Energy Resource Appeal Tribunal
Fourth Floor, 747 Fort Street, Victoria BC V8W 3E9
Tel: (250) 387-3464 Fax: (250) 356-9923
bcerat.ca info@bcerat.ca

Evidence

What is evidence?

Parties are allowed to present evidence to support their cases. The Energy Resource Appeal Tribunal (the "Tribunal") gives some interveners that chance too. Evidence is the information you use at a hearing to prove your case or to disprove the case of another party. It is anything that can be used to prove (or disprove) a fact that would be relevant to the Tribunal's decision.

Evidence is different from arguments or submissions that are made in appeal. Arguments or submissions rely on legal principles or authorities, to convince the Tribunal what it should decide any why. The Tribunal's decision will depend on the evidence (which establishes the facts of the situation) and the arguments (which may persuade the Tribunal to decide the appeal in a particular way, given the facts established by the evidence).

There are several kinds of evidence:

Oral (verbal) Testimony: in an oral hearing, witnesses make statements or answer questions to give information to the panel. In many hearings, the parties are witnesses.

Documentary Evidence: documents, such as records, maps, letters, reports, etc. At an oral hearing, these are introduced by witnesses. In a written hearing, these are introduced through affidavits or signed statements.

Physical objects: in an oral hearing, witnesses might refer to physical objects. The witnesses will need to explain where the objects came from. The party presenting the evidence will need to explain, in its submissions, why the objects matter to the appeal.

Images or videos: where an image or video is presented as evidence, the person who made it will need to identify where and when it was made.

Affidavits: a signed statement by a witness, sworn or affirmed as true before a lawyer or Notary Public.

Expert Evidence: opinions provided by people with specialized education, training, or experience, on issues that are outside the experience of everyday life. There are special rules and deadlines for giving notice of expert witnesses and reports (see the Information Sheet, "Expert Witnesses").

The Burden of Proof

The panel determines facts based on a standard called “the balance of probabilities”, which means accepting statements or claims that the panel thinks is most likely true. This is a different standard than “proof beyond a reasonable doubt”, which applies in criminal cases. It is easier to prove facts in an appeal to the Tribunal than it is in a criminal case.

The appellant has the responsibility of proving their case. To convince the panel that a fact is true, the appellant needs to show that it is more likely than not. If the parties disagree about any facts, the appellant will need to present evidence to do this.

What evidence will the Tribunal accept?

The panel can hear any evidence that might help decide an issue raised in the appeal. In an oral hearing, however, the panel can decide to not hear evidence that is overly repetitive, barely relevant, or unreliable. The panel can also refuse to hear evidence that is of minimal relevance, is unreliable, or may create more confusion than help decide the appeal. Before the panel refuses to hear any evidence, the parties will get to explain why the panel should or should not hear it.

After the panel receives evidence, the panel will decide how much to rely on it. This is called “weighing” the evidence, or giving it “weight”. Generally, if the evidence is not reliable because it does not seem to be accurate or true, or if it does not seem very helpful to deciding the appeal, the Panel will give it little weight.

Witnesses

How to arrange for witnesses to attend or request an Order from the Tribunal

A witness is someone who provides evidence in an oral hearing. This is called “testifying”. Witnesses should have personal, first-hand knowledge about the information you want them to talk about. Where a witness’ knowledge is second-hand, it is called hearsay. The panel may decide it does not want to hear the hearsay evidence, or may give it limited weight, depending on the circumstances of the case. It is a good idea to always choose your witnesses to have the most first-hand knowledge possible.

Each party must arrange for their witnesses to attend the hearing. If you want to question someone who works or worked for a different party, do not assume the other party will present them as a witness. You also cannot demand that they present a witness. You should

check if the other party will call that person as a witness. If they will not, you should check if the person will agree to be presented as your witness.

If a person refuses to be a witness, you can write to the Tribunal and ask it to order the person to attend the hearing. For more information, see the Information Sheet, "Requesting an Order for a Witness to Attend an Oral Hearing".

What happens when someone testifies?

A witness gives their evidence under a promise to tell the truth, either based on religious belief (an "oath") or on their conscience (an "affirmation"). In either case, the law requires that a witness tell the truth.

Each party (and, if allowed by the Tribunal, some interveners) has the chance to get evidence from a witness. The party for whom the witness is giving evidence has the first chance. This is called "direct examination" or "direct evidence". Afterward, the other parties (and any interveners allowed to ask questions) will have their turns. This is called "cross-examination". After cross-examination is finished, the party that presented the witness gets a last chance to ask questions about anything new that came up during cross-examination. This is called "re-examination" or "re-direct".

Direct Evidence

Often, the parties to an appeal are also witnesses. A party who testifies may give their evidence by answering questions asked by their representative, if they have one. If they do not have a representative, they just tell the panel their story. Other witnesses that are presented by a party will give their evidence by answering questions asked by the party or the party's representative.

If you are questioning a witness giving direct evidence, your questions should generally not suggest an answer. These are called leading questions. An example of a leading question is, "When you saw the stream, there was a lot of water in it, wasn't there?" A better way to phrase the question is, "How much water was in the stream when you saw it?"

If you ask leading questions during direct evidence, the panel may direct you to rephrase or may give less weight to the answer to leading questions.

Cross-examining witnesses

Parties (and any interveners who are allowed to do so) may cross-examine the witnesses presented by other parties (and any interveners allowed to call witnesses). The purposes of

cross-examination are to get information that supports the questioning party's case, weakens the case of other parties, or makes the panel less likely to believe the witness.

If you disagree with something that the other party's witness said during direct testimony, or you believe that the witness only told part of the story, take notes about your concerns. Refer to your notes during cross-examination to challenge the witness' evidence or get them to tell the whole story. It is not appropriate to interrupt a witness' testimony unless you are objecting to something (objections are discussed below).

When cross-examining a witness, you can ask leading questions (suggest an answer to the witness). You cannot, however, give your own evidence. Your chance to give evidence is when you testify. As a result, when cross-examining a witness, you should only ask questions to highlight why the panel should give their testimony little weight. For example, you might ask, "You didn't see that yourself, did you?" or "You didn't think it was important to have a staff member investigate the situation, did you?"

If you plan on presenting evidence that is contrary to a witness' testimony, you must give the witness the chance to address that evidence. If you do not, the panel will refuse to give any weight to your evidence. For example, you might ask, "Mrs. Smith is going to testify this afternoon. I expect she will say that you were not at the stream that day because you were with her all day. What do you say to that?" Or, "Would it surprise you if I told you your staff said you told them not to take any measurements, but just take a quick look around?"

Re-examination or re-direct

A party that presents a witness can ask questions after cross-examination, but only about questions asked during cross-examination. The purpose of re-examination is not to re-state evidence, but to explain and clarify what they said during cross-examination. If you are re-examining a witness, you should refer to specific questions from cross-examination in asking your questions. You are not allowed to ask leading questions. For example, you might ask a witness, "When Mr. Jones was asking you questions, you said you did not receive any email on June 8th. Did you receive the email written on June 8th on a later date?"

The Panel's questions

The Panel members may ask the witness questions to make sure the panel understands the evidence. This may be to clarify testimony as it is given or it may follow re-direct. In either case, the parties will have the opportunity to ask questions following up on the panel's questions.

Objections

When a party thinks that a witness is being asked appropriate questions, they can object. In an in-person hearing, you object by politely interjecting and saying you object, and providing the reason why. Common grounds to object during a witness' testimony include:

- **Argumentative questions:** the questions are not intended to get information about facts, but rather points of law that should be discussed in submissions/argument;
- **Asked and answered:** the information asked for has already been given by the witness;
- **Best evidence:** the question asks about evidence that is better to get from another source (for example, asking a witness to summarize a document that can be marked as an exhibit);
- **Beyond scope:** in re-direct, the questions are not about material covered in cross-examination;
- **Calls for expertise:** the question should only be answered by an expert witness;
- **Compound**: the question is confusing and should be broken down into two or more smaller questions;
- **Facts not in evidence:** the question assumes information that is not in evidence;
- **Hearsay**: the question asks a witness to describe what someone told them as proof of what they were told;
- **Improper characterization:** the question unfairly describes something (for example, describing the decision under appeal as "rash" or "ill-advised");
- **Leading:** an inappropriate leading question was asked in direct examination or re-direct;
- **Relevance:** the question does not have anything to do with the issues under appeal;
- **Speculative:** the question asks the witness to comment on something that they do not have direct knowledge about or a hypothetical situation; and
- **Vague:** the question asks the witness to comment on something without providing a clear explanation of what that is.

After a party objects, the party questioning the witness may be asked to explain why the question should be allowed. The objecting party will then have a chance to respond. The panel will then decide whether to allow the question to be answered.

A party can also object to evidence being admitted. The panel follows the same process, before deciding whether to allow the evidence to be admitted.

Documents

The Tribunal's Rules require parties (and any interveners allowed to present evidence) to share the documents that they intend to use as evidence between them. In an oral hearing,

this is done before the hearing in the Statements of Points. In a written hearing, this is done with written submissions. For more information on preparing a Statement of Points or written submissions, please see the Information Sheets, "Preparing for an Oral Hearing" and "Preparing for a Written Hearing".

In a written hearing, documents are introduced in affidavits or written statements. Those documents are included with the affidavit or written statement and provided to the Tribunal. They are then considered as evidence by the panel.

In an oral hearing, documents and other evidence are introduced in witness testimony. If a party wants the panel to consider those items, they must ask for those items to be marked as "exhibits". An official recorder will be at the hearing, and they will mark items as exhibits. A panel will not consider a document that is only in the Statement of Points—a witness must introduce the document and it must be marked as an exhibit.

Sometimes new documents are discovered or created just before or during a hearing. If a party wants to have a witness introduce a document that was not included in a Statement of Points, they must bring copies of the document for each panel member, the official recorder, and each party and intervener. The party must also be prepared to explain why the document could not be included in the Statement of Points.