Oil and Gas
Appeal Tribunal

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DECISION NO. 2015-OGA-002(a)

In the matter of an appeal under section 72 of the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36.

BETWEEN:	Olaf and Frances Jorgensen	**APPELLANTS**
AND:	Oil and Gas Commission	**RESPONDENT**
AND:	Encana Corporation	**THIRD PARTY**
BEFORE:	A Panel of the Oil and Gas Appeal Tribunal Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on June 2, 2015	

APPEARING:	For the Appellant:	Olaf and Frances Jorgensen
	For the Respondent:	Sara Gregory, Counsel
	For the Third Party:	Lars Olthafer, Counsel

PRELIMINARY ISSUE OF JURISDICTION

[1] Olaf and Frances Jorgensen appeal a permit that was issued on February 23, 2015 by Mohammad Farah, a delegated decision-maker with the Oil and Gas Commission (the "OGC"). The permit authorizes Encana Corporation ("Encana") to construct and operate a pipeline on a portion of the Jorgensen's property, and on neighbouring properties. The Jorgensens do not oppose the pipeline generally, but ask the Tribunal to realign the pipeline on their property.

[2] On May 4, 2015, Encana asked the Oil and Gas Appeal Tribunal (the "Tribunal") to summarily dismiss the Jorgensen's appeal pursuant to section 31 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, and Tribunal Rules 24 and 29, on the grounds that the Jorgensens do not meet the statutory requirements for appealing the permit and, therefore, the Tribunal does not have jurisdiction over their appeal.

[3] The Jorgensens submit that the Tribunal has jurisdiction over their appeal and that the appeal should be heard, as scheduled, on October 21-22, 2015. The Jorgensen's appeal is scheduled to be heard together with an appeal against the same permit filed by their neighbours, Robert and Maxine Dilworth (Appeal No. 2015-OGA-001). Encana's application only applies to the Jorgensen's appeal.

[4] The OGC takes no position on the application for summary dismissal of the Jorgensen's appeal.

[5] This preliminary matter was conducted by way of written submissions.

BACKGROUND

[6] Sometime in 2013, Encana applied to the OGC for a permit authorizing the construction and operation of a pipeline right-of-way, a shoefly and several temporary workspaces on cultivated private lands approximately 40.6 kilometres northwest of Dawson Creek, BC. The private lands are owned separately by the Jorgensen and Dilworth families. A small portion of the proposed pipeline would cross Crown land. The pipeline would "tie in" a Riser Site to a Wellsite.

[7] The *Oil and Gas Activities Act* ("*OGAA*") and the *Consultation and Notification Regulation*, B.C. Reg. 279/2010 (the "*Regulation*") required Encana to notify certain persons of its pipeline application. In particular, the *Regulation* required Encana to notify and consult any land owner within a certain number of metres of the proposed pipeline.

[8] By letter dated October 8, 2013, Encana notified the Jorgensens and the Dilworths, among others, of the application. The letter advised that Encana was proposing to construct and operate five pipelines in a right of way between its Riser Site and its Wellsite. The proposed route was shown on an attached map. With respect to the Jorgensen's property, the map showed the right of way entering the Jorgensen's land from the northern boundary, in the northwest corner of the property. Although this letter constitutes the "official" notice given to the Jorgensens in accordance with the legislation, Encana had previously contacted and discussed the route with the Jorgensens on a number of occasions.

[9] Land owners have a legal right to voice their concerns and/or opposition to an application. This right was described in Encana's October 8, 2013 letter to land owners as follows:

> If you feel at any time that we have not adequately addressed your concerns, you may submit a written response to Encana outlining the reasons why this proposed project should not be carried out or should be modified. Any written response must be received by Encana within 21 days of receipt of this letter, as outlined in Section 79(2) of the Oil and Gas Activities Act.
>
> You may also make a written submission to the B.C. Oil and Gas Commission (OGC) under Section 22(5) of the Oil and Gas Activities Act for this project up until such time as a determination is made by the OGC.
>
> To discuss this project or request a meeting, please contact a representative below:
>
> [names and contact information provided].

[10] There is no dispute that the Jorgensen's did not provide a written response to either Encana or the OGC.

[11] Over one year later, on December 9, 2014, Encana filed its consultation and notification report with the OGC pursuant to section 24(1)(c) of the *OGAA*. This report contains a summary of Encana's consultations with land owners. Regarding the Jorgensens, Encana states under the heading "Outstanding Concerns":

> Encana has been unable to reach an agreement with the landowner and will be seeking a right of entry, no project specific concerns have been raised.

[12] On February 23, 2015, Mr. Farah issued the permit to Encana. The permit allows the pipeline to proceed through the southwest corner of the Dilworth's property, and enter the northwest corner of the Jorgensen's property.

[13] In his rationale for decision, Mr. Farah identified the submissions provided by affected land owners and considered their concerns. Regarding the Jorgensens, Mr. Farah states:

> Community Relations confirmed that there is no objection or outstanding concerns to this pipeline application from other landowners, Olaf and Frances Jorgensen.

[14] The Jorgensen's appealed Mr. Farah's decision on March 10, 2015. In their Notice of Appeal, the Jorgensen's state that they are not opposed to the pipeline generally, but are opposed to its route in the northwest corner of their land. They submit that this creates a "pocket of marginalized land". To avoid this result, they would like the pipeline to be realigned so that it enters their property from the property directly to the west (the southeast ¼, section 25), rather than through the Dilworth's property to the north.

[15] As noted earlier, this appeal is scheduled to be heard at the same time as the appeal filed against the same permit by the Dilworths. The Dilworth's argue that the pipeline should not be permitted on their property, and also ask that it be re-routed.

The Summary Dismissal Application

[16] Encana argues that the Jorgensen's appeal ought to be summarily dismissed because the only allowable basis for an appeal by a land owner under section 72(2) of the *OGAA* is that the OGC made a decision "without due regard" to:

(1) the land owner's written submission to the OGC regarding the proposed activity; or

(2) the written report containing the results of the oil and gas company's notifications and consultations with land owners.

[17] Section 72(2) of the *OGAA* states as follows:

72(2) A land owner of land on which an oil and gas activity is permitted to be carried out under this Act may appeal a determination under this section only on the basis that the determination was made without due regard to

(a) a submission previously made by the land owner under section 22(5) … of this Act [a submission to the OGC], or

(b) a written report submitted under section 24(1)(c) … [the operator's consultation report].

[18] Since the Jorgensens did not make a written submission to the OGC regarding the proposed pipeline under section 22(5) of the *OGAA*, Encana argues that the Jorgensen's cannot argue the first statutory ground for appeal: they cannot argue that the OGC failed to have "due regard" to a written submission that they never made. Moreover, Encana notes that the Jorgensens do not rely on this as a ground for appeal. Rather, the Jorgensen's Notice of Appeal simply states that the pipeline should be realigned because it creates a marginalized land pocket.

[19] Regarding the second statutory ground for appeal, Encana states that its consultation and notification report was provided to the OGC pursuant to section 24(1)(c) of the *OGAA*, and this report was considered by Mr. Farah when he made his decision to issue the permit. The report states that the Jorgensens had no project-specific concerns relative to their lands and this was given "due regard" by Mr. Farah.

[20] Encana submits that it was not until *after* the permit was issued that the Jorgensen's requested the re-route from the property to the west. Therefore, the remedy that they seek from the Tribunal was not identified before the decision was issued, and there could not be "due regard" given to it.

[21] For these reasons, Encana argues that the Jorgensens do not meet the requirements of section 72(2) of the *OGAA* and have no basis upon which to appeal.

ISSUE

[22] The sole issue to be determined is whether the Tribunal has jurisdiction over the Jorgensen's appeal under section 72(2) of the *OGAA*?

RELEVANT LEGISLATION

[23] The following sections of the *OGAA* are relevant to this issue.

1 (1) Words and expressions used but not defined in this Act or in the regulations for the purposes of this Act, unless the context otherwise requires, have the same meanings as in the *Petroleum and Natural Gas Act*, other than Part 17 of that Act.

(2) In this Act:

…

"land owner" means

(a) a person registered in the land title office as the registered owner of the land surface or as its purchaser under an agreement for sale, and

(b) a person to whom a disposition of Crown land has been issued under the *Land Act*,

but does not include the government or a person referred to in paragraph (b) of the definition of "unoccupied Crown land" in section 1 of the *Petroleum and Natural Gas Act*;

...

69(1) In this Part:

"determination" means

...

(b) with respect to a land owner of land on which an oil and gas activity is permitted to be carried out under this Act,

(i) a decision made by the commission

(A) under section 25 to issue a permit to carry out an oil and gas activity on the land of the land owner, and

...

72(2) A land owner of land on which an oil and gas activity is permitted to be carried out under this Act may appeal a determination under this section only on the basis that the determination was made without due regard to

(a) a submission previously made by the land owner under section 22 (5) or 31 (2) of this Act, or

(b) a written report submitted under section 24 (1) (c) or 31 (6).

...

(6) On an appeal under subsection (1), the appeal tribunal may

(a) confirm, vary, or rescind the decision made under section 71 or the determination, or

(b) send the matter back, with directions, to the review official who made the decision or to the person who made the determination, as applicable.

DISCUSSION AND ANALYSIS

Whether the Tribunal has jurisdiction over the Jorgensen's appeal under section 72(2) of the *OGAA*?

The Parties' Submissions

[24] Based upon section 72(2) of the *OGAA*, Encana submits that the Tribunal only has jurisdiction over an appeal that is brought on the basis of one of the prescribed grounds in subsections (a) and (b); this is, an alleged failure of the OGC to give due regard to the land owner's submission, or an alleged failure of the OGC to give due regard to the operator's consultation report. In support, it refers to a previous decision of the Tribunal in *Daniel Kerr v. Oil and Gas Commission*, Decision No. 2011-OGA-005(b), issued December 12, 2011 [*Kerr*].

[25] In *Kerr*, the Tribunal concluded that the relevant provisions of the *OGAA* show an intention to limit the types of determinations that may be appealed by land owners, and the basis upon which a land owner may initiate an appeal. The Tribunal explained as follows:

> 40. Section 72(2) limits the "basis" on which land owners "may appeal a determination". Land owners may appeal only on the basis that the Commission made a determination "without due regard to" a submission previously made by the land owner under sections 22(5) or 31(2), or a written report submitted by an applicant under sections 24(1)(c) or 31(6). This is akin to limiting the grounds on which land owners may file appeals. By implication, this narrows the types of issues that may be relevant in land owner appeals.

[26] Encana submits that, in order to have standing to appeal a determination of the OGC, a land owner must have filed a submission in the underlying proceeding to which due regard has allegedly not been given, or must allege that the OGC failed to give due regard to the operator's consultation report. Encana submits that the Jorgensen's did not file a written submission with the OGC, and do not allege that the OGC failed to give due regard to the consultation report. Accordingly, Encana argues that they do not meet the requirements of section 72(2) of the *OGAA*.

[27] Encana submits that it would strain the intention of the legislature "beyond credulity" if a land owner could request relief that he or she had never requested or identified, whether in the land owner's submissions directly to the OGC, or in its consultations with the proponent. Encana submits that, as stated in its consultation report, the Jorgensens had not expressed any project-specific concerns prior to the issuance of the permit. It maintains that the Jorgensen's issues with respect of the project related only to compensation and right of entry, which are matters within the jurisdiction of the Surface Rights Board, not this Tribunal.

[28] Finally, Encana submits that the Jorgensen's appeal is not necessary to deal with the routing issues. It states:

> While Encana is of the view that the Dilworth Appeal is without merit and is unlikely to succeed, it is evident that the Jorgensen Appeal raises essentially the same routing concerns that have been raised in the Dilworth Appeal and that those concerns will, therefore, be before the Tribunal regardless of the participation of the Jorgensens. The Tribunal does not require information and evidence from the Jorgensens in order to fully understand the issues associated with the requested reroute.

[29] In their submissions on this summary dismissal application, the Jorgensens did not respond to the statutory interpretation issues. Rather, they provided a list of their communications with Encana and its land agents. The list shows two phone calls in 2012, and seven meetings between June of 2013 and March of 2015. The Jorgensens state that, during every meeting, they opposed the project location in the northwest corner of their property. The Jorgensens state that they assumed that Encana "would (as required by the Act) include our objections in their reports to the OGC."

[30] In reply, Encana states that it commenced consultation with the Jorgensens in November of 2012 to understand and attempt to resolve their project-specific concerns prior to filing the permit application with the OGC. It states that, in fact, it accommodated a request by the Jorgensens to realign the originally-planned project route in the property to the east (the southeast ¼ of section 30). It states, "Encana understands that it resolved all of the Jorgensens' Project-specific concerns during the pre-consultation phase. At no point during this time did the Jorgensens raise any concerns about the proposed routing of the Project in the SW 30 [their property] that is now the subject of the Jorgensen Appeal."

[31] On October 8, 2013, Encana provided the statutorily required consultation and notification letter to the Jorgensens, and others. The Jorgensens did not provide a written response.

[32] After that letter, Encana states that it "had no further ongoing consultation and notification obligations relative to the matters within the OGC's jurisdiction." Despite this, Encana states that it continued to meet with the Jorgensens on January 24, 2014, April 8, 2014 and March 9, 2015. It understood that, although the Jorgensens had no concerns about the project routing on their lands prior to the issuance of the permit, they were not prepared to enter into a right of way agreement with Encana as long as their neighbours, the Dilworths, maintained an objection to the project route in the northwest 30 (the Dilworth's land). Encana states, "Any efforts the Jorgensens might have made to try to facilitate resolution between Encana and the owners of the NW 30 do not, however, amount to an objection to the Project relative to their own lands."

[33] The OGC takes no position on the application for summary dismissal of the appeal. However, it provided the Tribunal with a copy of Mr. Farah's decision rationale, and the consultation and notification report submitted by Encana under section 24(1)(c) of the *OGAA*.

The Panel's Findings

[34] Based upon the wording of section 72(2) of the *OGAA*, the Jorgensen's must have expressed their opposition to the pipeline route to the OGC prior to the issuance of the permit, and/or clearly expressed their objection to Encana prior to the issuance of the permit. Unless the opposition was known to Mr. Farah through one of these means prior to making his decision, he could not possibly have "due regard" to the objection(s).

[35] There is no dispute that the Jorgensen's did not express any concerns or objections in writing prior to the permit being issued. There is a dispute over whether the Jorgensens expressed any concerns or objections verbally to Encana, which should have been included in its consultation report.

[36] The *Regulation* focuses on written submissions and responses from land owners. The applicant's obligation to respond to land owners, and to consult, is tied to a written response or written submission from a land owner, or a written request for a meeting. In fact, the *Regulation* states that the applicant has no further obligations to notify or consult with the land owner if it does not receive a written response within a specified period of time, or, if a meeting is requested in

writing, once the applicant conducts the last meeting with the person. It is likely that the focus on written communication in the *Regulation* was intentional; it is intended to avoid disputes, disagreements or misunderstandings between the parties by requiring a "paper trail".

[37] However, this finding does not preclude a proponent from including a land owner's clear objection to a proposal for oil and gas activities in its consultation report, and to the OGC, if those objections have not been received in writing. Further, depending upon the circumstances, this clear objection may be legally required to be included in a consultation report even if it is not confirmed in writing.

[38] From Encana's first informal communication with the Jorgensens in 2012, up to the date of the October 8, 2013 letter, the consultation report lists phone calls, an email, and at least five meetings prior to October 2013. The parties did not provide the Tribunal with any written notes or minutes from those meetings. Nor does the consultation report provide a detailed description of what was discussed during the meetings. Only one entry indicates that Jorgensen's expressed some type of concern. The consultation report states that an April 12, 2013 email was sent by Encana "in response to April 11, 2013 [meeting] concerns".

[39] Encana's notification and consultation letter dated October 8, 2013, clearly advised the Jorgensen's of Encana's proposed pipeline, the location of the proposed pipeline on the Jorgensen's property, and how the Jorgensens could communicate any outstanding concerns or objections; i.e., by providing a written response to Encana within 21 days, or a written submission to the OGC up until the time that the decision on the application is made (in this case, February 23, 2015). No written concerns or objections were provided to either Encana or the OGC by the Jorgensens. A written objection to the route was provided to the OGC by the previous owner of the Dilworth property to the north, and later by the Dilworths.

[40] Encana's letter also states that a land owner may contact Encana to discuss the project or to set up a meeting. However, Encana did not require a written request for a meeting as is contemplated by section 13 of the *Regulation*. In fact, the contact information provided in the letter included telephone land line and cell phone numbers, indicating a verbal request would suffice.

[41] It appears from the Jorgensen's materials that they met with Encana three times after the October 8, 2013 letter, but before the February 23, 2015 decision. It is unknown whether the Jorgensens requested these meetings, or whether they were requested by Encana. As neither the Jorgensens nor Encana provided the Tribunal with any written notes or minutes from any of those meetings, there is no record of what was discussed. The Jorgensens assert that they expressed their opposition to the project location in the northwest corner of their property at every meeting. Encana states that, from those meetings, it understood that the Jorgensens did not have concerns about the project routing on their land, but that they were not prepared to enter into a right of way agreement with Encana as long as their neighbours maintained an objection to the project route. However, in Encana's view, any effort the Jorgensens were making to facilitate resolution between Encana and the neighbours does not amount to an objection to the project relative to their lands.

[42] The only written record of the Jorgensen's position that is before the Tribunal is Encana's December 9, 2014 consultation report which states "no project specific concerns have been raised [by the Jorgensens]." Mr. Farah made his decision based upon the content of that report, as well as his consideration of the written objections received from others.

[43] The legislation requires a land owner's appeal to be based upon written submissions, of which there are none. Further, the Appellants do not challenge the consultation report in their Notice of Appeal, and, in fact, it is clear from the decision rationale that Mr. Farah considered that report. The problem for the Jorgensens is that the report did not contain any relevant objection from the Jorgensens. The only written record of the Jorgensen's concerns with the pipeline route on their land is in an email that was written after the permit was issued. As this record was made after the permit was issued, the Tribunal agrees that it neither provides a ground for appeal under section 72(2) of the *OGAA*, nor can it be accepted as evidence of previous concerns.

[44] However, if the Tribunal accepts the Jorgensen's claims that they clearly communicated their objections to Encana on numerous occasions, and if Encana ought to have included their objection in its consultation report as alleged by the Jorgensens, then there may have been a breach of procedural fairness and/or a violation of the legislation such that the consultation report is fundamentally flawed and should not have been given "due regard".

[45] Conversely, if the Tribunal accepts Encana's claims that the Jorgensens did not communicate these objections to Encana during the consultation period, then the Tribunal agrees that the Jorgensens do not have the required statutory grounds for appeal under section 72(2) of the *OGAA*, and their appeal would be dismissed.

[46] As this application has been conducted in writing and there are no personal notes, minutes of meetings, or affidavits with sworn evidence regarding what was discussed during the meetings, the Panel is unable to make an assessment of credibility and to determine whether the Jorgensens communicated a clear objection to the proposed route, as claimed.

[47] Further, the parties have not had the opportunity to address the question of whether there is, in law, a duty upon the proponent to include verbal objections in a consultation report and, if so, the implications of the OGC's reliance on the December 9, 2014 consultation report and on its decision-making process.

[48] In these circumstances, the Panel is not prepared to summarily dismiss the Jorgensen's appeal. To find that the Tribunal does not have jurisdiction over an appeal and to take away a land owner's ability to appeal, should only be done in clear cases. This is not one of those cases. There are lingering questions which the Panel has no ability to evaluate and decide based on the information before it. For all of these reasons, Encana's application is denied.

[49] However, this does not preclude the parties from pursuing the jurisdictional question during the hearing of this appeal, at which time the Tribunal will have the benefit of oral evidence from the parties and legal argument.

DECISION

[50] In making this decision, the Tribunal has considered all of the relevant documents and evidence, whether or not specifically reiterated herein.

[51] For the reasons provided above, the application for summary dismissal on the basis of a lack of jurisdiction under section 72(2) of the *OGAA* is denied.

"Alan Andison"

Alan Andison, Chair
Oil and Gas Appeal Tribunal

June 15, 2015