# Environmental Appeal Board

# 2017/2018

# Annual Report

APRIL 1, 2017 ~ MARCH 31, 2018

BRITISH COLUMBIA

Environmental Appeal Board

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Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2017 through March 31, 2018.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

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# Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2017/2018 fiscal year.

## The Year in Review – Appeals

Section 59.2(a) of the *Administrative Tribunals Act* requires the Board to provide a review of its operations during the preceding reporting period. The number of appeals filed with the Board in 2017/2018 decreased compared to the previous reporting period. After receiving 92 appeals in 2016/2017, the Board received 42 appeals during the 2017/2018 fiscal year, which is below the five-year average of approximately 80 appeals. Due to the number of appeals filed in the previous reporting period, a total of 122 appeals were active in 2017/2018. More than half of the active appeals were under the *Environmental Management Act*. 29 of the appeals that were closed did not require a hearing, as the appeals were withdrawn, abandoned, rejected, or resolved by consent of the parties. I am also pleased to note that most of the matters that required a hearing were heard by way of written submissions, which reduces costs for all parties and the Board.

During this period, the Board issued a decision of note on a complex question of constitutional law involving the federal-provincial division of powers under the *Constitution Act, 1867*. The appeal involved the provincial authority under the *Environmental Management Act* and a Metro Vancouver bylaw to issue a permit that regulates air emissions from a compost facility located on federally-owned lands. The Board concluded that the application of the provincial legislation to the compost facility did not impede upon the use and development of federal lands under the exclusive jurisdiction of Parliament under the *Constitution Act, 1867* (see *Harvest Fraser Richmond Organics Ltd. v. District Director*, Decision Nos. 2016-EMA-175(b) and 2016-EMA-G08)

Also during this reporting period, the courts issued several decisions on judicial reviews of Board decisions. In all three decisions that were issued by the BC Supreme Court, the Court recognized that the Board is an expert tribunal, and the Board's interpretation of the *Water Act* and the *Environmental Management Act* were given deference by the Court. The BC Court of Appeal issued two decisions. One of those decisions involved the legal principles regarding business partnerships and the interpretation of the *Water Act*. In that case, the majority of the Court of Appeal confirmed the Board's decision, finding that it was reasonable and consistent with the applicable legal principles. However, in another case, the Court of Appeal held that the Board had applied the definition of appealable "decision" under the *Environmental Management Act* too restrictively, and sent the matter back to the Board for reconsideration.

## Administrative Efficiencies – a 'Cluster' of Tribunals

As the Chair of three tribunals, the Environmental Appeal Board, the Forest Appeals Commission and the Oil and Gas Appeal Tribunal, I have encouraged the "clustering" of tribunals with similar processes and/or mandates. As a result, the Board office supports a total of eight administrative tribunals. This model has numerous benefits, not only in terms of cost savings, but also in terms of shared knowledge and information. Having one office provide administrative support for several tribunals gives each tribunal greater access to resources while, at the same time, reducing costs and allowing each tribunal to operate independently of one another.

## Plans for improving the Board's operations

Section 59.2(h) of the *Administrative Tribunals Act* requires the Board to report its plans for improving operations in the future. During 2017/2018, the Board was involved in the replacement and upgrading of the electronic appeal management system that is used by the Board and the seven other tribunals that are jointly administered through a shared office and staff. The existing appeal management system is 20 years old and its software is no longer supported. A new appeal management system will allow the shared administrative office to continue to function effectively and efficiently, using modern information technology. The Board plans to have the new system in place in 2018/2019.

## Forecast of workload for the next reporting period

Section 59.2(f) of the *Administrative Tribunals Act* requires the Board to provide a forecast of the workload for the succeeding reporting period. The Board's workload for the 2018/2019 reporting period is expected to be consistent with the past five years. No significant increases or decreases in workload are forecast. Based on the past five years, it is expected that approximately 100 appeals will be active, 80 new appeals will be filed, and 60 hearings will be completed during the coming year.

## Board Membership

The Board membership experienced some changes during the past year. I am very pleased to welcome Darrell LeHouillier and Susan Ross as new members of the Board. They will complement the expertise and experience of the outstanding professionals on the Board. Three members' appointments concluded on December 31, 2017. Those members are James (Jim) Hackett, David H. Searle, C.M., Q.C., and Michael Tourigny. I sincerely thank each of these distinguished members for their exemplary service as members of the Board. In particular, I wish to acknowledge the exceptional contribution that David Searle has made to the Board. As a senior and distinguished member of the environmental bar, Mr. Searle has dedicated much time and effort to the work of the Board since being appointed in 2004. His expertise, good judgment and collegiality will be missed.

I am very fortunate to have a Board that is comprised of highly qualified individuals who can deal with the various subjects that are heard by the Board. The current membership includes professional biologists, agrologists, engineers, foresters, and lawyers with expertise in the areas of natural resources and

administrative law. These members bring with them the necessary expertise to hear appeals on a wide range of subject matters, ranging from air emissions and contaminated sites, to guide outfitter hunting quotas, to water licensing on sensitive streams and water bodies.

I would like to take this opportunity to thank all Board members and staff for their hard work and dedication over the past year, and for their continued commitment to the work of the Board.

Alan Andison
Chair

# Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period from April 1, 2017 to March 31, 2018.

The report provides an overview of the structure and function of the Board and how the appeal process operates. It contains statistics on appeals filed, hearings held and decisions issued by the Board within the report period. It also contains the Board's recommendations for legislative changes to the statutes and regulations under which the Board has jurisdiction to hear appeals. Finally, a selection of summaries of the decisions issued by the Board during the report period is provided, and sections of the relevant statutes and regulations are reproduced.

Decisions of the Environmental Appeal Board are available for viewing at the Board office, on the Board's website, and at the following libraries:

- Ministry of Environment and Climate Change Strategy Library
- University of British Columbia Law Library
- University of Victoria Law Library

Decisions are also available through the Quicklaw Database.

Detailed information on the Board's policies and procedures can be found in the Board's Practice and Procedure Manual, and the Board's Rules, which may be obtained from the Board office or viewed on the Board's website. If you have any questions or would like additional copies of this report, please contact the Board office. The Board can be reached at:

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# The Board

The Environmental Appeal Board is an independent, quasi-judicial tribunal established on January 1, 1982 under the *Environment Management Act*, and continued under section 93 of the *Environmental Management Act*. As an adjudicative body, the Board operates at arms-length from government to maintain the necessary degree of independence and impartiality. This is important because it hears appeals from administrative decisions made by government officials under a number of statutes.

For the most part, decisions that can be appealed to the Board are made by provincial and municipal government officials under the following eight statutes, the relevant provisions of which are administered by the Minister identified: the *Environmental Management Act*, the *Integrated Pest Management Act*, and the *Greenhouse Gas Industrial Reporting and Control Act*, administered by the Minister of Environment and Climate Change Strategy; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* and the *Mines Act* administered by the Minister of Energy, Mines, and Petroleum Resources; and the *Wildlife Act*, the *Water Sustainability Act*, and the *Water Users' Communities Act* administered by the Minister of Forests, Lands, Natural Resource Operations, and Rural Development. The legislation establishing the Board is administered by the Attorney General of BC.

The Board makes decisions regarding the legal rights and responsibilities of parties that appear before it and decides whether the decision under appeal was made in accordance with the law. Like a court, the Board must decide its appeals by weighing the evidence before it, making findings of fact, interpreting the legislation and the common law and applying the law and legislation to the facts.

In carrying out its functions, the Board has the powers granted to it under the above-mentioned statutes, as well as additional powers provided under the *Administrative Tribunals Act*, including the ability to compel persons or evidence to be brought before the Board. The Board also ensures that its processes comply with the common law principles of natural justice.

Appointments to the Board and the administration of the Board are governed by the *Administrative Tribunals Act*.

## Board Membership

Board members are appointed by the Lieutenant Governor in Council (Cabinet) under section 93(3) of the *Environmental Management Act*. The members appointed to the Board are highly qualified individuals, including professional biologists, professional foresters, professional engineers and lawyers with expertise in the areas of natural resources and administrative law. These members apply their respective technical expertise and adjudication skills to hear and decide appeals in a fair, impartial and efficient manner.

The members are drawn from across the Province. Board membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members. The length of the initial appointments and any reappointments of Board members, including the chair, are set out in the *Administrative Tribunals Act*, as are other matters relating to the appointments. That Act also sets out the responsibilities of the chair.

The Board members during this report period were as follows:

| The Board | Profession | From |
|---|---|---|
| **Chair** | | |
| Alan Andison | Lawyer | Victoria |
| **Vice-chairs** | | |
| Robert Wickett, Q.C. | Lawyer | Vancouver |
| Gabriella Lang | Lawyer (retired) | Campbell River |
| **Members** | | |
| Maureen Baird, Q.C. | Lawyer | West Vancouver |
| Lorne Borgal | Professional Agrologist (retired) | Vancouver |
| Monica Danon-Schaffer | Professional Engineer | Britannia Beach |
| Cindy Derkaz | Lawyer (retired) | Salmon Arm |
| Brenda L. Edwards | Lawyer | Victoria |
| Les Gyug | Professional Biologist | West Kelowna |
| James Hackett | Professional Forester | Nanaimo |
| Jeffrey Hand | Lawyer | Vancouver |
| R.G. (Bob) Holtby | Professional Agrologist | West Kelowna |
| Kent Jingfors | Environmental Consultant | Nanoose Bay |
| Darrell LeHouillier | Lawyer | Vancouver |
| James S. Mattison | Professional Engineer | Victoria |
| Linda Michaluk | Professional Biologist | North Saanich |
| John M. Orr, Q.C. | Lawyer | Victoria |
| Susan Ross | Lawyer | Victoria |
| Howard Saunders | Forestry Consultant | Vancouver |
| David H. Searle, CM, Q.C. | Lawyer (retired) | North Saanich |
| Daphne Stancil | Lawyer/Biologist | Victoria |
| Michael Tourigny | Lawyer (retired) | Vancouver |
| Gregory J. Tucker, Q.C. | Lawyer | Vancouver |
| Douglas VanDine | Professional Engineer | Victoria |
| Reid White | Professional Engineer/Professional Biologist (retired) | Dawson Creek |
| Norman Yates | Lawyer/Professional Forester | Penticton |

## Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the rights and interests of people. It applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. This law has developed to ensure that officials make their decisions in accordance with the principles of procedural fairness/natural justice by following proper procedures and acting within their jurisdiction.

The Board is governed by the principles of administrative law and, as such, must treat all parties involved in a hearing before the Board fairly, giving each party a chance to explain its position.

Appeals to the Board are decided on a case-by-case basis. Unlike a court, the Board is not bound by its previous decisions; present cases of the Board do not necessarily have to be decided in the same way that previous ones were.

## The Board Office

The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board.

The Board shares its staff and its office space with the Forest Appeals Commission, the Oil and Gas Appeal Tribunal, the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Hospital Appeal Board, the Industry Training Appeal Board and the Health Professions Review Board.

Each of these tribunals operates completely independently of one another. Supporting eight tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, reducing administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

## Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. If a member of the public requests information regarding an appeal, that information may be disclosed, unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*. Parties to appeals should be aware that information supplied to the Board is subject to public scrutiny and review.

In addition, the names of the parties in an appeal appear in the Board's published decisions which are posted on the Board's website, and may appear in this Annual Report. Some Board decisions may also be published in legal journals and on law-related websites.

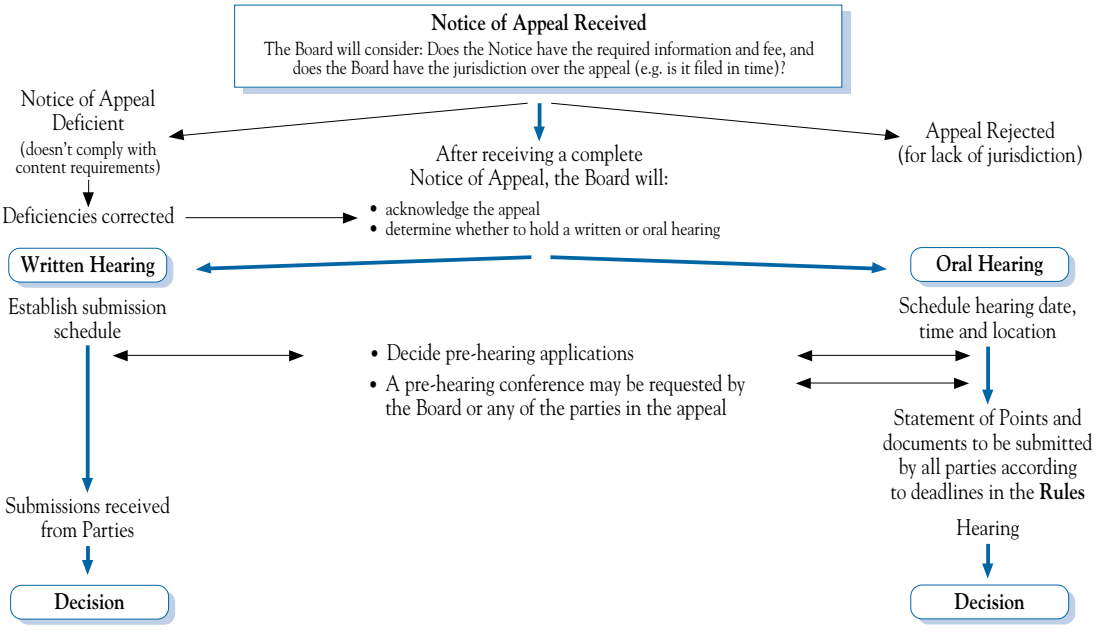
# The Appeal Process

## General Powers and Procedures of the Board

Part 8, Division 1, of the *Environmental Management Act*, together with the sections of the *Administrative Tribunals Act* specified in section 93.1 of the *Environmental Management Act*, set out the basic structure, powers and procedures of the Board. This legislation describes the composition of the Board and how hearing panels may be organized. It also describes the authority of the Board to add parties to an appeal, the rights of the parties to present evidence, and the Board's power to award costs. Additional procedural details are provided in the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 240/2015. The relevant portions of the *Environmental Management Act*, the *Administrative Tribunals Act*, and the *Regulation* are included at the back of this report.

In addition to the powers and procedures contained in the *Environmental Management Act*, the *Administrative Tribunals Act*, and the *Regulation*, the Board has developed its own policies and procedures. These policies and procedures have been created in response to issues that arise during the appeal process, from receipt of a notice of appeal, to the hearing, to the issuance of a final decision on the merits. To ensure that the appeal process is open and understandable to the public, these policies and procedures have been set out in the Environmental Appeal Board Practice and Procedure Manual which is posted on the Board's website. Also on the Board's website are a number of "Information Sheets" on specific topics and specific stages of the appeal process. The Board has also created a Notice of Appeal form that can be filled out online. Under section 11 of the *Administrative Tribunals Act*, the Board also has the authority to make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it. During this reporting period, the Board released its Rules.

Finally, in order to determine what decisions are appealable to the Board, who can appeal the decisions, the time for filing an appeal, whether the Board can issue a stay of the decision under appeal, and what the Board's decision-making powers are with respect to the appeal, one must consult the individual statutes and regulations which provide the right of appeal to the Board. A summary of the appeal provisions in the individual statutes is provided below.




## The Basics: who can appeal, what can be appealed and when to appeal

As stated above, to determine what decisions are appealable to the Board, who can appeal the decisions and the time for filing an appeal, as well as the Board's power to issue a stay of the particular decision under appeal, the individual statutes and regulations which provide the right of appeal to the Board must be consulted. The following is a summary of the individual statutes and the provisions that answer these questions.

## *Environmental Management Act*

The *Environmental Management Act* regulates the discharge of waste into the environment, including the regulation of landfills and the clean-up of contaminated sites in BC, by setting standards and requirements, and empowering provincial officials, and in some cases municipal officials, to issue permits, approvals, operational certificates, and orders, and to impose administrative penalties for non-compliance.

Waste regulated by this *Act* includes air contaminants, litter, effluent, refuse, biomedical waste, and special wastes.

The decisions that may be appealed under the *Environmental Management Act* are set out in Part 8, Division 2. That division states that a person "aggrieved by a decision" of a director or a district director may appeal that decision to the Board. An appealable "decision" is defined as follows:

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed [*under section 115(5), a director*

*may enter into an agreement with a person who is liable for an administrative penalty; the agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the director considers necessary or desirable*].

The Board has interpreted the phrase "person aggrieved" to mean that an appellant must establish that he or she has a genuine grievance because a decision has been made which prejudicially effects his or her interests.

The time limit for filing an appeal of a decision is 30 days after notice of the decision is given. The Board may order a stay of the decision under appeal, except in the case of administrative penalty decisions which are automatically stayed upon appeal.

## *Greenhouse Gas Industrial Reporting and Control Act*

The *Greenhouse Gas Industrial Reporting and Control Act* enables performance standards to be set for industrial facilities or sectors by listing them within a Schedule to the *Act*. The Schedule sets a greenhouse gas emissions benchmark for liquefied natural gas facilities. The Schedule also includes an emission benchmark (which is not yet in force) for coal based electricity generation operations. The *Act* brings several aspects of previous greenhouse gas legislation into a single enactment, including the emission reporting framework that was established under the former *Greenhouse Gas Reduction (Cap and Trade) Act*, under which the Board previously heard appeals.

Under this *Act*, certain decisions of a director may be appealed by a person who is served with an appealable decision. Under section 40 of the *Act*, a person who is served with an administrative penalty notice referred to in subsection 40(1)(a) or (b), or a document evidencing a decision referred to in subsection 40(1)(c), may appeal the decision to the appeal board. Under section 40 of the *Act*, the following decisions may be appealed to the Board:

- a determination under section 24 of the *Act* of non-compliance with reporting requirements or of the extent of that non-compliance, as set out in an administrative penalty notice;
- a determination under section 25 of the *Act* of non-compliance with the *Act* or regulations, of the extent of that non-compliance, or of the amount of the administrative penalty, as set out in an administrative penalty notice;
- a prescribed decision or a decision in a prescribed class.

Several types of prescribed decisions can be appealed to the Board pursuant to the section 12 of the *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation*. Under section 12(1) of that regulation, a decision under the following sections of the *Greenhouse Gas Emission Reporting Regulation* may be appealed to the Board:

- section 16(2)(a) or (3)(a) [*choice between direct measurement and mass balanced-based methodology*]; and
- section 26(3)(b) [*verification bodies*].

In addition, under section 12(2) of the *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation*, a decision under the following sections of the *Greenhouse Gas Emission Control Regulation* may be appealed to the Board:

- section 10(1), (3) or (4) [*suspension or cancellation of accounts*];
- section 13(4)(b) [*validation bodies and verification bodies*];
- section 17(2) [*acceptance of project plan*]; and
- section 23(2) [*issuance of offset units*].

The Board's powers and procedures in Division 1 of Part 8, and sections 101, 102(2) and 103 of the *Environmental Management Act* apply to appeals under the Act, as provided in section 40(3) of the Act and section 12(4) of the *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation*. The time limit for filing an appeal of a decision is 30 days after notice of the decision is given. The Board may order a stay of the decision under appeal. However, in appeals of administrative penalties levied under sections 24(2) or 25(2) of the Act, an appeal acts as an automatic stay of the penalty.

## Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels and to submit annual compliance reports to the government, and empowers government officials to impose administrative penalties for non-compliance.

Certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- a determination of non-compliance under section 11 of the Act [*imposed administrative penalties: fuel requirements*] or of the extent of that non-compliance, as set out in an administrative penalty notice;
- a determination of non-compliance under section 12 of the Act [*administrative penalties in relation to other matters*], of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;
- a refusal to accept an alternative calculation of carbon intensity under section 6(5)(d)(ii)(B) of the Act [*low carbon fuel requirement*]; and
- a prescribed decision or a decision in a prescribed class.

According to the *Renewable and Low Carbon Fuel Requirements Regulation*, B.C. Reg. 394/2008, the time limit for commencing an appeal is 30 days after the decision is served. The Board is not empowered to order a stay of the decision under appeal. However, under section 12(3)(c) of the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, if a person appeals an administrative penalty arising from a determination of noncompliance, the administrative penalty is automatically stayed pending the Board's final decision on the appeal.

## Integrated Pest Management Act

The *Integrated Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application and disposal of pesticides in BC. This Act requires permits to be obtained for certain pesticide uses, and requires certain pesticide applicators to be certified. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect, and it empowers government officials to impose administrative penalties for non-compliance.

Under this Act, the right of appeal (those with standing to appeal) is quite broad. The Act states that "a person" may appeal a decision under this Act to the Board. "Decision" is then defined as:

(a) making an order, other than an order under section 8 [*an order issued by the Minister of Environment*];

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty; and

(g) determining that the terms and conditions of an agreement under section 23(4) have not been performed [*under section 23(4), the administrator may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the administrator considers necessary or desirable*].

The time limit for filing an appeal of a decision is 30 days after the date the decision being appealed is made. The Board may order a stay of the decision under appeal, except in the case of administrative penalty decisions which are automatically stayed upon appeal.

## *Mines Act*

The *Mines Act* regulates mining activities in the province through a system of permits, regulations, and the Health, Safety and Reclamation Code. It applies to mines during their exploration, development, construction, production, closure, reclamation and abandonment phases. The *Mines Act* includes an administrative penalty scheme for certain contraventions of the legislation, as well as an appeal process to an "appeal tribunal". The Board is identified as the "appeal tribunal" in the *Administrative Penalties (Mines) Regulation* (the "*Regulation*").

Under section 36.1 of the *Mines Act*, the Chief Inspector of Mines may find that a person has contravened. or failed to comply with:

- an order made under the *Mines Act*;
- a term or condition imposed in a permit, a permit exemption, or a term or condition otherwise specified in section 36.1(b) of the *Mines Act*; or
- "prescribed provisions" of the *Mines Act*, the regulations under that *Act*, or the Health, Safety and Reclamation Code.

According to the *Regulation*, an administrative penalty may be levied for the failure to comply with permitting requirements, discrimination of an employee complying with the legislation, failure to properly supervise, failure to comply with certain provisions in the *Workplace Hazardous Materials Information System Regulation (Mines)*, and for various other contraventions identified in the *Regulation*.

Under section 36.2 of the *Mines Act*, the Chief Inspector may impose an administrative penalty for the contravention or the failure to comply. The Chief Inspector must notify a person of the decision finding a contravention and/or imposing an administrative penalty under section 36.3 of the *Mines Act*.

Under section 36.7 of the *Mines Act*, a person to whom a notice has been given under section 36.3 may appeal the decision to the Board. The time limit to commence an appeal is 30 days after the date on which the notice under section 36.3 is given to the person. The Board cannot order a stay of the appealed decision, but an appeal automatically postpones the date for paying a penalty. Section 37.4 of the *Mines Act* provides that, if a person on whom an administrative penalty is imposed commences an appeal, the person

must pay the penalty within 40 days after the date on which the Board's decision is given to the person.

## *Water Sustainability Act*

The *Water Sustainability Act* regulates the use and allocation of surface water and ground water, regulates works in and about streams, and regulates the construction and operation of ground water wells. It also includes requirements for protecting fish and aquatic ecosystems, dam safety, and compliance. It empowers government officials to issue licences, approvals, orders, and administrative monetary penalties.

The decisions that may be appealed under the *Water Sustainability Act*, and the persons who may appeal them, are set out in section 105(1) of the *Act*. The *Act* states that, except as otherwise provided in the *Act*, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the Board by the person who is subject to the order, an owner whose land is or is likely to be physically affected by the order (subject to an exception in section 105(2)), the owner of the works that are the subject of the order, or the holder of an authorization, a riparian owner, or an applicant for an authorization who considers that his or her rights are or will be prejudiced by the order.

Certain sections of the *Act* state that particular orders may not be appealed to the Board. For example, section 87(3) of the *Act* states that an order by the comptroller under section 87(1) (determining the critical environmental flow threshold for a stream once a significant water shortage declaration has been issued) is final and may not be appealed.

The time limit for filing an appeal is 30 days after notice of the order being appealed is delivered to the person commencing the appeal. The Board can order a stay of the order under appeal, except in the case of appeals of administrative penalty decisions which are automatically stayed pending the Board's final decision on the appeal.

## *Water Users' Communities Act*

The *Water Users' Communities Act* provides for water users' communities. A water users' community is a group of six or more water licensees, each with their own licence(s), who create and maintain a system to store and deliver water. Water users' communities are incorporated and named by the comptroller. A water users' community may acquire, hold and control property and water licences. The community may also acquire, construct, hold, maintain, improve, replace and operate works. The provisions in the *Water Users' Communities Act* were previously in Part 3 of the *Water Act* before it was replaced by the *Water Sustainability Act*.

Section 100.1(1)(b) of the *Water Users' Communities Act* adopts the appeal provisions in section 105 of the *Water Sustainability Act*.

## *Wildlife Act*

The *Wildlife Act* regulates the use, allocation, ownership, import and export of fish and wildlife in BC, and empowers government officials to issue licences, permits, certificates, and orders, and to impose administrative penalties for non-compliance. Activities regulated by this *Act* include hunting, angling in non-tidal waters, guide outfitting, and trapping.

Under section 101.1 of the *Wildlife Act*, a decision of a regional manager or the director that affects a licence, permit, registration of a trapline or guiding territory certificate, or an application for any

of those things, may be appealed by the person who is affected by the decision.

The time limit for filing an appeal under the *Wildlife Act* is 30 days after notice is given.

The Board can order a stay of the decision under appeal.

## Starting an Appeal

For all appeals, an appellant must prepare a notice of appeal and deliver it to the Board office within the time limit specified in the relevant statute. The notice of appeal must comply with the content requirements in section 22 of the *Administrative Tribunals Act*. It must identify the decision that is being appealed, state why the decision should be changed, contain the name, address, and telephone number of the appellant and of the appellant's agent (if any), and the address for the delivery of notices regarding the appeal. Also, the notice of appeal must be signed by the appellant, or on his or her behalf by their agent, and the notice must be accompanied by a fee of $25 for each decision or order appealed. The Board has created a Notice of Appeal form that may be filled out on-line.

In addition, the Board requires a copy of the permit, licence, order or decision being appealed.

If the Board does not receive a notice of appeal within the specified time limit, the appellant will lose the right to appeal.

If the notice of appeal is missing any of the required information, the Board will notify the appellant of the deficiencies. The Board may refrain from taking any action on an appeal until the notice is complete and any deficiencies are corrected.

Once a notice of appeal is accepted as complete, the Board will notify the office of the official who made the decision being appealed. The decision-maker will be the respondent in the appeal.

## Parties and Participants to an Appeal

A party to an appeal has a variety of important rights: the right to present evidence, cross-examine the witnesses of the other parties, and make opening and closing arguments. The person who filed the appeal (the appellant) and the decision-maker (the respondent) are parties to the appeal.

In addition to the appellant and respondent, the Board may add other parties to an appeal. As a standard practice, the Board will offer party status to a person who may be affected by the appeal, such as the person holding the permit or licence which is the subject of an appeal by another person. In addition, a person may apply to the Board to become a party to the appeal if he or she may be affected by the Board's decision. These additional parties are referred to as "third parties" to the appeal.

The Board also has the discretion to invite any person to be heard in the appeal, without making that person a party to the appeal. This may be done on the Board's initiative or as a result of a request. The Board refers to these people as "participants". If a person applies to participate in an appeal, the Board will decide whether the person should be granted participant status and, if so, the extent of that participation. In all cases, a participant may only participate in a hearing to the extent that the Board allows.

## Stays

A "stay" has the effect of postponing the legal obligation to implement all or part of a decision or order under appeal until the Board has held a hearing, and issued its decision on the appeal.

The Board has the power to stay most decisions under appeal, with some exceptions. As

described above, under several Acts, an appeal of an administrative monetary penalty automatically acts as a stay of the penalty, or automatically delays the imposition of the penalty until the appeal is concluded.

Even if the Board has the authority to grant a stay, the Board may decide not to do so. A stay is an extraordinary remedy that a person must apply for. For the Board to grant a stay, the applicant must satisfy a particular legal test. That test is described later in this report under the heading "Summaries of Decisions: Preliminary Applications".

## Dispute Resolution

The Board encourages parties to resolve the issues underlying an appeal at any time in the appeal process. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences; and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Board for its approval. Alternatively, the appellant may withdraw their appeal at any time.

## Pre-hearing Conferences

The Board, or any of the parties to any appeal, may request a pre-hearing conference. Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the spokespersons for the parties, one Board member and one staff member from the Board office. It will be less formal than a hearing and will usually follow an agenda, which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

## Scheduling a Hearing

After a notice of appeal is accepted by the Board, the chair will determine which member(s) of the Board will hear the appeal and the type of appeal hearing. A hearing may be conducted by way of written submissions, an oral (in person) hearing, or a combination of both.

If the chair decides that the issues in the appeal can be fairly decided on the basis of written submissions, the chair will schedule a written hearing. Prior to ordering a written hearing, the Board may request the parties' input.

If the chair decides that an oral (in person) hearing is required in the circumstances, the chair must set the date, time and location of the hearing and notify the parties and any other persons who are entitled to notice of the hearing. It may be held in the locale closest to the affected parties, at the Board office in Victoria or anywhere in the province.

Regardless of the type of hearing scheduled, the Board has the authority to conduct a "new hearing" on the matter before it. This means that the Board may hear the same evidence that was before the original decision-maker, as well as receive new evidence.

## Written Hearings

If it is determined that a hearing will be by way of written submissions, the chair will invite all parties to provide submissions and will establish the due dates for the submissions. The general order of submissions is as follows. The appellant will provide its submissions, including its evidence, first. The other parties will have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

## Oral Hearings

Oral (in person) hearings are normally scheduled in cases where there is some disagreement on the facts underlying the dispute, or where there is a need to hear the parties' evidence and assess the credibility of witnesses.

To ensure the hearing proceeds in an expeditious and efficient manner, in advance of the hearing, the chair asks the parties to provide the Board, and each of the parties to the appeal, with a written Statement of Points (a summary of the main issues, evidence, witnesses, and arguments to be presented at the hearing) and all relevant documents.

Board hearings are less formal than hearings before a court. However, some of the Board's oral hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation and witnesses are subject to cross-examination. In addition, each party to the appeal may have a lawyer or other spokesperson represent them at the hearing, but this is not required. The Board will make every effort to keep the process open and accessible to parties not represented by a lawyer.

All hearings before the Board are open to the public.

## Evidence

The Board has full discretion to receive any information that it considers relevant and will then determine what weight to give the evidence when making its decision.

## Experts

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge".

The Board is not bound by the provisions relating to expert evidence in the BC *Evidence Act*. However, the Board does require 84 days advance notice that expert evidence will be given at a hearing. The notice must include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing, and the facts on which the opinion is based.

## Obtaining an Order for Attendance of a Witness or Production of Documents

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to make an order requiring the person to attend a hearing and give evidence. Also, if a person refuses to produce particular relevant documents in their possession, a party may ask the Board to order the person to produce a document or other thing prior to, or during, a hearing.

Section 93.1 of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act* provide the Board with the power to require the attendance of a witness at a

hearing, and to compel a witness to produce for the tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

## The Decision

To make its decision, the Board is required to determine, on a balance of probabilities, what occurred and to decide the issues that are raised in the appeal.

The Board will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing within a reasonable time following the hearing. Copies of the decision will be given to the parties, the participants, and the appropriate minister(s).

There is no right of appeal to the courts from a Board decision. A party dissatisfied with a decision or order of the Board may apply to the BC Supreme Court for judicial review of the decision pursuant to the *Judicial Review Procedure Act*. Under section 57 of the *Administrative Tribunals Act*, a judicial review application must be commenced within 60 days of the date that the Board's decision is issued. Alternatively, section 97 of the *Environmental Management Act* allows Cabinet to vary or rescind an order or decision of the Board if it is in the public interest to do so.

## Costs

The Board also has the power to award costs. In particular, it may order a party or participant to pay all or part of the costs of another party or participant in connection with the appeal. The Board's policy is to only award costs in special circumstances.

In addition, if the Board 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 expenses of the Board in connection with the appeal.

# Legislative Amendments Affecting the Board

During this reporting period, there were no legislative changes that affected the Board's powers or procedures, or the types of appeals that the Board hears.

# Recommendations

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

The Board has identified no trends or special problems that need to be reported on. Accordingly, the Board is not making any recommendations at this time.

# Statistics

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

The following tables provide information on the appeals filed with the Board, and decisions issued by the Board, during this reporting period. The Board publishes all of its decisions on the merits of an appeal, and most of the important preliminary and post-hearing decisions. The Board also issues hundreds of unpublished decisions on a variety of preliminary matters, which are included in a separate line in the statistics below.

Between April 1, 2017 and March 31, 2018, a total of 42 appeals were filed with the Board against 41 administrative decisions. No appeals were filed or heard under the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Mines Act*, or the *Water Users' Communities Act*. The Board issued a total of 152 decisions, of which 58 were published.

## April 1, 2017 – March 31, 2018

| | | |
|---|---|---|
| **Total appeals filed** | | **42** |
| **Total appeals closed** | | **47** |
| **Appeals abandoned or withdrawn** | | **22** |
| **Appeals rejected, jurisdiction/standing** | | **3** |
| *Hearings held: | | |
| Oral hearings completed | 20 | |
| Written hearings completed | 42 | |
| **Total hearings held** | | **62** |
| **Total oral hearing days** | | **31.5** |
| **Decisions issued:** | | |
| Appeals allowed | 1 | |
| Appeals allowed, in part | 1 | |
| Appeals dismissed | 12 | |
| Final regular decisions | | 14 |
| ****Final decisions resulting from applications** | | **23** |
| **Total final decisions** | | **37** |
| **Consent orders/s. 17 settlement orders** | | **19** |
| **Preliminary decisions** | | **91** |
| **Costs decisions** | | **4** |
| **Reconsideration decisions** | | **1** |
| **Total decisions** | | **152** |

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This table provides an overview of the total appeals filed, hearings held, and decisions issued by the Board during the report period. It should be noted that the number of decisions issued and hearings held during the report period does not necessarily reflect the number of appeals filed for the same period, because the appeals filed in previous years may have been heard or decided during the report period.

It should also be noted that two or more appeals may be heard together.

**Notes:**

* This statistic includes final hearings of the merits of appeals, and hearings on preliminary applications and post-hearing applications.

** This statistic includes applications for summary dismissal, for an order withdrawing or abandoning an appeal under section 17 of the *Administrative Tribunals Act*, etc.

## Appeal Statistics by Act

| | Environmental Management Act | Greenhouse Gas Industrial Reporting and Control Act | Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act | Integrated Pest Management Act | Mines Act | Water Act/Water Sustainability Act/Water Users' Communities Act | Wildlife Act | Total |
|---|---|---|---|---|---|---|---|---|
| Appeals filed during report period | 17 | | | | 19 | 11 | | 42 |
| Appeals closed – final decision | 3 | | | | 2 | 10 | | 15 |
| Appeals closed – consent order/s. 17 settlement | 3 | | | | 2 | 2 | | 7 |
| Appeals closed - abandoned or withdrawn | 8 | | | | 9 | 5 | | 22 |
| Appeals closed - rejected jurisdiction/standing | 2 | | | | | 1 | | 3 |
| Total appeals closed | 16 | | | | 13 | 18 | | 47 |
| **Hearings held** | | | | | | | | |
| Oral hearings | 13 | | | | 5 | 2 | | 20 |
| Written hearings | 21 | | | | 8 | 13 | | 42 |
| Total hearings held | 34 | | | | 13 | 15 | | 62 |
| Total oral hearing days | 13 | | | | 13.5 | 5 | | 31.5 |
| **Decisions issued** | | | | | | | | |
| Final decisions | 3 | | | | 1 | 10 | | 14 |
| Consent orders/s. 17 settlement orders | 7 | | | | 8 | 4 | | 19 |
| Costs decisions | 2 | | | | 2 | | | 4 |
| Reconsiderations | 1 | | | | | | | 1 |
| Preliminary applications | 65 | | | | 10 | 16 | | 91 |
| **Total decisions issued** | **92** | | | | **24** | **36** | | **152** |

▲

This table provides a summary of the appeals filed, hearings held and published decisions issued by the Board during the report period, categorized according to the statute under which the appeal was brought.

# Performance Indicators and Timelines

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

The Board strives to facilitate the early resolution of appeals, and the resolution of appeals without the need for a hearing, to reduce the time and expenses associated with appeals for all parties. The Board is pleased to report that, of the 47 appeals that closed during this reporting period, 32 (68%) were resolved without the need for a hearing. As a result, the parties and the Board avoided the time and expenses associated with a hearing in those cases. Of the 62 hearings that were held, 42 (68%) were conducted by way of written submissions rather than in person. Conducting a hearing in writing also saves time and expenses for the parties and the Board.

Regarding the appeals that were concluded without the need for a hearing, the time elapsed between the filing of the appeal and the closure of the appeal was an average of 408 days. Regarding appeals which involved a hearing on the merits, the time elapsed from the filing of the appeal until the final decision was issued was an average of 270 days. The overall average for all appeals concluded during this reporting period was 361 days.

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

# Summaries of Board Decisions

## April 1, 2017 ~ March 31, 2018

Appeal cases are not heard by the entire Board, they are heard by a "panel" of the Board. As noted earlier in this report, once an appeal is filed, the chair of the Board will decide whether the appeal should be heard and decided by a panel of one or by a panel of three members of the Board. The size and the composition of the panel (the type of expertise needed on a panel) generally depends upon the subject matter of the appeal and/or its complexity. The subject matter and the issues raised in an appeal can vary significantly in both technical and legal complexity. The chair makes every effort to ensure that the panel hearing an appeal will have the depth of expertise needed to understand the issues and the evidence, and to make the decisions required.

In terms of its decision-making authority, a panel has the power to confirm, vary or rescind the decision under appeal. In addition, under all of the statutes except the *Mines Act*, a panel may also send the matter back to the original decision-maker with or without directions, or make any decision that the original decision-maker could have made and that the panel considers to be appropriate in the circumstances. When an appellant is successful in convincing the panel, on a balance of probabilities, that the decision under appeal was made in error, or that there is new information that results in a change to the original decision, the appeal is said to be "allowed". If the appellant succeeds in obtaining some changes to the decision, but not all of the changes that he or she asked for, the appeal is said to be "allowed in part". When an appellant fails to establish that the decision was incorrect on the facts or in law, and the Board upholds the original decision, the appeal is said to be "dismissed".

Not all appeals proceed to a hearing and a decision by the Board. Many cases are settled or resolved prior to a hearing. The Board encourages parties to resolve the matters under appeal either on their own or with the assistance of the Board. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a consent order and ask the Board to approve the order. The consent order then becomes an order of the Board. In the summaries, the Board has included an example of a case that resulted in a consent order.

In addition, some cases are withdrawn or abandoned by an appellant, before a hearing. In other cases, an appellant's standing to appeal may be challenged, or the Board's jurisdiction over the appeal may be challenged, resulting in the Board dismissing the appeal in a preliminary decision. The Board is also called upon to make a variety of other preliminary decisions, some which are reported and others that are not. Examples of some of the preliminary decisions made by the Board have been provided in the summaries below.

The summaries that have been selected for this Annual Report reflect the variety of subjects and the variety of issues that come before the Board in any given year. The summaries have been organized into preliminary applications decided by the Board, and final decisions on the merits of the appeal. The summaries of final decisions are further organized by the statute under which the appeal was filed. Please refer to the Board's website to view all of the Board's published decisions and their summaries.

# Preliminary Applications and Decisions

## Jurisdictional Issues

For the Board to have jurisdiction over an appeal, certain requirements in the Board's enabling legislation must be met. Generally, the legislation sets out requirements such as the categories of decisions that may be appealed, the categories of persons who may file appeals, and the time limits for filing an appeal. All of the applicable legislative requirements must be met before the Board has jurisdiction to hear an appeal.

Over the years, there have been many cases in which the Board has been asked to determine, as a preliminary matter, whether the person filing an appeal has "standing" to appeal, i.e., whether the person falls within a category of persons who may file an appeal under a specific Act. The requirements for "standing" vary from one Act to another. For example, under section 101(1) of the *Environmental Management Act*, an appeal may be initiated by a "person aggrieved by a decision".

Similarly, the Board must sometimes make a preliminary determination about whether the decision or order being appealed is appealable under the applicable legislation, as the types of decisions or orders that may be appealed vary from one Act to another. For example, specific types of decisions may be appealed under the *Environmental Management Act*. Section 99 of that Act defines "decision" for the purposes of an appeal.

Finally, appeals sometimes raise questions regarding the constitutional validity or applicability of a law. The Board has the jurisdiction to decide such constitutional questions when they are raised in an appeal.

The following summaries include examples of preliminary decisions regarding a constitutional question and the types of decisions that may be appealed to the Board.

### Air permit for Richmond compost facility constitutionally valid

**2016-EMA-175(b) & 2016-EMA-G08 Harvest Fraser Richmond Organics Ltd. v. District Director, *Environmental Management Act* (City of Richmond and Attorney General of British Columbia, Third Parties; Don Tegart et al, Participants)**

**Decision Date:** May 12, 2017

**Panel:** Alan Andison

Harvest Fraser Richmond Organics Ltd. ("Harvest") operates a composting and bioenergy facility on federally-owned land near Richmond, BC. The Vancouver Fraser Port Authority (the "Port Authority") leases the land to Harvest on behalf of the federal Crown, pursuant to the Port Authority's powers under the *Canada Marine Act* and its Letters Patent.

The composting facility began in 1993 as a smaller operation. In 2010, following an environmental review, the Port Authority issued a permit authorizing Harvest to commence construction of an anaerobic digester and biogas plant, subject to various requirements. In 2011, Natural Resources Canada ("NRC") approved funding assistance for the anaerobic digester and biogas plant following a

screening process under the *Canadian Environmental Assessment Act* ("CEAA"). In its proposals to the Port Authority and NRC, Harvest proposed that the facility would process up to 27,000 tonnes per year of mixed food and commercial waste to produce compost and biogas. In the reports issued following the environmental review and the screening process, the potential environmental impacts of air emissions, including odours, from the facility were discussed, and it was noted that Harvest planned to obtain an air emissions permit from the Greater Vancouver Regional District ("Metro Vancouver").

In 2012, Harvest applied to Metro Vancouver for an air emissions permit for the facility. In 2013, the District Director for Metro Vancouver issued an air quality permit to Harvest under the *Environmental Management Act* (the "*Act*") and Bylaw No. 1028, 2008 (the "Bylaw"), authorizing Harvest to discharge air contaminants from the facility. The *Act* provides Metro Vancouver with the authority to regulate air emissions within its region, and the Bylaw was enacted pursuant to that authority. Section 5 of the Bylaw prohibits a person from discharging air contaminants in the course of conducting an industry, trade or business unless the discharge is conducted strictly in accordance with the terms and conditions of a valid and subsisting permit.

In September 2016, following a public consultation process, the District Director issued a renewed air quality permit to Harvest. The renewed permit included a number of new conditions and requirements, including a condition that the District Director may order the facility to stop receiving food waste if he determined that malodourous impacts from the facility exceeded a threshold (the "Sniff Test") set out in the permit. By that time, the facility was processing between 200,000 and 250,000 tonnes of organic matter per year, and Metro Vancouver had received a large number of complaints from the public regarding odours from the facility.

Twenty-three appeals against the permit were filed by individuals residing in Richmond or surrounding municipalities, who asserted that odours from the facility adversely affect the environment and their health, and/or interfere with their ability to enjoy breathing fresh air where they live, work, recreate, etc. In addition, Harvest appealed the permit on several grounds, including that the Sniff Test and other aspects of the permit were arbitrary, vague, unreasonable, and/or punitive. Harvest also challenged the District Director's jurisdiction to regulate air emissions from the facility given that it is located on federal land.

After the appeals were filed, Harvest served notice of a constitutional question pursuant to the *Constitutional Questions Act*. Harvest challenged the application of the Bylaw and the *Act* to the facility on the basis that the permitting scheme under the *Act* and the Bylaw impedes upon the use and development of federal lands, which falls within the exclusive jurisdiction granted to the Parliament of Canada under section 91(1A) of the *Constitution Act*, 1867. Harvest argued that the doctrines of interjurisdictional immunity and paramountcy prevented the application of the permitting scheme to the facility. The Board granted party status to the Attorney General of British Columbia for the purpose of making submissions on the constitutional question. The Attorney General of Canada declined to participate.

Under the doctrine of paramountcy, when federal and provincial legislation conflict, the federal legislation is paramount and renders the provincial legislation inoperative.

Under the doctrine of interjurisdictional immunity, there need not be conflicting federal and provincial legislation; rather, there is provincial legislation that impairs a core legislative power that is within the exclusive jurisdiction of the Parliament of Canada. Harvest argued that the *Act* and the Bylaw

were inoperative in relation to the facility, to the extent that they impaired the core of the exclusive federal power over the use and development of federal lands under section 91(1A) of the *Constitution Act, 1867*.

First, the Board considered whether the doctrine of interjurisdictional immunity prevented the application of the *Act* and/or the Bylaw to regulate the discharge of air contaminants from the facility, to the extent that those laws interfered with the federal power over the use and development of federal lands. The Board found that the pith and substance of the *Canada Marine Act* and the Port Authority's Letters Patent is the management of federal public property as well as shipping and navigation, and that the Port Authority's statutory powers and activities include the management, leasing or licensing of the federally-owned land.

In contrast, the Board held that the dominant purpose and effect of the *Act* and Bylaw was to regulate the discharge of waste, including air contaminants, into the environment within the province. The Board also held that environmental regulation is a subject matter in which both federal and provincial authorities have a compelling interest, and where effective regulation requires cooperation between federal and provincial authorities. Air contaminants emitted on federal lands may travel great distances from their source and may have adverse effects on surrounding areas. Given that the *Act* and Bylaw are environmental legislation aimed at regulating and controlling air emissions that may be harmful to human health and the environment, they were clearly enacted in furtherance of the public interest. The Board concluded that the incidental effects of the provincial permitting scheme did not constitute an impermissible encroachment on the federal power over the use and development of federal lands.

Next, the Board considered whether the *Act* and/or the Bylaw triggered the doctrine of paramountcy. The Board held that the Port Authority's approval expressly contemplated that Harvest would seek a permit from Metro Vancouver which would regulate air emissions from the facility. Although federal legislation regulates some air pollutants in some circumstances, it does not provide a complete code for the regulation of air emissions in Canada, and Harvest failed to identify what particular aspect of the *Act* or the Bylaw allegedly conflicted with the federal legislation. Moreover, the Canadian Ambient Air Quality Standards are merely guidelines and are not legally binding.

In summary, the Board concluded that the application of the *Act* and the Bylaw to the facility did not impede upon the use and development of federal lands under the exclusive jurisdiction granted to Parliament under section 91(1A) of the *Constitution Act, 1867*.

## An Extraordinary Remedy – the Power to Order a Stay

An appeal to the Board does not automatically prevent the decision under appeal from taking effect, except for a few types of decisions specified in the legislation. In most cases, the decision under appeal remains valid and enforceable unless the Board makes an order to temporarily "stay" the decision. A temporary stay prevents the decision from taking effect until the appeal is decided.

If a party wants to postpone the decision from taking effect until after the appeal is decided, the party must apply to the Board for a stay and address the following issues:

- whether the appeal raises a serious issue to be decided by the Board;
- whether the applicant for the stay will suffer irreparable harm if a stay is not granted; and
- whether there will be any negative consequences to property (real or economic), the environment or to public health or safety if the decision is

stayed until the appeal is concluded (the balance of convenience test).

When addressing the issue of irreparable harm, the party seeking the stay must explain what harm it would suffer if the stay was refused and why this harm is "irreparable" (i.e., it could not be remedied if the party ultimately wins the appeal). "Irreparable" has been defined by the Supreme Court of Canada as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision …, where one party will suffer permanent market loss or irrevocable damage to its business reputation …, or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

In addressing the issue of "balance of convenience", the party seeking the stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties or the environment if the stay is granted.

## Appellants fail to establish irreparable harm from emissions from surrey industrial facility

**2017-EMA-015(a) to 2017-EMA-019(a) Ayreborn Audio Video Ltd. et al v. District Director, *Environmental Management Act* (Weir Canada Inc., Third Party)**

**Decision Date:** March 9, 2018

**Panel:** Brenda Edwards

Weir Canada Inc. ("Weir") operates an industrial rubber rebuilding facility in Surrey, BC. The facility provides custom cutting, assembly and rubber lining of pipeline segments used in the mining and oil and gas industries.

In 2017, the District Director for the Greater Vancouver Regional District ("Metro Vancouver") issued a permit to Weir under the *Environmental Management Act* (the "Act") and the Greater Vancouver Regional District Bylaw No. 1028, 2008 (the "Bylaw"), authorizing the discharge of air contaminants from the facility.

The permit was valid until October 29, 2032, and applied to "existing or planned works" at the facility. When the permit was issued, the existing works that were regulated by the permit consisted of a grist blasting booth, welding stations, paint booth, and rubber buffing station. The permit also regulated emissions from a rubber adhesive booth, urethane curing ovens, and urethane adhesive booths, but Weir had no immediate plans to install those works. The permit contained numerous requirements and conditions including maximum emission flow rates and maximum emission concentrations for each emission source at the facility, as well as requirements for monitoring and reporting air emissions.

Six appeals against the permit were filed by individuals, groups or businesses (the "Appellants"), who asserted that air emissions from the facility would adversely affect the environment, human health, animal health, and business reputations.

Each of the Appellants filed applications requesting a stay of the permit pending the Board's final decision on the merits of the appeals. In determining whether the stay applications ought to be granted, the Board applied the three-stage test set out in *RJR-MacDonald Inc. v. Canada* (*Attorney General*).

With respect to the first stage of the test, the Board found that the appeals raised serious issues which are not frivolous, vexatious, or pure questions of law. Consequently, the Board proceeded to consider the next stage of the test.

Regarding the second stage of the test, the Board found that the Appellants, as the applicants for a stay, had the onus of establishing that their interests would likely suffer irreparable harm if a stay was denied. The Board found that the Appellants failed to provide any evidence that, if a stay is denied, emissions from the facility would likely cause irreparable harm such as permanent loss of natural resources, permanent harm to the environment or human health, or permanent harm to any of their business interests. The Appellants raised general concerns about the potential harm to human health, the environment, and their business interests, but those concerns amounted to speculation and conjecture. Consequently, the Board concluded that the Appellants failed to establish that their interests were likely to suffer irreparable harm if a stay was denied.

Turning to the third stage of the test, the Board weighed the potential harm to the Appellants' interests, if a stay was denied, against the potential harm to Weir's interests if a stay was granted. Weir provided evidence that it would suffer operational, financial, and commercial harm if a stay was granted. The Board found that there was a substantial likelihood that Weir would suffer increased costs and harm to its business interests, and its employees would be at greater risk of adverse health effects from particulate matter, if a stay was issued and Weir was unable to operate under the permit and utilize the facility's filtration system. The Board also found that it was unclear whether the increased costs and damage to Weir's business interests could be recovered by Weir in the event that the appeals were unsuccessful. In contrast, there was no evidence that the Appellants would likely suffer irreparable harm if a stay was denied. In these circumstances, the Board concluded that the balance of convenience favoured denying a stay.

Accordingly, the stay applications were denied.

# Final Decisions

## *Environmental Management Act*

### Hobby farm polluted neighbour's drinking water

**2017-EMA-005(a) Steve and Amanda Hallett v. Director, *Environmental Management Act* (Owen Fewer, Third Party; Northern Health Authority, Participant)**

**Decision Date:** February 14, 2018

**Panel:** Maureen Baird, Q.C.

Steve and Amanda Hallett appealed a pollution abatement order (the "Order") that was issued to them by the Director, *Environmental Management Act* (the "Director"), Ministry of Environment. The Director issued the Order after finding that there were reasonable and probable grounds to believe that manure and wood waste on the Halletts' property was escaping and causing pollution on a neighbouring property owned by the Third Party, Owen Fewer.

In September 2016, the Halletts brought three horses onto their property. Their neighbour, Mr. Fewer, relied on a shallow well for his drinking water. His well was downhill from, and within 5 metres of, the area where the Halletts kept the horses. In October or November 2016, Mr. Fewer noticed a change in the quality of the water from his well. In late November and early December 2016, Mr. Fewer had his tap water tested, which revealed the presence of *E. coli* bacteria, fecal coliform, and substances associated with wood waste. The Northern Health Authority advised him that his well water was unsafe for drinking or household use.

In December 2016, Mr. Fewer filed a complaint with the Ministry, which then sent an

advisory non-compliance letter to the Halletts. In January 2017, the Ministry inspected the site. Ministry staff observed wood waste piled in the horse paddock, manure in the paddock and piled beside the driveway, permeable soil in the paddock area, and surface water runoff from the paddock and barn areas pooling in a grate that drained into a pipe that discharged onto Mr. Fewer's property below his well. Dark brown water was draining from the pipe. In February 2017, the Ministry issued an inspection report which found that the Halletts were not in compliance with several sections of the *Agricultural Waste Control Regulation*.

On March 6, 2017, the Director issued the Order pursuant to section 83 of the *Environmental Management Act* (the "Act"). The Order required the Halletts to comply with several requirements by specific dates, including immediately preventing waste from escaping from their property. By April 7, 2017, the Halletts were required to retain a qualified professional to develop and submit a plan, for the Director's approval, to cease pollution from being generated. The Halletts were also required to implement the plan once approved.

The Halletts appealed the Order. They argued that the Order should be rescinded, but offered to take certain steps regarding the storage of manure, use of wood waste, and diversion of some surface water on their property.

Meanwhile, the Northern Health Authority conducted three site investigations between late November 2016 and early March 2017. In April 2017, the Northern Health Authority issued a report concluding that activities on the Halletts' property were likely causing contamination of Mr. Fewer's well water, and creating a health hazard.

Also, in August 2017, the Ministry conducted a second inspection of the Halletts' property, and found several contraventions of the *Agricultural Waste Control Regulation*.

The Board conducted an oral hearing of the appeal. The Board then considered whether the Order should be reversed based on the parties' evidence and the requirements of section 83 of the *Act*. There was uncontested evidence that Mr. Fewer had experienced no problems with the quality of water from his well before October 2016, and after October 2016 his well water became contaminated with *E. coli* and fecal coliform such that it was unusable for drinking or washing, and contained high levels of lignins and tannins associated with wood waste. The Director and the Northern Health Authority provided evidence from site inspections and water tests which supported the conclusion that the Halletts' property was the likely source of contamination. The Halletts provided no evidence to contradict that evidence. Consequently, the Board concluded that the Order should be confirmed, subject to an extension of the deadline for the Halletts to submit a report by a qualified professional to the Director for approval.

The appeal was dismissed.

## Appeals resolved by consent without the need for a hearing

### 2016-EMA-134(a) & 2017-EMA-006(a) West Coast Reduction Ltd. v. District Director (Vancouver Coastal Health, Participant)

**Decision Date:** June 5, 2017

**Panel:** Alan Andison

West Coast Reduction Ltd. ("West Coast") filed two appeals against permit amendments issued by the District Director (the "District Director"), Greater Vancouver Regional District, under the *Environmental Management Act* and Air Quality Management Bylaw no. 1082, 2008. West Coast operates a rendering facility that processes parts from dead animals and waste oil from restaurants, and produces finished products such as refined animal fats, protein meals, and biofuel. The facility is located in an industrial area

near downtown Vancouver. The facility has operated since the 1960s, and held an air emissions permit since 1992. In recent years, people residing near the facility have complained about odours and other air emissions from the facility.

In February 2016, West Coast applied to renew, and make minor amendments to, its air emissions permit. In August and September 2016, the District Director issued permit amendments that imposed a number of procedures or requirements on West Coast, on his own initiative, which West Coast had not requested. Among other things, those additional procedures or requirements addressed sampling, measuring, reporting, and dispersion modelling of specific "odorous air contaminants", and the height, diameter and exit temperature of several stacks at the facility. West Coast filed an appeal against those amendments on the grounds that the additional procedures or requirements were arbitrary, unreasonable, and exceeded the District Director's jurisdiction.

In March 2017, the District Director issued a further amendment to the air emissions permit which made adjustments to some of the reporting requirements, including due dates. West Coast also appealed that amendment.

Before the appeals were heard by the Board, West Coast and the District Director initiated a mediation, which led to an agreement to settle the appeals by making certain amendments to the air emissions permit. The parties then requested that the Board issue a consent order reflecting the terms of their settlement agreement.

Accordingly, the Board granted the request for a consent order, and ordered that the air emissions permit was amended in accordance with the parties' settlement agreement. The appeals were allowed.

## Insufficient evidence that farm operations caused groundwater contamination

### 2016-EMA-121(a) George E. Curtis and Kevin F. Curtis v. Director, Environmental Management Act (Steele Springs Water District, Participant)

**Decision Date:** June 1, 2017

**Panel:** Robert Wickett, Q.C., Lorne Borgal, Robert Holtby

George E. Curtis and Kevin F. Curtis appealed a pollution abatement order (the "Order") issued by the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry"). The Director issued the Order to the Appellants under section 83 of the *Environmental Management Act* (the "*Act*"), after finding that there were reasonable grounds to believe that the Appellants' agricultural operations were causing pollution through the introduction of nitrates into an aquifer used for drinking water.

The Appellants own farm land near Armstrong, BC. Their land sits above an unconfined aquifer (the "Aquifer"). The Appellants operate a cattle feed lot (the "Curtis Farm") located approximately 450 metres southwest of a lake, and cultivate crops on land adjacent to the east side of the lake. The Appellants had operated the feed lot on their land for 42 years, and had been depositing manure mixed with wood shavings onto their land for 25 years. Other farms and homes are located over, or immediately adjacent to, the Aquifer.

There are numerous drinking water wells in the Aquifer, and the Steele Springs Water District (the "Water District") provides drinking water from the Aquifer to approximately 150 residents.

Situated to the northeast of the Curtis Farm is a dairy farm owned by Jansen & Sons (the "Jansen Dairy"). East of the Jansen Dairy is an area described as the "Field of Concern." The intake for the Water District (the "Intake") is situated approximately 150 metres south of the Field of Concern.

Nitrates are naturally present in the environment and can enter the soil in many ways, one of which is by the deposition of cattle manure. Excess nitrates in soil can leach into groundwater, migrate through the soil, and create elevated nitrate levels in an aquifer.

Beginning in 2014, the nitrate level in some wells around the Intake, and in water drawn from the Intake, exceeded the level considered safe in drinking water. In response, the Ministry investigated. At the Curtis Farm, Ministry staff observed large, uncovered piles of manure, some of which had sawdust or wood shavings on top. No containment system for surface water runoff was visible.

In May 2016, the Director issued the Order to the Appellants. The Director also issued pollution abatement orders to the other agricultural operations situated above, and adjacent to, the Aquifer. Among other things, the Order required the Appellants to prepare and implement a monitoring plan and environmental impact assessment for nitrates in the soil and groundwater on their lands.

The Appellants appealed the Order on several grounds. The Appellants submitted that they were not responsible for nitrate contamination in the Aquifer. They asserted that there was no pollution in the western portion of the Aquifer where their farm is located. The also argued that the groundwater flow was in the opposite (southwesterly) direction from the Intake relative to their lands. The Appellants requested that the Board reverse the Order.

The Director argued that the Appellants were not the sole source of contamination, but were contributing to the contamination of the Aquifer.

First, the Board considered the legal and evidentiary burden that the Director had to satisfy before having the jurisdiction to issue a pollution abatement order, particularly to a person who is alleged to be one of several contributors to pollution. The Board found that section 83 of the *Act* obliged the Director to obtain sufficient evidence to give her reasonable grounds to conclude that a substance (manure/shavings mixture) deposited by the Appellants into the environment was causing "pollution", which is defined in the *Act* as "the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment". Specifically, there had to be plausible evidence, considered objectively and on a balance of probabilities, that the manure/wood shavings were leaching nitrates into the Aquifer and substantially altering or impairing the usefulness of the environment.

Next, the Board considered the merits of the Order based on the evidence. Given that nitrates exist naturally in soil and water at certain levels, the Board found that the Order could only be justified if there was evidence that the nitrates in the manure/wood shavings mix exceeded the uptake of nitrates by plants and other natural processes, and that the excess nitrates could have leached into the Aquifer. Water testing records showed two periods of time since 1987 when nitrate levels increased to levels of concern. The evidence showed a pattern of nitrate levels increasing from low concentrations to high concentrations, then decreasing to low concentrations before increasing again to high concentrations, over a period of 27 years. However, for 25 years, the Appellants had deposited a relatively consistent amount of manure/shavings onto the Curtis Farm. There was no evidence that nitrates from the Curtis Farm reached the Aquifer through water runoff. There was also no evidence that the deposit of manure/wood shavings exceeded the uptake of nitrates by crops and other nitrogen consumption factors, such that nitrates were available to leach into the Aquifer. The Board concluded that some other source was causing the increase in nitrate levels in the water at the Intake and nearby wells.

In conclusion, the Board found that there was no evidence on which the Director or the Board could be satisfied on reasonable grounds that nitrates from the Curtis Farm had reached the Aquifer, such that they substantially altered or impaired the usefulness of the environment. Consequently, the Order was reversed, and the appeal was allowed.

## *Greenhouse Gas Industrial Reporting and Control Act*

There were no decisions by the Board during this reporting period.

## *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*

There were no decisions by the Board during this reporting period.

## *Integrated Pest Management Act*

There were no decisions by the Board during this reporting period.

## *Mines Act*

There were no decisions by the Board during this reporting period.

## *Water Act/Water Sustainability Act*

### Dispute between neighbours over new water licence

**2016-WAT-011(a) Rodney Gerald Retzlaff v. Assistant Water Manager (Mabel Denisoff, Third Party; Neil Denisoff and Louise Anne Denisoff, Participants)**

**Decision Date:** November 10, 2017

**Panel:** Cindy Derkaz

Rodney Gerald Retzlaff appealed a new conditional water licence (the "Licence") issued by the Assistant Water Manager (the "Water Manager"), Ministry of Forests, Lands, Natural Resource Operations, and Rural Development. The Licence was issued to Mabel Denisoff, and authorized the use of 500 gallons per day ("gpd") of water from Shore Creek for domestic purposes. The Licence specified that it authorized the use of water for one dwelling, and construction of the water works had to be completed and the water beneficially used before December 31, 2019.

Shore Creek was already a source of water for several homes and small agricultural holdings in the community of Glade, near Castlegar, BC. Mr. Retzlaff lived in Glade for many years and co-owned a small residential acreage with hay fields and an orchard. Before the Licence was issued, there were eight licensees (including Mr. Retzlaff) holding 13 water licences (the "Prior Licences") on Shore Creek. The Prior Licences authorized the diversion and use of water for domestic and/or irrigation purposes. Many of the Prior Licences were issued in 1964. The Prior Licences shared the same point of diversion on Shore Creek. The licensees constructed and maintained joint works to divert water from the Creek, and shared the costs of operating the system. A gravity

feed system captured almost all the surface water of Shore Creek at the point of diversion. There were no licensees downstream of the joint works, and no record of fish in Shore Creek.

Mr. Retzlaff held two conditional water licences on Shore Creek: one issued in 2000 authorizing the use of 1.22 acre-feet of water per year for irrigation; and one issued in 1964 authorizing the use of 500 gpd of water for domestic purposes. He had sought the use of two acre-feet per year for irrigation. At the time, the Ministry advised Mr. Retzlaff that there may be periods when Shore Creek may not produce the licensed quantity of water, and as a result, the quantity of water approved in his irrigation licence was reduced from the amount sought following a discussion between him and Ministry staff regarding his proposed water use. Over the years, Mr. Retzlaff experienced water shortages while irrigating.

Ms. Denisoff's Licence application provided that there was no home on the parcel of land at the time, and the land was going to be sold. The applicant proposed that a new water connection would be added to the joint works to supply water under the Licence. The eight existing licensees on Shore Creek were notified of the application for the Licence, and Mr. Retzlaff was the only one to object.

A Technical Report prepared by Ministry staff in response to the Licence application noted that there was extensive flow monitoring of Shore Creek in the mid-late 1980's, and water shortages had occurred at certain times during dry years. The Ministry had placed a "Possible Water Shortage" notation on the file. However, the Water Manager determined that most of the time, in most years, there would be sufficient water supply to issue the Licence without adversely affecting the rights granted under the Prior Licences.

Mr. Retzlaff appealed the Licence on several grounds. He argued that Shore Creek was already over-subscribed by the existing licensees, and that the superior status given by the *Water Sustainability Act* (the "*Act*") to domestic water rights would, during water shortages, reduce the amount of water available to the holders of irrigation licences with earlier precedence dates than the Licence. He also argued that the issuance of the Licence, when the applicant had no intention of making beneficial use of the water, violated the *Act*. He requested that the Licence be cancelled and Shore Creek be designated as "fully recorded".

Based on the Ministry's past flow measurements on Shore Creek and Mr. Retzlaff's testimony that he had experienced occasional water shortages, the Board found that there probably would be times, during drier summers, when there was insufficient flow to meet the total licensed demand. However, Mr. Retzlaff provided no details about the water shortages he had experienced, or the reasons for the Ministry's decision to grant him 1.22 acre feet per annum for irrigation. Without more information, the Board could not conclude that the decision to grant him 1.22 acre feet instead of two acre feet was due to insufficient water supply. The Board noted that the decision-maker may have concluded that his intended irrigation use did not require the full two acre feet requested.

The Board also found that occasional water shortages on a water source do not necessarily preclude the issuance of a new licence, especially if the new licence is for a small amount of water and there will be no adverse effects on the environment, as in the present case. The Board found that the quantity of water granted under the Licence was insignificant relative to the flow of Shore Creek, and would have no measurable impact on Mr. Retzlaff's ability to irrigate his hay field and orchard.

Finally, the Board found that it would be unreasonable to require a landowner to construct a dwelling without knowing whether water rights would be issued. Regarding Mr. Retzlaff's concerns about a lack of beneficial use under the Licence, the Board

found that the Licence required beneficial use before December 31, 2019. If the water is not beneficially used by then, the Water Manager has the authority to cancel the Licence.

For all of those reasons, the appeal was dismissed.

## *Wildlife Act*

### Guide outfitter's moose quota sent back with directions – grizzly bear quota appeal denied

2017-WIL-014(a) Gary Blackwell v. Deputy Regional Manager (BC Wildlife Federation, Participant)

**Decision Date:** March 14, 2018

**Panel:** Linda Michaluk

Gary Blackwell appealed a decision of the Deputy Regional Manager (the "Regional Manager"), Recreational Fisheries and Wildlife Programs, Skeena Region, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), regarding Mr. Blackwell's annual quota and five-year allocation of grizzly bear and bull moose.

Mr. Blackwell is a guide outfitter who is licensed to guide hunters within a specific territory in the Skeena Region. Under the *Wildlife Act*, regional managers may attach a quota as a condition of a guide outfitter's licence. A quota sets out the total number of a particular species that may be harvested by the guide's clients in the guide's territory during the period specified in the licence. Regional Managers determine a guide's annual quota after determining the guide's five-year allocation of the species. The allocation is determined based on the Ministry's estimate of the species' population and the amount of harvesting that should allow the population to be replenished through natural means (the sustainable harvest). The anticipated harvest by First Nations is then deducted. The remaining available harvest, known as the allowable annual harvest, is then split between resident hunters and non-resident hunters. Most guided hunters are non-resident hunters.

In his decision, the Regional Manager advised Mr. Blackwell that his five-year allocations for 2017-2021 were 35 bull moose and zero grizzly bear, and his quotas for the 2017/2018 hunting season were 11 bull moose and zero grizzly bear.

Mr. Blackwell appealed his quotas and allocations on several grounds. Among other things, he questioned the accuracy of the Ministry's population estimates for moose and grizzly in his territory, and argued that the Regional Manager incorrectly applied a figure of 4.6% instead of 5.06% to represent the amount of moose habitat in his territory. He requested an increase in his allocations to 55 bull moose and one grizzly bear.

On December 15, 2017, after the appeal was filed, the Minister of Forests, Lands, Natural Resource Operations, and Rural Development issued Ministerial Order M414 (the "Order") which made changes to the *Hunting Regulation* and the *Limited Entry Hunting Regulation*. As a result, those regulations no longer authorized grizzly bear hunting in BC.

First, the Board considered whether the appeal of the grizzly bear allocation and quota was moot due to the Order. The Board found that the appeal was moot in that regard, because any change to Mr. Blackwell's grizzly bear quota/allocation would not benefit Mr. Blackwell given that the Order effectively prohibits grizzly bear hunting in the Province indefinitely, except for First Nations' hunting. In any event, the Board found that Mr. Blackwell's evidence would have been insufficient to justify increasing his grizzly bear quota or allocation.

Next, the Board considered whether Mr. Blackwell's bull moose quota and/or allocation should be increased. The Board found that a key issue was to determine which of the two figures – 4.60% or 5.06% - was the correct one to use in the formula for determining Mr. Blackwell's bull moose allocation and quota. All of the evidence before the Board indicated that moose allocations (and resulting quotas) in the Region were based on the relative proportions of suitable moose habitat within each guide's territory. The Regional Manager used the 4.6% figure in calculating Mr. Blackwell's moose allocation and quota. However, Mr. Blackwell provided evidence that his guide territory accounted for 5.06% of the total moose habitat in the moose population management unit. The Regional Manager's submissions failed to explain why the 4.6% figure was used instead of the 5.06% figure. The Board noted that if it recalculated Mr. Blackwell's allocation and quota based on the 5.06% figure, Mr. Blackwell may receive a higher allocation, but this could adversely affect the allocations of other guide outfitters. Consequently, the Board found that Mr. Blackwell's moose allocation and quota should be returned to the Regional Manager with directions.

Accordingly, the appeal was dismissed with respect to the grizzly bear quota and allocation, and was sent back to the Regional Manager with directions regarding the moose allocation and quota.

## Process for allocating angling quota was fair

### 2017-WIL-015(a) Stan Doll v. Deputy Regional Manager (Keith Douglas, Third Party)

**Decision Date:** March 6, 2018

**Panel:** Michael Tourigny

Stan Doll appealed a decision of the Deputy Regional Manager (the "Regional Manager"), Recreational Fisheries and Wildlife Programs, regarding the allocation of 42 guided angler days on a section of the Zymoetz River (the "Zymoetz 1") in north-western BC.

The Zymoetz I is a classified water under the *Angling and Scientific Collection Regulation*, B.C. Reg. 125/90 (the "*Regulation*"). Schedule A of the *Regulation* limits the number of guides permitted, and the number of guided angler days available, on classified waters during a specified period. In 2012, Schedule A of the *Regulation* was amended, resulting in 42 additional guided angler days being available on the Zymoetz I.

In 2012, a former Regional Manager conducted a sealed tender and proposal process to allocate the 42 days on Zymoetz 1 among guides who already held angler day quota on Zymoetz 1; i.e., Mr. Douglas, Mr. Doll, and Dustin Kovacvich. The former Regional Manager awarded all 42 angler days to Mr. Douglas. Mr. Doll and Mr. Kovacvich appealed. In *Stan Doll and Dustin Kovacvich v. Regional Manager, Recreational Fisheries and Wildlife Program* (Decision Nos. 2012-WIL-021(b) and 022(b), April 17, 2013) [*Doll #1*], the Board found that the former Regional Manager had applied undisclosed criteria in assessing the sealed tenders and proposals, and the Board ordered him to conduct a new allocation process in accordance with certain directions.

In April 2017, the Regional Manager notified Mr. Doll, Mr. Douglas, and Mr. Kovacvich that he would be allocating the 42 angler days through a sealed tender and written proposal process, pursuant to section 11(1.2)(c) of the *Regulation*. He provided each of them with an application package.

After reviewing the applications, the Regional Manager allocated all 42 guided angler days to Mr. Douglas. The Regional Manager issued a decision to Mr. Doll, notifying him that he had been awarded none of the guided angler days, and that three certificates of accreditation that Mr. Doll had submitted as part of his application had been awarded

no points because they were not "directly related to guiding for fish".

Mr. Doll appealed the Regional Manager's decision. Mr. Douglas participated in the appeal as a Third Party.

First, the Board considered whether the Regional Manager had a duty to treat all applicants fairly and equally in the allocation process. The Board found that the phrase "sealed tender together with a written proposal" in section 11(1.2)(c) of the *Regulation* indicated an intention by the legislature that the Regional Manager had an implied duty to treat all bidders fairly and equally in the allocation process.

Next, the Board considered whether the application package complied with the Board's directions in *Doll #1*. The Board found that the examples of certificates and accreditations provided in the application package was more than adequate to comply with the directions in *Doll #1* that applicants be provided with "full knowledge of the determinative criteria", in terms of what sort of certificates and accreditations would be considered "directly relevant to guiding for fish". The Board noted that the application package was only provided to the three applicants, who had held angler day quota on Zymoetz 1 for some time, and who should have been well aware of what certificates and accreditations would likely be considered as "directly relevant to guiding for fish" on Zymoetz 1.

In addition, the Board held that the number of points available for each valid certificate or accreditation was set out in the application package, as was the requirement that the certificates or accreditations be directly relevant to guiding for fish. As long as the Regional Manager was applying the disclosed criteria, it was open to him to adopt a particular definition of "directly relevant to guiding for fish" as part of his methodology for assessing points. By focusing on certificates and accreditations that were directly relevant to guiding on the Zymoetz 1, the Regional Manager defined "directly relevant to guiding for fish" in a way that was consistent with the waterbody-specific nature of the *Regulation* and Ministry policies.

Finally, the Board found that the Regional Manager made no material errors by giving no points for Mr. Doll's Rejected Certificates. The Board found that the Regional Manager's definition of "directly relevant to guiding for fish" was consistent with the objectives of the *Act* and the *Regulation*, and his knowledge of the Zymoetz 1. The Board concluded that the Regional Manager applied the definition fairly and reasonably to all three applicants.

Accordingly, the appeal was dismissed.

## Guide outfitter's request for higher grizzly bear quota denied

### 2017-WIL-009(a) Fraser MacDonald v. Regional Manager (BC Wildlife Federation, Participant)

**Decision Date:** July 4, 2017

**Panel:** David H. Searle, C.M., Q.C.

Fraser MacDonald appealed a decision of the Regional Manager (the "Regional Manager"), Fisheries and Wildlife Program, Omineca Region, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), setting his annual quota of grizzly bear at three for the 2017/2018 season, and his five-year allocation of grizzly bear at eight. The annual quota and five-year allocation were attached to Mr. MacDonald's guide outfitter licence. Mr. MacDonald is a guide outfitter who is authorized to take hunters on guided hunts in the area specified in his guide outfitter certificate. His allocation of grizzly bears had decreased by almost half since 2007.

Mr. MacDonald appealed on the grounds that his five-year allocation was not calculated based on the best available scientific information, was inconsistent with other northern Regions, and did not adhere to the Ministry's policies and procedures.

In particular, he argued that grizzly bear populations and harvests should be set based on smaller geographic units (i.e. wildlife management units), rather than larger units that include areas with low grizzly bear population densities. He requested that his annual quota be increased to four grizzly bears, and his five-year allocation be increased to 14 grizzly bears.

The Board considered the Ministry's policies and procedures for setting quotas and allocations, and assessing grizzly bear populations. The Board also considered evidence regarding how the Regional Manager made his decision, grizzly bear population estimates in the Region, and the methods for calculating guide outfitter allocations and quotas, including the geographic scale of grizzly bear management. The Board found that the Regional Manager had considered whether to use a larger geographic scale to determine guide outfitters' grizzly bear allocations and quotas, but uncertainty in grizzly bear population information made it difficult to determine the best scale of management. In addition, the Regional Manager explained that increasing Mr. MacDonald's allocation and quota would require either taking away bears allocated to other harvesters, or exceeding the bear mortality rate that would ensure a sustainable harvest. Therefore, the Regional Manager decided to continue to set grizzly bear allocations and quotas for guide outfitters in the Region based on a larger geographic scale, pending the collection of more accurate data on grizzly bear populations and further engagement with stakeholders. Based on all of the information and evidence, the Board concluded that there were compelling reasons to confirm the Regional Manager's decision, and to delay making changes to Mr. MacDonald's grizzly bear allocation and quota until the Ministry's review of grizzly bear populations in the Region concludes.

Accordingly, the appeal was dismissed.

# Costs Decisions

## *Water Act/Water Sustainability Act*

The Board has the power to order a party to pay all or part of the costs of another party in connection with an appeal. The Board's policy is to only award costs in special circumstances. In addition, if the Board considers that the conduct of a party has been frivolous, vexatious or abusive, it may order that party to pay all or part of the expenses of the Board in connection with the appeal.

### Quantum of costs settled by consent

**2015-WAT-008(d) Thomas Hobby and SC Ventures Inc. v. Assistant Regional Water Manager (0716880 B.C. Ltd., Malahat First Nation and several numbered companies, Participants)**

**Decision Date:** September 12, 2017

**Panel:** Alan Andison

The Assistant Regional Water Manager (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations, and the Participants in this appeal, requested an order of costs against the Appellants after the conclusion of the appeal hearing. The appeal was filed by Mr. Hobby and SC Ventures Inc. against a decision of the Regional Manager denying an apportionment of water rights held under various water licences on Oliphant Lake and Spectacle Creek. Mr. Hobby owns SC Ventures Inc.

In 2005, SC Ventures Inc. became the registered owner of Lot 74 in the Malahat District. In 2007, Mr. Hobby became the registered owner of Lot 75 in the Malahat District.

On May 12, 2015, the Regional Manager issued a new conditional water licence apportioning water, which was previously assigned to a number of

historical licences, to certain property owners that had used the water. He also cancelled portions of the water licences that were appurtenant to properties that had not used the water and did not have any agreement to connect to the infrastructure used to convey the water. Lots 74 and 75 were among the properties that had their water licences cancelled.

Mr. Hobby and SC Ventures Inc. appealed the Regional Manager's decision. They requested that some water be apportioned to Lots 74 and 75.

The Board scheduled a nine-day hearing of the appeal, commencing on June 20, 2016.

On June 1, 2016, the Regional Manager advised that he would be challenging the Appellants' standing to appeal the decision in relation to Lot 75. He advised that Lot 75 had been sold, and neither of the Appellants had any legal interest in the property.

On June 13, 2016, seven days before the start of the hearing, the Appellants applied to postpone the hearing on the basis that they were involved in a Supreme Court action "to take back the Malahat District Lot 75 property." If successful in court, the Appellants stated that they would continue to pursue their appeal before the Board in relation to Lot 75. The Board granted the postponement.

On September 22, 2016, the Regional Manager advised the Board that the Appellants' court proceedings regarding Lot 75 had been dismissed. The Regional Manager requested that the Board schedule a teleconference to address the status of the appeal. During the teleconference, all of the Parties and Participants consented to an oral hearing of the appeal commencing at 9:00 am on January 3, 2017. In a subsequent letter, the Board confirmed the hearing date, and that the appeal would be restricted to Lot 74. A Notice of Hearing was sent to all Parties and Participants.

On January 3, 2017, the hearing commenced at the scheduled time. The Appellants were not in attendance. The Board adjourned the hearing until 10:30 a.m. while the Board's staff attempted to locate Mr. Hobby. At 10.01 a.m., the Board's staff contacted Mr. Hobby by telephone. He advised that he would not be attending the hearing. He was notified that the appeal would be dismissed if he did not appear by 10:30 am. The Board reconvened the hearing at 10:30 a.m. The Appellants failed to appear, and the Board dismissed the appeal.

After the hearing ended, the Regional Manager learned that the Appellants had not held an ownership interest in Lot 74 since November 18, 2016. The Regional Manager advised the Board and the Participants of that fact.

Subsequently, the Regional Manager and the Participants requested that the Board order costs against Mr. Hobby. They submitted that costs were warranted because Mr. Hobby's conduct in the appeal process was improper and abusive. In particular, he failed to advise the Board or the Parties and Participants that the Appellants no longer had an ownership interest in Lot 74, which was the only basis for the Appellants' standing to appeal after Lot 75 was sold, and he failed to notify the parties or the Board that he would not be attending the hearing.

In response, Mr. Hobby apologized for his failure to attend the hearing, and submitted that he had suffered financial and emotional stress over the past several years. He also submitted that the issues in the appeal had merit.

On March 20, 2017, the Board decided (Decision No. 2015-WAT-008(b)) that there were special circumstances in this case that warranted an award of costs against both Appellants, jointly and severally. Specifically, the Appellants had failed to advise the Board or the Parties and Participants that the Appellants no longer had an ownership interest in Lots 74 or 75. By failing to provide that information, Mr. Hobby knowingly or recklessly misled the Board

and caused prejudice to the Regional Manager and the Participants. In addition, Mr. Hobby provided no reasonable explanation for his failure to provide notice that he would not be attending the appeal hearing. The Board found that Mr. Hobby is a sophisticated self-represented party who was familiar with the appeal process and the court litigation process. He knew, or should have known, that his failure to disclose the sale of Lots 74 and 75, and his failure to attend the hearing, was conduct that fell below acceptable standards.

Regarding the quantity of costs, the Board found that the appeal involved matters of ordinary difficulty, and therefore, costs should be awarded based on Scale B of the BC Supreme Court Civil Rules.

Subsequently, the Regional Manager and the Appellants reached an agreement that the Appellants would pay $5,000 to the Regional Manager as full settlement of the Regional Manager's appeal costs. Accordingly, the Board issued an order (Decision 2015-WAT-008(c), April 27, 2017) to that effect under section 17(2) of the *Administrative Tribunals Act*.

Finally, 0716880 B.C. Ltd. and the Appellants reached an agreement that the Appellants would pay $4,400 to 0716880 B.C. Ltd. as full settlement of its appeal costs, and the Board issued an order to that effect under section 17(2) of the *Administrative Tribunals Act*.

# Summaries of Court Decisions Related to the Board

## BC Supreme Court

During this reporting period, the BC Supreme Court issued three decisions on judicial reviews of Board decisions. Summaries of two of those decisions are provided below.

### Court confirms the Board's process was fair and its decision was reasonable

**Michael Lindelauf v. Attorney General of British Columbia, Ministry of Forests, Lands and Natural Resource Operations, and Environmental Appeal Board**

**Decision date:** August 22, 2017
**Court:** B.C.S.C., Justice Dley
**Citation:** 2017 BCSC 1479

Michael Lindelauf sought a judicial review by the BC Supreme Court of a decision issued by the Environmental Appeal Board (the "Board") regarding an approval issued under the *Water Act* by the Assistant Regional Water Manager (the "Regional Manager"), Kamloops/Headwaters Forest District, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The approval was issued to staff in the Ministry's Thompson Okanagan Region, and authorized certain changes in and about Robbins Creek, located near Kamloops, BC. The changes were intended to remedy historic unauthorized diversions of Robbins Creek, and direct water back to the Creek's original channel. Mr. Lindelauf owns land that the diverted channel of Robbins Creek flows through. However, he never obtained a water licence on Robbins Creek.

Starting in the 1970s, water licensees on Robbins Creek began complaining about a lack of water, improper diversions, and siltation problems. In about 2011, after receiving more complaints, the Ministry began an investigation and discovered an unauthorized diversion built in the late 1960s in the headwaters of Robbins Creek (the upper diversion), which was sending water to a diverted channel. The Ministry also discovered unauthorized diversions downstream along the diverted channel (the lower diversions).

In June 2012, staff in the Ministry's Thompson Okanagan Region applied for an approval to remediate the unauthorized diversions and direct the entire flow of Robbins Creek back to its original channel. The proposed remedial work would primarily occur on Crown land at the upper diversion. The Ministry held a public meeting about the proposal, and offered interested parties an opportunity to comment on the proposal. Mr. Lindelauf provided a written objection to the Ministry.

In January 2013, the Regional Manager issued the approval.

Mr. Lindelauf and two other land owners appealed the approval. In general, they submitted that the unauthorized diversions had existed for a long time,

and the approval would direct water in the diverted channel away from its historic path. They submitted that their property, their interests, and aquatic habitat would be harmed by the approval. They also argued that the approval breached the principles of natural justice and violated the Charter of Rights and Freedoms because there was bias in the Regional Manager's decision-making process. Further, they asserted that the *Water Act* and the approval were unconstitutional. They requested that the approval be reversed.

Following a lengthy hearing, the Board confirmed the approval. The Board found that the approval was not issued for an improper purpose, and it would be absurd if an approval could not be issued to restore the flow in a stream that had been unlawfully diverted. In addition, the Board rejected the Appellants' submission that they had suffered prejudice due to unreasonable delays in the Ministry's investigation, and that the passage of time prevented the Ministry from applying for an approval. The Board found that the *Water Act* has no time limitations regarding approvals, and the Ministry provided a reasonable explanation as to why the investigation took time. In addition, the Appellants failed to establish that they were prejudiced by any delay.

The Board also found that the alleged negative effects of the approval were speculative, and the Ministry had carefully considered different options and their impacts before selecting a course of action. There was no evidence that the approval posed a danger to life, property or the environment. There was also no evidence that the Appellants would have no water if the approval was implemented. The evidence established that the Appellants used other water sources on their properties, including springs and/or groundwater wells. Furthermore, none of the Appellants established how much surface water they needed for domestic purposes. Therefore, it was unknown what, if any, negative impacts the approval would have on the Appellants' use of water in the diverted channel.

Additionally, the Board rejected the Appellants' claim that they had a common law right to use the diverted water flow, that Crown land grants issued in the 1920s to the original owners of their property provided a right to use the water flowing on their land, and that the Province has no legislative authority over water rights in BC. The Board found that the Crown grants provided no guarantee that the landowners would be able to use a specific amount of water from a particular water source. Moreover, given that the Crown grants were issued several decades before the diverted channel was built, the Crown grants could not have provided the landowners with any right to use water in the diverted channel. The Board also held that the courts have previously held that the common law rights historically enjoyed by riparian owners were abrogated by the *Water Act* and its statutory predecessors.

In addition, the Board rejected the Appellants' allegations of bias. Although the approval was issued by a decision-maker employed in the same Ministry as the applicant for the approval, the Regional Manager remained independent and objective in his decision-making process. The approval did not breach the Appellants' rights under the Charter of Rights and Freedoms.

Accordingly, the Board dismissed the appeals.

Mr. Lindelauf sought a judicial review of the Board's decision by the BC Supreme Court. Mr. Lindelauf sought to set aside the Board's decision for essentially the same reasons as those he had expressed before the Board. He also sought to tender new evidence, which the Court denied. The Court held that judicial reviews are typically based on the evidence that was before the tribunal, and in this case, there were no exceptional circumstances that justified allowing new evidence to be introduced.

The Court also discussed its role in a judicial review proceeding. The Court held that, with the exception of constitutional questions, the reasonableness standard applied in this case, meaning that the Court would not interfere with the Board's decision as long as it fell within the range of possible, acceptable outcomes. However, the constitutional questions would be reviewed based on the correctness standard, meaning that the Court would not defer to the Board's decision.

Next, the Court reviewed the Board's hearing process and found that Mr. Lindelauf was provided with a fair hearing. Regarding the constitutional questions, the Court held that the Board correctly concluded that the right to use water is lawfully vested in the Province. Regarding the allegation of bias in the Regional Manager's decision-making process, the Court held that the Board correctly determined that there was no bias, and even if there had been bias, it was corrected by the new hearing of the matter by the Board. Finally, the Court concluded that the Board's decision was reasonable, transparent and intelligible.

Consequently, the Court confirmed the Board's decision.

## Court confirms Board's interpretation and application of *Environmental Management Act*

### City of Burnaby v. Suncor Energy Inc. and Environmental Appeal Board

**Decision date:** December 8, 2017
**Court:** B.C.S.C., Justice Brundrett
**Citation:** 2017 BCSC 2267

The City of Burnaby ("Burnaby") sought a judicial review by the BC Supreme Court of a decision issued by the Board regarding Burnaby's standing to appeal a certificate of compliance issued to Suncor Energy Inc. ("Suncor") regarding remediation of property owned by Suncor.

Suncor's property was adjacent to property owned by Burnaby. In 1995, both properties were found to be contaminated with petroleum hydrocarbons that originated on Suncor's property. From 1996 to 2005, Suncor voluntarily remediated both properties to risk-based standards.

From 2008 to 2015, Suncor's environmental consultant conducted additional investigations of both properties. Suncor's consultant identified volatile organic compounds (VOCs) in the deep groundwater on both properties, and concluded that these compounds had likely originated from another site, and not from Suncor's property. As a result, Suncor did not delineate or remediate the VOCs on Burnaby's property. Subsequently, Suncor applied for certificates of compliance for both properties.

In December 2015, the Director, *Environmental Management Act* (the "Director"), Ministry of Environment, issued certificates of compliance for both properties pursuant to section 53 of the *Environmental Management Act* (the "*Act*"). In issuing the certificates, the Director accepted Suncor's position that it was not responsible for delineating or remediating the VOC contamination on Burnaby's property.

In January 2016, Burnaby appealed both certificates of compliance. Among other things, Burnaby submitted that the two properties were one contaminated site, the two certificates were interrelated, there was insufficient evidence to support a conclusion about where the VOC contamination had originated, and the Director ought to have required Suncor to delineate and remediate all contamination that was sourced from Suncor's land.

Before the appeals were heard, Suncor requested that the Board dismiss Burnaby's appeal of the certificate issued for Suncor's land. Suncor argued that Burnaby was not a "person aggrieved" by the issuance of that certificate within the meaning of section 100(1) of the *Act*.

To determine whether Burnaby was a "person aggrieved" by the certificate for Suncor's property, the Board applied the legal test that it had applied in previous cases, which was confirmed in *Gagne v. Sharpe*, 2014 BCSC 2077. Specifically, the Board considered whether Burnaby had provided sufficient evidence to establish, on a *prima facie* basis, that the certificate for Suncor's land prejudicially affects Burnaby's interests such that it was a "person aggrieved" under section 100(1) of the *Act*.

The Board found that Burnaby had not demonstrated, on a *prima facie* basis, that the issuance of the certificate for Suncor's property prejudiced Burnaby's interests. The Board found that Burnaby's concerns were only relevant to its appeal against the certificate for Burnaby's land. In its appeal against that certificate, Burnaby could still present evidence and arguments regarding whether there were flaws in the investigation, delineation and remediation of Suncor's land. Furthermore, if contaminants on Burnaby's land were not addressed by Suncor's remediation, Suncor may be subject to further regulatory action by the Director. There was no evidence that the issuance of the certificate for Suncor's land prejudicially affected Burnaby's interests. Accordingly, the Board dismissed Burnaby's appeal against the certificate for Suncor's land.

Burnaby sought a judicial review of the Board's decision by the BC Supreme Court, and requested that the decision be set aside.

The Court held that the reasonableness standard applied to its review of the Board's decision, meaning that the Court would not interfere with the Board's decision as long as the decision fell within the range of possible, acceptable outcomes. The Court held that it must approach the Board's decision with a high degree of deference, because the Board is an expert tribunal and the decision under review involved the Board's interpretation of one of its "home" statutes, with which the Board has particular familiarity.

The Court found that the Board's decision was reasonable. The Court held that the Board's decision was not contrary to the objectives underlying the statutory regime for remediating contaminated sites. Also, it was not unreasonable for the Board to have considered that essentially the same remedies were available to Burnaby through its appeals against either certificate. In assessing Burnaby's standing to appeal the certificate pertaining to Suncor's property, the Board considered the adequacy of the potential relief available to Burnaby if the Director's analysis underlying the issuance of that certificate proved to be wrong. All of these considerations involved the interpretation and application of a statute within the Board's purview, and the Board's findings were reasonable.

Accordingly, the Court confirmed the Board's decision.

# BC Court of Appeal

During this reporting period, the BC Court of Appeal issued two decisions on judicial reviews of Board decisions. A summary of one those decisions is provided below.

## Court confirms Board's decision was reasonable and consistent with the law

**Harrison Hydro Project Inc. et al v. British Columbia (Environmental Appeal Board and Deputy Comptroller of Water Rights)**
**Decision date:** February 2, 2018
**Court:** B.C.C.A, Justices Tysoe, Willcock, and Hunter
**Citation:** 2018 BCCA 44

Harrison Hydro Project Inc. ("Harrison") and five limited partnerships (collectively, the "Appellants") appealed a decision issued by the BC Supreme Court on a judicial review of a decision issued by the Board. The Board had dismissed the Appellants' appeal of an order made by the Deputy

Comptroller of Water Rights (the "Comptroller"), Ministry of Forest, Lands and Natural Resource Operations (the "Ministry") that the power produced at five separate power plants should be combined as if they were one power plant for the purpose of calculating water rentals payable to the Province under the *Water Act*. This resulted in water rental rates that are 4.7 times higher than if the power plants were treated as separate projects.

Harrison is the general partner of the five limited partnerships. Each of the limited partnerships is the beneficial owner of a "run of river" hydro project near Harrison Lake, BC. Each hydro project operates under a water licence authorizing the diversion and use of water from a stream for power production. The powerhouse and works for each hydro project are situated on Crown land, and each water licence is appurtenant to that Crown land.

From 2005 through 2006, the water licences were issued under the *Water Act* to a corporate predecessor of the Appellants which had received licences of occupation over the Crown land needed for each hydro project. In 2007, the limited partnerships were created with Harrison as the general partner. The licence of occupation for each hydro project was then assigned to the limited partnership that held the respective water licence. Between 2008 and 2009, the licences of occupation were replaced by leases over the same Crown land. All of the leases were issued to Harrison, and Harrison was named in the Land Title Office registry as the lease holder in each case.

From 2009 to 2012, the Ministry's records listed each limited partnership as the holder of the relevant water licence, and the Ministry billed each limited partnership individually for water rentals. However, when the Ministry discovered that Harrison held the leases for the Crown land to which the water licences were appurtenant, the Ministry launched an investigation. Ministry staff decided that Harrison should be named as the licensee for each water licence, and that water rentals should be billed collectively to Harrison. The water rental rate for each of the projects, if charged on an aggregate basis, is much higher than if each limited partnership is the licensee and is charged on an individual basis.

Harrison and the limited partnerships raised concerns with the Ministry about its new approach to billing, and whether Harrison was properly named as the licensee for all five licenses. The Comptroller reviewed the matter, and concluded that naming Harrison as the licensee for all five hydro projects, and billing water rentals for the five licences collectively to Harrison, was in accordance with the *Water Act* and the *Water Regulation*.

The Appellants appealed the Comptroller's decision to the Board. The main issue was whether Harrison is the proper licensee for all five water licences, as opposed to each limited partnership being the licensee for its respective water licence.

The Board found that section 16(1) of the *Water Act*, which states that a water licence will "pass with a conveyance or other disposition of the land", implies that the Ministry simply records a change of licensee in the Ministry's records upon receipt of notification from the licensee, which the licensee must provide under section 16(2) of the *Water Act*. Regarding the meaning of "disposition", the Board applied the definition in the *Land Act*, given that the appurtenant lands in this case were Crown lands subject to the *Land Act*.

Turning to the facts, the Board held that a conveyance or disposition of the appurtenant lands, from the limited partnerships to Harrison, occurred when the Crown land leases were issued in replacement for the licences of occupation. From 2009 to 2012, there was an inconsistency between the water licence holders recorded in the Ministry's records (i.e., the limited partnerships) and the holder of the leases

over the appurtenant Crown lands (i.e., Harrison), due to the licensee's failure to notify the Ministry of the conveyance or disposition of the appurtenant lands.

The Board also considered the language in the Limited Partnership Agreements, and concluded that only Harrison was entitled to physical possession, occupancy and control of the appurtenant lands, and was capable of carrying out the rights and obligations of a licensee as described in the *Water Act*. Therefore, Harrison was the "owner" of the appurtenant land for the purposes of the *Water Act*, and was properly named as the holder of the water licences. In addition, section 16(4)(c) of the *Water Regulation* requires that water rental rates be based on the total output from all projects that are owned or operated by a licensee. Given that Harrison was the proper licensee for all five water licences, the power produced at the hydro projects should be aggregated when calculating water rentals.

The Appellants sought a judicial review of the Board's decision. They argued that the Board failed to grasp the powers and capacities of the limited partnerships, and improperly interpreted the word "owner" under the *Water Act*.

The BC Supreme Court held that the Board's decision was reasonable, and accorded with the statutory and common law principles concerning limited partnerships. The petition was dismissed.

The Appellants appealed to the BC Court of Appeal. The Court reviewed the BC *Partnership Act*, as well as judicial decisions on the nature of limited partnerships. The majority of the Court found that the Board's interpretation of the *Water Act* was reasonable, its decision was reasonable in light of the legal principles surrounding limited partnerships and its decision did not contain contradictory reasoning. The majority concluded that the Board's decision fell within the range of possible, acceptable outcomes which are defensible in law and in fact.

The dissenting judge would have allowed the appeal on the basis that the Board's conclusion that limited partnerships could not hold water licences in their names was based on an unreasonable interpretation of the *Water Act*.

Accordingly, the appeal was dismissed, and the Board's decision was confirmed.

# Summaries of Cabinet Decisions Related to the Board

There were no orders by Cabinet during this reporting period concerning decisions by the Board.

APPENDIX I

# Legislation and Regulations

Reproduced below are the sections of the *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation* which establish the Board and set out some of its general powers and procedures. As specified in section 93.1 of the *Environmental Management Act*, many of the Board's powers are also provided in the *Administrative Tribunals Act*. A link to the *Administrative Tribunals Act* and its regulations can be found on the Board's website (www.eab.gov.bc.ca).

Also included are the appeal provisions contained in each of the statutes which provide for an appeal to the Board: the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Mines Act*, the *Water Sustainability Act*, and the *Wildlife Act*. Some appeal provisions are also found in the regulations made under the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, and the *Mines Act*. The appeal provisions in the *Water Sustainability Act* apply to appeals under the *Water Users' Communities Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (March 31, 2017). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications.

Although not provided below, it should be noted that, in addition to decisions of government officials, Part 3 of the *Environmental Management Act* gives district directors and officers appointed by the Greater Vancouver Regional District certain decision-making powers that can then be appealed to the Board under the appeal provisions in the *Environmental Management Act* referenced below. In addition, the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 (not reproduced) allows the Oil and Gas Commission to make certain decisions under the *Water Sustainability Act* and the *Environmental Management Act*, and those decisions may be appealed in the usual way under the appeal provisions of the *Water Sustainability Act* and *Environmental Management Act*, as set out below.

## *Environmental Management Act*, (SBC 2003, c. 53)

### Part 8 – Appeals

### Division 1 – Environmental Appeal Board

#### Environmental Appeal Board

93 (1) The Environmental Appeal Board is continued to hear appeals that under the provisions of any enactment are to be heard by the appeal board.

(2) In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

(3) The appeal board consists of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

(4) [Repealed 2015-10-60.]

(5 and 6) [Repealed 2003-47-24.]

(7) to (11) [Repealed 2015-10-60.]

### Application of *Administrative Tribunals Act*

**93.1** (1) Subject to subsection (2), for the purposes of an appeal, the following provisions of the *Administrative Tribunals Act* apply to the appeal board:

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

(b) Part 2 [*Appointments*];

(c) Part 3 [*Clustering*];

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

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

(ii) section 24 [*time limit for appeals*];

(iii) section 33 [*interveners*];

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

(e) Part 6 [*Costs and Sanctions*];

(f) Part 7 [*Decisions*];

(g) Part 8 [*Immunities*];

(h) section 57 [*time limit for judicial review*];

(i) section 59.1 [*surveys*];

(j) section 59.2 [*reporting*];

(k) section 60 [*power to make regulations*].

(2) A reference to an intervener in a provision of the *Administrative Tribunals Act* made applicable to the appeal board under subsection (1) must be read as a reference to a person or body to which both of the following apply:

(a) the appeal board has given the person or body the right to appear before it;

(b) the person or body does not have full party status.

### Parties and witnesses

**94** (1) In an appeal, the appeal board or panel

(a) may hear the evidence of any person, including a person the appeal board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body, whose decision is the subject of the appeal or review, must give that person or body full party status.

(2) and (3) [Repealed 2015-10-62.]

### Repealed

**95** [Repealed 2015-10-62.]

### Decision of appeal board

**96** If the appeal board or a panel makes an order or decision with respect to an appeal the chair must send a copy of the order or decision to the minister and to the parties.

### Varying and rescinding orders of appeal board

**97** The Lieutenant Governor in Council may, in the public interest, vary or rescind an order or decision of the appeal board.

### Appeal board power to enter property

98 The members of the appeal board have, for the purposes of an appeal, the right to enter any property except a private residence.

### Division 2 – Appeals from Decisions under this Act

### Definition of "decision"

99 For the purpose of this Division, **"decision"** means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115 (4) [*administrative penalties*] have not been performed.

### Appeals to Environmental Appeal Board

100 (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

### Time limit for commencing appeal

101 The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

### Procedure on appeals

102 (1) Division 1 [*Environmental Appeal Board*] of this Part applies to an appeal under this Division.

(2) The appeal board may conduct an appeal under this Division by way of a new hearing.

### Powers of appeal board in deciding appeal

103 On an appeal under this Division, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

### Appeal does not operate as stay

104 [Repealed 2015-10-64.]

### Division 3

105 [Repealed 2015-10-64.]

## *Environmental Appeal Board Procedure Regulation,*

## (BC Reg. 240/2015)

### Interpretation

1 In this regulation:

**"Act"** means the *Environmental Management Act*;

**"appealed decision"** means an action, decision or order that is the subject of an appeal to the board;

**"board"** means the Environmental Appeal Board established under the Act;

**"notice of appeal"** means a notice a person is required, under an enactment or rule, to give in order to begin an appeal to the board.

### Notice of Appeal

2 (1) A notice of appeal must be accompanied by a fee, in the amount of $25 for each appealed decision, payable to the minister responsible for the administration of the *Financial Administration Act*.

(2) The board must deliver a notice of appeal to

(a) the minister responsible for the administration of the Act,

(b) the minister responsible for the administration of the enactment under which the appeal arises, and

(c) the official who made the appealed decision.

(3) For certainty, nothing in this section affects the power of the board to make rules requiring that a notice of appeal be delivered to persons in addition to those enumerated in subsection (2).

### Providing reasons for orders or decisions

3 The board must provide an order or decision, other than an unwritten order or decision made in the course of a hearing, and any reasons for the order or decision to

(a) the parties, and

(b) the minister responsible for the administration of the enactment under which the appeal arises.

### Transcripts

4 (1) A person may request a transcript of any proceedings before the board or a panel.

(2) A person who makes a request under subsection (1) must pay the cost of preparing the transcript.

# *Greenhouse Gas Industrial Control and Reporting Act,* (SBC 2014, c. 29)

## Part 5 – Appeals to Environmental Appeal Board

### What decisions may be appealed, who may appeal and the appeal process

40 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) a determination of non-compliance under section 24 [*imposed administrative penalties: inaccurate report or failure to report*] or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) a determination of non-compliance under section 25 [*imposed administrative penalties in relation to other matters*], of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b), or

(b) a document evidencing a decision referred to in subsection (1) (c)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 [*Appeals*] of the *Environmental Management Act* applies in relation to appeals under this Act.

# *Greenhouse Gas Emission Administrative Penalties and Appeal Regulation,*
## (BC Reg. 248/2015)

### Part 2 – Appeals

#### Appeals to Environmental Appeal Board

12 (1) Decisions made under the following sections of the Greenhouse Gas Emission Reporting Regulation are prescribed for the purposes of section 40 (1) (c) [*what decisions may be appealed*] of the Act:

(a) section 16 (2) (a) or (3) (a) [*choice between direct measurement and mass balanced-based methodology*];

(b) section 26 (3) (b) [*verification bodies*].

(2) Decisions made under the following sections of the Greenhouse Gas Emission Control Regulation are prescribed for the purposes of section 40 (1) (c) of the Act:

(a) section 10 (1), (3) or (4) [*suspension or cancellation of accounts*];

(b) section 13 (4) (b) [*validation bodies and verification bodies*];

(c) section 17 (2) [*acceptance of project plan*];

(d) section 23 (2) [*issuance of offset units*].

(3) After making a decision referred to in subsection (1) or (2), the director must serve notice of the decision in accordance with section 41 [*notice and service under this Act*] of the Act.

(4) The following provisions of the *Environmental Management Act* apply in relation to appeals under the Act:

(a) section 101 [*time limit for commencing appeal*];

(b) section 102 (2) [*procedure on appeals*];

(c) section 103 [*powers of appeal board in deciding appeal*].

(5) For the purposes of subsection (4) (a) and (c), a reference to a decision in section 101 or 103 of the Environmental Management Act is to be read as a reference to a decision under section 40 (1) of the Act.

# *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act,*
## (SBC 2008, c. 16)

### Part 5 – Appeals to Environmental Appeal Board

#### What decisions may be appealed, who may appeal, the process of appeal

14 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 11 [*imposed administrative penalties: fuel requirements*] or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 12 [*administrative penalties in relation to other matters*], of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a refusal to accept an alternative calculation of carbon intensity under section 6(5) (d) (ii) (B) [*low carbon fuel requirement*];

(d) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with
   (a) an administrative penalty notice referred to in subsection (1) (a) or (b),
   (b) a refusal referred to in subsection (1) (c), or
   (c) a document evidencing a decision referred to in subsection (1) (d)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 [*Appeals*] of the *Environmental Management Act* applies in relation to appeals under this Act.

## *Renewable and Low Carbon Fuel Requirements Regulation,* (B.C. Reg. 394/2008)

### Part 4 – Appeals

#### Time limit for commencing appeal

21 The time limit for commencing an appeal is 30 days after the notice of administrative penalty to which it relates is served.

#### Procedures on appeal

22 An appeal must be
   (a) commenced by notice of appeal in accordance with the *Environmental Appeal Board Procedure Regulation*, and
   (b) conducted in accordance with Part 5 [*Appeals to Environmental Appeal Board*] of the Act and the Environmental Appeal Board Procedure Regulation.

#### Powers of appeal board on appeal

23 (1) On an appeal, the appeal board may
   (a) send the matter back to the person who made the decision with directions,
   (b) confirm, reverse or vary the decision being appealed, or
   (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

(2) The appeal board may conduct an appeal by way of a new hearing.

## *Integrated Pest Management Act,* (SBC 2003, c. 58)

### Part 4 – Appeals to the Environmental Appeal Board

14 (1) For the purposes of this section, "decision" means any of the following:
   (a) making an order, other than an order under section 8 [*minister's orders*];
   (b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;
   (c) amending or refusing to issue, amend or renew a licence, certificate or permit;
   (d) revoking or suspending a licence, certificate, permit or confirmation;
   (e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;
   (f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) [*administrative penalties*] have not been performed.

(2) A declaration, suspension or restriction under section 2 [*Act may be limited in emergency*] is not subject to appeal under this section.

(3) A person may appeal a decision under this Act to the appeal board.

(4) The time limit for commencing an appeal of a decision is 30 days after the date the decision being appealed is made.

(5) [Repealed 2015-10-109.]

(6) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under this Act.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision being appealed, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(9) [Repealed 2015-10-109.]

# *Mines Act,*
## (RSBC 1996, c. 293)

### Appeal

**36.7** (1) In this section, **"appeal tribunal"** means a tribunal identified by regulation for the purposes of this section.

(2) A person to whom a notice has been given under section 36.3 may appeal to the appeal tribunal a decision that is the subject of the notice.

(3) The time limit for a person to commence an appeal is 30 days after the date on which the notice under section 36.3 is given to the person.

(4) On an appeal under subsection (2), the appeal tribunal

(a) may confirm, vary or rescind the decision that is the subject of the notice, and

(b) must notify the person of the decision made under paragraph (a) of this subsection.

# *Administrative Penalties (Mines) Regulation,*
## (B.C. Reg. 47/2017)

### Part 3 – Appeals

### Definition

**8** In this Part, **"appeal"** means an appeal under section 36.7 [*appeal*] of the Act.

### Appeal tribunal

**9** For the purposes of section 36.7 of the Act and this Part, the appeal tribunal is the Environmental Appeal Board continued under the *Environmental Management Act*.

### Application of *Administrative Tribunals Act* to appeal tribunal

**10** The following provisions of the *Administrative Tribunals Act* apply to the appeal tribunal:

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

(b) Part 2 [*Appointments*];

(c) Part 3 [*Clustering*];

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

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

(ii) section 24 [*time limit for appeals*];

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

(iv) section 34 (1) and (2) [*power to compel witnesses and order disclosure*];

(e) Part 6 [*Costs and Sanctions*];

(f) Part 7 [*Decisions*];

(g) Part 8 [*Immunities*];

(h) Part 9 [*Accountability and Judicial Review*] except section 58 [*standard of review with privative clause*].

# *Water Sustainability Act,*
## (SBC 2014, c. 15)

### Division 3 – Appeals

### Appeals to appeal board

105 (1) Except as otherwise provided in this Act, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the appeal board by any of the following:

(a) the person who is subject to the order;

(b) subject to subsection (2), an owner whose land is or is likely to be physically affected by the order;

(c) the owner of the works that are the subject of the order;

(d) the holder of an authorization, a riparian owner or an applicant for an authorization who considers that his or her rights are or will be prejudiced by the order.

(2) In the case of the issuance of a drilling authorization, a person whose consent has been given for the purposes of section 62 (4) (c) [*drilling authorizations*] has no right of appeal unless the order respecting the drilling authorization in respect of which the consent was given is inconsistent with that consent.

(3) The time limit for a person to commence an appeal is 30 days after the date on which notice of the order being appealed is delivered to the person.

(4) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under this Act.

(5) The appeal board may conduct an appeal by way of a new hearing.

(6) On an appeal, the appeal board may

(a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,

(b) confirm, reverse or vary the order being appealed, or

(c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

(7) [Repealed 2015-10-192.]

# *Water Users' Communities Act,*
## (RSBC 1996, c. 483)

### Application of *Water Sustainability Act*

100.1 (1) The following provisions of the *Water Sustainability Act* apply for the purposes of this Act:

…

(b) section 105 [*appeals to appeal board*];

# *Wildlife Act*, (RSBC 1996, c. 488)

### Reasons for and notice of decisions

101 (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

(a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or

b) an application by a person for anything referred to in paragraph (a).

(1.1) The regional manager must give written reasons for a decision made under section 61 (1.1) (a) or (b).

(2) Notice of a decision referred to in subsection (1) or (1.1) must be given to the affected person.

(3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise,

whichever is earlier.

(4) For the purposes of applying this section to a decision that affects a guiding territory certificate, if notice of a decision referred to in subsection (1) is given in accordance with this section to the agent identified in the guiding territory certificate, the notice is deemed to have been given to the holders of the guiding territory certificate as if the agent were an affected person.

### Appeals to Environmental Appeal Board

101.1 (1) The affected person referred to in section 101 (2) may appeal the decision to the Environmental Appeal Board continued under the *Environmental Management Act*.

(2) The time limit for commencing an appeal is 30 days after notice is given

(a) to the affected person under section 101 (2), or

(b) in accordance with the regulations.

(3) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under this Act.

(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(6) [Repealed 2015-10-197.]

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