



Energy Resource Appeal Tribunal

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Preparing for an Oral Hearing

This information is designed to assist you in preparing for an oral hearing before the Energy Resource Appeal Tribunal (the “Tribunal”). You should also review the Tribunal’s [Practice and Procedure Manual](#) and [Rules](#), especially Rule 21. You are responsible for complying with the requirements of an oral hearing.

You may represent yourself at an oral hearing or you can choose to be represented by someone else. This can be a lawyer, although you are responsible for any associated legal fees. In preparing for an oral hearing, you may also wish to review videos produced by the Justice Education Society at <http://www.adminlawbc.ca/>.

Settling an appeal

The Tribunal encourages the parties to resolve the issues under appeal among themselves. It supports those parties to communicate to cooperatively resolve some or all issues before the hearing starts. In the right circumstances, the Tribunal will also offer to help the parties settle issues through mediation. You can expect the Tribunal to ask about settlement discussions during pre-hearing conferences.

The parties may not be ready or motivated to settle issues under appeal until after hearing some evidence or arguments. Any party may write to the Tribunal before the hearing, to ask for the appeal to be put on hold (or “adjourned”) so the parties can have time to try to settle issues under an appeal. It will be up to the Tribunal whether to do so. If the hearing is underway, you can ask in person.

Burden of proof in an appeal and the Tribunal’s powers

If you are the person bringing the appeal (the “Appellant”), you bear the burden of proof. This means you must show that what you are arguing is likely to be true. You need to show why the decision under appeal should be changed. The Tribunal can:

- send the decision being appealed back to the person who made the decision, with directions, or
- confirm, rescind or vary the decision being appealed.

Note that, if you are appealing as a “land owner” (not any other type of “eligible person”), the only issues you can raise in your appeal are that the BC Energy Regulator did not have “due regard for” submissions you made, or a written report that was submitted, when deciding whether to grant an application for a permit under [section 24](#) of the *Energy Resource Activities Act*, or an application for an amendment of a permit under section 31.

If you made the decision that is under appeal (so are the “Respondent”), you should provide evidence that supports your decision. While the Appellant will define the issues under appeal, you will want to provide evidence and explain the reasons for your decision when you respond to the evidence the Appellant presents.

If you are a Third Party in an appeal, you will need to provide evidence to support your position. If you are asking to change the decision under appeal in some way, you are responsible for proving your case, just like the Appellant.

If you have been given Intervenor status in an appeal, you should provide evidence and/or submissions in support of your position, to the limits defined by the Tribunal.

The Tribunal is independent

The Tribunal is independent from the BC Energy Regulator. It does not have any information or documents relevant to the issue(s) under appeal except what the parties give it. For this reason, the parties must ensure they give everything they think is relevant and important to their case to the Tribunal.

How do I get started?

- **Know what you want:** think about what you want the Tribunal to do and why. Then think about how to convince the Tribunal that this is the right outcome. You will need to show that certain facts are true and what the correct course of action is. Gather the information that you will need in order to build a strong and convincing case.

Remember that if you are appealing as a “land owner”, you can only argue that the BC Energy Regulator made its decision without “due regard” for submissions you made, or a report that was submitted to it, as discussed above.

- **Decide what evidence you will need:** Evidence is information that helps to show whether a fact asserted by a party is true or not. Think about the evidence that you will need as soon as possible so you can prepare your case. For each issue in the appeal, reflect on the facts you would like to establish and how you can prove those facts. Several kinds of evidence may be presented in an oral hearing, including:

Oral Testimony: live testimony given at a hearing while under an oath or affirmation, either as a statement or in response to questions.

Documents: paper or electronic documents, such as records, maps, letters, reports, etc.

Visuals: photographs, images, or videos.¹

Affidavits: statements signed and either sworn or affirmed before a lawyer or Notary Public.

Statements: written statements that were not sworn or affirmed before a lawyer or Notary Public. These statements might not be given the same “weight” (evidentiary value) as a sworn statement (affidavit).

Expert Evidence: an opinion by someone with education, training, or experience that gives the opinion weight as evidence. For example, medical doctors, engineers, or scientists giving opinions on their practice areas are all expert evidence.²

Note: any physical evidence entered as evidence at the hearing will be marked as an exhibit. You must bring an additional copy of all documents, to be marked by the official recorder ([Rule 21\(6\)](#)).

- **Arrange your witnesses:** each party must decide who they want to testify as witnesses in support of their case. While a party will often be the main witness for their own case, they might ask other people to testify who may confirm some aspects of their testimony, or give evidence on other matters. A witness (other than an expert) can only give evidence about things that they saw or experienced, or give opinions about limited matters within day-to-day experience (distance, speed, the value of objects, etc.).

When planning witnesses, bear in mind that the quality of the evidence is more importance than the quantity of it. Witnesses should have **personal, first-hand** knowledge of the facts they will describe. If a witness gives hearsay evidence (information that they heard secondhand), the Tribunal may decide not to consider that evidence or may give it limited value as evidence.

¹ The person who created the visual should explain, in the hearing, what the visual shows, and when and where it was made.

² The Tribunal has special rules and deadlines that apply where parties wish to present expert evidence. If you think you will be providing an expert report as part of your case, see [Rule 27](#), the Practice and Procedure Manual, and the Information Sheet, “Expert Witnesses”. You should let the Tribunal know of your plans to present expert evidence when the subject is discussed at pre-hearing conferences.

Witnesses should be asked, as early as possible in the appeal process, to voluntarily testify. If a potential witness refuses to testify, you can ask the Tribunal to order them to do so through a summons (see [Rule 26](#) and the Information Sheet entitled "[Requiring a Witness to Attend an Oral Hearing](#)" for more information).

If you wish to call an expert witness to give evidence about their opinions, there are additional rules that apply. **You must give notice of** expert testimony evidence or provide an expert report 84 calendar days before the scheduled hearing date, or as otherwise ordered by the Tribunal. Parties calling experts in reply must give notice or reports 42 days prior to the hearing. For more information, please see [Rule 27](#), the [Practice and Procedure Manual](#) and the Information Sheet entitled "[Expert Witnesses](#)".

- **Organize Statement of Points and Document Disclosure:** All parties are required to provide a Statement of Points and to disclose their documents in advance of the hearing. The deadlines and requirements are set out in [Rule 21](#). Before you write your Statement of Points, take the time to fully think through your case. Collect and organize the documents that your witnesses (including you) will present or refer to at the hearing.

In your Statement of Points, summarize the facts you are asserting in your case. Describe how your evidence supports the truth of those facts. Include a list of witnesses and, in general terms, the evidence you expect them to give. Organize your documents in the order referred to in your Statement of Points, and ensure all the evidence you intend to bring to the hearing appears in the Statement of Points.

Also, issue by issue, consider what you are going to ask the Tribunal to order, and the argument you will make to persuade it to do so. Include any laws or previous decisions from the Tribunal, courts, or other administrative bodies that support your appeal. Frame your argument with reference to those legal authorities.

It is important to note that the Panel that hears the appeal will **not** have the materials, documents or authorities that were provided to the Tribunal during any preliminary or pre-hearing applications. **The Panel will only have those materials, documents and case/legal authorities that have been submitted to the Tribunal during the exchange of documents and Statement of Points process.** Therefore, please reproduce any documents from pre-hearing processes that you want to rely upon during the hearing.

Although it takes time and effort to go through these steps, a well-prepared Statement of Points may save you time later as it can be used as your guide—or your speaking notes—at the hearing. Keep a copy of your Statement of Points and documents and bring them to the hearing for your use during the hearing.

For further information, see the Information Sheet entitled, "[Statements of Points and Document Disclosure](#)".

Things to do Before the Hearing

1. Ensure you bring one copy of all documents for your own use and another copy for the official recorder, so that exhibits can be marked. The Tribunal members assigned to decide the appeal (the "panel") will have copies of all Statements of Points and associated documents. If you have other documents that you want to present at the hearing that were not included with your Statement of Points, you must bring extra copies in the quantity required by [Rule 21\(6\)](#).
2. Be very familiar with the documents that you will use at the hearing. If you, or a witness, refer to a document during the hearing, you must be able to direct the panel to a copy of that document in the materials provided so that the panel can follow along.
3. Prepare what you are going to say at the hearing. Have a brief opening statement ready to present at the beginning of the hearing in which you state what you believe the appeal is about, and what you want the Panel to ultimately decide and why.
4. You may be the main or only witness for your case. If so, when you take the witness stand, you may be asked to simply tell your story. Therefore, it is important to prepare what you will say in advance of the hearing. The best way to organize your story may be to put your documents in the order that the events actually happened (chronological or date order). Think about how you would explain the case to another person who doesn't know you or the issue(s) involved. Use your Statement of Points to ensure that you discuss all of the points that you wish to cover.
5. Prepare your witnesses. Think carefully about what questions you will have to ask your witness in order to get the evidence that you need, and write the questions down. Ensure that you keep your questions open-ended, rather than suggesting an answer (also called leading questions). For instance, don't ask, "Was the light red?" Instead ask, "What color was the light?"
6. Before the hearing, it is a good idea to review with your witnesses the questions that you will be asking them. You may discuss the case with your witnesses, but you must not tell them what to say. The answers must be their own.
7. Get a sense for how long it will take you to present your case in total, and how long you will need to ask questions of each witness. The panel will likely ask for these estimates so that it can efficiently manage the witness schedule.

At the hearing

A panel of one or three Tribunal members will hear the appeal. The Tribunal member designated to preside over a hearing is the “Panel Chair”. They will be responsible for ensuring a fair and efficient process for the hearing, and explaining the procedure to the parties and any interveners.

The panel will hear the evidence and arguments provided by the parties intervenors, rule on any objections, and may ask questions. If you are unsure of what to do during the hearing, you should ask the panel for direction or clarification. After the hearing is over, the panel will consider the evidence, the parties’ submissions and the law. They will write a reasoned decision that will be sent to all of the parties and intervenors (and, unless the Tribunal orders otherwise, also put on the Tribunal’s website and may share it with other legal resource websites).

It is important to understand that the panel will make its decision based **only on the arguments and evidence that it hears at the hearing**. Therefore, make sure that you say and produce everything that you think will be necessary to prove your case.

Questioning witnesses

After you have asked your witness questions (a process called direct examination), the other parties, and the panel, will have an opportunity to ask questions of the witness. The other parties’ questioning is referred to as cross-examination (there is no special term for the panel’s questions). If the witness gives new information during cross-examination or questioning by the panel, you will have an opportunity to ask further questions of the witness to clarify the evidence. This is referred to as redirect or re-examination. If you are the only witness in your case, after you have made your statement or told your story to the panel, the other parties will have a chance to ask you questions. Since you cannot ask yourself questions, the panel will ensure you have had the chance to respond fully to any questions you are asked in cross-examination or the panel’s questioning.

You will have an opportunity to cross-examine the witnesses of other parties. This can be a difficult process, both for the person asking questions and the witness. If you need a short break to prepare your questions, you should make a request to the panel.

Keeping track of what’s happening during the hearing

It is not easy to perform all of the tasks at a hearing such as speaking, acting as a witness, answering questions, cross-examining other witnesses, listening to what another party is saying, as well as thinking about what you need to prove and how the evidence presented helps or hurts your case. If you can, have someone attend the hearing with you. That person can sit beside you and take notes of what is happening. This will help you keep track of what

is going on and help you decide what points you want to bring up later in the hearing (e.g., points in response to something someone else has said). If you have trouble keeping up with the information being given by a witness (having trouble taking notes), you may tell the panel, and the panel may ask the witness to slow down.

Closing statements/arguments

After all parties have had a turn presenting their evidence, the Panel will allow each party to “wrap up” their case with a closing statement. At this time, you should summarize what you want the panel to decide and why. You should refer to the evidence presented at the hearing that supports your position, and explain why the panel should believe and rely on it over any evidence that does not support your case.

This is the time to tell the panel what you think they should order and why. While making arguments, you should refer to any law, legislation, or prior decisions by the courts, the Tribunal, or other authorities. If, after hearing all of the evidence, you believe that an alternative decision/remedy may be acceptable to you – you should advise the panel and the other parties. For more information, see the Information Sheet entitled “[Closing Statements](#)”.

Preparation Checklist

- Review the notice of appeal and any other relevant documents, as well as the issues under appeal, as determined in pre-hearing processes.
- Decide what you want the Tribunal to decide and why for each issue.
- For each issue, list the facts you need to establish in order to support the outcome you are seeking.
- Consider the evidence you will need to prove each fact (documents, photos, affidavits, expert report, etc.).
- For each issue, list the arguments you need to make to convince the Tribunal what it should order and why, given the facts you seek to establish.
- Consider any sources (court cases, previous decisions of the Tribunal, law texts, statutes, regulations, etc.) that will support your position.
- Gather the documents you need and organize them in logical order. You will need to be able to efficiently refer to them in the hearing and refer them to the panel (and witnesses) as the hearing proceeds. Ensure you bring enough copies to comply with [Rule 21](#).
- Arrange for any expert witnesses or reports and provide the required advance notice under [Rule 27](#).
- Contact any witnesses you decide are necessary to prove your case.
- Have your witnesses prepare any reports, witness statements or affidavits, or schedule for them to attend the hearing for the periods of time you expect to need to have them available.
- Prepare your opening statement, evidence (if you will testify), and questions for all witnesses.
- Meet with your witnesses and prepare them for the sorts of questions you will ask (and, if you can think of them, questions they might expect from other parties and any interveners allowed to cross-examine witnesses).
- On the date of the oral hearing, aim to arrive early, to ensure you can get to the hearing room with enough time to set up and feel relaxed and ready to begin the hearing.

For additional information about administrative law generally, see the videos produced by the Justice Education Society at <http://www.adminlawbc.ca/>.