frivolous or vexatious appeals, and abusive conduct, to ensure that appeals proceed in an efficient and fair manner. In addition, the appeal process is intended to be more accessible and less costly than court proceedings, and costs awards can go either way – an order may be made in favour of, or against, a party to an appeal. Most appeals are filed by land owners, who often do not have legal counsel. The Tribunal held that the risk of having to pay another party's appeal costs could be daunting to parties with limited financial resources, and could discourage potential appellants from filing legitimate appeals. Taken together, the Tribunal found that these policy considerations are consistent with the express purpose of its rule-making power in section 11 of the *Administrative Tribunals Act*, which is "to facilitate the just and timely resolution of the matters before it."

In addition, the Tribunal found that there was no indication in the legislation that the Tribunal should exercise its discretion to award costs to "level the playing field" for land owners. The Tribunal noted that it hears appeals of determinations made under the *Oil and Gas Activities Act*, and those determinations do not include issues of expropriation, or how much compensation oil and gas companies should pay to land owners for using private property. Those issues are within the jurisdiction of the Surface Rights Board, a separate tribunal empowered to assist land owners in resolving disputes about the amount of compensation that oil and gas companies should pay to land owners. As such, the Tribunal held that the Surface Rights Board is the appropriate forum for addressing matters of compensation.

Finally, the Tribunal held that the circumstances in this case did not warrant ordering Murphy to pay Ms. Gross' appeal costs. Murphy did not engage in abusive or inappropriate conduct during the appeal process, and there were no other special circumstances that would warrant an award of costs. Ms. Gross' success in the appeals was mixed at best, and was limited to the Tribunal ordering two minor amendments to the permits. In these circumstances, the Tribunal concluded that each party should bear its own costs.

Summaries of Court Decisions Related to the Tribunal

There were no court decisions issued on judicial reviews of Tribunal decisions during this initial reporting period.

APPENDIX I

Legislation and Regulations

Reproduced below are the sections of the *Oil and Gas Activities Act* which establish the Tribunal and set out its general powers and procedures. Also included are the applicable provisions of the *Administrative Tribunals Act*, which sets out additional powers and procedures of the Tribunal.

The legislation contained in this report is the legislation in effect at the end of the reporting period (December 31, 2013). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications or viewed online free of charge at the BC Laws website: www.bclaws.ca

Oil and Gas Activities Act, S.B.C., Chapter 36

Part 2 – Administration

Division 2 – Oil and Gas Appeal Tribunal

Establishment of Oil and Gas Appeal Tribunal

19 (1) The Oil and Gas Appeal Tribunal is established.

(2) The appeal tribunal is to hear appeals under section 72.

(3) The appeal tribunal consists of the following members appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

Application of *Administrative Tribunals Act*

20 (1) Sections 1 to 22, 24, 26 to 33, 34 (3) and (4), 35 to 42, 44, 46.3, 47 to 57 and 59 to 61 of the *Administrative Tribunals Act* apply to the appeal tribunal.

Part 6 – Reviews and Appeals

Definitions and application

69 (1) In this Part:

"determination" means

(a) with respect to an eligible person other than a land owner referred to in paragraph (b),

(i) a decision made by the commission under section 25 or 26,

(ii) a declaration made by the commission on its own initiative under section 27,

(iii) an order made by the commission under section 40 (f),

(iv) an order issued by an official or the commission under Division 2 of Part 5,

(v) a finding made by the commission under section 62,

(vi) an administrative penalty imposed by the commission under section 63, and

(vii) a prescribed decision made under this Act, and

(b) with respect to a land owner of land on which an oil and gas activity is permitted to be carried out under this Act,

(i) a decision made by the commission

(A) under section 25 to issue a permit to carry out an oil and gas activity on the land of the land owner, and

(B) under section 31 to amend a permit, if the amendment changes the effect of the permit on the land of the land owner, and

(ii) a decision made by a review official under section 71 to vary a determination referred to in paragraph (a) (i) of this definition so that

(A) a permit is amended, if the amendment changes the effect of the permit on the land of the land owner, or

(B) a permit is issued to carry out oil and gas activities on the land of a land owner;

"eligible person" means

(a) an applicant for a permit,

(b) a permit holder or former permit holder,

(c) a land owner of land on which an oil and gas activity is permitted to be carried out under this Act,

(d) a person to whom an order under section 49 (1) has been issued, and

(e) a person with respect to whom the commission has made a finding of a contravention under section 62;

"review official" means, in relation to a determination, a person who did not make the determination but who is designated in writing by the commission to review the determination for the purposes of sections 70 and 71.

(2) Despite anything in a specified enactment, a determination may not be appealed, reviewed or otherwise reconsidered except as provided in this Part.

Review by review official

70 (1) Subject to subsection (2), an eligible person, other than a land owner of land on which an oil and gas activity is permitted to be carried out under this Act, may request, in accordance with this section, a review of a determination.

(2) An eligible person may not request a review of a determination under subsection (1) if the eligible person has appealed the determination under section 72.

(3) A request for a review under subsection (1) must be made within 30 days of receiving the later of

(a) the determination, and

(b) any written reasons respecting the determination.

(4) Despite subsection (3), a review official may extend the time to request a review, even if the time to make the request has expired, if satisfied that

(a) special circumstances existed which precluded making the request within the time period required under subsection (3), and

(b) an injustice would otherwise result.

(5) The eligible person must make the request in writing and must identify the error the eligible person believes was made or the other grounds on which a review is requested.

(6) On receipt by the review official of a request under subsection (1), the determination to be reviewed as a result of the request

(a) is stayed, if the determination is an administrative penalty imposed under section 63, and

(b) is not stayed, if the determination is not an administrative penalty referred to in paragraph (a), unless the review official orders that the determination is stayed.

(7) The review official may conduct a written, electronic or oral review, or any combination of them, as the review official, in his or her sole discretion, considers appropriate.

Powers of review official

71 (1) As soon as practicable after receiving a request under section 70 (1), the review official must

(a) confirm, vary or rescind the determination, and

(b) notify, in writing, the eligible person of the following:

(i) the review official's decision;

(ii) the reasons for the decision;

(iii) the eligible person's right to appeal the decision under section 72.

(2) If the review official varies a determination under subsection (1) so that

(a) a permit is amended and the amendment changes the effect of the permit on the land of the land owner, or

(b) a permit is issued to carry out oil and gas activities on the land of a land owner, the review official must notify the land owner of the amendment or issuance in accordance with section 25 (4) or 31 (9), as applicable.

Appeal

72 (1) Subject to subsection (2), an eligible person may appeal to the appeal tribunal

(a) a decision made under section 71, if the eligible person was a party to the review under that section, and

(b) a determination, if the eligible person has not, by the date the person commences the appeal, applied under section 70 (1) for a review of the determination.

(2) A land owner of land on which an oil and gas activity is permitted to be carried out under this Act may appeal a determination under this section only on the basis that the determination was made without due regard to

(a) a submission previously made by the land owner under section 22 (5) or 31 (2) of this Act, or

(b) a written report submitted under section 24 (1) (c) or 31 (6).

(3) Subject to subsection (4), the commencement of an appeal does not operate as a stay or suspend the operation of the determination or decision being appealed, unless the appeal tribunal orders otherwise.

(4) The commencement of an appeal with respect to an administrative penalty operates as a stay of the determination that imposed the penalty or the decision that did not rescind the penalty, unless the appeal tribunal orders otherwise.

(5) The appellant and the commission are parties to an appeal, and

(a) if a person to whom an order under section 49 (1) has been issued files an appeal and the person is not a permit holder with respect to the oil and gas activity that is the subject of the order, the permit holder is also a party to the appeal,

(b) if a land owner of land on which an oil and gas activity is permitted to be carried out under this Act files an appeal, the permit holder with respect to the oil and gas activity is also a party to the appeal,

(c) if an applicant for a permit appeals a refusal to issue a permit, the land owner of the land on which the applicant for the permit intended to carry out an oil and gas activity is, on request, also a party to the appeal, and

(d) if a permit holder appeals a refusal to amend a permit, the land owner of the land on which an oil and gas activity is permitted to be carried out under the permit is, on request, also a party to the appeal.

(6) On an appeal under subsection (1), the appeal tribunal may

(a) confirm, vary, or rescind the decision made under section 71 or the determination, or

(b) send the matter back, with directions, to the review official who made the decision or to the person who made the determination, as applicable.

(7) Despite the application of section 24 (1) of the *Administrative Tribunals Act* to the appeal tribunal, a land owner must file a notice of appeal within 15 days of the day the determination being appealed was made.

Administrative Tribunals Act, S.B.C. 2004, Chapter 45

Definitions

1 In this Act:

"applicant" includes an appellant, a claimant or a complainant;

"application" includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

"appointing authority" means the person or the Lieutenant Governor in Council who, under another Act, has the power to appoint the chair, vice chair and members, or any of them, to the tribunal;

"constitutional question" means any question that requires notice to be given under section 8 of the *Constitutional Question Act*;

"court" means the Supreme Court;

"decision" includes a determination, an order or other decision;

"dispute resolution process" means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute;

"intervener" means a person who is permitted by the tribunal to participate as an intervener in an application;

"member" means a person appointed to the tribunal to which a provision of this Act applies;

"privative clause" means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to

inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

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

"tribunal's enabling Act" means the Act under which the tribunal is established or continued.

Chair's initial term and reappointment

2 (1) The chair of the tribunal may be appointed by the appointing authority, after a merit based process, to hold office for an initial term of 3 to 5 years.

(2) The chair may be reappointed by the appointing authority for additional terms of up to 5 years.

Member's initial term and reappointment

3 (1) A member, other than the chair, may be appointed by the appointing authority, after a merit based process and consultation with the chair, to hold office for an initial term of 2 to 4 years.

(2) A member may be reappointed by the appointing authority as a member of the tribunal for additional terms of up to 5 years.

Appointment of acting chair

4 (1) If the chair expects to be absent or is absent, the chair may designate a vice chair as the acting chair for the period that the chair is absent.

(2) If the chair expects to be absent or is absent and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the chair may designate a member as the acting chair for the period that the chair is absent.

(3) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time, the appointing authority may designate a vice chair as the acting chair for the period that the chair is absent or incapacitated.

(4) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the appointing authority may designate a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for the period that the chair is absent or incapacitated.

(5) If the tribunal has no chair, the appointing authority may appoint an individual, who is a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for a term of up to 6 months.

(6) In exceptional circumstances an individual may be appointed as the acting chair under subsection (5) for an additional term of up to 6 months.

(7) Subsections (3), (4) and (5) apply whether or not an individual is designated, under the Act under which the chair is appointed, to act on behalf of the chair.

(8) An individual designated or appointed under any of subsections (1) to (5) has all the powers and may perform all the duties of the chair.

Member's absence or incapacitation

5 (1) If a member is absent or incapacitated for an extended period of time or expects to be absent for an extended period of time, the appointing authority, after consultation with the chair, may appoint another person, who would otherwise be qualified for appointment as a member, to replace the member until the member returns to full duty or the member's term expires, whichever comes first.

(2) The appointment of a person to replace a member under subsection (1) is not affected by the member returning to less than full duty.

Member's temporary appointment

6 (1) If the tribunal requires additional members, the chair, after consultation with the minister responsible for the Act under which the tribunal is established, may appoint an individual, who would otherwise be qualified for appointment as a member, to be a member for up to 6 months.

(2) Under subsection (1), an individual may be appointed to the tribunal only twice in any 2 year period.

(3) An appointing authority may establish conditions and qualifications for appointments under subsection (1).

Powers after resignation or expiry of term

7 (1) If a member resigns or their appointment expires, the chair may authorize that individual to continue to exercise powers as a member of the tribunal in any proceeding over which that individual had jurisdiction immediately before the end of their term.

(2) An authorization under subsection (1) continues until a final decision in that proceeding is made.

(3) If an individual performs duties under subsection (1), section 10 applies.

Termination for cause

8 The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.

Responsibilities of the chair

9 The chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among its members.

Remuneration and benefits for members

10 (1) In accordance with general directives of the Treasury Board, members must be reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in carrying out their duties.

(2) In accordance with general directives of the Treasury Board, the minister responsible for the tribunal's enabling Act must set the remuneration for those members who are to receive remuneration.

General power to make rules respecting practice and procedure

11 (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) respecting the holding of pre-hearing conferences, including confidential pre-hearing conferences, and requiring the parties and any interveners to attend a pre-hearing conference;

(b) respecting dispute resolution processes;
(c) respecting receipt and disclosure of evidence, including but not limited to pre-hearing receipt and disclosure and pre-hearing examination of a party on oath, affirmation or by affidavit;
(d) respecting the exchange of records and documents by parties;
(e) respecting the filing of written submissions by parties;
(f) respecting the filing of admissions by parties;
(g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an application and specifying the time within which and the manner in which the party must respond to the notice;
(h) respecting service and filing of notices, documents and orders, including substituted service;
(i) requiring a party to provide an address for service or delivery of notices, documents and orders;
(j) providing that a party's address of record is to be treated as an address for service;
(k) respecting procedures for preliminary or interim matters;
(l) respecting amendments to an application or responses to it;
(m) respecting the addition of parties to an application;
(n) respecting adjournments;
(o) respecting the extension or abridgement of time limits provided for in the rules;
(p) respecting the transcribing or tape recording of its proceedings and the process and fees for reproduction of a tape recording if requested by a party;
(q) establishing the forms it considers advisable;
(r) respecting the joining of applications;
(s) respecting exclusion of witnesses from proceedings;
(t) respecting the effect of a party's non-compliance with the tribunal's rules;
(u) respecting access to and restriction of access to tribunal documents by any person;
(v) respecting witness fees and expenses;
(w) respecting applications to set aside any summons served by a party.

(3) In an application, the tribunal may waive or modify one or more of its rules in exceptional circumstances.

(4) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Practice directives tribunal must make

12 (1) The tribunal must issue practice directives respecting
(a) the usual time period for completing an application and for completing the procedural steps within an application, and
(b) the usual time period within which the tribunal's final decision and reasons are to be released after the hearing of the application is completed.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) Practice directives issued under subsection (1) must be consistent with this Act and with the tribunal's enabling Act, the regulations made under those Acts and any

rules of practice and procedure made by the tribunal.

(4) The tribunal must make accessible to the public any practice directives made under this section.

Practice directives tribunal may make

13 (1) The tribunal may issue practice directives consistent with this Act and with the tribunal's enabling Act, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) The tribunal must make accessible to the public any practice directives made under subsection (1).

General power to make orders

14 In order to facilitate the just and timely resolution of an application the tribunal, if requested by a party or an intervener, or on its own initiative, may make any order

(a) for which a rule is made by the tribunal under section 11,

(b) for which a rule is prescribed under section 60, or

(c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.

Interim orders

15 The tribunal may make an interim order in an application.

Consent orders

16 (1) On the request of the parties to an application, the tribunal may make a consent order if it is satisfied that the order is consistent with its enabling Act.

(2) If the tribunal declines to make a consent order under subsection (1), it must provide the parties with reasons for doing so.

Withdrawal or settlement of application

17 (1) If an applicant withdraws all or part of an application or the parties advise the tribunal that they have reached a settlement of all or part of an application, the tribunal must order that the application or the part of it is dismissed.

(2) If the parties reach a settlement in respect of all or part of the subject matter of an application, on the request of the parties, the tribunal may make an order that includes the terms of settlement if it is satisfied that the order is consistent with its enabling Act.

(3) If the tribunal declines to make an order under subsection (2), it must provide the parties with reasons.

Failure of party to comply with tribunal orders and rules

18 If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal, after giving notice to that party, may do one or more the following:

(a) schedule a written, electronic or oral hearing;

(b) continue with the application and make a decision based on the information before it, with or without providing an opportunity for submissions;

(c) dismiss the application.

Service of notice or documents

19 (1) If the tribunal is required to provide a notice or any document to a party or other person in an application, it may do so by personal service of a copy of the notice or document or by sending the copy to the person by any of the following means:

(a) ordinary mail;

(b) electronic transmission, including telephone transmission of a facsimile;

(c) if specified in the tribunal's rules, another method that allows proof of receipt.

(2) If the copy is sent by ordinary mail, it must be sent to the most recent address known to the tribunal and must be considered to be received on the fifth day after the day it is mailed, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(3) If the copy is sent by electronic transmission it must be considered to be received on the day after it was sent, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(4) If the copy is sent by a method referred to in subsection (1) (c), the tribunal's rules govern the day on which the copy must be considered to be received.

(5) If through absence, accident, illness or other cause beyond the party's control a party who acts in good faith does not receive the copy until a later date than the date provided under subsection (2), (3) or (4), that subsection does not apply.

When failure to serve does not invalidate proceeding

20 If a notice or document is not served in accordance with section 19, the proceeding is not invalidated if

(a) the contents of the notice or document were known by the person to be served within the time allowed for service,

(b) the person to be served consents, or

(c) the failure to serve does not result in prejudice to the person, or any resulting prejudice can be satisfactorily addressed by an adjournment or other means.

Notice of hearing by publication

21 If the tribunal is of the opinion that because there are so many parties to an application or for any other reason it is impracticable to give notice of a hearing to a party by a method referred to in section 19 (1) (a) to (c), the tribunal may give notice of a hearing by public advertisement or otherwise as the tribunal directs.

Notice of appeal (inclusive of prescribed fee)

22 (1) A decision may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must

(a) be in writing or in another form authorized by the tribunal's rules,

(b) identify the decision that is being appealed,

(c) state why the decision should be changed,

(d) state the outcome requested,

(e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, the name of the agent and a telephone number at which the agent may be contacted during regular business hours,

(f) include an address for delivery of any notices in respect of the appeal, and

(g) be signed by the appellant or the appellant's agent.

(3) A notice of appeal must be accompanied by payment of the prescribed fee.

(4) Despite subsection (3), if a notice of appeal is deficient or if the prescribed fee is outstanding, the chair or the chair's delegate may allow a reasonable period of time within which the notice may be corrected or the fee is to be paid.

Time limit for appeals

24 (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

Organization of tribunal

26 (1) The chair of the tribunal may organize the tribunal into panels, each comprised of one or more members.

(2) If the chair organizes a panel comprised of more than one member, the chair must designate one of those members as chair of the panel.

(3) The members of the tribunal may sit

(a) as the tribunal, or

(b) as a panel of the tribunal.

(4) Two or more panels may sit at the same time.

(5) If members of the tribunal sit as a panel,

(a) the panel has the jurisdiction of, and may exercise and perform the powers and duties of, the tribunal, and

(b) a decision of the panel is a decision of the tribunal.

(6) The decision of a majority of the members of a panel of the tribunal is a decision of the tribunal and, in the case of a tie, the decision of the chair of the panel governs.

(7) If a member of a panel is unable for any reason to complete the member's duties, the remaining members of that panel, with consent of the chair of the tribunal, may continue to hear and determine the matter, and the vacancy does not invalidate the proceeding.

(8) If a panel is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the tribunal, with the consent of all parties to the application, may organize a new panel to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

(9) The chair or the chair's delegate may hear and decide any interim or preliminary matter in an application, and for that purpose may exercise any of the powers of the tribunal necessary to decide the matter.

Staff of tribunal

27 (1) Employees necessary to carry out the powers, functions and duties of the tribunal may be appointed under the *Public Service Act*.

(2) The chair of the tribunal may engage or retain consultants, investigators, lawyers, expert witnesses or other persons the tribunal considers necessary to exercise its powers and carry out its duties under the tribunal's enabling Act and may determine their remuneration.

(3) The *Public Service Act* does not apply to a person retained under subsection (2) of this section.

Appointment of person to conduct dispute resolution process

28 (1) The chair of the tribunal may appoint a member or staff of the tribunal or other person to conduct a dispute resolution process.

(2) If a member of the tribunal is appointed under subsection (1), that member, in addition to assisting in a dispute resolution process, may make pre-hearing orders in respect of the application but must not hear the merits of the application unless all parties consent.

Disclosure protection

29 (1) In a proceeding, other than a criminal proceeding, unless the parties to an application consent, a person must not disclose or be compelled to disclose

(a) a document or other record created by a party specifically for the purposes of achieving a settlement of one or more issues through a dispute resolution process, or

(b) a statement made by a party in a dispute resolution process specifically for the purpose of achieving a settlement of one or more issues in dispute.

(2) Subsection (1) does not apply to a settlement agreement.

Tribunal duties

30 Tribunal members must faithfully, honestly and impartially perform their duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.

Summary dismissal

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(a) the application is not within the jurisdiction of the tribunal;

(b) the application was not filed within the applicable time limit;

(c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the application was made in bad faith or filed for an improper purpose or motive;

(e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the application will succeed;

(g) the substance of the application has been appropriately dealt with in another proceeding.

(2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.

(3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

Representation of parties to an application

32 A party to an application may be represented by counsel or an agent and may make submissions as to facts, law and jurisdiction.

Interveners

33 (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that:

(a) the person can make a valuable contribution or bring a valuable perspective to the application, and

(b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention.

(2) The tribunal may limit the participation of an intervener in one or more of the following ways:

(a) in relation to cross examination of witnesses;

(b) in relation to the right to lead evidence;

(c) to one or more issues raised in the application;

(d) to written submissions;

(e) to time limited oral submissions.

(3) If 2 or more applicants for intervener status have the same or substantially similar views or expertise, the tribunal may require them to file joint submissions.

Power to compel witnesses and order disclosure

34 (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).

Recording tribunal proceedings

35 (1) The tribunal may transcribe or tape record its proceedings.

(2) If the tribunal transcribes or tape records a proceeding, the transcription or tape recording must be considered to be correct and to constitute part of the record of the proceeding.

(3) If, by a mechanical or human failure or other accident, the transcription or tape recording of a proceeding is destroyed, interrupted or incomplete, the validity of the proceeding is not affected.

Form of hearing of application

36 In an application or an interim or preliminary matter, the tribunal may hold any combination of written, electronic and oral hearings.

Applications involving similar questions

37 (1) If 2 or more applications before the tribunal involve the same or similar questions, the tribunal may

(a) combine the applications or any part of them,

(b) hear the applications at the same time,

(c) hear the applications one immediately after the other, or

(d) stay one or more of the applications until after the determination of another one of them.

(2) The tribunal may make additional orders respecting the procedure to be followed with respect to applications under this section.

Examination of witnesses

38 (1) Subject to subsection (2), in an oral or electronic hearing a party to an application may call and examine witnesses, present evidence and submissions and conduct cross examination of witnesses as reasonably required by the tribunal for a full and fair disclosure of all matters relevant to the issues in the application.

(2) The tribunal may reasonably limit further examination or cross examination of a witness if it is satisfied that the examination or cross examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the application.

(3) The tribunal may question any witness who gives oral evidence in an oral or electronic hearing.

Adjournments

39 (1) An application may be adjourned by the tribunal on its own motion or if it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

(2) In considering whether an application should be adjourned, the tribunal must have regard to the following factors:

(a) the reason for the adjournment;

(b) whether the adjournment would cause unreasonable delay;

(c) the impact of refusing the adjournment on the parties;

(d) the impact of granting the adjournment on the parties;

(e) the impact of the adjournment on the public interest.

Information admissible in tribunal proceedings

40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

(3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

(5) Notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application are inadmissible in tribunal proceedings.

Hearings open to public

41 (1) An oral hearing must be open to the public.

(2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

(3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

Discretion to receive evidence in confidence

42 The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

Tribunal without jurisdiction over constitutional questions

44 (1) The tribunal does not have jurisdiction over constitutional questions.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Tribunal without jurisdiction to apply the *Human Rights Code*

46.3 (1) The tribunal does not have jurisdiction to apply the *Human Rights Code*.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Power to award costs

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;

(b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

Maintenance of order at hearings

48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the tribunal, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a proceeding, and

(b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

Contempt proceeding for uncooperative witness or other person

49 (1) The failure or refusal of a person summoned as a witness to do any of the following makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court:

(a) attend a hearing;

(b) take an oath or affirmation;

(c) answer questions;

(d) produce the records or things in their custody or possession.

(2) The failure or refusal of a person to comply with an order or direction under section 48 makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the court in respect of conduct by a person in a proceeding before the tribunal.

Decisions

50 (1) If the tribunal makes an order for the payment of money as part of its decision, it must set out in the order the principal sum, and if the tribunal has power to award interest and interest is payable, the rate of interest and the date from which it is to be calculated.

(2) The tribunal may attach terms or conditions to a decision.

(3) The tribunal's decision is effective on the date on which it is issued, unless otherwise specified by the tribunal.

(4) The tribunal must make its decisions accessible to the public.

Final decision

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

Notice of decision

52 (1) Subject to subsection (2), the tribunal must send each party and any interveners in an application a copy of its final decision.

(2) If the tribunal is of the opinion that because there are so many parties to an application or for any other reason that it is impracticable to send its final decision to each party as provided in subsection (1), the tribunal may give reasonable notice of its decision by public advertisement or otherwise as the tribunal directs.

(3) A notice of a final decision given by the tribunal under subsection (2) must inform the parties of the place where copies of that decision may be obtained.

Amendment to final decision

53 (1) If a party applies or on the tribunal's own initiative, the tribunal may amend a final decision to correct any of the following:

(a) a clerical or typographical error;

(b) an accidental or inadvertent error, omission or other similar mistake;

(c) an arithmetical error made in a computation.

(2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.

(3) Within 30 days of being served with the final decision, a party may apply to the tribunal for clarification of the final decision and the tribunal may amend the final decision only if the tribunal considers that the amendment will clarify the final decision.

(4) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3).

(5) This section must not be construed as limiting the tribunal's ability, on request of a party, to reopen an application in order to cure a jurisdictional defect.

Enforcement of tribunal's final decision

54 (1) A party in whose favour the tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the court.

(2) A final decision filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

Compulsion protection

55 (1) A tribunal member, a person acting on behalf of or under the direction of a tribunal member or a person who conducts a dispute resolution process on behalf of or under the direction of the tribunal must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under the tribunal's enabling Act or this Act.

(2) Despite subsection (1), the court may require the tribunal to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

Immunity protection for tribunal and members

56 (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted

(a) in the performance or intended performance of any duty under this Act or the tribunal's enabling Act, or

(b) in the exercise or intended exercise of any power under this Act or the tribunal's enabling Act.

(3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Time limit for judicial review

57 (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.

(2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

Standard of review if tribunal's enabling Act has no privative clause

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Power to make regulations

60 The Lieutenant Governor in Council may make regulations as follows:

(a) prescribing rules of practice and procedure for the tribunal;

(b) repealing or amending a rule made by the tribunal;

(c) prescribing tariffs of fees to be paid with respect to the filing of different types of applications, including preliminary and interim applications;

(d) prescribing the circumstances in which an award of costs may be made by the tribunal;

(e) prescribing a tariff of costs payable under a tribunal order to pay part of the costs of a party or intervener;

(f) prescribing limits and rates relating to a tribunal order to pay part of the actual costs and expenses of the tribunal.

Application of *Freedom of Information and Protection of Privacy Act*

61 (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:

(a) a personal note, communication or draft decision of a decision maker;

(b) notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application;

(c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;

(d) a transcription or tape recording of a tribunal proceeding;

(e) a document submitted in a hearing for which public access is provided by the tribunal;

(f) a decision of the tribunal for which public access is provided by the tribunal.

(3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

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