



Energy Resource Appeal Tribunal

Citation: *Richard Kabzems v. BC Energy Regulator*, 2025 BCERAT 1

Decision No.: ERAT-ERA-24-A006(a)

Decision Date: 2025-02-03

Method of Hearing: Conducted by way of written submissions concluding on September 3, 2024

Decision Type: Final Decision

Panel: Nancy Moloney, Panel Chair

Appealed Under: *Energy Resource Activities Act*, SBC 2008, c 36

Between:

Richard Kabzems

Appellant

And:

BC Energy Regulator

Respondent

And:

Ovintiv Canada ULC

Third Party

Appearing on Behalf of the Parties:

For the Appellant: Richard Pearce & Maryam Putris

For the Respondent: Dorothy McDaid

For the Third Party: Nicole Bakker

FINAL DECISION

INTRODUCTION

[1] Mr. Richard Kabzems (the “Appellant”) filed a Notice of Appeal (the “Appeal”) of Application Determination 100116869 (the “Permit”), issued by the British Columbia Energy Regulator (“BCER” or the “Respondent”) allowing Ovintiv Canada ULC (“Ovintiv” or the “Third Party”) to carry out various resource activities across numerous well sites at a development site (the “Site”).

[2] The Appellant claims that the Permit does not sufficiently protect residents with respect to seismic and health risks. The Respondent and Third Party claim that the Appellant does not have standing to file the Appeal nor does the Energy Resource Appeal Tribunal (the “Tribunal”) have jurisdiction to hear the Appeal.

BACKGROUND

The Parties

[3] The Appellant is a homeowner in the Lebell Road subdivision, located in the Peace River Regional District. He lives near Farmington, about 33 km northwest of Dawson Creek and 1.5 km east of Highway 97. The Lebell Road subdivision is comprised of 33 residences and is located 1.3 km from the Site.

[4] The BCER is the provincial agency responsible for regulating energy activities and granting associated permits in British Columbia.

[5] Ovintiv is an oil and natural gas producing company.

The Project

[6] On 8 July 2024, the BCER issued the Permit under section 25(1) of the *Energy Resource Activities Act*, SBC 2008, c. 36 (the “*ERAA*”), authorizing Ovintiv to carry out the following activities (collectively, the “Resource Activities”):

- I. drill, test, and operate 24 wells to explore for, develop and produce petroleum, natural gas or both;
- II. construct, maintain and operate a facility, and piping and equipment associated with the facility; and
- III. construct, maintain and operate an oil and gas road for access to and within the Site.

The History

[7] The Appellant and Ovintiv were in communication regarding the Resource Activities prior to BCER granting the Permit. The correspondence started in October 2022, when the Appellant and other residents received a letter from Ovintiv, outlining the Resource Activities and inviting them to submit questions or concerns for consultation purposes.

[8] Over the next 21 months, there were numerous emails, letters, in-person meetings, and a town hall where the Appellant expressed his concerns around the project, primarily focused on the potential seismic and public health risks.

[9] Ovintiv engaged with the Appellant regarding his concerns and noted their use of internal and external subject matter experts. They also noted that the project areas fall under the BCER's 2021 *Kiskatinaw Seismic Monitoring and Migration Area (KSMMA) Special Project Order*¹ to which they would be compliant.

[10] The Appellant likewise provided expert opinions to support his concerns, including commissioning a 2024 report² authored by Allan Chapman on the proposed project. Ovintiv's position is that the Project complies with all statutory and regulatory requirements.

[11] In April 2024, the Appellant wrote to the Landowner Liaison for the BCER asking them to either deny the Permit or impose a 5km buffer between the Resources Activities and residential homes. This letter was signed by nine other households near the project site. The Appellant also sent the Chapman Report with the letter. The Landowner Liaison included the letter and report in the permit application review.

[12] On 8 July 2024, the BCER issued the Permit.

The Appeal

[13] On 23 July 2024 the Appellant filed the Appeal on the grounds that the Permit does not sufficiently protect residents of the Lebell Road subdivision with respect to:

- a) the increased risk of earthquakes induced by high volume fracturing; and
- b) the negative impact toxic pollutants can have on air and water quality in the area.

¹ BCER Order 18-90-001 (Amendment #2) (April 19, 2021) ("KSMMA Special Project Order").

² Memo Report titled "Concern over Hydraulic Fracturing-Induced Earthquakes Proximal to the Lebell Road Subdivision" by Allan Chapman of Chapman Geoscience Ltd, 16 April 2024 ("Chapman Report").

LEGISLATIVE CONTEXT

[14] Section 72 of the *ERAA* sets out the appeal rights to the Tribunal:

72 (1) Subject to subsection (2), an eligible person may appeal to the appeal tribunal

(a) a decision made under section 71, if the eligible person was a party to the review under that section, and

(b) a determination, if the eligible person has not, by the date the person commences the appeal, applied under section 70 (1) for a review of the determination.

(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).

[15] Section 72(1) of the *ERAA* states that an "eligible person" may appeal to the Tribunal. Section 69(1) defines an "eligible person" as:

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 a technical order under section 49 (1) has been issued, and

e) a person with respect to whom the regulator has made a finding of a contravention under section 62.

[16] A land owner is defined in Section 1 of the *ERAA* as:

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

(b) a person to whom a disposition of Crown land has been issued under the *Land Act*, RSBC 1996, c. 245.

but does not include the government or a person referred to in paragraph (b) of the definition of "unoccupied Crown land" in section 1 of the *Petroleum and Natural Gas Act*, RSBC 1996, c. 361.

[17] Therefore, appeals can only be filed by an “eligible person” under section 72(1) of the *ERAA*. A land owner on which an operating area is located may qualify as an “eligible person”, but their appeal rights are limited by section 72(2). Section 72(2) reads:

(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).

PRELIMINARY ISSUES

[18] Further to the Appeal, on 6 August 2024, the Tribunal requested written submissions from the parties on three preliminary issues:

- I. whether the Appellant's property is on or adjacent to the "activity area" as defined in the Permit (the “Geographic Issue”);
- II. whether the Appellant has:
 - a) made a submission under section 22(5) or 31(2) of the *ERAA*; or
 - b) submitted a written report under section 24(1)(c) or 31(6). (the “Submissions Issue”); and
- III. whether the appeal should be summarily dismissed because the Tribunal lacks the jurisdiction to hear the appeal (the “Jurisdictional Issue”).

[19] All three parties submitted responses to the preliminary issues.

SUMMARY OF THE PARTIES’ SUBMISSIONS ON PRELIMINARY ISSUES

[20] The Appellant submitted that their property is both adjacent to and within 1.3 km of the Site. The Appellant also stated that he made multiple submissions pursuant to section 22(5) of the *ERAA*, but does not mention sections 24(1)(c), 31(2) or 31(6). He provided a chronology of the interactions between parties including his communications expressing concerns around the impact of the Resource Activities on health, noise, seismic activity, and land value, among others.

[21] The Respondent and Third Party both submitted that the Appellant’s property is neither on nor adjacent to the activity area set out in the Permit. Both of these parties also submitted that the Appellant made submissions under section 22(5) of the *ERAA*, however, the Respondent stated that the act of making submissions under section 22(5) is insufficient to establish standing and that the Appellant must first demonstrate that he is

a relevant land owner in accordance with section 72(2) of the *ERAA*. The Respondent submitted that the Appellant is not an owner of the land on which the Site is located.

[22] Ovintiv submitted that section 24(1)(c) refers to the written consultation and notification report that applicants must submit as part of their permit application, and as the Appellant is not a permit applicant, this section is not relevant. Ovintiv also submits that sections 31(2) and 31(6) of the *ERAA* relate to permit amendments and since the decision was not for permit amendments, Ovintiv says that these sections are not relevant to the Appeal.

[23] The Appellant submitted scientific research on the potential public health and safety risks of energy resource extraction activities. Sources included the 2024 Chapman Report on hydraulic fracturing-induced earthquakes proximal to the Lebell Subdivision. The Chapman Report supports the Appellant's position that the Permit should be denied. The Appellant submitted that he has experienced years of seismic disturbances from Ovintiv drilling in the area and is not able to attain earthquake insurance for his property. The Appellant submitted that the Permit should not be approved until a current, independent scientific review has been performed demonstrating very low health risks to residents, and that this burden of proof is borne by Ovintiv. The Appellant requested recent (2020-2023) peer reviewed, scientific references to support Ovintiv's statement that seismic events have no impact on health, safety or the environment, and questioned why the KSMMA Special Project Order exists if there are no impacts. The Appellant submitted that his questions and concerns remain unresolved by Ovintiv and the BCER.

[24] Ovintiv submitted that they have responded to the Appellant's concerns and cited guidelines, legislation, and regulations, and provided a link to the KSMMA Special Project Order and the BC Ministry of Health's 2014 human health risk assessment³ on the potential impacts of oil and gas activities in northeastern BC. Ovintiv further submitted that the details of such correspondence between parties are not relevant to the Appeal as they are outside the scope of the preliminary issues. Ovintiv submitted that at least four April-May 2024 communications were omitted from the Appellant's chronology.

[25] The Appellant submitted that sections 69 and 72 of the *ERAA* should provide land owners on property adjacent to permitted sites with a procedural right to appeal the BCER's decisions. The Appellant submitted that the current definition of eligible persons excludes him, but is too narrow and violates neighbouring property owners' rights under Section 7 of the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 (the "*Charter*").

[26] The Respondent and the Third Party submitted that the definition of eligible persons excludes the Appellant, and only eligible persons have the right to appeal to the

³ Detailed Human Health Risk Assessment of Oil and Gas Activities in Northeastern British Columbia (Phase 2), prepared for the BC Ministry of Health, 2014.

Tribunal. They submitted that changes to legislation such as the *ERAA* are beyond the scope of the Tribunal and the Tribunal does not have the jurisdiction to consider the Appellants' *Charter* arguments. Further, the Respondent and Ovintiv stated that the Tribunal has previously determined that the definition of eligible person is exhaustive, and that the Tribunal does not have authority to amend that definition. They further cited that the Tribunal has also held that land owners neighbouring an operating area do not have standing.

ANALYSIS AND DISCUSSION

The Geographic Issue

[27] In the Preliminary Issues, the Tribunal queried whether the Appellant's property is on or adjacent to the "activity area" to determine the Appellant's right to appeal, as section 72(1) of the *ERAA* geographically limits who can appeal a decision.

[28] On 8 July 2024, the BCER issued the Permit to Ovintiv and within section 2 defined the "activity area" as being the area Ovintiv submitted in its permit application. This is the "operating area" as defined in section 1(2) of the *ERAA* as "an area, identified in a permit, within which a permit holder is permitted to carry out an energy resource activity."

[29] All the authorized activities in the Permit are located on private land, which is not owned by the Appellant. As stated in the Appellant's submission, the Appellant's property is located 1.3 km from the activity area and no party submits that the activity area is on the Appellant's property. There are two intervening parcels of land between the Appellant's property and the activity area.⁴ Given these facts, I find the Appellant's property is not on or adjacent to the "activity area" as defined in the Permit.

The Submissions Issue

[30] In the Preliminary Issues, the Tribunal questioned whether the Appellant had made submissions under various sections of the *ERAA*, which is a prerequisite for a land owner having standing under section 72(2). In their responses, the parties agreed with respect to preliminary issue 2(a) (whether the Appellant made a submission under section 22(5) or 31(2) of the *ERAA*). Under section 22(5) of the *ERAA* "A person, other than the applicant, may make a written submission to the regulator with respect to an application or a proposed application under section 24." All parties agreed that the Appellant made multiple

⁴ Affidavit of Tarille Rauscher, Executive Director, Responsible Development, BCER made on 30 Aug 2024.

submissions pursuant to section 22(5) between October 2022 and July 2024, as outlined above.

[31] Though raised in the Preliminary Issues as a potential avenue for appeal submissions, in this case Section 31(2) of the *ERAA* is not relevant for two reasons. First, it relates to permit amendments and, as stated by the Respondent and Ovintiv, the Permit is not an amendment, it is a permit in first instance. Second, it allows a land owner to make a submission. As the Appellant's land is located 1.3 km from the proposed development site, the Appellant is not a land owner of land on which the operating area is located.

[32] Section 24(1) of the *ERAA* was also not relevant to the Appellant as it relates to a person's eligibility to apply to the regulator for a permit. The Appellant did not apply for a permit.

[33] Under sections 22(2) and 31(6) of the *ERAA*, before submitting an application or an amendment to a permit, a person must notify the land owner of the land on which the operating area is located. The Appellant is not such a land owner and therefore did not receive a notification under sections 22(2) or 31(6). Also, as noted above, section 31 only applies to permit amendments, so even if the Appellant was a land owner, section 31(6) did not apply to the Permit.

[34] In further response to preliminary issue 2(a), the Respondent stated that the Appellant's submission under section 22(5) is insufficient to establish standing to Appeal under section 72. This point will be further addressed in the Jurisdictional Issue section of this decision.

[35] I agree with the parties that the Appellant made submissions under section 22(5) of the *ERAA* and was not eligible to make submissions under sections 31(2), 24(1), or 31(6) of the *ERAA*.

The Jurisdictional Issue

[36] The operating area of the Permit is not located on the Appellant's land, and they do not fall under any of the other categories in section 72(1) of the *ERAA*. I therefore agree with all parties that the Appellant is not an "eligible person" under the *ERAA*.

[37] The Appellant submits that the definition of eligible persons is too narrow and should be expanded to include aggrieved individuals on neighbouring lands. As it stands, the *ERAA* precludes land owners of neighbouring land from any procedural standing to appeal. The Appellant submits this is in violation of their right to life, liberty and security under Section 7 of the *Charter*.

[38] I have no authority to add to the list of eligible persons defined under the *ERAA* and the Tribunal has previously ruled under *Apsassin v. British Columbia (2021)*⁵ that the definition of “eligible person” under the *ERAA* is an exhaustive list and the Tribunal does not have authority to amend that definition. In order to expand the definition, the *ERAA* would need to be amended to include other eligible persons. The Tribunal has also previously ruled under *Heler v. BCER (2024)*⁶ and *Penalty Ranch v. BCOG (2018)*⁷ that land owners not on or adjacent to the activity area do not have standing to appeal. While I am not bound by these decisions, I find the reasons in these decisions persuasive in interpreting the *ERAA* in this Appeal. Since only an “eligible person” can appeal to the Tribunal under section 72(1) of the *ERAA*, I conclude that the Appellant does not have standing to appeal the Permit to the Tribunal.

[39] The Appellant made an argument related to a *Charter* issue; however, the jurisdiction of the Tribunal is limited by the *ERAA*, and applicable provisions of the *Administrative Tribunals Act*, SBC 2004, c. 45 (the “*ATA*”). Section 20 of the *ERAA* provides that the following provisions of the *ATA* apply to the appeal tribunal:

- a) Part 1 [Interpretation and Application];
- b) Section 44 [tribunal without jurisdiction over constitutional questions];

[40] Section 44 of the *ATA* provides that “the tribunal does not have jurisdiction over constitutional questions.” Section 45 further states that “The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*”. By way of Section 20 of the *ERAA* and Sections 44 and 45 of the *ATA*, the Tribunal does not have jurisdiction to consider the Appellants’ *Charter* arguments. Changes to legislation such as the *ERAA* or considerations as to its constitutionality are outside of the scope of the Tribunal’s authority.

[41] Section 31 (1) of the *ATA* provides that: “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”

[42] The Tribunal’s Practice and Procedure Manual states at pages 15-16 that: “In accordance with section 31 of the *ATA*, the Tribunal will reject a notice of appeal (summarily dismiss the appeal) if it is clear that: (a) the notice of appeal was filed after the time limit ...; (b) the appellant does not have standing to appeal; or (c) the Tribunal does not have jurisdiction over the subject matter of the appeal or the remedy sought.”

⁵ *Ralph Apsassin v. BC Oil and Gas Commission*, 2021 BCOGAT 3 (CanLII), paras 64-65.

⁶ *Ewald Helier & Claudia Pamela Helier v. BC Energy Regulator*, 2024 BCERAT 3 (CanLII), para 51.

⁷ *Penalty Ranch Ltd. v. Oil and Gas Commission*, 2018 BCOGAT 6 (CanLII), para 65.

[43] The Appellant does not have standing to appeal the Permit to this Tribunal, therefore their appeal is not within the jurisdiction of the Tribunal. Pursuant to section 31(1)(a) of the *ATA*, I therefore dismiss the Appellant's appeal.

DECISION

[44] In reaching this decision, I have carefully considered all the arguments, relevant documents, evidence, and submissions from all parties involved.

[45] Based on my findings that the Appellant lacks the standing to appeal the Permit, and the Tribunal lacks the jurisdiction to hear the appeal, the appeal is dismissed under section 31(1)(a) of the *ATA*.

"Nancy Moloney"

Nancy Moloney, Panel Chair
Energy Resource Appeal Tribunal