

March 16, 2009

TO: ALL INTERESTED PARTIES

**RE: ENERGY RESOURCES CONSERVATION BOARD (ERCB/BOARD) PROCEEDING
IN THE MATTER OF SULLIVAN SOUR GAS DEVELOPMENT PROJECT
APPLICATION NOS. 1520388, 1513051, 1520922, 1520923, 1517148, 1517151,
1517160, 1517168, 1517170, 1517176, 1574414 AND 1574409
PETRO-CANADA SULLIVAN FIELD (PROCEEDING)**

DECISION

Having considered the facts surrounding the relationship between the ERCB employee and the Petro-Canada employee and the applicable law, the hearing panel in the Proceeding (Panel) hereby concludes that the Proceeding can continue. This letter constitutes the Panel's decision in that regard.

BACKGROUND

The Applications and Proceeding

Between May 24, 2007 and May 30, 2008, Petro-Canada filed application nos. 1520388, 1513051, 1520922, 1520923, 1517148, 1517151, 1517160, 1517168, 1517170, 1517176, 1574414 and 1574409 requesting approval to drill and operate a number of sour gas wells, the construction and operation of a gathering system of pipelines, a compression and dehydration facility and the construction and operation of a trunkline to transport the sour gas (Applications). If approved, the facilities would be located in the Eastern Slopes Area of Southwestern Alberta to the south and west of Longview, Alberta. A number of interveners are opposed to the proposed project and a public hearing was convened to consider the Applications and receive and consider the evidence of the parties.

The hearing commenced November 12, 2008 and continued November 13, 14, 19, 20, 21, 25, 26 and 27, December 8, 9, 10, 11, 12, 15, 18, and 19, 2008 and January 20, 21, 29 and 30, 2009. The Panel sat for a total of 21 hearing days. On January 30, 2009, the Panel adjourned the hearing, subject to rulings on two procedural motions and a Notice of Question of Constitutional Law question before it.

The Self Disclosure

On February 17, 2009, an ERCB employee disclosed to the Panel that the employee had recently commenced a personal relationship with a Petro-Canada employee. Both persons had been involved in the Proceeding on behalf of their respective employers.

On receipt of the disclosure, the Board:

- i) removed the ERCB employee from the Proceeding;
- ii) disclosed the matter to all interested parties by letter dated February 19, 2009;
- iii) placed the ERCB employee on administrative leave with pay effective February 19, 2009; and
- iv) engaged third party advisers to assist the Board in investigating the facts surrounding the relationship and reaching a decision about the Panel's ability to continue the Proceeding.

In addition, the Panel deferred its deliberations on the Proceeding pending the outcome of the factual investigation and conclusions regarding what impact, if any, the relationship may have on the Proceeding and the Panel's ability to fulfill its adjudicative function in relation to the Proceeding with objectivity and impartiality.

THE ERCB'S COMMITMENT TO FAIR PROCESS

The ERCB strives at all times to have a regulatory framework and decision making process that inspires public confidence. This fundamentally requires fairness, objectivity, impartiality, openness, independence, respect, integrity and honesty.

Board hearing panels rely on advice, assistance and technical expertise from Board counsel and Board staff from different areas of the Board before, during and after the hearing. In this capacity, ERCB staff members:

- i) closely review the application, expert reports and submissions filed by the applicant and interveners in the proceedings involving their expertise;
- ii) analyze the evidence for the purpose of developing questions for Panel counsel to ask at the hearing and to brief or instruct counsel;
- iii) advise Panel members on technical issues and evidence when invited to do so; and
- iv) assist in the writing of portions of decisions at the conclusion of the hearing.

In conducting their duties, ERCB technical staff and board counsel may be present with the Panel during prehearing meetings or briefings of the Panel. They also travel with Panel members to and from the hearing venue, have discussions with Panel members during morning, lunch and afternoon breaks during the hearing, and often dine with the Panel Members throughout the course of out-of-town hearings.

To better ensure impartiality, the Board has adopted and maintains a Conflict of Interest Policy and Procedures (Conflict Policy) that applies to all Board employees. The Conflict Policy is available to all staff as well as the public on the Board's website. The Conflict Policy requires all ERCB employees to conduct their duties with impartiality at all times. Employees must disclose any situation in which their involvement is a real or perceived conflict of interest. The Conflict Policy provides that a conflict of interest may exist where an employee's actions may be reasonably perceived in such a way that questions the employee's fairness or impartiality. All ERCB employees are expected to avoid all real and perceived conflicts of interest.

INDEPENDENT FACT-FINDING PROCESS

As a result of the Board employee's self-disclosure, on February 23, 2009, the Board retained Mr. Perry Mack, Q.C. of the law firm Machida Mack Shewchuk Meagher LLP to assist in the conduct of its investigation of and to ascertain the facts regarding this matter. Mr. Mack is a prominent civil litigation lawyer in Calgary with over 25 years experience and is Past President of the Law Society of Alberta. Mr. Mack is not employed by and does not have any direct or indirect relationship with the Board or its employees. Mr. Mack does not regularly act for or practice before the Board.

Mr. Mack interviewed two Board counsel and six Board staff involved to date in the Proceeding (including the Board employee involved in the relationship with the Petro-Canada employee). Mr. Mack also interviewed the Petro-Canada employee. The interviews were conducted on February 27, 2009 and March 2, 2009.

Mr. Mack provided his factual findings to the Board by letter dated March 3, 2009 (Mack Report). In the course of reaching its decision regarding its ability to continue the Proceeding, the Panel has reviewed and hereby accepts the findings in the Mack Report. The Mack Report is attached as Appendix A to this Decision.

INDEPENDENT LEGAL ADVICE TO THE PANEL

To assist it in determining whether it can continue the Proceeding, the Panel also received independent legal advice from Mr. David P. Jones, Q.C. of the law firm deVillars Jones. Mr. Jones is a former professor at McGill University and the University of Alberta and taught administrative, constitutional, property and taxation law. He is co-author of Jones & deVillars' *Principles of Administrative Law* (going into its 5th edition) and co-editor of the *Administrative Law Reports*. Mr. Jones's practice consists of all areas of administrative law and he has acted for and against various government boards and agencies. Mr. Jones is not employed by and does not have any direct or indirect relationship with the Board or its employees. Mr. Jones has not been previously retained by the Board and does not act for or practice before the Board.

The Panel notes that Mr. Mack did not make any findings with respect to the panel members themselves. This is appropriate because the Panel is the decision maker and the Panel members must therefore make their own determination of the facts as they relate to the Panel members in order to determine their ability to continue the Proceeding.

Each Panel member has made the following factual determinations with respect to himself. Since the last hearing day on Friday, January 30, 2009, none of the three members of the Panel has had any contact with the ERCB employee. Further, since the commencement of the relationship between the ERCB employee and the Petro-Canada employee in early February 2009, the ERCB employee has had no communications or interaction with or opportunity to influence the Panel in relation to the Proceeding.

THE LEGAL TEST FOR A REASONABLE APPREHENSION OF BIAS

The Panel is mindful that the ultimate duty of a decision-maker is to be impartial. Impartiality refers to the absence of bias and a freedom from outside pressure or influence. The Panel's mindset and actions must permit it to act impartially.

The Supreme Court of Canada in *Wewaykun Indian Band v. Canada*¹ has outlined the test to be used to determine whether a reasonable apprehension of bias exists as follows:

“What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.”

In considering the circumstances in which judges hearing an appeal are disqualified, the Alberta Court of Appeal in *Boardwalk REIT LLP v. Edmonton (City)*² (Boardwalk case) had this to say about the test for reasonable apprehension of bias (citations omitted):

“To have any legal effect, an apprehension of bias must be reasonable, and the grounds must be serious, and substantial. Real likelihood or probability is necessary, not a mere suspicion: ...The threshold is high....The test of appearance to a reasonable neutral observer does not include the very sensitive or scrupulous conscience:”

In the *Boardwalk* case, the Court of Appeal also said, at paragraph 79:

And of course the rules to test bias depend upon the views of a well-informed reasonable person:”

CONCLUSION

Based on the facts outlined above and set out in the Mack Report, the Panel concludes that a reasonably informed and neutral person would conclude that there is no reasonable apprehension of bias that would prevent the Panel from continuing with the Proceeding.

In reaching its conclusion regarding continuation of the Proceeding, the Panel notes the following salient facts:

- i) the ERCB employee is not a decision maker in the Proceeding;
- ii) the Panel has not yet commenced the decision making process in relation to the Proceeding because the Proceeding has not yet been completed;

¹ [2003] S.C.R. 259. In *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] S.C.R. 269 at pp. 394-395, Justice de Grandpré emphasized that the test involves determining “what would an informed person, viewing the matter realistically and practically—and having thought the matter through— conclude?”

² 2008 ABCA 176, at paragraph 29.

- iii) any apprehension of bias would be on the basis of the association between the ERCB employee and the Petro-Canada employee;
- iv) as neither party had any opportunity to and did not communicate with the Panel after their relationship started, there is no association or relationship between a party to and any decision maker in the Proceeding;
- v) immediately following disclosure of the personal relationship between the ERCB employee and the Petro-Canada employee, the ERCB employee was removed from the file; and
- vi) since February 18, 2009 the ERCB employee has not and will not have any further involvement on the file and/or communication with ERCB staff or the Panel on the Proceeding.

Based on these facts, a reasonable person would know that the employees' relationship started after the hearing was adjourned and that thereafter the ERCB employee had no further involvement in the Proceeding. A reasonable person would also know that the Panel has had no communication or interaction with the ERCB employee since the relationship started. Also, the ERCB employee has not had any opportunity to influence the decision making process or the Panel's decision in the Proceeding. Finally, based on the findings in the Mack Report, a reasonable person would know that the individuals involved in the relationship did not discuss matters of substance arising in the hearing.

Viewing all of the foregoing facts practically and realistically, the Panel finds that no reasonable, well informed, neutral person would perceive that the Panel has been biased by the events or that these facts would prevent the Panel from making a fair, impartial and independent decision in relation to the Applications.

Accordingly, the Panel has concluded that the Proceeding can continue as constituted.

The Panel will now proceed to decide the motions currently before it.

Dated at Calgary, the 16th day of March, 2009.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>
 J.D. Dilay, P.Eng.
 Presiding Member

<original signed by>
 B.T. McManus Q.C.
 Board Member

<original signed by>
 J.D. (Jack) Ebbels
 Board Member



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PRIVATE AND CONFIDENTIAL

March 3, 2009

**Energy Resources Conservation Board -
Law Branch**
640 - 5th Avenue S.W.
Calgary, Alberta
T2P 3G4

Delivered via courier

Attention: Ms. Patricia (Patty) Johnston, Q.C.

Dear Madam:

**Re: Energy Resources Conservation Board (ERCB/Board) Proceedings
In the matter of Petro-Canada
Application Nos. 1520388, 1513051, 1517148, 1520922, 1517151, 1517158, 1517161,
1717162, 1517168, 1517170, 1517176, 1517160 and 1520923
Sullivan Field (Proceeding)**

On February 19, 2009, the ERCB (the "Board") suspended the Sullivan Field Proceeding as a result of an ERCB employee having on February 17, 2009 self-disclosed to ERCB counsel that the employee had recently commenced a personal relationship with a Petro-Canada employee. Both employees had been involved in the Proceeding on behalf of their respective employers. Although the ERCB employee was not a decision maker in the Proceeding, the concern was that the relationship may have created a conflict or perceived conflict between the employee's private interest and the employee's official duties and responsibilities in relation to the Proceeding.

The ERCB employee was removed from the file and placed on administrative leave on February 19, 2009 pending the ERCB investigation into the matter. The ERCB determined that it needed to understand the potential impact of the matter upon the Proceeding. It determined to engage an independent third party to assist in the investigation.

In the result, the undersigned was retained to conduct a review of the facts and provide findings to the Board.

The Process

On February 20, 2009, the undersigned was contacted by telephone by Patricia Johnston, Q.C., general Counsel for the ERCB. Ms. Johnston gave an outline of the issue at hand. I was provided the following background documentation:

1. A copy of the Notice of Rescheduling of Hearing dated August 22, 2008; and
2. Copy of ERCB counsel, Kirk Stilwell and Trena Grimoldby's letter of February 19, 2009 to All Interested Parties.

On February 23, 2009, I met with Ms. Johnston, and Board counsel to the Proceeding, Mr. Stilwell and Ms. Grimoldby, to obtain further background information and to determine how this investigation would proceed. It was agreed that I would interview Board counsel and staff having knowledge of the matter at issue and provide a report for consideration by the Board. The ERCB employee and the Petro-Canada employee would be invited to be interviewed in the presence of their own counsel.

It was agreed that a court reporter would transcribe the interviews. It was agreed that Board counsel would provide any further documentation I may request subject to reservations respecting solicitor/client privilege and the Panel's deliberations.

It was agreed that I would not interview members of the Panel or provide legal advice in connection with the results of this investigation.

At my request I was provided copies of emails retrieved from the ERCB employee's Outlook. I was provided copies of emails related to the issue at hand that cover a time period of November 14, 2008 to February 17, 2009. These emails were retrieved from the ERCB backup system and are not the result of an expert forensic analysis. As such they would not for example include emails, if any, that had been deleted from the ERCB employee's computer prior to the automated backup process.

In addition, at my request I received the following documentation:

- i. A copy of the ERCB Respectful Workplace policy dated December 2004;
- ii. A copy of the ERCB Conflict of Interest policy and procedures dated October 2008;
- iii. A copy of the ERCB employee's work product for counsel dated November 3, 2008;
- iv. A copy of the ERCB employee's work product for counsel dated November 24, 2008;

- v. A copy of transcript excerpts of the December 8, 2008 examination of the Petro-Canada witness panel, including testimony about or prepared reports about air quality, risk assessment, human health risk assessment, livestock health risk assessment, flaring of gas and emergency response planning;
- vi. A copy of a Final Argument List prepared by the ERCB employee dated January 22, 2009;
- vii. A copy of an Issues List prepared by the ERCB employee dated January 26, 2009; and
- viii. A copy of a Revised Issues List prepared by ERCB counsel dated January 26, 2009.

The Interviews

Interviews occurred in my office in the presence of a court reporter on Friday, February 27, 2009 and Monday, March 2, 2009. Interviewed were Board counsel, Mr. Stilwell and Ms. Grimoldby, five ERCB staff, as well as the ERCB employee and the Petro-Canada employee who were involved in the personal relationship. The ERCB employee was interviewed, in the presence of counsel on February 27, 2009. The Petro-Canada employee was interviewed in the presence of counsel on March 2, 2009.

I have determined that it is not necessary for purposes of this report to document the names of the individuals interviewed. ERCB counsel have the list of the names of persons interviewed and transcripts of the interviews will be tendered to the ERCB along with this report.

Factual Background

Petro-Canada has applied to drill 11 sour-gas wells from new and existing pads in an area south and west of Longview, Alberta. The application includes access roads, a gathering system, and a trunk line. The application is contentious. The Hearing commenced November 12, 2008. There have been 21 days of Hearing to and including January 30, 2009. No further steps have taken place in the Proceeding since January 30, 2009.

Because the ERCB employee at issue is a member of the technical staff, some explanation of the role of that staff in the Hearing process is warranted.

When an application is filed with the ERCB it is reviewed by any number of technical staff depending upon the issues it raises. This internal review may include assessments by a geologist, reservoir engineers, an emergency assessment group, an environmental assessment group, persons with expertise in pipe line construction and human and animal health risk assessments. In a case involving H₂S an air quality specialist would be included in the internal review.

In addition to their role in reviewing the applications, technical staff assist Board counsel in respect of the evidence at the Hearing and in the preparation of technical questions for counsel to pose to witnesses after they are cross-examined by parties opposed in interest.

Technical staff also serve to assist the Board Panel. They will meet with the Panel to assist in preparation for the Hearing. Technical staff will also meet with the Panel members during the course of the Hearing to assist in interim consolidation of the issues and evidence. After the conclusion of a Hearing, technical staff may assist the Panel in drafting portions of the written decision.

Additionally, there is incidental contact between Board Panel members and technical staff during the course of the Hearing including sometimes transportation to and from the Hearing, coffee breaks, meals and the like. I did not ask for any particulars of this nature as it was not in my view relevant to this inquiry.

In the normal course, technical staff would be present in the room during the course of the Hearing and in particular during those portions of the Hearing that deal with their areas of expertise. Technical staff may also be present in break out rooms with Panel members during breaks in the Hearing.

Petro-Canada put up 2 panels of witnesses at this Hearing. The first panel which testified from November 12, 2008 to mid-day November 27, 2008 spoke to the project generally, the construction of the project, the need for the project and the environmental aspects of the project. This panel will be referred to as "the First Panel."

Petro-Canada's second panel ("the Second Panel") testified from November 27, 2008 to December 8, 2008 and dealt with health and safety issues including the emergency response plan.

Thereafter the interveners began to present their evidence.

The Petro-Canada employee at issue testified as part of the First Panel. The ERCB employee at issue assisted Board counsel with respect to the evidence of the Second Panel. The ERCB employee did not assist counsel in respect of the evidence of the Petro-Canada employee. The areas of expertise of the ERCB employee and the Petro-Canada employee do not overlap in any relevant sense of the Proceeding.

After December 8, 2008 the ERCB employee was not asked by Board counsel to provide technical assistance in respect of the evidence of the interveners.

After the Christmas break in the Proceeding the ERCB employee would have attended a meeting of the Board Panel, Board counsel and technical staff on January 13, 2009. The ERCB employee would have commented upon issues relating to that person's area of expertise.

There was a meeting of Board Panel, Board counsel and technical staff, on February 5, 2009. The ERCB employee was not able to attend because of a commitment in respect to an unrelated matter.

With taking administrative leave, the ERCB employee has had no further input on the Proceeding.

The Relationship

The personal relationship between the ERCB employee and the Petro-Canada employee did not commence until February 2009. While the ERCB employee had informed several colleagues and one Petro-Canada consultant of an interest in the Petro-Canada employee, no material steps were taken in furtherance of this interest until the last day of testimony at the Hearing. On that day, the ERCB employee gave a business card to the Petro-Canada employee. Contact was subsequently made and the two individuals had dinner on February 7, 2009. A personal relationship followed.

The Petro-Canada employee was emphatic in the interview that one of the ground rules of the relationship was that the two individuals would never discuss any matters of substance to the Proceeding. Both the ERCB employee and the Petro-Canada employee said that they never discussed any matters of substance with respect to the Proceeding during the relationship.

I directed both their attention to one email in particular. The email in question was from the ERCB employee to another staff member dated February 10, 2009 and referenced the ERCB employee and the Petro-Canada employee watching a CTV-W5 program together. The email included the words "we talked a lot about the hearing." Both individuals confirmed to me to the extent they spoke about the hearing while watching that television program it was not in respect of the substance of the Proceeding, but rather in terms of how they came to be together.

I tend to believe both these individuals on the essential matter at issue.

Conclusions

Based upon my review, the following are my conclusions:

1. The personal relationship between the ERCB employee and the Petro-Canada employee did not commence until after January 30, 2009;
2. The ERCB employee has not had further contact with the Board Panel (the decision makers) respecting the Proceeding after January 30, 2009;
3. The ERCB employee does not appear to have had any input into the response of Board counsel to the Petro-Canada employee's evidence;
4. The Petro-Canada employee's evidence is not within the realm of the ERCB employee's area of expertise or input within the Board;
5. None of ERCB counsel or ERCB technical staff were able to point to any aspect of the Proceeding which had been impacted or potentially impacted by the personal relationship at hand; and
6. The removal of the ERCB employee from this file on February 19, 2009, appears to have removed the practical possibility of any influence the ERCB employee may have upon the Proceeding or the deliberations of the Panel.

In the result, I have seen no evidence that the personal relationship of these individuals has had any actual effect upon the Proceeding.

I confirm that I have delivered all the referenced documentation to your office including the transcripts and that I have not kept any copies.

All of which is respectfully submitted.

Yours truly,

MACHIDA MACK SHEWCHUK MEAGHER LLP

PERRY R. MACK, Q.C.

PRM/mah

enclosures