Environmental Appeal Board

2018/2019 Annual Report

APRIL 1, 2018 ~ MARCH 31, 2019

BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria, British Columbia
Telephone: 250-387-3464
Facsimile: 250-356-9923

Mailing Address:
P.O. Box 9425
Stn Prov Govt
Victoria, British Columbia
V8W 9V1

The Honourable David Eby
Attorney General
Parliament Buildings
Victoria, British Columbia
V8V 1X4

The Honourable Michelle Mungall
Minister of Energy, Mines and Petroleum Resources
Parliament Buildings
Victoria, British Columbia
V8V 1X4

The Honourable George Heyman
Minister of Environment and Climate Change Strategy
Parliament Buildings
Victoria, British Columbia
V8V 1X4

The Honourable Doug Donaldson
Minister of Forests, Lands, Natural Resource Operations, and Rural Development
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2018 through March 31, 2019.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

AR 18/19

Table of Contents

Canadian Cataloguing in Publication Data
British Columbia. Environmental Appeal Board.
Annual report of the Environmental Appeal Board.
-- 1990 / 91 -

Annual.
Report year ends March 31.
ISSN 11-88-021X

1. British Columbia. Environmental Appeal Board - Periodicals. 2. Environmental law - British Columbia - Periodicals. 3. Pollution - Law and legislation - British Columbia - Periodicals. I.

KEB421.A49E58 354.7110082'321 C91-092316-7

ENV126788.1192

Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2018/2019 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 2018/2019 increased compared to the previous reporting period. The Board received 64 appeals during the 2018/2019 fiscal year, which is below the five-year average of approximately 80 appeals. Due to the number of appeals filed in previous reporting periods, a total of 138 appeals were active in 2018/2019. Over 70% of the active appeals were under the *Environmental Management Act*. Seventy-five percent of the appeals that were closed did not require a hearing, as the appeals were withdrawn, abandoned, rejected, or resolved by consent of the parties.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 reporting period, the Board and the courts issued three decisions of note on appeals under the *Water Act* (the predecessor to the *Water Sustainability Act*).

First, the Board heard an appeal of a water licence that authorized the BC Hydro and Power Authority ("BC Hydro") to store water in the reservoir that will be created by the Site C dam (see *Clara London v. Deputy Comptroller of Water Rights*, Decision No. 2016-WAT-002(b)). The Appellant owns land that will be affected by the reservoir. She submitted that the ground in the area is unstable and unsuitable for a reservoir, and the construction and operation of the dam and reservoir posed a risk to private property, the environment, and public safety. She also argued that BC Hydro was ineligible to hold the water licence because it did not own all of the land affected by the licence. She requested that the Board reverse or vary the licence.

The Board dismissed the appeal. Based on the relevant provisions of the *Water Act*, the Board found that BC Hydro was eligible to hold the licence. In addition, the Board held that the risks of slope instability, silt and sedimentary deposits, and flooding were the subject of extensive and ongoing study, and BC Hydro's environmental assessment certificate and water licences required it to take numerous steps to mitigate those risks. The Board concluded that the licence conditions reflected a cautious approach to ensuring public safety and managing the risks.

Next, the BC Court of Appeal issued a decision confirming the Board's decision in an appeal under the *Water Act*. The appeal was filed by a landowner who claimed he had legal rights to water in a stream flowing through his property, despite the fact that he did not hold a water licence on the

stream, and the stream was created by an illegal water diversion. The Court of Appeal found that the Board's hearing process was fair, and the Board's decision was reasonable. The Court confirmed the Board's findings that the *Water Act* abrogated common law riparian rights, and the landowner had no right to water from an illegal stream on his property.

Finally, the Supreme Court of Canada denied leave to appeal a decision of the BC Court of Appeal which had confirmed the Board's decision in an appeal under the *Water Act*. The appeal involved water rental charges for five hydroelectric power projects. Originally, the water licence for each project was issued to one of five limited partnerships. However, the tenure for the Crown land where the power projects were located was held by a general partner that had a partnership agreement with the limited partnerships. When the Deputy Comptroller of Water Rights found out about this arrangement, he transferred the water licences to the general partner, and charged water rentals for the five projects to the general partner as the sole licensee, which resulted in significantly higher water rental charges. The limited partnerships and the general partner appealed the higher water rental charges, and the Board dismissed the appeal. On judicial review, the majority of the Court of Appeal found that the Board's interpretation of the *Water Act* was reasonable, and its decision was reasonable in light of the legal principles surrounding limited partnerships.

Summaries of those court decisions are provided in this annual report.

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 2018/2019, 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 late 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 2019/2020 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 50 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 Lana Lowe and Teresa Salamone as new members of the Board. They will complement the expertise and experience of the outstanding professionals on the Board. Five members' appointments concluded during 2018/2019. Those members are Cindy Derkaz, R.G. (Bob) Holtby, Kent Jingfors, John M. Orr, Q.C., and Gregory J. Tucker. I sincerely thank each of these distinguished members for their exemplary service as members of the Board.

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 dam construction and groundwater licensing, to gas and oil spills, compost facilities, possession of exotic species, and hunting without a licence.

In addition, and on a very sad note, Board member Lorne Borgal was killed in an airplane crash on May 9, 2019. Lorne was a highly valued member of the Board who had a genuine interest in the work of the Board, and for providing due process and fairness to those parties that appeared before him. He will be missed.

Finally, 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, 2018 to March 31, 2019.

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:

Environmental Appeal Board
Fourth Floor, 747 Fort Street
Victoria, British Columbia V8W 3E9
Telephone: 250-387-3464
Facsimile: 250-356-9923

Website Address: www.eab.gov.bc.ca

Email Address: eabinfo@gov.bc.ca

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria, British Columbia
V8W 9V1

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	Lions Bay
Cindy Derkaz	Lawyer (retired)	Salmon Arm
Brenda L. Edwards	Lawyer	Victoria
Les Gyug	Professional Biologist	West Kelowna
Jeffrey Hand	Lawyer	Vancouver
R.G. (Bob) Holtby	Professional Agrologist	West Kelowna
Kent Jingfors	Environmental Consultant	Nanoose Bay
Darrell LeHouillier	Lawyer	Vancouver
Lana Lowe	Land Use Specialist	Fort Nelson
James S. Mattison	Professional Engineer	Qualicum Beach
Linda Michaluk	Professional Biologist	North Saanich
John M. Orr, Q.C.	Lawyer	Victoria
Susan Ross	Lawyer	Victoria
Teresa Salamone	Consultant/Lawyer	Osoyoos
Howard Saunders	Forestry Consultant	Vancouver
Daphne Stancil	Lawyer/Biologist	Victoria
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.

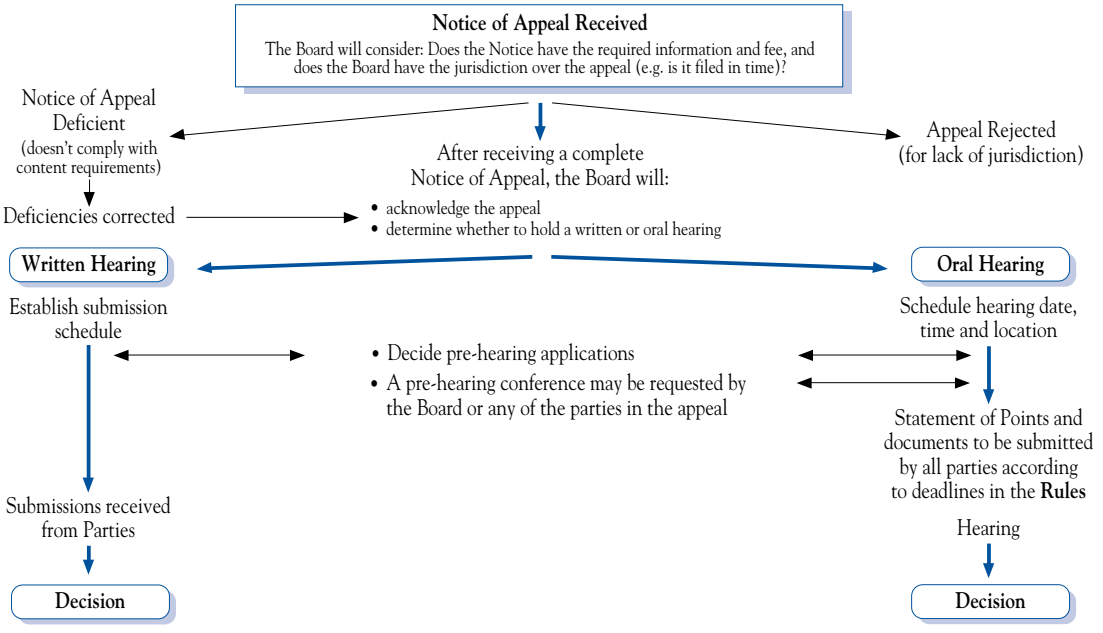
The Appeal Process

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* 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. Pursuant to the authority provided to it under section 11 of the *Administrative Tribunals Act*, the Board has also made Rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it. The Board's Rules can be found on the Board's website.

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, state the outcome or remedy that is requested, 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, and the relevant ministers. 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, 2018 and March 31, 2019, a total of 64 appeals were filed with the Board against 64 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 151 decisions, of which 39 were published.

April 1, 2018 – March 31, 2019

Total appeals filed		**64**
Total appeals closed		**36**
Appeals abandoned or withdrawn		**19**
Appeals rejected, jurisdiction/standing		**6**
*Hearings held:		
Oral hearings completed	8	
Written hearings completed	28	
Total hearings held		**36**
Total oral hearing days		**58**
Decisions issued:		
Appeals allowed – sent back with directions	1	
Appeals allowed, in part	1	
Appeals dismissed	7	
Final regular decisions		**9**
****Final decisions resulting from applications**		**42**
Total final decisions		**51**
Consent orders		**2**
Costs decisions		**1**
Preliminary decisions		**94**
Jurisdiction/Standing		**1**
Other		**2**
Total decisions		**151**

▲

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	48				10	6		64
Appeals closed – final decision	2				4	3		9
Appeals closed – consent order	1					1		2
Appeals closed - abandoned or withdrawn	11				5	3		19
Appeals closed - rejected jurisdiction/standing	4				2			6
Total appeals closed	18				11	7		36
Hearings held								
Oral hearings	6				1	1		8
Written hearings	16				7	5		28
Total hearings held	22				8	6		36
Total oral hearing days	51.5				0.5	6		58
Decisions issued								
Final decisions	26				11	14		51
Consent orders	1					1		2
Costs decisions						1		1
Jurisdiction/Standing	1							1
Preliminary applications	74				13	7		94
Other	1				1			2
Total decisions issued	**103**				**25**	**23**		**151**

▲

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 36 appeals that closed during this reporting period, 27 (75%) 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 36 hearings that were held, 28 (78%) 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 397 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 477 days. The overall average for all appeals concluded during this reporting period was 417 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 the majority of 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, 2018 ~ March 31, 2019

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. The summaries include an example of an appeal 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 provide examples of preliminary decisions that address questions of jurisdiction regarding standing to appeal, and the time limit for filing an appeal.

Surrey residents have standing to appeal air permit issued to industrial facility

2018-EMA-003(a), 004(a), 012(a) to 016(a)
Patricia Rush et al v. District Director, *Environmental Management Act* (Ebco Metal Finishing L.P., Third Party)

Decision Date: August 20, 2018

Panel: Alan Andison

Thirteen individuals and organizations (collectively, the "Appellants") filed separate appeals against a permit issued by the District Director, *Environmental Management Act* (the "District Director"), of the Greater Vancouver Regional District ("Metro Vancouver"). The permit authorizes Ebco Metal Finishing L.P. ("Ebco") to discharge contaminants to the air from a zinc galvanizing facility located in Surrey, BC. The permit was issued under both the Greater Vancouver Regional District Air Quality Management Bylaw and the *Environmental Management Act* (the "Act"). In general, the Appellants raised concerns about the potential adverse impact of the facility's air emissions on human health, animals, plants, and businesses surrounding the facility. Some of the Appellants also raised concerns about the emissions due to the facility's proximity to an aquifer that supplies drinking water, a salmon-

bearing creek, homes, a school, and land where a new school and housing is planned to be built.

Ebco applied to the Board for dismissal of seven of the appeals. Ebco submitted that those appeals were outside of the Board's jurisdiction, because they were either filed after the expiry of the 30-day time limit specified under section 101 of the *Act* for commencing an appeal, or were not filed by a "person aggrieved" by the permit within the meaning of section 100(1) of the *Act*.

Specifically, Ebco submitted that Metro Vancouver gave notice of the decision to issue the permit on March 28, 2018, and therefore, the 30-day appeal period ended on April 27, 2018. Ebco argued that the Board received five of the appeals after the Board's office closed on April 27, 2018, and therefore, those appeals were outside of the Board's jurisdiction. In addition, Ebco argued that three of the Appellants were not persons aggrieved, because they were located outside of the area affected by emissions from the facility, and that they had provided insufficient information to conclude that they were prejudicially affected by the permit.

The Board noted that section 101 of the *Act* states that the time limit for filing an appeal is 30 days "after notice of the decision is given". The Board interpreted this to mean that the 30-day appeal period begins on the date when the decision is first "given" to the person filing the appeal. In addition, based on the dictionary definition of "day", the Board held that the final "day" in the 30-day appeal period ends at 11:59 pm on the 30th day, and not at 4:30 pm when the Board's business hours end. Based on the evidence regarding when the five Appellants received, the Board concluded that only one of the appeals was filed outside of the 30-day appeal period, and the Board had no jurisdiction over that appeal.

The Board also considered whether three of the Appellants were "persons aggrieved" by the permit. The Board applied the test set out in *Gagne v. Sharpe*, 2014 BCSC 2077: whether each appellant established on a *prima facie* basis that he or she had a genuine grievance because the permit prejudicially affected his or her specific interests. Based on the evidence, including Ebco's modelling of the predicted dispersion of emissions from the facility, the Board concluded that all three Appellants' specific interests in the environment and/or human health may, on a *prima facie* basis, be prejudicially affected by the emissions authorized under the permit. Accordingly, the Board concluded that those Appellants had standing to appeal as "persons aggrieved" by the permit.

Therefore, one application for dismissal was granted, and the other six applications for dismissal were denied.

No standing to appeal licence issued to Comox valley water bottling facility

2018-WAT-001(a) Bruce Gibbons v. Assistant Water Manager (Christopher MacKenzie and Regula Heynck, Third Parties)

Decision Date: June 19, 2018

Panel: Alan Andison

In November 2017, the Assistant Water Manager (the "Water Manager"), Ministry of Forests, Lands, Natural Resources and Rural Development, issued a groundwater licence (the "Licence") to Christopher MacKenzie and Regula Heynck (the "Third Parties"). The Licence authorized the Third Parties to divert and use up to ten cubic metres per day of water from Aquifer 408 for industrial purposes; i.e., fresh water bottling. The Third Parties own a small acreage in a rural area, the Comox valley on Vancouver Island. A groundwater well was drilled on the property before the Licence was issued. Bruce Gibbons owns land approximately ¼ mile away from the Third Parties' property. His land also has a groundwater well.

When the Licence was issued, no other licences had been issued for Aquifer 408, and only one licence application was outstanding. The Province did not begin to regulate non-domestic groundwater use until 2016. A three-year transition period for existing domestic groundwater wells allows land owners to receive groundwater licenses if applications are filed by March 1, 2019.

Mr. Gibbons was not notified when the Licence was issued. He found out about the Licence a few months later, when the Third Parties applied to re-zone their property to permit "water and beverage bottling".

In March 2018, Mr. Gibbons appealed the Licence on a number of grounds. He argued that: the Licence was approved without adequate baseline data; Aquifer 408 is located in a rural area where residents, farmers and agricultural operations rely on the aquifer for water; and, fish habitat in local creeks and rivers depends on the Aquifer during droughts. He also submitted that he was directly affected by the Licence, because he relies on a groundwater well for drinking water.

Before the appeal was heard, the Water Manager challenged Mr. Gibbons' standing to appeal the Licence. Specifically, the Water Manager submitted that Mr. Gibbons did not qualify as an appellant under section 105(1) of the *Water Sustainability Act* (the "*Act*"), because he was not "an owner whose land is or is likely to be physically affected by" the Licence, a "riparian owner", an authorization holder, or an applicant for an authorization. Since Mr. Gibbons was not an authorization holder or an applicant for an authorization, the Board focused on whether Mr. Gibbons was an owner whose land was or was likely to be physically affected by the Licence, or was a riparian owner.

The Board held that Mr. Gibbons was not "an owner whose land is or is likely to be physically affected" by the Licence within the meaning of section 105(1)(b) of the *Act*. The Board found that there was insufficient evidence to establish, on a *prima facie* basis, that Mr. Gibbons' land was, or would likely be, physically affected by the Licence. Mr. Gibbons provided no information about his well, such as its depth, the amount of water he draws, or how any impact on the flow of water from his well might "physically affect" his land. The Board noted that, based on the language in section 105(1)(b) of the *Act*, it is his land that must be affected, or be likely to be affected, as opposed to his water supply.

The Board also found that there was insufficient evidence to conclude that Mr. Gibbons was "a riparian owner" within the meaning of section 105(1)(d) of the *Act*. The phrase "riparian owner" is not defined in the *Act*, but under common law principles it means a person who owns land that is abutting, adjacent to, or bordering on and in contact with a stream that has a defined channel. The phrase has not been used in relation to groundwater. The Board found that Mr. Gibbons provided no evidence that his land is adjacent to any particular stream, especially a stream that is hydraulically connected to Aquifer 408. In addition, the Water Manager's evidence showed that Aquifer 408 is probably a confined aquifer, and is unlikely to be connected to a stream.

For all of those reasons, the Board concluded that Mr. Gibbons had no standing to appeal the Licence, and therefore, the Board had no jurisdiction over the appeal.

Accordingly, the appeal was dismissed.

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.

Board refuses to issue stay for an unlicensed dam

2017-WAT-014(a) Bernard Wohlleben v. Assistant Water Manager (Joan Kyba, Preston Lenko, Janet Garland, Michael Lenko, and Mabel Lanko (collectively, the "Lenko Family"), and Tammy Lofstrom, Third Parties)

Decision Date: April 16, 2018

Panel: Cindy Derkaz

This stay application was part of a long-running dispute between Bernard Wohlleben and the Lenko Family concerning flooding on the Lenko Family's waterfront property on Gabriola Island, BC. Mr. Wohlleben and Tammy Lofstrom own a waterfront acreage adjacent to the Lenko Family's property. Martin Brook is a seasonal stream that flows through both properties and then into the ocean.

In 1994, a former water manager with the Ministry (now the Ministry of Forests, Lands, Natural Resource Operations, and Rural Development) issued a water licence and a permit to occupy Crown land, which authorized the construction of a dam on the Crown foreshore and the property of Mr. Wohlleben and Tammy Lofstrom, at the mouth of Martin Brook. The purpose of the dam was to store fresh water from Martin Brook for irrigation and stockwatering.

After the dam was built, the Lenko Family complained that the dam caused unauthorized flooding on their property. In response, Mr. Wohlleben insisted that the flooding was on Crown land, and was authorized by the water licence and the permit authorizing the occupation of Crown land. At the heart of the dispute was a disagreement about the location of the legal boundary between the private property and the Crown-owned foreshore.

In 2002, a former water manager issued an order cancelling the water licence and requiring the dam to be removed (the "2002 Order"). Mr. Wohlleben

appealed the 2002 Order to the Board. In deciding that appeal, the Board found that although the dam may cause some flooding above the natural boundary of the Crown foreshore, there was insufficient evidence to reach a conclusion about the location of the boundary (*Wohlleben v. Assistant Regional Water Manager*, (2002-WAT-034(b)), May 15, 2003). The Board reversed the 2002 Order.

Subsequently, the former water manager reconsidered the matter, and found that the dam caused flooding above the natural boundary of the Crown foreshore. In 2004, he issued another order (the "2004 Order") cancelling the water licence, and ordering the removal of the dam by September 30, 2004. Mr. Wohlleben did not appeal that order, and did not remove the dam.

In September 2017, the Ministry notified Mr. Wohlleben that it expected him to comply with the 2004 Order, and requested confirmation of his plans by the end of September 2017.

In November 2017, the Assistant Water Manager (the "Water Manager") issued a further order (the "2017 Order"), requiring Mr. Wohlleben and Ms. Lofstrom to remove the dam. The 2017 Order required them to retain professionals to prepare plans to remove the dam and to restore Martin Brook. The 2017 Order further required the dam and related works to be removed, and for Martin Brook to be restored, during the summer of 2018, with all work to be completed by no later than September 28, 2018.

Mr. Wohlleben appealed the 2017 Order to the Board, and applied for a stay pending the Board's final decision on the merits of the appeal.

In determining whether a stay ought to be granted, the Board applied the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*.

With respect to the first stage of the test, the Board considered whether the appeal raised serious issues to be decided, which were not frivolous, vexatious or pure questions of law. Mr. Wohlleben submitted that the appeal raised the same serious issue as in his 2002 appeal: i.e., what is the correct legal boundary between private property and the Crown foreshore. He submitted that the answer to that question was critical to the issue of whether the dam caused flooding of the Lenko property. Mr. Wohlleben submitted that the 2004 Order was incorrect, and he requested that the Board overturn the 2004 Order and the 2017 Order.

The Water Manager submitted that the appeal was "frivolous" and raised no serious issue to be tried, because the 2004 Order cancelled the water licence, and therefore, Mr. Wohlleben had no authority to maintain the dam and store water. The appeal period for the 2004 Order expired long ago, and the Board had no jurisdiction to reverse or vary the 2004 Order. Also, the 2004 Order was not reversed or replaced by the 2017 Order.

The Board found that the 2004 Order cancelled the water licence that authorized the dam and related works. Mr. Wohlleben did not appeal that order. Once the licence was cancelled, Mr. Wohlleben had no authority to maintain the dam or to store water from Martin Brook. The 2017 Order did not revisit the licence cancellation; it only addressed the removal of the unauthorized dam and the restoration of Martin Brook. Therefore, the Board could not reconsider the cancellation of the licence. The Board concluded that the appeal, as filed, was "frivolous", and Mr. Wohlleben had not established a serious issue to be decided.

Given those findings, the Board did not need to consider the second part of the *RJR MacDonald* test. However, for greater certainty, the Board found that Mr. Wohlleben had failed to show that he would suffer irreparable harm if the stay was denied and he was required to provide the plans required by the 2017 Order prior to the Board's final decision on the merits of the appeal.

Given the findings on the first and second parts of the *RJR MacDonald* test, the Board found that it did not need to address the third part of the test. However, the Board would have found that the balance of convenience favoured denying the stay.

Accordingly, the application for a stay was denied.

Final Decisions

Environmental Management Act

No evidence that pellet plant air emissions will cause harm to human health or the environment

2017-EMA-011(b) Thomas H. Coape-Arnold v. Director, *Environmental Management Act* (Pinnacle Renewable Energy Inc., Third Party)

Decision Date: March 27, 2019

Panel: Gregory J. Tucker, QC, R.G. (Bob) Holtby, Kent Jingfors

Thomas H. Coape-Arnold appealed a decision of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment, to amend an air emissions permit (the "Amendment") held by Pinnacle Renewable Energy Inc. ("Pinnacle") for its wood pellet manufacturing plant (the "Plant") located in Lavington, BC.

In December 2014, the Ministry issued a permit allowing Pinnacle to discharge contaminants to the air from its new wood pellet manufacturing plant. On March 9, 2016, there was a fire at the Plant. Pinnacle determined that the fire was caused by material in recirculated air passing through the Plant's belt dryers. Air passed through the dryers twice before being discharged to the atmosphere. Pinnacle was also concerned about the corrosion of equipment, caused by recirculating air through the belt dryers. The belt dryers dry the raw materials that are manufactured into pellets, and are central to the pellet manufacturing process.

As a result, Pinnacle decided to eliminate the air recirculation system. Pinnacle applied to amend the permit to allow changes in the concentration and discharge rate of some emissions, due to the increased air flow from changing to a single pass of air through the belt dryers. Pinnacle proposed that the total maximum rate of discharge would double from 66 cubic metres per second (m^3/second) to 132 m^3/second. The permitted limit of 15 mg/m^3 on total particulate matter ("TPM") for each dryer would remain unchanged, but the maximum combined rate of TPM discharge from the Plant would increase from 10.314 kilograms per hour (kg/hr) to 15.480 kg/hr. Pinnacle hired a consultant to prepare an emission dispersion modelling report in support of its application.

A meteorologist with the Ministry reviewed Pinnacle's application and air dispersion modelling report, and concluded that there was a risk that fine particulate matter ($PM_{2.5}$ and and PM10) concentrations would increase under certain meteorological conditions given the increase in dryer emissions. He advised that the only way to confirm that such an increase did not occur would be by conducting stack testing at the Plant and ambient air quality monitoring in the airshed.

The Director granted the Amendment with the revised emissions levels sought by Pinnacle, subject to certain requirements. In particular, the Amendment required Pinnacle to participate in a joint ambient air quality and meteorological monitoring program that included $PM_{2.5}$ or related studies, as directed by the Director.

Mr. Coape-Arnold appealed the Amendment. His appeal focused on the emissions from the belt dryers. In particular, he submitted that: a

study of volatile organic compounds ("VOCs") should have been required as a permit condition; the emission dispersion modelling provided by Pinnacle was inadequate; the Amendment should have specified discharge limits for $PM_{2.5}$ and PM_{10}; and, the TPM limit in the Amendment was too high.

After Mr. Coape-Arnold presented his case at the hearing, Pinnacle brought a no evidence motion and requested that the appeal be dismissed. The Director supported Pinnacle's motion. Pinnacle submitted that Mr. Coape-Arnold had provided no evidence or arguments which would require the Director and Pinnacle to make submissions or tender evidence in response. Specifically, Pinnacle argued that Mr. Coape-Arnold had failed to provide any evidence or arguments from which the Board could find that the conditions in the Amendment were insufficient, or that requiring a VOC study, additional dispersion modelling, or limits on $PM_{2.5}$ and PM_{10} emissions should be added to the permit.

The Board granted the no evidence motion in regard to three grounds of appeal: alleged lack of proper consideration of increased VOC emissions; inadequate emissions dispersion modelling; and, adding discharge limits for $PM_{2.5}$ and PM_{10} in the permit.

The Board denied the no evidence motion in regard to the fourth ground of appeal: whether the TPM limit in the Amendment was too high. The Board considered the parties' evidence, and found that in leaving the TPM limit at 15 mg/m^3, the Director recognized that there was some uncertainty in how the change in air flow through the belt dryers would affect TPM emissions. The Board held that it would be inappropriate to set the TPM limit at a level which would risk exceedances during normal operations at the Plant, and that there was no evidence that setting the TPM limit at 15 mg/m^3 instead of 10 mg/m^3 posed a risk of harm to human health or the environment.

Accordingly, the appeal was dismissed.

Administrative penalty reduced by consent without the need for a hearing

2018-EMA-046(a) Mark Spittael v. Director, *Environmental Management Act*

Decision Date: February 27, 2019

Panel: Alan Andison

Mark Spittael appealed an administrative penalty of $11,500 that was issued to him by the Director, *Environmental Management Act* (the "Director"), Ministry of Environment and Climate Change Strategy (the "Ministry"). The penalty arose from the following circumstances.

In mid-February 2015, the Ministry received a call from a member of the public that diesel was spilling from a tank at a gas station and leaking across the property into the Elk River. A few days later, Ministry staff inspected the site and found two sources of hydrocarbons leaking from the property into the Elk River. One source was diesel saturated soil surrounding the diesel tank, and the other was used engine oil that had been dumped on the property. Mr. Spittael owns the property and the gas station, and was determined to be responsible for the tank. Clarkson Contracting Ltd. leased part of the property, and was determined to be responsible for the used engine oil.

In early March 2015, the Ministry issued a pollution abatement order to Mr. Spittael and Clarkson Contracting Ltd. Among other things, the order required Mr. Spittael to retain a qualified professional to design and install a spill containment system on the property by no later than March 31, 2015. Although the leaking diesel tank was taken out of operation and drained, it was left on the property, and no steps were taken to retain a qualified professional to design and install a spill containment system.

During 2015, the Ministry warned Mr. Spittael several times to comply with this requirement. In response, Mr. Spittael questioned the need to retain

a qualified professional to design and install a spill containment system.

In June 2018, the Ministry inspected the site and found that this requirement still had not been met. The Ministry's inspection report recommended that an administrative penalty be levied against Mr. Spittael. In response, Mr. Spittael again questioned the need to retain a qualified professional to design and install a spill containment system.

In October 2018, following an opportunity to be heard, the Director issued a penalty of $11,500 to Mr. Spittael pursuant to section 115 of the *Environmental Management Act*, for failing to comply with the spill containment system requirement in the pollution abatement order.

Mr. Spittael appealed the penalty on the basis that it was excessive and unreasonable, and he asked that it be rescinded.

Before the appeal was heard, the parties negotiated an agreement to resolve the matter. Mr. Spittael and the Director agreed that the penalty amount would be reduced to $2,000 if Mr. Spittael removed the diesel tank from the property by no later than January 31, 2019. Mr. Spittael removed the tank by that date.

Accordingly, by consent of the parties, the Board ordered that the penalty be reduced to $2,000. The appeal was allowed, in part.

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

Local landowner appeals Site C dam water storage licence

2016-WAT-002(b) Clara London v. Deputy Comptroller of Water Rights (BC Hydro and Power Authority, Third Party)

Decision Date: February 5, 2019

Panel: Brenda Edwards

Clara London appealed a conditional water licence (the "Storage Licence") issued by the Deputy Comptroller of Water Rights (the "Deputy Comptroller"), Ministry of Forests, Lands and Natural Resource Operations, to the BC Hydro and Power Authority ("BC Hydro"). The Storage Licence

authorized BC Hydro to store water in a reservoir created by a dam on the Peace River. It was issued together with another licence that authorized BC Hydro to divert and use water from the Peace River for power purposes (the "Diversion Licence").

Both water licences were issued as part of the Site "C" Clean Energy Project (the "Project"). The Project will be located downstream of BC Hydro's two existing hydroelectric stations and dams on the river. Before the water licences were issued, the Project was subject to an environmental assessment process, which resulted in the issuance of an environmental assessment certificate ("EAC") in October 2014.

Specifically, the Storage Licence authorized the storage of 165 million cubic metres of water in the reservoir. The authorized works under the Storage Licence are the dam, spillways, a reservoir, a shoreline protection berm, and ancillary works associated with the dam. The Storage Licence states that it is appurtenant to BC Hydro's "undertaking" to generate power at the generating station authorized in the Diversion Licence.

When the water licences were issued, a permit over Crown land (the "Land Permit") was issued under the *Land Act* by a different statutory decision-maker. The Land Permit authorizes BC Hydro to flood 9,580.10 hectares of Crown land, and to place the licensed water works on Crown land.

Ms. London owns land that is directly affected by the dam construction and flooding. She submitted that the ground in the Peace River area is unstable and prone to landslides, which makes the area unsuitable for a dam and a reservoir. She also submitted that the construction and operation of the dam and reservoir poses a risk to private property, the environment, and public safety. She further argued that BC Hydro was ineligible to hold the Storage Licence because BC Hydro did not own all of the land that will be affected by the Storage Licence. She requested that the Board reverse or vary the Storage Licence.

The Board found that BC Hydro was eligible to hold the Storage Licence, because the *Water Act* did not require BC Hydro to "own" or acquire all of the land or land tenures needed for the Project before obtaining the Storage Licence. Section 27(4) of the *Water Act* provides that the holder of a licence that authorizes the construction of a dam "has the right to expropriate any land that would be flooded if the dam were constructed and utilized to the maximum height authorized."

Next, the Board considered the environmental and safety risks posed by the dam and reservoir, including the risk of flooding caused by:

- dam failure or the slopes of the reservoir collapsing into the reservoir due to unstable soil in the area;
- landslides, including the potential for damage due to wave action or the reservoir flooding its banks;
- accumulated silt and sediment entering the reservoir and causing it to flood its banks; and/or
- cascading failure of a dam upstream of the Site C dam.

The Board considered the technical evidence, including numerous expert reports, regarding these risks. The Board found that the risks of slope instability, landslides, silt and sedimentary deposits, and the associated risk of flooding were the subject of extensive and ongoing study, and BC Hydro was required by its environmental assessment certificate and water licences to take numerous steps to monitor and mitigate those risks. The Board concluded that the conditions in the Storage Licence reflected a cautious approach to ensuring public safety and managing the risks associated with the construction and operation of the Project, which added to the requirements imposed in the environmental assessment certificate.

The Board also held that the risk of upstream dam failure was being appropriately managed and mitigated through the environmental assessment certificate, and the oversight of Dam Safety Officers under the *Dam Safety Regulation*.

For all of these reasons, the Board dismissed the appeal.

Board orders water licence amendment to correct error in water source

2016-WAT-010(a) Jack and Linda Chisholm v. Assistant Water Manager (Byland Floors Ltd. and Donald Lancaster, Third Parties)

Decision Date: July 16, 2018

Panel: Gabriella Lang, Lorne Borgal, Reid White

Jack and Linda Chisholm (the "Appellants") appealed a decision issued by the Assistant Water Manager (the "Water Manager"), Ministry of Forests, Lands, Natural Resources and Rural Development. In the decision, the Water Manager denied the Appellants' request to amend their Conditional Water Licence C68000 (the "Licence").

The Appellants own a large ranch, with four water licences attached to their property. The Licence was issued in 1988, but the water rights in the Licence were originally issued in 1904 through a water grant. The Licence authorized the use of up to 57 acre feet of water per annum for irrigation purposes. The Licence stated that the water source was "Cameron Creek, with a re-diversion of water from Thos Creek". Attached to the Licence was a map indicating a point of diversion ("POD") on Cameron Creek and a point of re-diversion on Thos Creek. The Licence also stated that the authorized water works were "diversion structures, pipe and sprinkler system, which shall be located approximated as shown on the attached plan."

The Appellants applied for an amendment to the Licence to correct alleged errors. The Appellants maintained that historical mapping errors and renaming of streams had led to their water rights on Cameron Creek being usurped. They asserted that the Licence did not reflect the correct location of their authorized POD, as authorized by the water grant in 1904. The Appellants also requested an amendment to authorize works that had historically been used for irrigation on their property.

The Water Manager denied the Appellants' application to amend the Licence. He concluded that there was no error to correct, because the re-naming and re-mapping of water sources and PODs occurred in conjunction with water licence amendments in 1988, and the source locations were confirmed in an appeal to the Comptroller of Water Rights in 1993. In addition, he found that the historical POD was now on a different source, Heldon Brook, and amending a licence to a different source is not permitted under section 26(1) of the *Water Sustainability Act*.

The Appellants appealed the Water Manager's decision on several grounds. They argued that the Water Manager: erred by refusing to correct stream naming and mapping errors associated with the Licence; failed to acknowledge that those errors usurped the Appellants' historic water rights; erred by considering their application as an attempt to seek new or additional water rights; relied on the outcome of the 1993 appeal without advising them that he would be considering it; and, demonstrated bias. The Appellants asked the Board to reverse the Water Manager's decision, amend the Licence by moving the POD back to its historic location on Cameron Creek as shown on maps before 1977, and authorize the existing water works on the Appellants' property.

First, the Board considered the Appellants' allegation that the Water Manager was biased. The Board held that any potential bias was cured by the appeal hearing, which was conducted as a new hearing of the matter. Furthermore, even if the hearing did not cure those defects, there was inadequate evidence to support the allegation of bias.

Next, the Board considered whether the Water Manager had the jurisdiction to make the requested amendments to the Licence. The Board found that the Water Manager had the authority to amend the Licence to fix an error under section 26 of the *Water Sustainability Act*. Under that section, the Water Manager may, on application of a licence holder or on his own initiative, amend an "authorization" to correct an error in the authorization. The "authorization" in this case was the Licence.

Finally, the Board considered the merits of the Water Manager's decision. The Board reviewed historical maps, sketches, and water licences. In 1904, the Ministry granted the then property owner the right to divert water from Cameron Creek. Water licences from 1914, 1925, and 1977 identified Cameron Creek as the water source, and their maps showed the POD on Cameron Creek. The maps showed a stream named Cameron Creek, and not Heldon Brook. Based on the evidence, the Board concluded that since 1904, successive owners of the property held water rights on Cameron Creek, which always flowed through the property. The stream that the Water Manager referred to as Heldon Brook was a historical portion of Cameron Creek, as shown on historical licensing maps. Thus, in applying for the amendment, the Appellants were not asking for new or additional water rights; they were asking for the Licence's POD to be put back to where it was from 1904 to 1977. The Board also found that the 1993 appeal to the Comptroller of Water Rights settled nothing related to Cameron Creek, and may have contributed to the confusion about the location of water rights identified in this appeal.

For these reasons, the Board directed the Water Manager to amend the Licence map by showing the POD at its pre-1977 location, and by amending the Licence so that it listed the existing irrigation works.

Accordingly, the appeal was allowed.

Licence denied for water irrigation use from Okanagan Lake

2017-WAT-010(a) Karen Nonis v. Assistant Regional Water Manager

Decision Date: April 19, 2018

Panel: John M. Orr, Q.C.

Karen Nonis owns a property in the City of Kelowna (the "City"), on the shore of Okanagan Lake. Dan Nonis purchased the property in 1992, and Ms. Nonis was later added to the title of the property. When Mr. Nonis purchased the property, it had an irrigation system that drew water from Okanagan Lake. The water system and associated water use were unlicensed. Nevertheless, over the years, the property owners did extensive landscaping on the property, and continued to irrigate their trees and plants with water from the Lake.

In March 2017, Ms. Nonis received approval to replace a lakeshore retaining wall on the property. However, during an inspection by staff from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), the unlicensed water works were noted. The Ministry advised Ms. Nonis that she had to apply for a water licence if she wanted to continue to draw water from the Lake.

In April 2017, Ms. Nonis applied for a licence to divert 3,520 cubic metres of water from the Lake between May and September of each year, to irrigate 0.45 hectares of land.

On reviewing her licence application, the Ministry's Assistant Regional Water Manager (the "Water Manager") calculated the property's arable area to be 0.233 hectares rather than 0.45 hectares, after eliminating areas covered by structures, driveway, and a pool. The Water Manager estimated that the amount of water needed to irrigate that area would be 1819 cubic metres, about half of the amount requested. In addition, the City advised the Water Manager that the City's

water system, and size of the property's piping connected to that system, was sufficient to irrigate that area.

In July 2017, the Water Manager denied the licence application on the basis that Ms. Nonis had access to sufficient water from the City to meet the property's irrigation needs, and there was no need to draw water from the Lake.

Ms. Nonis appealed the Water Manager's decision on a number of grounds. Among other things, she submitted that she was required to plant at least 100 riparian plants and 11 trees as part of the approval to replace her retaining wall, and the City's water system could not provide sufficient water for irrigation without enlarging the property's connection to the system.

The Board found that although there was a history of the property's owners using water from both the City system and the Lake, there was no question that the use of Lake water was unlicensed and unauthorized. Under the *Water Sustainability Act*, no right to divert or use water may be acquired by prescription (i.e., use over time). Although the use of unrecorded water for "domestic purpose" is permitted without a licence in certain circumstances under section 6(3)(a) of the *Water Sustainability Act*, "domestic purpose" as defined in section 2 of that *Act* does not include irrigating large areas of landscaping. The evidence showed that the City's water system, and the property's connection to it, was sufficient to meet the property's irrigation needs, and there was no need to draw water from the Lake. The Board also found that denying the application for a licence was consistent with the scheme of the *Water Sustainability Act* and the public interest in conserving and managing water in Okanagan Lake.

Accordingly, the appeal was dismissed.

Groundwater licence denied for farm irrigation due to potential impact on a hydraulically connected stream

2017-WAT-007(a) Doug and Donna Halstead v. Water Manager (Patricia Frass, Participant)

Decision Date: April 6, 2018

Panel: James S. Mattison

In 2016, Doug and Donna Halstead (the "Appellants") purchased a farm in the Bessette Creek watershed near Lumby, BC. There have been water allocation restrictions on Bessette Creek since 1965. The Bessette Creek watershed supports fish populations including salmon and rainbow trout. The farm had a spring which was already licensed for household use. The previous landowners sometimes allowed the spring to flood irrigate portions of a hayfield on the property. The Appellants intended to clear more of the property, to increase hay production. The Appellants did not purchase the property until after they had a test well drilled and tested.

In October, 2016, the Appellants applied for a "New Groundwater Licence" that would authorize the withdrawal of 160,000 m^3 (cubic metres) of water per year from Aquifer 318 during May to September, to irrigate 40 hectares. The Appellants retained Western Water Associates Ltd. ("WWAL") to provide the technical information supporting the application.

The Appellants' application was reviewed by staff from the Ministry of Forests, Lands, Natural Resources and Rural Development (the "Ministry"). Ministry staff met with WWAL staff to discuss the degree of connectivity between Aquifer 218 and Bessette Creek.

Ministry staff also reviewed an environmental flow needs report (the "EFN Report") prepared by a Ministry contractor that considered Bessette Creek. The EFN Report was prepared after a three-year program of flow monitoring and weighted

useable habitat width calculations for environmental flows in the watershed. Based the information in the EFN Report, Ministry staff were concerned that stream flows in Bessette Creek, from July through October, were insufficient for salmon migration and spawning about 50% of the time. During dry years, flows were typically below the level needed for salmon rearing, and well below the flows needed for salmon migration and spawning.

In March 2017, Ministry staff advised the Appellants and WWAL that Aquifer 318 is likely connected to Bessette Creek, and therefore, the Ministry was required to consider how water extraction under the proposed licence may impact the Creek's environmental flow needs. Ministry staff found that, although the water to be extracted may be a small fraction of the flow in the Creek, the Creek's environmental flow needs were already compromised, and further licensing would exacerbate the issue. The Ministry advised the Appellants that their application would likely be reused, but offered to keep the application on hold if they wanted to explore options that might address the Ministry's concerns. The Appellants declined the offer to keep the application on hold.

In June 2017, the Water Manager denied the Appellants' licence application, on the basis that Bessette Creek is likely hydraulically connected to Aquifer 318, and there is insufficient flow in Bessette Creek to meet environmental flow needs.

The Appellants appealed the Water Manager's decision on a number of grounds, including that the Ministry provided inadequate information and communication before accepting the Appellants' application, which caused them to incur unnecessary expenses when the decision to refuse the licence had already been made. They also argued that the effect of pumping from the well would probably be unmeasurable, and would not coincide with the low-flow periods in Bessette Creek due to an expected time lag between pumping and when groundwater would reach the Creek. The Appellants requested that the Board grant a licence for 80,000 m^3 per year, half the volume they had originally requested.

The Board found that the Ministry provided more than adequate information to, and communication with, the Appellants during the process of considering the licence application. The Board also concluded that the Ministry did not cause the Appellants to incur unnecessary expenses, and the Water Manager's decision was not made before they filed their application. The Appellants acted at their own risk when they purchased the property and invested in a farming operation without first obtaining a water licence that could provide the irrigation water they needed.

In addition, based on the evidence, the Board found that it is reasonably likely that Aquifer 318 is hydraulically connected to Bessette Creek, and that the streamflow in Bessette Creek is already below target environmental flow needs during the early spring and late summer in average years, and worse during drought years. The Board found that granting the licence presented a risk of additional harm to the proper functioning of the Creek's aquatic ecosystem and would be contrary to the protection of Bessette Creek's environmental flow needs.

Finally, the Board recommended that the Ministry consider designating Aquifer 318 as fully recorded for licensing purposes, or alternatively, designating the Bessette Creek watershed under section 65 of the *Water Sustainability Act* for the purpose of developing a water sustainability plan.

Accordingly, the appeal was dismissed.

Wildlife Act

Permit to possess cheetahs denied

2017-WIL-017(a) Earl Pfeifer v. Director of Wildlife

Decision Date: March 4, 2019

Panel: Linda Michaluk

Earl Pfeifer appealed a decision of the Director of Wildlife (the "Director"), Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). The Director denied an application by Mr. Pfeifer, doing business as RunCheetahRun, for a permit to possess "controlled alien species"; namely, two cheetahs.

Cheetahs are designated as "controlled alien species" ("CAS") under the *Controlled Alien Species Regulation* (the "CAS *Regulation*"). Under the CAS *Regulation*, a person is prohibited from possessing a CAS unless the person holds a permit. The Director may grant a permit to possess a CAS under section 4(f) of the *Permit Regulation*, if: the animal was in BC on March 16, 2009; the permit applicant operates a zoo or is an educational or research institution; or, the Director is satisfied that special circumstances exist.

In 2013, Mr. Pfeifer imported two cheetahs into Ontario from a breeder in South Africa after obtaining import permits from Ontario. The cheetahs were then transported, with the proper permits, to a facility in Alberta where they remained until October 2014.

In April 2014, RunCheetahRun, an organization operated by Mr. Pfeifer for the purpose of cheetah awareness and conservation, applied for a permit to possess the cheetahs in Kaslo, BC, "for zoos and education and research institutions". In early 2016, the Ministry became aware that Mr. Pfeifer no longer owned/controlled the Kaslo property. The Director denied the permit, as CAS permits are location specific.

While the Kaslo application was being considered, RunCheetahRun also applied to possess the cheetahs in Creston, BC. In July 2016, the Director denied the application on the basis of the location and ownership of that property. Mr. Pfeifer appealed the decision, but the appeal was abandoned.

Meanwhile, in December 2015, a cheetah was spotted loose on a highway near Crawford Bay, BC, and Mr. Pfeifer was charged with possessing an alien species without a permit in relation to this incident. In June 2017, the Crown directed a stay of proceedings on those charges due to improperly obtained evidence.

In January 2016, the cheetahs were confirmed to be in Ontario.

On June 29, 2016, Mr. Pfeifer applied for a permit to possess the cheetahs "for zoos and education and research institutions" on behalf of RunCheetahRun, at a new location in Crawford Bay, BC. The application was subject to review by the CAS Permit Advisory Committee ("PAC") in accordance with Ministry policies and procedures. The PAC is comprised of professionals from the Canadian Association of Zoos and Aquariums, the Pet Industry Joint Advisory Council, the BC Society for the Prevention of Cruelty to Animals, and Ministry specialists.

On August 16, 2017, the Director denied the permit application. Among other things, the Director's decision noted that the application did not fit within the categories in the Ministry's policies and procedures, and the PAC did not support the application. Ultimately, the Director concluded that there were no "special circumstances" justifying a permit to possess the cheetahs.

Mr. Pfeifer appealed the Director's decision based on several grounds for appeal. He alleged that the Director: erred in construing the legislation; fettered her discretion by elevating the Ministry's policies and procedures to legislative status; unreasonably relied on the PAC's comments; relied on unlawfully obtained evidence underlying the charges

that were stayed by the Crown; and, erred in finding that the cheetahs pose a danger to public safety. Mr. Pfeifer requested that the Board approve a permit, and award him costs in the appeal.

Based on the relevant provisions under the *Wildlife Act* and regulations, and statements made in the legislature when the CAS *Regulation* was introduced, the Board found that the legislature enacted a regulatory framework that sets a 'high bar' for the private ownership of CAS. The framework was established to discourage not only keeping prohibited CAS as pets, but private ownership of CAS in general. The fact that cheetahs are designated as CAS indicates that the Minister considered cheetahs to "pose a risk to the health or safety of any person" or to "pose a risk to property, wildlife or wildlife habitat" under section 6.4 of the *Wildlife Act*. Moreover, cheetahs are designated as a prohibited species under Schedule 1 of the CAS *Regulation* which indicates that they are considered to be "the most harmful alien species".

The Board considered whether Mr. Pfeifer or RunCheetahRun could be considered a zoo or an educational or research institution for the purposes of issuing a permit under section 4(f)(ii) of the *Permit Regulation*. The Board held that they did not fit within those categories.

Next, the Board considered whether there were special circumstances that warranted granting a permit under section 4(f)(iii) of the *Permit Regulation*.

The Board noted that Mr. Pfeifer's business plan proposed public interaction with the cheetahs, but he had no training as a cheetah trainer and handler, and he had only seen the cheetahs once since they returned to Ontario in 2016. The Board also considered Mr. Pfeifer's testimony that: he brought the cheetahs to BC without a permit despite knowing that a permit was required; his cheetah was loose on a highway in 2015, after it escaped to chase a deer while he was walking it; he had not initiated the safety protocols included in his application to address a cheetah escape; and, he was not truthful with Conservation Service Officers when they questioned him about the escape.

The Board concluded that Mr. Pfeifer had demonstrated a disregard for BC laws regarding CAS, and for safety procedures and protocols. This was a concern because Mr. Pfeifer intended to have the cheetahs live in his residence, the cheetahs would require regular walks and exercise outside of their enclosure, and he planned to use the cheetahs for educational and outreach programs targeting children.

The Board concluded that there were no special circumstances that warranted granting a permit under section 4(f)(iii) of the *Permit Regulation*. The Board also held that any defects in the Director's decision-making process were cured by the *de novo* nature of the appeal proceedings.

For all of those reasons, the Board confirmed the Director's decision.

Finally, the Board found that there were no special circumstances that would warrant ordering the Director to pay Mr. Pfeifer's costs associated with the appeal.

Accordingly, the appeal was dismissed, and the application for costs was denied.

Ten-year prohibition on hunter confirmed

2018-WIL-001(a) Li Zhu Liu v. Deputy Director of Fish, Wildlife and Habitat Management

Decision Date: December 27, 2018

Panel: Gabriella Lang

Li Zhu Liu appealed a decision of the Deputy Director of Fish, Wildlife and Habitat Management (the "Deputy Director"), Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). The Deputy Director cancelled the Appellant's hunting licence,

and suspended his hunting licence privileges for ten years commencing on February 1, 2018. In addition, the Deputy Director required the Appellant to successfully complete the Conservation and Outdoor Recreation Education program before his hunting licence privileges may be reinstated.

The Deputy Director's decision arose from the Appellant's involvement in several hunting-related violations of the *Wildlife Act* and its regulations between 2013 and 2016. During that time, the Appellant held resident hunting licences, and participated in hunting trips with other individuals in BC.

Specifically, in October 2013, a Conservation Officer investigated a complaint of illegal hunting, and found a cow moose that had been shot dead in a field, with empty rifle casings nearby. There was no open season for cow moose in that area at that time. Following an investigation, the empty rifle casings were matched to one of the Appellant's rifles. The Appellant admitted to hunting in the area, but stated that he did not think that his group had "hit" anything.

Also, in October 2013, a witness observed the Appellant and two hunting companions standing over a recently shot cow moose. The cow moose was shot outside of open season and was left at the roadside. The Appellant and his companions were arrested later that day. The Appellant admitted to shooting the cow moose, but stated that he was mistaken about the gender of the moose. He referred to his and his companions' lack of hunting experience. Subsequently, the Appellant took responsibility for the illegal harvest of the cow moose.

In September 2014, the Appellant shot a white tailed deer and improperly cancelled his licence for the wrong species, a mule deer. He also incompletely cancelled the species licence by failing to identify the animal's sex, and processed the deer in a way that removed evidence of the species and sex.

During the 2014/2015 hunting season, the Appellant obtained 16 deer species licences, which exceeded the legal limit of 15 species licences for deer.

Finally, in October 2016, based on a complaint of illegal hunting, a Conservation officer inspected a deer that the Appellant had harvested, and determined that the Appellant had shot and killed a 3-point mule deer when there was only an open season for 4-point (or more) mule deer.

As a result of these incidents, the Appellant was charged with offences under the *Wildlife Act* and its regulations, and pled guilty to two charges in BC Provincial Court. In June 2018, he was sentenced and fined $500 on each count, for a total of $1,000. Also, the Court prohibited him from hunting for two years unless he hunts with a licensed guide outfitter, and ordered him to pay $1,500 on each count (a total of $3,000) to the Habitat Conservation Trust Foundation.

Under section 24 of the *Wildlife Act*, in addition to any court-ordered penalties, a director may cancel a hunting licence and prohibit a person from hunting for any cause considered sufficient by the director. After considering the penalties imposed on other hunters for similar violations, and the information presented by the Conservation Officer Service and the Appellant, the Deputy Director concluded that a 10-year licence suspension was appropriate.

The Appellant appealed the Deputy Director's decision on the grounds that the penalty was excessive. The Appellant also argued that the Deputy Director's evidence presented during the appeal process showed that he was biased against the Appellant. The Appellant asked the Board to allow him to hunt with a licensed guide outfitter during the suspension period. Alternatively, he asked that the period of prohibition be reduced to two years, with the exception of allowing him to hunt during that period with a guide outfitter. He submitted that he would no longer be a resident of Canada, and therefore, he would be required to hire a

licensed guide outfitter to hunt in BC. Therefore, the ten-year licence suspension was not required to achieve the purpose of protecting wildlife.

The Deputy Director opposed the appeal, and requested that the Board award costs against the Appellant on the basis that the appeal raised no real justiciable question, had little prospect of success, and was lacking in substance.

The Board found that there was no evidence of a reasonable apprehension of bias, or actual bias, on the part of the Deputy Director when he made his decision, or in his appeal submissions.

In assessing the appropriateness of the penalty imposed by the Deputy Director, the Board considered the evidence that the Appellant described as mitigating factors, and the evidence that the Deputy Director described as aggravating factors. The Appellant claimed that he now took responsibility for the violations, and that the violations were attributable to his inexperience and ignorance. However the Board found that the violations committed by the Appellant, individually and cumulatively, were very serious: shooting game out of season, failing to correctly identify species, and abandoning wildlife that were shot. As a further aggravating factor, the violations were committed over several years, and the Appellant made no effort to mend his ways until 2017, when he faced Court charges and the suspension of his hunting licences. The Board held that there was a pattern of poor and unethical hunting practices by the Appellant over several years, with no acceptance of responsibility until he faced serious consequences. The Board also considered penalties that were previously imposed on others for similar violations. The Board concluded that the penalty imposed on the Appellant was appropriate in the circumstances.

Finally, the Board found that although the appeal was unsuccessful, it was not frivolous, brought for an improper purpose, or lacking in substance. The Board held that the circumstances did not warrant an order for costs.

Accordingly, the appeal was dismissed, and the Deputy Director's application for costs was denied.

Costs Decisions

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.

The summaries above include examples of cases where the Board considered an application for costs (see: *Earl Pfeiffer v. Director of Wildlife*; and, *Li Zhu Liu v. Deputy Director of Fisk, Wildlife and Habitat Management*).

Summaries of Court Decisions Related to the Board

BC Supreme Court

During this reporting period, no decisions were issued by the BC Supreme Court on judicial reviews of Board decisions.

BC Court of Appeal

During this reporting period, the BC Court of Appeal issued one decision on a judicial review of a Board decision. A summary of that decision is provided below.

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

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

Decision date: May 2, 2018

Court: B.C.C.A., Justices Kirkpatrick, Tysoe, Dickson

Citation: 2018 BCCA 183

Michael Lindelauf appealed a decision of the BC Supreme Court regarding a judicial review of a decision issued by the Environmental Appeal Board (the "Board").

Mr. Lindelauf owns land near Robbins Creek, southeast of Kamloops, BC. A stream that flows from the upper part of Robbins Creek via an unauthorized diversion runs through his land. Starting in the 1970s, water licensees on Robbins Creek began complaining about a lack of water, improper diversions, and siltation problems. In about 2011, the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") discovered an unauthorized diversion built in the late 1960s in the upper part of Robbins Creek, which was sending water to a diverted channel. The Ministry also discovered unauthorized diversions downstream along the diverted channel.

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. 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 filed appeals with the Board against the approval. They submitted that the unauthorized diversions had existed for a long time, and the approval would direct water away from the diverted channel and its historic path. They submitted that the approval would harm their property, their interests, and aquatic habitat. They also argued that the approval breached the principles of natural justice and violated the *Charter of Rights*

and Freedoms due to 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.

The Board confirmed the approval, and dismissed the appeals. The Board found that it would be absurd if an approval could not be issued to restore flow in a stream that had been unlawfully diverted. In addition, 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. The Board also found that the alleged negative effects of the approval were speculative. The Appellants used other water sources on their properties, including springs and/or groundwater wells, and 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' claims 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 had no legislative authority over water rights. 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 a right to use water in the diverted channel. The Board also held that the courts had previously found 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 was independent and objective in his decision-making process. The approval did not breach the Appellants' rights under the *Charter of Rights and Freedoms*.

Mr. Lindelauf sought a judicial review of the Board's decision. On review, the BC Supreme Court found that the Board had provided Mr. Lindelauf with a fair hearing. The Court held that the Board correctly concluded that the right to use water is lawfully vested in the Province, and that the Board correctly determined that there was no bias in the Regional Manager's decision-making process. 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. The Court confirmed the Board's decision.

Mr. Lindelauf appealed to the BC Court of Appeal. The Court of Appeal confirmed that water rights are not a public right in BC. The *Water Act* was created within the legislative competence of the Province to modify, alter or abolish common law property rights, and it abrogated common law riparian rights. The Court held that the Crown land grant did not guarantee that the landowner would be able to use a specific amount of water from a particular water source on the property. The Crown grant could not prevent the Province from rectifying an unauthorized diversion of water onto a property toward which the water did not lawfully flow. Further, there was no merit to Mr. Lindelauf's assertion that the Board was biased. The Court also found that the Board reasonably concluded that it had no jurisdiction to assess whether other water licences should have been cancelled in the past.

Accordingly, the Court of Appeal dismissed Mr. Lindelauf's appeal.

Supreme Court of Canada

During this reporting period, the Supreme Court of Canada issued one decision on a judicial review of a Board decision. A summary of that decision is provided below.

Board's decision stands after Supreme Court of Canada denies leave to appeal

Harrison Hydro Project Inc., et al. v. Environmental Appeal Board, et al.

Decision date: August 2, 2018

Court: Supreme Court of Canada

Citation: case no. 38047

Harrison Hydro Project Inc. ("Harrison") and five limited partnerships (collectively, the "Appellants") sought leave from the Supreme Court of Canada to appeal a decision issued by the BC Court of Appeal, regarding a decision issued by the Board. At stake in the appeal was the amount of money that Harrison and several related companies must pay to the Province for the use of water in their hydroelectric power plants.

The matter arose from an order issued 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 power plants should be combined as if they were one power plant for the purpose of calculating water rentals payable under the *Water Act*. This resulted in water rental rates that were 4.7 times higher than if the power plants were treated as separate projects.

Harrison is the general partner of five limited partnerships. Each limited partnership is the beneficial owner of a "run of river" power project near Harrison Lake, BC. Each 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 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 by the BC Supreme Court. 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 rejected those arguments, and held that the Board's decision was reasonable, and accorded with the statutory and common law principles concerning limited partnerships.

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. The Court of Appeal dismissed the appeal.

The Appellants sought leave to appeal to the Supreme Court of Canada. The Supreme Court of Canada dismissed the application for leave to appeal, without reasons. As a result, the Board's decision stands.

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, 2019). 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.]

BRITISH
COLUMBIA