Energy Resource Appeal Tribunal

PRACTICE AND PROCEDURE MANUAL

July 1, 2016
Amended: April 2019
Amended: August 2023

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DISCLAIMER

The legislation referred to in this Manual is subject to amendment from time to time and to judicial interpretation. The Manual may not reflect recent amendments to the legislation and should not be relied upon as an accurate statement of the existing law. It is a guide to the Tribunal's practices and procedures only. An official version of the legislation may be obtained from Crown Publications or online through BC Laws (http://www.bclaws.ca/).

1.0 INTRODUCTION

The Energy Resource Appeal Tribunal (the "Tribunal") was established in 2010 under section 19 of the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36. It is a quasi-judicial tribunal with statutory authority to hear appeals from administrative decisions made under the *Oil and Gas Activities Act*.

The appeal process is governed by the legislated requirements set out in the *Oil and Gas Activities Act*, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, as well as by the common law principles of procedural fairness and natural justice.

In addition to hearing appeals, the Tribunal produces a report which is provided to the Legislative Assembly. A copy of the Tribunal's reports are posted on the Tribunal's website (www.bcerat.ca), and is available upon request.

To ensure that the appeal process is open and understandable to the public, the Tribunal has developed this Manual. It contains information about the Tribunal itself, the legislated procedures that the Tribunal is required to follow, the Tribunal's Rules created pursuant to section 11 of the *Administrative Tribunals Act*, and the policies the Tribunal has adopted to fill in the procedural gaps left by the legislation and the Rules.

Parties that are involved in the appeal process can expect the Tribunal to follow the legislated procedures, the Rules, and the policies set out in this Manual. If a matter arises during the course of an appeal that is not addressed by the legislation, the Rules, or the policies and procedures set out in this Manual, the Tribunal will do whatever is necessary to enable it to adjudicate fairly, effectively and completely on the appeal. Further, the Tribunal may dispense with compliance with any or all of a Tribunal policy or procedure when it is appropriate in the circumstances.

The Tribunal will make every effort to process appeals in a timely fashion and issue decisions expeditiously. With the cooperation of the parties and their attention to the procedures and policies outlined in this Manual, the Tribunal will be able to achieve this goal.

2.0 THE TRIBUNAL

The Tribunal is independent, in that it is not part of the Oil and Gas Commission which makes the decisions that can be appealed to the Tribunal, and it does not have any of the information or documents considered by the Commission when it made its decision. The Tribunal was created as a separate entity to ensure that it could hear appeals from the Commission's decisions in an independent and fair manner. The Tribunal is committed to providing a fair, impartial and independent appeal process.

Members

The Tribunal consists of a full-time chair, part-time vice-chair(s) and a number of part-time members. According to Part 2 of the *Administrative Tribunals Act*, the chair is appointed by Cabinet after a merit-based process for an initial term of 3 to 5 years. The vice-chair(s) and other part-time members are appointed by Cabinet, in consultation with the chair, after a merit-based process for an initial term of 2 to 4 years. All of the members may be reappointed for additional terms of up to 5 years.

The Tribunal has a roster of highly qualified members including registered professional foresters, professional engineers, biologists, and lawyers with expertise in the areas of environmental and administrative law. They bring with them a wide range of backgrounds and perspectives.

All Tribunal members are required to faithfully, honestly and impartially perform their duties (section 30 of the *Administrative Tribunals Act*).

Role of the Chair

Under section 9 of the *Administrative Tribunals Act*, the chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among the members.

Role of the Vice-Chair

The vice-chair acts as chair of the Tribunal in the chair's absence.

Composition of panels

Section 26 of the *Administrative Tribunals Act* states that the chair may organize the Tribunal into panels consisting of one or more members.

If members of the Tribunal hear an appeal as a panel, the panel has all of the powers and duties given to the Tribunal. Further, an order, determination or decision of a panel is deemed to be an order, determination or decision of the Tribunal.

When determining who will be on a particular panel, the chair will consider the background, qualifications and availability of the members. Oral hearings will be conducted by a panel of one or three members, depending on the length and complexity of the hearing. Written appeals are normally considered by a panel of one, often the chair of the Tribunal.

Quorum

Section 26 of the *Administrative Tribunals Act* provides that, if one member of a three-person panel is unable to complete the member's duties, the remaining members of the panel may continue to hear and decide the matter with the consent of the Tribunal's chair.

If the panel is comprised of one member, the hearing may continue with a new member provided that all parties consent.

Withdrawal or disqualification of a Tribunal member on the grounds of bias

If the chair or a member of a panel becomes aware of any facts that would lead an informed person, viewing the matter reasonably and practically, to conclude that a member, whether consciously or unconsciously, would not decide a matter fairly, the member will be prohibited from conducting the appeal unless consent is obtained from all parties to continue. In addition, any party to an appeal may challenge a member on the basis of a real or reasonable apprehension of bias.

To raise an allegation of bias during a hearing, the party should make a motion to the panel promptly. All parties will be given an opportunity to make submissions on the motion before a decision is rendered.

If the panel determines that the allegation has merit, the panel member will disqualify him/herself and withdraw from the panel hearing the appeal, unless consent is obtained from all parties for that member to continue. If the parties do not consent, the remaining members of the panel may continue with the hearing, provided there are enough panel members to constitute a quorum. Alternatively, the hearing will be adjourned until a new member is selected by the chair.

Communicating and filing documents with the Tribunal

All appeal-related correspondence **must** be sent to the Tribunal, and addressed to the Chair, the panel chair (if the hearing has commenced), the Tribunal's Registrar, or staff in the Tribunal office. Correspondence must **not** be sent to individual Tribunal member's private residences, email addresses or offices. Tribunal members will not contact a party, accept personal telephone calls from a party, or attend private meetings with a party while that party is involved in the appeal process. Nor will a member discuss his or her reasons for a decision. Once a decision is rendered in an appeal, the decision "speaks for itself".

Rule 12 [Filing documents with the Tribunal]

To ensure that the appeal process is kept open and fair to the parties and interveners, any correspondence sent to the Tribunal in relation to an appeal must be copied to all other parties and interveners to the appeal. Correspondence sent to the Tribunal should include the appeal file number (found in the upper right hand corner of the Tribunal's correspondence).

Letters, submissions and all other materials (defined generally as "documents" in the Rules) may be sent to the Tribunal by mail, courier, fax, email or may be hand delivered. However, if the total number of pages being sent by email is greater than 10, a printed copy (hard copy) must also be sent to the Tribunal, unless the Tribunal approves otherwise.

If the Tribunal requires multiple copies of a document to be provided to the Tribunal, a copy of the document may be sent to the Tribunal by email or by fax; however, the required number of paper copies must also be provided to

the Tribunal by mail, courier or hand delivery. The Tribunal will not make additional copies. In addition, any attachments emailed to the Tribunal must be in a format supported by the software used by the Tribunal (contact the Tribunal for the formats which may be used).

Rule 12 also sets out when a document is deemed to be delivered to the Tribunal. It states that if a document is sent to the Tribunal by fax or email, the document is not considered delivered until the transmission is received by the Tribunal, regardless of the date or time that it is shown to have been sent. Further, if a document is received by the Tribunal after the business day (defined in Rule 1 [Definitions] as "8:30 am to 4:30 pm, Monday through Friday, excluding public holidays"), the document is deemed to be delivered on the next business day.

The Tribunal's powers and order-making authority

In addition to the common law powers given to tribunals to determine their own procedures and control their own processes, the Tribunal has been granted broad powers to make orders and decisions.

Under the *Administrative Tribunals Act*, the Tribunal has the power to make orders to "facilitate the just and timely resolution of an application the tribunal". In particular, section 14 of the *Administrative Tribunals Act* states that the Tribunal has the power to may make any order:

(a) for which a Rule is made by the Tribunal;

(b) for which a Rule is prescribed under section 60 of the *Administrative Tribunals Act*; or

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

Section 15 of the *Administrative Tribunals Act* allows the Tribunal to make interim orders in an appeal. In addition, sections 16 and 17 of the *Administrative Tribunals Act* give the Tribunal the power to make consent orders and orders incorporating the terms of a settlement.

The Tribunal also has broad decision-making powers under the *Oil and Gas Activities Act*. The Tribunal may:

(a) confirm, vary or rescind the decision appealed from, or

(b) send the matter back, with directions, to the person who made the decision under appeal.

Tribunal office

The Tribunal shares an office and staff with the Environmental Appeal Board, the Forest Appeals Commission, and a number of other administrative tribunals. The combined office has a small full-time staff consisting of an Executive Director/General Counsel, Registrar, Office Administrator, Manager of Research and Mediation, Research Officer, and support staff. The office provides registry services, legal advice, research support, systems support,

financial and administrative services, training and communications support for the Tribunal and the other tribunals administered through the office.

The Tribunal's contact information is as follows:

Energy Resource Appeal Tribunal
4th Floor, 747 Fort Street
Victoria BC V8W 3E9
Phone: (250) 387-3464
Fax: (250) 356-9923
Website: www.bcerat.ca

The office's mailing address is:

Energy Resource Appeal Tribunal
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

3.0 PUBLIC PROCEEDINGS/FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

Public Proceedings

The appeal process is public in nature. In accordance with procedural fairness and Rule 12 [Filing documents with the Tribunal], information provided to the Tribunal by one party or intervener must also be provided to all other parties and interveners to the appeal. Therefore, no party or intervener should expect that any information provided to the Tribunal in the context of the appeal will be kept private or confidential, except in special circumstances that are described below. Further, section 41 of the *Administrative Tribunals Act* requires oral hearings to be open to the public and for the Tribunal to make a document submitted in a hearing accessible to the public subject to certain exceptions.

Freedom of Information and Protection of Privacy

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*. Information may be requested by a member of the public from an appeal file. The "appeal file" is the record of communications maintained by the Tribunal regarding an appeal, including all communications filed with the Tribunal, or delivered by the Tribunal to the parties or interveners, except for information:

- received in confidence pursuant to section 42 of the *Administrative Tribunals Act*;
- received by the Tribunal as part of a settlement (mediation) process (section 29 of the *Administrative Tribunals Act*);

- falling under an exception in the *Freedom of Information and Protection of Privacy Act*; or
- falling under an exception in section 61 of the *Administrative Tribunals Act*.

The names of parties, interveners, representatives and witnesses in an appeal will appear in the Tribunal's published decisions which are posted on the Tribunal's website, and may appear in its annual report. Some decisions of the Tribunal may also be published in legal journals and on law-related websites (e.g., LexisNexis® Quicklaw®).

Parties to appeals should be aware that information supplied to the Tribunal may be subject to public scrutiny and review.

4.0 STARTING AN APPEAL

What can be appealed and who can appeal

Part 6 of the *Oil and Gas Activities Act* sets out the decisions made by the Oil and Gas Commission that are appealable to the Tribunal. They 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 (see further the definition of "oil and gas activity" in section 1(1) of the *Act*). Decisions made by a review official may also be appealed to the Tribunal.

It is important to note, however, that not everyone has the same right to appeal these decisions. The types of decisions that may be appealed are divided into:

- decisions that may be appealed by an "eligible person"; and,
- decisions that may be appealed by an owner of land on which an oil and gas activity is permitted to be carried out under this *Act* (a "land owner").

If a person does not fall within the group of persons allowed to appeal a certain type of decision under the *Oil and Gas Activities Act*, the Tribunal cannot accept the appeal. It is said that the person does not have "standing" to appeal.

Appeals by Eligible Persons

An "eligible person" is defined in section 69(1) of the *Oil and Gas Activities Act* as: an applicant for a permit, a permit holder or former permit holder, a person named in an order for non-compliance issued by an official under section 49(1) and a person who is subject to a finding of contravention by the Oil and Gas Commission under section 62.

For some purposes, an eligible person also includes a land owner. However, land owners cannot appeal the same decisions as the other eligible persons and their right of appeal will be discussed separately below.

The decisions that are appealable to the Tribunal are set out in the definition of "determination" in section 69(1) of the *Oil and Gas Activities Act*. They include the following:

- issuance of a permit;
- refusal to issue a permit;
- suspension or cancellation of a permit or a permission specified in a permit;
- an amendment to a permit or refusal to amend;
- the suspension or cancellation of an authorization for an activity related to oil and gas activity permitted by a permit;
- a declaration that a permit, a permission specified in a permit, or an authorization held by the permit holder, is spent;
- decisions regarding the transfer of a permit or authorization;
- an order to carry out actions for the purposes of restoration or the protection of public safety in relation to a permit, a permission in a permit, or an authorization that is cancelled, expired, or declared spent;
- an order issued by an official or the Oil and Gas Commission to address risks to the environment, safety and/or resource conservation under Division 2 of Part 5;
- a finding of contravention under section 62; and,
- an administrative penalty.

According to section 72(1)(a) of the *Oil and Gas Activities Act*, an eligible person may also appeal a review decision made under section 71 if the eligible person was a party to the review.

Appeals by Land Owners

An owner of land on which an oil and gas activity is permitted to be carried out under the *Oil and Gas Activities Act* may appeal fewer types of decisions (see section 69(1)(b) of the *Oil and Gas Activities Act*). They may appeal:

- a decision made by the Oil and Gas Commission under section 25 to issue a permit to carry out an oil and gas activity on the land of the land owner; and,
- a decision under section 31 to amend a permit, if the amendment changes the effect of the permit on the land of the land owner.

A land owner may also appeal a decision made by a review official under section 71 to vary a decision of the Oil and Gas Commission so that:

- a permit is amended, if the amendment changes the effect of the permit on the land of the land owner; or
- a permit is issued to carry out oil and gas activities on the land of a land owner.

How to file an appeal

In accordance with section 22 of the *Administrative Tribunals Act* and Rule 5 [Starting an appeal], to start an appeal a person must file a notice of appeal with the Tribunal. The Tribunal has created a notice of appeal form for each category of appellant: Form 1 for land owners, and Form 2 for eligible persons. If these forms are not used, the notice of appeal **MUST** be in writing and include:

(a) the appellant's name, address, and telephone number;

(b) if the appellant is represented by a lawyer or agent, the name and daytime/business telephone number of the representative;

(c) the address to which all official letters and documents are to be sent, which may be the person's current postal address, fax, or email;

(d) the identity of the decision that is being appealed (e.g., identify the name of the decision-maker, date of decision, what is the decision about);

(e) a description of what is wrong with the decision and why it should be changed (the grounds for appeal and particulars);

(f) a description of what the appellant wants the Tribunal to order at the conclusion of the appeal (the remedy sought); and

(g) the signature of the appellant or the appellant's representative.

The Tribunal also asks for the following information to be included:

- an email address (if available) for the appellant and/or the appellant's representative;
- the date that the appellant was notified of the decision; and
- a copy of each decision being appealed.

A notice of appeal may be filed by regular mail, registered or certified mail, courier, fax, hand delivery, or email.

If the appeal is not commenced in accordance with the requirements of section 22 of the *Administrative Tribunals Act*, the Rules, and the *Oil and Gas Activities Act*, the Tribunal may not have jurisdiction to hear the appeal, regardless of the merits of the appeal.

Time limit for filing the appeal

An eligible person must file an appeal within 30 days of the decision (section 20 of the *Oil and Gas Activities Act* and section 24(1) of the *Administrative Tribunals Act*).

A land owner must file a notice of appeal within 15 days of the day that the determination being appealed was made (section 72(7) of the *Oil and Gas Activities Act*).

The notices of appeal must be filed within the statutory appeal period unless the Tribunal grants the person an extension of time to file an appeal (see "Extension of time to appeal", below).

Extension of time to appeal

Section 24(2) of the *Administrative Tribunals Act* gives the Tribunal the power to extend the time limit for filing a notice of appeal if it is satisfied that "special circumstances" exist, even if the time for filing the appeal has already expired.

If a person is aware that he/she is filing an appeal after the appeal period has already expired, an application for an extension of time should be made at the same time as the appeal is filed. A request for an extension of time to file an appeal is attached at the end of Form 1 and Form 2 (the Notice of Appeal forms).

If the application attached to the form is not used, Rule 6 [Extension of time to file an appeal] requires that the application for an extension of time include a complete notice of appeal (a notice of appeal that complies with the requirements of Rule 5), as well as the reasons for the delay in filing the appeal, and any other special circumstances that the applicant believes will support an extension of time.

As stated in section 24(2) of the *Administrative Tribunals Act*, the Tribunal must be satisfied that "special circumstances" exist in order to grant an extension of time to appeal. The Tribunal will take into consideration the length of the delay, whether there is a reasonable and credible explanation for the delay, and the prejudice to those affected by the delay. Other factors not identified could be relevant depending on the circumstances of the particular case.

The Tribunal will provide the other parties with the notice of appeal and the application for an extension of time in accordance with the procedure below, and may offer them with an opportunity to comment on the extension application. However, the Tribunal will not set down a hearing or take any further action on the appeal unless the extension of time to file an appeal is granted. If the extension is not granted, the appeal will be dismissed.

Acknowledgement/Notification of the appeal (and file number)

When the Tribunal receives a notice of appeal, with or without an application to extend the time to file the appeal, it will assign a file number to the appeal.

In accordance with Rule 7 [Acknowledgement of appeal], the Tribunal will then write to the appellant to acknowledge receipt of the appeal, and will notify the Oil and Gas Commission (the respondent), as it made the decision under appeal. The file number will appear in the upper right corner of the letter. A party must include this file number on all subsequent correspondence with the Tribunal.

The Tribunal will also send notification of the appeal to any additional parties (third parties) identified in section 72 of the *Oil and Gas Activities Act*.

Incomplete (deficient) notice of appeal

If the notice of appeal does not contain the information required in Rule 5, it is considered deficient. In accordance with section 22(4) of the *Administrative Tribunals Act*, the chair (or the chair's delegate) will write to the appellant and identify:

(a) the deficiencies; and

(b) the date within which the deficiencies must be corrected.

If the deficiencies identified by the chair are not corrected by the date specified, the appeal may be deemed to be abandoned.

Filing a notice of appeal that is deficient will result in delays as the Tribunal will not take any action on the appeal until the deficiencies are corrected.

Rejection of a notice of appeal

In accordance with section 31 of the *Administrative Tribunals Act*, the Tribunal will reject a notice of appeal (summarily dismiss the appeal) if it is clear that:

(a) the notice of appeal was filed after the time limit for filing an appeal has expired and no extension of time is granted;

(b) the appellant does not have standing to appeal; or

(c) the Tribunal does not have jurisdiction over the subject matter of the appeal or the remedy sought.

As required by section 31 of the *Administrative Tribunals Act*, before making a decision to summarily dismiss an appeal, the Tribunal will give the appellant an opportunity to make submissions. The Tribunal may provide the respondent, and any other parties, with an opportunity to respond. It may also give interveners an opportunity to respond, depending on the circumstances.

When a notice of appeal is rejected, the Tribunal will provide the appellant with written reasons for its decision.

Objection to the appeal by parties

Under section 31 of the *Administrative Tribunals Act*, the Tribunal may dismiss all or part of an appeal on the grounds that it is not within the Tribunal's jurisdiction any time after the appeal is filed.

If a party has information or an argument that may call into question the Tribunal's jurisdiction over an appeal (e.g., no appealable decision was made, the appellant does not have standing, the appeal was filed out of time without an extension being granted, etc.), that information should be provided to the Tribunal as soon as possible in the appeal process in an "application to summarily dismiss the appeal". The application must include the information set out in Rule 18 [General application procedure]. Failure to provide this information and to challenge jurisdiction as soon as possible in the process may result in an unnecessary hearing, at significant cost to all involved.

Before making a decision on the application, the Tribunal will give the appellant an opportunity to make submissions on the application. This is required under section 31 of the *Administrative Tribunals Act*. If the Tribunal dismisses all or part of the appeal, it must provide written reasons for its decision.

Summary dismissal of all or part of an appeal

In addition to the power of the Tribunal to reject/dismiss an appeal on the grounds of lack of jurisdiction or failure to file the appeal within the time limit (see above "Rejection of a notice of appeal"), section 31 of the *Administrative Tribunals Act* allows the Tribunal to dismiss all or part of an appeal at any time after the appeal is filed if the following apply:

- the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
- the appeal was made in bad faith or filed for an improper purpose or motive;
- the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
- there is no reasonable prospect the appeal will succeed; or
- the substance of the appeal has been appropriately dealt with in another proceeding.

A party or intervener may apply for all or part of an appeal to be summarily dismissed in accordance with Rule 18 [General application procedure]. As required by section 31 of the *Administrative Tribunals Act*, the Tribunal will give the appellant an opportunity to make submissions before the Tribunal makes its decision on the application. If the Tribunal dismisses all or part of the appeal, it will provide written reasons for its decision.

Representatives/legal counsel

According to section 32 of the *Administrative Tribunals Act* and Rule 9 [Representation before the Tribunal], a party or intervener may represent him or herself (i.e., present their own case) in an appeal, or may be represented by legal counsel or an agent (spokesperson). Under Rule 9, there is certain information required from a representative. If a party or intervener has a representative, all correspondence in the appeal will be provided to the

representative. It will be up to the representative to provide the party or intervener with the correspondence.

The Tribunal will make every effort to keep the process open and accessible to parties that are not represented by a lawyer.

Amending the Notice of Appeal (adding grounds for appeal)

The grounds for appeal presented in the original notice of appeal should be complete. However, the Tribunal recognizes that there may be occasions when additional grounds of appeal are identified after that time.

To ensure that the other parties have adequate notice of the new grounds for appeal and have an opportunity to prepare their respective cases, an appellant should file an amended notice of appeal with the Tribunal as soon as possible. Delay in notifying the Tribunal, and the other parties, of the new grounds may result in a postponement or adjournment of the hearing.

Stays pending the completion of an appeal

A stay has the effect of postponing the legal obligation to implement the determination or decision under appeal until the appeal is completed and the Tribunal issues its decision. For certain decisions under appeal, there is an automatic stay unless the Tribunal orders otherwise (see below). For other decisions under appeal, an appeal does not act as a stay but the Tribunal has the power to order a stay. This section describes the Tribunals powers in relation to ordering a stay of a decision (or removing an automatic stay), pending the completion of an appeal. .

Automatic stay (administrative penalties)

When an administrative penalty, or the refusal to rescind an administrative penalty, is appealed, section 72(4) of the *Oil and Gas Activities Act* states that the decision is automatically stayed unless the Tribunal orders otherwise. To determine how to apply to have an automatic stay removed, see Rule 18 [General application procedure], and section 7.0 of this Manual titled "Application for a stay or removal of a stay".

No automatic stay

With the exception of administrative penalties (above), an appeal does not operate as a "stay" of the decision under appeal unless the Tribunal orders otherwise: the decision continues to be valid and enforceable. However, section 72(3) of the *Oil and Gas Activities Act* allows the Tribunal to order a stay of the decision under appeal pending the Tribunal's final decision on the merits of the appeal.

A person may apply for a stay of the decision in accordance with Rule 18 [General application procedure], and the procedure described in section 7.0 of this Manual, below.

Disclosure of the respondent's "record of decision"

Rule 8 [Delivery of the respondent's "record of decision"] requires the Oil and Gas Commission to provide a copy of its record of decision within **14 calendar days** after it is given notice of the appeal by the Tribunal. The record of decision consists of:

- the full determination and, where applicable, the full review decision being appealed, including a copy of the determination that was reviewed;
- the respondent's reasons for decision and/or review (if in a separate document); and, if the appeal is by a land owner, it includes any:
  - i. any submissions made by the land owner to the respondent under sections 22(5) or 31(2) of the *Oil and Gas Activities Act*; or,
  - ii. reports submitted by the permit holder under section 24(1)(c) or 31(6) of that Act.

The Tribunal requires this information to be provided by the respondent in an expeditious manner to ensure that the Tribunal has sufficient information to make any decision on its jurisdiction over the appeal, to determine whether there are any preliminary issues to be determined, and to assess the type of hearing that will be most appropriate for the appeal (written or oral). It also assists the appellant to prepare for either a settlement meeting or for the hearing.

If more than 1 document is provided to the Tribunal as part of the record of decision, the record of decision must include a table of contents and the documents must be organized by either numbering all documents consecutively, or by dividing the documents using tabs.

The documents included with the record of decision do not need to be provided again in advance of the hearing. The panel that decides the appeal will have a copy of the record of decision.

5.0 PARTIES AND INTERVENERS

Parties to the appeal

There are always at least two parties to an appeal: an appellant and a respondent. The "appellant" is the party that appeals the decision of the Oil and Gas Commission by filing a notice of appeal with the Tribunal. The "respondent" is the Oil and Gas Commission: the Oil and Gas Commission will be "responding" to the appeal.

Other parties (a land owner or permit holder) must be added in the circumstances set out in section 72(5) of the *Oil and Gas Activities Act*. These other parties are called "third parties".

In addition, the Tribunal may allow a person to intervene in an appeal. If so, this person is referred to as an "intervener".

Interveners & adding interveners to an appeal

Interveners are generally individuals or groups that do not meet the criteria to become a party but have sufficient interest in, or some relevant expertise, in relation to the subject matter of the appeal.

The Tribunal has the authority to allow a person to intervene in an appeal. A person seeking to intervene in an appeal must meet the test set out in section 33 of the *Administrative Tribunals Act*. That is:

(a) whether the proposed intervener can bring a valuable contribution or bring a valuable perspective to the appeal; and

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

An application for intervener status in an appeal must conform with Rule 18 [General application procedure] and Rule 11 [Adding or removing interveners to an appeal]. Specifically, the application must include the person's name and contact information, and the amount of participation sought in the appeal (e.g., to make written submissions only, to present evidence on a particular subject or issue, the ability to cross-examine witnesses, the ability to present opening and closing arguments).

The Tribunal also requires the person to provide a description of:

(a) the issues the person seeks to address;

(b) the person's expertise or interest in a particular subject; and

(c) the particular perspective that the person will provide to the Tribunal and whether it is different from the perspectives of the parties.

The application should be made as early as possible in the appeal process. If it is made close to the hearing date, the Tribunal will consider whether there are sound reasons for the delay.

Prior to deciding whether to grant the application to intervene, the Tribunal will provide all parties with an opportunity to make submissions on the application.

When deciding whether to add someone as an intervener in an appeal, the Tribunal will consider whether the person's intervention will assist the Tribunal by offering evidence or argument relevant to the appeal, whether their participation will unnecessarily delay the appeal, whether their evidence or argument will repeat or duplicate evidence or argument presented by other parties, whether the parties will be prejudiced by the intervention, and any other factors which are relevant in the circumstances or required by the legislation.

Under section 33 of the *Administrative Tribunals Act*, the Tribunal may limit or impose terms and conditions on the participation of an intervener in an appeal.

Accordingly, if the application is allowed, the Tribunal will advise the person of any terms, conditions or limitations placed on the person's intervention in the appeal.

If the Tribunal allows an intervener to take part in the hearing of an appeal, the Tribunal will advise the parties and any other interveners of this decision, and will specify the extent to which the intervener will be permitted to participate in the hearing.

Applying to remove an intervener

A party may apply to the Tribunal to remove an intervener from the appeal in accordance with Rule 11.

The application must explain why the intervener ought to be prevented from participating in the appeal. The application should be made as soon as possible in a proceeding to avoid unnecessary expense and delay.

Change in contact information

In accordance with Rule 10 [Change in contact information], all parties and interveners must immediately notify the Tribunal of any change to their address for delivery or other contact information. This will ensure that the Tribunal is able to effectively communicate with all parties and interveners throughout the appeal process.

Delivering documents to the parties and interveners

Delivery between parties & interveners

According to Rule 13 [Delivering documents to parties and interveners] anything that is to be sent/delivered to another party or intervener, must be sent to their "address for delivery" unless the party or intervener consents to an alternative location or the Tribunal orders otherwise. An address for delivery may be the person's current postal address, fax number, or email address.

If an address for delivery has not been specifically identified by a party or intervener, the definition of "address for delivery" in Rule 1 [Definitions] allows this to be "inferred from the party or intervener's usual method of delivering documents to the Tribunal and/or to the other parties and interveners".

Rule 13 sets out certain terms and conditions for delivering documents to another party or intervener. For example, if a party or intervener does not consent to the delivery of documents by fax or email, the Tribunal may make an order directing that documents be delivered by fax or email, subject to any terms, conditions or limitations that are appropriate in the circumstances. This will be considered by the Tribunal if communicating with the party or intervener is time sensitive and/or if there have been problems with delivery of documents through their preferred method. If the Tribunal orders delivery by fax or email, the Tribunal will attempt to advise the person of this decision by telephone.

Delivery by the Tribunal to the parties and interveners

If the Tribunal is "required" to serve, deliver or otherwise provide a document under an enactment, sections 19 and 20 of the *Administrative Tribunals Act* explain how the Tribunal is to effect that service, and when failure to properly serve a document may invalidate a proceeding. Under section 19(5), a person may dispute that he or she received the document from the Tribunal within the deemed date of delivery due to certain prescribed circumstances. Rule 13(5) requires this dispute to be provided to the Tribunal "as soon as practicable".

If the Tribunal is not "required" to serve a document, Rule 13 applies to the Tribunal.

When delivery of a document to a party or intervener is complete

Rule 13 also explains when a document delivered to a party or intervener by another party or intervener is deemed to be complete. For instance, if a document is not received by a person within the business day (defined in Rule 1 [Definitions] as "8:30 am to 4:30 pm, Monday through Friday, excluding public holidays", it is deemed to be delivered on the next business day.

For documents "required" to be sent by the Tribunal, section 19(2) and (3) of the *Administrative Tribunals Act* establishes when that document is deemed to be received by the recipient, whether it is sent by electronic transmission or by regular mail. Section 20 of the *Administrative Tribunals Act* describes the situations when the Tribunal's failure to serve the document in accordance with section 19 does not invalidate the proceeding.

If the Tribunal is not "required" to serve a document, Rule 13 applies to the Tribunal.

6.0 APPLICATIONS: GENERAL

There are a multitude of different orders, directions, or decisions that can be sought by the parties during the course of an appeal. Sections 14 and 15 of the *Administrative Tribunals Act* give the Tribunal general order-making powers. In addition to these general powers, there are various specific powers given to the Tribunal in the *Administrative Tribunals Act*, the *Oil and Gas Activities Act*, and the common law.

To ask for a particular order, decision, direction or exercise of discretion, a party or intervener must make an application, in writing. Rule 18(2) sets out the basic requirements for making an application to the Tribunal. They are:

(a) the grounds (the reasons) for the application;

(b) the relief requested (the nature of the order or direction);

(c) whether other parties and interveners agree to it (if known); and

(d) any evidence to be relied upon.

When making an application, you should be aware that applications should be organized. This will not be difficult for a relatively short, simple application, such as an application to extend a deadline. However, for applications that require supporting documents, Rule 18(2) requires the supporting documents be organized by either numbering all documents consecutively, or by dividing the documents using tabs.

If an application is contested and/or may raise issues of fairness, the Tribunal will establish a submission schedule to allow the other parties to be heard. Interveners may be offered an opportunity to be heard, depending upon the terms, conditions or limitations placed on their intervention in the appeal, and how the application may impact the intervener.

Applications are normally conducted in writing and decided by the chair of the Tribunal. If the subject matter of the application is such that oral evidence or argument would be helpful and appropriate, the parties may apply to have all or part of the application heard orally, by teleconference, or by videoconference (if available).

Note*:* Submissions and documents provided to the Tribunal during preliminary applications (e.g., an application for a stay) are **not** provided to the panel that hears the merits of the appeal. Therefore, parties and interveners that want to refer to previous submissions or documents must resubmit them during the written or oral hearing process.

7.0 APPLICATION FOR A STAY OR REMOVAL OF A STAY

The decision under appeal remains valid and enforceable unless the Tribunal makes an order to "stay" the decision. A stay prevents the decision from taking effect until the appeal is decided: it has the effect of postponing the legal obligation to implement all or part of the decision or order under appeal.

Automatic Stay (Administrative Penalties)

When an administrative penalty is appealed, section 72(4) of the *Oil and Gas Activities Act* states that the penalty decision is automatically stayed unless the Tribunal orders otherwise.

If a party wishes to have the stay removed and the penalty take effect during the course of the appeal, an application must be made to the Tribunal. The party must apply in accordance with Rule 18 [General application procedure]. The applicant must explain why the administrative penalty ought to be enforced, and what harm may result if the stayed is not removed, and what arrangements may be made to compensate the appellant should the appeal of the penalty be successful.

The Tribunal will provide the other parties to the appeal with an opportunity to reply.

Application for a stay (all other decisions)

With the exception of administrative penalties (above), section 72(3) of the *Oil and Gas Activities Act* states that an appeal to the Tribunal does not automatically prevent the decision under appeal from taking effect.

Section 72(3) of the *Oil and Gas Activities Act* allows the Tribunal to order a stay of the decision under appeal pending the Tribunal's final decision on the merits of the appeal.

A party seeking a stay must apply to the Tribunal in accordance with Rule 18 [General application procedure]. When an application for a stay is made, the parties will be asked to address the test set out by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385. That is:

- whether the appeal raises a serious issue;
- whether the applicant for a stay will suffer irreparable harm if a stay is refused; and,
- whether the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted (the "balance of convenience" test).

This test from *RJR-Macdonald Inc. v. Canada (Attorney General)* was adopted by the Tribunal on June 27, 2011 in *Daniel Kerr v. Oil and Gas Commission*, (Decision No. 2011-OGA-005(a))(unreported). The test has been adopted by the Tribunal in every stay decision since then.

When addressing the second issue of "irreparable harm", the party seeking the stay must explain what harm it will suffer if the stay is refused, and why this harm is "irreparable" (i.e., it could not be fixed/remedied if the party ultimately wins the appeal).

When addressing the issue of "balance of convenience", the party applying for the stay must show that it will suffer greater harm if the Tribunal refuses to

grant a stay, than the harm that would be suffered by the other parties or the environment if the Tribunal grants the stay.

The Tribunal will notify all parties of the application and provide them with an opportunity to respond to the application. In particular, the other parties will be asked to outline their positions on whether a stay should be granted, and they will also be asked to address the issues identified above: serious issue, irreparable harm and the balance of convenience.

Normally an application for a stay will be conducted in writing, rather than in an oral hearing.

The Tribunal will provide written reasons for its decision.

8.0 SCHEDULING A HEARING

Type of appeal hearing

Under section 36 of the *Administrative Tribunals Act* and Rule 19 [Scheduling a hearing], an appeal hearing may be conducted by way of an in-person (oral) hearing, written submissions (a written hearing), telephone or videoconferencing, or a combination thereof. The Tribunal will determine the appropriate type of hearing for the appeal, and will provide a written notice to the parties and interveners. Currently, the Tribunal does not have videoconferencing available in its office or hearing room.

When considering the type of hearing to be held, the Tribunal will give careful consideration to balancing the process to be followed with the nature and complexity of the appeal, any views expressed by the parties, the likelihood that there will be conflicting evidence and/or credibility issues that will need to be assessed, the number of parties involved in the appeal, whether there are any language or literacy barriers to a particular type of hearing, and the potential for community interest in the appeal.

If there are issues of credibility, complex issues that require oral evidence, or other circumstances that warrant having the parties, interveners and the panel to be in the same room, the Tribunal will schedule an oral hearing. If there are serious impediments to holding an in-person hearing in one location, the Tribunal will consider an application for a hearing by videoconference (if available). Depending on the circumstances, the requesting party(s) may be required to bear all or part of the costs of videoconferencing. Alternatively, the Tribunal may consider dividing the hearing between two different locations.

When a hearing by written submission is being considered for a particular case, the chair may request input from the parties before making a decision on whether to proceed in this manner.

If a party wants to request a particular type of hearing, the request should be forwarded to the Tribunal within a reasonable time after receipt of the complete notice of appeal or amended notice of appeal. The request should set out the

reasons in support of the type of hearing proposed. (For more information about written and oral hearings, see sections 11.0 and 12.0, below.)

Request for expedited hearing

The Tribunal will, where possible, accommodate applications for an expedited hearing. An application must be made in accordance with Rule 18 [General application procedure]. To ensure that the application proceeds expeditiously, it should clearly explain why the matter must be heard quickly, and provide the following information:

(a) the likelihood that there will be issues of credibility and/or technical evidence at the hearing;

(b) the desired type of hearing (oral, written, other);

(c) available dates for an expedited hearing; and

(d) an estimate of the number of days that would be required if an oral hearing is held.

When making a decision on the application, the Tribunal will consider the reasons given for the urgency, the other parties' right to proper notice of the appeal and of the appeal hearing, and the rights of other appellants who are awaiting hearings.

Hearing *de novo*

The *Oil and Gas Activities Act* does not expressly state that the Tribunal may conduct a "new hearing" of the matter before it. However, following a detailed analysis of the legislation in *Daniel Kerr v. Oil and Gas Commission*, (Decision No. 2011-OGA-005(b))(December 12, 2011), the Tribunal found that its jurisdiction goes beyond a review of the decision under appeal, and is more akin to an appeal *de novo*. It concludes at paragraph 58:

> The Tribunal finds that the Legislature intended for appeals of questions regarding oil and gas activities to come before the Tribunal, and for the Tribunal to have the authority to consider those matters from its own specialized perspective, with the courts providing a supervisory role over the Tribunal. The Tribunal may consider the decision under appeal, the record before the original decision-maker, any relevant new evidence, and submissions on the facts, law and jurisdiction. The only limiting factor is in respect of the grounds for appeal. Further, there is no indication that the Legislature intended the Tribunal to show deference to the Commission's determinations.

The Tribunal has followed this reasoning in subsequent cases.

Therefore, written and oral hearings are generally conducted as a "new hearing". This means that, in addition to reviewing the evidence and decision of the Oil and Gas Commission, the Tribunal may hear new evidence and argument that was not before the Oil and Gas Commission, make findings of fact on the evidence presented to it, and decide questions of law.

However, the Tribunal also has the discretion to conduct the appeal as an "appeal on the record"; that is, an appeal based solely on the information that was before the Oil and Gas Commission. If a party wants the appeal to be conducted on the record, an application must be made to the Tribunal as soon as possible in the appeal process and in accordance with Rule 18 [General application procedure].

Joining or consolidating appeals

In accordance with section 37 of the *Administrative Tribunals Act* and Rule 14 [Joining or consolidating appeals], when the Tribunal considers that two or more appeals are related to each other, involve the same or similar questions, or involve some of the same parties, it may combine the appeals to be heard together, or the Tribunal may direct that one appeal be heard immediately after the other. The goal of joining appeals is to make the appeal process more efficient.

The Tribunal will notify all parties if it decides to join the appeals to be heard together. A group appeal file number will be given to the joined appeals.

Objections may be made to the Tribunal, in writing, as soon as practicable.

If the Tribunal joins a number of appeals against one decision or order, the appellants may appoint one spokesperson for the group and make a joint presentation of evidence and argument. The Tribunal encourages such actions as they will lead to a more efficient and effective hearing process.

9.0 DISPUTE RESOLUTION & SETTLEMENT

The Tribunal encourages parties to resolve the issues underlying the appeal at any time in the appeal process. If the parties advise the Tribunal that they have reached a settlement of all or part of an appeal, the Tribunal must order that all or part of the appeal is dismissed (section 17(1) of the *Administrative Tribunals Act*). If the parties are unable to resolve the appeal on their own, the Tribunal may provide the parties with some assistance.

The purposes of dispute resolution, also referred to as facilitated settlement, are to resolve the issues underlying the appeal and avoid the need for a formal hearing. 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; and
- pre-hearing conferences (discussed further under "Oral Hearing Procedure").

If a more formal mediation process is desired by the parties, section 28 of the *Administrative Tribunals Act* and Rule 16 [Facilitated settlement] allow the Tribunal to appoint Tribunal members or staff to conduct a facilitated settlement. The Tribunal will not convene a settlement meeting (mediation) unless all parties to the appeal agree to participate.

In advance of the meeting, the Tribunal may require that the parties sign an agreement to ensure that:

(a) the parties are willing to participate in the facilitated settlement process;

(b) any representative of a party has authority to settle the appeal; and

(c) the information exchanged during the facilitated settlement process will be kept confidential.

If a Tribunal member conducts the facilitated settlement process and the appeal is not resolved, that member will not sit on the panel that hears the merits of the appeal without the written 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 (see Rule 17 [Consent orders], and "Consent orders" in the next section, below). Alternatively, the appellant may withdraw the appeal at any time (see "Withdrawing or abandoning an appeal" under section 15.0 of this Manual. See also the Information Sheet).

Confidentiality of settlement discussions

In accordance with section 29 of the *Administrative Tribunals Act*, any information received by any person in the course of attempting to reach a settlement of an appeal is confidential and may not be disclosed or admitted in evidence, except with the consent of the parties.

Consent orders

The Tribunal may make consent orders on any matter under section 16 of the *Administrative Tribunals Act*, provided that the order is consistent with the enactment governing the appeal.

In addition, the Tribunal may make orders specifically related to settlements under section 17 of the *Administrative Tribunals Act*. If the parties reach an agreement that will resolve the issues in the appeal and want the Tribunal to endorse the agreement, this may be done by way of a consent order. Section 17(2) of the *Administrative Tribunals Act* states that the Tribunal may authorize an order that includes the terms of settlement if it is satisfied that the order is consistent with the enactments governing the appeal.

Under Rule 17 [Consent orders], consent orders must contain the information consented to by the parties, be signed by the parties and submitted to the Commission for its consideration and approval. The date must be left blank and will be filled in if the Tribunal endorses the order.

If the Tribunal declines to make the order, both sections 16 and 17 of the *Administrative Tribunals Act* require the Tribunal to provide the parties with reasons for doing so.

If the order is authorized by the Tribunal, the Tribunal requires an electronic version of the unsigned consent order to be provided to the Tribunal in Word format, for posting on the Tribunal's website.

When the Tribunal approves a consent order, all or part of the appeal, as specified in the order, will be closed. The Tribunal will provide a copy of the approved order to the parties. The consent order will also be posted on the Tribunal's website and may be included in the Tribunal's annual report.

10.0 OBTAINING DOCUMENTS BEFORE THE HEARING

Each party and intervener is responsible for obtaining the documents needed to support their case. If a party or intervener does not have certain documents that they need, they must ask the person or persons in possession and control of the documents to voluntarily provide them. The Tribunal encourages parties to co-operate in the exchange of information as soon as possible in the appeal process to ensure that the matter proceeds in an informed and expeditious manner. The failure or refusal to produce documents prior to a hearing may result in delays.

If the request for the voluntary production of documents is refused, the party or intervener may apply to the Tribunal for an order.

Application for an order to produce documents or other things

Section 34(3)(b) of the *Administrative Tribunals Act* gives the Tribunal the power to make an order, at any time before or during a hearing, requiring the production of documents or other things that are admissible and relevant to an issue in the appeal, and in a person's possession or control. As a result, if the documents sought are in the possession and control of the Oil and Gas Commission, a request under the *Freedom of Information and Protection of Privacy Act* is **not** required.

An application for the production of documents or other items must be made in accordance with Rule 18 [General application procedure]. To ensure that the application proceeds in an expeditious manner, it should include the following information:

(a) the name of the person in possession or control of the documents or things;

(b) a reasonably detailed description of the documents or things that would enable a reasonable person to know what documents, things or information is being sought;

(c) the reasons why such materials are relevant to the subject matter of the appeal; and

(d) the attempts made to have the person voluntarily provide the document or thing. An order will not be granted unless the party or

participant has first asked the person to voluntarily produce the documents or things.

If sufficient detail is not provided in the application, the Tribunal may ask for additional information.

When deciding whether to issue an order for pre-hearing disclosure of documents or other things, the Tribunal will consider whether the documents are relevant to an issue in the appeal, whether they are subject to disclosure protection under section 29 of the *Administrative Tribunals Act*, and any other factors that the Tribunal considers relevant.

It is important to note that failure or refusal to produce documents prior to the hearing may result in delays and, possibly, a postponement or adjournment of the hearing.

If an order for the production of documents is granted, the party requesting the order will be responsible for serving it on the person.

A person who is subject to the order may apply to the Tribunal to amend the terms of the order or to have it cancelled. The application may be made before or during the hearing. If the Tribunal is satisfied that the documents are not in the person's possession or control, are not relevant to the appeal, or are protected by a privilege at law, the Tribunal may cancel or vary the order.

11.0 WRITTEN HEARING PROCEDURE

For specific written hearing requirements, see Rule 22 [Written hearings].

Scheduling written submissions

In some cases, the Tribunal will decide that an oral hearing is not required to fairly decide the issues in an appeal. Section 36 of the *Administrative Tribunals Act* allows the Tribunal to conduct an appeal on the basis of written submissions.

Written hearings are normally scheduled in cases where there are no language or literacy barriers for a party or intervener, where credibility of the parties or witnesses is not a significant factor in the appeal, there is no dispute about material facts, the issues to be decided have been dealt with in previous appeals, or there are purely legal questions to be decided.

If the Tribunal determines that the appeal can be heard fairly by way of written submissions, it will provide the parties with a submission schedule. In making the schedule, the Tribunal will ensure that each party to the appeal is given an opportunity to review the written submissions from the other parties, and is given an opportunity to respond to those submissions from parties adverse in interest. The submissions will normally be scheduled to proceed in the following order:

(1) appellant's submissions

(2) respondent's and third party's submissions

(3) appellant's submissions in reply (no new evidence is to be included)

In accordance with Rule 22, all submissions must be delivered to the Tribunal office by the dates specified, unless the Tribunal grants an extension of time (see "Extension of time to make submissions" below). Failure to provide submissions on an appeal may result in the appeal being dismissed (if it is the appellant's failure), or a decision being made on the appeal without further notice (if it is another party or intervener's failure). (See Rule 20 [Failure to participate in a hearing], and the information below)

Submissions must be copied to the other parties and interveners, as well as to the Tribunal, in the quantities specified. Once the deadlines have expired for making submissions, the written hearing is over.

Written hearings are normally decided by one member of the Tribunal, often the chair.

How to apply for a written hearing

A party may request a written hearing in accordance with Rule 18 [General application procedure]. The request should be made to the Tribunal as soon as possible in the process, and state: whether there are any issues of credibility to be decided, whether the material facts are in dispute, whether the issues to be decided have been dealt with in previous appeals, and/or whether the appeal raises purely legal questions.

Content of submissions

If an appeal is conducted by written submissions, the parties are required to present their **entire** cases in writing (Rule 22). This means that all evidence (which includes all means of proof including correspondence, maps, charts, graphs, affidavits, studies, reports, etc.), legal authorities, and argument that the party wants the Tribunal to consider must be included in the submissions (for further information see section 12.2 "Evidence", below). Submissions and documents that were provided to the Tribunal during preliminary applications (e.g., an application for a stay) are **not** provided to the panel that hears the merits of the appeal. Therefore, parties and interveners that want to refer to previous submissions or documents must resubmit them with during the written hearing process.

It is important to note that the Tribunal does not receive the information considered by the Oil and Gas Commission. To ensure that the Tribunal considers those materials, a party must submit them to the Tribunal as part of their case or ensure that one of the other parties or participants does so.

In addition to the materials that were before the Oil and Gas Commission, the Tribunal may consider new evidence and argument: evidence and argument that was not before the Oil and Gas Commission.

Although expert evidence is not normally provided in a written hearing, if an expert report is to be provided, the deadlines and requirements for notice set

out in Rule 27 [Expert evidence] apply. (See also the heading "Notification of expert evidence" in section 12.1 of this Manual).

An appellant's written submission should contain all evidence and argument in support of the grounds for appeal. It should also explain why the decision that has been appealed should be different, and how it should be changed (what remedy is being sought). A respondent's submission should provide all evidence and argument in support of the decision being appealed, and explain why the appeal should be dismissed. A third party's submissions should explain that party's position on the evidence and argument provided by the appellant. An intervener may address the submissions presented by the other parties in accordance with any terms or conditions set out by the Tribunal. Any party may suggest alternatives to the decision being appealed or recommend additional terms or conditions.

Where there is more than one evidentiary document or legal authority provided with the written submission, Rule 22 requires the documents and authorities to be numbered consecutively, or divided into tabs. This allows the party to easily reference the attached documents and authorities in their submission.

Prior to making a decision, the Tribunal will consider all of the submissions, weigh the evidence provided, and apply the correct burden of proof (see "Burden of Proof", below).

Notification of expert evidence (Rule 27)

In some cases, a party (or intervener if approved by the Tribunal) may wish to provide an expert report as part of their case. Rule 27 [Expert evidence] sets out the requirements for providing notice of an expert report. These requirements are further described in section 12.1 of this Manual under "Notification of expert evidence").

Joint books of documents and legal authorities

Parties should refrain from photocopying a legal authority or document already provided to the Tribunal in the submissions of another party. Photocopying of legislation or policies should be limited to the sections that are considered pertinent and necessary to the Tribunal's decision on the issues raised in the appeal. To reduce the unnecessary duplication of legal authorities and other documents, the Tribunal asks that parties consider providing a joint book of documents and legal authorities to the Tribunal where possible.

Additional information requested by the Tribunal

Upon receipt of the written submissions, the panel considering the appeal may find that further information is required from one or more of the parties in order to make an informed decision on the appeal.

If the panel requests additional information from one or more of the parties, all parties will have an opportunity to respond to that information.

Extension of time to make submissions

If a party or intervener is not able to deliver their submissions by the date specified by the Tribunal, they must apply for an extension of time. The application should be made prior to the specified deadline.

In accordance with Rule 18 [General application procedure], the application must be in writing and include the following information:

(a) the reasons for extension;

(b) the length of the extension;

(c) whether the other parties to the appeal consent to the extension; and

(d) any evidence to be relied upon.

If the other parties do not consent to the extension, they may be provided with an opportunity to make submissions on their position with respect to the request.

When deciding whether to grant an extension, the Tribunal will consider the adequacy of the reasons given for the extension, any prejudice to the other parties, and any environmental or other impacts that may result from an extension.

If an extension of time is granted to one party or intervener, the submission schedule for the other parties and interveners will be similarly extended unless the circumstances do not warrant a similar extension. The Tribunal will inform all parties of the revised schedule, in writing.

Failure to file submissions

In accordance with Rule 20 [Failure to participate in a hearing], if the appellant has been given timely notice of the submission schedule and fails to deliver its written submissions by the specified date, the Tribunal may proceed with the hearing, dismiss the appeal as abandoned, or make any order appropriate in the circumstances..

If the respondent, third party or an intervener has been given timely notice of the submission schedule and, without advance written notice and reasonable explanation, fails to deliver written submissions by the specified date, the Tribunal may proceed to make a decision without further notice to the party or intervener.

Application to cross-examine

If it becomes apparent that credibility is a significant factor in the appeal the panel may, on its own initiative or at the request of a party, require evidence to be presented at an oral hearing to allow cross-examination of some or all of the witnesses.

If a party seeks to cross-examine an affiant on an affidavit included in the written submissions of another party, Rule 22 requires the party to apply to the Tribunal in accordance with Rule 18 [General application procedure].

Role of precedent (previous decisions of the Tribunal)

Although the Tribunal may be bound by the decisions of certain courts, it is not required to follow (i.e., is not bound by) its past decisions or the decisions of other administrative agencies. While prior decisions of the Tribunal may indicate how Tribunal members will view particular types of cases, as a matter of law, the Tribunal must decide each case on its own merits.

Burden of proof

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities".

Public access

In written hearings, the evidence, written submissions and decisions arising from the appeal are available to the public as described in section 3.0 of this Manual.

12.0 ORAL HEARING PROCEDURE

For specific oral hearing requirements, see Rule 21 [Oral hearings].

12.1 Pre-hearing

Scheduling an oral hearing

If the Tribunal decides that an appeal will be conducted by full oral hearing, it will ask the parties and interveners for an estimate of the amount of time that will be required for an oral hearing and their availability. The Tribunal will attempt to accommodate the parties' schedules unless:

- there is some other reason to schedule a hearing within a particular time-frame; or
- the parties cannot agree on a specific date.

In these circumstances, the Tribunal may set the hearing date without further consultation with the parties.

An oral hearing may be held at the Tribunal office in Victoria or any other location in the Province. The location of the hearing will be determined on a case-by-case basis. Requests to have a hearing conducted in a particular location will be considered by the Tribunal. Hearings conducted outside of Victoria are often held in meeting or conference rooms in hotels.

In accordance with Rule 19 [Scheduling a hearing], the Tribunal will provide the parties and interveners with a Notice of Hearing, confirming the date, time

and venue for the hearing. If there is some impediment to providing this notice in the usual way, section 21 of the *Administrative Tribunals Act* allows notice of hearing by publication.

Scheduling a hearing by telephone conference call

If all or part of an appeal will be held by way of a telephone conference call, the Tribunal will set the date, time and dial-in information for the conference call, and notify the parties and interveners of these details. It will also advise of any special requirements or conditions (Rule 19).

Scheduling a hearing by videoconference

If all or part of an appeal will be held by way of a videoconference, the Tribunal will set the time, date, and place(s) for the hearing, and provide written notification to the parties and interveners. It will also advise of any special requirements or conditions (Rule 19). Currently, the Tribunal does not have videoconferencing capabilities in its office or hearing room.

Statement of Points and exchange of documents

In order to facilitate identification of the main issues and arguments in an appeal and ensure the hearing proceeds in an efficient and expeditious fashion, Rule 21(1) requires each party to provide pre-hearing submissions and documents. The pre-hearing submissions are referred to as a Statement of Points. The Statement of Points is intended to be a summary of the case that the party will be presenting at the hearing. It is to include the party's positions on the main issues, the party's witness list (which should include the party if the party will be testifying on his or her own behalf), and the legal authorities that will be relied upon at the hearing.

In addition, Rule 21 requires all parties to provide a copy of the documents that they will be referring to, or relying upon, at the hearing. It should be noted that submissions and documents that were provided to the Tribunal during preliminary applications (e.g., an application for a stay) are **not** provided to the panel that hears the merits of the appeal. Therefore, parties and interveners that want to refer to previous submissions or documents must resubmit them with during the Statement of Points process.

Under Rule 21, any affidavit evidence that will be relied upon at the hearing must also be provided with the Statement of Points. If a party seeks to cross-examine on an affidavit, the party must provide written notice of this request within a reasonable time after receiving the affidavit.

Unless the Tribunal directs otherwise, two copies of the appellant's Statement of Points and documents must be provided to the Tribunal, and one copy to each party and intervener, at least **30** calendar days prior to the commencement of the hearing. The respondent, and all other parties to the appeal, must also provide two copies of their respective Statements of Points and documents to the Tribunal, and one to each party and intervener, at least

15 calendar days prior to the commencement of the hearing unless the Tribunal directs otherwise.

In addition, pursuant to Rule 21(6), all parties and participants must bring one additional copy of all documents to the hearing (excluding legal authorities and Statements of Points) if the documents will be referred to or relied upon at the hearing. This copy will be provided to the official recorder and marked as an exhibit, if and when required.

As a matter of practice, the Tribunal will send a letter to the parties confirming the due dates for each party's Statement of Points and documents, and the quantities required. The Tribunal may alter the schedule if the circumstances warrant doing so.

Pursuant to Rule 21, the Tribunal may require interveners to provide a Statement of Points and documents in advance of the hearing. If so, it will notify the interveners in writing.

If a party fails to file a Statement of Points in accordance with the Rules, the Tribunal may take any action set out in section 18 of the *Administrative Tribunals Act* or in Rule 3 [Effect of non-compliance]. However, if the appellant fails to comply with the pre-hearing disclosure in Rule 21, the Tribunal may allow the appeal to proceed to a hearing if it is satisfied that the other parties and interveners have sufficient information to prepare for the hearing (Rule 21(7)).

Documents

As noted above, Rule 21 requires parties to disclose all documents to be referred to, or relied upon, at the hearing with their Statement of Points. This will ensure that all parties will be prepared at the hearing. The types of documents that might be provided are: letters, memos, emails, notes to file, photographs, studies, reports, charts, articles, and any other materials that will be used to prove the party's case at the hearing.

If more than one document is provided, the documents must be organized by using an index and either numbering all documents consecutively, or by dividing the documents using tabs in accordance with Rule 21.

In addition, as noted above, one extra copy of the documents that will be referred to or relied upon at the hearing (excluding legal authorities and Statements of Points) must be brought to the hearing for the official recorder (Rule 21(6)).

The schedule for submitting documents with the Statement of Points does not preclude parties from the voluntary exchange of documents either before or after the 30- and 15-day deadlines. The Tribunal encourages parties to co-operate in the exchange of information as soon as possible in the appeal process to ensure that the matter proceeds in an informed and expeditious manner. If a party is not able to obtain the documents that it requires through a voluntary exchange, it may apply to the Tribunal for an order to produce documents or other things under section 34(3)(b) of the *Administrative*

Tribunals Act and Rule 18. See also "Obtaining documents before the hearing", in section 10.0 of this Manual.

Joint books of documents and legal authorities

Parties should refrain from photocopying a legal authority or document already provided to the Tribunal in the submissions of another party. Photocopying of legislation or policies should be limited to the sections which are considered pertinent and necessary to the Tribunal's decision on the issues raised in the appeal. To reduce the unnecessary duplication of legal authorities and other documents, the Tribunal asks that parties consider providing joint books of documents and legal authorities to the Tribunal where possible.

Pre - hearing conferences

Rule 15 [Pre-hearing conferences] states that the Tribunal may, on its own initiative, or at the request of a party or intervener, schedule a pre-hearing conference.

A pre-hearing conference is usually conducted by telephone, but may also be conducted in person in unusual circumstances. Attendance will generally be limited to one member of the Tribunal and one representative from each party and intervener to the appeal. Normally, the chair of the Tribunal oversees the pre-hearing conference. These conferences may be recorded by an official recorder.

Pre-hearing conferences provide the parties and interveners with an opportunity to clarify the hearing procedures, narrow the issues to be dealt with at the hearing, and discuss any preliminary concerns. They are intended to facilitate a just, expeditious and inexpensive disposition of the matter and the Tribunal may make any recommendation, direction or order to achieve this objective.

Some matters that may be addressed in a pre-hearing conference include:

- defining and simplifying the issues to be determined at the hearing;
- scheduling the date, time and place for the hearing of the appeal;
- identifying and scheduling witnesses;
- arranging for the exchange of documents and expert reports;
- admitting evidence relevant to the hearing and consented to by the parties;
- admitting facts relevant to the hearing and consented to by the parties;
- determining the day-to-day conduct of the hearing;
- hearing applications on preliminary or interim matters, including applications to extend a time limit, produce documents or postpone the hearing date; and

- resolving the appeal (settlement discussions).

The Tribunal will normally schedule a pre-hearing conference in complex cases or in cases that involve numerous parties.

An application for a pre-hearing conference must be made in accordance with Rule 15; specifically, it must be in writing, provide the reasons for the pre-hearing conference, include possible dates for the conference as well as a list of the items to be discussed.

Pre-hearing conferences are of limited value unless all parties and interveners are fully prepared for a useful discussion of all items scheduled to be addressed, and are authorized to negotiate and make decisions with respect to those items. To be effective, the parties and interveners must be open to discussing all items on the agenda.

If a Tribunal member conducts a pre-hearing conference and settlement matters are discussed but the appeal is not resolved, that member will not sit on the panel that hears the merits of the appeal unless all parties provide their written consent.

These provisions do not preclude voluntary meetings between the parties. The parties are always free to discuss the case among themselves, and to try to resolve the appeal without the need for a hearing or decision by the Tribunal.

Failure to attend pre-hearing meetings or conferences

If notice of a pre-hearing conference has been properly given and a party fails to attend without advance written notice, the Tribunal may proceed in that party's absence (Rule 15).

Notification of expert evidence (Rule 27)

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on a particular subject. To be an "expert" the person must have knowledge that goes beyond "common knowledge". (See also section 12.2 of this Manual for more information on expert evidence.)

If a party wants to submit an expert report at the hearing, and/or have an expert testify at the hearing without a report, the Tribunal requires the party to plan this well in advance of the hearing. The Tribunal requires parties to provide "notice" of expert evidence almost three months before the hearing is scheduled to start. However, Rule 27(12) also allows parties to agree to different dates provided that the new dates do not impact the scheduled commencement of the hearing.

The purpose of this notice is to give the other parties sufficient time to review and consider the opinions and facts upon which the opinion is based, to determine whether they need to retain their own expert to provide reply evidence, and to prepare questions to ask at the hearing. It may also facilitate settlement discussions.

Under Rule 27, if a party intends to produce a written statement or report by an expert at a hearing, two copies of the statement or report must be provided to the Tribunal (unless additional copies are required by the Tribunal) and one copy to each of the parties and interveners before the statement or report is given in evidence. The expert report must be provided **84** calendar days before the commencement of the hearing (or **84** calendar days before the appellant's first written submission is due if the hearing is in writing). The expert's qualifications must be included with the report.

If a party intends to call an expert witness at a hearing without a report, the party is required to provide notice that an expert will be called to give an opinion. The party must provide two copies of the notice to the Tribunal (unless directed otherwise), and one copy to each of the parties and interveners, at least **84** calendar days in advance of the commencement of the hearing (or the appellant's first written submission is due in a written hearing). The notice must include:

(a) the witness's qualifications and areas of expertise;

(b) a written summary of the opinion to be given at the hearing; and

(c) the facts on which the opinion is based.

If a party intends to produce evidence of an expert in reply, the notice of expert reply evidence and/or any reply report must be delivered at least **42** calendar days before the commencement of the hearing (or **42** calendar days before the appellant's first written submissions are due in a written hearing), in the same quantities identified above, unless the Tribunal directs otherwise. Notice of an expert reply must contain the information required above for the notice of an expert report or notice of expert testimony (without report), whichever applies.

Failure to provide reasonable notice of expert evidence or expert reports may result in a postponement/adjournment of the hearing or exclusion of the intended evidence.

***Note**: One additional copy of any notices of expert evidence, expert reports and expert qualifications must be brought to the hearing for the official recorder (see Rule 27).*

Because the Tribunal has established its own rules for the introduction of expert evidence and the testimony of experts, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Tribunal. If there is a conflict between the Tribunal's rules and sections 10 or 11 of the *Evidence Act*, the Tribunal's Rules on expert evidence apply.

Arranging for witnesses to attend a hearing

Arranging for the attendance of witnesses at a hearing must be performed by the parties (and interveners, if authorized to call witnesses). It is up to the

parties to ask a person or persons to voluntarily attend a hearing and to give evidence.

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may apply to the Tribunal for an order requiring the person to attend the hearing and give evidence (a summons).

Application for an order requiring the attendance of a witness (summons)

The Tribunal's power to order the attendance of a witness is found in section 34(3) of the *Administrative Tribunals Act* which states that, at any time before or during a hearing, but before its decision, the Tribunal may order a person to attend a hearing to give evidence.

An application for an order requiring a person to attend a hearing to give evidence (a summons) must be made to the Tribunal in accordance with Rule 18 [General application procedure] and Rule 26 [Application for a summons (order to attend as a witness)].

Before applying for an order, the applicant must first ask the person to voluntarily attend as a witness. The request should be made in writing so the applicant can show that this step has been done. If the person refuses, an application may be made. Rule 26 requires the application to be made in writing, at least **60** calendar days before the hearing is scheduled to begin. The application must include the following information:

(a) the name and address of the person wanted as a witness;

(b) a brief summary of the evidence to be given by the person, and an explanation of why the evidence is relevant and necessary;

(c) the attempts made to have the person voluntarily attend the hearing; and

(d) if required, a list of the particular documents or other things the person must bring with them to the hearing.

It should be noted that Rule 26(7) requires the party who requested the order to pay any witness fees and expenses in accordance with Schedule 3 of Appendix C of the BC *Supreme Court Civil Rules*, B.C. Reg. 168/2009, enacted under the *Court Rules Act*, unless certain exceptions apply or the Tribunal directs otherwise. Therefore, if the applicant wants the Tribunal to waive the requirement for payment of witness fees and expenses if an order is granted, the applicant should also make this request, with reasons, in the application.

When deciding whether to issue an order, the Tribunal will consider whether the party has requested voluntary attendance/compliance before making the request to the Tribunal, whether the information sought to be obtained through this person is relevant to the appeal, whether the person is reasonably likely to be able to supply the information, and any other factors that the Tribunal considers relevant.

If the application is not made 60 calendar days before the hearing, the person applying for an order must include reasons for the delay. The Tribunal may waive this requirement.

If an order requiring the attendance of a witness is granted, the party who requested the order is responsible for serving it on the person (witness) by leaving it with that person, or by leaving it at the person's usual residence, within a reasonable time before the date the person is required to appear (Rule 26(6)). As proof of service may be required if the person does not appear at the hearing, the person who serves the Order should make a note of:

- the place, date and time of delivery;
- how the order was served (by giving it to the person or leaving it at their residence); and
- if the server gave the order to the person, how did the server know that it was the right person (for example, did the server know the person, or ask to see a driver's licence?).

Objecting to an order requiring attendance at a hearing (summons)

The person (witness) who is served with a summons ordered by the Tribunal may apply to the Tribunal for an order cancelling or varying the summons under Rule 26(8). The application may be made before or during the hearing and must set out the reason(s) the order should be cancelled or its terms should be varied, and must be sent to the person that requested the order.

The Tribunal may cancel or vary the order if it is satisfied that the evidence sought from the person is not relevant, may be obtained through some other means, is protected by privilege, the person is not able to provide the information sought, or the attendance of the person will be unduly inconvenient.

Failure to comply with an order for attendance at a hearing (summons)

According to section 34(4) of the *Administrative Tribunals Act*, the Tribunal may apply to the Supreme Court for an order directing the person or any directors and officers of a person, to comply with the Tribunal's order.

Contempt

If a person ordered by the Tribunal to attend as a witness fails or refuses to attend a hearing, take an oath or affirmation, answer questions, or produce the records or things in their custody or possession, the Tribunal may apply to the court to have that person committed for contempt, as if in breach of an order or judgment of the court (section 49(1) of the *Administrative Tribunals Act*).

Security for costs

Under section 47.1 of the *Administrative Tribunals Act* and section 1 of the *Security for Costs (Administrative Tribunals) Regulation*, the Tribunal has the

authority to order an appellant or an intervener to deposit a sum of money that the Tribunal considers sufficient to cover all or part of the anticipated costs of the other parties and the anticipated actual costs and expenses of the Tribunal in connection with the appeal.

Section 2 of the *Security for Costs (Administrative Tribunals) Regulation* sets out the preconditions for making an order for security for costs. The Tribunal cannot make this order against an appellant or intervener unless it concludes that:

(a) the appeal was initiated for improper purposes;

(b) the intervener sought to participate in the appeal for an improper purpose;

(c) there is no reasonable prospect that the appeal will succeed;

(d) the appeal, or the person or body's participation in the appeal, is an abuse of process;

(e) the appellant or the intervener fails to attend or be represented at a hearing without reasonable excuse; or

(f) the appellant or intervener unreasonably delays the hearing of the appeal.

The Tribunal may make an order on its own initiative or upon the request of a party.

The Tribunal is not bound to order a security deposit when one of the above-mentioned examples occurs.

An application for security for costs must be made in accordance with Rule 18 [General application procedure] and should include the suggested amount of the security deposit as well as identify which of the above preconditions is being relied upon for the order.

If the Tribunal grants an order for security for costs, the Tribunal may include directions respecting the disposal of the money deposited. Pursuant to section 3 of the *Security for Costs (Administrative Tribunals) Regulation*, the Tribunal may order that a deposit under section 47.1 of the *Administrative Tribunals Act* be paid in instalments.

If an order for deposit is made and the appeal proceeds to an oral hearing, the panel will give directions respecting the disposition of the money deposited at the completion of the appeal, or in its decision (see section 47.1(2) of the *Administrative Tribunals Act*). Submissions on the disposition of the money will be accepted in closing arguments in addition to any submissions regarding costs in general (see "Application for costs" in section 13.0 of this Manual).

Requesting a site visit

Prior to or during a hearing the Tribunal may, on its own initiative or at the request of a party, schedule a site visit. If a party wishes to schedule a site visit, a written request should be made to the Tribunal as early as possible in

the process because additional time in the hearing schedule may be required to accommodate the visit. The request must comply with Rule 18 [General application procedure], in that it must be in writing, explain the reasons for the site visit, and advise whether the other parties/interveners agree to a site visit.

If the site visit will be on private property, the party requesting the site visit must ensure that the property owner consents to the site visit.

The purpose of a site visit is to provide the panel with the opportunity to learn more about the appeal and better understand the evidence, not to gather evidence. The panel's observations during a site visit are not evidence. A site visit is not to be used as a fact-finding expedition. New evidence will normally not be accepted, unless in accordance with the rules of procedural fairness and in the presence of the official recorder. Examples of when a site visit would be appropriate include situations where the proximity of certain features on the site to each other, or to neighbouring properties, is an issue, or where an appreciation is needed of the size or scope of an undertaking or natural feature.

Prior to a site visit, the panel and parties will agree upon the date and time of the visit and how the visit will proceed. A site visit will not be conducted without all parties and interveners in attendance, unless that party or intervener has waived his or her right to attend.

Postponement of the hearing

All parties to an appeal are entitled to a hearing of the appeal in a timely fashion. Accordingly, the Tribunal will only grant a postponement of a hearing when all parties to the appeal consent to the postponement, or when the party requesting a postponement can show that special circumstances exist that justify postponing the hearing to a later date.

An application for a postponement must be made in accordance with Rule 18 [General application procedure]; specifically, it must be in writing and explain the reasons for the postponement and whether the other parties and interveners agree to a postponement. In addition, the application should include the length of the proposed postponement (specify the next available date for a hearing).

When deciding whether to grant this request, the Tribunal will apply the general factors in section 39 of the *Administrative Tribunals Act* with respect to adjournments; that is, it will consider the reasons for the postponement, whether the postponement will cause unreasonable delay, the impact of both refusing and granting the postponement on the parties, and any impact on the public interest. In furtherance of, and/or in addition to, consideration of these general factors, the Tribunal will specifically consider the following:

- the proposed or anticipated length of the postponement;
- the adequacy of the reasons provided and the adequacy of any objections to the postponement;

- the number, length and causes of any previous postponements that have been granted;
- whether the postponement will needlessly delay or impede the conduct of the hearing;
- whether the purpose for which the postponement is sought will contribute to the resolution of the matter;
- whether the postponement is required to provide a fair opportunity to be heard;
- the degree to which the need for the postponement arises out of the intentional actions or the neglect of the applicant for the postponement;
- the prejudice to the other parties if a postponement is granted, balanced against the prejudice to the applicant if the postponement is not granted;
- any environmental impacts that may result from a postponement of the hearing;
- any public interest factors, such as the public interest in the efficient and timely conduct of the appeal; and
- any other factors which may be relevant.

If a hearing is postponed, the Tribunal will consider whether to order any terms and conditions that may assist with the fair and efficient conduct of the appeal such as conditions respecting rescheduling, attendance at a pre-hearing conference, or production of documents or reports.

Before granting a postponement of a scheduled hearing, and except in extenuating circumstances, the Tribunal will give the other parties an opportunity to be heard. If the other parties to the appeal consent to the postponement, the request will rarely be denied.

12.2 Evidence

General

In an oral hearing, each party has the right to present evidence to support that party's case. "Evidence" is anything that has the potential of establishing or proving a fact. Evidence includes oral testimony, written records, demonstrations, physical objects, etc. It does not include argument or submissions made by a party for the purpose of persuading or convincing the Tribunal to decide the case in a particular way.

The only evidence the Tribunal will consider is the evidence that is provided to the Tribunal by the parties and interveners to the appeal. The Tribunal does not have the information that was considered by the Oil and Gas Commission when an appeal is filed: the Tribunal is not part of the Oil and Gas Commission and does not have access to the Commission's files. Therefore, a party or intervener must ensure that they submit all information to the Tribunal that

will form part of their case, or make sure that one of the other parties or interveners does so.

In some circumstances, the *Evidence Act* may apply to oral and written evidence that is presented at hearings before the Tribunal. Parties should consult that Act to determine whether it may apply. However, as noted above, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Tribunal (see "Notification of expert evidence", above).

While most of the information under this heading relates primarily to oral hearings, the principles involved in weighing evidence and applying the correct burden of proof are common to all types of hearings.

Admissibility and exclusion of evidence

The rules of evidence that apply to a hearing before the Tribunal are less formal than the rules applied by the courts. Section 40 of the *Administrative Tribunals Act* states that 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 Tribunal may admit hearsay and circumstantial evidence if it is considered relevant.

Relevance is the primary consideration for the Tribunal when deciding whether to admit evidence. Relevant evidence can be described as evidence (oral or written) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.

The Tribunal may also exclude evidence. Section 40(2) of the *Administrative Tribunals Act* allows the Tribunal to exclude anything unduly repetitious. In addition, in accordance with general legal principles, the Tribunal may exclude evidence if it is of minimal relevance, is unreliable, may confuse the issues, or may prejudice the other parties. The Tribunal may be obligated to exclude evidence that is privileged or is restricted by a statute such as the *Evidence Act*.

Before any evidence is excluded by the Tribunal, parties will be offered an opportunity to explain why the evidence they are seeking to introduce is relevant and should not be excluded. If evidence is limited or excluded, the Tribunal will advise the parties of its reasons for doing so.

All evidence admitted during the hearing will be assessed by the Tribunal to determine what weight, if any, should be given to the evidence. Generally speaking, evidence that is not sufficiently reliable for the Tribunal's purposes will be given less weight when the Tribunal is making its decision on the merits of the appeal.

New evidence: evidence not before the Oil and Gas Commission

To ensure that the Tribunal has the best evidence before it, including the most up to date information, the Tribunal normally holds a "new hearing". This means that the Tribunal will allow evidence to be presented in a hearing that

was not before the Oil and Gas Commission, subject to the considerations mentioned in the previous section ("Admissibility and exclusion of evidence").

However, if a party or intervener provides new evidence at a hearing that was not disclosed prior to the hearing, the evidence "surprises" a party or intervener that is adverse in interest, or there is insufficient time for the other party to adequately consider the evidence, the Tribunal may grant a recess (a break) to allow the other party to consider the evidence. Alternatively, the Tribunal may adjourn the hearing to another date.

Agreed statement of facts

If the parties to an appeal agree that certain facts are true, or that certain events relevant to the appeal happened in a certain way, the parties may submit an "agreed statement of facts" to the Tribunal.

An agreed statement of facts can reduce the overall length of the hearing by avoiding the need for the parties to call witnesses or produce evidence at the hearing to prove those facts or events. If an agreed statement of facts is submitted, it will be determinative of those facts for the purposes of the appeal.

Evidence provided by affidavit, telephone or videoconferencing

If a witness is unable to attend an oral hearing in person, the Tribunal may allow the witness to testify by telephone, videoconferencing, or provide their evidence in a sworn written statement (i.e., affidavit). However, if a party seeks to have the witness give evidence by telephone or videoconferencing, that party must determine whether such options are available at the hearing venue before making the application to the Tribunal, and must specify the time and date that the witness will be available to testify by telephone or videoconference.

When considering a request to allow evidence to be given in one of these, the Tribunal will consider any objections from the parties. If the request is for testimony by affidavit, the Tribunal will also consider any request for cross-examination of the affiant on the contents of the affidavit under Rule 21.

If the Tribunal allows a witness to testify by telephone or videoconferencing, it is up to the requesting party to make all necessary arrangements, and any associated cost must be paid by that party. Further, any documents that the witness will be referring to must be provided to the Tribunal and the other parties in advance.

In some cases, the Tribunal may give less weight to evidence provided by telephone or affidavit, compared to evidence given in person or by videoconference, because it is more difficult to assess a witness's credibility.

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".

As stated previously in this section, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Tribunal, because the Tribunal has established its own rules for the introduction of expert evidence and the testimony of experts. In addition, if there is a conflict between the Tribunal's rules and sections 10 or 11 of the *Evidence Act*, the Tribunal's rules on expert evidence apply.

Experts must be "qualified" by the Tribunal before giving their opinion. Each party will have an opportunity to cross-examine a proposed expert and make submissions on the expert's qualifications. To be "qualified" to give expert opinion evidence on a particular subject matter(s), the Tribunal must be satisfied that the witness has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.

If a person is not qualified to give expert evidence on a particular subject matter, the Tribunal may still receive the witness's evidence. The Tribunal will determine what weight should be given to each witness's testimony. The qualifications and experience of the witness will be a factor in determining the weight to be given to that witness's testimony.

Witness panels

The Tribunal may permit evidence to be given by a number of witnesses sitting as a witness panel. This will normally be allowed when the testimony of two or more witnesses is interconnected, and the evidence will be more understandable if the witnesses are able to give their evidence in a chronological fashion. Cross-examination will not take place until all of the witnesses on the panel have presented their initial evidence (i.e., evidence-in-chief/direct evidence).

The main restriction on this type of format is that the witnesses cannot discuss the answers to questions with the other witnesses on the panel. Each witness must give his or her evidence without consultation with the other panel witnesses.

12.3 The Hearing

Role of the panel chair

The member of a panel who has been designated as chair of that panel will be responsible for the general conduct of the appeal hearing.

Official hearing recorder

All Tribunal hearings are recorded by an official verbatim recorder (section 35 of the *Administrative Tribunals Act*). The recording of Tribunal proceedings by anyone other than the Tribunal's official recorder is not permitted unless approved by the Tribunal (see also Rule 21(10) and (11)).

Section 35 of the *Administrative Tribunals Act* states that the recording is presumed to be correct and constitutes part of the record. If the recording is defective, it does not affect the validity of the proceeding.

Powers of the panel at the hearing

The panel will determine how the hearing is conducted and may, among other things:

- determine the order and the hours of proceeding;
- receive and accept on oath or affirmation, by affidavit or otherwise, evidence and information that the panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law, or exclude or limit evidence and information;
- require the production of evidence;
- require the attendance of witnesses;
- allow oral evidence and/or argument by telephone or videoconference in special circumstances;
- order the exclusion of witnesses from the hearing prior to giving evidence;
- ask questions of participants or witnesses;
- place time limits on the examination or cross-examination of witnesses, or on opening or closing arguments;
- adjourn a hearing; and/or
- make any other decision or order necessary for the just, timely and full resolution of the appeal.

The panel may make any orders or give directions that the panel considers necessary for the maintenance of order at the hearing, including:

- imposing restrictions on a person's continued participation in, or attendance at, a proceeding; and
- excluding a person from further participation in, or attendance at, a proceeding until the panel orders otherwise.

Additional information on some of these subjects is set out under different headings below.

Restriction of public access to oral hearings and documents

Under section 41 of the *Administrative Tribunals Act*, an oral hearing of an appeal will be open to the public unless the panel directs that all or part of the information be received to the exclusion of the public because, in the opinion of the panel:

(a) the desirability of avoiding disclosure in the interests of any person or participant 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.

A document submitted in the hearing of an appeal will be accessible to the public unless:

- the panel is of the opinion that (a), above, applies; or
- the panel directs that all or part of the document be received in confidence to the exclusion of a participant or participants because, in the opinion of the panel, its nature requires that direction to ensure the proper administration of justice.

Exclusion of witnesses

Prior to giving his or her evidence, the panel may ask a witness (or witnesses) to wait outside of the hearing room until the witness is called upon to testify. This may be done on the panel's initiative or at the request of a party.

Swearing-in of witnesses

According to Rule 25 [Oath or affirmation], before a person testifies at an oral hearing (including a party), the person will be asked to swear an oath or make a solemn affirmation that the evidence given will be true. An oath is sworn on a bible. An affirmation is a solemn statement that may be expressed as follows: "I solemnly affirm to tell the truth, the whole truth and nothing but the truth."

When a spokesperson or representative will be giving evidence, he or she will also be asked to swear an oath or make a solemn affirmation before giving evidence. It is not necessary to be sworn in to examine or cross-examine a witness.

The official recorder normally administers the oath or affirmation. To avoid delays when the witness is on the stand, parties should ask each of their witnesses, in advance of the hearing, whether the witness wants to give their evidence under oath or affirmation. The parties should also give advance notice to the official recorder of the witness's choice (oath or affirmation).

Evidence in Confidence

Under section 42 of the *Administrative Tribunals Act*, the panel may direct that all or part of the evidence of a witness, or documentary evidence, be received in confidence to the exclusion of a party(s) or intervener(s) on terms that the panel considers necessary. This order will only be made if the panel is of the opinion that it is required to ensure the proper administration of justice.

Procedure at the hearing

While Tribunal hearings are not as formal as court proceedings, they are still reasonably formal and parties are expected to act appropriately. The chair of the panel is addressed as "Mister Chair" or "Madam Chair". Surnames should be used when addressing or referring to the other panel members or parties. The degree of formality of a hearing may vary depending on the composition of the panel hearing the appeal, the nature of the parties, and the subject matter of the appeal. The following format will generally be followed:

1. The chair of the panel will begin the hearing by identifying the panel members conducting the appeal and the official recorder appointed to record the proceedings.
2. The chair will state the statutory authority for the Tribunal to hear the appeal and identify the decision that is being appealed. The chair may also clarify with the parties the precise issue(s) to be decided in the appeal.
3. The chair will invite those parties in attendance to introduce themselves for the record.
4. The chair will review the procedures that will apply at the hearing in connection with the presentation of evidence. Where there are multiple appellants, respondents and/or third parties, or the presence of an intervener(s), the order for presenting their respective cases will also be addressed. The chair may make a statement regarding the scope of evidence that will be acceptable and other limitations as may be applicable.
5. The parties will be given an opportunity to confirm or to clarify their understanding of the matter at hand and to make any preliminary objections or requests.
6. Opening Statements: The chair will then ask the parties for their opening statements, usually in the following order:

   (1) appellant
   (2) respondent
   (3) third party (if any)
   (4) intervener (if any)

   The appellant's opening statement is to include the grounds for appeal, the remedy (decision) sought at the end of the appeal, the number and names of witnesses (if any) to be called, and the approximate time required to put the appellant's case before the panel. The respondent's and third party's opening statements should include the respective remedies (decisions) they seek from the Tribunal, the number and names of witnesses (if any) to be called, and the approximate time required to put their respective cases before the panel. An intervener's opening statement is to include a

summary of the position that it will be presenting on the appeal in accordance with any prior limitations or conditions set by the Tribunal.

7. Witnesses/Evidence (see also sections 38 and 40 of the *Administrative Tribunals Act*): The chair will advise the appellant to call its first witness (this may be the appellant him or herself, or a representative of the corporation, society or other legal person who may be the appellant). The appellant will ask the witness questions first. When the appellant is finished with its questions, the witness may be cross-examined by the respondent and the third party (if present). Members of the panel may also ask the witness questions. New information given in response to questions asked by the other parties or the panel is subject to re-examination by the appellant. The same procedure applies for each subsequent witness.
8. When the appellant has finished calling its witnesses, the chair will advise the respondent to proceed with the presentation of its evidence (call its witnesses to testify). The respondent will ask its witness questions first, and then the witness may be cross-examined by the appellant and the third party (if present). Members of the panel may also ask the witness questions. New information given in response to questions asked by other parties or the panel is subject to re-examination by the respondent. The same procedure applies for each subsequent witness.
9. When the respondent has finished calling its witnesses, the third parties (if any) will present their evidence in the order determined by the chair. Each witness will give his or her evidence, and will then be subject to cross-examination by the appellant and the respondent. Members of the panel may also ask the witness questions. New information given in response to questions asked by other parties or the panel is subject to re-examination by the third party that called the witness. The same procedure applies for each subsequent witness.
10. Any interveners will be given the opportunity to present evidence if, or to the extent, initially authorized by the Tribunal. This evidence may be subject to cross-examination by the parties and to questions from the panel.
11. The appellant may apply to the panel for the opportunity to call "reply evidence" (e.g., a witness to respond to evidence tendered by the other parties). The application may only be granted if the respondent or third party called evidence that could not reasonably have been anticipated by the appellant.
12. Closing Statements: When the parties are finished calling their witnesses and providing their documents (presenting their evidence), the chair will ask the parties to present a closing statement (argument). In some circumstances the panel chair will allow, or

request that, the parties make their closing submissions to the Tribunal in writing.

In their closing statements, the parties should focus on those facts and/or principles of law that they would like the panel to consider, and reiterate the remedy that they are seeking from the Tribunal. The parties may also wish to suggest alternatives for the panel to consider when making its decision, provided that the evidence presented during the hearing supports the proposed alternatives. The order of presentation is normally as follows:

(1) appellant
(2) respondent
(3) third party (if any)
(4) intervener (if any)
(5) reply by appellant

**No new evidence will be accepted in the closing statement.

12. The chair will advise parties to the appeal that the hearing of evidence is concluded and the "record is closed" (see below).

Objections

If a party wishes to object to something during the hearing, that party may raise an objection. For instance, a party may object to questions or evidence on the grounds that it is not relevant to an issue in the appeal.

To object, a party should stand and state the reasons for the objection in a courteous manner. The panel will provide the other party(s) with an opportunity to respond before making a decision on the objection.

Maintenance of order at hearings

Section 48 of the *Administrative Tribunal Act* gives the panel the power to make orders or give directions that it considers necessary for the maintenance of order at the hearing. For instance, it may impose restrictions on a person's continued participation in, or attendance at, a hearing, or it may exclude a person from further participation in an appeal, or attendance at the hearing, until the panel orders otherwise.

Contempt

Under section 48 of the *Administrative Tribunals Act*, if the person who is subject to the order or direction disobeys, refuses, or fails to comply with the order or direction, the panel may ask a peace office to enforce the order or direction, or it may apply to the court to commit the person for contempt of the order or direction under section 49(2) of the *Administrative Tribunals Act*.

Documents not provided during pre-hearing disclosure

The pre-hearing disclosure rules were created to ensure that the Tribunal, the parties, and the interveners are able to prepare for the hearing. Avoiding "surprises" will ensure an efficient hearing process. However, there are occasions when new documents come to light that are relevant to the issues under appeal.

In accordance with Rule 21(8) and (9), if a party or intervener seeks to refer to, or rely upon, a document that was not disclosed prior to the hearing, that party or intervener must obtain the approval of the panel. The party or intervener must bring sufficient copies of the document to the hearing for each member of the panel, each party and intervener, the official recorder, and a copy for the Tribunal's file (usually 7 – 8 copies). If the new material is legislation, case law, legal articles or excerpts from text books, the official recorder does not require a copy.

If sufficient copies are not brought to the hearing, it is the responsibility of the party submitting the documents to arrange for, and pay for, copies to be made during the hearing.

The panel may ask the other parties and interveners whether they have any objections to the document. Among other things, when deciding whether to accept the new document, the panel will consider whether the document is relevant to an issue in the appeal and whether the other parties will require additional time to review the document.

Documents entered into evidence at the hearing will be marked as an exhibit to the hearing.

Failure to identify witnesses prior to the hearing

If a party or intervener wants to call a person to testify at the hearing that was not identified during the pre-hearing disclosure process, the person may not be able to give evidence without the panel's approval. The panel may ask the other parties and interveners whether they have any objections to the proposed witness. Among other things, when deciding whether to allow the new witness to testify, the panel will consider whether the person's evidence is relevant to an issue in the appeal, whether the addition of the witness will delay the proceedings, and whether the other parties and interveners may require an opportunity to present new witnesses in reply.

The panel may make any decision or order that it considers appropriate in the circumstances, including:

- adjourning the hearing; and
- ordering a party to pay the costs incurred by any other parties as a result of the adjournment.

Legal authorities not provided prior to the hearing

A party wanting to rely on a legal authority not previously provided during pre-hearing disclosure, must provide a copy for each panel member, all of the other parties and interveners, and the Tribunal's file.

Adjournments

An adjournment is a discontinuation of a hearing which is in progress. The panel will make every effort to complete a hearing within the time scheduled. However, the panel has the authority under section 39 of the *Administrative Tribunals Act* to adjourn a proceeding if an adjournment is required "to permit an adequate hearing to be held."

The panel will adjourn a hearing to a later date if: the hearing is not concluded within the allotted time, a party is "surprised" by previously undisclosed evidence, or another problem arises that is of sufficient importance to warrant the delay that will occur if the adjournment is granted.

If a party requests an adjournment, the panel is required under section 39(2) of the *Administrative Tribunals Act* to have regard to the reasons for the adjournment, whether the adjournment would cause unreasonable delay, the impact of both refusing and granting the adjournment on the parties, and any impact on the public interest. In furtherance of, and/or in addition to, consideration of the general factors, the panel will specifically consider the following:

- the views of the other parties;
- the proposed or anticipated length of the adjournment;
- the adequacy of the reasons provided for the adjournment and the adequacy of any objections to the adjournment;
- the number, length and cause of any previous adjournments or postponements that have been granted;
- whether the adjournment will needlessly delay or impede the conduct of the hearing;
- whether the purpose for which the adjournment is sought will contribute to the resolution of the matter;
- whether the adjournment is required to provide a fair opportunity to be heard;
- the degree to which the need for the adjournment arises out of the intentional actions or the neglect of the applicant;
- any prejudice to the other parties if an adjournment is granted, balanced against the prejudice to the applicant if the adjournment is not granted;
- any environmental impacts that may result from an adjournment of the hearing;

- any public interest factors, such as the public interest in the efficient and timely conduct of the appeal; and
- any other factors which may be relevant.

Before granting an adjournment, and except in extenuating circumstances, the panel will give the other parties an opportunity to be heard. If the other parties to the appeal consent to the adjournment, the request will rarely be denied.

If a hearing is adjourned, the panel will consider whether to order any terms and conditions that may assist with the fair and efficient conduct of the appeal.

Closing of the record

Rule 24 [Closing of the record] states that, at the conclusion of the hearing, the record will be closed unless the panel directs otherwise. Once the record is closed, no additional evidence will be accepted.

Reopening a hearing on the basis of new evidence

Pursuant to Rule 24 [Closing of the record], once the record is closed, no additional evidence will be accepted from the parties unless the Tribunal's decision has not been released and the panel decides that: the evidence is material to the issues, there are good reasons for the failure to produce it in a timely fashion, and acceptance of such evidence is in accordance with the principles of natural justice and procedural fairness.

Additional information requested by the Tribunal

After the oral hearing is completed, the panel may find that further information is required from one or more of the parties in order to make a decision on the appeal. If the panel requests additional information from one or more of the parties, all parties will be given access to or copies of the information, and will have an opportunity to make submissions and respond to the information.

Role of precedent (previous decisions of the Tribunal)

Although the Tribunal may be bound by the decisions of certain courts, it is not required to follow (i.e., is not bound by) its past decisions or the decisions of other administrative agencies. While prior decisions of the Tribunal may indicate how panel members will view particular types of cases, as a matter of law, the panel must decide each case on its own merits.

Burden of proof

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities".

Photographing and recording during a hearing **[as amended 04/19]**

According to Rule 21(10), photographing, audio recording, video recording or other electronic recording of Tribunal proceedings is prohibited without the

prior approval of the Tribunal or the panel. If approved, the Tribunal or the panel may impose terms and conditions on the activity.

If permission will be sought from the hearing panel, the panel should be advised of the application before the hearing opens for the day. This gives the panel time to determine the process that it will follow to decide the application.

Failure to attend an oral hearing

In accordance with Rule 20 [Failure to participate in a hearing], if the **appellant** has been given timely notice of the hearing and fails to attend, the panel may proceed with the hearing, dismiss the appeal as abandoned, or make any order appropriate in the circumstances.

If the **respondent, third party or an intervener** has been given timely notice of the hearing and, without advance written notice and reasonable explanation, fails to attend, the panel may proceed with the hearing and make a decision without further notice to that party or intervener.

13.0 APPLICATION FOR COSTS

Section 47 of the *Administrative Tribunals Act* provides the Tribunal with the power to order costs in respect of an appeal.

Party-and-Party Costs

Under sections 47(1)(a) and (b) of the *Administrative Tribunals Act,* the Tribunal may order a party or an intervener to pay all or part of the costs of another party or intervener in connection with the appeal. An order for costs cannot be made against an agent or representative of government (section 47.2 of the *Administrative Tribunals Act*), it may only be made against "the government".

An application for costs may be made at any time during the appeal. However, if the appeal proceeds to a hearing on the merits, the party applying for costs should reapply for an award of costs at the hearing, at which time the panel will normally take submissions on the application.

The panel will not make an order for costs unless a party/intervener requests that it be awarded costs. However, the panel may, on its own initiative, ask a party/intervener whether it seeks costs.

The Tribunal has not adopted a policy that follows the civil court practice of "loser pays the winner's costs." The objectives of the Tribunal's costs policy are to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct. Thus, the Tribunal's policy is to award costs in special circumstances. Those circumstances include:

(a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;

(b) where the action of a party/intervener, or the failure of a party/intervener to act in a timely manner, results in prejudice to any of the other parties/interveners;

(c) where a party/intervener, without prior notice to the Tribunal, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing";

(d) where a party/intervener unreasonably delays the proceeding;

(e) where a party's/intervener's failure to comply with an order or direction of the Tribunal, or a panel, has resulted in prejudice to another party/intervener; and

(f) where a party/intervener has continued to deal with issues which the Tribunal has advised are irrelevant.

The panel is not bound to order costs when one of the above-mentioned examples occurs, nor does it have to find that one of the examples must have occurred to order costs.

The panel will not order a party/intervener to pay costs unless it has first given that party/intervener an opportunity to make submissions on the application. If the Tribunal orders that all or part of a party's/intervener's costs be paid, it may ask for submissions with respect to the amount of costs incurred.

The costs payable to a party under section 47(1)(a) or (b) of the *Administrative Tribunals Act* will be determined on the basis of Appendix B of the BC *Supreme Court Civil Rules*, B.C. Reg. 168/2009, enacted under the *Court Rules Act*. Appendix B lists items for which costs can be awarded, as well as the corresponding number of units for each item. The panel will decide the scale under which costs are to be assessed. The scale chosen depends on the difficulty of the matter being appealed and provides increasing dollar values for matters of greater difficulty.

If the panel orders costs, the order may be filed in a court registry at which time it will have the same effect as an order of the court for the recovery of a debt in the amount stated. All proceedings may be taken as if the order were an order of the court (section 47(2) of the *Administrative Tribunals Act*).

The Tribunal's Costs and Expenses

If the panel considers that the conduct of a party has been improper, 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 (section 47(1)(c) of the *Administrative Tribunals Act*). Decisions of the courts defining conduct that is improper, frivolous, vexatious or abusive may be used to assist the panel in determining whether to apply this section.

Expenses of the Tribunal that a party may be required to pay:

a) recorder fees;

b) per diems of panel members;

c) travel expenses;

d) hotel costs; and

e) charges for the hearing room.

These expenses will vary based on such factors as the nature and location of the appeal, the number of days of the hearing, and the number of panel members sitting on the appeal.

The panel will not order a party to pay the Tribunal's actual costs or expenses unless it has first given that party an opportunity to make submissions on this issue.

14.0 DECISIONS

Powers of the Tribunal when making final decisions

The Tribunal has broad decision-making powers. In general, the Tribunal may:

(a) confirm, vary or rescind the decision appealed from, or

(b) send the matter back, with directions, to the person whose decision is under appeal.

[For other powers, see also section 2.0 of this Manual under the heading "The Tribunal's powers and order-making authority".]

How final decisions are made

Only those Tribunal members who sat on the panel that heard the appeal will make the decision.

When making the decision, the panel members are required to determine, on a balance of probabilities, what occurred and decide the issues raised in the appeal. They will evaluate the evidence presented and apply the relevant legislation and legal authority. As a general rule, the panel is not bound by government policy.

The decision of the majority of the members of a panel is the decision of the Tribunal. In the case of a tie, the decision of the chair of the panel governs (section 26(6) of the *Administrative Tribunals Act*).

Written reasons

The Tribunal will give written reasons for all of its final decisions (section 51 of the *Administrative Tribunals Act*). It also gives written reasons for most preliminary applications and orders.

The Tribunal will provide a copy of its final decision to all of the parties and interveners in accordance with the usual method of delivery to that party or

intervener, and a hard copy of the decision will be sent by mail. The decision will also be sent to the responsible minister's office.

Most preliminary decisions and all final decisions are posted on the Tribunal's website, and some will be summarized and included in the Tribunal's annual report.

Section 52 of the *Administrative Tribunals Act* provides the Tribunal with authority to give notice of its decision to the parties by alternative methods in certain circumstances.

When will a final decision on the appeal be made?

The time required to issue a decision will vary depending on the nature of the appeal, the length of the hearing, and the complexity of the issues involved.

The panel presiding over an appeal will endeavour to provide the parties with its final decision and written reasons as soon as practicable after the completion of the hearing. Final written decisions with reasons will generally be released within the timelines set out in Practice Directive No. 1 issued by the Tribunal.

On rare occasions, an oral decision may be rendered at the conclusion of an oral hearing. If this occurs, the panel will provide its written reasons within the timelines set out in Practice Directive No. 1.

Effective date of decisions and orders

Pursuant to section 50(3) of the *Administrative Tribunals Act*, a decision or order is effective on the date on which it is issued, unless otherwise specified by the Tribunal.

Amendments to final decisions

Section 53 of the *Administrative Tribunals Act* provides that the panel may amend a final decision within 30 calendar days of all parties being served with the final decision. An amendment may be made on application by a party, or on the panel's own initiative, to correct:

(a) a clerical or typographical error;

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

(c) an arithmetical error made in a computation.

A party may also apply for clarification of the final decision under section 53 within 30 days of being served with the decision.

Enforcement of final decisions

Pursuant to section 54 of the *Administrative Tribunals Act*, once a certified copy of the Tribunal's final decision is filed with the BC Supreme Court, the decision

will have the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

Where past Tribunal decisions may be found

Copies of past Tribunal decisions are available upon request from the Tribunal office and from the following libraries:

- Legislative Library
- University of British Columbia Law Library
- University of Victoria Law Library
- West Coast Environmental Law Library

Decisions are also located on the Tribunal's website (https://www.bcerat.ca/decisions/), and are available on the LexisNexis® Quicklaw® database (http://www.lexisnexis.ca/en-ca/home.page), to subscribers of that service.

Review of Tribunal decisions

There is no right of appeal to the courts from a Tribunal decision. If a party is dissatisfied with a decision or order of the Tribunal may apply to the B.C. Supreme Court for a judicial review of the decision pursuant to the *Judicial Review Procedure Act*. A judicial review of a final decision of the Tribunal must be commenced within **60** days of the date that the Tribunal's decision was issued, unless the court extends the time (section 57 of the *Administrative Tribunals Act*).

15.0 WITHDRAWING OR ABANDONING AN APPEAL

An appellant may withdraw all or part of the appeal by informing the Tribunal in writing, or by informing the panel in person (on the record) during the course of a hearing. According to section 17(1) of the *Administrative Tribunals Act*, once the appellant advises the Tribunal that all or part of the appeal is withdrawn, the Tribunal must accept it and order that all or part of the appeal is, accordingly, dismissed.

16.0 ADDITIONAL PROVISIONS

Calculating time limits and deadlines

Section 25 of the *Interpretation Act* applies to all time limits set out in statutes, such as the time limits for filing a notice of appeal.

Rule 4 [Calculating time] explains how the Tribunal calculates time under the Rules, any order or direction of the Tribunal, as well as any time lines set out in this Manual.

When something must be done or provided within a certain number of days, "days" are counted as calendar days, which is defined in Rule 1 [Definitions] as each day shown on a calendar and includes weekends and holidays. There are two types of calculations that may be required to determine a due date: calculating due dates going forward, and calculating due dates going backwards. For example, if a person is given 10 days to provide something to the Tribunal (counting forward in time), the days are calendar days, and are to be counted by excluding the first day and including the last day. The last day will be the "due date". If it is the first days of the month, the item would be required on the 11th. However, if the 11th is a Saturday, Sunday or public holiday, the due date will be the next calendar day that is not a Saturday, Sunday or public holiday. Using the current example, the due date would be on the Monday or, if the Monday is a public holiday, then the due date would be Tuesday.

If the calculation requires time to be calculated backwards (e.g., 30 calendar days before the first day of hearing), the calendar days are counted by excluding the first day of the hearing and including the last day (i.e., the last day is the due date). For example, if the first day of a hearing is on July 31st, 30 calendar days before that day is July 1st. The item would be due on July 1st. However, if the due date falls on a Saturday, Sunday or public holiday, the due date will be the calendar day that falls before the Saturday, Sunday or public holiday (e.g., the Friday before the weekend). Using the current example, the due date would fall in June (June 30th or earlier).

If a party or intervener is unable to meet a time limit in the Rules, or a deadline that has been set out in an order or direction of the Tribunal, the party or intervener must apply for a change to the time limit. Under Rule 4, the Tribunal may modify a time limit if the Tribunal determines that it is fair and appropriate in the circumstances, regardless of whether the time limit has already expired.

It should also be noted that, to be on time, the document (including submissions) must be delivered or filed with the Tribunal within the "business day", which is defined in Rule 1 [Definitions] as 8:30 am to 4:30 pm, Monday through Friday, excluding public holidays. If it is not delivered within that time frame (e.g., it is delivered at 5:30 pm), the document is deemed to be delivered on the next business day (see Rule 12).

Non-compliance with the Rules or a Tribunal order

Pursuant to section 18 of the *Administrative Tribunals Act* and Rule 3 [Effect of non-compliance], if a party fails to comply with a Rule or an order of the Tribunal, the Tribunal must give the party notice of the non-compliance, and then may do one or more of the following:

(a) schedule a hearing;

(b) continue with the appeal and make a decision based upon the information before it, with or without providing an opportunity to make submissions;

(c) dismiss the appeal;

(d) make an order for costs; and/or

(e) make any other decision or order that the Tribunal considers appropriate in the circumstances.

However, Rule 3 also clarifies that technical defects and irregularities in form will not invalidate the proceedings or constitute non-compliance with the Rules.

When deciding the outcome of a party or participant's non-compliance, the Tribunal will consider the severity of the non-compliance, whether there is a history of non-compliance, and the prejudice to the other parties and participants of the non-compliance. The Tribunal will not dismiss an appeal unless the non-compliance is the appellant's, is highly prejudicial to the other parties, and it cannot be remedied by an order for costs or by an alternate remedy. Dismissing an appeal due to non-compliance will only occur in the rarest of cases.

If the non-compliance relates to a deadline in the Rules, or in an order or direction of the Tribunal, the Tribunal may modify the deadline whether or not it has already passed. Before doing so, the Tribunal must be satisfied that it is fair and appropriate to do so in the circumstances (Rule 4).

Audio or visual requirements in the hearing room

If a party wants to use an overhead projector, flip chart, VCR, telephone conferencing, videoconferencing, etc., at a hearing, that party must confirm the availability of such items with the venue scheduled for the hearing (e.g., hotel, Tribunal office) and make arrangements accordingly. The cost of such equipment or services must be paid by that party.

Interpreters and other accommodations

The Tribunal will make every effort to accommodate the parties' and interveners' reasonable needs to enable their meaningful participation at a hearing. If a party, intervener, representative, or a witness requires an interpreter and/or any other accommodation (e.g., services to assist the visually or hearing impaired), the Tribunal will, at the request of the party or intervener, or on its own initiative, accommodate the intervener's needs as is reasonable in the circumstances.

If a party or intervener requires some type of accommodation or assistance, he or she must notify the Tribunal **at least 30 calendar days** before the hearing commences (Rule 23).

Transcripts

A person may request a transcript of any proceedings before the Tribunal from the official recorder. The cost of a transcript must be paid by the person who makes the request.

Pursuant to section 35 of the *Administrative Tribunals Act*, if a transcript is unable to be produced due to a mechanical or human failure or other accident, the validity of the proceeding is not affected.

Legal counsel to the Tribunal

The Tribunal may appoint and direct its legal counsel to:

(a) advise the Tribunal on matters of law and procedure and on such other matters as the Tribunal requests;

(b) ask questions of the witnesses retained by the Tribunal; and

(c) question witnesses.