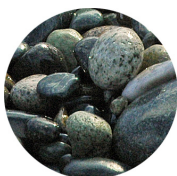


Environmental Tribunals in British Columbia



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Environmental Law Centre
University of Victoria
Faculty of Law

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About the Environmental Law Centre

The Environmental Law Centre (ELC) is a non-profit society that operates the ELC Clinic at the Faculty of Law, University of Victoria. A key part of our mandate is to improve access to justice by advocating reforms to environmental laws through thoughtful, scientifically sound, and pragmatic legislative proposals. To that end, we are hopeful for a broad dialogue with the many interests, parties and officials who strive to protect the BC environment by taking part in the environmental assessment process.



THIS PROJECT IS FUNDED BY THE LAW FOUNDATION OF BRITISH COLUMBIA

Preface

Across this province, environmental tribunals play a key yet sometimes unappreciated role in adjudicating environmental protection and resource management disputes; ensuring government decisions that affect the environment are made in an open and transparent fashion; facilitating access to environmental justice for affected citizens and citizens groups; and, ultimately, protecting and conserving the environmental values that are so important to us as British Columbians.

The Environmental Law Centre at the University of Victoria Faculty of Law (ELC) is a registered non-profit society which partners with the Faculty of Law to operate Canada's largest clinical program in public interest environmental law. A key part of the ELC's mandate is to promote and enhance access to justice by advocating environmental law reforms that are pragmatic, thoughtful, and scientifically sound.

We are proud to publish this new report that is based on almost two years of investigation and research into the current state and future prospects of BC's environmental tribunals. To lead this project, the ELC retained the services of Mark Haddock, one of BC's most experienced and respected public interest environmental lawyers.

He worked closely with and was ably assisted by Holly Pattison, who was responsible for layout, design and editing of this report.

A team effort, this report has also been significantly informed by the research contributions of ELC Clinic student Jim Monier-Williams and articulated student Scott Bernstein. It has also significantly benefitted from editorial and conceptual contributions by ELC articulated student Sarah Sharp, other members of the ELC legal team including Deborah Curran, Calvin Sandborn and Chris Tollefson, and Professors Robert Gibson and Meinhard Doelle.

We have been gratified by the respectful and constructive dialogue that this project generated to date; we are especially grateful to those who have contributed their time, ideas and perspectives during consultations on the discussion paper published last year. We hope that publication of this report and its recommendations will mark the beginning of an even broader dialogue around these important issues.

This project, and its sister project which explores the current status and future prospects of Environmental Assessment in BC, were made possible through generous grants from the Law Foundation of BC. We are grateful for this support and would like especially to recognize Program Directors karima budhwani and Janna Cumming for their considerable advice and assistance for the duration of these two projects. We are also grateful to the Tula Foundation, which provided core funding for ELC operations throughout this project.



Chris Tollefson
ELC Executive Director &
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Executive Summary

Administrative tribunals play an important role in our justice system. Former BC Attorney General Geoff Plant stated that administrative tribunals “offer great promise as informed, informal, accessible and inexpensive alternatives to the courts” that should strive to be “citizen-focused, relevant, practical, accountable, fair, affordable and accessible.”

Of the 26 administrative tribunals in British Columbia, about one-third have mandates that touch on environmental protection issues in one way or another. This demonstrates the high value that British Columbians place on environmental protection and acceptance of the need for checks and balances on environmental decision-making through expert tribunals, rather than through the courts alone.

This paper focuses on ten administrative tribunals (including Crown corporations that have tribunal-like functions) that we call “environmental tribunals.” It is the culmination of a research project examining the structure, mandates and procedures of BC’s environmental tribunals carried out by the Environmental Law Centre at the University of Victoria between September 2008 and September 2010. Our objective has been to consider ways in which these tribunals might be improved, to better serve the public and protect the environment.

In November 2009 the Environmental Law Centre released a discussion paper that outlined our research findings and posed several questions. It was made available on our website and distributed to a broad audience that included the tribunals, government agencies, First Nations, industry and professional organizations, public interest groups and lawyers with a diverse practice and client base related to the research (e.g. environmental, alternative dispute resolution, Aboriginal, natural resource, administrative law, etc.) through the Canadian Bar Association (BC Branch) sections. In July 2010 the Environmental Law Centre hosted a focus group session in Vancouver to receive input and feedback on the discussion paper and identify options for reform where desirable. This final report is the outcome of our consideration of the valuable input we received in the focus group session, written responses and interviews.

It has not been our intent in this research project to audit administrative tribunals or critique their decisions. Rather, we have focused on the larger picture issues of tribunal mandates, structures and procedural rules with a view to what is happening in the world of environmental tribunals and courts in jurisdictions elsewhere in Canada and internationally. Many jurisdictions have taken steps to ensure that environmental tribunals and courts are not only accessible, fair, efficient, effective and accountable, but also mandated to deliver environmentally sustainable outcomes. Some BC tribunals have mandates and procedures that serve the public interest very well, and adopt best practices that would be recognized internationally. However, there is also considerable room for improvement and BC can learn from advancements in other jurisdictions, both in Canada and abroad.

To establish a more effective tribunal system Part 10 of the report proposes 12 broad reforms encompassing the following:

1. consolidating tribunals with similar mandates;
2. expanding tribunal mandates for increased accountability;
3. making tribunals more accessible;
4. making standing rules consistent and fair;
5. improving participant funding and costs;
6. ensuring limitation periods are reasonable;
7. providing a clear mandate for environmental protection;
8. modernizing tribunal procedures to meet best practices;
9. improving tribunal investigative powers;
10. improving the tenure and appointments system;
11. eliminating unnecessary levels of appeal; and
12. reconsidering how environmental watchdog functions are delivered.

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1. The Role and Rationale for Administrative Tribunals

From the outset, administrative tribunals were established, often as an alternative to the courts, for the purpose of providing informal, accessible and efficient mechanisms for decision making and dispute resolution... As an alternative to the courts, they are also expected to be more accessible, less costly and more able to reach decisions in a timely and efficient manner.

ON BALANCE: GUIDING PRINCIPLES FOR ADMINISTRATIVE JUSTICE REFORM IN BRITISH COLUMBIA
2002 WHITE PAPER, MINISTRY OF ATTORNEY GENERAL¹

Administrative tribunals play a critical role in our justice system. As Mr. Justice David Vickers succinctly stated in his 2002 address to the BC Council of Administrative Tribunals, the central threads of our administrative justice system include:

...first and foremost, the need to be heard in some fair process and secondly, the need to give reasoned, honest and independent decisions. In the end, administrative justice is the provision of a dispute resolution service without which society and government could not function. It is an integral part of the rule of law that sustains and nurtures the freedoms and peace we are all so fortunate to enjoy.²

Delivered at a time of some uncertainty over the future of BC's tribunal system, Justice Vickers added:

...efficient and effective delivery of administrative justice in British Columbia is absolutely critical. In my view it would place an impossible burden on the courts if the disputes now handled by administrative tribunals were to revert to the courts. Indeed, it would put the administration of justice into disarray.³

Fortunately, British Columbia has recognized the importance of its administrative tribunal system, and in 2002 the Ministry of Attorney General undertook an Administrative Justice Project that conducted a broad review of the system with a view to implementing reforms. Attorney General Geoffrey Plant indicated that the purpose of the project was “to establish a platform for a public law for the twenty-first century that is citizen-focused, relevant, practical, accountable, fair, affordable and accessible.” Mr. Plant stated that the government’s approach to administrative justice reform “proceeds from a fundamental premise that administrative tribunals continue to offer great promise as informed, informal, accessible and inexpensive alternatives to the courts.”⁴

The Administrative Justice Project⁵ concluded that an effective tribunal system should be:

- Accessible – to everyone, including those who are unrepresented and those for whom access may be limited by geography, language, culture or personal circumstances;
- Informal and Simple – easy to use and understand;
- Efficient – offering early dispute resolution, with clear, certain and final decisions;
- Proportionate – following procedures that are proportionate to the issues at stake;
- Affordable – operating so that reasonable costs are not a barrier to access;
- Fair – treating individuals in similar circumstances in similar ways; and treating participants in proceedings equally, courteously, impartially and with respect;

1 http://www.gov.bc.ca/ajo/down/white_paper.pdf, p.i, 3.

2 <http://www.bccat.net/assets/downloads/chartingcourseBC.pdf>

3 <http://www.bccat.net/assets/downloads/chartingcourseBC.pdf>

4 http://www.bccat.net/assets/downloads/remarks_by_attorney_general-1.pdf

5 In a white paper entitled “On Balance: Guiding Principles for Administrative Justice Reform in British Columbia.”

- Open and Transparent – operating under policies and practices that are published and readily available; providing written reasons for decisions, where appropriate and in the public interest; and being responsive to the views and concerns of partners and stakeholders;
- Flexible – offering choices to individuals in selecting the forum and process that most clearly; addressing their needs; and being responsive, adaptable and able to accommodate unusual or unexpected circumstances; and
- Sustainable – operating effectively within government’s economic and fiscal framework.⁶

The Attorney General acknowledged that government has a responsibility to reform and modernize the administrative justice system to ensure that:

- Administrative tribunals are able to access a full range of early dispute resolution techniques;
- Decision making is improved in terms of quality and timeliness of initial decisions; and
- Tribunal mandates are structured in such a way that they are indeed an alternative to the courts where specialized professional or technical expertise can be brought to bear in addition to or as an alternative to the strict application of legal principles.

⁶ http://www.gov.bc.ca/ajo/down/white_paper.pdf @ p.ii.

The Administrative Justice Project reviewed numerous issues that apply broadly across tribunals⁷ and its recommendations led to passage of the *Administrative Tribunals Appointment and Administration Act* in 2003 and the *Administrative Tribunals Act* in 2004.⁸

The project also led to the creation of the Administrative Justice Office in the Ministry of Attorney General, which has published several excellent papers on alternative dispute resolution, model statutory powers, inspection powers, duty to give reasons, administrative monetary penalties, judicial review and many other issues.⁹

These initiatives have made an important contribution to research and analysis of administrative justice issues, and have provided invaluable background for this study of environmental tribunals. The Administrative Justice Office was closed in 2009, but some of its role has been assumed by the Dispute Resolution Office in the Attorney General ministry.

⁷ Such as mandates, dispute resolution, the appointment process, standing rules, independence and accountability.

⁸ The various white papers published by the Administrative Justice Project may be viewed at <http://www.gov.bc.ca/ajo/popt/archives.htm>.

⁹ As of June 2009 the Administrative Justice Office is now part of the Dispute Resolution Office of the Ministry of Attorney General. For its publications, see http://www.gov.bc.ca/ajo/popt/publications_and_research.htm

2. Environmental Tribunals

During this past decade, the protection of the environment has come to be recognized as “one of the major challenges of our time”.¹⁰

“...individually and collectively, we are responsible for protecting the natural environment...environmental protection [has] emerged as a fundamental value in Canadian society.”¹¹

-- SUPREME COURT OF CANADA

Environmental issues are some of the most complex matters we face as a society. They often involve complex technical issues requiring expertise across multiple disciplines. They frequently require predictive models that attempt to assess future impacts. They almost always involve multiple parties with competing interests and legal rights. They pit private interests against the larger public interest. Environmental issues evoke difficult ethical choices, such as duties to neighbours, future generations and even other species. They require the careful balancing of competing societal objectives. Just acquiring the necessary expertise and input to make sound decisions can be very expensive, and the consequences of poor decisions can be even more expensive to fix after the fact. Every day in British Columbia civil servants and statutory decision-makers faced with these complexities are called upon to make decisions that find the right balance between present and future, private and public, risk and profit.

Like other jurisdictions, environmental tribunals have been established in BC over many years and on a somewhat *ad hoc* basis. Some have an explicit mandate for environmental matters, while others have a broader public interest mandate that includes environmental considerations. The establishment of tribunals and the mandates they were given by the Legislature largely reflect current environmental concerns at the time they were founded. There is considerable variability

among the mandates, procedures, and accessibility of these environmental tribunals. Some are essentially delegated bodies for licensing purposes, while others are quasi-judicial tribunals that hear appeals of statutory decisions either as a new *de novo* hearing, or on more limited grounds specified in the tribunal’s enabling statute.

Some tribunals operate in a court-like manner following the conventions of adversarial process, while others employ alternative dispute resolution techniques and attempt to resolve disagreements between parties. Courts have referred to administrative tribunals as “spanning the constitutional divide between the executive and judicial branches of government,”¹² and have recognized that they have a spectrum of purposes and functions, sometimes within the same tribunal. These factors lead to different degrees of independence and deference when courts are asked to judicially review or hear appeals from tribunal decisions.

To the best of our knowledge, the current mix of administrative tribunals in BC with an environmental mandate has never been reviewed in a systematic way to assess its effectiveness in delivering accountability for environmental decision-making, particularly from a public interest perspective. In this project, the Environmental Law Centre explored how accepted administrative justice objectives could or should apply to these tribunals. In addition, we researched how environmental courts and tribunals outside of British Columbia are structured and mandated, and considered whether the experience of other jurisdictions is useful for BC.

Broader Legal Context

Administrative tribunals provide a valuable service in our larger system of justice because they provide an independent review of the decisions of government officials. They can provide checks and balances to the bureaucracy’s administration of laws and policies. But more than just providing an administratively efficient

¹⁰ *Oldman River* (S.C.C., 1992) per La Forest J.

¹¹ *Ontario v Canadian Pacific Ltd* (1995), and cited with approval by the Supreme Court of Canada per L’Heureux-Dubé J. in *Spraytech v the Town of Hudson* (2000).

¹² *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, para.24

dispute resolution function, tribunals are usually established where decision-making would be enhanced by familiarity or expertise with a particular regulatory field. Tribunals are not just about due process and administrative fairness – they are also about delivering desirable outcomes that meet the intent of a regulatory and policy scheme. In a province where 95% of the land base is public Crown land, there is a greater need than elsewhere to have a robust administrative justice system to resolve legitimate environmental disputes and competition for the use of publicly owned natural resources.

Courts provide a measure of *legal* accountability for statutory decision-making. This can be facilitated by provisions in environmental statutes expressly allowing for appeals of certain decisions to the BC Supreme Court or BC Court of Appeal, or through the *Judicial Review Procedure Act* provisions for court-level review of the exercise of statutory powers, according to the principles of administrative law. However, judicial review based on legal errors has inherent limitations, a legally permissible decision is not at all the same as an environmentally sound decision. Generally courts will not interfere with a statutory decision maker’s finding of facts, and will not overturn a decision unless it is clearly based on an incorrect interpretation of a statute or regulation, or is otherwise so unreasonable that it defies logic. Courts have made it clear that decision-makers have the right to be “wrong” on a broad spectrum of issues – including substantive environmental issues.

Judicial review can be well-suited to disputes that are essentially about legal rights and statutory interpretation. However, most of our environmental laws are drafted in a manner that provides broad discretion to decision-makers, so the instances of outright legal error are likely to be very few and far between. This limitation, coupled with the cost of litigation and the risk of adverse cost awards being imposed on an unsuccessful public interest party, render this avenue of accountability inappropriate for most environmental disputes, and financially out of reach for most citizens.

Far more significant to most environmentally concerned British Columbians is how agency decision-makers exercise their discretion: how they make findings of

fact; how they evaluate or weigh the interests of affected parties; and how they balance environmental protection with other social, economic and policy objectives of government. Over the last decade provincial environmental agencies have faced extraordinary budget cuts and reorganizations to grapple with reduced staffing levels. In addition, many environmental statutes have been rewritten, with the objective of making the statutes less prescriptive,¹³ introducing greater managerial discretion, and delegating broad oversight powers to ostensibly independent ‘qualified professionals’ who are often closely associated with the entity being regulated.¹⁴ Such major shifts in environmental regulation lead us to ask whether the structure, function and mandate of BC’s environmental tribunals needs to be updated to reflect the current regulatory environment.

Review of discretionary decision-making is where administrative tribunals can provide a valuable public service. Some tribunals are empowered to “re-hear” a decision on the merits of the evidence, and to vary the decision in accordance with its own judgment, or otherwise exercise the powers of the original decision-maker. This type of appeal or re-hearing requires more than legal expertise. Familiarity with the scientific and technical aspects of the issue, industry norms, and the regulatory and policy environment are just as important; and for this reason specialized environmental tribunals have Cabinet-appointed members who represent collectively multi-disciplinary expertise. Tribunals with this authority can provide an important check on bureaucratic decisions, and the mere availability of appeals can improve the integrity of decision-making in the knowledge that some independent oversight and scrutiny might be applied in the future.

BC’s Environmental Tribunals

We have identified ten administrative tribunals in British Columbia that have either an explicit or implicit mandate concerning the environment. There is a high degree of variability among them. Some of these

¹³ For an extended discussion of the concept of “prescriptiveness” and environmental standard setting see C. Tollefson, F. Gale and D. Haley, *Setting the Standard: Certification, Governance and the Forest Stewardship Council* (UBC Press, 2008) chapter 11.

¹⁴ See West Coast Environmental Law publications “Please Hold: Someone Will be With You” and “Cutting Up the Safety Net”.

tribunals function mostly as licensing bodies who have delegated powers to issue permits and tenures, along with related adjudication powers. Others operate as quasi-judicial tribunals that function similar to courts. Our primary interest is with the tribunals that provide oversight and accountability for environmental decisions by having the authority to affirm, reverse or vary an original statutory decision, rather than being first-instance decision-makers.

1. Environmental Appeal Board

Mandate: The Environmental Appeal Board (EAB) was established in 1981 under the former Environment Management Act, and has the broadest mandate of any of BC's environmental tribunals. That mandate has changed over the years since 1981, and currently the board hears appeals under the following statutes:

- *Environmental Management Act*
- *Integrated Pest Management Act*
- *Water Act*
- *Wildlife Act*

Once they are in effect, the EAB will also have jurisdiction to hear appeals under these statutes:

- *Greenhouse Gas Reduction (Cap and Trade) Act*
- *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*
- *Greenhouse Gas Reduction (Vehicle Emission Standards) Act*

The decisions that may be appealed are specified in each of these statutes, and normally include decisions relating to licences, permits, operational certificates and compliance-related orders and penalties. Previously, the EAB also heard appeals under the *Commercial River Rafting Safety Act* and the *Health Act* (relating to sewage system approvals), but these were repealed between 2004 and 2009.¹⁵

The EAB is a quasi-judicial or adjudicative tribunal that operates much like a court, but is somewhat less

formal. The Board has the authority to determine its own procedures, and has set those out in a detailed Procedure Manual that is understandable to the general public.¹⁶ While the Board is not bound by the strict rules of evidence that would apply in a court proceeding, most unrepresented citizens would find it to be fairly court-like in terms of how hearings are conducted, and parties are often represented by lawyers. Oral hearings are often held in meeting rooms or hotels near the community in which the matter under appeal is located. Appeals may also be decided through written arguments rather than oral hearings. Most appeals heard by the board are “*de novo*” or new hearings of an issue on its merits.

The mission statement of the EAB affirms that its goal is “To provide the public with a fair and accessible appeal process that decides the issues under appeal in an unbiased, timely and cost-effective manner.”¹⁷

Composition: The EAB currently has one full time chair, who is a lawyer, and 23 part-time members from throughout the province with varied expertise in law, economics, geology, biology, engineering, forestry, agrology and oceanography. Board members are appointed by Cabinet for two- to three-year terms. It has an office in Victoria, with six staff, including a registrar, legal counsel, research manager, finance and administration manager, executive assistant, and finance and web administrator. It should be noted that this single office administers several boards in addition to the EAB, including the Forest Appeals Commission, Community Care and Assisted Living Appeal Board, Hospital Appeal Board, Health Professions Review Board and the Industry Training Appeal Board.

Budget: The overall operating budget (for all tribunals served by the EAB office) for fiscal year 2009-2010 is \$2,103,000, which is its highest in the last 10 years. The office has 11 full time equivalent (FTE) staff positions, seven of which are filled and dedicated to the EAB and FAC, and four of which are assigned to the health boards. Not all of these FTE positions are filled presently.

15 For a detailed discussion of the mandate and history of the EAB, see http://www.eab.gov.bc.ca/about/EAB_Mandate_2010.pdf.

16 http://www.eab.gov.bc.ca/fileappeal/EAB_Proc_Manual_2010.pdf
17 http://www.eab.gov.bc.ca/about/EAB_Mission.pdf

2. Forest Appeals Commission

Mandate: The Forest Appeals Commission (FAC) was established in 1996 under the *Forest Practices Code of British Columbia Act* to hear appeals relating to forest practices rulings, and had its mandate expanded in 1998 to replace the *ad hoc* boards that formerly heard tenure-related appeals under the *Forest Act* and *Range Act*.

The Commission currently hears appeals under the following statute:

- *Forest Practices Code of British Columbia Act*¹⁸
- *Forest and Range Practices Act*
- *Private Managed Forest Land Act*
- *Wildfire Act*
- *Forest Act*
- *Range Act*

These appeals include decisions concerning forest stewardship plans, range use plans, compliance-related orders and penalties, and decisions concerning tenure agreements including cancellation, compensation and the determination of stumpage payable to the Crown.¹⁹

Composition: The composition of the FAC is identical to that of the EAB, as members are now appointed to both boards at the same time.

Budget: As noted above, the FAC office is combined with that of the Environmental Appeal Board (EAB), and also provides services to several health-related boards. The overall operating budget for fiscal year 2009-2010 is \$2,103,000, which is its highest in the last 10 years. The office has 11 full time equivalent (FTE) staff positions, seven of which are filled and dedicated to the EAB and FAC, and four of which are assigned to the health boards. Not all of these FTE positions are filled presently.

3. Private Managed Forest Land Council

Mandate: The Private Managed Forest Land Council (PMFLC) was established in 2004 under the *Private Managed Forest Land Act* to be an independent, joint industry-government agency overseeing forest practices on private land classified as “managed forest land” under the *Assessment Act*. The Council sets and monitors forest practices standards for managed forest land, enforces those standards, performs audits, and reviews landowner applications to have land designated as managed forest. As an independent body with regulatory duties, the Council is in some ways similar to the Ministry of Forests and Range, but for private land. The Council is also similar to the Forest Practices Board because it investigates complaints about forest practices and audits compliance with the rules set out in the *Private Managed Forest Land Act* and regulations. However, it differs from the Forest Practices Board in that the complaint process is a policy of the Council, not mentioned in the legislation or regulations, and investigations only occur if there is potential non-compliance.

The Council has the power to make remediation orders, stop work orders, levy penalties and enter into consent agreements with landowners concerning forest management. A managed forest landowner who is subject to an order of the Council may appeal to the Forest Appeals Commission.²⁰

Composition: The council consists of five members: two members appointed by the provincial government; two members elected by private Managed Forest landowners; and a chair who is jointly appointed by the other four council members.

Budget: The Council’s operating budget for the 2009 fiscal year is \$428,400. It is funded through an annual administration fee charged to owners of private managed forest land. The Council has an executive director and administrative support staff.

¹⁸ The *Forest Practices Code* is mostly phased out now, replaced with the *Forest and Range Practices Act*.

¹⁹ For a detailed discussion of the mandate and history of the FAC, see http://www.fac.gov.bc.ca/about/FAC_Mandate_2007.pdf

²⁰ However, to date there has only been one administrative penalty levied in the amount of \$1000, and no appeals to the FAC. For further information see <http://www.pmflc.ca/council.html>

4. Forest Practices Board

Mandate: The Forest Practices Board of BC (FPB) is an independent tribunal that was established in 1995 under the *Forest Practices Code of British Columbia Act* and continued under the *Forest and Range Practices Act*. The FPB has a mandate to exercise investigative and audit powers similar to those of the Ombudsperson and Auditor General in relation to forest practices on public Crown land. The Board must audit government and industry forestry practices and must deal with complaints from the public regarding forest practices and government enforcement. It may also carry out special investigations of forest practices on its own initiative. In investigating complaints and reporting audit results, the Board is the final decision-maker. The FPB does not have authority to audit or investigate forest practices on private land (that authority resides with the Private Managed Forest Land Council) or other activities on Crown land outside of those regulated under the *Forest and Range Practices Act*.

In addition to its investigation and auditing functions, the FPB has standing to appeal to the Forest Appeals Commission certain enforcement decisions, penalties imposed by government, and government decisions to approve plans for forestry operations. Because forest companies and range tenure holders have standing to appeal these decisions on their own, the FPB is seen as representing the public interest in such matters, as the public does not have similar standing. Members of the public may, however, apply to the Commission to be an intervener in an appeal. The FPB may take the same or a different position from a licensee or government agency, depending on its view of the public interest.

The Board has the power to investigate, publish reports and make recommendations to government, but has no power to revoke permits or to direct companies, individuals or government agencies to carry out any actions.²¹

In our opinion, the Board's limited mandate is more a function of its vintage than current provincial needs. When the Board was first established forest practices were the focus of public attention, but current environmental issues and the impacts of multiple resource development activities on provincial land call out for a more coherent approach to cumulative

environmental impacts. The Ministry of Forests and Range is currently the Board's "host ministry."

Composition: The Forest Practices Board is comprised of eight Cabinet-appointed members, including one full-time chair and seven part-time members. Cabinet usually appoints members from throughout the province with backgrounds in forestry, ranching, land use, biology, as well as resource community and First Nations experience. Part-time board members may be independent consultants in private practice, or retired from government or industry. More recent appointments include employees of government and the forest industry. Board members oversee FPB staff work and sit on panels that decide the disposition of complaint investigation, audit and special investigation reports. The day-to-day functions of the board are carried out by about 27 employees located throughout the province.

Budget: The Forest Practices Board operating budget was \$3,857,000 for the 2009-10 fiscal year, with 27 FTE positions, 23 of which are filled. The Board's budget has decreased over time. A decade ago, its budget was \$5,311,000 with 32 FTE positions (1998-99 fiscal year).

5. Utilities Commission

Mandate: The Utilities Commission (BCUC) is one of BC's oldest administrative tribunals, having been established in 1938 to oversee the regulation of public utilities that provide the province with electricity, natural gas, and delivery systems such as transmission lines and pipelines. The Commission sees its primary mandate as ensuring that:

- the rates charged for energy are fair, just and reasonable;
- energy utility operations provide safe, adequate and secure service to their customers; and
- shareholders of public utilities under its jurisdiction are afforded a reasonable opportunity to earn a fair return on their invested capital.²²

Historically, Commission decisions have attempted to balance these three objectives. However, until recently the *Utilities Commission Act* gave the Commission a

21 See <http://www.fpb.gov.bc.ca/content.aspx?id=326>

22 <http://www.bcuc.com/CorpProfile.aspx>

broad discretion to determine the “public interest” in approving not only rates charged by utilities, but also expenditure plans, long term acquisition plans, energy supply contracts and the construction of new utilities. For example, the construction and operation of a public utility requires a “certificate of public convenience and necessity,” which “must not be approved” unless the commission determines that “is necessary for the public convenience and properly conserves the public interest.”²³ We have therefore included the Utilities Commission in our list of environmental tribunals because it has a broad authority to consider the environmental aspects of the public interest in addition to ratepayer interests. However, the Commission’s authority has become subject to considerable flux recently due to interventions by the Legislature.

In 2008 the Legislature amended the *Utilities Commission Act* to require that the Commission consider the government’s energy objectives in the areas of long-term planning, project approvals, and the award of energy supply contracts. These amendments also introduced additional mechanisms that allow the government to direct how the Commission exercises its discretion. In June 2010, after the BC government voiced displeasure with how the Commission exercised its authority even under these directives, the Legislature passed the *Clean Energy Act* which: 1) exempts three major hydro projects and a major transmission corridor from Utilities Commission review; 2) allows Cabinet to decide on BC Hydro long term energy forecasting and supply plans, rather than the Commission; and 3) allows Cabinet to exempt projects, programs, contracts or expenditures from review by the Commission; 4) gives detailed, legally binding directives to the Commission.

The Commission is seen as quasi-judicial in its function, and has the power to make legally binding rulings. Decisions and orders of the Commission may be appealed to the Court of Appeal on questions of law or jurisdiction, but are protected by a privative clause that stipulates that they “must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.”²⁴

Composition: The Utilities Commission is comprised

²³ *Utilities Commission Act*, RSBC 1996, c.473, s.45.

²⁴ *Utilities Commission Act*, RSBC 1996, c.473, s.105.

of three full-time and six part-time commissioners. The *Act* provides for the appointment of a Chair, one or more Deputy Chairs and Commissioners by Cabinet. As of March 2008, there were six part-time Commissioners, two full-time Commissioners and the Chair. The Commission has about 23 staff (plus one vacant position), including professional engineers, accountants, economists, and administrative support. The Commission is located in Vancouver.

Budget: The BC Utilities Commission has an annual budget of about \$5,000,000, and about 28 employees. The Utilities Commission has been self-funded since 1988, primarily through a levy on the public utilities it regulates.

6. Farm Industry Review Board

Mandate: The BC Farm Industry Review Board (BCFIRB) is also one of the province’s earliest quasi-judicial tribunals, having been established in 1934 under the *Natural Products Marketing (BC) Act*. Known then as the British Columbia Marketing Board, it was originally established to have a supervisory role over the commodity boards administering marketing schemes, which now include chickens, eggs, hogs, turkey, vegetables, cranberries and milk, and which role remains a key aspect of its mandate. The Board hears appeals filed by any person who is aggrieved by or dissatisfied with orders, decisions or determinations of the commodity boards. It also hears appeals under the *Agricultural Produce Grading Act* from persons who have had their grading licences refused, suspended, revoked or not renewed. BCFIRB acts as a signatory to federal-provincial agreements for supply-managed commodities. Commodity boards find themselves dealing with environmental issues increasingly as food production standards (quality, safety, biosecurity, organics, etc.) become central to good practices.

More relevant for our purposes, in 1996 the Farm Practices Board was established under the *Farm Practices Protection (Right to Farm) Act* to hear complaints about odour, noise, dust and other disturbances arising from farm operations, and to conduct studies and make recommendations concerning any matter related to farm practices. The definition of “farm operations” has since been expanded to include aquaculture. In 2003, the BC Marketing Board and

Farm Practices Board were amalgamated to create the current BCFIRB.

Like the Forest Practices Board, BCFIRB also has authority to study and report generally on farm practices on its own initiative, or at the request of a municipality, regional district or at the direction of the Minister of Agriculture and Lands. In its complaint investigation role, BCFIRB has greater powers than the Forest Practices Board because it can order a farmer to cease or modify his or her practices if a farm operation is not following “normal farm practice.”

BCFIRB employs dispute resolution processes to resolve issues by agreement. If dispute resolution is not used or is unsuccessful, a hearing is convened. Parties are sometimes represented by legal counsel. Decisions on farm practices may be appealed to the Supreme Court of British Columbia on questions of law or jurisdiction.²⁵

Composition: BCFIRB is composed of up to 10 members appointed by Cabinet. There are currently six part-time appointees, who have experience in production, marketing, law, research and education related to agricultural issues.²⁶ The Board currently has a staff of seven, with two positions being vacant.²⁷

Budget: The Farm Industry Review Board’s operating budget was \$1,258,000 in the 2009–2010 fiscal year, and it has eight full time equivalent employees. Its 2008–09 budget was slightly higher at \$1,353,000.

7. Agricultural Land Commission

Mandate: The Agricultural Land Commission (ALC) was established in 1973 as an independent tribunal to administer the agricultural land reserve (ALR), a provincial land use zone that recognizes agriculture as a priority use for about five percent of the provincial land base. The *Agricultural Land Commission Act* sets out rules and processes for land use approvals such as the inclusion or removal of land from the ALR, non-farm uses and subdivisions of land within the ALR. The ALC administers regulations that govern land uses and subdivisions within the ALR. The nature of these

²⁵ <http://www.firb.gov.bc.ca/>

²⁶ <http://www.firb.gov.bc.ca/board.htm>

²⁷ <http://www.firb.gov.bc.ca/staff.htm>

regulations has fluctuated over time. For example, from 1988 to 1992 golf courses were defined as a “farm use.”

While the ALC functions as an independent agency of government, we have included it as an administrative tribunal because the Commission also hears appeals of stop work orders, compliance determinations, remediation orders and penalties made by ALC staff and the executive director. To this end, the Commission has been given “exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal.”²⁸

Prior to 1993 the *Agricultural Land Commission Act* allowed direct appeals to Cabinet of decisions of the ALC, giving rise to numerous critiques of this political appeal process. According to the ALC, “It was felt that such appeals to Cabinet circumvented administrative fairness and due process, and undermined the Commission, which consisted of experienced people appointed by Cabinet and staffed by professionals. In 1993 the Provincial government, acknowledging these criticisms and recognizing the many potential pitfalls of Ministers reviewing complex decisions, eliminated appeals to Cabinet.”²⁹

In more recent years the Commission has delegated some of its authority to local governments and to the Oil and Gas Commission.

Composition: The *Agricultural Land Commission Act* is administered by a government-appointed Commission consisting of 19 members including a Chair and six panels for six geographical regions of the province. Each panel has three members including a Vice-chair.

Budget: The Agricultural Land Commission’s operating budget was \$2,276,000 in 2009–2010, with 23 full time equivalent employees. In 2008 the ALC’s budget was slightly higher at \$2,435,000.

8. Oil and Gas Commission

Mandate: The Oil and Gas Commission (OGC) was established in 1998 under the *Oil and Gas Commission Act* as a “single-window” agency that

²⁸ *Agricultural Land Commission Act*, S.B.C.2002, c.36, s.55.1.

²⁹ http://www.alc.gov.bc.ca/publications/Alr_history.htm#TOP

oversees the regulation of oil and gas exploration, drilling, production, pipelines and reclamation. It is an independent Crown corporation that has been delegated broad powers to administer matters not only under the *Petroleum and Natural Gas Act* and *Pipeline Act*, but also under certain specified provisions of the *Environmental Management Act*, *Land Act*, *Forest Act*, *Forest Practices Code of British Columbia Act*, *Heritage Conservation Act*, and *Water Act*. The *Oil and Gas Activities Act* was passed by the Legislature in 2008 but is not in effect at the time of writing: once in effect this Act will replace the *Oil and Gas Commission Act*, *Pipeline Act* and portions of the *Petroleum and Natural Gas Act*. As mentioned earlier, the OGC also has been delegated the powers of the Agricultural Land Commission respecting certain approvals of oil and gas activities and non-farm uses on agricultural land.³⁰

One of the OGC's goals is to "minimize potential for negative environmental effects from oil and gas activities."³¹ It summarizes its mandate as:

- Regulating the oil and gas activities and pipelines in British Columbia;
- Providing for effective and efficient processes for the review of applications related to oil and gas activities or pipelines, and to ensure that applications that are approved are in the public interest having regard to environmental, economic and social effects; Encouraging the participation of First Nations and aboriginal peoples in processes affecting them;
- Participating in planning processes; and
- Undertaking programs of education and communication in order to advance safe and efficient practices and the other purposes of the Commission.³²

While the OGC is essentially a permitting authority more than an adjudicative tribunal, the fact that oil and gas activities interact with the surface rights of landowners puts the Commission in the position of having to address conflicts between these two interests. The *Oil and Gas Commission Act* presently requires

the OGC to encourage the use of alternative dispute resolution methods to resolve disputes arising from its discretionary decisions. If dispute resolution is not successful, the OGC will make a decision on an application for oil and gas activities. An "interested person" may request within 15 business days that the decision be reconsidered by an Advisory Committee, which is comprised of area residents and industry representatives appointed for a four-year term. The Advisory Committee does not have decision-making authority, but may make recommendations that must be considered by the Commissioner within 30 days.³³

The OGC also has authority to hear appeals from any ruling or decision of the chief inspecting engineer made under the *Pipeline Regulation*.

Composition: The OGC is governed by a board of three directors consisting of the deputy minister of the Ministry of Energy, Mines and Petroleum Resources and two directors appointed by the Lieutenant Governor in Council for terms of up to five years. The deputy minister chairs the Commission, while one of the appointed directors is the Commissioner and vice-chair. The Board of Directors provides policy direction, approves budgets and reviews the performance of the OGC. Operational matters are the responsibility of the Commissioner and the executive.

Budget: As a Crown corporation, the OGC is funded through fees and levies paid by the oil and gas industry for exploration and development rights. The OGC expenditures have ranged from \$23.6 to \$32.3 million over the last five years reported, with a \$4.5 million deficit in 2008-09. The OGC has a staff of about 180, and is based in Fort St. John.

³⁰ The delegation agreement is found at http://www.alc.gov.bc.ca/Delegation/ALC-OGC/Delegation_Mar2007.pdf

³¹ Goal 1 on page 18 of the OGC's [2008-09 Annual Service Plan Report](#).

³² See <http://www.ogc.gov.bc.ca/background.asp> and the *Oil and Gas Commission Act*, S.B.C.1998, s.39, s.3.

³³ From 2001 to 2008, landowners and First Nations made 66 requests for reconsideration, 57 of which were declined by the Advisory Committee. Almost half of the requests were made by one First Nation. The 9 recommendations for reconsideration that were made by the Advisory Committee were declined by the OGC. Both the OGC and the Advisory Committee seem to take the view that broader environmental impacts (such as to wildlife), and cumulative impacts of multiple oil and gas plays, are beyond their jurisdiction to consider. The Advisory Committee seems to take the position that consideration of the OGC's obligations of consultation and accommodation of First Nations interests are beyond its jurisdiction. See the [Gitscheff](#) and [Doig River First Nation](#) decisions.

9. Mediation and Arbitration Board (Surface Rights Board)

Mandate: The Mediation and Arbitration Board (MAB) was established in 1953 under the *Right of Entry Arbitration Act* and continued later under the *Petroleum and Natural Gas Act*. The MAB is responsible for resolving disputes respecting compensation for surface access between landowners and the holders of subsurface rights under the *Petroleum and Natural Gas Act*, *Pipeline Act*, *Mineral Tenure Act*, *Mining Right of Way Act*, *Geothermal Resources Act* and *Coal Act*. Legislative amendments passed in May 2010 (but not in effect at the time of writing) rename this the Surface Rights Board and improve its ability to address neighbouring landowners concerns and to require companies carrying out oil and gas activities to pay the actual costs of mediation or arbitration in advance to landholders.³⁴

In order to extract subsurface petroleum, natural gas, coal or mineral resources, the holder of the rights to those resources must negotiate surface access with the landowner or obtain a right of entry order from the Mediation and Arbitration Board (MAB). If the holder of subsurface rights and the landowner with surface rights cannot reach agreement on the conditions or compensation for surface access and disturbance, either party may apply to the MAB for assistance in resolving the dispute. The MAB will ordinarily attempt to facilitate a mediated, consensual agreement. However, because the legislation guarantees access for the subsurface rights holder, the MAB also has an arbitration power to issue a right of entry order and determine compensation and other terms.

There is some potential for confusion between the roles of the OGC and the MAB insofar as they may both be asked to resolve disputes between landowners and oil and gas companies with respect to a proposed oil and gas installation. For example, parties may have differing views over the terms and conditions of an OGC authorization; they may likewise be at odds over the terms and conditions of a surface lease agreement. This has been an issue in the past, particularly when oil and gas companies would seek surface use agreements or entry orders *before* they had authorizations from the Oil and Gas Commission, over the objections of a land

owner. The Mediation and Arbitration Board's primary mandate is addressing compensation for disruptions to the use and enjoyment of land by the surface owner. The MAB views itself as having no mandate to address environmental concerns raised by landowners, and that these are matters that should be addressed by the OGC. The OGC and MAB now have a Memorandum of Understanding that attempts to define roles and cooperation.³⁵ As a matter of policy the MAB now requires oil and gas companies to acquire their OGC authorizations prior to applying to it for mediation or arbitration of surface use disputes.

Composition: The MAB is comprised of up to nine (currently eight) members appointed for two to three year terms. Its current membership includes two lawyers, two members currently or formerly working in the oil industry, retired civil servants, a realtor and a farmer. Some members are also appointed to the Property Assessment Appeal Board, which is the office that manages and operates the MAB. That board hears appeals of property assessments prepared for tax purposes.

Budget: The MAB's budget for 2008/09 is \$127,000. It does not have any staff, but uses Property Assessment Appeal Board staff under an agreement between its host ministry (Energy, Mines and Petroleum Resources) and the Ministry of Community and Rural Development.

10. Oil and Gas Appeal Tribunal

Mandate: The newest tribunal with a mandate that relates to environmental matters is the soon-to-be Oil and Gas Appeal Tribunal (OGAT). This tribunal was enabled under the *Oil and Gas Activities Act* in 2008, a replacement for the *Oil and Gas Commission Act* and the *Pipeline Act* but not yet in force at the time of writing.³⁶

Applicants and permit holders, and in some cases land owners with surface rights, will have the ability to appeal decisions concerning oil and gas permits and authorizations, amendments, compliance determinations and administrative penalties. Affected land owners are limited in their grounds for appeal to

³⁵ http://www.empr.gov.bc.ca/OG/mab/Documents/OGC_MAB_MOU.pdf

³⁶ See s.19 of the *Oil and Gas Activities Act*, 2008 at http://www.leg.bc.ca/38th4th/3rd_read/gov20-3.htm#part2div2

³⁴ *Energy, Mines and Petroleum Resources Statutes Amendment Act*, 2010.

arguing that a determination was made without due regard to issues they previously raised with the OGC or an applicant.³⁷ Also, land owners will only have a 15 day appeal limitation period, while applicants have the standard 30 day period set out in section 24 of the *Administrative Tribunal Act*. There is no standing for the owner of a neighbouring parcel or members of the public who otherwise consider themselves to be aggrieved by a proposed oil and gas authorization.

Composition: The *Oil and Gas Activities Act* does not set a limit on the number of tribunal members for the Oil and Gas Appeals Tribunal. It merely requires that the tribunal have a chair, one or more vice-chairs, and additional members. At the time of writing it is anticipated that the combined Environmental Appeal Board and Forest Appeals Commission will also sit as the Oil and Gas Appeals Tribunal. It is not presently known whether the membership of the tribunal will change to reflect this new mandate.

Budget: There is currently no budget or staff for this tribunal.

11. Officers of the Legislature

Although they are not administrative tribunals and do not have a specifically environmental mandate, it may be useful to remind readers that the Ombudsperson and Auditor General are two officers of the legislature that can have an important role in investigating and auditing the integrity of environmental decision-making and the performance of government.

The Ombudsperson has broad authority to investigate decisions, recommendations, acts, omissions, or procedures employed by a government authority that aggrieves a person. Government authorities are set out in a schedule to the *Ombudsperson Act*, and include ministries, boards and local governments that are exercising environmental functions.³⁸ In addition to responding to complaints from citizens, the Ombudsperson may investigate on her own initiative. If she finds upon investigation that a decision was unlawful, improper, unreasonable, arbitrary or based on

a mistake of law or fact, she must make a report with recommendations to the authority under investigation.³⁹ If the authority does not take appropriate action in a reasonable time, the Ombudsperson may submit a report to Cabinet or the Legislature.

Due to the Forest Practices Board's mandate restriction to forest practices, complaints relating to other forestry issues and all other environmental matters fall to the Ombudsperson. Yet she is responsible for investigating complaints covering every other aspect of government as well (yet within a budget similar to the Board's). Realistically, this usually only allows for "fairness review" of government actions and not assessment of the scientific merits or substantive issues involved in many environmental disputes. However, the Ombudsperson occasionally investigates systemic environmental issues, such as her valuable 2008 report on challenges to providing safe drinking water in British Columbia.⁴⁰

The Auditor General established a Sustainability and Environment division in 2008 that carries out performance audits reviewing the wider management issues of a government organization or program to evaluate whether it is achieving its objectives effectively, economically and efficiently. Unlike the Ombudsperson, the Auditor General is not required to respond to complaints but is mandated to conduct any examinations that he considers advisable.⁴¹ Audits have been carried out on diverse areas such as parks, contaminated sites, wild salmon, oil and gas contamination, pulp mill effluent, drinking water and agricultural land, removing private land from tree farm licences, and the Ministry of Forests' woodlot program.⁴² These audits often assess the adequacy of the systems and processes in place to manage the environment. By contrast, the Forest Practices Board audits systems and processes, but also the on-the-ground environmental impacts through field investigations.

Given the breadth of their mandate to oversee programs across government the Ombudsperson and Auditor General are limited in their practical ability to

37 See s.72 of the *Oil and Gas Activities Act*, 2008 at http://www.leg.bc.ca/38th4th/3rd_read/gov20-3.htm#section72

38 However, the Ombudsperson may not investigate decisions for which rights of appeal or objection are being exercised or remain viable.

39 A more complete list is found in section 23 of the *Ombudsperson Act*.

40 See http://www.ombudsman.bc.ca/resources/reports/Special_Reports/Special%20Report%20No%20-%2032.pdf

41 See sections 11-13 of the *Auditor General Act*, S.B.C.2003, c.2.

42 See <http://www.bcauditor.com/pubs>

address environmental concerns and are better able to address systemic, procedural and fairness issues than on-the-ground impacts. Some jurisdictions, such as Ontario and Canada, have appointed environmental or sustainable development commissioners with a dedicated environmental mandate and expert staff to address similar limitations. The closest we have in BC

to this is the Forest Practices Board which has a much narrower forestry mandate.

3. Tribunal Mandates – Do They Include the Key Government Decisions?

The Administrative Justice Project laid important groundwork establishing the rationale and objectives for BC’s specialized administrative tribunals. It did not, however, undertake a detailed examination of how those objectives were being met under the *status quo*, nor did it propose systematic and consistent criteria for determining which decisions should be appealable. We propose in this section to explore these objectives and examine how they might apply to the current mix of environmental tribunals.

The tribunal mandates discussed above developed in an *ad hoc* manner in response to the needs and demands that were current when they were created. There is surprisingly little discussion of the rationale and mandate for many of the tribunals in the *Hansard* record of the Legislative debates at the time the tribunals were established, with some exceptions. Nor does *Hansard* shed much light on why some decisions became appealable and others did not.

Currently there is a mixed and somewhat inconsistent approach to who may appeal to a tribunal. Regulated parties who are the subject of statutory decisions, and those holding permits or approvals, typically may appeal decisions that affect them. In some cases, such as in forestry and oil and gas legislation, regulated parties (usually resource companies exercising extraction rights) are provided two levels of appeal beyond the initial decision-maker: an internal agency review opportunity, as well as appeal to an independent tribunal.

But third parties who may be affected by those same decisions, whether they be directly affected (such as neighbouring property owners or rights holders, including First Nations exercising Aboriginal rights) or indirectly affected (such as tourism operations, recreational users, local citizens or public interest environmental organizations), sometimes may appeal to a tribunal, but often they may not. This will be explored

further below under “Standing and Utilization of BC’s Environmental Tribunals.”

In this section we wish to address the breadth of tribunal mandates in BC against environmental legislation, statutory decision-making and potential impacts to the environment. Some key questions include:

- Do tribunals have the power to review the important statutory decisions being made pursuant to environmental legislation?
- Do tribunal mandates adequately encompass regulated activities that can adversely affect the environment?
- Are tribunal mandates appropriate in the current regulatory environment, which is one of deregulation, “increased reliance” on independent professionals and “results-based management”?

There are about 45 statutes that regulate environmental matters in British Columbia, and there are numerous regulations passed under these statutes. Currently, our environmental tribunal mandates extend to only 10 of these statutes, or less than 25%.⁴³ When decisions made under regulations are factored in, it would appear that a large number of environmental decisions in BC are not subject to the oversight provided by the administrative justice system.

For example, there is either no or very restricted access to administrative tribunals for decisions of

⁴³ Access to environmental tribunals is currently provided to varying degrees under the *Environmental Management Act*, *Forest Act*, *Forest and Range Practices Act*, *Integrated Pest Management Act*, *Health Act*, *Private Managed Forest Land Act*, *Range Act*, *Water Act*, *Wildlife Act*, and *Wildfire Act*. Once they are in effect, additional appeal rights will be available to certain parties under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, *Greenhouse Gas Reduction (Cap and Trade) Act*, *Greenhouse Gas Reduction (Vehicle Emission Standards) Act*, and *Oil and Gas Activities Act, 2008*.

environmental consequence that are made under the following legislation and companion regulations:

1. *Agricultural Land Commission Act*;
2. *Clean Energy Act*
3. *Coal Act*;
4. *Dike Maintenance Act*;
5. *Drinking Water Protection Act*,⁴⁴
6. *Ecological Reserve Act*;
7. *Environmental Assessment Act*;
8. *Environment and Land Use Act*;
9. *Fish Protection Act*;
10. *Fisheries Act*;
11. *Forest Act*;
12. *Geothermal Resources Act*;
13. *Greenbelt Act*;
14. *Integrated Pest Management Act*;
15. *Islands Trust Act*;
16. *Land Act*;
17. *Local Government Act, Community Charter and Vancouver Charter*;
18. *Mineral Tenure Act*;
19. *Mines Act*
20. *Mining Right of Way Act*;
21. *Muskwa-Kechika Management Area Act*;
22. *Oil and Gas Commission Act*;
23. *Park Act*;
24. *Petroleum and Natural Gas Act*;
25. *Pipeline Act*;
26. *Public Health Act*,⁴⁵
27. *Resort Timber Administration Act*;
28. *Significant Projects Streamlining Act*;
29. *Transportation of Dangerous Goods Act*;
30. *Utilities Commission Act*;

31. *Water Protection Act*;
32. *Weed Control Act*;
33. *Zero Net Deforestation Act*.⁴⁶

The lack of tribunal mandate to hear appeals under such a broad array of statutes results in a rather large “accountability gap” in the administration of environmental laws.

In addition, as mentioned earlier, some legislation that does provide access to administrative tribunals tends to be very restrictive when it comes to standing provisions for anyone other than parties that are directly regulated under the statute. This will be explored further in our discussion of standing in Section 5.

Reasonably broad accountability for environmental decisions is found in the *Environmental Management Act*, section 100 of which allows any person aggrieved by a decision of a director to appeal to the EAB.⁴⁷ “Decision” is broadly defined to capture most types of decisions that would occur under this pollution legislation.

Notably absent from existing tribunal mandates are appeal mechanisms for decisions relating to:

- environmental assessment;
- land use;
- protected areas;
- wildlife and wildlife habitat; and
- local government decisions that impact the environment.

Certain resource sectors in particular – such as mining, oil and gas, and energy projects – seem to be sheltered from this type of accountability, and people who are impacted by these activities must rely on their ability to lobby the ministry granting such rights, the larger political process, or the court system to have their interests recognized and accommodated.

⁴⁶ Passed but not in force at time of writing.

⁴⁷ Directors are designated waste management officials employed by the Ministry of Environment, or the “district director” designated by the Greater Vancouver Regional District to exercise its delegated powers under the Act.

⁴⁴ Cabinet may, however, prescribe decisions that may be appealed to the EAB under s.36 of this Act.

⁴⁵ Appeals were formerly allowed under the *Health Act*.

There are many jurisdictions in Canada, the U.S. and internationally in which the administrative justice system applies to these types of decisions. For example, some form of appeal or oversight is potentially available for environmental assessment decisions in five provinces – Alberta, Manitoba, New Brunswick, Newfoundland and Quebec. By contrast, not only does BC legislation not provide for review of environmental assessment decisions, it expressly takes away appeal opportunities that otherwise exist under other legislation if the proponent of a reviewable project applies for “concurrent permitting.”⁴⁸ We are not aware of any rationale for why a permit decision by the same official is appealable in one context and not the other.

The Current Regulatory Environment

Since 2001 the BC government has rewritten or amended most environmental statutes with the stated aim of reducing red tape, significantly reducing the number of permits or approvals issued by government agency officials, and increasing its overall reliance on independent professionals. Considerable effort has been made to shift from a “prescriptive” regulatory system dependent on agency decision-making and oversight to one of “results-based management.”⁴⁹

These changes have brought about regimes in which:

- The Ministry of Forests and Range no longer approves site level logging plans, and forest companies no longer have to identify proposed cutblock and road locations on development plans and make them available for public and agency review;⁵⁰
- About 80% of the permits formerly required for any industry, trade or business that discharges waste into the environment are no longer required (though in some cases permits have been replaced by a code of practice);⁵¹
- “Qualified professionals” now approve or certify compliance with regulatory objectives for

contaminated sites, riparian areas, septic systems and some forestry plans, rather than government agency officials;⁵²

- Many pesticide use permits are no longer required.⁵³

Effectively, the jurisdiction of Environmental Appeal Board and Forest Appeals Commission has been diminished as a result of these changes.⁵⁴ The purpose of this paper is not to debate the merits of this deregulation initiative, but to consider how the administrative justice system can best adjust to this regime in order to ensure that there are appropriate checks and balances to ensure that environmental quality is maintained for British Columbians.

Because environmental tribunal mandates traditionally have been tied to statutory decisions, the repeal of decision-making functions has resulted in the loss of appeal rights and hence the ability of an aggrieved party to seek accountability through a tribunal. But the environmental issues do not go away – in some cases they increase from the lack of oversight. For example, pollution from poorly designed sewerage systems persists – but the decisions of independent professionals (sometimes the very contractors selling the systems and carrying out the work) cannot be reviewed by the Environmental Appeal Board as was formerly possible under the *Health Act* (now the *Public Health Act*).⁵⁵ If independent professionals are replacing agency decision-makers, should their decisions and judgment be reviewable? Numerous appeal rights formerly available to parties affected by pesticide use permits, contaminated sites decisions, and waste management permits are no longer available due to these and other changes.⁵⁶

52 See section 54 of the *Environmental Management Act* and section 63 of the *Contaminated Sites Regulation*; the *Riparian Areas Regulation* under the *Fish Protection Act*; section 7 of the *Sewerage System Regulation* under the *Public Health Act*; and section 16(1.01) of the *Forest and Range Practices Act* and section 22.1 of the *Forest Planning and Practices Regulation*.

53 See <http://wcel.org/resources/publication/deregulation-background-report-bill-53-integrated-pest-management-act> and pages 11-12 of the Ministry of Environment’s [Integrated Pest Management Act and Regulation Summary](#).

54 For example, in 2007 the EAB found in [Chief Wayne Christian et al. v. Director, Environmental Management Act](#) that it did not have jurisdiction to hear an appeal based on impacts to fish and water quality because the “registration” of a sewage treatment system adjacent to the Shuswap River was not a reviewable decision.

55 See <http://www.elc.uvic.ca/press/documents/SSR-Reform-Submission-Mar4.09-FINAL.pdf>

56 See the [EAB Mandate and History](#) publication for further details

48 See section 23(4) of the BC *Environmental Assessment Act*, S.B.C.2002, c.43.

49 See Tollefson *et al* at note 13 *supra* and West Coast Environmental Law at <http://wcel.org/category/publications/environmental-deregulation-0>

50 See http://www2.news.gov.bc.ca/nrm_news_releases/2004FOR0004-000048.htm

51 See <http://www.env.gov.bc.ca/epd/main/ema.htm>

Scenario 1:	Scenario 2:
<p>“C” lives next to an autobody shop that does not have adequate ventilation for its painting booth. Due to topography, solvent-like fumes accumulate in his backyard, making it not only unpleasant to be in but also raising concerns about possible health impacts to the parents and their newborn child. Attempts to resolve the problem directly with the shop owner are fruitless. The autobody shop no longer requires a permit under the <i>Environmental Management Act</i>, and the Ministry of Environment is reluctant to investigate, even though it might potentially amount to “pollution” prohibited under s.6(4) of the <i>Act</i>, because the prevailing view is that businesses that no longer require permits are a low priority. The local government says the auto body shop is a permissible use under zoning bylaws and it has no other authority to deal with the matter. As the EAB has no mandate for this situation, C’s only recourse is to sue in nuisance in the BC Supreme Court, but he cannot afford the costs of going to court and the risk of an adverse cost award. He ends up selling his home (at a loss, having truthfully disclosed the fumes problem) and moving away. His financial loss is likely greater than the cost of upgrading the shop’s ventilation equipment to the industry norm, but the owner was unwilling to upgrade his equipment even with a cost contribution from C.</p>	<p>“M Farms” surrounds a small lot that is well known to have drainage problems due to the silty clay loam soils. It’s drinking water well is nearby. Unable to get septic approval under the <i>Health Act</i>, the lot sold for only \$6,500 in 2004, as it could not be built on. A few years later, following deregulation under that legislation and the removal of an approval role for public health inspectors, a “registered onsite wastewater professional” (a designation which may be acquired after as little as 15 days training, and which may be held by the persons selling and installing septic systems) filed a sewage system plan, misclassifying the soils and misrepresenting the lot size. As a result of deregulation, there was no notice or posting of the intent to build a sewerage system on the lot. When M Farms learned of the proposal and complained to the Vancouver Island Health Authority, it was advised that health authorities do not have “the legal authority to review the technical correctness of filings under the <i>Sewerage System Regulation</i>. The Provincial Government’s deregulation process has removed much responsibility and authority regarding on-site sewage disposal from the Health Authority and transferred it to private industry.” No longer able to appeal a permit approval to the EAB, M Farms has had to resort to legal action to recover damages from effluent escaping onto its property near the well.</p>

Table 1

Should there be other opportunities to access environmental tribunals?

Current tribunal mandates seem to adopt a *rights-based* model in which administrative justice and duties of fairness are primarily owed to the party acquiring a right to pollute or extract a natural resource, with limited allowance for those who are impacted by these decisions to intervene in hearings according to the standing rules of a given statute. Should tribunals be imbued with an *impacts-based* mandate as well, reflecting the reality that granting rights to one party or resource sector often impacts other parties with other economic, property, or broader public interests?

Also, does it make sense for the terms and conditions of a pollution permit for a major industrial operation to

be reviewable by the EAB only at the first instance of issuance or amendment? These permits are frequently issued without any term or expiry date, and may remain in force indefinitely unless amendments are requested by the permit holder or determined to be necessary for the protection of the environment by the waste management director.⁵⁷ If a community is experiencing pollution problems from an industrial operation with an outdated, inadequate permit and is unable to persuade the agency to amend it, should its aggrieved residents have recourse to a body such as the EAB or an arms-length investigative tribunal?⁵⁸ Environmental problems are not always foreseeable at

57 See section 16 of the *Environmental Management Act*, S.B.C.2003, c.53.

58 Recent amendments to s.99(d) of the *Environmental Management Act* may resolve this scenario insofar as the refusal to amend a permit is now appealable.

the time a permit is issued; they may be granted with imperfect knowledge. Also, environmental conditions and technology can change over the course of time. For example, in communities like Prince George many different air emission permits have been issued over the years, cumulatively leading to a serious community air pollution problem, particularly when compounded by unregulated air emissions.⁵⁹ Yet citizens have difficulty addressing this problem if they cannot appeal outdated, longstanding permits.

A related issue is whether environmental tribunals should have the ability to respond not just to the exercise of statutory powers, but also the failure or refusal to exercise statutory powers to protect the environment. Our current system grants extensive review and appeal rights to parties that are the subject of compliance-related orders and penalties, but no rights at all to those who are impacted by the negligence or refusal of government agencies and officials to enforce permits and regulations. Private prosecution usually is not a viable option in British Columbia. Does this approach ignore the reality that failing or refusing to enforce is in fact a decision that has real consequences to people and the environment?

On numerous occasions the Forest Practices Board has reported that an omission, often due to delay and under-resourcing, has resulted in ineffective resource and land management. Perhaps the most egregious example was reported by the Board in April 2007. In March 2002, 17 owners of a strata development applied for a community watershed designation in order to gain a degree of protection for their watershed. Five years later, the government had not made a decision. The Forest Practices Board recommended that the Ministry of Environment act promptly to decide for or against approval of the designation. In spite of this, the community watershed designation was not made until February 2009.⁶⁰

Another example was reported by the Board in March 2005 concerning failure to establish ungulate winter range. The Board reported that “the most significant

problem identified in this investigation is the failure of government to establish deer winter ranges in the Chilliwack Forest District despite a winter range proposal being put forward by MOE in 2001.”⁶¹ Other examples identified by the Board include the failure to designate old growth management areas and wildlife habitat areas.⁶²

There is also a gap in the mandates provided to tribunals with investigative powers. For example, the Forest Practices Board (FPB) has the authority to audit the adequacy of government’s compliance and enforcement efforts for forest practices. However, FPB investigators and auditors do not have the authority to address anything that is not a “forest practice” as defined in the *Forest and Range Practices Act*, which results in odd disparities. For example, the Board may audit or investigate the impact of forestry roads on caribou habitat, but not oil and gas exploratory roads or mining roads in the very same area that impact the very same habitat. Public concerns are being expressed about decision-making and enforcement of non-forestry related environmental issues, but there is no independent expert body for them to approach. Should the Board’s mandate be expanded, or should there be some other independent agency, commissioner or environmental ombudsperson empowered to investigate and audit compliance with environmental laws beyond forest practices?

Which decisions should not be reviewable?

While the administrative justice system can provide greater accountability for environmental decision-making, this does not mean that all environmental decisions should be reviewable by tribunals. There needs to be a principled approach to determining which decisions should be reviewable and which should not. Some environmental decisions necessarily involve weighty trade-offs between social, cultural or

61 Forest Practices Board Report, *Harvesting in the Winslow Goat Winter Range*, online at <http://www.fpb.gov.bc.ca/assets/0/114/178/298/356/8485310a-8e96-4136-a40e-b51a8d677b88.pdf>

62 Forest Practices Board Reports, *Goshawk Foraging Habitat on the Queen Charlotte Islands/Haida Gwaii*, online at <http://www.fpb.gov.bc.ca/assets/0/114/178/298/356/8166978b-0ffc-4db4-bd25-74dee81655c8.pdf>; and *Establishment of Conservation Areas for Old Growth and Wildlife Habitat in the Squamish and Chilliwack Forest Districts*, online at <http://www.fpb.gov.bc.ca/assets/0/114/178/186/358/93095306-9919-47a4-823c-57ac24ac23b5.pdf>.

59 See the documentation of Prince George’s air quality problems at the website of Prince George Air Improvement Roundtable, online: <http://pgairquality.com/resources-reports>

60 Forest Practices Board Report, *Watershed Protection at Anderson Lake*, online at <http://www.fpb.gov.bc.ca/assets/0/114/178/298/356/824ded7e-cff9-4493-a2b9-49af181f12f3.pdf>

economic values, and should be made at a high political level. Accountability for these types of decisions will be political rather than legal or discretionary review through the administrative justice system. To a certain degree, tribunals exist to serve a larger democratic, legal and policy accountability defined by elected officials, not to usurp those officials.

The current system reflects this by provisions such as subsection 100(2) of the *Environmental Management Act* which clarifies that “a decision under this *Act* of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.”

At the same time, however, it would be overly simplistic to classify all or most environmental decisions as political just because they involve trade-offs or just because a minister may be involved at some level. The integrity of environmental decision-making is contingent upon accurate facts and credible impact assessment being put to decision-makers so that they can make fully informed decisions.

Examples of an exclusively political decision might include decisions on whether a major mill or industrial facility should be allowed in or near a community, ideally, informed by credible fact finding and community consultation. At the same time, however, there are discrete issues that flow from these decisions that will impact the environment and affect the public interest. These may include such as issues as 1) where the facility is situated; 2) the technology and operating conditions specified in any permit; and 3) the sources and rates of extraction of natural resources required to supply the facility with raw materials. There are often many alternatives when carrying out an industrial project which can significantly impact people’s lives and environmental quality.

Is consolidation of tribunal mandates desirable?

Another issue to consider when examining tribunal mandates is whether the current configurations best serve British Columbia’s needs including current and emerging issues. In our consultations many practitioners expressed interest in a consolidation of resource and environment tribunals to better coordinate mandates, appeal procedures and practical realities on-

the-ground.

The Forest Practices Board itself has publicly commented many times on the lack of coordinated management of human activity on Crown land. For example, in the Board’s 2008/9 annual report, the Chair stated that:

Overlapping tenures for land and water uses are leading to conflicts among competing users. Increases in resource road density and numbers of road users raise issues from worker safety to habitat fragmentation, from impact on community watersheds to maintenance of fish passage on important habitat streams. Our provincial efforts to come to grips with such cumulative impacts have many management implications. Our aging public land use plans are being outdated by new conditions on the landscape. The responsible agencies across the separate fields of forestry, energy, recreation, agriculture and public water supply management find themselves responsible for resources of the forest land base that are functionally interconnected. Demands are rising from all directions for more integrated management of those resources and are leading to increased collaboration among agencies that are often disconnected from public land use planning.

While these comments are directed to the initial, decision-making level, in our consultations the Board queried whether there may be potential to enhance coordination and consistency through tribunal mandates. This could potentially include creating new rights of appeal for members of the public respecting issues such as the rate of resource extraction and the degree of landscape conversion and fragmentation. Further, a fragmented environmental tribunal system may be less effective at addressing these concerns. A more integrated system could have a positive impact on oversight of landscape level management, making that oversight broader as well as more comprehensive and coordinated.

4. Environmental Protection and the Public Interest

We express our conviction that the Judiciary, well informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development and enforcement of laws, regulations and international agreements relating to sustainable development, plays a critical role in the enhancement of the public interest in a healthy and secure environment.

- THE JOHANNESBURG PRINCIPLES ON THE ROLE OF LAW AND SUSTAINABLE DEVELOPMENT ADOPTED AT THE GLOBAL JUDGES SYMPOSIUM, 2002

BC legislation establishing environmental tribunals is often silent about the purpose of the tribunal. It is also often silent on the broader public interest purpose to be served by the legislative scheme as a whole. The overall intent of the legislation must often be gleaned from a review of the statute as a whole – an exercise not unfamiliar to courts sitting in judicial review when deciding matters of statutory interpretation. For much environmental legislation, it is accepted that the Legislature’s intent includes maintaining the public

interest in environmental protection. Civil servants are expected to incorporate that public interest into their decision-making when administering the statute.

While some administrative tribunals are established primarily to adjudicate rights between individuals, or between an individual and the state, there is a common and underlying assumption that tribunals also serve the public interest by exercising their mandate in a manner that protects the public interest in environmental quality and sustainability. For the most part in BC, this seems to be implicit rather than explicit. It may appear in government press releases, agency mission statements, and sometimes in a tribunal’s decisions or publications, but not necessarily in the enabling legislation.⁶³

Table 2 summarizes our review of the extent to which environmental tribunals in BC have an explicit or implicit mandate to protect the environment in the public interest.

⁶³ This may simply reflect a preference among legislative drafters in BC to avoid “purposive clauses” generally.

BC Tribunal Mandates for Environmental Protection

Tribunal	Public Interest Environmental Mandate
Environmental Appeal Board	The EAB’s enabling legislation is silent on its public interest mandate, as is its mission statement. However, the EAB’s website states that “The Environmental Appeal Board plays a role in ensuring the protection and wise use of the environment by providing a quasi-judicial access point for the public and industry to appeal certain government decisions.”
Forest Appeals Commission	The FAC’s enabling legislation and publications are silent on its public interest mandate. Most of its decisions amount to rulings on compliance in which the public interest in forest management results do not necessarily arise. However, where the FAC has reviewed discretionary approvals in <i>de novo</i> hearings, its decisions do not seem to disclose consideration of the public interest as a factor.
Private Managed Forest Land Council	The PMFLC’s enabling legislation states that “The object of the council is to encourage forest management practices on private managed forest land, taking into account the social, environmental and economic benefits of those practices.” A regulation references the public interest in granting government wildlife officials a right of entry onto private land. The PMFLC’s website states that its mandate is to protect five key public environmental values – fish, water, wildlife, soils and reforestation.

Tribunal	Public Interest Environmental Mandate
Forest Practices Board	The FPB's enabling legislation is silent on its public interest mandate. However, its website states: "We serve the public interest as an independent watchdog for sound forest and range practices in British Columbia." It also states that: "Our task is to provide the public with an objective and independent assessment of the state of forest practices in the province, and to contribute to the ongoing improvement and sustainability of those practices," and that "Your information and views help us to find out how well forest companies, ranchers and government resource agencies and processes are protecting the environment while carrying out forestry and grazing." At the time the FPB was established, the <i>Forest Practices Code of British Columbia Act</i> had an extensive preamble that addressed sustainable use, conserving biological diversity and the notion of forests held in trust for future generations, which has now been repealed. (See footnote 64 below.)
Utilities Commission	The BCUC's enabling legislation references the public interest in 13 instances: see ss.13, 28, 30, 44.1, 44.2, 45, 50, 52, 53, 70, 71, 86, 125.2. The "environment" is not singled out as a factor in considering the public interest, and is omitted from the list of factors in s.71 (2.1). Some feel the Commission weighs ratepayer interests much more heavily than environmental concerns. However, it is very clear in Commission rulings that the public interest is an important consideration in its decision-making.
Farm Industry Review Board	The <i>Farm Practices Protection (Right to Farm) Act</i> does not reference the public interest, except in the context of allowing the Board to exclude the public from a hearing [s.7(5)]. When adjudicating a complaint the Board's mandate is to determine whether the farm practice in question is "normal," i.e. whether it is consistent with accepted customs followed by similar farm businesses, and not whether it is sound environmental practice per se. However, BCFIRB indicates that "proper and accepted" farming practices increasingly include consideration of environmental issues. The Board's website states that "As an independent tribunal, BCFIRB ensures that the public interest is served and protected." The Board uses dispute resolution methods to try to resolve complaints, and this may suggest an underlying public interest in seeing that farming practices peacefully co-exist with neighbours.
Agricultural Land Commission	The ALC's enabling legislation does not explicitly reference the public interest, but requires consideration of environmental values for certain limited decisions. Environmental values are mentioned but are subordinate to agricultural values (ss.13, 44). Evaluation of environmental effects is mandatory if a public hearing is held on a matter of provincial interest (s.43). The ALC's vision statement is for "A provincial agricultural land reserve system that fosters economic, environmental and social sustainability."
Oil & Gas Commission	The OGC's enabling legislation states that a purpose of the Commission is "to ensure that applications that are approved are in the public interest having regard to environmental, economic and social effects" and that oil & gas activities are regulated in a manner that "provides for the sound development of the oil and gas sector, by fostering a healthy environment, a sound economy and social well being (s.3). It may recommend to Cabinet "any measures the commission considers necessary or advisable in the public interest related to oil and gas activities or pipelines" (s.10). An advisory committee appointed by the minister is to "anticipate and identify environmental, economic and social issues arising out of the commission's operations." The Commission may order that work on an exploration project be stopped if unreasonable damage to the environment will be caused (s.33, <i>PNGA</i>)
Mediation & Arbitration Board (Surface Rights Board)	The MAB's enabling legislation does not reference the public interest in environmental matters, as this is not its role. The legislation is instead focused on the settling of private disputes between land owners and oil & gas operators and the provision of monetary compensation for disruptions and loss in value in relation to the Board's entry, occupation and use orders. The public interest is met in ensuring that there is a system of fair compensation for disruptions to the use and enjoyment of land.
Oil & Gas Appeals Tribunal	This tribunal does not yet exist and its enabling legislation is not yet in effect; however, the <i>Oil and Gas Activities Act, 2008</i> does not specify an environmental public interest mandate for the tribunal.

Table 2

Does it matter whether or not a tribunal's enabling legislation incorporates an explicit mandate for environmental protection or sustainability? That likely depends on the purpose for which the tribunal was created. It may be more important for tribunals that conduct *de novo* hearings of discretionary decisions and have the authority to confirm, reverse or vary the original decision under appeal, because they are in effect being called upon to step into the shoes of the agency decision-maker and determine whether an authorization or permit should have been granted, and if so, under what terms and conditions. In this situation, it may be more appropriate for the public interest in environmental protection to be incorporated into the legislation as a whole, rather than specifically into the enabling provisions of review tribunals, because it presumably applies equally to civil servants administering the acts and those sitting in review of their decisions. Purposive clauses may have a similar effect, although recently BC legislation tends to avoid incorporating these clauses, and some have been repealed.

This issue perhaps arises in part because much of BC's natural resources legislation is *rights-based* rather than *stewardship-based*, and arguably has not kept pace with the complexity of modern environmental issues, population growth and more diverse economic activity tied to the land and environment. The impacts of resource extraction on endangered species habitat; diminished snow packs and increased competition for water resources; the sensitivity of fish populations to stream temperatures, climate change and the resulting mountain pine beetle epidemic – these challenges and more were not much on the minds of legislators even a decade ago, let alone under earlier

legislative frameworks. The pace of environmental change has been a challenge for law-makers, yet there is nevertheless broad agreement that these current management issues are or should be relevant considerations for decision-makers and tribunals today.

An explicit environmental mandate may not be relevant to all the decisions a tribunal makes, such as matters that purely involve rights adjudication. It might be less relevant to the tribunal reviewing a finding of non-compliance, and it may or may not be relevant to the amount of an administrative penalty levied by an enforcement official. However, some formal acknowledgement of this environmental mandate may help a tribunal develop a more coherent and consistent understanding of its purpose that is understood by all its members, coming as they do from diverse backgrounds, disciplines and interests, whether sitting at the same time or over the course of time for those tribunals with a revolving door of members with short-term appointments.

An additional question is how much substantive and procedural content should be prescribed, if a “public interest” mandate were to be given to tribunals. Some have observed that where the “public interest” has been specifically incorporated but generally stated in tribunal mandates it provides very limited guidance to decisions unless it is has both a substantive and procedural component.⁶⁵

65 J. Heirlmeier, “The Public Interest: Can it Provide Guidance for the ERCB and NRCB?” in 18 *J.E.L.P.* 279, August 2008.

5. Standing Before BC's Environmental Tribunals

In this section we wish to explore who has “standing” (i.e. who is entitled or permitted) to bring a matter before BC’s environmental tribunals. Our review of the relevant legislation suggests that there is considerable variability in the approaches to standing, and a question arises as to whether these are justified or whether there should be a more consistent approach. A key issue is the extent to which third parties who are affected by a decision or those who can demonstrate genuine concern about its impact on the public interest should be given standing to make submissions.

As mentioned earlier, the *Environmental Management Act* standing provisions are quite broad in that any person who is “aggrieved” by a decision by a director may appeal to the Environmental Appeal Board.⁶⁶ The Environmental Appeal Board has interpreted this to mean that an appellant must disclose sufficient information to allow the Board to reasonably conclude that the appellant “has a genuine grievance...which prejudicially affects his interests.” Mere concern for the environment is not sufficient to establish this, but at the same time, an appellant “is not required to provide definitive proof that he or she is harmed by the amended permit.”⁶⁷

Relatively liberal standing rules also apply to complaints about farm practices to the Farm Industry Review Board under the *Farm Practices (Right to Farm) Protection Act*. Any person who is aggrieved by odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business may file a written complaint. The BCFIRB panel must be satisfied that the Complainants are aggrieved by odour, dust, noise or some other disturbance emanating from the farm. If the Complainants cannot establish that they are aggrieved, the complaint must be dismissed without need to consider whether the alleged source of the grievance results from a normal farm practice.⁶⁸

66 Or a decision of a district director appointed by the Greater Vancouver Regional District, where EMA authority is so delegated. Decisions of Cabinet or the Minister of Environment are not appealable under s.100(2).

67 See Goggins *et al.* <http://www.eab.gov.bc.ca/ema/2008ema014a.pdf>

68 See *Westcreek Citizens Society v. Vane*, para.37. <http://www.firb.gov>

Under the *Oil and Gas Commission Act*, any “interested person” currently may apply to the Oil and Gas Commission or its Advisory Committee for alternative dispute resolution for disputes arising from the commission’s “discretion, function and duties.”

However, for many environmental decisions there is much narrower standing, based on property or other legal rights. The *Water Act* limits standing to licensees, applicants, and riparian owners whose rights may be prejudiced, and to property owners whose land is likely to be physically affected by an order. While this is still broader than some environmental legislation, it excludes a host of potentially affected parties such as tourism businesses, salmon enhancement organizations, water-based recreation users, and communities concerned about the public amenities provided by a river, lake or stream.

The *Petroleum and Natural Gas Act* and forthcoming *Oil and Gas Activities Act, 2008*, grant standing more restrictively to owners of land on which oil and gas activities are authorized.

For all other decisions, access to environmental tribunals is available only to the person or corporate entity that is “the subject of the order” or permit. If that entity appeals to a tribunal, there is often a discretionary ability on the part of a tribunal to grant intervener status to affected third parties. However, intervener status usually comes with a much-reduced ability to raise issues before the tribunal, to introduce evidence, and to cross-examine witnesses.

We are not suggesting that there ought to be affected third party or public interest standing for every decision made by government – certainly, there are some matters that are quite properly between the rights holder and the regulator exclusively or primarily. However, we do question whether the current standing rules appropriately differentiate between matters that are purely private disputes and matters that involve

[bc.ca/complaints/farm_practice_complaints/Westcreek_01-01_dec_aug25_03.pdf](http://www.firb.gov.bc.ca/complaints/farm_practice_complaints/Westcreek_01-01_dec_aug25_03.pdf)

important third party or public interest issues. If a decision or order raises a legitimate issue of public policy, should there be an opportunity for oversight, accountability and scrutiny by environmental tribunals? Should affected third parties, genuinely concerned citizens or public interest organizations be able to make that case before a tribunal?

Courts have inherent jurisdiction to grant public interest standing where: 1) there is a serious issue to be tried, 2) where the applicant has a genuine interest

in the validity of administrative action, and 3) where there is no other reasonable and effective manner in which the matter may be brought before the court. A number of discretionary legal tests are applied to determine these issues and to screen out premature and frivolous challenges. Tribunals are more limited in their jurisdiction, and may only hear matters that are defined by the Legislature. Should tribunals be empowered to apply judiciously a similar public interest right of appeal?

Standing Provisions for BC Environmental Tribunals

Act	Tribunal	Who Has Standing?	Comments & Issues
<i>Agricultural Land Commission Act</i>	ALC	A person who is the subject of a remediation determination and order, a stop work order or a penalty (s.55) An “person affected” may request that the Commission reconsider a decision (s.33)	There is no third party standing for many issues, such as Commission approvals of non-farm uses, subdivision, soil removal or fill, and other matters that affect neighbouring farmers or the environment. However, any “person affected” may request that the ALC reconsider a decision if new evidence becomes available, the decision was based on erroneous or false evidence, or it is warranted following recommendations by a facilitator.
<i>Environmental Management Act</i>	EAB	A person aggrieved by a decision of a director or a district director (s.100)	This standing rule seems to allow reasonable tribunal access for affected third parties. The EAB has interpreted it to exclude people who have not demonstrated that they will be prejudicially affected by a permit or permit amendment, but neither is proof of harm required, for that is a matter for the hearing itself.
<i>Farm Practices (Right to Farm) Protection Act</i>	FIRB	A person aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation (s.3)	This standing rule seems to allow broad tribunal access for affected third parties. However, when the scope of the Act was extended to protect fish farm practices, the provision was not amended to make it more suitable to grievances from these operations, where dust and noise are likely not an issue. Aquaculture complaints would likely have to qualify as “other disturbance,” and the complainant would have to meet the requirements of being “aggrieved.”
<i>Forest Act</i>	FAC	The person or tenure agreement holder who is the subject of a determination, order or decision (s.147)	This standing rule is broad for forest companies, but does not allow affected third parties access to the FAC. For example, licensees may appeal AAC and stumpage determinations, but third parties may not, meaning the FAC will likely only hear the issues that the industry wants to appeal. The Commission may grant intervener status for those hearings, but will not hear the concerns of third parties with respect to these and other issues, such as the award of new tenures, etc.

Act	Tribunal	Who Has Standing?	Comments & Issues
<i>Forest & Range Practices Act</i>	FAC	The person who is the subject of a determination, or the Forest Practices Board (ss.82, 83)	This standing rule does not allow tribunal access for affected third parties, but instead allows the Forest Practices Board to bring appeals on the public's behalf. No such appeals have been brought by the FPB in recent years, despite requests from the public to do so. The issue is complicated by the deregulation of forest practices rules, which substantially takes away the discretion of Ministry of Forests and Range officials to refuse to approve a plan. But even outside of plan approvals, there are many important decisions made under FRPA that affect diverse interests that are not reviewable.
	FPB	Any member of the public may make a complaint to the Forest Practices Board about a licensee's compliance and the appropriateness of government enforcement (s.123, and <i>Forest Practices Board Regulation, s.5</i>).	This rule provides broad access to the FPB, but it only has recommendation making powers, unless it appeals an approval to the FAC.
<i>Integrated Pest Management Act</i>	EAB	"A person" may appeal decisions that are listed in s.14(1) of the Act.	The IPMA is the result of deregulation of the former Pesticide Control Act, and curtails access to the EAB from what was formerly available, because it substantially reduces the requirement for pesticide use permits. The types of decisions that can be appealed are those which a pesticide user would be interested in appealing, rather than the public. For example, it is possible to appeal the refusal to issue a licence, but not the decision to issue a licence in the first place. The Administrator may amend, revoke, suspend, or renew a licence, and these actions can be appealed at the EAB. Since the IPMA was passed in 2003 there have been no public-interest based appeals of pesticide use permits.
<i>Oil & Gas Commission Act</i>	OGC or Advisory Committee	An "interested person" (ss.8, 9) may request the OGC or Advisory Committee to apply alternative dispute resolution to authorizations under this Act, the <i>Petroleum and Natural Gas Act</i> , and the <i>Pipeline Act</i> .	This standing rule currently allows broad access to the OGC and Advisory Committee for affected third parties to request alternative dispute resolution or reconsideration of oil and gas authorizations. However, it will be repealed once the <i>Oil and Gas Activities Act</i> comes into effect, which has narrower standing.

Act	Tribunal	Who Has Standing?	Comments & Issues
<i>Petroleum and Natural Gas Act</i>	MAB	a) A person who requires land to explore for, develop or produce petroleum or natural gas where the land owner refuses to grant a satisfactory surface lease; or b) a land owner experiencing damage to the land or suffering to the owner caused by entry or occupation for petroleum or natural gas purposes; or c) a person who has a right, title or interest in land designated by Cabinet as an underground storage reservoir (s.16)	This is a narrow standing rule, but given that the mandate of the MAB is to mediate or arbitrate surface lease agreements, there is probably little justification for expanding it to include third parties in most circumstances. However, the rules do seem predicated on the assumption that the only party whose property interests are harmfully affected by oil and gas activities is the surface owner, as opposed to neighbouring property owners.
<i>Private Managed Forest Land Act</i>	PMFLC	The council may rescind its orders, decisions or determinations “on the request of an owner or a contractor, employee or agent of the owner, or on its own initiative” (s.32)	Under PMFLC policy the public may complain about forest practices on private managed forest land. If the complaint could amount to non-compliance with the <i>Act</i> or regulations, Council staff will investigate. However, the complainant does not have standing with respect to the compliance determination or reconsideration.
	FAC	A person who is the subject of an order, a decision or a determination of the council (s.33)	This is a narrow standing rule that does not allow third parties access to the FAC to appeal questionable compliance determinations, or activities on private managed forest land that harmfully affect them, such as impacts to watersheds, water supply, fish and wildlife habitat and terrain stability.
<i>Range Act</i>	FAC	The person who is the subject of, or whose licence or permit is affected by, an order, decision, or amendments (s.70)	This is a narrow standing rule that prevents affected third parties access to the FAC. For example, there is no recourse for those who have a demonstrable interest in riparian degradation, the sustainability of the animal-unit-months authorized in a licence or permit, or impacts to wildlife or grassland species at risk.
<i>Utilities Commission Act</i>	BCUC	BCUC public hearings provide standing for “any person whom the commission determines to have an interest in the matter” (ss.1, 86)	This grants the BCUC broad discretion to determine who has public interest standing before it. Traditionally, it has granted standing to broad types of ratepayers (industry, senior citizens groups, etc.) but also to environmental non-government organizations. However, BCUC rulings on costs have not been as generous to environmental NGOs.

Act	Tribunal	Who Has Standing?	Comments & Issues
<i>Water Act</i>	EAB	<p>Orders of the comptroller, the regional water manager or an engineer may be appealed by:</p> <p>a) The person who is subject to an order; b) an owner whose land is or is likely to be physically affected by the order, or 4) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order. (s.92)</p>	<p>This is a narrow standing rule that prevents affected third parties access to the EAB. It is a private rights based rule that does not accommodate the public interest in streams throughout the province. For example, there are many stream stewardship groups throughout the province who dedicate countless hours to salmon enhancement and stream restoration. They may have years worth of public service behind them, but have no standing against a new applicant for a water licence. The rule prevents tribunal access for those who wish to object to water diversions that may impair fish habitat, riparian wildlife habitat, water-based recreation and other public amenities represented in streams, rivers and lakes of the province.</p>
		<p>Orders in relation to a well, works related to a well, ground water or an aquifer may be appealed by: (a) the person who is subject to the order, (b) the well owner, or (c) the owner of the land on which the well is located. (s.92)</p>	<p>This is a narrow standing rule, however, most orders respecting wells will likely be private rather than public disputes. However, there may be some occasions in which well practices impact public interest issues in relation to ground water and aquifers, both in terms of water quantity and water quality.</p>
		<p>Orders in relation to drilling authorizations may be appealed by: (a) the person who is subject to the order, (b) the well owner, (c) the owner of the land on which the well is located, or (d) a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area. (s.92)</p>	<p>Similar to the above comment, this is a narrow standing rule likely reflecting the fact that most orders respecting drilling authorizations will likely be private rather than public disputes. However, there may be some occasions in which drilling practices impact public interest issues in relation to ground water and aquifers, both in terms of water quantity and water quality. While the rule attempts to incorporate the public interest by giving standing to certain persons in relation to water management plans or drinking water protection plans, so far it has proven very difficult for these plans to get approved. Yet the public interest issues remain in terms of diminishing and polluted aquifers, particularly in the Fraser Valley, regardless of whether such a plan is in place.</p>

Act	Tribunal	Who Has Standing?	Comments & Issues
<i>Wildlife Act</i>	EAB	The person affected by a decision of the regional manager or director respecting a licence, permit, registration of a trapline or guiding territory certificate (s.101.1)	This is a narrow standing rule that does not allow third party access to the EAB. A review of EAB decisions will show numerous appeals of by guide outfitters of their authorized kill quota for certain wildlife. Third parties, such as wildlife viewing tourism operations, First Nations and wildlife conservation organizations may be harmfully impacted or have important facts and perspectives to bring to the tribunal, but are prevented from doing so unless a licensee appeals and they are granted intervener status. There are numerous other decisions made from time to time under the <i>Wildlife Act</i> that also have a strong public interest component.
<i>Wildfire Act</i>	FAC	The person who is the subject of an order, or the Forest Practices Board (ss.39, 40).	These appeals relate to hazard abatement, compensation for fire control, contravention of the Act or regulations, administrative penalties, remediation, and stop work orders. They are essentially private disputes between the government and the subject of an order, and are unlikely to have a public dispute aspect.
	FPB	Any member of the public may make a complaint to the Forest Practices Board about a licensee's compliance and the appropriateness of government enforcement (s.123, and <i>Forest Practices Board Regulation, s.5</i>).	This rule provides broad access to the FPB, but it only has recommendation making powers, unless it appeals an approval to the FAC.
<i>Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act</i>	EAB	A person served with an administrative penalty notice, a refusal to accept an alternative calculation of carbon intensity, or other decision to be prescribed by regulation (s.14)	This standing rule is restricted to the subjects of orders relating to compliance. There may be a broader public interest in how compliance is determined; however, the details are subject to forthcoming regulations not yet published.
<i>Greenhouse Gas Reduction (Cap and Trade) Act</i>	EAB	A person served with an administrative penalty notice or other decision to be prescribed by regulation (s.22)	This standing rule is restricted to the subjects of orders relating to compliance. There may be a broader public interest in how compliance is determined; however, the details are subject to forthcoming regulations not yet published.
Legislation Passed But Not in Force as of September 2010			
<i>Greenhouse Gas Reduction (Vehicle Emission Standards) Act</i>	EAB	A person served with an administrative penalty notice or other decision to be prescribed by regulation (s.14)	This standing rule is restricted to the subjects of orders relating to compliance. There may be a broader public interest in how compliance is determined; however, the details are subject to forthcoming regulations not yet published.

Act	Tribunal	Who Has Standing?	Comments & Issues
<i>Oil and Gas Activities Act, 2008</i>	OGAT	a) An applicant for a permit; b) a permit holder or former holder; c) the owner of land on which an oil and gas activity is permitted; d) a person who is the subject of an order, or e) a person who has been found in contravention of the Act, a permit, or order (ss.72, 69)	This provision narrows standing from the present requirement in the <i>Oil and Gas Commission Act</i> that any “interested person” may apply for reconsideration of an authorization or for alternative dispute resolution.

Table 3

6. Participant Funding & Costs

While administrative tribunals serve an important function in delivering administrative justice for environmental decisions, the costs of participation can be prohibitive, particularly for individual citizens and public interest groups that have no financial interest in the matter at hand. Generally, these participants face two main costs issues: 1) the cost of effectively participating in a tribunal proceeding; and 2) the risk of an “adverse costs award” in which the unsuccessful party is ordered to pay some or all of the costs of the successful parties – which could include the government agency, the industrial permit holder, and in some cases those of the tribunal as well.

While a significant factor in the civil court setting,⁶⁹ the risk of adverse costs liability is not a major impediment to public participation before BC environmental tribunals. This is because even though many such tribunals are empowered to do make adverse costs awards, as a matter of policy they generally decline to do so. The Environmental Appeal Board and Forest Appeals Commission, for example, both state that their policy is to award costs only in special circumstances, including:

- a) where an appeal is brought for improper reasons or is frivolous or vexatious in nature;
- b) where the party’s action or the failure to act in a timely manner results in prejudice to any of the other parties;
- c) where, without prior notice, a party or participant fails to attend a hearing or to send a representative to a hearing when properly served with a “notice of hearing”;
- d) where a party or participant unreasonably delays the proceeding;

- e) where the failure to comply with an order or direction of the Board (or Commission) has resulted in prejudice to another party; and
- f) where a party or participant has continued to deal with issues which the Board (or Commission) has advised are irrelevant.⁷⁰

As a consequence, it is rare for the EAB or FAC to make cost orders against appellants, although it is a live possibility designed to encourage appropriate conduct.

A more significant barrier to justice is securing the funding required to effectively participate in a tribunal hearing. While administrative tribunals are theoretically designed to be “affordable, accessible, informal and simple” alternatives to courts, there are several factors that complicate if not frustrate these objectives when it comes to environmental tribunals. These include the following:

- some tribunals have become very “court-like:” although procedures and the rules of evidence may be relaxed when compared to court, to the average unrepresented citizen it is a very formal process with lawyers frequently bringing confusing arguments about pre-hearing matters, procedural motions at the hearing, and arguments about the admissibility of evidence, etc.;
- environmental regulations are often quite complex, and the citizen must either be prepared to face regulators, government lawyers and industry lawyers at that level, or retain legal representation themselves, which is costly;
- environmental issues frequently require expert opinion evidence, and even where the citizen may be correct on the facts, or justified in refuting factual claims or assumptions, retaining the experts who are qualified to provide expert evidence that can effectively counter that of government or industry employees and consultants can be very costly;
- environmental tribunal hearings can be quite lengthy, and are typically held during the work

⁶⁹ See Chris Tollefson, Darlene Gilliland & Jerry DeMarco, “Towards a Costs Jurisprudence in Public Interest Litigation” [2004] 83 *Can. Bar Rev.* 473; C. Tollefson, “Costs and the Public Interest Litigant: *Okanagan Indian Band and Beyond*” 19 *C.J.A.L.P.* 39; and C. Tollefson, “Costs in Public Interest Litigation: Recent Developments and Future Directions” (2009) 35 *Advocates Quarterly* 181. 1

⁷⁰ [EAB Procedure Manual](#), p.45; [FAC Procedure Manual](#), pp.37-38.

week, requiring a considerable commitment of time away from regular employment or running a business, or using vacation time. Where the citizen is able to retain legal and expert services, the lack of control over the length of the hearing (e.g. how long other parties may wish to cross-examine their witnesses, etc.) can add enormously to the costs;

- many environmental matters involve multiple players and are multi-layered disputes – it's not just about a simple decision of an agency official, such as entitlement to employment insurance, but often involves the rights and potential profits of a company and its workers, and frequently will have a history involving multiple agencies of government, making environmental hearings more complicated than those of many other tribunals; and
- a hearing on a complex matter can easily cost thousands or tens of thousands of dollars, and there are very few sources of funding available to the citizen or public interest group. Bake sales and garage sales cannot come close to funding a typical environmental hearing.⁷¹

As shown in Table 4, only three of BC's environmental tribunals are empowered to make award costs that could help public interest groups bring meritorious appeals and indemnify them for their legal fees and disbursements. The Environmental Appeal Board and Forest Appeals Commission have very similar discretionary authority to do so, but only award costs in exceptional circumstances or by consent.⁷² There

71 The main source in BC is the Environmental Dispute Resolution Fund of West Coast Environmental Law, which is considered a partial pro bono program that will fund pre-approved applications within certain policy limits. See <http://wcel.org/our-work/environmental-dispute-resolution-fund/>.

72 Since the EAB acquired the jurisdiction to award costs on July 28, 1997, one application for costs has been granted, and three have been granted in part. In two of the cases where costs were granted in part, it was by the parties' consent: in one case the respondent agreed to pay certain costs to the appellant in relation to expert witnesses (Appeal nos. 2007-EMA-008(a) & 2007-EMA-004(a), decision issued on Nov. 5, 2008); in the other case, one appellant (Northwood/Canfor) agreed to pay certain costs to some other appellants in relation to an expert witness (Appeal Nos. 99-WAS-06/08(d), 99-WAS-11/12/13(d), 00-WAS-01(d), decision issued on April 25, 2002). In the third case where costs were granted in part, the Board granted the third party/permit holder's request for costs against the appellant (Appeal No. 2002-HEA-015, decision issued on January 31, 2003). In the case where costs were granted in full, the Board granted the respondent's application for costs against the appellant (Appeal no. 2000-WAS-003(a), decision issued July 11, 2000), because the appellant failed to appear at the

are few decisions addressing costs, and we assume that there may be an underlying assumption that the denial of cost applications is seen as the *quid pro quo* for the policy that costs will not normally be awarded against unsuccessful parties.

The third tribunal that has jurisdiction to award costs is the Utilities Commission, and it does award costs on a discretionary basis. The Utilities Commission grants standing to diverse citizen interest groups in its public hearings, and costs are awarded after the hearing according to the panel's determination of the value of the evidence and argument provided by the participant. The BCUC has adopted Participant Assistance/Cost Award Guidelines,⁷³ and is the only tribunal discussed in this paper to have such guidelines. The Commission staff will vet proposals for costs against approved guidelines in advance of participation at a hearing, but they are not binding on the panel. This has been problematic for environmental groups in the past where the panel has not agreed with Commission staff, and funded only a small portion of the vetted budget.⁷⁴

hearing despite receiving notice of the hearing and confirming that it would attend.

73 See http://www.bcuc.com/Documents/Guidelines/2007/DOC_5014_G-72-07_PACA_2007_Guidelines.pdf

74 See [Sierra Club et al. v. BC Utilities Commission](#), 2008 BCCA 98.

Costs Provisions for BC Tribunals

Tribunal	Legislation	Costs Provisions
Environmental Appeal Board	<p><i>Environmental Management Act</i>, s.95</p> <p><i>Integrated Pest Management Act</i>, s.14(6)</p> <p><i>Water Act</i>, s.92(6)</p> <p><i>Wildlife Act</i>, s.101.1(3)</p> <p>Forthcoming <i>Greenhouse Gas Reduction Acts</i>.</p>	<p>EAB may require any party to pay all or part of the costs of another party;</p> <p>Where the conduct of an appellant has been frivolous, vexatious or abusive, the EAB may require the appellant to pay the EAB's expenses;</p> <p>The EAB may require an appellant to provide security for the anticipated respondents' costs, and appeal board expenses, in advance of a hearing.</p> <p>The EAB has not adopted the civil court rule that the loser pays the winner's costs. However, if costs are to be awarded its policy is to determine costs on the basis of Appendix B of the <i>B.C. Supreme Court Rules</i>.</p>
Forest Appeals Commission	<p><i>Forest Act</i>, s.149(4)</p> <p><i>Range Act</i>, s.71(3)</p> <p><i>Forest and Range Practices Act</i>, s.84(3)</p> <p><i>Private Managed Forest Land Act</i>, s.33(15)</p> <p><i>Wildfire Act</i>, s.41(2)</p>	<p>In <i>Forest Act</i> appeals, the FAC may require any party to pay "any or all of the <u>actual</u> costs in respect of the appeal."</p> <p>In <i>Range Act</i>, <i>Forest and Range Practices Act</i>, <i>Private Managed Forest Land Act</i> and <i>Wildfire Act</i> appeals the FAC may require any party or <u>intervener</u> to pay "another party or intervener any or all of the actual costs in respect of the appeal."</p>
Farm Industry Review Board	<p><i>Farm Practices (Right to Farm) Protection Act</i></p>	<p>The BCFIRB does not have the authority to award costs to a complainant or farm operation.</p>
Agricultural Land Commission	<p><i>Agricultural Land Commission Act</i>, ss.13, 52, 55</p>	<p>The ALC does not have the authority to award costs in relation to appeals, as s.47 of the <i>Administrative Tribunals Act</i> is not referenced in s.55(5) of the <i>ALC Act</i>. A person who does not comply with an order is liable to the ALC for its costs. Each party bears their own costs in dispute resolution on community issues.</p>
Utilities Commission	<p><i>Utilities Commission Act</i>, s.118</p>	<p>The BCUC "may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding." The Commission has adopted guidelines for awarding such costs. Costs are regularly ordered to be paid by the utility involved in a proceeding to other participants where the Commission considers a participant has addressed material issues and made a worthwhile contribution. Such costs, though borne by the utility in the first instance, are customarily passed on to the ratepayers. The Commission makes its costs decisions at the conclusion of a hearing.</p>

Mediation and Arbitration Board	<i>Petroleum and Natural Gas Act</i> , s.30	The MAB does not have the authority to award costs in relation to a mediation or arbitration, but if a landowner does not cooperate with an order, it may deduct the oil/gas company's cost of obtaining entry from the compensation payable to the land owner.
Oil and Gas Commission	<i>Oil and Gas Commission Act</i>	Neither the OGC nor its Advisory Committee has the authority to award costs in relation to reconsideration or dispute resolution respecting authorizations for oil and gas development on private land.
Oil and Gas Appeals Tribunal	<i>Oil and Gas Activities Act, 2008</i>	Once established, the OGAT will not have the authority to award costs in relation to appeals unless the <i>Oil and Gas Activities Act</i> is amended.

Table 4

Other Provinces

A former chair of the Ontario Environmental Assessment Board has commented on the “imbalance and inequality between well-funded proponents (both in the private and public sectors) and the ordinary citizen.” Michael Jeffery, QC argues that:

Where financial assistance is forthcoming through an award of costs, it is too late in the process to enable the citizen intervenor to properly prepare for environmental litigation and, for the most part, renders the participation ineffective and often meaningless. The real loss to the citizenry at large, however, is the generally poor quality of the environmental decisions that result when the decision-maker is deprived of evidence obtained from parties other than the proponent.

The inability of parties in opposition to effectively present their case seriously undermines the concept of public participation as well as the integrity of the entire decision-making process. There is little doubt in this writer's mind that the quality of environmental decision-making is greatly enhanced where all of the relevant evidence is canvassed at a hearing, not just that adduced by the proponent, for the very nature of an adversarial proceeding guarantees that a party seeking approval will inevitably attempt to present the evidence in the most favorable light.⁷⁵

The Ontario Environmental Review Tribunal has developed rules on costs with the intent of providing “consistency and predictability in the awarding of

⁷⁵ Michael I. Jeffery, “Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back Into the Picture” (2002) 19 *Ariz. J. Int'l & Comp. L.* 643 at 676, as cited in Chiasson *et al*, note 78.

costs by outlining relevant principles and evaluation criteria.” Rule 216 sets out 11 criteria by which the tribunal measures “responsible participation.” Most of these would seem to apply after or near the conclusion of the hearing, and Rule 211 states that “In most cases, the Tribunal will not decide issues of costs until the decision on the overall substance of the proceeding is released.” Rule 221 allows recovery of legal fees of between \$80 (articling students) and \$210 (> 10 years experience) per hour, and consulting fees of between \$50 (technician) and \$210 (> 10 years experience) plus disbursements.⁷⁶

The Alberta Environmental Appeals Board has authority to “award costs of and incidental to any proceedings before it on a final or interim basis.”⁷⁷ An application for interim costs may be made “at any time prior to the close of a hearing.” This allows a participant to receive costs in advance of a hearing. In reviewing applications the Board considers:

- a) whether the submission of the party will contribute to a mediation meeting or the hearing of the appeal;
- b) whether the party has a clear proposal for the interim costs;
- c) whether the party has demonstrated a need for the interim costs;
- d) whether the party has made an adequate attempt to use other funding sources;

⁷⁶ See Rules 204 through 223, on pages 34-38 of *Ontario Environmental Rights Tribunals Rules of Practice* http://www.ert.gov.on.ca/files/Rules_of_Practice_Nov_15_2007.pdf.

⁷⁷ See section 96 of the *Environmental Protection and Enhancement Act*, RSA 2000, c.12.

- e) whether the party has attempted to consolidate common issues or resources with other parties;
- f) any further criteria the Board considers appropriate.⁷⁸

An award of interim costs is subject to a redetermination in an award of final costs. A 2006 study criticized the Alberta Board for seldom awarding interim cost applications, and noted that final cost awards were limited to seven out of 26 applications between 1993 and 2004.⁷⁹ It pointed to the more generous cost policy of what is now the Alberta Energy Resources and Conservation Board (ERCB), which allows parties to recover costs that are incurred prior to the hearing itself. The ERCB has an extensive costs directive that provides legal fees of between \$140 (for articling students) and \$350 per hour (for more than 12 years experience), and consulting, analysts and expert fees of between \$120 and \$270 per hour.⁸⁰

While the EAB may order that costs be paid by any party to the appeal or by the EAB itself, in practice the

EAB has only awarded costs against industry.⁸¹ Where the Alberta EAB has awarded costs it stated that:

In the Board's view, financial assistance to enable the retention of experienced legal counsel may help to redress the imbalance of resources in these circumstances and contribute to the efficient functioning of the appeal process set out under the Act – all of which ultimately assists appellants, the Board, the public, and the approval holder whose approvals are under appeal.⁸²

And that:

The Board believes that it should decide requests for costs with the primary objectives of making the appeal process a meaningful “opportunity” under the Act for public participation, to help enable citizens to fulfill their individual “responsibility” for protecting the environment, and to empower citizens in order to promote sustainable development.⁸³

⁷⁸ See section 19 of the [Environmental Appeal Board Regulation](#), Alta. Reg. 114/1993.

⁷⁹ Cindy Chiasson and Jodie Hierlmeier, “Public Access to Environmental Appeals: A Review and Assessment of Alberta’s Environmental Appeals Board,” Environmental Law Centre, April 2006, p.63.

⁸⁰ ERCB Directive 031, March 12, 2009 at <http://www.ercb.ca/docs/documents/directives/directive031.pdf>.

⁸¹ Cindy Chiasson and Jodie Hierlmeier, “Public Access to Environmental Appeals: A Review and Assessment of Alberta’s Environmental Appeals Board,” Environmental Law Centre, April 2006, p.63

⁸² Costs Decision re: *Kievit et al.* (12 November 2002) Appeal Nos. 01-097, 098 and 101-CD at para. 52.

⁸³ Cost Decision #2 re: *The City of Calgary (Fay Ash)* (2 July 1998) Appeal No. 97-032-C-2 at para. 12.

7. Different Approaches to Dispute Resolution: Tribunal Powers and Procedures

The environmental tribunals described in Section 2 differ both in their mandates and in the means by which they exercise their duties. Insofar as they have been designed to serve different purposes, one would not expect them to carry out their mandates in an identical manner, even where they share the same broad objective of resolving disputes and providing accountability for environmental decision-making. However, a survey of the procedures and methods adopted by environmental tribunals in BC serves as a “gap analysis” of the extent to which British Columbia is availing itself of the tools available for environmental dispute resolution.

There are three main approaches to dispute resolution in BC’s environmental tribunal system:

Adversarial/Adjudicative/Arbitration: some tribunals, such as the Environmental Appeal Board and Forest Appeals Commission, primarily or exclusively sit as quasi-judicial tribunals that are very court-like in their processes. These tribunals typically expect the participants to fully define the grounds for appeal and muster the evidence necessary to prove their case, but have greater tolerance for irregularities when parties are not represented by legal counsel as compared to the court system. The tribunal procedures are based on adversarial process, but are more flexible than court rules. We include binding arbitration in this category. Some tribunals, such as the BC Farm Industry Review Board, combine approaches, undertaking the adjudicative role only after mediation has proven unsuccessful.

Inquiry/Investigative: some tribunals, such as the Forest Practices Board, exercise their mandate by carrying out investigations. A member of the public may complain to the tribunal about the impacts of certain activities on public land, and tribunal staff has powers to investigate, enter land and demand documents, to aid the board in making findings of fact, possibly followed by recommendations to an agency

(in the case of the FPB), or enforcement measures (in the case of the Private Management Forest Land Council). The BC Utilities Commission is inquiry-based in that it holds public hearings on matters that the Commission must decide, inviting stakeholders to provide evidence and perspective on the matters before it. While the BCUC process bears some elements of adversarial process, as witnesses give evidence under oath and may be cross-examined, the matters are defined by the *Utilities Commission Act*, rather than the parties appearing before it. This category applies to tribunals that have the authority (or duty) to initiate their own fact-finding in order to come to a decision or make a recommendation.⁸⁴ The Farm Industry Review Board also has inquiry powers related to its mandate over farm practices that allow it to “study, report on, and make recommendations concerning, any matter related to farm practices” on its own initiative or at the request of a local government.⁸⁵

Problem Solving/Mediation: Another approach to resolving environmental disputes is to explore ways in which legitimate interests can be accommodated through formal or informal dispute resolution procedures. Four tribunals have the express authority of the Legislature to engage in dispute resolution: the Oil and Gas Commission, Mediation and Arbitration Board, BC Farm Industry Review Board and the Utilities Commission.

- The *Oil and Gas Commission Act* requires that “The commission must encourage the use of consensual alternative dispute resolution methods for the purpose of resolving disputes relating to the commission’s discretion, functions and duties.”⁸⁶

⁸⁴ For example, see section 24 of the *Utilities Commission Act*.

⁸⁵ See section 11 of the *Farm Practices (Right to Farm) Protection Act*.

⁸⁶ See ss.8-9 of the *Oil and Gas Commission Act*, S.B.C.1998, c.39. We note, however, that these provisions did not make it into the *Oil and Gas Activities Act* which will replace this *Act*, but have been advised by OGC staff that its intent is to continue using dispute resolution procedures between oil and gas companies and land owners.

- The Mediation and Arbitration Board must attempt to mediate disputes between land owners and oil and gas companies, but if it is determined that a dispute cannot be resolved the mediator may order entry onto the land and fix the amount of compensation. If the land owner does not agree with the order, it proceeds to arbitration.⁸⁷
- The BC Farm Industry Review Board has a more general authority that allows the chair to attempt to settle complaints about farm practices, failing which the matter proceeds to a formal hearing of a panel of the board.⁸⁸
- The Utilities Commission has the authority under s.11 of the *Administrative Tribunals Act* to determine its own rules and procedures, and adopted a ‘negotiated settlement process’ in 1994 to reduce the need for hearings, or to focus the issues and reduce hearing length.⁸⁹

To some degree other tribunals attempt to resolve differences between parties in a less formal way or without express authority. For example, the Forest Practices Board “must deal with” complaints, and its policy is to attempt to help resolve a complaint prior to undertaking a formal investigation.⁹⁰ The Environmental Appeal Board “encourages parties to resolve the issues underlying the appeal at any time in the appeal process” and states that it uses early screening, pre-hearing conferences and mediation where parties consent. Staff report that about 50% of the appeals filed before the Environmental Appeal Board and Forest Appeals Commission are resolved without the need for a full oral hearing. Resolved disputes are usually confirmed by a formal consent order. However, neither the EAB nor the FAC have a formal mediation process.⁹¹

The three broad approaches outlined above all have an important place in the resolution of environmental disputes. A tribunal with *investigative powers* can excel in fact-finding and, as such, is not completely reliant

upon the ability of parties or complainants to place the facts before them. Tribunals using *mediation* can facilitate dispute resolution efficiently and in some ways more effectively than adjudication because the parties have greater “buy-in” to the end result, and may have come to better understand each others’ interests through the process. On the other hand, where resolution is not suitable or possible, *adjudicative tribunals* provide the necessary finality and rigorous scrutiny of the adversarial system.

Some commentators have noted that there are drawbacks to rights-based arbitral approaches when it comes to environmental and other public interest disputes. Cautioning against the “judicialization” of administrative tribunals, Judith McCormack, a former chair of the Ontario Labour Relations Board, has argued:

Tribunals that have gone down the judicialization road to any degree then often find themselves inheriting some of the very problems they were designed to correct... Legal concepts may also be particularly ill-suited to areas involving collective rights such as labour relations, or the kind of public interests at play in environmental or planning issues... the common law is “uncompromisingly individualistic”. Importing common law notions into public interest or collective rights disputes can be incongruous. Procedural problems can also arise in the case of multi-party, polycentric disputes such as environmental or planning issues where the public interest component can mean that an appropriate process is in conflict with the in personam orientation of much legal procedure.⁹²

It is also important to recognize that, although the three broad approaches are not necessarily mutually exclusive, some precautions are required if a single tribunal is to undertake more than one. For example, if an adjudicative tribunal were to exercise investigative or mediation powers, it would have to do so in a manner that did not compromise its objectivity, neutrality, fairness, and due process. The BCUC’s Negotiated Settlement Process guidelines acknowledge this by stating:

Negotiated settlements can offer significant

87 See ss.18-20 of the *Petroleum and Natural Gas Act*, R.S.B.C.1996, c.361.

88 See ss.4-6 of the *Farm Practices (Right to Farm) Protection Act*, R.S.B.C.1996, c.131.

89 See http://www.b cuc.com/Documents/Guidelines/NSPGuidelines_Jan2001.pdf

90 See s.123 of the *Forest and Range Practices Act*, S.B.C.2002, c.69 and the FPB [Complaint Investigation Reference Manual](#), p.8.

91 See the [EAB Procedure Manual](#), p.18. A recent EAB decision references an attempt by the Board to mediate a settlement in [City of Cranbrook v. Regional Waste Manager et al.](#)

92 Judith McCormack, “Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change,” (1995), 59 Sask. L. Rev. 385.

benefits to the regulatory process; however, realizing those benefits, while maintaining fundamental principles of natural justice and fairness, requires that certain principles and process attributes be present, including the appropriate participation of Commission staff. If participants are not satisfied with a negotiated settlement process they are free, at any time, to choose not to participate and to use the traditional hearing process to resolve their concerns. The flexible nature of the negotiated settlement process allows it to adapt to problems

as they arise.

A negotiated settlement process may not always be appropriate or successful. The first question to be considered by potential participants is what, if any, of the issues are amenable to the negotiated settlement process.⁹³

93 BCUC [Negotiated Settlement Process Guidelines](#), pp.1-2.

Dispute Resolution Approaches of BC Environmental Tribunals

Tribunal	Adversarial / Adjudicative	Inquiry / Investigative	Problem Solving / Mediation
EAB	✓		?
FAC	✓		
BCFIRB	✓	✓	✓
BCUC		✓	✓
FPB		✓	?
PFLMC		✓	
ALC (See footnote 94 below)	✓		
OGC			✓
MAB	✓		✓
OGAT	✓		

Table 5

94 ALC: We are focusing here on the ALC's appeal function under s. 55 of the *Agricultural Land Commission Act*, S.B.C. 2002, c.36.

Assuming then that all three approaches play a valuable role in environmental dispute resolution, what does the above table tell us about the capacity of current tribunal system in BC to employ these techniques or processes? Our observations are as follows:

1. **Energy related issues:** the BCUC process is inclusive and well-equipped for fact-finding and dispute resolution, provided that the Commission duly incorporates environmental issues into its processes and consideration of the public interest;
2. **Agricultural Land Use and Farm Practices:** The BCFIRB has an appropriate mandate and procedures to resolve disputes between farm operations and neighbouring land owners, in cases where environmentally poor farm practices are not found to be "normal." However, the ALC seems to be less inclusive and less equipped to undertake fact-finding and dispute resolution on environmental matters (although this might also have to do with a weakness in its mandate for environmental protection);

3. **Forestry:** Environmental disputes arising from forest practices on public land are well-served by the mandate of the FPB to investigate complaints and make recommendations, but only to the extent that its recommendations are followed by government. For forest practices on private managed forest land, the PMFLC has a complaints system, but it is limited to non-compliance with a much narrower set of rules. Adjudication of disputes is available through the FAC, but deregulation and narrow standing rules greatly diminish the utility of the FAC tribunal process for resolving environmental disputes. No tribunal has a clear mandate for dispute resolution, which is unfortunate because forest practices and planning generally are quite flexible and capable of adaptation. It must also be considered that many forestry-related disputes are about land use, not just operational practices, and there is no tribunal with a mandate to address those critical land use issues.

4. **Pollution, Pesticides, Wildlife & Water Issues:**

Dispute resolution for these diverse and important matters is limited to the EAB's adjudicative process, which with the exception of permits still required under the *Environmental Management Act*, is further limited by the deregulation of approvals and narrow standing rules. What is particularly lacking is a tribunal with fact-finding or inquiry powers to receive and investigate complaints, such as the Forest Practices Board for forest practices, and a venue for mediation or other means of resolving environmental disputes. This is a major gap in the administrative justice system.

5. **Oil and Gas Activities:** The Mediation and Arbitration Board has the necessary combination of mediation and arbitration powers to address surface lease and compensation disputes between land owners and companies with authorizations to carry out exploration and development. However, it is tightly circumscribed in its ability to resolve the environmental aspects of these disputes by the *Petroleum and Natural Gas Act* and has no mandate for public interest issues. While the OGC and its advisory committee appear to have a strong mandate for alternative dispute resolution, public

dissatisfaction with outcomes has led to pending reform of the current system and the establishment of the Oil and Gas Appeals Tribunal, which has a solely adjudicative function and narrower standing rules. It appears that environmental disputes relating to oil and gas activities will therefore also lack independent inquiry and investigation, and a venue for mediation or other dispute resolution, other than what is available through the OGC itself.

There are significant inconsistencies and gaps in the ability of BC's environmental tribunals to utilize the full array of modern dispute resolution strategies. However, what this analysis does not take into account is the extent to which government agencies themselves may or may not do so as part of their approval processes. While we do not discount the fact that agencies may employ fact-finding and dispute resolution techniques in the course of administering their legislation, we do not view this as an appropriate proxy for the accountability provided by independent administrative tribunals, for the following reasons.

- To the extent that it happens, it is not normally based on an agency's legislative mandate or duty to protect the environment, and as a result is quite inconsistently applied.
- Many of the relevant laws do not expressly acknowledge the importance of minimizing or mitigating environmental impacts, or the legitimacy of citizen and non-government organization public interest perspectives.
- Many regulatory agencies develop a close relationship with the industries they licence, whom they consider to be their clients, rather than the general public. There is a power imbalance between the regulated sector and the average citizen, as the public is not seen to have any 'rights' that need to be accommodated.
- Agency efforts are highly variable on contingencies at many levels – the actual or perceived wishes of the government in power, the minister, deputy minister or other officials, and their assessment of the importance or sophistication of the person or organization raising the environmental issue.

- Resource agencies have an inherent conflict of interest at times due to their mandate to grant resource rights for economic development and government revenue. This can lead to bias and clouded judgment when it comes to environmental fact-finding.
- Often even the Ministry of Environment has no statutory power, and finds itself outside the decision-making process, along with other stakeholders.
- Often governmental agencies are parties to the dispute and not disinterested, neutral bystanders that come with the preconditions necessary for successful dispute resolution.
- Some governmental agencies have little discretionary authority to withhold approvals, or to specify terms and conditions that might resolve environmental disputes, as a result of deregulation.⁹⁵

Non-Adversarial Approaches to Environmental Dispute Resolution

We would like to elaborate upon the discussion of non-adversarial approaches to environmental dispute resolution, such as mediation and other approaches sometimes referred to as “alternative” or “appropriate” dispute resolution (ADR), because it is here that BC’s environmental tribunals seem to be particularly lacking compared to other jurisdictions, and even to other types of tribunals in BC. According to one scholar who examined the use of mediation by environmental tribunals in Canada in 2001:

Although interest in and use of ADR has grown significantly in the past decade, it is still in a relatively early stage of development, especially in Canadian administrative law, when contrasted against the well established use of ADR in the United States. Nonetheless, mediation is currently being utilized by 8 out of 13 Canadian environmental administrative tribunals... Only the tribunals in British Columbia, P.E.I, Saskatchewan, New Brunswick and Newfoundland do not employ mediation as an ADR technique.⁹⁶

The “well established use” of ADR for resolution of environmental disputes in the U.S. goes back at least three decades to the 1970s. There is extensive multi-disciplinary literature on the benefits and challenges of various dispute resolution techniques across a wide range of environmental issues and players. The American Bar Association’s (ABA) publication “Environmental Dispute Resolution: An Anthology of Practical Solutions” identified seven attributes that are common to almost all environmental disputes:

1. Subject matter that crosses geographic and professional borders;
2. Optimum solutions outside the scope of judicial reach;
3. Scientific and/or economic uncertainty;
4. Cross-cultural issues and/or important values conflicts;
5. Multiparty dynamics;
6. Involvement of significant stakeholders outside the scope of any judicial proceedings; and
7. Extremely large economic stakes.

We would add that environmental disputes often involve prediction of future impacts (as opposed to calculations of past damages), and complex risk assessments that require the weighing of the uncertainties inherent in the scientific reasoning process against the precautionary principle. They often pit private interests (e.g. the right to develop a property or extract a resource) against the public interest in a shared environmental medium (e.g. land, air, water). Despite the complexity and financial stakes in environmental disputes, the ABA found that “conflict management and dispute resolution are no longer regarded solely as cost centers; they are now seen as potential sources of seminal creativity, solutions, and improved relationships as well.” They argue that jurisdictions that are able to employ environmental

⁹⁵ For example, see s.16 of the *Forest and Range Practices Act*.

⁹⁶ Ron Goltz, [Amicable Dispute Resolution: The Mediation Alternative and](#)

[the Alberta Environmental Appeal Board](#), 2000.

dispute resolution effectively to manage the tension between economic and environmental objectives will have a significant advantage over those that are not able to meet this challenge.⁹⁷

Although the Canadian experience in environmental dispute resolution is more recent and less extensive, significant depth of experience and thoughtful analysis has come out of the practice of tribunals particularly in Alberta, Ontario and Quebec. For example, the Alberta Environmental Appeals Board both mediates and adjudicates disputes. The Ontario Environmental Review Tribunal uses all three methods of dispute resolution – adjudicative, investigative and mediation – in various contexts. The authors of a 1999 study that surveyed the use of mediation by environmental tribunals across Canada considered the practice at that time to be somewhat experimental compared to other jurisdictions, and recommended a model law to better ground and legitimize the practice of ADR by tribunals.⁹⁸ This raises the question of whether it is necessary or desirable for environmental tribunals to have specific authority or guidance for use of ADR in enabling legislation, even though they generally are “masters of their own procedures.”

Arguments in favour of statutory authority for ADR have been that: 1) there is a risk of a tribunal acting outside its jurisdiction by implementing such reforms unilaterally; 2) legislation lends legitimacy to ADR and results in a more consistent, fairer, better informed approach, and 3) it is necessary for enforcement of mediated solutions. Arguments against statutory authority include the concern that overly detailed provisions “tie the hands” of administrative tribunals when it comes to process design of their own practices and procedures, and could be counter-productive given that one of the advantages of mediation is the opportunity to tailor its application to each dispute.

In 1995 Swanson argued that ADR-specific legislation should deal with issues of common concern such as:

- a) confidentiality and privilege;

- b) mediator liability;
- c) preservation of pre-existing legal rights;
- d) subsequent right of legal action and standards for judicial review;
- e) minimum qualification criteria or standards for mediators; and
- f) participant rights; for example, the right to funding and the right to information.⁹⁹

⁹⁷ Ann L. McNaughton, Jay G. Martin, editors, “Environmental Dispute Resolution: An Anthology of Practical Solutions,” American Bar Association, 2002.

⁹⁸ Matthew Taylor, Patrick Field, Lawrence Susskind, and William Tilleman, “Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices”, *Dalhousie Law Journal* (Fall 1999), Vol. 22, No. 2, at p.51.

⁹⁹ Elizabeth Swanson, “Alternative Dispute Resolution and Environmental Conflict: The Case for Law Reform,” (1995) 34 *Alta. L. Rev.* 267.

Examples of Canadian Environmental Legislation & Alternative Dispute Resolution

<p><i>Canadian Environmental Assessment Act, ss.29-32</i></p>	<p>All or part of an environmental assessment can be referred to a mediator;</p> <p>A project may not be referred to a mediator unless interested parties have been identified and are willing to participate;</p> <p>A mediation may be terminated at any time by the Minister of the Environment if the Minister or the mediator determines that it is unlikely to result in a result acceptable to all the participants;</p> <p>The selection of a mediator is left to the Minister of the Environment in consultation with the responsible agency and all parties who are willing to participate in the mediation;</p> <p>Additional parties may be added to a mediation at any time, with the permission of the mediator; and</p> <p>Upon the conclusion of a mediation, the mediator must submit a report to the Minister of the Environment and to the responsible agency</p>
<p><i>Alberta's Environmental Appeal Board Regulation (ss.11-13) & EAB Rules of Practice (Rules 16-18)</i></p>	<p>Prior to determining the issues on appeal and whether to proceed, the Board may schedule a mediation meeting at which all Parties may make representations.</p> <p>The Board will set the terms of reference for the mediation meeting in advance and will notify all Parties of the terms of reference in writing.</p>
<p><i>Manitoba's Environment Act</i></p>	<p>The Clean Environment Commission may, upon the request of the Environment Minister, "act as a mediator between two or more parties to an environmental dispute..."</p>
<p><i>Ontario's Environmental Assessment Act, s.8;</i></p> <p><i>Environmental Bill of Rights, ss.24, 34;</i></p> <p><i>Rules of Practice and Practice Directions for the Environmental Review Tribunal</i></p>	<p>The Minister may appoint one or more persons to act as mediators who shall endeavour to resolve such matters as may be identified by the Minister as being in dispute or of concern in connection with the undertaking.</p> <p>A minister may appoint a mediator to assist in the resolution of issues related to a proposal for an instrument.</p> <p>Mediation may be held for the purpose of attempting to reach a settlement or simplification of the issues in accordance with Rules 154-159, and the Practice Direction for Tribunal Appointed Mediators.</p>
<p><i>Nova Scotia Environment Act, s.14</i></p>	<p>For the purpose of resolving a dispute, the Minister may refer a matter to a form of alternate dispute resolution, including but not limited to conciliation, negotiation or arbitration;</p> <p>...the Minister, in consultation with the affected parties and using criteria prescribed or adopted by the Department, shall determine which form of dispute resolution is most appropriate.</p> <p>Any form of alternate dispute resolution used shall strive to achieve consensus to resolve procedural and substantive issues throughout the process.</p> <p>Where a form of alternate dispute resolution is being used...and where an independent party or neutral third party has been chosen to facilitate, mediate or arbitrate, at the conclusion of the process that person shall file a report...whether or not the dispute was resolved.</p>

<i>Newfoundland’s Environmental Protection Act, s.105</i>	Minister may enter into alternative dispute resolution agreement as part of a compliance agreement.
<i>Northwest Territories’ Environmental Protection Act (s.2.2(f))</i>	Minister may appoint a mediator to mediate disputes upon the written request of a party;
<i>Nunavut’s Environmental Protection Act</i>	Upon written request of a party to a dispute involving a matter arising under this Act, the Minister may appoint a mediator, establish the term of office, remuneration and terms of reference of the mediator to mediate the dispute.
<i>Yukon’s Environment Act, ss.21-23.</i>	Minister may appoint a mediator to resolve complaints about the exercise of discretionary powers The Yukon Council on the Economy and the Environment may recommend mediation or other dispute resolution methods to the Minister

Table 6

British Columbia has highly qualified practitioners of ADR with extensive experience in other fields, such as family law, labour relations, residential tenancy, human rights, commercial and civil disputes. In the environmental field, ADR proved reasonably effective in the land use planning of the 1990s and early in the present decade to develop broad consensus with multiple parties resulting in land and resource management plans across much of the province. In the natural resources sector ADR is extensively used, particularly in forestry to resolve contractual disputes between forest companies and their contractors.¹⁰⁰

The Ministry of Attorney General has researched the utility of greater use of dispute resolution by administrative tribunals. The 2002 White Paper noted that:

Although most administrative tribunals were intended to offer an alternative to formal, complicated and costly court processes, many are experiencing problems that parallel those in the court system. In both forums, cost, delay and procedural complexity can impede public access. The adoption of processes for the early, consensual resolution of disputes has come to be seen as a significant component in enhancing public access to justice and improving the efficiency of administrative tribunals.

...

In the absence of readily available alternatives for handling demanding caseloads, many tribunals have responded to the pressures and tensions of modern life by adopting court-

like practices and procedures. The so-called judicialization of administrative tribunals has tended to undermine the core values of the administrative justice system itself, established, as it was, for the purpose of providing accessible, informal and efficient mechanisms for decision making and dispute resolution...¹⁰¹

More recently, the Administrative Justice Office and Dispute Resolution Office of the Attorney General ministry have carried out a “BC Tribunal Dispute Resolution Needs Assessment Project,” which produced several papers on incorporating non-adversarial dispute resolution into administrative tribunal processes. The most recent of these is a “Guide to Implementing Dispute Resolution into Tribunal Processes,” which argues that these techniques offer the following advantages:

- improved access to justice so that citizens can solve their problems more simply, quicker and at less cost;
- greater control over outcomes for the parties;
- streamlined procedures that result in savings of time and costs not only for the tribunal but for the users;
- a stronger perception of privacy and fairness;
- less stress, increased confidentiality and greater flexibility in crafting an appropriate outcome;
- preserves on-going relationships and fosters open, honest communication between the persons in dispute; and

¹⁰⁰ See Part 4 of the *Timber Harvesting Contract and Subcontracting Regulation under the Forest Act*.

¹⁰¹ “On Balance: Guiding Principles for Administrative Justice Reform in British Columbia,” Ministry of Attorney General, 2002, p.22, 39-40 @ http://www.gov.bc.ca/ajo/down/white_paper.pdf.

- parties are more likely to comply with the outcomes and carry out any obligations, when those outcomes reflect a mutually acceptable agreement, thereby eliminating or reducing the costs of enforcement or the need for judicial review.¹⁰²

With such strong policy and research support for dispute resolution residing within BC generally, and the Attorney General ministry in particular, it is puzzling that there has not been greater uptake of dispute resolution methods by environmental tribunals. Tribunals are justly protective of their independence, and the literature confirms that there are potential pitfalls and limitations to tribunals employing non-adversarial dispute resolution. However, there are many practical suggestions for addressing those potential difficulties through process design, such as building “firewalls” and confidentiality requirements between

¹⁰² See http://www.gov.bc.ca/ajo/download/DR_20Guide_final_version.pdf, pp.3-4.

those members responsible for dispute resolution and those who undertake adjudication if a matter does not settle.

While the above papers propose practical means for tribunals to incorporate dispute resolution into their appeal processes, there may be other options available. Our early consultations with members of the Canadian Bar Association’s ADR Section identified the option of carrying out ADR entirely outside of, and as an alternative to, a tribunal appeal process. We note that 37 qualified ADR practitioners on the BC Civil Mediator Roster claim “environmental” as an area of practice experience.

8. Appointments and Structure

A major advantage of administrative tribunals over courts is that their decisions can be enriched by the multi-disciplinary expertise of tribunal members. Diverse expertise may be particularly appropriate for environmental tribunals as compared to tribunals that hear more rights-oriented appeals, given the factually complex context of many environmental disputes. The *de novo* nature of some appeal hearings (which allows the tribunal to “re-decide” the matter afresh) makes it important that tribunals include experts who can apply professional judgment to the decision at hand.

BC’s environmental tribunals typically have a membership of Cabinet-appointed individuals with diverse backgrounds and experience relevant to the mandate of the tribunal, with a full-time chair and the remainder part-time members. Part-time board members may be retired or still in the work force, whose compensation reflects a ‘public service’ component to tribunal membership (\$400 per day for most environmental tribunals).¹⁰³

The tribunal will usually have staff (the numbers of which vary greatly from one tribunal to another) whose function varies according to the type of tribunal. For example, tribunals carrying out investigative functions may depend upon staff to do the bulk of the analytical, background, research and field or other support work for the board as a whole. Tribunals exercising an adjudicative function will have support services, but stricter rules limiting staff involvement to maintain the integrity of decision-making and to uphold the principles that only “the person who hears must decide the case” and *audi alteram partem* (the obligation to “hear the other side”). The chair is responsible for the overall management and operation of the tribunal and the organization and allocation of work among its members.¹⁰⁴

Much attention has been paid in recent years to the appointment process, out of concern that tribunal

members be properly qualified and untainted by partisan politics. There is a tension between the authority of Cabinet to appoint tribunal members and the vital independence of the tribunals who sit in review of government agency decisions. In BC the appointment process for administrative tribunals is overseen and facilitated by the Board Resourcing and Development Office (BRDO), which originally resided in the Office of the Premier but now is part of the Ministry of Finance. BRDO has developed appointment guidelines that aim to ensure tribunal appointments are “merit based,” which means that they are based on “an objective assessment of the fit between the skills and qualifications of the prospective candidate and the needs of the tribunal determined through a process that is transparent, consistent and proportional.”¹⁰⁵

There are several layers of involvement in the appointment of tribunal members: in addition to BRDO and the tribunal itself, candidates are vetted by the “host ministry” (the ministry from which a tribunal receives administrative, financial, policy or operational support), the “host minister” (the minister responsible for a tribunal’s enabling legislation) and, ultimately, the actual “appointing authority” decision-makers (i.e. Cabinet). Appointment decisions carry the potential to enhance or compromise a tribunal’s independence and credibility in this process; public confidence in the administrative justice system depends upon its sense that the appointment process is carried out with integrity and delivers members who are competent in their fields, open-minded and fair in their decision-making. Even though they do not ultimately have appointing authority, some tribunals will take the lead in advertising appointment opportunities, inviting interested and qualified individuals to apply, carrying out their own due diligence in reviewing applications, and forwarding a short list of candidates to BRDO and the host ministry and minister.¹⁰⁶

¹⁰³ Per diems are determined by the Treasury Board Directive for Appointees to Administrative Tribunals. The BCUC has a higher per diem than the other tribunals.

¹⁰⁴ See section 9 of the *Administrative Tribunals Act*.

¹⁰⁵ See <http://www.fin.gov.bc.ca/brdo/appoint/AdminTribGuid.pdf>, p.3.

¹⁰⁶ For an example of a recent EAB & FAC recruitment notice see http://www.fac.gov.bc.ca/recruitment/FAC_EAB_NOP_May_2009.pdf

While much attention has been paid to the procedure for appointments, very little has been focused on the larger issue of the merit of fixed-term appointments, or the length of the terms. Traditionally appointments have been for terms between two and four years. The *Administrative Tribunal Act* and *Administrative Tribunal Appointments and Administration Act* (which applies to the EAB and FAC) specify that tribunal chairs may be initially appointed for terms of three to five years, and may be reappointed for additional terms of up to five years. Board members may be initially appointed for two- to four-year terms, and reappointed for additional terms of up to five years. No rationale is provided for these terms other than the statement in the appointment guidelines that “Recognizing the professionalism and independent judgment required of tribunal members, appointments to administrative tribunals will be for fixed, renewable terms.”¹⁰⁷ But professionalism and independent judgment do not depend on fixed terms, and may perhaps be hampered by them. Despite these legal provisions, some tribunals have an unwritten policy that a member’s tenure should not exceed six years in total in order to encourage an influx of diverse approaches and ideas.

Taken together, these provisions have served environmental tribunals well for many years: there have been few public controversies that have resulted in a significant loss of confidence.¹⁰⁸ This was not always the case historically. At the same time, however, as with any system that requires “deliberative secrecy”¹⁰⁹ and independent decision-making, the public does not normally have a way to assess the tribunal system other than through its decisions. The present structure of the tribunal system could lead to the following difficulties:

- Appointment terms may be too short for a tribunal to truly develop long term expertise. As soon as tribunal members hone their competence and expertise, their appointments expire and the learning process begins again with new members. No one is there long enough for the tribunal to

develop longer term wisdom.

- A system of part-time members is fraught with potential difficulties. Members who are not retired must maintain a professional practice outside of their tribunal duties. This raises the potential for conflicts of interest, and while tribunals may develop guidelines and policies to address these, they sometimes narrowly define conflicts as arising from a personal, business or financial relationship to one of the parties in a proceeding. This does not address the larger, more systemic conflict that can arise if a tribunal member allows consideration of how his or her decision might be received in the industry or profession in which they continue to work to influence outcomes.
- The demands of a busy professional practice or business may compete for time devoted to tribunal duties, which when coupled with the modest compensation for tribunal duties, could result in delayed decision-making, frustrating the objective of providing speedier, simpler access to justice through the tribunal system.¹¹⁰
- Knowing that their initial appointments are up for review and possible re-appointment by the host ministry and minister could unduly influence some tribunal members.

We wish to make it clear that in raising these issues we are not challenging the integrity or professionalism of any particular tribunal members. Our interest is in the larger structural issues that will ensure the integrity of the environmental tribunal system. We do note however that some tribunals have taken considerable time to deliver decisions (one to three years). Also, there do not seem to be clear guideposts in the current merits-based system for addressing all of the issues that arise, such as what types of employment and business relationships should be avoided in tribunal appointments, for the purposes of public perception and confidence, regardless of an individual’s integrity and personal ability to wear different hats effectively.

107 See <http://www.fin.gov.bc.ca/brdo/appoint/AdminTribGuid.pdf>, p.5.

108 One exception would appear to be the lack of confidence that many land owners in northeast BC have in oil and gas related tribunals dealing with their surface rights.

109 This term is used by the Supreme Court of Canada to describe the ability of tribunals to confer with panel members and reach their decisions in private, as opposed to the American Idol approach.

110 While most cases are decided within a reasonable time following the close of a hearing or submissions, our review noted over 30 cases in which the EAB (25+) and FAC (6) took longer than 6 months to render a decision. Several of these took more than one year, with the longest taking 33 months. E.g. EAB decisions in *BC Rail*, *Houston Forest Products*, *Beazer East*, *Westcliff*, *Houweling Nurseries*, *Imperial Oil*, *Xats’all First Nation*, *Josette Weir*, *Anderson*, *Charlton*, *Dickson* and others. FAC decisions are *Kalesnikoff (2)*, *Weyerhaeuser*, *Beau West*, *Antonsen* and *Bullen*.

Where these questions inevitably lead is to consideration of whether tribunal members should be appointed with tenure or for longer terms, and on a full-time rather than part-time basis. This may not be appropriate for some tribunals with a small caseload. It might reduce the types of expertise that would be represented on a tribunal (assuming that fewer members would be appointed), and this would be a trade-off. An alternative might be the development of tribunal policies, or amendments to a tribunal's enabling legislation or the *Administrative Procedure Act*,

that address these concerns.

Some jurisdictions have circumscribed greater detail in tribunal appointment legislation. For example, Ontario's *Environmental Review Tribunal Act* specifies that "None of the members of the Tribunal shall be public servants employed under Part III of the *Public Service of Ontario Act, 2006* who work in the Ministry of the Environment."

9. Environmental Courts and Tribunals in Other Jurisdictions

...Access to information, public participation, and access to justice are frequently grouped together as key elements of effective environmental governance... Allowing the public and civil society to challenge acts and omissions by public authorities and corporations that violate national environmental laws can greatly enhance the strength of a country's environmental enforcement.

- UNITED NATIONS ENVIRONMENT PROGRAMME¹¹¹

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.

- ARTICLE 1, AARHUS CONVENTION¹¹²

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

- PRINCIPLE 10, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT¹¹³

111 UNEP [Manual on Compliance with and Enforcement of Multilateral Environmental Agreements](#), Guideline 32 and Guideline 41(i)

112 <http://www.unece.org/env/pp/documents/cep43e.pdf>

113 <http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163>

Internationally, in recent years, there has been much discussion of reforming legal institutions to better deliver “environmental justice.” Multi-lateral environmental agreements and international law conventions routinely affirm the importance of improving public involvement, incorporating precaution and reflecting duties to future generations into environmental decision-making. With climate change, species loss, drought, and unsustainable resource extraction on both land and sea, there is a prevailing sense that legal doctrines and institutions have not adapted quickly enough to address modern environmental realities at the global, national and local levels. The Environmental Justice Project in England noted that “Environmental law carries a responsibility to ensure justice not only for the individual citizen, but for the collective benefit in terms of protecting our environment – both now and for future generations.”¹¹⁴

The creation of specialized environmental courts and tribunals has become a common way for nations, states and even cities to address the need for accountability and fairness in the administration of environmental laws. Some jurisdictions (e.g. New Zealand and three Australian states) have established specialized courts with a judiciary dedicated to hearing environmental cases, while others follow tribunal models similar to ours in BC. Where specialized courts do not exist, some jurisdictions have opted to have a “green bench” of judges dedicated to hearing environmental cases.¹¹⁵

Although there clearly has been an increase in these tribunals over the last two decades, this trend began almost a century ago. Denmark established a Nature Protection Board as early as 1917, and Sweden's Water Court was created in 1918. Environmental tribunals

114 See [A Report by the Environmental Justice Project](#), p.16.

115 E.g. Netherlands, Finland, Thailand, Kenya Supreme Court, India and Bangladesh: See George (Rock) Pring and Catherine (Kitty) Pring, *Specialized Environmental Courts & Tribunals: Improved Access to Justice for Those Living in Poverty*, at <http://law.du.edu/documents/ect-study/ORIL-Article-FINAL.pdf> and Donald Kaniaru, “Environmental Tribunals as a Mechanism for Settling Disputes,” *Environmental Policy and Law*, 37/6 (2007) 459.

are becoming common not just in wealthy nations but in the developing world as well, many of which have very progressive mandates and rules.

A recent study published by the World Resources Institute surveyed over 80 such tribunals in 35 countries, and identified the following as the most common reasons for establishing environmental courts and tribunals (ECT's):¹¹⁶

1. **Efficiency:** Reduce decisional time.
2. **Economy:** Reduce costs for all concerned with more efficient handling of cases, aggressive case management, more efficient use of experts, and use of ADR.
3. **Expertise:** Increase decisional quality with judges who have more expertise and experience with complex environmental laws, technical-economic questions, and value-laden issues than general jurisdiction judges.
4. **Uniformity:** Increase consistency in the interpretation and application of environmental law across the jurisdiction and discourage forum shopping.
5. **Access to Justice:** Improve access to justice for business, government, and the public by having an open, identified forum to handle environmental complaints.
6. **Case Processing:** Improve case processing and reduce backlog of undecided cases in the general court system.
7. **Commitment:** Demonstrate government's commitment to protection of the environment, sustainable development, compliance with international treaties and agreements, etc., by creating a visible court symbolic of that commitment.
8. **Problem-Solving Approach:** Open up more flexible ways to solve environmental problems than the traditional adversary process – including alternative dispute resolution (ADR), collaborative planning and decision-making, hybrid civil-criminal prosecution, creative sentencing and enforcement options, court appointed special commissions, and facilitated settlement agreements. The “problem solving approach” (as opposed to the strict legalistic adjudication) can work better in some environmental cases, allowing judges to craft innovative solutions, focus on outcomes rather than outputs, take account of what is best for whole communities or the environment rather than just individual parties.
9. **Public Participation:** Encourage greater public participation and support for the decision-making process through more open standing, use of community expert committees, etc.
10. **Public Confidence:** Increase public confidence in the government's environmental and sustainable development efforts by having a transparent, effective, expert decisional body.
11. **Accountability:** Potential review by an independent ECT encourages government agencies to be more thorough, fair, and transparent in their decision-making.
12. **Prevent Marginalization:** Ensure that judicial resources will be dedicated to resolving environmental conflicts and that they will not be marginalized or pushed aside in favor of cases which are less time consuming and less complex.

Cross-jurisdictional comparative analysis is sometimes difficult due to differences in constitutions and legal systems. Many of the jurisdictions with ECTs are common law jurisdictions with a similar historic connection to the British legal system as British Columbia, but others are unitary rather than federal states, or civil rather than common law jurisdictions. We do not intend to carry out a comprehensive comparative analysis, but will simply survey practices in other jurisdictions to consider whether there are any lessons that British Columbia can learn when it comes to the issues discussed above.

¹¹⁶ George (Rock) Pring and Catherine (Kitty) Pring, “Greening Justice: Creating and Improving Environmental Courts and Tribunals,” The Access Initiative, World Resources Institute, 2010. See also George (Rock) Pring and Catherine (Kitty) Pring, *Specialized Environmental Courts & Tribunals: Improved Access to Justice for Those Living in Poverty*, online at <http://law.du.edu/documents/ect-study/ORIL-Article-FINAL.pdf>, pp.6-7.

1. Tribunal Mandates

While British Columbia has a number of tribunals, there are some notable mandate limitations as compared to other jurisdictions. Perhaps the three most notable areas are land use planning, environmental assessment and local government decisions.

Prince Edward Island's Regulatory and Appeal Commission notes that "...it is not uncommon for land use planning decisions to be subject to administrative tribunal oversight in many jurisdictions. Land use planning appeals are provided for in Prince Edward Island..."¹¹⁷ Ontario's Environmental Review Tribunal also has a land use planning mandate.¹¹⁸ Such mandates are very common elsewhere, including Ireland, England and Wales, the Netherlands, Australia, New Zealand, Sweden, Denmark, Spain, and Germany.¹¹⁹ In many jurisdictions, land use decisions of local governments may be appealed.

Environmental assessments (EAs) are a major component of environmental decision-making in most jurisdictions throughout the world, and EA decisions may be appealed or otherwise heard by environmental tribunals in many jurisdictions that have them. In Canada, this is true in Alberta, Manitoba, New Brunswick, Newfoundland and Quebec, and in some provinces is available for certain types of projects or if referred to the tribunal by the responsible minister (e.g. Ontario¹²⁰). Elsewhere, EA appeals are available in New Zealand, Australia, U.S. (for agencies with appeal tribunals), Mauritius and Guyana. This is by no means intended as an exhaustive list.

2. The Public Interest

In Alberta, the *Energy Resources Conservation Act* requires that the Energy Resources Conservation Board "give consideration to whether the project is in the public interest, having regard to the social and

economic effects of the project and the effects of the project on the environment."¹²¹ Similarly, the Natural Resources Conservation Board must impartially determine whether projects are in the public interest having regard to their effect on the environment.¹²²

In Ontario, the Environmental Review Tribunal's public interest mandate is found in the purposive clauses of environmental legislation and its Rules of Practice.¹²³ The ERT considers the public interest in its disposition of appeals, including where there has been a proposed withdrawal of an appeal not agreed to by all of the parties. This duty extends to the Tribunal's review of settlement agreements, even where all of the parties agree to its terms.¹²⁴ Saxe comments that "The ultimate decision-maker is the Board, not the parties themselves. The Board has an obligation to ensure that the public interest is protected, no matter what the parties prefer."¹²⁵

3. Standing

In many jurisdictions, environmental tribunals have broader standing rules than exist in British Columbia. With the exception of the *Environmental Management Act* and *Farm Practices (Right to Farm) Protection Act*, much of BC's environmental legislation bases tribunal access on private rights tied to an approval or land ownership, as discussed above. Even the *Environmental Management Act* is premised on an appellant being aggrieved, or having a direct interest, which would be considered a narrow rule in many jurisdictions.

There are many different approaches to standing: in Denmark, specific rights of complaint or appeal are granted to non-profit organizations named in legislation, in addition to "any party having an individual, significant interest in the case." In Sweden, third party appeals may be brought by any non-profit organization that has nature protection or

121 [Energy Resources Conservation Act](#), R.S.A. 2000, c.E-10, s.3

122 [Natural Resources Conservation Board Act](#), R.S.A. 2000, c.N-3, s.2

123 For example, see s.2 of the [Environmental Bill of Rights, 1993](#), S.O.1993, c.28.

124 See Rules 192 and 193 of the [Rules of Practice and Practice Directions of the Environmental Review Tribunal](#).

125 D. Saxe, "Water Disputes in Ontario: Environmental Dispute Resolution and the Public Interest" in J. Macfarlane, ed., *Rethinking Disputes - The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd., 1997) 233 at 246, as cited in Goltz, 2000.

117 See <http://www.irac.pe.ca/appeals/planning/>

118 See <http://www.ert.gov.on.ca/english/about/index.htm>

119 Malcolm Grant, *Environmental Court Project Final Report*, Department of the Environment, Transport and the Regions: London, UK. February 2000.

120 See http://www.ert.gov.on.ca/files/Guides/Guide_EAA_EPA_OWRA_Nov_15_07.pdf. This authority has not been utilized in Ontario for about a decade.

environmental protection in their purposes, have been active for three years, and have at least 2000 members. In Spain, open standing rules allow everyone who wants to take part in a public inquiry about planning or environment problems to do so without restriction.¹²⁶

Moving to commonwealth jurisdictions, New Zealand's legislation grants standing to any person who has an interest in the proceedings that is greater than the public generally, or anyone who is representing a relevant aspect of the public interest, or who made a submission in an earlier proceeding on the same matter.¹²⁷ In Australia, New South Wales, Queensland and South Australia all have broad third party rights of appeal.

Developing countries with relatively recent environmental tribunals also have broad standing rules. In Kenya, "any human being or legal entity has access without having to demonstrate to the [*National Environment*] Tribunal that they have suffered direct damage or injury," because everyone is "entitled to a clean and healthy environment and has a duty to safeguard and enhance the environment."¹²⁸ In Sudan, any person may lodge a civil claim in the environment court where there has been some environmental damage – and the person does not have to prove his or her connection with such damage.¹²⁹ In Trinidad & Tobago, any individual or group of individuals expressing a general interest in the environment or a specific concern with respect to alleged violations of specified environmental requirements, can bring direct private party action to the Environmental Commission.¹³⁰ In Tanzania, "any person who is aggrieved by the decision or omission by the Minister" (emphasis added) may appeal and appear before the Environmental Appeals Tribunal.¹³¹

In Kenya and Austria, an environmental Ombudsperson has standing and funding to represent

complainants in court.¹³²

In Ontario, the Environmental Review Tribunal has three levels of participation for members of the public: 1) a *presenter* may be a witness and present evidence and received proceeding documents, but may not cross-examine witnesses or make submissions; 2) a *participant* may make oral and written submissions to the tribunal, and 3) a *party* has the fullest range of rights and responsibilities.¹³³

4. Participant Funding and Costs

It would appear that the challenges of providing for participant funding for public interest appellants remain significant in most jurisdictions. Many tribunals have the authority to award costs to appellants, similar to the BC Environmental Appeal Board and Forest Appeals Commission. One study in 2000 found that costs are seldom awarded for the tribunals Australasia and Europe.¹³⁴

This is a major and vexing problem for public interest environmental litigation, because cases are typically very complex and require expert evidence.¹³⁵ Public interest parties typically have no economic advantage to gain from their participation. As Justice Toohey of the Australian Federal Court stated 20 years ago: "Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in."¹³⁶

132 George (Rock) Pring and Catherine (Kitty) Pring, Specialized Environmental Courts & Tribunals: Improved Access to Justice for Those Living in Poverty, at <http://law.du.edu/documents/ect-study/ORIL-Article-FINAL.pdf>, p.7

133 See pp.12-14 of the [Rules of Practice and Practice Directions of the Environmental Review Tribunal](#).

134 Malcolm Grant, *Environmental Court Project Final Report*, Department of the Environment, Transport and the Regions: London, UK. February 2000.

135 See generally C. Tollefson, D. Gilliland and J. DeMarco, "Towards a Public Interest Costs Jurisprudence" (2004) *83 Canadian Bar Review* 607 and C. Tollefson, "Costs in Public Interest Litigation: Recent Developments and Future Directions" (2009) *35 Advocates Quarterly* 181-201.

136 Toohey (1989) "Environmental Law – Its Place in the System" in *Proceedings of the First NELA/LAWASIA International Conference on Environmental Law* June 1989 at p 79, as cited in <http://www.edo.org.au/edonsw/site/pdf/2005conf/smith2.pdf>, p.2, footnote 5.

126 Chapter 3 of Malcolm Grant, *Environmental Court Project Final Report*, Department of the Environment, Transport and the Regions: London, UK. February 2000.

127 Section 274 of New Zealand's [Resource Management Act](#).

128 Donald Kaniaru, "Environmental Tribunals as a Mechanism for Settling Disputes," *Environmental Policy and Law*, 37/6 (2007) 459 at 461; and s.3(1) of the [Environmental Management and Coordination Act](#)

129 See UNEP's [Environmental Courts in Sudan](#)

130 See UNEP's [The Environmental Commission of Trinidad and Tobago](#)

131 See s.206(2) of Tanzania's [Environmental Management Act](#)

Legal aid is available in many countries, but is typically underfunded and is used or available for criminal, family and poverty rather than environmental matters. One alternative model that has been adopted successfully for over 20 years in Australia is state government funding of non-profit Environmental Defenders Offices (EDOs), which represent public interest litigants. The adequacy and continuity of that funding is frequently an issue that limits the EDO's ability to carry out this service.

In Europe, 43 countries¹³⁷ have committed to “consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice” by ratifying the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.¹³⁸ The state that appears to be delivering the most progress on this is Spain, which in 2006 adopted legislation to bring it into compliance with this provision.¹³⁹

The U.S. probably has the most progressive costs rules for public interest environmental litigation before courts. The U.S. Supreme Court has adopted the “American Rule” that costs are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization. The court held that “It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances.”¹⁴⁰ In addition, many federal environmental statutes explicitly authorize citizen suits to enforce the law, and allow for payment of costs to the party that initiated the suit if it is successful. Finally, the *Equal Access to Justice Act*¹⁴¹ allows non-profit organizations to recover the costs in actions under 200 federal and 2,000 state laws including the *Clean Air Act*, *Clean Water Act*, *Endangered Species Act*, *Freedom of Information Act*, etc. These costs decisions are made at the conclusion of litigation and therefore are not guaranteed.

137 For signatories, see <http://www.unece.org/env/pp/ratification.htm>

138 [Aarhus Convention](#), Article 9 (5).

139 John Bonine, “[Best Practices -- Access to Justice](#),” World Resources Institute, 2009 at p.20.

140 *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) at 270-271.

141 [28 USC sec.2412](#)

It would appear then, that the best practices to enable the “*effective* access to judicial and administrative proceedings” called for the Rio Convention (which was ratified by Canada and endorsed by British Columbia) are to be found in the rules of the Alberta Environmental Appeals Board (which allows participant costs in advance) and the system of Environmental Defenders Offices in Australia. Canada’s federal environmental assessment process also provides up-front participant funding from time to time, and requires the Minister “to establish a participant funding program to facilitate the participation of the public in comprehensive studies, mediations and assessments by review panels.”¹⁴²

For costs after the fact of participation, the BC Utilities Commission and Ontario Environmental Review Tribunal provide models that are helpful but may limit the ability to participate fully with expert evidence because of the “gamble” that costs will not be awarded ultimately.

5. Tribunal Powers and Procedures

In Section 7 we identified gaps in the powers and procedures of environmental in BC, and turn here to practices in other jurisdictions that may be worthy of consideration.

Investigative / Inquiry Powers

BC lacks a dedicated environmental tribunal to receive and investigate complaints about harm to the environment, with the exception of forest practices and farm practices. Traditionally there has been a major fork in the road when it comes to how tribunals do their fact-finding, which is tied to the powers they are given. Purely adjudicative boards, like courts, will consider only the evidence put before them by the parties and will not carry out their own investigation so as not to taint the proceeding or open the door to potential allegations of bias or unfairness. At the same time, however, adjudicative tribunals typically have more relaxed evidentiary rules than courts, and tribunal members will often engage in the evidence in a more direct way than judges. Tribunals that primarily exercise investigative powers are, of course, far more

142 See subsection 58 (1.1) of the [Canadian Environmental Assessment Act](#).

active in their fact-finding, and may on their own initiative interview employees, government workers, witnesses and experts in order to arrive at the “truth of the matter.” Traditionally, however, these tribunals (or commissioners of inquiry) make findings of fact followed by recommendations, rather than deciding rights.

One question that should be asked is whether these functions are necessarily mutually exclusive, and whether the complexity of environmental issues justifies a hybrid approach from time to time. Some jurisdictions endow their adjudicative tribunals with investigative/inquiry type powers. For example, the Alberta Environmental Appeals Board has “all the powers of a commissioner under the *Public Inquiries Act*.”¹⁴³ Many environmental tribunals, including the BC Environmental Appeal Board, Alberta EAB, Ontario ERT, European, Australasian and African tribunals, have the authority to invite witnesses to appear before them to assist the tribunal in its fact-finding. However, in our review of the literature to date, it appears that this authority is seldom used.

Some jurisdictions appoint environmental commissioners¹⁴⁴ with investigative/inquiry powers to receive and investigate complaints, and to undertake investigations on their own initiative or at the request of government. New Zealand was the first jurisdiction in the world to appoint a Commissioner of Environment in 1986. Ontario has an Environmental Commissioner,¹⁴⁵ as does Canada federally,¹⁴⁶ and Australia.¹⁴⁷ Like Auditors General, these officers report directly to the Legislature or Parliament, rather than the Minister of Environment or Cabinet, in order to have greater independence from the political or executive branch of government. In 2001 British Columbia’s *Auditor General Act* was amended to require the Auditor General to appoint a Commissioner for Environment and Sustainability in the last legislative

143 See section 95 of the Alberta [Environmental Protection and Enhancement Act](#), R.S.A.2000, c.E-12 and the [Public Inquiries Act](#), R.S.A.2000, c.P-39.

144 This title is often used differently in the U.S. to reference the person appointed to head an environmental regulatory agency, like our Ministry of Environment.

145 The Ontario Commissioner is appointed under [Part 3](#) of the *Ontario Environmental Bill of Rights*; See also <http://www.eco.on.ca/>

146 See http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html.

147 See <http://www.ces.vic.gov.au/ces/wcmn301.nsf/Home+Page/Default?newhome?open>

session of the NDP government,¹⁴⁸ but these provisions were later repealed by the incoming Liberal government that same year before the appointment was made.

Experts

Environmental disputes are often largely dependent on expert evidence, and this raises several issues for tribunals and public interest parties. Qualified experts are often necessary or important to the outcome of a hearing, yet many public interest parties cannot afford to retain them. Tribunals tend to deal with expert evidence in a similar fashion as courts, and there are many decisions in which citizen appellants failed to meet their burden of proof, or were unable to effectively counter an industry party’s expert witness, because of a lack of either qualifications to provide opinion evidence or money to retain an expert. Even if they can afford an expert initially, there is often little control over the final cost, as they do not know how long the expert will be cross-examined, what counter-evidence the industry or government party will call, and BC tribunals typically do not tend to manage these matters in order to give a full and fair hearing to these parties.

There is a notable exception, however, in that the Farm Industry Review Board is specifically empowered to “obtain the advice of persons who are knowledgeable” about the farm practices under investigation. BCFIRB informed us that knowledgeable persons are almost always used in the settlement and hearing process: normally, BCFIRB case management staff and the parties agree on a “knowledgeable person” – normally experts in their own right – who will investigate and report on the complaint issues. As part of that agreement (included in a formal terms of reference), it is acknowledged that if the report doesn’t result in settlement, it and its author may appear at the hearing as a witness called by the panel. This helps get knowledgeable evidence, facts and opinion evidence on the table for the information of the panel. Parties can challenge the “knowledgeable person,” the person’s report, and call witnesses of their own.

Environmental courts and tribunals in some jurisdictions have attempted to mitigate concerns about “hired gun” experts with a view to ensuring decision-making and adjudicative processes possess

148 See http://www.leg.bc.ca/36th5th/3rd_read/gov07-3.htm, Part 3

the best available scientific evidence. Australian courts adopted new expert rules in 2004 to address the adversarial process's "voracious appetite for the consumption of public and private resources." One strategy has been to try to get all parties to agree to a single expert witness.¹⁴⁹ Another has been to have court-appointed experts following consultation with the parties.¹⁵⁰ Although initially resisted by the legal profession, the "consistent comment from judges and legal practitioners had been that evidence from persons appointed as Court experts reflected a more thorough and balanced consideration of the issues than was previously the case."¹⁵¹ Yet another strategy is to engage expert panels who affirm their neutrality, duty to the tribunal, and provide evidence as a panel so each can respond to the other as appropriate.¹⁵²

The New Zealand Environment Court has a Code of Conduct for expert witnesses that requires a pledge of duty to the court acknowledging that they are not an advocate for the party who engages the witness, and that they have an "overriding duty to assist the Court impartially." Experts must follow the set of rules set out in the court's Practice Notes.¹⁵³

The Chair of Kenya's National Environmental Tribunal reports that African tribunals "can and often do access experts in the various environmental fields for consultation" as "friends of the tribunal."¹⁵⁴ Also, while The Netherlands does not have a specialist environment court, the Administrative Court has established a special Advisory Board of 30 to 40 experts to assist with environmental cases, and is used for technical and policy questions in 70% of its cases.¹⁵⁵

149 Address by Justice Margaret Wilson on [The New Expert Witness Rules](#), 28 October 2004.

150 See the New South Wales Land and Environment Court Practice Direction for [Court Appointed Experts](#)

151 Address by Justice Margaret Wilson on [The New Expert Witness Rules](#), 28 October 2004.

152 Maria Comino, "Democratizing Down-Under: The Role of the Community in Water Resource Decision Making in Australia," August 2001 at <http://www.awra.org/proceedings/dundee01/Documents/Comino.pdf>.

153 See <http://www.justice.govt.nz/courts/environment-court/legislation-and-resources/practice-notes/expert-witness.html>.

154 Donald Kaniaru, "Environmental Tribunals as a Mechanism for Settling Disputes," *Environmental Policy and Law*, 37/6 (2007) 459 at 460.

155 Malcolm Grant, *Environmental Court Project Final Report*, Department of the Environment, Transport and the Regions: London, UK. February 2000, p.69

Closer to home, a tribunal practice is developing in Alberta in which expert witnesses are allotted 15 to 30 minutes, which is closely managed by the Chair. Other jurisdictions as well are resorting to more assertive case management techniques in order to focus and limit the time required for expert evidence.

The BC Supreme Court recently has taken steps to address the concerns that arise from the traditional adversarial approach to expert evidence. The new Supreme Court Rules that came into effect in July 2010 introduce several innovations in dealing with experts and codify common law rules by:

- explicitly addressing an expert's duty to the court;
- encouraging parties to use jointly-appointed experts subject to appointment agreements;
- allowing a judge or master in a case planning conference to order that expert evidence shall be given by one jointly-instructed expert;
- encouraging the use of expert panels; and
- allowing a court to appoint its own expert;¹⁵⁶

It would seem that if the Supreme Court is moving in this direction, then BC's environmental tribunals should be too.

Alternative Dispute Resolution

Many environmental courts and tribunals in jurisdictions outside of Canada appear to use mediation and other ADR techniques quite extensively. It is a common practice for mediation to be carried out by those tribunal members, staff or officials who will not be involved if the matter proceeds to adjudication. For example, some jurisdictions like New Zealand have full-time judges who are lawyers, as well as full or part-time non-lawyer commissioners who administer pre-hearing settlement processes in addition to other duties such as advising the court or tribunal on technical matters.¹⁵⁷

156 See Rules 5-3, 11-3 and 11-4, *Supreme Court Civil Rules*, BC Reg 168/2009, online at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_02.

157 See the Environment Court of New Zealand [Practice Notes - Alternative Dispute Resolution](#).

The following is just a sampling of the many jurisdictions which promote alternative means of environmental dispute resolution in their tribunal statutes or procedural rules. There are some differences among jurisdictions regarding whether ADR is always a voluntary exercise or whether a tribunal's practice is to try to actively promote or prod the parties into finding a resolution. In New Zealand mediation is voluntary, but a judge reviewing a newly filed appeal will "only rarely...conclude that an appeal is not suitable for mediation, and [the parties] will almost always be referred to a Commissioner for mediation to be arranged."¹⁵⁸ Administrative Law judges in the U.S. Environmental Protection Agency appeal process offer ADR in "essentially every environmental case filed" for a 60-day period.¹⁵⁹ In Trinidad and Tobago, the Environmental Commission must "encourage and promote alternative dispute resolution, being any mechanism for resolving disputes other than by way of litigation."¹⁶⁰ Indonesia's Environmental Management Law call for "Increased...efforts to give effect to alternative methods of dispute settlement, namely out of court dispute settlement to achieve agreement amongst the parties in dispute" and expresses the objective that "With such a method of settlement of environmental dispute settlement it is hoped that the compliance of the community to the system of values regarding the importance of preservation and development of environmental capacity in present and future human life will be increased."¹⁶¹

Decision Deadlines

Several jurisdictions have legal or policy requirements and expectations respecting the time for decision following conclusion of a hearing. In Ontario, environmental statutes will sometimes specify a decision deadline. Some decisions, such as leave to appeal applications, require a decision within 30 days of the application unless extended by the Environmental Review Tribunal. In Sweden, judgments must be issued

¹⁵⁸ See <http://www.justice.govt.nz/courts/environment-court/procedure-in-the-environment-court/mediation.html>

¹⁵⁹ See <http://www.epa.gov/oalj/about.htm#adr>

¹⁶⁰ See s.84(3) of Trinidad and Tobago's [Environmental Management Act, 2000](#)

¹⁶¹ Indonesia's Law Concerning Environmental Management, Law No.23 of 1997, at <http://faolex.fao.org/docs/html/ins13056.htm>, Articles 31, 32 and Elucidation, Part A.

within two months of the conclusion of the main hearing.¹⁶² In Ireland, the Planning Appeals Board has a policy objective to dispose of appeals within four months, and must inform parties of the reasons for delay, and state when it intends to make the decision if this is not possible.¹⁶³ In Pakistan, the Environmental Tribunal Rules set out an "expeditious disposal" rule requiring the tribunal to "make every effort to dispose of a complaint or an appeal or other proceedings within 60 days of its filing."

6. Appointments and Structure

While several jurisdictions have environmental tribunals with a similar structure and appointment process to British Columbia's, some interesting innovations have developed over the last three decades.

Environment Courts

One innovation is the establishment of environment courts, such as those now in place in Sweden,¹⁶⁴ New Zealand,¹⁶⁵ and the three Australian states of New South Wales,¹⁶⁶ Queensland¹⁶⁷ and South Australia.¹⁶⁸ These courts may have jurisdiction over criminal (enforcement proceedings) and civil matters, as well as appeals and judicial review of approvals or authorizations granted by government agencies. Judges have tenure and are appointed until retirement. They may be dedicated to the environment court, or also sit on other civil or criminal courts at the same level. The New Zealand Environment Court also appoints commissioners who are typically non-lawyer technical experts for terms up to five years: commissioners may sit on panels chaired by a judge (but are excluded from some matters such as criminal) and carry out pre-hearing mediation.

¹⁶² Malcolm Grant, *Environmental Court Project Final Report*, Department of the Environment, Transport and the Regions: London, UK. February 2000, p.51.

¹⁶³ Malcolm Grant, *Environmental Court Project Final Report*, Department of the Environment, Transport and the Regions: London, UK. February 2000, p.87.

¹⁶⁴ See http://www.domstol.se/templates/DV_InfoPage____2328.aspx

¹⁶⁵ See <http://www.justice.govt.nz/courts/environment-court>

¹⁶⁶ See <http://www.lawlink.nsw.gov.au/lec>

¹⁶⁷ See <http://www.courts.qld.gov.au/996.htm>

¹⁶⁸ See <http://www.courts.sa.gov.au/courts/environment/index.html>

Transposed into the BC context, these courts essentially combine the appellate jurisdiction of the Environmental Appeal Board and Forest Appeals Commission with the judicial review and real property¹⁶⁹ jurisdiction of the BC Supreme Court, with the criminal jurisdiction of our Provincial Court and the powers of commissioners under the BC *Public Inquiry Act*.

The establishment of environmental courts has been under consideration in many jurisdictions. In 1991, Lord Woolf of the Court of Appeal for England and Wales advocated “a multi-faceted and multi-skilled body which would combine the services provided in existing Courts, Tribunals and Inspectorate in the environmental field. It would be a ‘one stop shop’ which should lead to faster, cheaper and the more effective resolution of disputes in the environmental area.” They would have “power to instruct independent counsel on behalf of the Tribunal or members of the public; [and] resources for direct investigation by the Tribunal itself.”¹⁷⁰ This proposal was followed up by numerous studies and academic articles in the UK since 2000.¹⁷¹ The Law Commission of India recommended an environmental court in 2003.¹⁷²

In the U.S., the notion of specialized courts at the federal level to deal with backlogs met a less enthusiastic response in the 1990 Federal Courts Study Committee of Congress.¹⁷³ However, as mentioned above, environmental administrative appeal tribunals exist in the federal system, and environmental courts have been established at the state, county and city levels.

- Vermont State has an Environmental Court with appellate and criminal jurisdiction.¹⁷⁴

169 I.e. to deal with interests in property and nuisance-type cases seeking injunctive relieve which our Provincial Court does not have authority for.

170 Sir Harry Woolf, “Are the Judiciary Environmentally Myopic?” 1992 J.E.L. Vol 4, No.1, p1 at 14.

171 Four such studies are: 1) Malcolm Grant, *Environmental Court Project Final Report*, Department of the Environment, Transport and the Regions: London, UK. February 2000; 2) 23rd Royal Commission Report on Environmental Planning (March 2002); 3) Richard McRory and Michael Woods, “Modernizing Environmental Justice,” Centre for Law and the Environment, University College London, 2003; and 4) Castle, Day, Hatton and Stookes, Report of the Environmental Justice Project, 2004

172 See <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>

173 See <http://www.law.fsu.edu/library/admin/acus/305919.html>

174 See <http://www.vermontjudiciary.org/GTC/environmental/default.aspx>

- Memphis, Tennessee shares an environmental court with Shelby County.¹⁷⁵
- Mobile, Alabama also has an environmental court.¹⁷⁶
- New York City has an Environmental Control Board that is a city-level appeal tribunal.¹⁷⁷
- Environmental courts at the local government level have been described as a growing trend, particularly in the southern U.S.

Part-time versus Full-time Appointments

Closely related to whether judges or tribunal members are provided with tenure is the issue of whether they serve on a part-time or full-time basis. Most jurisdictions with environmental courts have full-time judges. Part-time appointments invoke considerations of conflict of interest (in relation to non-tribunal work), tribunal workload (whether full-time appointments can be justified) and the expeditious provision of tribunal services. Ontario recently addressed this issue in a review of its municipal, environment and land use planning tribunals. The Chair of the Ontario Labour Relations Board facilitated a process in 2006-2007 which concluded that:

The work of the Tribunals should be the first and primary responsibility for adjudicators. The Tribunals should be able to schedule and assign work to adjudicators on a Monday to Friday basis during normal office hours and to expect and require adjudicator attendance at training and committee meetings. These objectives are difficult to obtain in situations where adjudicators are appointed on a part-time basis and have duties, responsibilities and priorities other than the work of the Tribunals.

....

Full-time appointments are more appropriate for purposes of quality control and are consistent with the government’s broader objective of creating a complement of full-time professional adjudicator appointees...¹⁷⁸

175 See [Shelby County Environmental Court](#) and [Memphis Environmental Court](#)

176 See <http://urban.cityofmobile.org/safety.php#Anchor-General-7638>

177 See <http://www.nyc.gov/html/ecb/html/home/home.shtml>

178 Final Report of the Agency Cluster Facilitator for the Municipal,

At the Ontario Environmental Review Tribunal, the chair plus five members are full-time, while an additional five are part-time appointments. Advantages to this mixed approach are that the tribunal is able to have access to broader expertise, coupled with the cost savings of part-time membership.

Given our initial review of the time frames for appeal hearings and delivery of decisions for some tribunals, it would appear that the merits of full-time appointments

should be considered and evaluated in British Columbia. There are no doubt trade-offs involved, as a large stable of part-time members could provide tribunals with access to a larger pool of expertise on an 'as-needed' basis, while full-time appointments could make the conduct and length of hearings, and the time for decisions, more expeditious.

Environment and Land Planning Tribunals, August 22, 2007, p.15, online at <http://www.mgs.gov.on.ca/en/AbtMin/166282.html>.

10. Recommendations

The discussion paper we published in November 2009 sought broad input on 33 questions: it did not contain recommendations, but indicated the direction of our thinking on ways to reform the tribunal system. Since releasing the discussion paper we have heard from lawyers, tribunal members and staff, government agencies, citizens and organizations experienced with the environmental tribunal system. Understandably, for the most part tribunal members and staff reviewed the paper for accuracy rather than proposed reform ideas. Adjudicative tribunals in particular no doubt consider some issues concerning their mandate and powers to be largely matters for the Legislature.

We also carried out interviews with parties who filed appeals and appeared before them, with or without legal counsel. A half-day focus group session was held in July 2010 in Vancouver to further explore the issues raised in this paper and to seek ideas for reform that would be practical and effective. The research, interviews and focus group discussions were carried out

on a “non-attribution” basis. While we believe there is strong support for the recommendations proposed below, we do not attempt to quantify that or suggest that they represent a consensus of opinion. They have been developed with a view to moving British Columbia’s environmental tribunal system closer to emerging best practices nationally and internationally among jurisdictions that support greater access to justice and accountability for environmental decision-making.

At the same time, however, it is hoped that these recommendations will be seen to be practical, feasible and “made in British Columbia.” We have tried to avoid being too prescriptive, recognizing that implementation of these suggestions will require attention to details that are too refined to address here.

Recommendation #1: Consolidate Tribunals with Similar Mandates

Tribunals with similar mandates should be consolidated to make the system more efficient and consistent. There are a number of adjudicative tribunals that hear appeals relating to natural resource decisions made by the so-called “dirt ministries” that could be consolidated. While there has been some effort to cluster the administration of these tribunals in a single office (e.g. Environmental Appeal Board, Forest Appeals Commission and the forthcoming Oil and Gas Appeals Tribunal), there remain disparate rules and procedures. There are three separate forestry tribunals (Forest Appeals Commission, Private Managed Forest Land Council and the Forest Practices Board).

Several participants in our focus group saw benefit in having a single adjudicative tribunal operating under a consistent set of rules concerning grounds for appeal,

standing, costs and tribunal procedures. This is not to suggest that all of the tribunals with an environmental mandate should be merged: some serve distinct regulatory functions, such as the Utilities Commission, Oil and Gas Commission and Farm Industry Review Board. However, a review could examine the merits of consolidating the environmental and land use aspects of decision-making into a single tribunal.

Consideration should be given to placing adjudicative tribunals under the Ministry of Attorney General, rather than having reporting and funding channeled through a “host ministry,” for a greater appearance of independence and identity as part of the justice system.

Recommendation #2: Expand Tribunal Mandates for Increased Accountability

Establish and implement principled criteria for determining which decisions should be appealable according to. A significant number of environmental decisions are outside the purview of the tribunal system, including forestry, oil and gas, energy, water, environmental assessment, land use, protected areas, wildlife and wildlife habitat-related decisions by provincial officials. Local governments also make decisions that significantly impact the environment, public resources and areas of provincial or federal responsibility such as fish, species at risk, water, air, etc.

Of course, not every decision should be appealable. Principles and criteria should be developed, as suggested in Section 3 of this paper, to distinguish

those that are properly political-level decisions, those that involve primarily personal or private matters between the regulator and an individual, etc.

Expanding tribunal jurisdiction does not necessarily mean opening the “floodgates” to an excessive number of appeals. Often the mere possibility of appeal acts as an important check to initial decision-making, providing incentive to more carefully consider the perspectives and interests of those affected by the decision.

Recommendation #3 – Make Tribunals More Accessible.

The opportunity to access tribunals should be broadened:

- Appeal “triggers” should be *impacts*-based, not just *rights*-based (i.e. those impacted by a decision should be able to appeal, not just those who are the subject of the decision);
- Tribunals should be accessible when the impacts occur, not just at the first instance when a permit, licence or other approval is granted or amended;
- Tribunals should be accessible when a decision-maker refuses to exercise a statutory power, including compliance and enforcement powers, not just following a decision;
- Some decisions that have been delegated to independent “qualified professionals” or permit holders also should be subject to tribunal review in some situations.

Recommendation #4 – Make Standing Rules Consistent and Fair

“Standing” rules should be more consistent and ensure that affected parties may bring appeals. Standing rules vary widely and in many instances clearly exclude parties that could be aggrieved or adversely affected by a decision (or the failure or refusal to make a decision). The focus group did not advocate “wide open” standing provisions in which “any person” could appeal any decision: it was felt that the need for an appellant to show she or he is aggrieved or adversely affected by the decision (or issue) is important for sharpening the issues between parties and avoiding frivolous or nuisance appeals where the appellant does not have enough at stake to warrant invoking the costs and procedures of the tribunal system. However, this

is not to suggest that only private interests warrant standing or that public interest groups should not be able to bring appeals relating to public resources, such as adverse impacts to species at risk, local air quality, or water quality or quantity in relation to streams with salmon enhancement projects, etc.

Standing rules should also allow direct access to a tribunal by an aggrieved party. For example, the rule that only the Forest Practices Board may bring public interest appeals as a party before the Forest Appeals Commission should be replaced with broader standing provisions.

Recommendation #5 – Improve Participant Funding and Costs

Develop viable ways of providing funding to public participants in tribunal processes to level the playing field. The complexity of environmental hearings and the extent to which they depend upon expert evidence makes competent, effective participation impractical for many citizen and public interest organizations. Some government agencies that provided input to us also remarked on the extent to which they are disadvantaged with limited budgets when facing industry appellants.

BC tribunals appear reticent to award costs. To be meaningful, costs must be available in advance of or during the hearing, to allow expert witnesses the opportunity to review the evidence of other parties and to prepare their own opinion evidence. This is well understood and accepted in some processes (federal environmental assessment, provincial utilities commission hearings) and is more available in other jurisdictions (Alberta, Canada). It appears that there may be some movement towards this provincially in surface rights disputes between landowners and oil and

gas companies, but needs to be more broadly applied.

There may be several ways of resolving this:

- By amending tribunal enabling legislation to encourage or provide greater direction on participant funding;
- By establishing a dedicated line item within tribunal budgets;
- By making “duty counsel” available, as in the provincial court system, but broadened to include qualified experts;
- By establishing a trust funded through a small levy on permit fees, royalties, court-imposed penalties for environmental infractions, etc.;

Establishing a pooled fund might lessen tribunal reluctance to make a permit holder pay the costs of opposition to its permit.

Recommendation #6 – Ensure Limitation Periods are Reasonable

Limitation periods should be reviewed to ensure they are practical and reasonable. Some limitation periods currently are triggered by notice of the decision or approval being delivered to the permit holder. In the absence of any requirement for public notice of the decision, this can be prejudicial to those who may be adversely affected by the decision but

who are unaware that it has been made. This could be corrected through more reasonable limitation triggers, or by a more transparent system of providing public notice of decisions.

Recommendation #7 – Provide Clear Mandate for Environmental Protection

Tribunals should have a clear mandate to protect the environment. Administrative tribunals serve a different function from courts which are only concerned with application of the law. Tribunals are created to play a part of the statutory scheme and purposes of enabling legislation. If they become too legalistic and lose sight of the purpose of the statutory scheme, tribunals can succumb to “judicialization.” Our focus group commented that simply mandating tribunals to make decision in the “public interest” is not necessarily the answer: there are too many different “publics” and “interests” and the concept can easily devolve into politics, which is the purview of elected

officials.

There appear to be two options that are not mutually exclusive: 1) explicitly mandating environmental tribunals to consider effective means of environmental protection in their decision-making, and/or 2) introducing clearer purpose clauses into environmental legislation which could have the same effect. These measures would enable tribunals to make a concerted effort to resolve substantive issues in legitimate environmental disputes, rather than narrowly focusing on statutory interpretation or procedure.

Recommendation #8 – Modernize Tribunal Procedures

Environmental tribunal procedures should be modernized to make them more efficient and effective. In particular, the tribunals should have:

1. **A clear mandate for alternative dispute resolution.** Increasingly the court system itself is moving in this direction with mandatory mediation. Some tribunals have already made real progress towards this, such as the Farm Industry Review Board and Mediation and Arbitration Board (Surface Rights Board), but others have not (Environmental Appeal Board, Forest Appeals Commission, Oil and Gas Appeals Tribunal, Agricultural Land Commission).
2. **Frequent and effective case management.** Some tribunals that frequently have lengthy hearings would benefit from a proactive, rather than reactive (i.e. on application by a party) approach to case management.
3. **A problem-solving approach to environmental disputes.** Some tribunals are making real progress in this, but others do not see problem-solving as being within their mandate. There are clearly some limits to how far a tribunal
4. **A creative approach to employing experts in the dispute resolution and hearing process.** BC tribunals should experiment with the use of expert panels and tribunal-appointed amicus experts as the BC Supreme Court and other jurisdictions are doing (Alberta, Australia, etc.) to limit the problems associated with the “hired gun” approach of traditional adversarial litigation.
5. **Time limits for rendering decisions.** Either tribunals themselves or the Legislature should adopt time limits (or at least targets) for rendering a decision following hearing of a matter. Some tribunals (Environmental Appeal Board, Forest Appeals Commission) are taking a considerable amount of time to hand down decisions following hearings, which is inconsistent with the purpose of the “speedier resolution” objective of administrative tribunals.

should go down this road, but it can also be an important service and rationale for having administrative tribunals.

Recommendation #9 – Improve Investigative Powers

Invest tribunals with greater investigative powers to aid their ability to “get to the truth of a matter” and resolve or adjudicate environmental disputes. Measures would have to be taken to maintain tribunal objectivity, neutrality, fairness and due process, and though challenging, this should not be a significant hurdle. Independent review panels for environmental assessment processes

grapple with these issues to assist fact-finding, as do commissions of inquiry. There are several other tribunals having investigative powers concurrently with adjudicative or decision-making powers, for example, in the securities regulation, human rights and workers’ compensation fields.

Recommendation #10 – Improve Tenure and Appointments

Consideration should be given to increasing the number of full time tribunal members and the length of their appointment terms where justified by case loads. This should

be accompanied by greater attention to candidate qualifications and transparency in the appointments process.

Recommendation #11 – Eliminate Unnecessary Levels of Appeal

Multiple levels of appeal should be eliminated, such as internal agency reviews prior to tribunal appeal. Our focus group considered that these “review” opportunities simply increase the time and cost it takes to get to final resolution of the issue.

Examples include forestry and contaminated sites decisions and mine approvals.

Recommendation #12 – Reconfigure Environmental Watchdog

Reconsider how the environmental watchdog role currently served by the Forest Practices Board, Ombudsperson and Auditor General is delivered. Currently, environmental complaint investigations and audits of government agencies and licensees fall within the mandates of these three organizations. In our view, each of them does a good job and performs a valuable public service within the limits of their mandates and budgets, but there is merit in evaluating how these watchdog services are delivered to ensure the best use of resources and responsiveness to current needs in British Columbia.

The watchdog role is best performed by an officer of the Legislature to maintain independence from a “host ministry.” Some jurisdictions have appointed commissioners to focus on environmental complaint

investigations, program reviews and audits. They may be an independent officer (e.g. Environmental Commissioner of Ontario) or appointed by and housed within the Auditor General office (e.g. Canada’s Commissioner of the Environment and Sustainable Development).

British Columbia needs an environmental watchdog with a mandate across environmental issues that can investigate like the Ombudsperson, carry out performance audits like the Auditor General, and dig down to the substantive, on-the-ground environmental impacts like the Forest Practices Board. There are likely several options for how this could be delivered, including within these organizations or by a reconfiguration of roles and responsibilities.

Acronyms used in this Paper

ALC	Agricultural Land Commission
ALR	Agricultural Land Reserve
BCFIRB	BC Farm Industry Review Board
EAB	Environmental Appeal Board
FAC	Forest Appeals Commission
FPB	Forest Practices Board
MAB	Mediation & Arbitration Board
OGC	Oil & Gas Commission
OGAT	Oil & Gas Appeals Tribunal
PMFLC	Private Managed Forest Land Council
PNGA	<i>Petroleum and Natural Gas Act</i>
BCUC	BC Utilities Commission



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