



Oil and Gas Appeal Tribunal

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

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1
Email: ogainfo@gov.bc.ca

DECISION NO. 2017-OGA-033(a)

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

BETWEEN:	ARC Resources Ltd.	APPLICANT/THIRD PARTY
AND:	Mary Miller	APPELLANT
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 June 14, 2018	
APPEARING:	For the Appellant: Mary Miller For the Respondent: Claire Bond, Counsel For the Third Party: Rick Williams, Counsel Tim Pritchard, Counsel	

PRELIMINARY APPLICATION FOR SUMMARY DISMISSAL

[1] ARC Resources Ltd. ("ARC") applies to the Oil and Gas Appeal Tribunal (the "Tribunal") for summary dismissal of an appeal filed by Mary Miller. Ms. Miller appealed a permit amendment (the "Amendment") issued on November 21, 2017, by the Oil and Gas Commission (the "Commission"). The Amendment amends permit no. 100102516, which authorized ARC to construct and operate a sour gas flow line with a 20-metre wide right-of-way across certain private lands, including land owned by Ms. Miller. The Amendment changed part of the pipeline's route, but did not alter the route through Ms. Miller's land.

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

BACKGROUND

The Pipeline Permit

[3] Before the permit was issued, ARC provided notice of the proposed permit to all owners of land on which the pipeline would be built, including to Ms. Miller. Specifically, on January 30, 2017, ARC sent a letter to Ms. Miller notifying her of the proposed pipeline, and advising her that, as an affected land owner, she could

provide a written submission to ARC or the Commission regarding the proposal. Ms. Miller provided no written submissions to the Commission.

[4] According to Ms. Miller, on or about May 9, 2017, she met with ARC's agents at her home, and advised them that she wanted the pipeline to be bored instead of trenched through her property, to avoid erosion and the loss of topsoil.

[5] On July 27, 2017, the Commission issued the permit to ARC. The affected private land owners, including Ms. Miller, were notified of the permit and their right of appeal to the Tribunal.

[6] On August 11, 2017, Richard and Sharan Mitchell, who are owners of land that was also affected by the pipeline, filed an appeal against the permit. Ms. Miller did not. As part of their appeal, the Mitchells requested a stay of the permit pending the Tribunals' decision on the merits of the appeal.

[7] On September 20, 2017, the Tribunal granted a stay of the permit with respect to the Mitchells' land only (Decision No. 2017-OGA-026(a)). In making that decision, the Tribunal found that the Commission's rationale for issuing the permit, and the terms of the permit itself, relied on recommendations in a report provided by ARC's consultant, Gemini Corporation, with respect to managing and mitigating the impacts of the permitted activities on agricultural land. The Tribunal found that the report contained significant gaps and uncertainties, because it was prepared when the ground was covered with snow.

[8] On September 29, 2017, the Commission ordered ARC to prepare a report fully assessing, in the absence of snow cover, and describing the following site characteristics of the proposed pipeline right-of-way: drainage, potential existing erosion, soil stability, and the presence of noxious weeds.

[9] On November 16, 2017, the Commission advised ARC that the requirements in the September 29, 2017 order had been met.

The Permit Amendment and the Present Appeal

[10] Meanwhile, on October 17, 2017, Ms. Miller received a letter from ARC, notifying her that ARC intended to apply for a permit amendment to re-route part of the pipeline, as indicated on a map attached to the letter. The letter also advised her that she could provide a written submission to the Commission regarding the proposed amendment.

[11] On October 20, 2017, ARC received a "Schedule A and Ecological Assessment" report from ClearStream Environmental Consulting Services LP, regarding an alternate route for part of the pipeline, which avoided the Mitchells' land.

[12] On October 31, 2017, Ms. Miller sent a written submission, including photographs, to the Commission, objecting to the pipeline. She expressed concern that trenching the pipeline would cause topsoil erosion, and she requested that the pipeline be bored where it traversed her land.

[13] On November 7, 2017, ARC applied to the Commission to amend the permit by re-routing the pipeline segment that would have crossed the Mitchell's land.

[14] On November 21, 2017, the Commission granted the Amendment. The Commission's decision rationale notes that Ms. Miller provided a written submission regarding the pipeline route, and that the route change did not affect her land.

[15] On November 27, 2017, ARC began constructing the portion of the pipeline right-of-way that is located on Ms. Miller's land. Construction of the pipeline has since been completed.

[16] On December 6, 2017, the Tribunal received Ms. Millers' Notice of Appeal with respect to the Amendment. In her Notice of Appeal, she expresses concerns about the fact that the pipeline was trenched on her property rather than bored, and the adverse impact that this would have on agricultural soils on her property. She also submits that the Commission made errors with respect to the written submission she sent to it on October 31, 2017. She expresses confusion over the fact that ARC sent a letter on October 17, 2017 inviting her to make submissions, but the Commission later advised her that she should have made submissions in response to the original invitation to consult dated January 30, 2017. She requests that the permit be rescinded, and that there be improvements with respect to how the Commission communicates with land owners.

ARC's Application for Summary Dismissal

[17] On February 16, 2018, ARC requested that the Tribunal summarily dismiss the appeal pursuant to sections 31(1)(a), (c), and (f) of the *Administrative Tribunals Act* (the "ATA"). ARC seeks summary dismissal on the basis that Ms. Miller lacks standing to appeal the Amendment, and therefore, the appeal is not within the Tribunal's jurisdiction. Specifically, section 69(1)(b)(i)(B) of the *Oil and Gas Activities Act* ("OGAA") provides that a land owner may appeal a permit amendment "if the amendment changes the effect of the permit on the land of the land owner." ARC submits that the area of pipeline that was re-routed in accordance with the Amendment did not include Ms. Miller's land, and the Amendment did not affect her land. In addition, ARC submits that the Tribunal has no jurisdiction to rescind the permit, as requested by Ms. Miller.

[18] Similarly, the Commission submits that Ms. Miller has no standing to appeal the Amendment, based on section 69(1)(b)(i)(B) of the OGAA.

[19] Ms. Miller submits that ARC, as a Third Party in the appeal process, has no standing to apply for summary dismissal of the appeal. She notes that the Commission, which is the Respondent in the appeal process, has not applied for summary dismissal, and that a conflict arises when a Third Party steps into the 'shoes' of the Respondent. Alternatively, she submits that the Tribunal has the jurisdiction to hear her appeal and grant the relief she seeks.

ISSUES

[20] The issues to be determined are:

1. Whether ARC, as a Third Party, may apply for summary dismissal under section 31(1) of the ATA.

2. If so, whether the appeal should be summarily dismissed pursuant to sections 31(1)(a), (c) or (f) of the ATA.

RELEVANT LEGISLATION

[21] The relevant portions of section 31 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;

...

(c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;

...

(f) there is no reasonable prospect the application will succeed;

...

[22] Section 1 of the ATA defines “application” as follows:

“application” includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court

[23] The following sections of the OGAA are relevant to this decision:

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

...

69 (1) In this Part:

“determination” means

...

(b) with respect to a land owner of land on which an operating area is located,

(i) a decision made by the commission

...

(B) under section 31 to amend a permit, if the amendment changes the effect of the permit on the land of the land owner, and

...

72 (2) A land owner of land on which an operating area is located 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).

...

- (5) The appellant and the commission are parties to an appeal, and

...

- (b) if a land owner of land on which an operating area is located files an appeal, the permit holder with respect to the oil and gas activity is also a party to the appeal,

...

- (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 ARC, as a Third Party, may apply for summary dismissal under section 31(1) of the ATA.

The Parties' submissions

[24] Ms. Miller submit that although ARC is a party to the appeal, it has no standing, as a Third Party, to apply for summary dismissal of the appeal. In this instance, the Commission, as the Respondent, has not applied for summary dismissal. She submits that there is no provision in the OGAA for a Third Party to apply for summary dismissal, and allowing a Third Party to do so would blur the roles of the Commission and the Third Party, or even 'trump' the Commission's role. She further submits that the fact that ARC initiated consultation on the Amendment demonstrates the conflict that arises when a Third Party steps into the 'shoes' of the Respondent.

[25] In support of those submissions, she cites an unpublished decision of the BC Supreme Court (*Dhaliwal and Nuff v. ICBC*, docket M061223, September 5, 2013) which cited an Alberta Court of Appeal decision with respect to the standing of an insurer, as a third party in civil litigation proceedings involving a motor vehicle accident. The Court of Appeal held that the insurer had no standing to apply to set aside an order for substituted service, because the third party did not have same the rights as the defendant and should not be able to exercise the defendant's rights without its knowledge or consent (*Wennekers v. Kingsway General Insurance Co.*, 2009 ABCA 422 (CanLii)).

[26] The Commission did not address this issue.

[27] ARC submits that it is a party to the appeal proceedings pursuant to section 72(5)(b) of the *OGAA*, and there is no basis for treating ARC as having lesser procedural rights than the other parties to the appeal.

[28] In addition, ARC notes that section 31(1) of the *ATA* provides that “the tribunal may dismiss” [underlining added by ARC] all or part of an appeal, at any time after an appeal is filed. ARC maintains that section 31(1) does not constrain the procedural rights of any particular party to an appeal, nor does it constrain the procedures that the Tribunal may use in making such decisions. In that regard, ARC notes that the Tribunal’s *Practices and Procedures Manual* states that a “party or an intervenor may apply” for summary dismissal of an appeal.

[29] Furthermore, ARC submits that the case law cited by Ms. Miller arises in a different factual and legal context; i.e., an insurer’s ability to participate in civil litigation regarding a motor vehicle accident. ARC argues that this case law is inapplicable to the present matter.

The Tribunal’s Findings

[30] In deciding this issue, the Tribunal has considered the relevant provisions in the *ATA* and the *OGAA*.

[31] Section 72(5) of the *OGAA* provides that the appellant, Ms. Miller, and the Commission are parties to the appeal. Furthermore, subsection 72(5)(b) states that in appeals filed by land owners, “the permit holder with respect to the oil and gas activity is also a party to the appeal”. Thus, ARC, as the permit holder, is also a “party” to the present appeal. In general, subject to any statutory limitations, all parties have full participatory rights in the appeal process.

[32] Section 31 of the *ATA* applies to the Tribunal, and provides that “the tribunal” may dismiss all or part of an appeal at any time after an appeal is filed. Section 31(1) does not specify or limit who may initiate summary dismissal. In addition, sections 31(2) and (3) of the *ATA* contain no express limits on who may initiate summary dismissal proceedings. Section 31(2) of the *ATA* requires a tribunal to give the appellant an opportunity to make written submissions or otherwise be heard before summarily dismissing all or part of an appeal. Section 31(3) of the *ATA* requires that, if a tribunal decides to summarily dismiss all or part of an appeal, it must “inform the parties and any interveners of its decision in writing and give reasons for that decision”. Thus, the language in section 31 does not prevent any party from initiating a summary dismissal application.

[33] In addition, the Tribunal’s *Practices and Procedures Manual* states at page 16 that a “party or an intervenor may apply” for summary dismissal of an appeal.

[34] In the context of appeals filed by land owners, it is common that the land owner and the permit holder will have opposing interests in the appeal. Land owners who appeal permits and permit amendments typically object to some aspect of the permitted oil and gas activities, whereas the permit holder typically has vested interests in proceeding with the permitted oil and gas activities. Although the Commission, as the statutory decision-maker that made the appealed decision, is considered the Respondent in an appeal under the *OGAA*, the Commission does not have financial interests or oil and gas rights at stake in the appeal process. In

an appeal by a land owner, it is logical that the permit holder may seek summary dismissal of the appeal, because the permit holder may be affected if the appeal is successful.

[35] The Tribunal finds that the insurance cases cited by Ms. Miller are not relevant to the present circumstances. The Alberta Court of Appeal decision she cites involved that province's *Insurance Act*, and the defendant's insurer was seeking to exercise the defendant's procedural rights under the Rules of the Alberta Court of Queen's Bench. The Court's decision involved the interpretation and application of Alberta's *Insurance Act* and the Rules of the Alberta Court of Queen's Bench, none of which apply to appeals under the *OGAA*.

[36] Furthermore, if the permit holder in an appeal under the *OGAA* seeks summary dismissal, it is not a case of the permit holder attempting to step into the 'shoes' of the Commission. Under the scheme of the *OGAA*, the Commission's role is to regulate the oil and gas industry, whereas a permit holder is an industry proponent seeking to conduct oil and gas activities in accordance with the *OGAA*. If a permit holder seeks summary dismissal of an appeal, there is no blurring of its role versus the Commission's role, nor is the permit holder attempting to 'trump' the Commission's role. The permit holder is simply seeking to use a procedural option that is available under the legislation, to defend its interests in proceeding with oil and gas activities that it has been authorized to carry out.

[37] For all of these reasons, the Tribunal finds that ARC, as a Third Party to the appeal against the Amendment to ARC's permit, has standing to initiate an application for summary dismissal of this appeal pursuant to section 31 of the *ATA*.

2. Whether the appeal should be summarily dismissed under sections 31(1)(a), (c) or (f) of the *ATA*.

The Parties' submissions

[38] ARC submits that the change in pipeline routing authorized in the Amendment is limited to the route through the Mitchells' land, and has no impact on Ms. Miller's land. ARC further submits that section 69(1)(b)(i)(B) of the *OGAA* limits land owners to appealing permit amendments "if the amendment changes the effect of the permit on the land of the land owner". Given that the Amendment has no effect on Ms. Miller's land, she has no standing to appeal the Amendment. Consequently, according to ARC, the Tribunal has no jurisdiction to hear her appeal of the Amendment, and the appeal should be summarily dismissed (pursuant to section 31(1)(a) of the *ATA*).

[39] In addition, ARC submits that the Tribunal has no jurisdiction to grant the relief Ms. Miller seeks. Although she requests that the Tribunal rescind the permit, the Amendment is the decision under appeal. The permit is not the decision under appeal, and the permit was never appealed by Ms. Miller. ARC maintains that, even if the Amendment was rescinded, the effect would be to re-route the pipeline back onto the Mitchells' land. It would not result in the pipeline being bored rather than trenched on Ms. Miller's land. In any case, ARC submits that the appeal is moot, because the pipeline has been constructed on Ms. Miller's land.

[40] Ms. Miller submits that the Tribunal has the jurisdiction to hear the appeal, and grant the remedy she seeks. She submits that ARC failed to comply with the legislated consultation requirements in the first instance by not reporting the results of the meeting between her and ARC's agents at her house, when she expressed concerns to ARC's agents about trenching the pipeline.

[41] Ms. Miller notes that ARC invited further consultation with her regarding its application for the Amendment. She argues that although ARC was not required to provide her with notice of that application, it did so "in a manner of consultation." She maintains that ARC's further invitation to consult, combined with the Commission's September 27, 2017 order requiring ARC to submit a new report on the environmental impacts of the original permit, indicate that the permit was *de facto* rescinded. She argues that the order was an admission by the Commission that the permit was issued without the necessary ground science. She submits that the OGAA has no provision for issuing a permit and then seeking justification post-permit.

[42] Consequently, Ms. Miller submits that the appeal is not frivolous, vexatious or an abuse of process, nor have the other parties provided evidence that the appeal has no reasonable prospect of success. Further, Ms. Miller submits that the fact that the pipeline has been constructed on her land does not render the appeal moot.

[43] The Commission submits that the Amendment did not change the effect of the permit on Ms. Miller's land, and therefore, she has no standing to appeal the Amendment under section 69(1)(b)(i)(B) of the OGAA.

[44] In addition, the Commission submits that ARC was not actually required to provide Ms. Miller with notice and consultation regarding the application for the Amendment, because the Commission issued an exemption under section 31(1.1) of the OGAA on March 3, 2016. That exemption meant that ARC, as a permit holder, was exempted from notifying land owners of applications permit amendments, other than owners of land on which the change would occur.

[45] The Commission provided the Tribunal with a copy of its Exemption No. 2016-02, dated March 6, 2016. Clause 2.e. exempts permit holders from notifying owners of land on which an operating area is located, except those on whose land the change will occur, when submitting an application to amend a pipeline permit to make a change in pipeline location or route.

[46] ARC disagrees with Ms. Miller's submission that the amendment was a *de facto* rescission of the permit. ARC submits that she has ignored the fact that the OGAA specifically provides the Commission with the power to amend (rather than rescind or re-issue) a permit, and provides procedures for doing so. Moreover, ARC submits that the Tribunal recently held that when a land owner appeals a permit amendment, the only issues before the Tribunal are issues that relate to the amendment, and not the underlying permit: *Brian and Carolyn Derfler v. Oil and Gas Commission*, 2018-OGA-001(a), at paras. 64 – 68.

The Tribunal's Findings

[47] Although ARC applied for summary dismissal pursuant to sections 31(1)(a), (c), and (f) of the ATA, the substance of ARC's submissions focuses on the question of whether the appeal is within the Tribunal's jurisdiction (section 31(1)(a) of the ATA). For that reason, the Tribunal has not addressed ARC's application with respect to sections 31(1)(c) and (f) of the ATA. In any event, for the reasons provided below, the Tribunal finds that the appeal should be summarily dismissed pursuant to section 31(1)(a) of the ATA.

[48] Regarding section 31(1)(a) of the ATA, the Tribunal agrees with its previous findings at para. 38 of *Rodney and Kim Strasky v. Oil and Gas Commission* (Decision No. 2016-OGA-004(b), February 16, 2017), that summarily dismissing an appeal for lack of jurisdiction should only occur in "clear cases". There are many reasons for this, including the fact that summary dismissal takes away an appellant's opportunity to have a full hearing of the merits of their appeal. Furthermore, the appeal process under the OGAA provides a way to resolve disputes that is more accessible than the court process, especially for self-represented parties. The threshold for summary dismissal based on a lack of jurisdiction must be high, to ensure that appellants have an opportunity to be heard on matters that are, arguably, within the Tribunal's jurisdiction.

[49] The Tribunal finds that this is a "clear case" of the appeal being outside of its jurisdiction under section 72(2) of the OGAA, because Ms. Miller lacks standing to appeal the Amendment. Section 69(1) of the OGAA defines "determination" in a way that limits the circumstances in which a land owner may appeal a permit amendment. In particular, section 69(1)(b)(i)(B) of the OGAA provides that a land owner may appeal a permit amendment "if the amendment changes the effect of the permit on the land of the land owner." The Amendment in this case re-routed the pipeline off of the Mitchells' land, and onto the land of another land owner (who is not Ms. Miller). The Amendment did not change the effect of the permit on Ms. Miller's land. Consequently, the Amendment is not a "determination" that Ms. Miller may appeal under section 72(2) of the OGAA. For these reasons, the appeal is clearly not within the Tribunal's jurisdiction under section 72(2) of the OGAA.

[50] In addition, for an appeal to be within the Tribunal's jurisdiction, the appellant must 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. The Amendment is the determination under appeal, and it had no effect on Mrs. Miller's land. In the context of this appeal, the Tribunal only has the power to rescind or vary the Amendment, or send the Amendment back to the Commission with directions, as it pertained to the land of the affected land owners, which did not include Ms. Miller. Even if the Tribunal granted one of those remedies with respect to the Amendment, it would not address Ms. Miller's concerns about the original permit, or the effect of the pipeline on her land. For these reasons, the Tribunal finds that it has no jurisdiction to grant the remedies that Ms. Miller is seeking. As such, the appeal lies outside of the Tribunal's remedial jurisdiction under section 72(6) of the OGAA.

[51] Further, the Tribunal has considered whether ARC's October 17, 2017 consultation letter to Ms. Miller amounts to a re-opening of consultation on the original permit, and whether the Commission's September 29, 2017 order requiring ARC to submit a new report with respect to certain environmental impacts of the pipeline as originally permitted amount to a *de facto* rescission of the permit. The Tribunal finds that ARC sent the October 17, 2017 letter despite the fact that ARC was exempted from consulting with Ms. Miller regarding the Amendment pursuant to the Commission's Exemption No. 2016-02. In any case, ARC's October 17, 2017 letter clearly indicated that it was limited to the application for the Amendment. Nothing in that letter expressly or impliedly indicates that ARC intended to consult regarding the original permit or any terms of the permit other than re-routing the pipeline off of the Mitchells' land and onto the other land owner's land.

[52] In addition, the Tribunal finds that the Commission's September 29, 2017 order to ARC did not constitute a *de facto* rescission of the pipeline permit. The OGAA provides the Commission with powers to suspend or cancel a permit, but the issuance of an order under section 38 of the OGAA does not have that effect. The order states that it was issued under section 38(1)(c) of the OGAA, which states that a permit holder must "prepare and maintain the records, reports and plans the commission orders the permit holder to maintain". Nothing in section 38(c) suggests that such an order affects the authorizations contained in a permit. In contrast, under sections 26(1)(b) and (c) of the OGAA, the Commission may suspend or cancel a permit. In this case, there is no evidence that the Commission exercised its powers under those sections to suspend or cancel ARC's pipeline permit.

[53] In summary, the Tribunal finds that this is a clear case in which the appeal is not within its jurisdiction, as Ms. Miller has no standing to appeal the Amendment, and she is not seeking a remedy that is within the Tribunal's jurisdiction to grant in the context of an appeal of the Amendment.

DECISION

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

[55] For the reasons provided above, ARC's application for summary dismissal of the appeal pursuant to section 31(1)(a) of the ATA is granted.

"Alan Andison"

Alan Andison, Chair
Oil and Gas Appeal Tribunal

June 26, 2018