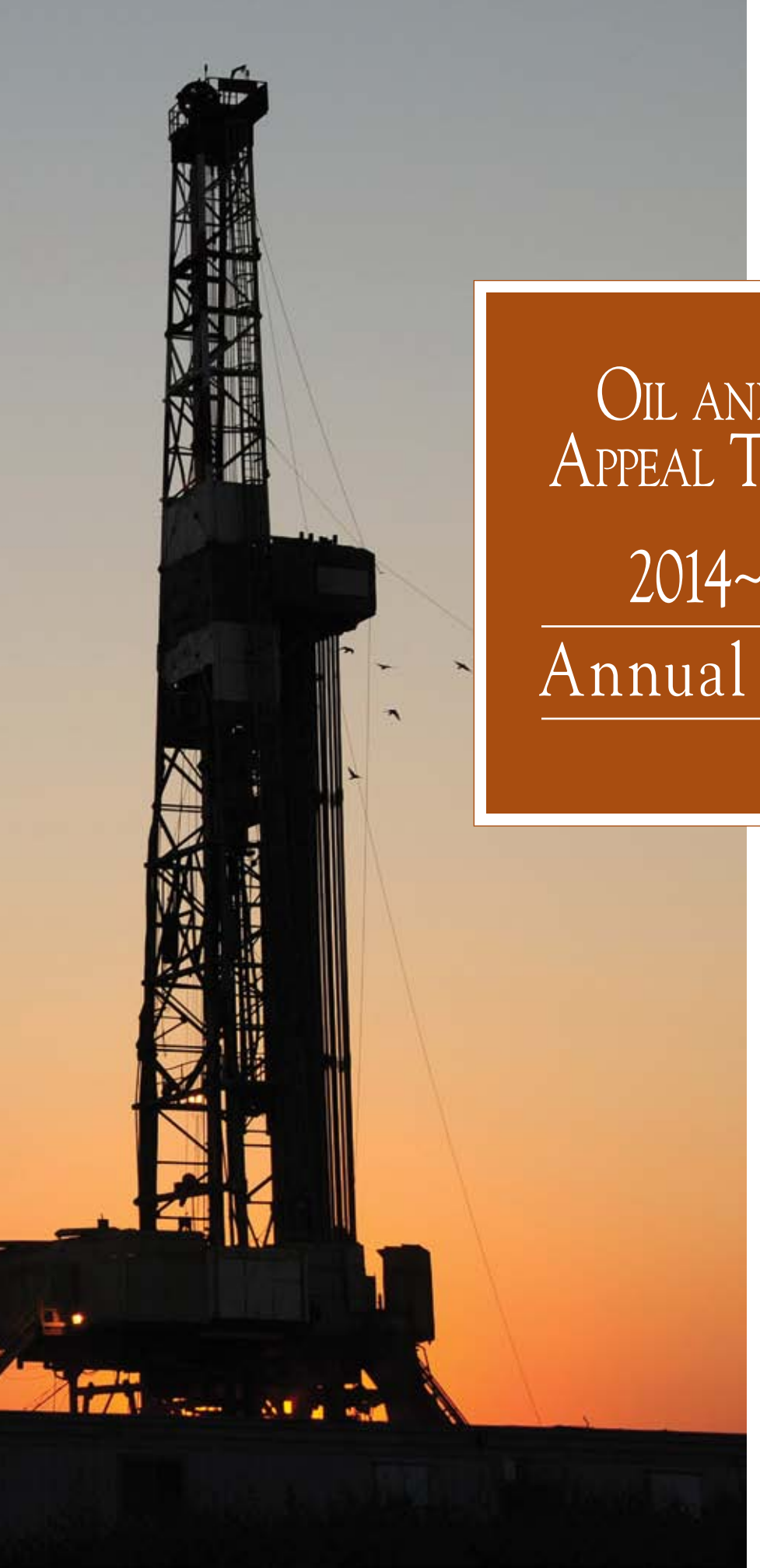

Oil and Gas Appeal Tribunal

2014~2016

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, Q.C.
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 Annual Report of the Oil and Gas Appeal Tribunal for the period January 1, 2014 through December 31, 2016.

Yours truly,

Alan Andison
Chair
Oil and Gas Appeal Tribunal

AR 2014 TO 2016

Table of Contents

Message from the Chair

I am pleased to submit the triennial report of the Oil and Gas Appeal Tribunal. The Tribunal was established on October 4, 2010, under the *Oil and Gas Activities Act*. The Tribunal's initial triennial report covered the period from the Tribunal's start of operations to December 31, 2013. This report covers the three-year period from January 1, 2014, to December 31, 2016.

Appeals during the Reporting Period

Section 59.2(a) of the *Administrative Tribunals Act* requires the Tribunal to provide a review of its operations during the preceding reporting period. During this reporting period, a total of 17 appeals were filed with the Tribunal, and all but one of which were filed by owners of land on which oil and gas activities were authorized by the Oil and Gas Commission.

Of those 17 appeals, 13 were closed within the reporting period. Of the appeals closed during the reporting period, 54% (7 appeals) were withdrawn or resolved by consent of the parties, which meant that they did not require a hearing. The Tribunal encourages parties to resolve appeals without the need for a hearing.

Six of the appeals ultimately proceeded to a hearing on their merits. Those 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 including sour gas levels, drinking water contamination, hydraulic fracturing, flaring, access road construction, and pipeline routing.

During this reporting period, one judicial review of a Tribunal decision was filed in the BC Supreme Court, but the petitioner abandoned the matter before it was heard by the Court.

Revised Rules and new Practice and Procedure Manual

Pursuant to its statutory powers under section 11 of the *Administrative Tribunals Act*, the Tribunal has the authority to make Rules governing the appeal process. On July 1, 2016, the Tribunal's revised Rules replaced the previous Rules. The revised Rules do not change the usual way that an appeal proceeds; rather, they reduce the duplication with the statutory provisions and reduce some of the content that is more in the nature of policy. The latter is now in a Practice and Procedure Manual. Some notable changes to the Rules are set out below.

There is a new Rule stating how to calculate time in the Rules, and new deadlines have been established for the following:

- notice of expert evidence and expert reports;
- applying for a summons (order to attend as a witness) notice advance of the hearing; and
- requesting an interpreter, assistance for the visually or hearing impaired, or other accommodation to enable meaningful participation at a hearing.

There is a new requirement in the Rules for the Oil and Gas Commission to produce its "record of decision".

In addition, there are new requirements in the Rules on the following subjects: filing documents with the Tribunal by email, service of documents on other parties; applications; consequences for failure to participate in a hearing; and the payment of a summoned witness's fees and expenses.

A comprehensive Practice and Procedure Manual has been created which explains the appeal process in detail and cites the legislation and/or Rule that may apply to a subject and any Tribunal policy relevant to that subject. The Tribunal has also created a new series of Information Sheets on discrete topics. These sheets supplement the topics covered in the Practice and Procedure Manual, all of which are available on the Tribunal's website.

The revised Rules, together with the Practice and Procedure Manual, will facilitate the just and timely resolution of appeals.

Reducing Cost to Government

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.

Plans for improving the Tribunal's operations

Section 59.2(h) of the *Administrative Tribunals Act* requires the Tribunal to report its plans for improving operations in the future. During this reporting period, the Tribunal was involved in the replacement and upgrading of the electronic appeal management system that is used by the Tribunal and the seven other tribunals that are jointly administered through a shared office and staff. The existing appeal management system is nearly 20 years old and its software is no longer supported. A new appeal management system will allow the shared administrative office to continue to function effectively and efficiently, using modern information technology. The Tribunal plans to have the new system in place in 2017.

Forecast of workload for the next reporting period

Section 59.2(f) of the *Administrative Tribunals Act* requires the Tribunal to provide a forecast of the workload for the succeeding reporting period. The Tribunal's workload for the 2017 reporting period is expected to be consistent with the past five years. No significant increases or decreases in workload are forecast. Based on the past five years, it is expected that approximately seven new appeals will be filed, six appeals will be closed, and two hearings on the merits of appeals will be completed during the coming year.

Tribunal Membership

The Tribunal's membership experienced some changes during the past three years. I am very pleased to welcome twelve new members to the Tribunal who will complement the expertise and experience of the outstanding professionals on the Tribunal. Those new members are Maureen Baird, Q.C., Lorne Borgal, Brenda Edwards, Jeffrey Hand, Kent Jingfors, Linda Michaluk, John M. Orr, Q.C., Howard Saunders, Daphne Stancil, Michael Tourigny, Gregory J. Tucker, and Norman E. Yates.

Four members' appointments concluded on December 13, 2015. Those members are R. O'Brien Blackall, Tony Fogarassy, Blair Lockhart, and Ken Long. 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 report covers the period from January 1, 2014 to December 31, 2016.

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

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 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		
Maureen Baird, Q.C.	Lawyer	Vancouver
R. O'Brian Blackall	Land Surveyor	Charlie Lake
Lorne Richard Borgal	Professional Agrologist (retired)	Vancouver
Monica Danon-Schaffer	Professional Engineer	Britannia Beach
Cindy Derkaz	Lawyer (retired)	Salmon Arm
Brenda Edwards	Lawyer	Victoria
J. Tony Fogarassy	Lawyer/Geoscientist	Vancouver
Les Gyug	Professional Biologist	West Kelowna
James Hackett	Professional Forester	Nanaimo
Jeffrey Hand	Lawyer	Vancouver
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Kent Jingfors	Environmental Consultant	Nanoose Bay
Gabriella Lang	Lawyer (retired)	Campbell River
E. Blair Lockhart	Lawyer/Geoscientist	Vancouver
Kenneth Long	Professional Agrologist	Prince George
James Mattison	Professional Engineer	Victoria
Linda Michaluk	Professional Biologist	North Saanich
John M. Orr, Q.C.	Lawyer	Victoria
Howard Saunders	Forestry Consultant	Vancouver
Daphne Stancil	Lawyer/Biologist	Victoria
Michael Tourigny	Lawyer (retired)	Vancouver
Gregory J. Tucker	Lawyer	Vancouver
Douglas VanDine	Professional Engineer	Victoria
Reid White	Professional Biologist (retired)/ Professional Engineer	Dawson Creek
Robert Wickett, QC	Lawyer	Vancouver
Norman E. Yates	Lawyer/Professional Forester	Penticton

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 (described above) 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 84 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

Administrative Tribunals Statutes Amendment Act, 2015

On December 17, 2015, the *Administrative Tribunals Statutes Amendment Act, 2015*, S.B.C. 2015, c. 10, was brought into force by regulation. This Act amended the existing *Administrative Tribunals Act* by adding sections allowing the formal "clustering" of administrative tribunals, giving tribunals the authority to compel parties to participate in early dispute resolution methods, and adding reporting requirements, among other things.

Of note for the Tribunal, the amendments added a provision allowing the Tribunal to order security for costs in an appeal (section 47.1 of the *Administrative Tribunals Act*).

Recommendations

Section 59.2(g) of the *Administrative Tribunals Act* requires the Tribunal to report any trends or special problems it foresees.

The Tribunal is pleased to report that it has identified no trends or special problems that need to be reported on. Accordingly, the Tribunal is not making any recommendations in relation to any trends or problems at this time.

Statistics

Section 59.2(c) of the *Administrative Tribunals Act* requires the Tribunal to report details on the nature and number of appeals and other matters received or commenced by the Tribunal during this reporting period.

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, which are included in a separate line in the statistics below.

Between January 1, 2014 and December 31, 2016, a total of 17 appeals were filed with the Tribunal against 15 decisions, and a total of 10 decisions were published. The Tribunal issued five final decisions on the merits of appeals. In addition, seven appeals were withdrawn, and one was resolved by consent of the parties. Thus, eight appeals were closed without the need for a hearing. Consequently, a total of 13 appeals (68%) were closed during the reporting period.

January 1, 2014 – December 31, 2016

Appeals open at period start		**2**
Total appeals filed		**17**
Total appeals closed		**13**
Appeals abandoned or withdrawn	7	
Appeals rejected lack of jurisdiction	0	
Consent orders	1	
Final decision issued	5	
Total hearings held on the merits of appeals*		**3**
Oral hearings completed	3	
Written hearings completed	0	
Total oral hearing days		**6**
Published decisions issued		
Final decisions (excluding consent orders)		
Appeals allowed	0	
Appeals allowed, in part	0	
Appeals dismissed	5	
Total final decisions		**5**
Decisions on preliminary matters		
Extension of time to file appeal	1	
Standing to appeal	1	
Interim Stay pending appeal	2	
Total preliminary decisions		**4**
Decisions on post-hearing matter – costs		**0**
Consent orders		**1**
Total published decisions issued		**10**
Total unpublished decisions issued		**10**

▲

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.

Performance Indicators and Timelines

Sections 59.2(b) and (d) of the *Administrative Tribunals Act*, respectively, require the Tribunal to report on performance indicators, and provide details of the time from filing or commencement to decision of the appeals and other matters disposed of by the Tribunal during this reporting period.

The Tribunal strives to facilitate the early resolution of appeals, and the resolution of appeals without the need for a hearing, to reduce the time and expenses associated with appeals for all parties. The Tribunal is pleased to report that 67% of the appeals that closed during this reporting period were resolved without the need for a hearing. As a result, the parties and the Tribunal avoided the time and expenses associated with a hearing in those cases.

A total of 10 hearings were held: seven on preliminary matters; and three final hearings on the merits of appeals. Of those ten hearings, 60% were conducted by way of written submissions rather than in person. Conducting a hearing in writing also saves time and expenses for the parties and the Tribunal.

Regarding the appeals that were concluded without the need for a hearing, the time elapsed between the filing of the appeal and the closure of the appeal was an average of 143 days. Regarding appeals which involved a hearing on the merits, the time elapsed from the filing of the appeal until the final decision was issued was an average of 368 days. The overall average for all appeals concluded during this reporting period was 229 days.

The Tribunal is also pleased to report that the majority of appeals that involved a hearing on the merits achieved the timelines set out in its Practice Directive regarding the time elapsed from the completion of the hearing until the release of the final decision. Practice Directive No. 1, which is available on the Tribunal's website, provides timelines for completing appeals and releasing final decisions on appeals. For matters where the hearing is conducted in writing or the total number of hearing days to complete the appeal is two days or less, the final decision will generally be released within five months of the close of the hearing. For matters where the total number of hearing days to complete the appeal is three to five days, the final decision will generally be released within six months of the close of the hearing. For matters where the total number of hearing days to complete the appeal is six or more days, the final decision will generally be released within nine months of the close of the hearing. In 60% of appeals involving a hearing on the merits that were completed within this reporting period, the decisions were released within those timelines.

Finally, section 59.2(e) of the *Administrative Tribunals Act* requires the Tribunal to report the results of any surveys carried out by the Tribunal during the reporting period. The Tribunal did not carry out any surveys during this reporting period.

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.

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. An example of this type of decision is provided in the summaries below.

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 Decisions

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

Standing to Appeal

Land owners granted standing to appeal a permit for a pipeline across their property

2015-OGA-002(a) Olaf and Francis Jorgensen v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: June 15, 2015

Panel: Alan Andison

Olaf and Francis Jorgensen appealed a decision of the Oil and Gas Commission ("Commission") to issue a permit that authorizes Encana Corporation ("Encana") to construct and operate a pipeline. The pipeline crosses the Appellants' property and their neighbours' property, located northwest of Dawson Creek. The Appellants appealed on the basis that the pipeline route through their property should be realigned to prevent a portion of their property from being "marginalized." The Appellants' neighbours also appealed the permit. The two appeals were scheduled to be heard together.

Before the appeals were heard, Encana applied to the Tribunal for an order summarily dismissing the Appellants' appeal, pursuant to section 31 of the *Administrative Tribunals Act*. Encana sought summary dismissal on the basis that the Appellants did not meet the requirements of section 92(2) of the *Oil and Gas Activities Act*, which provides that a land owner may appeal only on the basis that the Commission's decision was made without due regard to a submission previously made by the land owner, or a written consultation report submitted by the permit holder. Encana had notified the Appellants of the proposed pipeline route in an October 8, 2013 letter, which invited them to provide written comments to the Commission within 21 days, but the Appellants provided no written submission to the Commission regarding the proposal, and their grounds for appeal did not allege that the Commission failed to give due regard to any submission they had provided. In addition, the Commission had considered Encana's December 2014 consultation report, which stated that the Appellants had no concerns, before the Commission issued the permit.

The Appellants opposed Encana's application for summary dismissal. They provided a list of their communications with Encana or its agents between 2012 and March 2015. The list showed two telephone calls in 2012, and several meetings between June 2013 and March 2015. The Appellants submitted that, at every meeting, they expressed opposition to the proposed location of the pipeline on their property.

The Commission took no position on Encana's application.

The Tribunal found that the Appellants did not provide a written submission to Encana or the Commission objecting to the proposed pipeline, before the permit was issued. However, the Tribunal found that Encana may have been obligated to include in its consultation report any oral objections that the Appellants had expressed to it. Encana met with the Appellants three times before the permit was issued and after Encana's provided written notice of

its proposal to the Appellants. However, there was no written minutes or personal notes from those meetings, and the parties' evidence was conflicting regarding what was stated at the meetings: the Appellants claimed that they had expressed their objection to the pipeline route at every meeting, whereas Encana claimed that the Appellants had expressed no concerns about the pipeline route over their lands but had refused to sign a right-of-way agreement as long as their neighbours also objected to the pipeline.

Given that the application for summary dismissal was conducted in writing, and there were no personal notes, minutes, or sworn affidavit evidence regarding what was discussed at the meetings between Encana and the Appellants, the Tribunal found that it was unable to assess the credibility of the parties' respective versions of what was said at the meetings. Further, the parties did not address whether Encana had a legal duty, as the permit applicant, to include in its consultation report any verbal objections that may have been expressed by the Appellants. The Tribunal held that, in deciding a preliminary application for summary dismissal, an appellant's right of appeal should only be taken away in clear cases. The Tribunal concluded that, in the present case, the information before it was insufficient to decide the threshold questions of jurisdiction raised by the application, but that these questions could be addressed at an oral hearing on the merits of the appeal. In these circumstances, the Tribunal decided that it would be inappropriate to summarily dismiss the Appellants' appeal.

Accordingly, Encana's application for summary dismissal was denied.

Extension 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 provide proper notice results in extension of time

2016-OGA-004(a) Rodney and Kim Strasky v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: December 2, 2016

Panel: Alan Andison

Rodney and Kim Strasky appealed a decision of the Commission to issue a pipeline permit to Encana. The permit authorized Encana to construct and operate a pipeline, subject to certain conditions, on land that is owned by the Appellants. The appeal was not filed "within 15 days of the day the determination being appealed was made", which is the appeal period that applies to land owners under section 72(7) of the *Oil and Gas Activities Act*. The Appellants requested an extension of time to file the appeal pursuant to section 24(2) of the *Administrative Tribunals Act*, which provides that the Tribunal may extend the time to file an appeal "if satisfied that special circumstances exist".

The Commission originally mailed a letter to the Appellants on August 12, 2016, notifying them that the permit was issued on that same date. The Commission sent the notice to the Appellants' address that was provided in the consultation and notification materials which Encana had provided as part of its permit application. However, the notice was returned to the Commission on October 6, 2016, indicating that the address no longer existed due to Canada Post updates. The Commission then obtained an updated

address for the Appellants, and re-sent the notice on October 11, 2016. The Appellants filed their appeal on October 18, 2016.

Copies of the permit were provided to the Appellants through other means before October 11, 2016. Encana had included a copy of the permit in an application to the Surface Rights Board, filed on August 16, 2016, which was served on the Appellants. In addition, the Commission provided a copy of the permit to the Appellants' legal counsel on September 22, 2016.

The Appellants submitted that an extension of time to file the appeal was warranted in the circumstances. The Commission consented to the application. Encana objected to the application.

The Tribunal found that, when the Appellants received the permit with Encana's Surface Rights Board application, the Appellants were neither notified, nor could they reasonably be expected to be aware, of their right to appeal the permit to the Tribunal. Moreover, although the Commission had emailed a copy of the permit to the Appellants' counsel, neither the email nor the permit mentioned the Appellants' right to appeal the permit. Sections 25(4) and (5) of the *Oil and Gas Activities Act* state that the Commission "must" provide notice of the permit to the relevant land owners, and the notice "must" state that the land owner may appeal the permit, and include the Tribunal's address. The Appellants did not receive notice in accordance with the *Oil and Gas Activities Act* until the Commission sent its letter dated October 11, 2016. The Appellants filed their appeal on October 18, 2016, well within 15 days of when they received proper notice.

The Tribunal concluded that the Commission's failure to provide notice to the Appellants in accordance with sections 25(4) and (5) of the *Oil and Gas Activities Act* until October 11, 2016, constituted special circumstances that justified granting an extension of time to file the appeal.

Accordingly, the application for an extension of time was granted.

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.

Irreparable harm to farming activities due to pipeline construction

2015-OGA-003(a) Brian Derfler v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: August 14, 2015

Panel: Brenda Edwards

Brian Derfler appealed a decision of the Commission to issue a permit that authorizes Encana to construct and operate a pipeline.

In July 2014, Encana applied to the Commission for a permit to construct a pipeline within a right of way, along with temporary workspace areas. The proposed pipeline would consist of five lines, some containing natural gas and some containing emulsion/water associated with fracturing. The proposed right of way would be 18 metres wide, but temporary work spaces on either side of the right of way would extend the total width to as much as 58 metres. Except for a small area of Crown land, the pipeline would be constructed on private cultivated land, including lands owned by Mr. Derfler. The pipeline would be constructed adjacent to three other pipeline right of ways which are, in part, located on Mr. Derfler's land. Mr. Derfler cultivates grain on his land.

Shortly after Encana applied for the permit, it provided the Commission with a consultation and notification report, which indicated that Encana had received no written submissions associated with the permit application, and there were no outstanding concerns associated with the application. The report also stated that Encana had been unable to reach an agreement with Mr. Derfler, but "no project specific concerns" had been raised.

In September 2014, Mr. Derfler filed a written submission with the Commission setting out his concerns regarding the pipeline. He stated that he had requested information from Encana during the consultation period, but he was not provided with some of that information. He also stated that he had unresolved issues with Encana regarding flooding/erosion and road damage on his lands, as well as compensation for crop loss due to his loss of access to a field.

In May 2015, the Commission issued the pipeline permit to Encana.

Mr. Derfler appealed the pipeline permit to the Tribunal on several grounds including that: his crops are his livelihood; Encana failed to provide the information he requested regarding the contents of the pipeline so he could understand the risk of contamination; Encana did not accommodate his proposal for an alternate pipeline route that would address flooding and reduce the potential for contamination; and, he was denied access to Encana's consultation and notification report.

As a preliminary matter, Mr. Derfler requested a stay of the amendment under section 72(3) of the *Oil and Gas Activities Act*, pending the Tribunal's decision on the merits of his appeal. The Tribunal heard the stay application on an expedited

basis, as construction of the pipeline was to begin imminently. The Tribunal issued a temporary stay of the permit, except for certain non-invasive archaeological and soil work, pending the Tribunal's final decision on the stay application.

Encana opposed the application for a stay.

The Commission took no position on the application.

In determining whether a stay ought to be granted, the Tribunal applied the three-part test set out in the Tribunal's Rules of Practice and Procedure.

With respect to the first part of the test, the Tribunal found that Mr. Derfler's appeal raised serious issues related to the permit that are not frivolous, vexatious or pure questions of law. For example, the appeal raised issues regarding the Commission's reasons and evidence for rejecting Mr. Derfler's proposal of an alternate pipeline route which may have fewer impacts on landowners, and the potential for Encana's proposed route to harm Mr. Derfler's grain farming business.

Turning to the second part of the test, Mr. Derfler had the onus of establishing that his interests would likely suffer irreparable harm unless a stay was granted. The Tribunal found that, if a stay was denied, there could be serious harm to Mr. Derfler's interests, which would be "irreparable" harm. Specifically, the Tribunal found that construction of the pipeline was to begin imminently, and it was unlikely that Encana would remove the pipeline and rebuild it in another location if the appeal was successful and the Tribunal determined that an alternate location was more appropriate. Further, even if the appeal was successful and Encana relocated the pipeline after it was constructed, it was unclear whether the harm to Mr. Derfler's interests in the meantime could be remediated or compensated. The Tribunal found that, if a stay was denied, the pipeline could cause or contribute to flooding, soil loss, difficulty accessing his crops with farm equipment, and reduced productivity on his land, which could cause a significant loss of farming income and harm to his business reputation. There was a risk that he could be put out of business as a grain farmer.

Turning to the third part of the test, the Tribunal concluded that the balance of convenience weighed in favour of granting a stay. The Tribunal found that Encana may suffer increased costs if a stay was granted and construction of the pipeline was delayed until the merits of the appeal were decided. However, the Tribunal found that the risk of financial harm to Encana, if a stay was granted, did not outweigh the potential for irreparable harm to Mr. Derfler's interests if a stay was denied.

Accordingly, the application for a stay was granted.

Stay denied because the alleged harm to the environment was speculative

2016-OGA-001(a) Penalty Ranch Ltd. v. Oil and Gas Commission (Crew Energy Inc., Third Party)

Decision Date: June 27, 2016

Panel: Alan Andison

Penalty Ranch Ltd. (the "Applicant") appealed a decision of the Commission to issue a permit authorizing Crew Energy Inc. ("Crew") to drill and operate an oil and gas well on certain Crown lands subject to a number of conditions. The well authorized by the permit was one of five wells that Crew intended to construct on the same well pad.

The Applicant holds an agricultural lease over the Crown lands covered by Crew's five well permits, including the permit that was the subject of the appeal. The Applicant conducts ranching and farming operations on the Crown lands. A family owns and operates the Applicant, and owns and occupies a home on private land adjacent to the Crown lands covered by the permit. Four unnamed natural springs

and a marsh are located on or near the Crown lands covered by the permit, and the Applicant relies on at least one of those springs for livestock and home use.

In May 2015, Crew sent a notice and invitation to consult to the Applicant regarding Crew's proposal to drill the wells. In response, the Applicant sent a written submission to the Commission objecting to Crew's proposal, and expressing numerous concerns about the proposal.

In February 2016, the Commission issued five well permits to Crew, including the appealed permit. The Applicant appealed the permit, and requested a stay of the permit pending the Tribunal's decision on the merits of the appeal.

After the appeal was filed, the Commission amended the permit to include several more conditions that were intended to provide additional protection to water resources, including requirements for Crew to test and monitor the water quality and flow rate at the springs.

In determining whether a stay ought to be granted, the Tribunal applied the three-part test set out in the Tribunal's *Rules of Practice and Procedure*.

With respect to the first part of the test, the Tribunal found that the appeal raised serious issues. The primary issue was whether the Commission gave due regard to the Applicant's written submission before the permit was issued. The Applicant's submission expressed concerns about contamination of an aquifer, air pollution, flaring, the drilling path, the proximity of the drilling to a family home, and the disturbance caused by noise from trucking, fracking and flaring. The Tribunal found that those issues were not frivolous, vexatious or pure questions of law.

Turning to the second part of the test, the Applicant must establish that its interests would likely suffer irreparable harm unless a stay was granted. The Tribunal found that the Applicant raised concerns that were too speculative to support a finding that denying a stay, and allowing the permitted activities to proceed, would likely result in irreparable harm to the Applicant's interests. There was insufficient evidence to conclude that denying a stay would likely result in permanent contamination or other harm to natural resources such as the aquifer, springs, or marsh. In addition, the Tribunal found that the Applicant was entitled to compensation for damage arising from Crew's oil and gas activities on the Crown lands that are leased by the Applicant.

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 found that Crew provided evidence that it would suffer increased costs if a stay was granted and construction of the well was delayed until the merits of the appeal were decided. The Tribunal found that the risk of financial harm to Crew's interests, if a stay was granted, outweighed the potential harm to Applicant's interests if a stay was denied.

Accordingly, the application for a stay was denied.

Mediation or Negotiation leading to a Consent Order

The Tribunal encourages parties to resolve the issues underlying an appeal at any time in the appeal process and avoid the need for a formal hearing. The Tribunal's procedures for assisting in dispute resolution include 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.

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.

Concerns about water contamination resolved by consent

2013-OGA-004(a) Encana Corporation v. British Columbia Oil and Gas Commission (Wesley and Laurene Ilnisky, Third Parties)

Decision Date: April 22, 2014

Panel: Gabriella Lang

Encana appealed a permit issued by the Commission, which authorized Encana to construct and operate a pipeline, subject to a number of conditions. Encana appealed the Permit on the basis that two of the conditions provided in the permit were unwarranted in the circumstances.

Encana applied for the permit on March 23, 2010. The pipeline, which was the subject of the permit, was planned to transverse the northeast corner of a parcel of land owned by Laurene and Wesley Ilnisky (the "Landowners"), and would be used to transport hydraulic fracturing water. After applying for the permit, Encana sent the Landowners a stakeholder consultation letter, which described the application and showed a map of the applied-for pipeline. In response to the consultation letter, the Landowners raised concerns about, among other things, the potential for contamination of two water source dugouts located on their property, approximately 547m and 647m from the applied-for pipeline.

On April 30, 2013, the Commission issued the permit to Encana, subject to a number of conditions. Some of the conditions appeared to respond to the concerns raised by the Landowners. Two such conditions may be broadly summarized as follows: condition 6 of the permit required Encana to identify, in their emergency response plan, the water source dugouts and associated drainage connectivity as "specific value at risk of contamination"; condition 7 required Encana to take water samples from the water source dugouts and conduct contamination testing on an ongoing basis.

On May 15, 2013, the Landowners appealed the permit to the Tribunal, raising concerns with the use of a Flexsteel pipe for the pipeline, and requesting that Encana perform water testing, as proposed in condition 7, on each of the water source dugouts "after each Spring run off". However, the Landowners subsequently withdrew their appeal.

On May 30, 2013, Encana appealed the permit on the basis that conditions 6 and 7 were not warranted in the circumstances. As a remedy, Encana requested that the Tribunal strike the two conditions.

Encana requested a settlement meeting (mediation) to take place during the time when the appeal hearing was scheduled to take place. The Tribunal granted this request, as it was supported by all parties to the appeal.

During the mediation, the parties reached an agreement with respect to conditions 6 and 7 of the permit. With the consent of the parties, the Tribunal sent the matter back to the Commission with directions to delete conditions 6 and 7 and replace them with two new conditions. Condition 6 was only subject to minor changes in the language of the condition. Condition 7 was amended to require Encana to perform surveys of the pipeline for leaks on an ongoing basis, rather than requiring Encana to perform water sampling and testing.

Accordingly, the matter was sent back to the Commission with directions to amend the permit, with the parties' consent.

Final Decisions on the Merits of the Appeals

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

Permit amendment following trespass leads to appeal

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

Decision Date: January 10, 2014

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

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

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

In September 2012, Murphy Oil realized that, due to a surveying error, part of the pipeline had been bored under the corner 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. Murphy Oil notified the Commission and Ms. Hauber of the situation.

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

Meanwhile, Murphy Oil applied for an amendment of its pipeline permit, believing that moving the pipeline would be more disruptive than leaving it in place. As part of the statutory requirements for its amendment application, Murphy Oil notified and consulted with Ms. Hauber regarding the proposed amendment. In response, she provided written submissions on three occasions expressing concerns about Murphy Oil'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 giving Murphy Oil a right of entry to, and access across, Ms. Hauber's land, subject to certain conditions. One of those conditions is that Murphy Oil must pay Ms. Hauber $1,000 as "partial compensation."

On June 3, 2013, Ms. Hauber appealed the permit amendment to the Tribunal on the basis that: the Commission did not consider Ms. Hauber's concerns that Murphy Oil was trespassing on her land; the Surface Rights Board ignored the fact that Murphy Oil was trespassing; and, the amendment issued by the Commission and the order issued by the Surface Rights Board allow Murphy Oil to contravene the law and disregard Ms. Hauber's rights as a land owner. Ms. Hauber requested that the Tribunal rescind the Commission's decision to amend the permit, or alternatively, remit the matter back to the Commission with certain directions.

As a preliminary matter, Ms. Hauber requested a stay of the amendment, pending the Tribunal's decision on the merits of her appeal. On July 12, 2013, the Tribunal denied the application for a stay (Decision No. 2013-OGA-005(a)).

The merits of the appeal were heard by way of written submissions. The main issue was whether the Commission issued the amended permit without

due regard to Ms. Hauber's submissions in response to the proposed permit amendment.

Before turning to that issue, the Tribunal noted that it had no jurisdiction to address some of the matters raised in Ms. Hauber's Notice of Appeal. Specifically, it was beyond the Tribunal's jurisdiction to determine whether the pipelines located beneath her land constitute a trespass under the *Trespass Act*, or any other enactment. The Tribunal also had no the jurisdiction to provide compensation to Ms. Hauber for any trespass claims, or provide a remedy for any errors or issues arising from the Surface Rights Board's process or decision.

The Tribunal rejected Ms. Hauber's argument that, due to the trespass by Murphy Oil, the permit amendment should not be allowed to stand as an 'after-the-fact' approval. The Tribunal found that, although Murphy Oil was in a state of noncompliance until the amendment was issued, the Commission had to deal with the situation by either granting the amendment or requiring Murphy Oil to move the pipeline off of Ms. Hauber's land. The document evidence showed that the Commission gave due regard to Ms. Hauber's submissions, and weighed the potential impacts of authorizing the amendment and leaving the pipeline in place, versus requiring the pipeline to be relocated off of Ms. Hauber's land. The Tribunal found that, given the potential impacts of removing and re-boring the portion of the pipeline on Ms. Hauber's land, and the limited impact that the pipeline had on her land, it was appropriate to issue the amendment with conditions that mitigate the impact on her land.

Accordingly, the appeal was dismissed.

Landowners object to pipeline route across their land

2015-OGA-001(a) and 2015-OGA-002(b) Robert and Maxine Dilworth, Olaf and Francis Jorgensen v. Oil and Gas Commission (Encana Corporation, Third Party)

Decision Date: June 7, 2016

Panel: Gregory J. Tucker, James Hackett, Douglas VanDine

Robert and Maxine Dilworth, and Olaf and Francis Jorgensen, filed two appeals against a decision of the Commission to issue a permit authorizing Encana to construct and operate a pipeline. The pipeline crosses parcels of land owned by the Dilworths and the Jorgensens, respectively, near Dawson Creek, BC.

Before the permit was issued, Encana consulted with the Dilworths and the Jorgensens about the proposed pipeline. During the consultation process, the Dilworths provided written submissions to the Commission expressing their concerns about Encana's preferred route for the pipeline across their land. The Dilworths proposed two alternate routes. The Jorgensens did not provide written submissions to the Commission regarding the proposed pipeline, but they expressed their concerns verbally during discussions with Encana. Following the consultation process, Encana provided a consultation report to the Commission as part of its permit application. The consultation report stated that Encana was still negotiating with the Dilworths. It also stated that Encana had failed to reach an agreement with the Jorgensens but "no project specific concerns have been raised."

The Commission's decision to issue the permit included a written rationale for the decision. The rationale included a discussion of alternate routes for the pipeline, particularly in regard to the Dilworth's

land. Regarding the Jorgensens, the rationale stated that there were no objections or outstanding concerns.

The Dilworths appealed the permit on the basis that the Commission failed to give due regard to their written submissions. They also argued that Encana misled them to believe that it had an agreement with the previous owner of their land regarding the pipeline. The Jorgensens appealed on the basis that the permit was issued without due regard to their verbal objections and Encana's consultation report. They also argued that the consultation report was defective because it did not include their verbal concerns. In both cases, the Appellants argued that, had the Commission given due regard to their respective submissions, an alternate pipeline route would have been required. The Appellants requested that the Tribunal rescind the permit. The appeals were heard together.

Regarding the Dilworth's appeal, the Tribunal found that a statement by an Encana representative at a consultation meeting left the Dilworths with the impression that the previous owner of their land had consented to the project and that, as a result, they were not entitled to object to the project. However, the Tribunal found that Encana's representative did not intentionally mislead the Dilworths, and the Commission corrected their misunderstanding at a subsequent meeting. Moreover, the Dilworths lost no right or benefit, and Encana gained no benefit, as a result of the misunderstanding. The Tribunal concluded that those circumstances did not warrant rescinding the permit. The Tribunal also found that the Commission was aware that a land owner was entitled to object to a project even if the land owner had consented to Encana doing a survey on their land. Finally, the Tribunal found that the Commission gave due regard to the Dilworths' submissions regarding the proposed pipeline route and possible alternate routes. Based on the evidence, the Tribunal found that the alternate routes were not better options.

Regarding the Jorgensens' appeal, the Tribunal found that the legislation requires a consultation report to include information about the formal consultation process that is required by the legislation, but the report need not contain information about any informal consultations that may take place. The Tribunal found that although Encana had engaged in a lengthy informal consultation process with land owners affected by the project, including the Jorgensens, Encana had also complied with the legislation's requirements regarding the formal consultation process and the contents of the consultation report. The Tribunal found that Encana's notice and invitation to consult clearly indicated that land owners could provide written submissions to either the Commission or Encana, but the Jorgensens provided neither. The Tribunal found that the statement in the consultation report that Encana had not reached an agreement with the Jorgensens, and that they had not raised project specific concerns, was accurate. To the extent that the Jorgensens had verbally objected to the project, it was in support of their neighbour and not in regard to their own property. Consequently, the Tribunal concluded that the Jorgensens had no standing to appeal the permit under section 72(2) of the *Act*.

However, the Tribunal went on to consider the substantive issues raised by the Jorgensens. The Tribunal found that none of the issues that the Jorgensens raised during the appeal process were raised by them before the permit was issued, and even if those issues had been raised beforehand, they would not have justified an alternate pipeline route. The issues were relatively minor, and are the subject of compensation that Encana pays to land owners.

Accordingly, the appeals were dismissed.

Landowners' concerns about access road to an LNG facility were given due regard

2015-OGA-006(a) Anthony James Formby, Eleanor Gertrude McDaniel (deceased), Jeanette Eleanor Formby, Maryann Catherine Liddle, Maureen Ralph, Michael Forhan, Norman Forhan, Olga Jeanette Formby, Paul Charles Formby v. Oil and Gas Commission (Pacific Northwest LNG Ltd., Third Party)

Decision Date: April 13, 2016

Panel: Jeffrey Hand

Nine individuals (collectively, the "Appellants") appealed a decision of the Commission to issue a permit authorizing Pacific Northwest LNG Ltd. ("PNW") to construct, operate and maintain an oil and gas road on a parcel of land owned by the Appellants. The Appellants' land is located south of Port Edward, BC, and immediately east of Lelu Island.

PNW is the general partner of the Pacific Northwest LNG Limited Partnership, which was formed for the purpose of constructing, owning and operating a liquefied natural gas facility on Lelu Island. A railway line runs in a north/south direction between the Appellants' land and Lelu Island. PNW proposed to access Lelu Island from an existing public road on the mainland to the east of the Appellants' land, by building a road across the Appellants' land and, from there, building a bridge over the railway line and a slough, onto Lelu Island.

In late 2014, PNW began discussions with the Appellants regarding this plan. In December 2014, PNW sent an invitation to consult to the Appellants, advising them of its intention to apply for a permit to build the road.

On January 6, 2015, the Appellants provided a written submission to PNW, expressing a number of concerns about the proposed road.

On January 19, 2015, representatives of PNW met with some of the Appellants to discuss the location of the road.

On January 22, 2015, PNW provided digital drawings of the proposed roadway to one of the Appellants and a real estate appraiser who had been retained by the Appellants.

In February 2016, PNW applied to the Commission for the road permit. Included with the application was a cover letter indicating that the road would be 208 metres long, 13.3 metres wide, and within a construction corridor 103 metres wide.

On May 12, 2015, the Commission wrote to PNW asking for clarification as to why it sought a right-of-way of 103 metres in width for a road that would only be 13.3 metres in width. In response, PNW advised that it could reduce the right-of-way to 75 metres wide, but this width was necessary to support a fill embankment for the road.

On June 2, 2015, the Commission asked PNW to provide a technical rationale explaining why this amount of fill was necessary. In response, PNW advised that this volume of fill was required to build the road up to the elevation needed for clearance over the railway line. PNW explained that the bridge needed to be at least 11 metres above the railway line, to provide sufficient clearance for railway cars. PNW also provided the Commission with a copy of the design drawings that were provided to the Appellants on January 22, 2015. PNW subsequently amended it road permit application by reducing the maximum width of the right-of-way to 75 metres.

On July 17, 2015, the Appellants provided a second written submission expressing concerns about the proposed road.

On a July 24, 2015, the Commission issued the road permit to PNW. The permit includes authorization for a 75-metre wide right-of-way based on the design drawings that were submitted by PNW.

As a condition of the road permit, PNW was not authorized to begin construction of the road until the primary oil and gas activity (i.e., the proposed liquid natural gas facility on Lelu Island) has been authorized by the Commission.

The Appellants appealed the road permit on the basis that the size of the right-of-way was excessive, the embankment was unnecessary, and the Commission failed to properly consider whether a 75-metre wide right-of-way was necessary to support construction of the road. The Appellants requested an order reducing the width of the right-of-way, or alternatively, an order remitting the matter back to the Commission for reconsideration.

The Tribunal considered whether the Commission gave "due regard" to the Appellants' concerns before issuing the road permit, as required by section 72(2) of the *Oil and Gas Activities Act*. The Tribunal reviewed the concerns that were expressed by the Appellants in the two written submissions they provided to the Commission before the road permit was issued. The Tribunal noted that none of those concerns related to the width of the road right-of-way. The Tribunal found that the Commission's evidence showed that it gave due regard to each of the Appellants' concerns, and the Commission went further by asking PNW to explain the proposed width of the right-of-way. The Tribunal also found that the design drawings that PNW had provided to the Appellants and the Commission were detailed enough to understand the size and boundaries of the fill embankment that was necessary to increase the road elevation over the railway line. In addition, the Tribunal found that the Appellants provided no evidence to establish that the road could be safely constructed with a smaller embankment, or that the embankment was unnecessary to safely construct the road.

Accordingly, the appeal was dismissed.

Increased sour gas level in pipeline near home leads to appeal

2015-OGA-007(a) Karl Bryce Mattson v. Oil and Gas Commission (ARC Resources Ltd., Third Party)

Decision Date: November 23, 2016

Panel: Cindy Derkaz

Karl Bryce Mattson appealed a decision of the Commission to amend a pipeline permit held by ARC Resources Ltd. ("ARC"). The amendment increased the maximum permitted hydrogen sulfide content from 0.5% to 1.4% in the pipeline, which crosses private lands including land owned by the Appellant. Gas containing hydrogen sulfide is known as "sour gas" and is highly toxic. The pipeline is part of a system used to transport sour gas to a processing plant near Rolla. The pipeline was authorized by a permit issued in 2010. At that time, the permit authorized a maximum hydrogen sulfide content of 0.5%.

The Appellant and his family live in a house on a farm near Rolla, outside of Dawson Creek, BC. There is also an art studio and guest house on the farm. The house and the art studio are located approximately 91 metres and 40 metres, respectively, from the pipeline. The pipeline is buried at least 1.5 metres underground.

In 2014, ARC drilled a new natural gas well which initially showed a hydrogen sulfide content of 0.9%. ARC sought to tie in the new well to its existing pipeline, but it required a permit amendment to allow the flow of gas with a higher hydrogen sulfide content.

In early 2015, ARC began the process of notifying and consulting with land owners about the proposed permit amendment. Of the 12 landowners who were notified, only the Appellant responded. ARC's representatives met with the Appellant in June 2015 to discuss the proposal. The minutes of that meeting were forwarded to the Appellant for his

review. ARC sent two more emails to the Appellant requesting his comments on the minutes. After receiving no response from the Appellant, ARC forwarded the meeting minutes to the Commission. The Commission issued the permit amendment in August 2015 after considering ARC's application, including the meeting minutes.

The Appellant appealed the permit amendment on several grounds. The Appellant submitted that the increase in the maximum hydrogen sulfide level exceeded ARC's needs given that the new well tested at 0.9%, ARC should have a better emergency response plan for the pipeline, and there should be better and wider consultation zones.

Based on the scope of appeals by land owners as provided in section 72(2) of the *Oil and Gas Activities Act*, the Tribunal considered whether the Commission decided to issue the permit amendment without giving due regard to a submission previously made by the Appellant. The Tribunal reviewed the minutes of the June 2015 meeting between the Appellant and ARC, and found that the Commission gave due regard to the Appellant's concerns. The Tribunal also found that the increase in the permitted maximum concentration of hydrogen sulfide to 1.4% was reasonable given ARC's test results which showed a trend towards higher hydrogen sulfide concentrations in the areas where it was drilling new wells that would tie in to the pipeline. Regarding the Appellant's safety concerns, the Tribunal found that the evidence established that the pipeline was constructed to standards that apply to pipelines which carry gas with a hydrogen sulfide concentration of 1.4%, and there would be no change in the pipeline's operating pressure or temperature.

Finally, during the appeal hearing, ARC agreed to update its emergency response plan for the pipeline to show the location of the art studio and guest house on the Appellant's land, and to note that the Appellant has requested immediate evacuation in the event of an incident. The Tribunal directed ARC to make those changes, and to advise the Appellant when the updates were complete.

Accordingly, the appeal was dismissed.

Summaries of Court Decisions Related to the Tribunal

There were no court decisions issued on judicial reviews of Tribunal decisions during this 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, 2016). 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 The following provisions of the *Administrative Tribunals Act* apply to the appeal tribunal:

(a) Part 1 [*Interpretation and Application*];

(b) Part 2 [*Appointments*];

(c) Part 3 [*Clustering*];

(d) Part 4 [*Practice and Procedure*], except the following:

(i) section 23 [*notice of appeal (exclusive of prescribed fee)*];

(ii) section 25 [*appeal does not operate as stay*];

(iii) section 34 (1) and (2) [*party power to compel witnesses and require disclosure*];

(e) section 44 [*tribunal without jurisdiction over constitutional questions*];

(f) section 46.3 [*tribunal without jurisdiction to apply the Human Rights Code*];

(g) Part 6 [*Costs and Sanctions*], except section 47.2 (1) (a) and (c) [*government and agents of government*];

(h) Part 7 [*Decisions*];

(i) Part 8 [*Immunities*];

(j) section 57 [*time limit for judicial review*];
(k) section 59 [*standard of review without privative clause*];
(l) section 59.1 [*surveys*];
(m) section 59.2 [*reporting*];
(n) Part 10 [*Miscellaneous*], except section 62 [*application of Act to BC Review Board*].

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 operating area is located,
(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 operating area is located, 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 operating area is located 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 operating area is located 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, a land owner notified by the applicant under section 22 (2) 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 the operating area is located 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

Part 1 – Interpretation and Application

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;

"court" means the Supreme Court;

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

"facilitated settlement process" means a process established under section 28 [*facilitated settlement*];

"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;

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

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

Application by incorporation

1.1 (1) The provisions of this Act do not operate, except as made applicable to a tribunal or other body by another enactment.

(2) If another enactment refers to a provision of that enactment or of a third enactment that incorporates a provision of this Act, the reference is deemed to include a reference to the incorporated provision of this Act.

(3) If another enactment incorporates section 1 [*definitions*] of this Act,

(a) the definitions in this Act apply to provisions of this Act incorporated by the other enactment, but

(b) unless a contrary intention appears in the other enactment, the definitions in this Act do not apply to a use of a term in the other enactment outside of the incorporated provisions.

(4) Subsection (1) does not apply to this section or to section 62 [*application of Act to BC Review Board*].

Part 2 – Appointments

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.

Part 3 – Clustering

Designating clusters

10.1 (1) The Lieutenant Governor in Council may, by regulation, designate 2 or more tribunals as a cluster if, in the opinion of the Lieutenant Governor in Council, the matters that the tribunals deal with are such that they can operate more effectively and efficiently as part of a cluster than alone.

(2) The Lieutenant Governor in Council may, by regulation, do one or both of the following:

(a) remove a tribunal from a cluster;

(b) add a tribunal to a cluster.

(3) If a tribunal is in a cluster, this Part applies to the tribunal despite any other enactment.

Executive chair

10.2 (1) The Lieutenant Governor in Council may, after a merit-based process, appoint an executive chair to be responsible for the effective management and operation of all of the tribunals in a cluster.

(2) The executive chair has all the powers, duties and immunities of the chair of each tribunal in the cluster under an enactment.

(3) To the extent necessary to give effect to subsection (2), and subject to this Part, if a tribunal is in a cluster, any reference to the chair of the tribunal in an enactment is deemed to be a reference to the executive chair of the cluster.

(4) The executive chair holds office for an initial term of 3 to 5 years.

(5) The executive chair may be reappointed by the Lieutenant Governor in Council, after a merit-based process, for additional terms of up to 5 years.

(6) The executive chair must have all the qualifications required of a chair of any tribunal in the cluster under any enactment.

(7) The executive chair is a member of each of the tribunals in the cluster for which he or she is responsible.

Tribunal chairs

10.3 (1) Subject to section 10.6 [*transition*], the appointing authority may, after a merit-based process, appoint a tribunal chair for a tribunal in the cluster under the direction of the executive chair of that cluster.

(2) The term of appointment of a tribunal chair is the same as the term of appointment of the chair of the tribunal under the tribunal's enabling Act.

(3) A tribunal chair may be reappointed, after a merit-based process, on the same basis as the chair of the tribunal under the tribunal's enabling Act.

(4) The executive chair may delegate to a tribunal chair a power or duty of the chair of the tribunal under an enactment, including a power under the enactment to delegate a power or duty to another person.

(5) The tribunal chair has all the immunities of the chair of the tribunal under an enactment.

(6) The appointing authority may appoint the executive chair of a cluster to also be the tribunal chair of a tribunal in the cluster.

(7) The tribunal chair is a member of the tribunal for which he or she is appointed.

Alternate executive chair

10.4 (1) The Lieutenant Governor in Council may designate a member of a tribunal in a cluster, other than the executive chair of the cluster, as an alternate executive chair.

(2) If the executive chair of a cluster is absent or incapacitated, the alternate executive chair has all the powers and immunities and may perform all the duties of the executive chair.

Validity of tribunal acts

10.5 An act of a tribunal is not invalid because of a defect that is afterwards discovered in the appointment of an executive chair or tribunal chair.

Transition

10.6 (1) On the designation of a tribunal as part of a cluster under section 10.1 (1) or (2)(b) [*designating clusters*], the individual appointed as chair under the tribunal's enabling Act is no longer appointed under the tribunal's enabling Act and is deemed to be appointed as tribunal chair under section 10.3 [*tribunal chairs*].

(2) The term of the deemed appointment as tribunal chair under subsection (1) ends on the date the individual's appointment under the tribunal's enabling Act would have ended if the tribunal had not been designated as part of a cluster.

(3) On a tribunal in a cluster ceasing to be in any cluster, the individual appointed as tribunal chair is deemed to be the chair under the tribunal's enabling Act for the remainder of the term of his or her appointment as tribunal chair.

(4) On an individual appointed as tribunal chair being appointed as executive chair of a cluster, the individual remains the tribunal chair until his or her appointment as tribunal chair expires or is terminated.

(5) This section applies despite any other provision in this Part.

Part 4 – Practice and Procedure

General power to make rules respecting practice and procedure

11 (1) Subject to an enactment applicable to the tribunal, 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 facilitated settlement 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;

(i.1) requiring an intervener to provide an address for service or delivery of notices, orders and other documents;

(j) providing that a party's address of record is to be treated as an address for service;

(j.1) providing that an intervener'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;

(v.1) respecting filing and service of a summons to a witness;

(w) respecting applications to set aside any summons served by a party;

(x) requiring or allowing that a process be conducted electronically, with or without conditions.

(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.

(5) Rules for the tribunal may be different for different classes of disputes, claims, issues and circumstances.

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 must be consistent with any enactment applying to the tribunal and any rule of practice or 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.

(1.1) Practice directives must be consistent with any enactment applying to the tribunal and any rule of practice or 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 the enactments governing the application.

(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.

Facilitated settlement

28 (1) The chair may appoint a member or staff of the tribunal or another person to conduct a facilitated settlement process to resolve one or more issues in dispute.

(2) The tribunal may require 2 or more parties to participate in the facilitated settlement process, in accordance with the rules of the tribunal.

(3) The tribunal may make the consent of one, all or none of the parties to the application a condition of a facilitated settlement process, in accordance with the rules of the tribunal.

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 facilitated settlement process, or

(b) a statement made by a party in a facilitated settlement 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) [Repealed 2015-10-18.]

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.

Part 5 — Jurisdiction over Legal Questions

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.

Part 6 — Costs and Sanctions

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.

Security for costs

47.1 (1) The tribunal may require an applicant or intervener to deposit with it an amount of money it considers sufficient to cover all or part of either or both of the following:

(a) the anticipated costs of the other parties or interveners;

(b) the anticipated actual costs and expenses of the tribunal in connection with the application.

(2) An order under section 47 [*power to award costs*] may include directions respecting the disposition of money deposited under subsection (1).

Government and agents of government

47.2 (1) If a party is an agent or representative of the government,

(a) an order under section 47 (1) (a) and (b) [*power to award costs*] may not be made against the party,

(b) an order under section 47 (1) (c) [*power to award costs*] may not be made against the party, and

…

(2) An order under section 47 (1) (c) may not be made against the government.

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.

Part 7 — Decisions

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.

Part 8 — Immunities

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.

Part 9 — Accountability and Judicial Review

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.

Surveys

59.1 For the purposes of evaluating and improving its services, the tribunal may conduct surveys in the course of or after providing those services.

Reporting

59.2 At the times, and in the form and manner, prescribed by regulation, the tribunal must submit the following to the minister responsible for the tribunal:

(a) a review of the tribunal's operations during the preceding period;

(b) performance indicators for the preceding period;

(c) details on the nature and number of applications and other matters received or commenced by the tribunal during the preceding period;

(d) details of the time from filing or commencement to decision of the applications and other matters disposed of by the tribunal in the preceding period;

(e) results of any surveys carried out by or on behalf of the tribunal during the preceding period;

(f) a forecast of workload for the succeeding period;

(g) trends or special problems foreseen by the tribunal;

(h) plans for improving the tribunal's operations in the future;

(i) other information as prescribed by regulation.

Part 10 — Miscellaneous

Power to make regulations

60 (1) 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;

(e.1) establishing restrictions on the authority of a tribunal under sections 47.1 [*security for costs*] and 47.2 [*government and agents of government*], including, without limiting this,

(i) prescribing limits, rates and tariffs relating to amounts that may be required to be paid or deposited, and

(ii) prescribing what are to be considered costs to the government in relation to an application and how those are to be determined;

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

(g) prescribing the form, manner and timing of reports to the minister responsible for the tribunal;

(h) prescribing information that must be included in reports to the minister responsible for the tribunal;

(i) prescribing information the tribunal must make public.

(2) The Lieutenant Governor in Council may make different regulations under subsection (1) for different tribunals.

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.

BRITISH
COLUMBIA