



# Oil and Gas Appeal Tribunal

**Citation:** *Brian and Carolyn Derfler v. BC Energy Regulator*, 2023 BCOGAT 1

**Decision No.:** OGAT-OGA-23-A001(a)

**Decision Date:** 2023-06-06

**Method of Hearing:** Conducted by way of written submissions concluding on May 26, 2023

**Decision Type:** Preliminary Decision on an Application for Extension of Time to File Appeal

**Panel:** James Carwana, Panel Chair

**Appealed Under:** *Oil and Gas Activities Act*, S.B.C. 2008, c. 36

**Between:**

Brian and Carolyn Derfler

**Appellants**

**And:**

BC Energy Regulator

**Respondent**

**And:**

Ovintiv Canada ULC

**Third Party**

**Appearing on Behalf of the Parties:**

For the Appellants: Self-represented

For the Respondent: Dorothy McDaid, Counsel

For the Third Party: Lars Olthafer, Counsel

# PRELIMINARY DECISION ON AN APPLICATION FOR AN EXTENSION OF TIME TO FILE AN APPEAL

## INTRODUCTION

[1] The Appellants apply to extend the time for filing an appeal to the Oil and Gas Appeal Tribunal (the “Tribunal”) under section 72(2) of the *Oil and Gas Activities Act*, SBC 2008, c.36 (“OGAA”). The appeal relates to an amendment to a previously granted approval held by the Third Party.

[2] The Appellants’ preliminary application for an extension is made pursuant to Section 24(2) of the *Administrative Tribunals Act*, SBC 2004, c.45 (the “ATA”). The extension application is opposed by the Third Party. The Respondent takes no position with respect to the extension request, but notes that the delay in this case is significant.

## BACKGROUND

[3] The construction and operation of a four-segment pipeline on the Appellants’ property was originally approved on April 24, 2017, and was subsequently built by the Third Party.

[4] The Third Party indicates that a letter dated June 13, 2022 was hand-delivered to the Appellants on June 17, 2022, and related to the proposed amendment (the “Amendment”) to the original approval. The June 13, 2022 letter described the work to be done in relation to the Amendment, including the change of service regarding Segment 3 of the pipeline from uni-directional flow of produced water with a maximum hydrogen sulphide (H<sub>2</sub>S) content of 0 mol % to bi-directional flow of natural gas and/or produced water with a maximum H<sub>2</sub>S content of 0.099 mol %.

[5] The Third Party has produced documents relating to the Amendment indicating they were signed by the Appellants on June 17, 2022. These documents consist of a signed Confirmation of Non-Objection to the Amendment and a signed Written Consent to the Amendment. The Written Consent indicates the Amendment was to be treated “as being in effect on and after the date” the Written Consent was given.

[6] By letter dated December 21, 2022, the Respondent (formerly known as the BC Oil and Gas Commission) informed the Appellants of its decision (the “Decision”) that the Amendment had been approved. The documentation attached to the letter identified that the Amendment was “to add sour natural gas as a product and increase H<sub>2</sub>S” in relation to Segment 3 of the pipeline.

[7] The definition of sour natural gas, or sour gas, is incorporated into the OGAA through its regulations and their adoption of the standards published by the Canadian Standards Association as CSA Z662, Oil and Gas Pipeline Systems. It is uncontested by the

parties that the gas permitted to be transmitted by the four-segment pipeline in this appeal includes, as a result of the Amendment, sour gas.

[8] The December 21, 2022 letter provided information about appealing the Amendment approval. The letter indicated that the Appellants could appeal the Decision and indicated as follows:

Any appeal by a land owner must be filed within 15 days of the date to issue the permit. More information on the appeal process may be found at [www.ogat.gov.bc.ca](http://www.ogat.gov.bc.ca) and a notice of appeal may be sent to the Oil and Gas Tribunal at:

Oil and Gas Tribunal  
PO Box 9425 Stn Prov Govt  
Victoria, BC, V8W 9V1

[9] The December 21, 2022 letter further advised that if there were any questions with respect to the letter, the Respondent's Community Relations department could be contacted at a phone number provided in the letter or at [ogc.writtensubmissions@bcogc.ca](mailto:ogc.writtensubmissions@bcogc.ca).

[10] On March 21, 2023, the Appellants sent an email to the Tribunal with a Notice of Appeal in respect of the Decision; and, on March 23, 2023, amended their Notice of Appeal to formally request an extension of time for the filing of their appeal.

[11] On March 30, 2023, the Tribunal wrote to the parties. The Tribunal stated:

In the amendment to their notice of appeal, the Appellants have requested an extension of time to file their appeal. Before the Tribunal makes a decision on whether to grant the extension, it would like to receive comments from the Respondent and the Third Party regarding the extension. The Respondent and the Third Party are requested to provide their comments in response to the extension request by Friday, April 14, 2023.

[12] The Respondent filed its submission on April 12, 2023, and the Third Party filed its submission on April 14, 2023.

[13] On May 9, 2023, the Tribunal wrote to the Appellants to indicate that if they wished to reply to the submissions of the Respondent and Third Party, such a reply was to be filed by May 17, 2023.

[14] On May 17, 2023, the Appellants filed their Reply. Among other things, the Appellants allege in their Reply that they did not receive the June 13, 2022 letter, they never knew anything about the Amendment, and the signatures on the signed Confirmation of Non-Objection to the Amendment and signed Written Consent to the Amendment were not theirs.

[15] On May 19, 2023, the Third Party requested the opportunity to respond to the allegations in the Appellants' Reply. On the same day, the Tribunal granted the Third Party's request to respond and to address such allegations with evidence, including sworn affidavit evidence. The response was to be provided by May 26, 2023.

[16] On May 26, 2023, the Tribunal received the Third Party's response material answering the allegations in the Appellants' Reply. The sworn affidavit of the Third Party's representative indicates that he met with the Appellants on June 17, 2022, to discuss the Amendment Application (among other things), that he hand-delivered notice of the Amendment to the Appellants, and that he specifically witnessed the Appellants sign several copies of the Confirmation of Non-Objection to the Amendment and Written Consent.

[17] No request was received to make further submissions from either the Appellants or the Respondent.

## ISSUE

[18] The issue raised on the preliminary application before me is whether the extension of time sought for the filing of the appeal should be granted.

## DISCUSSION AND ANALYSIS

[19] The time set for an appeal in this case is established under section 72 of the *OGAA*:

**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).

(7) Despite the application of section 24 (1) of the *Administrative Tribunals Act* to the appeal tribunal, **a land owner must file a notice of appeal within 15 days of the day the determination being appealed was made.** [emphasis added]

[20] Pursuant to section 20 of the *OGAA*, section 24 of the *ATA* applies to the Tribunal and, as previously noted, the extension of time here is sought pursuant to section 24(2) of the *ATA*, which provides as follows:

**24** (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, **if satisfied that special circumstances exist.** [emphasis added]

[21] The question which arises under section 24(2) is whether “special circumstances” exist for extending the time to file the Notice of Appeal in the present case. In the circumstances and under the enabling legislation here, the time limit for filing the appeal, if an extension is not granted, is 15 days.

[22] The Tribunal's Practice and Procedure Manual speaks to the situation under section 24(2) of the *ATA*. The Manual indicates that the factors which will be taken into consideration in determining whether to grant an extension under section 24(2) include:

- (a) the length of the delay;
- (b) whether there is a reasonable and credible explanation for the delay;
- (c) the prejudice to those affected by the delay; and
- (d) other relevant factors depending on the circumstances of the particular case.

[23] In terms of other relevant factors, in the present case I find that the following factors are also to be considered:

- i) whether there was there a bona fide intention to appeal;
- ii) when the other parties were informed of the intention to appeal.

[24] These other factors are among the considerations which have been adopted in determining whether “special circumstances” exist under section 24(2) of the *ATA* by another body under the *ATA* (the Health Professions Review Board), and have been considered by the BC Court of Appeal in deciding the question of whether to grant an extension of time in proceedings before the Court of Appeal (see *Clock Holdings v. Braich Estate* [2009] BCJ No. 2464 (BCCA)). I find these additional factors to be helpful in my analysis of whether an extension of time should be granted, and as such I adopt them into my analysis of this issue.

[25] I turn now to an examination of these factors.

#### **a) the length of delay**

[26] The Appellants point out there were delays in notifying them of the Amendment approval, with the December 21, 2022 letter not postmarked until December 28, 2022.

While the Appellants do not specify the date upon which they received the Decision, in their Reply they indicate they had received the Decision before January 20, 2023. The Appellants further state that the Amendment approval was on their minds for a while prior to January 20, 2023, when they say they had a phone call with an individual employed by the Respondent about not receiving the letter until after the 15 day appeal period. The Appellants also say they had a discussion with a representative of the Third Party on January 26, 2023, during which they raised that they had not been told the pipeline would deal with sour gas. The Appellants indicate there has been no discussion since.

[27] The Notice of Appeal was filed on March 21, 2023. While the 15 day appeal period under the statute runs from the date of the Decision, I will use a more favourable date for the Appellants in calculating the delay, being the January 20, 2023 date when they discussed having received the Decision with the Respondent, and which is both 23 days after the Decision letter was postmarked and after they acknowledge having received it. However, even using the January 20, 2023 date, it was still not until approximately 60 days afterwards that the Appellants filed their Notice of Appeal. That is approximately 4 times longer than the 15 day appeal period provided for under the statute, and I find such a delay to be significant.

**b) the explanation for the delay**

[28] The Appellants say they are “requesting an extension because [the Third Party] promised to compensate us for past damages and expenses but it was conditional on us not ‘protesting’ the new pipeline project”, and “that agreement has not been fulfilled by them as 9 months later we still have not received any money”. They further mention not being aware that the Amendment related to sour gas, and in the portion of their Notice of Appeal where an appellant is to set out the special circumstances relating to their extension request, the Appellants state:

Due to both our son and mother\mother in law passing away in the Spring of 2022 our lives were already stressed and we felt that we did not have the energy to focus on yet another challenge with [the Third Party].

[29] The Third Party takes issue with the Appellants comments about outstanding compensation and says:

With regard to the Appellants’ assertions regarding “old grievances” not being finalized, [the Third Party] notes that such matters are entirely irrelevant to the matter at hand and were, in any event, resolved by an agreement the full implementation of which is not yet complete.

[30] The Third Party points to the documents it says the Appellants signed in June 2022 relating to the Amendment and says the Appellants were aware from the documents that the Amendment would include changes consistent with sour gas. In any event, the Third

Party says that in January 2023 the Appellants had ample opportunity to file the Notice of Appeal after receiving the Decision which clearly indicated that sour gas was involved with the Amendment, but the Appellants failed to do so.

[31] I find the Appellants' explanation for the delay to be both inadequate and unreasonable. Their reference to past damages and expenses indicates that their concern mainly relates not to the Amendment at issue, but to previous grievances. While the Appellants experienced the loss of loved ones in the Spring of 2022, they were able to make inquiries of the Respondent and Third Party in January 2023 after receiving the Decision. It was clear that the Amendment related to sour gas and the Appellants admit in their Reply that by January 20, 2023, they were aware that permission for sour gas was involved with the Decision. While the Appellants say they would not have signed the consent for sour gas, they do not adequately explain why it took them approximately 60 days to appeal the matter after receiving the document clearly indicating the permission related to sour gas and knowing that sour gas was involved.

### **c) the prejudice involved**

[32] In general, the prejudice to an appellant in not being able to pursue the appeal is obvious. However, the prejudice to responding parties also needs to be considered. The Forest Appeals Commission addressed this matter when considering an extension request under section 24(2) of the ATA in *Gary Andrew Brammer v. Government of British Columbia*, 2016 BCFAC 1 ("*Brammer*"). The panel there noted that:

"With the passage of time, the risk of prejudice to the Respondent's interests increases" ...[and] "as time passes, it may become more difficult for all parties to gather reliable evidence." (at para. 20)

[33] In the present case, the denial of the extension will mean the Appellants will not be able to proceed with their appeal. That means they will not be able to pursue the desired outcomes set out in their Notice of Appeal. Those desired outcomes primarily involve being able to "settle all previous damages and expenses incurred for their past operations on our land" and to "renegotiate the agreement for the new pipeline we signed for on June 17/22".

[34] The Third Party says that it "should, subject to the reasonable period provided for an appeal as provided by the legislature under s. 72 of OGAA, be able to rely on the finality" of the Respondent's decisions. It further says this is particularly the case here "where the Appellants provided a signed non-objection to the Amendment and written consent to the abridging of the 15-day delay before the Amendment would normally take effect". The Third Party "submits that no special circumstances exist in this case that warrant the prejudice to [the Third Party's] properly acquired rights and interests that would result from granting the Appellants' very lengthy requested extension of time for filing a notice of appeal".

[35] I agree with the panel in *Brammer* that the risk of prejudice to responding parties increases when there has been a significant delay in the passage of time. There is a necessity for finality in decisions and for responding parties to be able to rely on the authorizations granted when conducting their business. As previously noted, I find the delay in appealing has been significant and the sworn evidence presented by the Third Party indicates that the period during which the Third Party could rely on there being no issue regarding the Amendment dates back many months before the Decision was made. On the other hand, I find the prejudice to the Appellants relates more to pursuing their past “grievances” than to challenging the Amendment. The past grievances are not part of the Respondent’s Decision which is subject to appeal. In other words, the prejudice to the Appellants relates more to the separate matter of past grievances than to the Amendment, and the prejudice in denying the extension relates more to the separate matter than the Amendment.

#### **d) other factors**

[36] In terms of whether there was a bona fide intention to appeal, I note that while the Appellants say they spoke to the Third Party on January 26, 2023, they do not say they indicated they were intending to appeal. They were aware by that point that the Amendment approval included sour gas and, in my view, this demonstrates a lack of intention to appeal. Similarly, the information in the Notice of Appeal and the delay in filing the appeal demonstrates a lack of intention to appeal the Amendment Decision and a focus more on the Appellants’ past grievances.

[37] Regarding when other parties were informed of the intention to appeal, the evidence indicates that the Third Party was made aware of this intention only after the Notice of Appeal was filed. Again, despite the Appellants indicating that they contacted the Third Party after receiving the Decision, they do not indicate that they expressed an intention to appeal the Decision, as opposed to discussing their concerns with past grievances.

#### **Panel’s Findings**

[38] As previously discussed, the issue here is whether an extension of time to file an appeal should be granted under section 24(2) of the *ATA*. The determination of that issue depends on whether I am satisfied that “special circumstances exist” for extending the time to appeal. In terms of exercising the power to extend under section 24(2) of the *ATA*, I further note that the panel in *Brammer* stated that the “power to extend the time to appeal should not be exercised lightly” and the “purpose of an appeal period is to bring finality to a proceeding” (at para. 20). In my view, that is consistent with the statutory requirement that “special circumstances exist” in relation to an extension.



[39] In determining whether such “special circumstances exist” in the present case, my conclusions regarding the various factors set out previously are as follows. I find the delay involved in filing the Notice of Appeal has been significant. In that respect, the 15 day appeal period in the *OGAA* reflects a legislative intention for an appeal decision to be made promptly – not some 2 months later. The Appellants’ explanation for the delay does not adequately explain the lengthy delay and does not constitute a reasonable and credible explanation for the delay. Although the Appellants say they had concerns about sour gas and were unaware the approval related to sour gas until approximately January 20, 2023, they do not adequately explain why it took them approximately 60 days after that to appeal. I find the Appellants have not demonstrated they had a bona fide intention to appeal either before the appeal period began, within the appeal period, or within a reasonable time period after the expiry of the appeal period. Similarly, I find the Appellants have not demonstrated that the other parties were aware of their intention to appeal prior to the expiry of the appeal period or prior to the filing of their Notice of Appeal. I find all of these factors weigh against finding that “special circumstances exist” for extending the time period to appeal here.

[40] This brings me to the question of prejudice. In determining matters under section 24(2) of the *ATA*, prejudice will often be an important consideration. In each case, the particular circumstances will need to be reviewed in determining the issue of prejudice.

[41] The lengthy delay in this case involves some prejudice to the Third Party. Regarding the prejudice to the Appellants, as previously stated, I find the Appellants’ concerns relate more to concluding past grievances, which are not part of the Respondent’s Decision which is subject to appeal, than to the Amendment at issue in the Decision. As such, I find the prejudice to the Appellants is not at a significant level and, while in some cases the prejudice to an appellant may outweigh the prejudice to the responding parties such as to constitute “special circumstances”, I do not find the fact that the Appellant will not be able to appeal the Amendment creates such “special circumstances” here.

[42] In weighing and considering all the factors, I find that “special circumstances” do not exist for an extension of time under section 24(2) of the *ATA*.

[43] Regarding the dispute between the Appellants and the Third Party concerning the Confirmation of Non-Objection to the Amendment and Written Consent regarding the Amendment, the Third Party has responded to the Appellants’ allegations with sworn evidence including additional background information supporting its position. Such evidence is to be preferred to the assertions of the Appellants, made without evidence about what they say did occur. In the circumstances, I find that the Appellants simply raising allegations about the documents, without more, is insufficient to outweigh the other factors against an extension. Further, in my view the lack of an expressed intention to appeal for approximately 60 days, after receiving the Decision and knowing the approval related to sour gas, is consistent with the Appellants not objecting to the Amendment and having signed the Confirmation of Non-Objection to the Amendment and

signed Written Consent regarding the Amendment, although they have raised allegations otherwise.

## DECISION

[44] For the reasons set out, I find that “special circumstances” do not exist for an extension of time to appeal under section 24(2) of the *ATA*. As a result, the Appellants’ application for an extension of time is dismissed.

[45] In reaching my decision, I have considered all of the submissions and relevant evidence provided by the parties, whether specifically referenced in my reasons or not.

“James Carwana”

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James Carwana, Panel Chair  
Oil and Gas Appeal Tribunal