BRITISH COLUMBIA

Oil and Gas Appeal Tribunal

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DECISION NO. 2017-OGA-023(c)

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

BETWEEN:	Encana Corporation	**APPLICANT/THIRD PARTY**
AND:	Olaf and Frances Jorgensen	**APPELLANTS**
AND:	Oil and Gas Commission	**RESPONDENT**
BEFORE:	A Panel of the Oil and Gas Appeal Tribunal Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on January 19, 2018	
APPEARING:	For the Appellants:	Colleen Brown, counsel
	For the Respondent:	Claire Bond, Counsel
	For the Third Party:	Lars Olthafer, Counsel

PRELIMINARY APPLICATION FOR SUMMARY DISMISSAL

[1] Encana Corporation ("Encana") applies to the Tribunal for summary dismissal of an appeal filed by Olaf and Frances Jorgensen against permit 100102009 (the "Permit"). The Permit was issued by the Oil and Gas Commission (the "Commission") to Encana Corporation ("Encana"), and authorizes Encana to construct and operate a pipeline on land owned by the Jorgensens.

[2] This application was conducted by way of written submissions.

BACKGROUND

[3] In December of 2016, Encana provided an invitation to consult letter to the Jorgensens regarding its plans to construct and operate a four-segment pipeline on the NE ¼ 30-79-17-W6, the SE ¼ 30-79-17-W6M, and the SW ¼ 30-79-17-W6M owned by the Jorgensens (collectively, the "Lands"). The letter included a map showing the proposed pipeline route and the general areas associated with the pipeline's construction.

[4] On behalf of the Jorgensens, a representative from the Farmers' Advocacy Office requested additional information on the proposed pipeline, such as the size, operating pressure and anticipated permit approval pressure, the reason for two

gas lines, and whether the four lines are in addition to existing lines. Encana responded to those questions.

[5] In February of 2017, Encana wrote to the Jorgensens to advise that it was in the process of submitting its permit application for the pipeline to the Commission, and was completing its notification and consultation requirements. As it had not heard anything further from the Jorgensens, Encana was of the view that its response had addressed their questions and concerns. However, Encana advised that the Jorgensens could provide written submission to the Commission in relation to the proposed pipeline, should they wish to do so.

[6] On February 28, 2017, Encana applied to the Commission for a permit to construct and operate the pipeline. The application included supporting documents including detailed maps and plans, and a report setting out Encana's notification and consultation activities with land owners. It indicated that the Jorgensens had unresolved concerns regarding compensation.

[7] On March 22, 2017, the Commission issued the Permit pursuant to section 25(1) of the *Oil and Gas Activities Act* (the "*OGAA*"). The Commission's decision rationale includes the following opening statement:

> **Project Details:**
>
> This is a multi activity [application] with pipeline and AOGA [Associated Oil and Gas Activities]. Total area is 1.824 [ha] and is located within private land. Area occupied by pipeline is 1.004 ha and AOGA covers 0.82 ha. AOGA includes one sump and 6 workspace[s].
>
> [underlining added]

[8] After the Permit was issued, Mr. Jorgensen attended the Commission's office seeking clarification about whether the Permit authorized a sump and/or temporary workspaces on the Lands.

[9] On April 5, 2017, a Commission employee sent an email to Mr. Jorgensen advising that the Commission does not issue authorizations for associated oil and gas activities on private land, and that Encana would need to arrange for access to the Lands prior to constructing any sump or workspaces. The employee referred to chapter 4.6 of the Commission's "Oil & Gas Activity Application Manual", which states in part:

> **4.6.1 Associated Oil & Gas Activity Defined**
>
> Section 1 of the Oil and Gas Activities Act (OGAA) defines oil and gas related activity …
>
> Specifically, AOGA are related activities which require the use of Crown land [and] require an authorization under either the Land Act or the Petroleum and Natural Gas Act issued by the Commission. The Commission does not issue authorizations for associated oil and gas activities on private land.
>
> …

> **Associated Oil and Gas Activity Intended Land Use Types**
>
> Associated oil and gas activity applications can be submitted for several intended land use types, including:
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> ...
>
> - Sump
>
> ...
>
> - Workspace
>
> **4.6.2 Creating an Associated Oil & Gas Activity Application**
>
> Associated oil & gas activities can be applied for independently, but also can be combined in a multi-activity application along with the primary activity. The Commission encourages multi-activity applications wherever practicable, especially when additional authorizations are required in relation to the associated oil & gas activity.
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> [underlining added]

[10] In April or early May 2017, Encana applied to the Surface Rights Board for a right of entry order on portions of the Lands to construct and operate the pipeline authorized by the Permit. Its application to the Surface Rights Board included areas of the Lands to be used for six workspaces during construction, and a 0.180 hectare (0.445 acre) area for a sump. The Surface Rights Board is a quasi-judicial administrative tribunal established under the *Petroleum and Natural Gas Act*.

[11] On May 31, 2017, the Surface Rights Board issued a right of entry order granting Encana access to the Lands for the permanent pipeline right-of-way and six temporary workspaces.

[12] Access to the Lands for a sump was addressed in a June 2, 2017 Surface Rights Board decision (Board Order No. 1939-3) and a separate right of entry order. Notably, paragraphs 7 and 10 of the Surface Rights Board's decision state:

> The OGC's Permit (the Permit) specifically authorizes an oil and gas activity namely, the construction and operation of a pipeline. The Sump is referenced in the Application Report attached to the Permit and the area required for the Sump is included in the Project Area covered by the Permit.
>
> ...
>
> I am satisfied that the Sump, as proposed in the context of this application, is part and parcel of the construction of the Pipeline and is, therefore an "oil and gas activity". The Sump has no purpose other than for the disposal of drilling fluid and soil removed as part of the construction process for the installation of the Pipeline. Entry and use of the land for this purpose is akin to entry and use for temporary workspace in that its only purpose is to facilitate construction and the area required will be reclaimed and returned to landowners when it is no longer needed for that purpose.
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> [underlining added]

The Appeal and the Application for a Stay

[13] The Jorgensens filed an appeal of the Permit on June 30, 2017. As their appeal was filed after the 15-day appeal period had expired, the Jorgensens also filed an "Application to Extend the Time to File an Appeal".

[14] In their initiating appeal documents, the Jorgensens expressed their opposition to the temporary workspaces and the sump being allowed on their Lands without any prior consultation, negotiation or an agreement. They believed that the Surface Rights Board had amended the Permit to allow the sump and workspaces on their Lands, given that they had been advised by a Commission employee that the Commission does not authorize those things. The Jorgensens also applied to the Tribunal for a stay of the Permit "until this matter is resolved".

[15] Before accepting the appeal, the Tribunal considered a number of preliminary issues, including whether the Surface Rights Board amended the Permit to allow the temporary workspaces and the sump, whether the sump and the temporary workspaces were authorized by the Permit and, if so, whether to grant the Jorgensens' application for an extension of time to appeal.

The Tribunal's First Preliminary Decision: Jorgensen #1

[16] In *Olaf and Frances Jorgensen v. Oil and Gas Commission* (Decision No. 2017-OGA-023(a), issued on August 8, 2017) [*Jorgensen #1*], the Tribunal found that the Surface Rights Board did not, and cannot, amend a permit issued by the Commission. Based upon a preliminary assessment, the Tribunal also found that the sump and the temporary workspaces formed part of the Commission's Permit determination and may be appealed by the Jorgensens. The Tribunal then found that an extension of time to file the appeal ought to be granted given the Commission's assurance that the sump and workspaces were not covered by the Permit, and given the Jorgensens' evidence that they were not aware of the full implications of the permitted oil and gas activities until the completion of the Surface Rights Board's processes.

[17] The Tribunal then established a submission schedule for the Jorgensens' stay application.

The Tribunal's Decision on the Stay Application: Jorgensen #2

[18] In its submissions on the Jorgensens' stay application, Encana advised that pipeline construction was completed on August 23, 2017, and it had restored the Lands, including the temporary workspaces, for incorporation back into the Jorgensens' farming operations. Encana further advised that it did not use the sump to construct the pipeline.

[19] Encana submitted that the stay application was moot given that the temporary workspaces were remediated, it did not use the sump, and the Jorgensens' initiating appeal documents only raised issues with respect to the workspaces and the sump, and not the operation of the pipeline.

[20] On September 20, 2017, the Tribunal issued its decision denying the Jorgensens' stay application: *Olaf and Frances Jorgensen v. Oil and Gas Commission* (Decision No. 2017-OGA-023(b) [*Jorgensen #2*].

Encana's Application for Summary Dismissal

[21] On November 3, 2017, Encana requested that the Tribunal summarily dismiss the appeal pursuant to sections 31(a) and (g) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"). Encana seeks summary dismissal on the basis that the appeal is not within the Tribunal's jurisdiction, and the substance of the appeal (i.e., the Jorgensens' concerns about the sump and temporary workspaces) is moot and has been appropriately dealt with in another proceeding (i.e., the Tribunal's proceedings associated with the Jorgensens' stay application).

[22] The Commission submits that the substance of the appeal has been rendered moot, and in any event, has been appropriately dealt with in the proceedings associated with the Tribunal's stay decision. The Commission takes no position on whether the appeal is within the Tribunal's jurisdiction.

[23] The Jorgensens submit that the Tribunal has previously held that an appeal should only be summarily dismissed in a clear case, and Encana has not met that burden. The Jorgensens argue that Encana's argument regarding jurisdiction is contrary to both the proper interpretation of section 72(2) of the *OGAA* and the Tribunal's previous decisions. Furthermore, the Jorgensens maintain that the substance of the appeal has not been appropriately dealt with in another proceeding.

ISSUES

[24] The issues to be determined are whether the appeal should be summarily dismissed pursuant to section 31(1)(a) or (g) of the *ATA*, respectively, on the basis that:

1. the appeal is not within the Tribunal's jurisdiction; or
2. the substance of the appeal has been appropriately dealt with in another proceeding.

RELEVANT LEGISLATION

[25] The relevant portions of the *ATA* state as follows:

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(a) the application is not within the jurisdiction of the tribunal;

…

(g) the substance of the application has been appropriately dealt with in another proceeding.

[26] The following sections of the *OGAA* are relevant to this application.

19 (2) The appeal tribunal is to hear appeals under section 72.

...

69 (1) In this Part:

"eligible person" means

(a) an applicant for a permit,

(b) a permit holder or former permit holder,

(c) a land owner of land on which an operating area is located,

(d) a person to whom an order under section 49 (1) has been issued, and

(e) a person with respect to whom the commission has made a finding of a contravention under section 62;

...

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

1. Whether the appeal should be summarily dismissed on the basis that it is not within the Tribunal's jurisdiction.

The Parties' submissions

[27] Encana submits that the Jorgensens initiated the appeal on the basis that the Surface Rights Board amended the Permit to include the sump and temporary workspaces. However, Encana maintains that this ground of appeal was effectively rejected by the Tribunal in *Jorgensen #1* on the basis that the Surface Rights Board has no authority to amend a determination of the Commission. Encana submits that the appeal is now being conducted on the basis of issues that were set by the Tribunal, rather than the Jorgensens.

[28] Specifically, Encana maintains that, at paragraph 41 of *Jorgensen #2*, the Tribunal stated that it "gleaned" certain issues "from a generous reading of the Jorgensens' initiating appeal documents and later submissions". Those issues are set out in paragraph 43 of that decision as follows:

> … the Tribunal finds that the issues underlying the Jorgensens' appeal are:
>
> (1) Whether Encana's Permit includes authorization for the temporary workspaces and/or sump?
>
> (2) If so, whether Encana's notification/consultation activities in advance of its permit application provided the Jorgensens' with the information required for them to understand the activities proposed for the Lands, and to provide informed written comments to the Commission and/or Encana, if any.
>
> (3) If the answer to both of the above is "yes", then did the Commission have due regard to their submissions.
>
> (4) If the answer to #2 is "no", then what is the appropriate remedy?

[29] Encana submits that those four issues are being advanced by the Tribunal rather than the Jorgensens, but the Tribunal is not an "eligible person" under section 72 of the *OGAA* and has no standing to advance an appeal.

[30] Even if those four issues were raised by the Jorgensens, Encana submits that they are beyond the Tribunal's jurisdiction because they do not engage the question of whether the Commission issued the Permit without "due regard" to a submission from the Jorgensens or a written report from Encana as specified in section 72(2) of the *OGAA*. Encana maintains that the Jorgensens have never suggested that they filed written submissions with the Commission, and the Tribunal acknowledged the non-existence of such submissions at paragraph 79 of *Jorgensen #1*.

[31] Encana argues that the Tribunal has taken an "expansive view" of its jurisdiction, and has implied a power to conduct an appeal on the circumstances that may have influenced whether a land owner made a submission to the Commission at all, or the adequacy of the proponent's consultation and notification process. In that regard, Encana refers to *Jorgensen* #1 at paragraph 74:

> Limiting the Tribunal's jurisdiction to considering whether the determination was made "without due regard" to a landowner's written submission or to the applicant's written consultation and notification report, presupposes that the full extent of the application and its potential impact on the landowner's property is understood by the landowner. A landowner cannot provide comments on the impact of the application if its contents are not known. Whether or not the Jorgensens understood that the workspaces and the sump formed part of Encana's application for the Pipeline, and whether they had an opportunity to provide written submissions on the application, will be an issue in the appeal.

[32] Encana also refers to paragraph 44 of *Joregensen #2*, in which the Tribunal held that the list of four issues described in paragraph 43 of *Joregensen #2* "is consistent with … paragraphs [74 and 75] from *Jorgensen #1*…."

[33] Encana acknowledges that the doctrine of necessary implication provides tribunals with implied powers, and requires tribunals' enabling legislation to be interpreted broadly enough to enable the tribunal to fulfill the statute's purposes and to do the things it is expressly empowered to do: S. Blake, *Administrative Law in Canada*, 5th ed., 2011, at page 123; citing *ATCO Gas Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, at paragraph 51 [*ATCO*]. However, Encana submits that even a broad approach to the *OGAA* does not allow the Tribunal to conduct an appeal for the purposes of assessing a land owner's understanding of a permit application. Encana maintains that under section 19(2) of the *OGAA*, it is clear that section 72 is the only basis on which the Tribunal can conduct an appeal, and the doctrine of necessary implication should not be applied when the jurisdiction sought "has already been dealt with through the use of expressly granted powers": *ATCO*, at paragraph 73. Based on the principles of statutory interpretation, Encana submits that the implied power claimed by the Tribunal is contrary to the use of the word "only" in section 72(2).

[34] In summary, Encana submits that the appeal is not being conducted under section 72 of the *OGAA* because the appeal issues, as set out in paragraph 43 of *Joregensen #2*, have not been advanced by an eligible person, and do not engage questions of the Commission's "due regard" for a submission by the Jorgensen's or a report by Encana.

[35] The Jorgensens submit that a high standard must be met before an appeal will be summarily dismissed. In that regard, the Jorgensens refer to a Tribunal decision on a previous application by Encana for summary dismissal of an appeal by the Jorgensens: *Olaf and Frances Jorgensen v. Oil and Gas Commission* (Decision No. 2015-OGA-002(a), June 15, 2015 [*Previous Appeal*]. At paragraph 48 of the *Previous Appeal*, the Tribunal stated:

> … 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. …
>
> [underlining added in Jorgensens' submissions]

[36] The Jorgensens also point to paragraph 38 of *Rodney and Kim Strasky v. Oil and Gas Commission* (Decision No. 2016-OGA-004(b), February 16, 2017 [*Strasky*], in which the Tribunal stated:

> … Summarily dismissing a land owner's appeal on the basis that the grounds for appeal in the Notice of Appeal do not fall within the Tribunal's jurisdiction should only be done in clear cases.
>
> [underlining added in Jorgensens' submissions]

[37] The Jorgensens argue that the Tribunal's findings in those decisions accord with the BC Supreme Court's test for striking pleadings in civil cases. The Jorgensens maintain that it is trite law that a claim will only be struck where it is "plain and obvious" that the pleading discloses no reasonable cause of action, and the applicant bears a heavy onus to establish that the test is met: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paragraph 17.

[38] The Jorgensens submit that the present appeal does not fall within the "clear case" standard articulated by the Tribunal. The fact that the Tribunal identified four issues for determination in *Jorgensen #2*, and found those issues to be questions of mixed fact and law that were not frivolous or vexatious, should suffice to establish that this is not a "clear case" which should be summarily dismissed. To summarily dismiss an appeal where "serious issues" have been affirmed by the Tribunal would effectively be asking the Tribunal to overrule itself and find that there are no meaningful grounds for appeal. Moreover, the Jorgensens submit that the jurisdictional issue in the present appeal engages complex and intertwined questions of statutory interpretation and procedural fairness that merit a full hearing.

[39] In addition, the Jorgensens submit that it is important to distinguish between an appellant's standing to bring an appeal under section 72(2) of the *OGAA*, versus the Tribunal's jurisdiction to decide an appeal under the *OGAA*. The Jorgensens note that Encana acknowledges the doctrine of necessary implication, whereby a tribunal's enabling statute must be interpreted broadly enough for the tribunal to fulfill its statutory purpose. The Jorgensens submit that Encana's arguments run contrary to the Tribunal's previous decisions on this appeal, including paragraphs 74 to 76 in *Jorgensen #1*:

> Limiting the Tribunal's jurisdiction to considering whether the determination was made "without due regard" to a landowner's written submission or to the applicant's written consultation and notification report, presupposes that the full extent of the application and its potential impact on the landowner's property is understood by the landowner. A landowner cannot provide comments on the impact of the application if its contents are not known. Whether or not the Jorgensens understood that the workspaces and the sump formed part of Encana's application for the Pipeline, and whether they had an opportunity to provide written submissions on the application, will be an issue in the appeal.
>
> In making these observations, the Panel is not deciding whether there was or was not proper notification and consultation with the Jorgensens, nor whether the Jorgensens had an opportunity to make written submissions and failed to do so. The findings in this decision are only made for the limited purpose of deciding the threshold jurisdictional question of whether the subject matter of the appeal, the sump and the workspaces, are the subject of the Commission's determination.
>
> For the reasons set out above, on the basis of the submissions and arguments before it, the Panel finds that the sump and the workspaces are part of the Commission's pipeline permit determination, and may be appealed by the Jorgensens. Although the Jorgensens framed their appeal as an appeal against a decision of the Surface Rights Board, this was based upon the information provided by the Commission. In essence, they understood that the Surface Rights Board's orders/decision *must be* an amendment to the Permit given the Commission's position that the Permit does not authorize the sump and the workspaces. The Panel has already found that the Board did not,

and could not, amend the Permit, and that the Commission's determination covers the sump and workspaces.

[underlining added in Jorgensens' submissions]

[40] Based on the findings above, the Jorgensens submit that the Tribunal has clearly considered the issue of jurisdiction, at least in terms of the Jorgensens' ability to bring the appeal.

[41] Moreover, the Jorgensens argue that, if a proponent provided inadequate disclosure during the consultation and notification process, Encana's interpretation would leave land owners with no recourse through an appeal.

[42] The Jorgensens also submit that legislation involving expropriation or interference with private land should be strictly construed in favour of those whose rights are derogated from: *Leiriao v. Val Belair*, [1991] S.C.R. 349, at paragraphs 9 and 10; *Toronto Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 3 S.C.R. 32, at paragraph 20; *R. v. Colet*, [1981] 1 S.C.R. 2, at 110; *MacDonald v. Halifax (Regional Municipality)*, [1997] N.S.J. No. 376, 162 N.S.R. (2d) 214.

[43] Further, the Jorgensens submit that the issue of what, in fact, the Permit authorized is of abiding interest to them, as is the question of the appropriate remedy if Encana failed to comply with the notification and consultation requirements in the legislation. They submit that their avenues of legal recourse are not limited to proceedings before the Tribunal, and may include "theoretical recourse to a cause of action based in trespass before the courts" if the Tribunal found that the Permit failed to authorize the temporary workspaces.

[44] The Commission takes no position on the issue of whether the appeal is within the Tribunal's jurisdiction. However, the Commission submits that the substance of the appeal, i.e., the Jorgensens' concerns about the sump and temporary workspaces, has been rendered moot. The Jorgensens have not taken issue with the pipeline itself, and have not requested that it be removed. The Commission submits that there is no further remedy within the Tribunal's jurisdiction that would address the Jorgensens' concerns about the sump and temporary workspaces. Regarding any theoretical cause of action based in trespass, the Commission submits that it does not authorize access to private land, and any claims by a land owner for compensation or damages caused by the exercise of a right of entry fall within the jurisdiction of the Surface Rights Board.

[45] In reply, Encana submits that an appeal must not only be initiated by land owners, but also "driven by" land owners. Therefore, the question of whether the issues identified in *Jorgensen #2* are "serious" must be considered in relation to the issues or concerns that were actually raised by the Jorgensens and the relief they sought. Encana maintains that the Jorgensens' submissions on the present preliminary matter show that the issues identified in *Jorgensen #2* are not serious, in that they are flawed and divorced from the legislated requirements, and the Jorgensens have made no attempt to show that those issues are connected to their Notice of Appeal or previous submissions.

[46] Encana also submits that the Jorgensens have not articulated what specific outcome or relief they seek with respect to the issues, and they have not requested

a remedy that is within the Tribunal's power to grant under section 72(6) of the *OGAA*. Encana maintains that it is "highly dubious" to suggest that the Jorgensens may have some "theoretical recourse" based in trespass, and in any event, it was the Surface Rights Board (and not the Commission) that authorized Encana's entry onto the Lands.

The Tribunal's Findings

[47] Regarding the test to be met in an application for summary dismissal, the Panel agrees with the Tribunal's findings in the *Previous Appeal* and *Strasky*, discussed above. Specifically, summary dismissal of an appeal based on a lack of jurisdiction should only be done in "clear cases". There are several reasons for this. First, summary dismissal takes away an appellant's opportunity to have a full hearing of the merits of their appeal. Also, summary dismissal proceedings are preliminary in nature, and do not provide the parties or the Tribunal with an opportunity to consider the implications of different interpretations of the legislation in the context of full submissions on the facts and the law. Evidence presented at a full hearing on the merits may be helpful in understanding the consequences of different interpretations. Furthermore, one of the reasons for the existence of an administrative appeal process is to provide a way to resolve disputes that is more accessible than the court process, especially for self-represented parties, as is often the case with land owners appealing to the Tribunal. The threshold for summary dismissal of an appeal must be high to ensure that appellants have an opportunity to be heard on matters that are, arguably, within the Tribunal's jurisdiction.

[48] Regarding Encana's argument that the issues in the appeal are being "advanced by" the Tribunal rather than the Jorgensens, the Panel is mindful that the Tribunal's role is to hear and decide appeals, whereas appellants such as the Jorgensens are responsible for advancing their appeal. The issues that Encana claims are being advanced by the Tribunal were set out in *Jorgensen #2* in the context of deciding whether the appeal raised a "serious issue" for the purposes of deciding a stay application. When assessing whether a stay application meets the three-part test, the first step is for the Tribunal to decide whether the appeal raises a serious issue. In order to decide whether the appeal raises a serious issue, the Tribunal must identify the issues that are raised by the appeal. The four issues listed in *Jorgensen #2* were based on the Tribunal's understanding of the submissions provided by the Jorgensens in their initiating appeal documents and subsequent submissions.

[49] When appeals are advanced by self-represented parties, it is not unusual for their concerns to be stated in simple terms that may not adhere to the language in section 72(2) of the *OGAA*. If that is so, as it was when the Tribunal decided *Jorgensen #1* and *#2*, the Tribunal will do its best to "glean" or distill the issues raised by the appeal based on a review of the appellant's materials. This was addressed in paragraph 41 of *Jorgensen #2*:

> To determine whether there are serious issues in this case has not been straightforward. <u>This is not a case were the Notice of Appeal clearly sets out the issues. The Notice of Appeal was crafted by concerned landowners, not by lawyers, and was the end result of a confusing set of decision-making</u>

> processes which left them feeling like they had been left out of decisions made on their Lands. As a result, the specific issues raised by the appeal need to be "gleaned" from a generous reading of the Jorgensens' initiating appeal documents and later submissions.
>
> [underlining added]

[50] The paragraph above indicates that the Tribunal reviewed the Jorgensens' materials to ascertain why they sought to appeal the Permit. In doing so, the Tribunal applied a "generous reading", bearing in mind that the Jorgensens were self-represented and found themselves in a confusing situation: how to frame the appeal given that the Commission had told them that the Permit did not authorize the sump and workspaces, only to later find that the Surface Rights Board issued orders authorizing Encana to use the Lands for the sump and workspaces, and the Surface Rights Board was of the view that the sump "is part and parcel of the construction of the Pipeline" and is an "oil and gas activity". By giving the Jorgensens' documents a generous reading in these circumstances, the Tribunal was simply being fair; it was neither advancing the appeal nor setting the issues.

[51] This approach is consistent with past decisions in appeals by self-represented parties. For example, at paragraph 38 of *Strasky*, the Tribunal held as follows:

> Although the Appellants' Notice of Appeal does not expressly allege that the Commission's decision to issue the permit was made "without due regard to" either a submission previously made by them, or Encana's consultation and notification report, the Panel finds that it is not unusual for self-represented appellants to express their grounds for appeal using language that does not replicate the language in section 72(2) of the *OGAA*. For example, the grounds for appeal may imply, but not directly state, that the appellant is appealing because they believe that their concerns were not given due regard by the Commission. Sometimes the grounds for appeal in a Notice of Appeal are very brief, and the appellant provides further particulars on the grounds for appeal as the appeal proceeds. The Panel will not necessarily summarily dismiss an appeal simply on the basis that the appellant, especially a self-represented appellant, has articulated the grounds for appeal using language that is not parallel to the language in section 72(2) of the *OGAA*. Summarily dismissing a land owner's appeal on the basis that the grounds for appeal in the Notice of Appeal do not fall within the Tribunal's jurisdiction should only be done in clear cases.

[52] Regarding whether this is a "clear case" that the issues raised by the appeal are outside of the Tribunal's jurisdiction, the Tribunal found in *Jorgensen #2* that the issues are serious issues of mixed fact and law, and are not frivolous or vexatious. The Panel agrees with those findings.

[53] Regarding whether the issues in the appeal engage the question of whether the Commission issued the Permit without "due regard" to a submission from the Jorgensens or a consultation report from Encana, the Tribunal addressed that point in *Jorgensen* #1 at paragraph 74:

> Limiting the Tribunal's jurisdiction to considering whether the determination was made "without due regard" to a landowner's written submission or to the

> applicant's written consultation and notification report, presupposes that the full extent of the application and its potential impact on the landowner's property is understood by the landowner. A landowner cannot provide comments on the impact of the application if its contents are not known. Whether or not the Jorgensens understood that the workspaces and the sump formed part of Encana's application for the Pipeline, and whether they had an opportunity to provide written submissions on the application, will be an issue in the appeal.
>
> [underlining added]

[54] The Panel also agrees with those findings.

[55] Although Encana argues that the Tribunal took an overly "expansive view" of its jurisdiction in making those findings, Encana acknowledges that under the doctrine of necessary implication, the Tribunal's enabling legislation must be interpreted broadly enough for the Tribunal to fulfill its statutory purpose. While section 72(2) of the *OGAA* states that a land owner may appeal "only on the basis that the determination was made without due regard to …" a previous submission by the land owner or the proponent's consultation report, the Panel finds that this language assumes that the land owner's submission (if any) and the consultation report were prepared after the proponent disclosed all relevant information about the permit application to the land owner. In other words, it presupposes that the land owner was properly informed about the permit application during the consultation and notification process.

[56] However, the strict interpretation of the *OGAA* advocated by Encana would allow permit applicants to avoid appeals by providing inadequate disclosure to land owners, such that land owners are unable to make fully informed comments during the consultation process. Inadequate disclosure may result in a land owner making ill-informed or no submission to the Commission, and may result in the proponent's consultation report reflecting the land owner's lack of information. The Commission would still be obliged to give "due regard" to the consultation report, which the proponent must file pursuant to section 24(1)(c) and 31(6) of the *OGAA*, even if the report was based on incomplete disclosure to the land owner. However, land owners would have no recourse through an appeal as long as the Commission gave "due regard" to the consultation report, despite the fact that the report arose from a notification and consultation process that involved inadequate disclosure. The Panel finds that this interpretation of the legislation would frustrate the purpose of providing land owners with a right of appeal that, based on the doctrine of necessary implication, is supposed to ensure that land owners' concerns are given "due regard" by the Commission. Surely, the legislature did not intend to allow such an absurd result, or encourage mischief in the form of inadequate disclosure to land owners, when it granted land owners a right of appeal.

[57] Furthermore, the Tribunal's express powers under the *ATA* with respect to appeals support a broader interpretation of section 72(2) of the *OGAA* than has been advanced by Encana. As stated in paragraph 56 of *Daniel Kerr v. Oil and Gas Commission* (Decision No. 2011-OGA-005(b), December 12, 2011) [*Kerr*], the Tribunal's enabling legislation indicates that "the Tribunal's jurisdiction goes beyond a review of the decision under appeal, and is more akin to an appeal *de novo*…."

In *Kerr*, the Tribunal reviewed the relevant provisions of the *OGAA* and the *ATA*, and noted that its powers under sections 32, 38 and 40 of the *ATA* include: hearing the parties' submission as to facts, law and jurisdiction; determining whether the submissions and evidence are sufficient to disclose fully and fairly all matters relevant to the issues in the appeal; questioning witnesses; and receiving and accepting information that the Tribunal considers "relevant, necessary and appropriate", whether or not the information would be admissible in a court of law.

[58] For all of these reasons, the Panel concludes that this appeal is not a clear case where none of the issues advanced by the Jorgensens are within the Tribunal's jurisdiction. On the contrary, the Panel confirms its findings in *Jorgensen #1* and *#2* regarding the issues raised by the appeal, and finds that those issues are within the Tribunal's jurisdiction under section 72(2) of the *OGAA*.

[59] However, the Panel is mindful that, for an appeal to be within the Tribunal's overall jurisdiction, the appellant must also be seeking a remedy that is within the Tribunal's jurisdiction to grant. Under section 72(6) of the *OGAA*, the Tribunal has the power to "confirm, vary or rescind" the determination under appeal, or "send the matter back, with directions" to the Commission.

[60] The Jorgensens' initiating documents and subsequent submissions consistently express concerns about the sump and the temporary workspaces, but not about the presence or operation of the pipeline on the Lands. In that regard, the Tribunal stated as follows at paragraphs 67 to 69 of *Jorgensen #2*:

> In their initiating documents and their various submissions to the Tribunal, the Jorgensens' main concerns with the issuance of the Permit have been in relation to the temporary workspaces and, in particular, the sump. Their arguments regarding reliance on representations made by the Commission, and in relation to the confusing jurisdictional boundaries between the Commission and the Surface Rights Board, arise because the Jorgensens were not notified, or did not fully understand during the notification/consultation process, that Encana intended to place a sump and six temporary workspaces on their lands without consulting with them and/or obtaining their consent. These are the main concerns and the main objections that they have identified in their appeal of the Permit. The Jorgensens have not taken issue with the pipeline itself, or the pipeline right-of-way on their Lands.
>
> The Tribunal understands the fairness issues raised by the Jorgensens. However, their concern with the sump now appears to be moot; the pipeline has been constructed on the Lands without the sump.
>
> Further, their concern with the temporary workspaces may also be moot. It would be pointless to "stay" the workspaces as they have already "come and gone".
>
> [underlining added]

[61] The Panel finds that, regardless of whether the Permit authorized the sump, or whether the Jorgensens were adequately informed about the sump such that the Commission could give due regard to any concerns they may have had about it, the pipeline was built without the sump, and Encana no longer has any need for the

sump. Consequently, even if the Tribunal varied or rescinded the Permit, or sent it back to the Commission with directions, those remedies would have no effect in relation to the Jorgensens' concerns about the sump. The Panel finds that the Tribunal has no jurisdiction to grant a remedy with respect to a sump that did not, and will not, come to exist.

[62] Although the temporary workspaces have been remediated, the Jorgensens postulate that they may have recourse to a "cause of action based in trespass through the courts" if the Tribunal found that the Permit did not authorize the temporary workspaces. Regardless of whether the Permit authorized the workspaces, or whether the Jorgensens were adequately informed about them such that the Commission could give due regard to any concerns that the Jorgensens may have had about them, any remedy associated with a claim of trespass lies with the courts, and any claim for compensation or damages caused by Encana's exercise of a right of entry order lies with the Surface Rights Board. Moreover, the Panel finds that the success of any such claims would depend on the evidence and submissions presented to those adjudicative bodies, and not on any findings that the Tribunal may make. Consequently, the Panel finds that the Jorgensens have not requested a remedy with respect to the temporary workspaces that is within the Tribunal's jurisdiction.

[63] Finally, the Panel is satisfied that the Tribunal has no jurisdiction to grant a remedy with respect to the temporary workspaces as they have been fully remediated. As is the case with the sump, the Jorgensens' concerns with the temporary workspaces are moot.

[64] In summary, although the Panel has found that this is not a clear case in which the issues raised by the appeal are beyond the Tribunal's jurisdiction, the Panel has also found that the Jorgensens are not seeking a remedy that is within the Tribunal's jurisdiction. As such, the appeal clearly lies outside of the Tribunal's remedial jurisdiction under section 72(6) of the *OGAA*. Moreover, it would serve no purpose to proceed to a hearing of the merits of the appeal.

2. Whether the appeal should be summarily dismissed on the basis that the substance of the appeal has been appropriately dealt with in another proceeding.

[65] Given the findings above on Issue 1, the Panel need not decide this issue.

[66] However, for greater certainty, the Panel finds that the appeal proceedings and Tribunal decisions prior to the present application dealt with preliminary matters. Neither *Jorgensen #1*, which addressed an application for an extension of time and whether the sump and the temporary workspaces were authorized by the Permit, nor *Jorgensen #2*, which addressed a stay application, dealt with the substance of the appeal.

DECISION

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

[68] For the reasons provided above, Encana's application for summary dismissal of the appeal is granted.

"Alan Andison"

Alan Andison, Chair
Oil and Gas Appeal Tribunal

February 1, 2018