



# Energy Resource Appeal Tribunal

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## Preparing for a Written Hearing

This information is designed to help you prepare for your written hearing before the Energy Resource Appeal Tribunal (the “Tribunal”). You should also review the Tribunal’s [Practice and Procedure Manual](#) and [Rules](#), especially Rule 22. You must comply with the Tribunal’s requirements for a written hearing.

During a written hearing, you can present your own case, or you can be represented by someone else. This can be a lawyer, but you are responsible for any legal fees.

## 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 reviewing the evidence or arguments of another party. Any party may write to the Tribunal to ask for the appeal to be put on hold 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.

## 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.

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.

The Tribunal can:

- send the decision being appealed back to the person who made the decision, with directions, or

- confirm, reverse or vary the decision being appealed.

If you made the decision that is under appeal (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 person who made the appealed decision and the BC Energy Regulator. It does not have any information or documents relevant to the issue(s) under appeal except what the parties give to 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 a written hearing, including:

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

**Visuals:** photographs, images, or videos.<sup>1</sup>

**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.<sup>2</sup>

- **Include all relevant information:** your submissions must include everything that you want the Tribunal to know about your case. Even if you provided information you want the Tribunal to consider as part of a pre-hearing process, you need to re-submit that material during the written hearing.

It is not usually enough to provide background information, explanations and arguments. You should also provide evidence (see description above). Do not assume that someone else will provide any particular evidence, or that the Tribunal will already know something.

In your submissions, you should explain how your evidence proves your case. You should discuss any laws or previous decisions from the Tribunal, courts, or other administrative bodies that support your appeal. Your aim is to convince the Tribunal about facts that you think are significant, and to persuade the Tribunal what it should do and why, given the facts that your evidence proves.

- **Organizing and structuring your submissions:** As part of the pre-hearing conferences, the issues under appeal will be defined. The parties might agree about them or the Tribunal might have to decide any points of disagreement. For each issue, decide what evidence you need to prove the facts you are asserting. Decide what you are asking the Tribunal to do once you prove those facts, and consider if there are any laws, regulations, or previous decisions from the Tribunal, courts, or other administrative bodies that might support your argument.

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

<sup>2</sup> 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.

In your submissions, you should explain how the evidence you are submitting (described above) supports the factual claims you are making. You should tell the Tribunal what it should do and why. You should reference any legal authorities (laws or previous decisions of the Tribunal, courts, or other administrative bodies) that support your argument. Be sure to refer to the information and arguments supplied by other parties too, if you think they support your position.

Your submission and any attached documents (usually evidence and previous court or Tribunal decisions) must be organized as described in [Rule 22](#). You must number all pages consecutively, or divide the attached documents using tabs. It is helpful to include an index for larger submissions and to place everything in a binder.

- **Replying to/disagreeing with information provided by others:** make sure you address things the other parties have said that you disagree with. The Tribunal will ensure that all parties have a chance to do so. These replies can only address new evidence or arguments that the other parties have made. The Tribunal will not consider new evidence or arguments that are not responses to the positions advanced by the other parties.
- **Ensure you file submissions as required:** the Tribunal will tell you how and when to provide your submissions to the Tribunal. According to [Rule 22\(1\)](#), you must file two hard copies with the Tribunal “unless directed otherwise”. You must also provide a copy to each party and intervener involved in the appeal, as directed by the Tribunal. You will receive the submissions of the others involved in the appeal as well.

### **When is the hearing over?**

The hearing is over after everyone has had a chance to file their submissions and respond to the submissions of the others involved in the appeal. Normally, the Appellant’s reply is the last submission. If the Tribunal allows additional submissions or responses, then the hearing is over at the conclusion of the last submission.

Once the hearing is over, the Tribunal member(s) assigned to decide the appeal will consider the evidence, submissions, and law. They will write a decision that will be sent to all of the parties and intervenors. Unless the Tribunal decides not to for a specific case, it will also put the decision on its website. It may also share the decision with other websites that allow legal decisions to be searched.

## 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.
- 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 their reports, witness statements or affidavits.
- Prepare your written submissions.
- Provide your submissions to the Tribunal and the other parties within the timelines set out by the Tribunal, and in the quantities required by the Tribunal.

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