



Oil and Gas Appeal Tribunal

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DECISION NO. 2018-OGA-001(a)

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

BETWEEN:	Brian and Carolyn Derfler	APPLICANT
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 May 4, 2018	
APPEARING:	For the Applicant: Brian Derfler For the Respondent: Claire Bond, Counsel For the Third Party: Lars Olthafer, Counsel	

STAY APPLICATION

THE APPLICATION

[1] Brian and Carolyn Derfler apply to the Oil and Gas Appeal Tribunal to stay a March 8, 2018 amendment to pipeline permit #9708141 (the "Amendment") held by Encana Corporation ("Encana"). The Amendment was issued by the Oil and Gas Commission (the "OGC").

[2] The Amendment relates to segments 1, 5, 6 and 7 of the pipeline permit. It authorizes the following:

- split of segment 1 into segment 1 and 6 and segment 1 tied to project #23397.
- split segment 5 into segment 5 and 7 and bring it above ground via a camel back riser at 13-29 and install another riser at the 16-28.

[3] The Derflers argue that the Amendment should be stayed pending a full hearing and decision on the merits of their appeal. The OGC and Encana argue that the application for a stay ought to be denied.

[4] No date has been set to hear the merits of this appeal.

[5] This application has been heard by way of written submissions.

BACKGROUND

[6] As stated above, the Amendment relates to segments 1, 5, 6 and 7 of pipeline permit #9708141. The OGC issued this pipeline permit to Encana on May 19, 2015. It authorized Encana to construct and operate a five segment pipeline comprised of three natural gas pipelines and two water pipelines between locations described as 13-29-79-17 W6M and 15-27-79-17 W6M. A portion of those pipelines was permitted to traverse lands owned by the Derflers; specifically, four parcels of land legally described as SE 33-79-17 W6M, SW 33-79-17 W6M, NE 29-79-17 W6M, and NW 28-79-17 W6M.

[7] Section 1 of the pipeline permit authorized a maximum hydrogen sulphide ("H₂S") content of 0.001% - or approximately 10 parts per million ("ppm") – in the gas transported through segments 1 and 5 of the natural gas pipelines. The natural gas pipelines were designated as "unidirectional".

[8] On June 5, 2015, Mr. Derfler appealed the issuance of this pipeline permit to the Tribunal. To resolve some of Mr. Derfler's concerns, Encana applied for, and the OGC granted, an amendment to the permit that rerouted the pipeline around one parcel of the Derfler's land (the SW 33-79-17). Mr. Derfler then withdrew his appeal.

[9] Following Mr. Derfler's withdrawal of that appeal, there were a number of amendments to the permit prior to the subject Amendment. There has also been an application for a new permit. As the parties' submissions on the stay application refer to these amendments and application, they are briefly described below.

[10] In December 2016, Encana decided to apply for an amendment of the permit to allow the transport of natural gas containing up to 0.099% H₂S – or approximately 990 ppm - in segment 1 of the pipeline. Encana explains that the amendment was needed because small amounts of H₂S were discovered in natural gas wells producing from the Lower Montney geological formation.

[11] Before applying to the OGC for the amendment, Encana states that it sent a notification letter to the Derflers in accordance with section 31 of the *Oil and Gas Activities Act* (the "OGAA"). Encana provided the Derflers with a Bulletin explaining the reason for the amendment and advised the Derflers of their right to make a written submission to the OGC setting out their comments or concerns. The Derflers did not make any submissions to the OGC.

[12] On January 27, 2017, the OGC granted the amendment.

[13] In March of 2017, Encana applied for the same amendment with respect to segment 5 of the pipeline. On May 4, 2017, the OGC granted the amendment.

[14] These two 2017 amendments increased the maximum H₂S content in segments 1 and 5 of the natural gas pipelines to 990 ppm.

[15] The OGC granted a further application to amend the pipeline permit in October of 2017, which changed the flow of segment 3 of the water pipeline to bidirectional.

[16] Also in October of 2017, Encana notified the Derflers of its intention to apply for the subject Amendment. In addition to this notification, Encana also provided the Derflers with a consultation letter regarding a new project with nine pipeline segments (the "New Pipeline Project"). A portion of the proposed New Pipeline Project would traverse lands owned by the Derflers.

[17] Mr. Derfler filed a six page hand-written submission dated October 28, 2017 regarding the New Pipeline Project. In that submission, Mr. Derfler raised concerns about Encana's survey access to their land, soil handling and reclamation, pipeline failure, contamination, as well as pipeline abandonment. Encana responded in a letter dated December 14, 2017.

[18] On December 29, 2017, Encana applied to the OGC for the subject Amendment of the existing pipeline permit. Specifically, it applied to amend the existing pipeline permit to allow two segments of the pipeline to be split, and to allow for the installation of two risers on leased sites at 13-29 and 16-28. Encana also sought to increase the size of the emergency planning zone ("EPZ") associated with the project. According to Encana, the EPZ does not encompass the Derflers' residence.

[19] The OGC states that it did not require Encana to carry out consultations under section 31(5) of the *OGAA* with respect to the application for the subject Amendment. However, according to Encana, it included the Derflers' written submissions on the New Pipeline Project, and Encana's response, with its application for the Amendment because the time periods for landowner written submissions overlapped with respect to the Amendment application and the New Pipeline Project application.

[20] On January 29, 2018, Encana advised Mr. Derfler during a face-to-face meeting that the scope of the New Pipeline Project would include three pipeline segments – not nine - and confirmed this information in a letter dated February 2, 2018.

The Amendment Decision

[21] On March 8, 2018, the OGC issued the Amendment to the existing pipeline permit. In a Decision Rationale of the same date, the decision-maker explains the Amendment as follows:

Project Details:

This is an amendment to previously permitted pipeline with project#23573 under AD# 100082254. This amendment is applied

- to split segment 1 into segment 1 and 6 and segment 1 tied to project # 23397.
- to split segment 5 and bring it above ground via a camel back riser and install another riser at the 16-28.

...

Consultation and Notification:

Consultation not required but notice to the land owner on whose land the activities are proposed was sent as per section 31 of OGAA.

Written submission received from the land owners Brian Derfler and Community Relations looked into it and provided a summary report.

Concerns raised by Brian [Mr. Derfler] are related to application 100104330 which is new pipeline [the New Pipeline Project] and the consultation carried out at the same time by Encana. ... Concerns raised are not directly related to this amendment but I am satisfied that due consideration have been given. I would also put this application under inspection to make sure that the pipeline constructed are in compliance with legislation.

There were two similar consultation carried out by proponent. This amendment doesn't have any new land impacts but only addition of one riser at 13-29. ... The scope of this amendment is only technical in nature and has no new impacts ...

Outcome:

This application has been approved.

[22] In the Decision Rationale, the OGC notes that there are no changes to the size of the pipeline and no new area is added.

The Appeal and Application for a Stay

[23] The Derflers filed their appeal of the Amendment on March 23, 2018. In their Notice of Appeal, the Derflers state that submissions were made to the OGC in accordance with the OGAA but their concerns and questions have not been answered or addressed properly.

[24] The Derflers state that they have advised Encana on four different occasions that they are not interested in any more pipeline right of ways on their lands. In their Notice of Appeal, the Derflers seek to have the pipeline right-of-way relocated as the cumulative effect of the pipelines on their property affect their farming operation, quality of life and ability to sell their land when they decide to retire. If this cannot be done, they ask for the following:

- a specific plan that reclaims all soils within Encana's right-of-ways to be similar to original condition before pipeline construction within a defined time period;
- secure funding or bonds to remove pipes when right-of-ways are decommissioned and remediate any problems related to the pipeline;
- no off-shore pipe to be used in pipeline construction;
- no soil stripping in temporary work spaces; and
- in the event that the pipeline is abandoned in this location by another energy company, Encana must provide a binding plan for funding and

cost estimates for the duration of abandonment and assume responsibility if the other company cannot.

[25] The Derflers also state that they would like Encana to honour its commitment to correct flooding on the Derflers' land from a well site on adjacent land that currently affects a 2015 right-of-way, and farming operations dating back several years.

[26] In their Notice of Appeal, the Derflers also applied for a stay. The Derflers state: "In light of EnCana's impending permit, I would like to request a full stay prior to this order until all of my questions have been answered by EnCana and the OGC."

Subsequent events

[27] Following the Notice of Appeal and application for a stay, Encana states that its representatives left telephone messages for the Derflers explaining the distinction between the Amendment and the New Pipeline Project, and confirming that the Amendment does not entail any direct impact to the Derflers' lands.

[28] On April 11, 2018, the Derflers wrote to the Tribunal apologizing for the "confusion of our appeal", and attached a copy of a March 19, 2018 letter from Encana regarding:

13-29-79-17 W6M to 16-28-79-17 W6M
Lands: NW1/4 28-79-17 W6M & SE 33-79-17 W6M
Encana File: S471567

[29] That letter states that Encana confirmed the need for a Right of Entry Order for the installation of its pipeline on the subject land. The letter then states, "We are now in receipt of the permit and would like to proceed with application to the BC Surface Rights Board (SRB) for a Right of Entry." Encana attached a number of documents to the March 19th letter.

[30] In their April 11th letter to the Tribunal, the Derflers explain that the March 8, 2018 Amendment provided maps of the proposed pipeline right-of-way and they thought that this was the proposed 2018 right-of-way 13-29-79-17 to 16-28-79-17 referred to in the March 19th letter. They state:

Originally it was only our intention to appeal the 2018 ROW. Currently the 2018 ROW is before the SRB for approval of ROE [right of entry]. The OGC has not issued a permit for this project although EnCana claims to be in receipt of one in their letter to us dated March 19, 2018.

[31] The Derflers then asked the Tribunal to accept an appeal "for both of these projects." They state:

In regards to the March 8, 2018 amendment we would appreciate a better understanding of the implications of this project on our property. When we signed for this ROW in 2015, EnCana did not indicate future changes. They routinely stated that the Montney gas is sweet and the gas plant is sweet, etc. and now this amendment states

flow direction is uni-directional and the project will be sour natural gas. I have concerns about the EPZ, emergency shut down valves, total release volumes of sour gas and "technical pipeline permissions".

[32] In response to the Derflers' April 11th request to accept an appeal for "both projects", the Tribunal accepted, "subject to any objections or clarifications" from Encana or the OGC, this letter as a request for an amendment to the Derflers' grounds of appeal that would allow them to address these additional issues as part of their existing appeal. The Tribunal also understood from the March 19th attachment that "these activities have been approved under the same Amendment".

Encana's submissions

[33] Encana objects to the Derflers' application for a stay. It submits that the Derflers' grounds for appeal do not relate to the Amendment; rather, they relate to Encana's application for the New Pipeline Project and to pipeline development generally. In this same vein, Encana submits that the application for a stay does not show how the Amendment raises a serious issue, or why a stay will prevent irreparable harm.

[34] Encana also objects to the Tribunal's proposed method of dealing with the Derflers' April 11th letter. It submits as follows:

- a. The Derflers' appeal has been invalid from the outset as the original Notice of Appeal is actually an appeal of the New Pipeline Project, which has not been permitted. The March 19, 2018 letter to the Derflers was Encana's notification to apply to the Surface Rights Board for a right of entry order for the installation of the new project. Encana states that the letter incorrectly stated that there was a permit for the New Pipeline Project, when there was (and is) not.
- b. The new grounds in the April 11th letter relate to the original pipeline permit and previous amendments, not the Amendment: the natural gas pipelines have been unidirectional since the permit was issued and Encana has been allowed to transmit some H₂S content since that time. The 2017 amendments allowed a higher H₂S content to 990 ppm. The subject Amendment does not address any of the new grounds referenced in the April 11th letter.
- c. It would be improper and beyond the Tribunal's jurisdiction to consider the new grounds referenced in the Derflers' April 11th letter as they were never raised with the OGC prior to the issuance of the Amendment. Appeals to the Tribunal lie from matters that were raised in a written submission or report provided to the OGC (section 72(2) of the OGAA). The Derflers only provided written submissions dated October 28, 2017 in response to Encana's notification of the proposed New Pipeline Project.

The OGC's submissions

[35] The OGC provided submissions opposing the Derflers' application for a stay "without conceding that the Appellants have standing to bring the appeal, which is an issue". The Tribunal is not addressing the Derflers' standing in this decision.

[36] The OGC submits that the Derflers have neither established that their appeal of the Amendment raises a "serious issue" to be tried, nor the likelihood of irreparable harm to their interests if a stay is denied.

[37] Regarding the Tribunal's proposed amendment to the Derflers' grounds for appeal, the OGC provided a brief chronology of the amendments to the 2015 pipeline permit, including the subject Amendment, as well as the legislative context for the Amendment. It submits that the Amendment did not change the direction of flow in the pipelines and did not alter the gas product to sour. In other words, the proposed new grounds for appeal do not relate to, and were not authorized by, the subject Amendment. The OGC notes that the Amendment "does not involve any activity or new impacts" on the Derflers' lands.

ISSUE

[38] The main issue to be decided in this case is whether the Tribunal should grant a stay of the Amendment.

APPLICABLE LEGISLATION AND LEGAL TEST

[39] Section 72(3) of the *OGAA* grants the Tribunal the authority to order a stay:

72(3) Subject to subsection (4), the commencement of an appeal does not operate as a stay or suspend the operation of the determination or decision being appealed, unless the appeal tribunal orders otherwise.

[40] As stated in the Tribunal's *Practice and Procedure Manual* at pages 23 to 24, when considering an application for a stay the Tribunal's practice is to apply the three-part test in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.); [1994] S.C.J. No. 17 [*RJR-MacDonald*]. That test requires an applicant for a stay to demonstrate the following:

- there is a serious issue to be tried;
- the applicant will suffer irreparable harm if the stay is not granted; and
- the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted (the "balance of convenience" test).

[41] A stay is an extraordinary remedy. The onus is on the applicant for a stay to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Serious Issue

[42] In *RJR-MacDonald*, the Court considered the indicators of a serious issue to be tried and found:

49. ... There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. ...

50. Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[43] The Court later clarified as follows:

78. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. ... A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. ...

[44] To make a preliminary or limited assessment of the merits of the case, the Tribunal will consider the Amendment under appeal and the issues raised by the Derflers in relation to that Amendment.

The Derflers' appeal

[45] In the Derflers' March 20, 2018 Notice of Appeal, they explain in paragraph 2 as follows:

I sent in a written submission to the OGC on November 3, 2017 [the submission is dated October 28th] stating my concerns with a proposed pipeline that EnCana is wanting to construct. I have since received letters from both Encana and the OGC with their attempts to try and answer my questions and concerns but I do not feel that they have all been answered or addressed properly.

[46] The Derflers then reiterate many of the concerns and questions from that written submission to the OGC. First, they refer to concerns with "schedules A and B" for soil management and reclamation. The Derflers state that they feel helpless to protect their fields from irreparable harm, and express frustration with the length of time that it has previously taken Encana to address soil issues on their property. The soil issues affect their crops and ability to farm.

[47] They express concerns about potential contamination of their land by abandoned pipes. They have questions about how future responsibility for problems will be enforced and who is responsible for clean-up.

[48] In their April 11, 2018 letter to the Tribunal asking to appeal “both projects”, the Derflers set out their particular concerns with the Amendment. They:

- seek “a better understanding of this project on their property”;
- are concerned that “this amendment states flow direction is uni-directional and the product will be sour natural gas”; and
- are concerned about the EPZ, emergency shut down valves, release volumes of sour gas and “technical pipeline permissions”.

[49] The Derflers’ submissions on the stay application pertain to the issues they raised in their initial Notice of Appeal as well as the new grounds from the April 11th letter.

[50] In their final submissions on the stay application, the Derflers provide two pages of questions that they want answered, and then highlight concerns with the risks of H₂S and sulphur dioxide (SO₂) to their family and the community, and concerns with EPZs. In their conclusion, they state that they are disappointed by Encana’s response to their “request for an appeal of the sour gas amendment that increases the EPZ.”

The OGC’s submissions

[51] The OGC agrees that the serious issue branch of the *RJR-MacDonald* test has a “low threshold”, but submits that the Derflers have not met this branch of the test.

[52] The OGC argues that section 72(2) of the *OGAA* provides a right of appeal to a landowner on the basis that the determination “was made without due regard to a submission previously made by the land owner under section 22(5) or 31(2) of the Act, or a written report submitted under section 24(1)(c) or 31(6) of the Act.” It submits that the Derflers have not suggested that the OGC failed to give due regard to any submissions made by them regarding the Amendment application. The only submission made by the Derflers was the October 28, 2017 submission pertaining to the New Pipeline Project. That submission will be the subject of consultation in relation to the pending application for the New Pipeline Proposal.

[53] The OGC further submits that the Derflers stated concerns with access, soils, reclamation, and abandonment are not engaged by this appeal given that the Amendment is a “minor, technical amendment involving no activity or new impacts on the Appellants’ Lands.”

[54] Further, the OGC notes that, in their April 11th letter, the Derflers acknowledge that their initial submissions and grounds for appeal relate to the Encana’s pending application for the New Pipeline Project. As these do not relate to the Amendment, the OGC submits that they cannot be considered “serious issues” as required by the first part of the test.

[55] Further, as the “new grounds” raised in the April 11th letter were never raised with the OGC until April 11th, they cannot substantiate an appeal on the question of whether the OGC gave due regard to them before issuing the Amendment. In any event, the OGC submits that the new grounds are premised on the assumption that the Amendment changed the flow direction and gas product, which is not correct.

[56] The OGC submits that the Derflers have not raised any serious issues related to the Amendment under appeal.

Encana's submissions

[57] Encana submits that none of the matters identified by the Derflers relate to the Amendment decision under appeal. It submits that the Derflers’ original grounds for appeal relate either to the New Pipeline Proposal or to pipeline development generally, neither of which are under appeal. Further, no appeal can be filed against the New Pipeline Project unless/until a permit is issued.

[58] Regarding the new grounds for appeal identified in the April 11th letter, Encana submits that these grounds relate to activities that were already authorized under the 2015 pipeline permit and/or the 2017 amendments. Specifically, Encana notes that the natural gas pipelines associated with the 2015 permit have been unidirectional since the permit was issued, and, since the outset, Encana has been permitted to transmit gas with some H₂S content. The 2017 amendments permitted Encana to transit gas with a slightly higher H₂S content (up to 990 ppm). Encana submits that, as the subject Amendment does not approve any of the activities that the Derflers reference in that letter, none of the new grounds can be considered serious issues.

[59] Encana notes generally that the Amendment will have no direct impact on the Derflers: it does not authorize any construction or ground disturbance on their land.

[60] In sum, Encana argues that the original grounds for appeal relate to the New Pipeline Proposal which has not been permitted, and the subsequent grounds for appeal and clarifications relate primarily to activities that were permitted before the Amendment, and which have never been raised with the OGC. While Encana acknowledges that its decision to concurrently give notice of the then proposed Amendment and New Pipeline Project “may have contributed to confusion on the part of the Appellant”, it submits that the stay application does not establish a serious issue arising from the issuance of the Amendment.

The Panel's findings

[61] In an application for a stay, the onus is on the applicant, in this case the Derflers, to satisfy each branch of the three-part *RJR-MacDonald* test.

[62] In most cases, the serious issue stage of the test has a low threshold. Except in rare circumstances, it is to be decided on an extremely limited review of the case on its merits. As a general rule, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry should proceed to the next stage.

[63] The Panel has carefully reviewed the Derflers' Notice of Appeal and submissions on the stay application, their April 11th letter, the Tribunal's response to that letter, and the submissions of Encana and the OGC. It is apparent from the additional information provided by the parties as part of this application that the process leading to, and following, the subject Amendment has resulted in confusion, both on the part of the Derflers and for the Tribunal in responding to their April 11th letter. Encana acknowledges that its decision to concurrently notify the Derflers of the Amendment application and the New Pipeline Project contributed to the confusion. This was compounded by Encana's March 19th letter to the Derflers which we now know relates to the New Pipeline Proposal (not the Amendment), and incorrectly states that a permit for that proposal was issued.

[64] With the benefit of all of the new information before the Tribunal, it is apparent that the Derflers' real concerns relate to the 2015 permit and/or prior amendments to that permit, the New Pipeline Project, and pipelines generally. None of their grounds for appeal, original or in their April 11th letter, relate specifically to the Amendment. This is problematic as the only decision that has been appealed within the statutory appeal period is the Amendment, and that Amendment decision must be the focus of the "issues to be tried" – the assessment of whether there are serious issues to be addressed by the Tribunal in the appeal. Issues related to the direction of flow or sour gas volumes allowed in the 2015 pipeline permit, or the 2017 amendments increasing that volume, are not properly before the Tribunal on this appeal.

[65] Similarly, as no permit for the New Pipeline Proposal has been granted by the OGC, issues related to that proposal are not properly before the Tribunal. However, if the OGC issues a permit, that decision may be appealed to the Tribunal.

[66] Despite the detailed information that the Derflers have included in their Notice of Appeal and submissions on the stay application, and the multitude of questions and concerns that they have raised, the Panel is unable to find any serious issues that relate to the Amendment under appeal. Therefore, the Panel finds that Derflers have failed to satisfy the onus of demonstrating that there is a serious issue to be decided in their appeal of the Amendment.

[67] The Panel has reached its conclusion on the information before it and "on the basis of common sense and an extremely limited review of the case on the merits" as contemplated by the Court in *RJR-MacDonald* at paragraph 78. The Panel's conclusion on this issue is solely for the purpose of deciding this stay application.

[68] Given that the Panel finds that the Derflers have not established a serious issue to be decided in relation to the Amendment, the Panel will not proceed to consider the second and third branches of the test.

[69] As a final matter, the Panel has considered Encana's objection to the Tribunal's proposed method of dealing with the Derflers' April 11th letter. In that letter, the Tribunal accepted that the activities referred to in Encana's March 19, 2018 letter were approved under the Amendment and, accepted the April 11th letter as an amendment to their grounds for appeal. Given the clarifications provided by the OGC and Encana during this stay application, it is now apparent that the March

19, 2018 letter relates to the New Pipeline Project, not the Amendment. Further, the “new grounds” do not relate to the Amendment: they relate to the 2015 permit and/or the 2017 amendments. As the Tribunal cannot hear appeals of these matters in the context of an appeal of the Amendment, and cannot add grounds for appeal that do not relate to the particular decision under appeal, the objection is sustained. The Tribunal cannot accept an appeal of “both projects” – only the March 8, 2018 Amendment – and the Notice of Appeal will not be amended to include the new issues identified in the Derflers’ April 11th letter.

DECISION

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

[71] For the reasons provided above, the application for a stay of the Amendment is denied.

“Alan Andison”

Alan Andison, Chair
Oil and Gas Appeal Tribunal
May 16, 2018