

Love is in the air at the Energy Resources Conservation Board: A comment on the Petro-Canada Sullivan Field Application

By Shaun Fluker

Cases Considered:

[*Big Loop Cattle Co. v. Alberta \(Energy Resources Conservation Board\)*](#), 2009 ABCA 301;
[*Big Loop Cattle Co. v. Alberta \(Energy Resources Conservation Board\)*](#), 2009 ABCA 302;
[Petro-Canada Sullivan Field Proceeding](#)

In separate decisions cited as *Big Loop Cattle Co. v. Alberta (Energy Resources Conservation Board)*, Madam Justice Marina Paperny dismisses two applications by the Pekisko Group et. al. for leave to appeal an Energy Resources Conservation Board (ERCB) ruling concerning the revelation of an ERCB employee involved in a personal relationship with a Petro-Canada employee during a Petro-Canada facility application hearing. Petro Canada proposes to drill sour gas wells along the front range of the Rocky Mountains west of Longview, Alberta, and the Pekisko Group among others opposes the development. In a strange twist, the ERCB ruled on its own partiality in March 2009 and the recent Alberta Court of Appeal decisions flow from that ruling.

Background

The legal and policy frameworks governing land use in Alberta generally subordinate recreation, preservation, ranching, water, agriculture, and forestry interests to those of the oil & gas industry in the name of the public interest. The Minister of Energy, together with his delegates including the ERCB, wield significant influence over the Alberta landscape by issuing subsurface mineral leasehold rights and associated well, pipeline and facility licenses, resulting in approximately 350,000 drilled wells since 1981 (see Canadian Association of Petroleum Producers' [statistics](#)).

There was a time when only environmental preservationists, such as the Alberta Wilderness Association, the Castle-Crown Wilderness Coalition, or the Rocky Mountain Ecosystem Coalition, and landowners with the misfortune of having the oil & gas industry in their backyard, argued the drilling of these wells was not in the public interest. Those days have passed. Energy companies increasingly propose to drill oil and gas wells closer to the daily lives of Albertans, and in turn have significantly increased the number and variety of persons who believe oil and gas development is not *always* in the public interest. The ERCB, however, rarely denies a well license application and the Department of Energy continues to lease subsurface mineral rights to

energy companies under a veil of secrecy. The public interest, it seems, remains stacked in favour of oil and gas development with little or no regard for other socio-ecological concerns on the landscape.

The Whaleback region of southwest Alberta is perhaps the sole exception to this story, if only because the ERCB has denied a well license application on concerns for the impact sour gas development would have on the landscape. In 1994, the ERCB denied a well license application by Amoco Petroleum to drill an exploratory gas well in the Whaleback region (ERCB decision D94-8). The ERCB's decision led to the subsequent designation of two protected areas in the Whaleback: the Bob Creek Wildland Park and the Black Creek Heritage Rangeland. Generally however, the ERCB steadfastly refuses to address socio-ecological concerns associated with energy development (I have previously written on the ERCB's jurisdiction to address these concerns; see Shaun Fluker, "The Jurisdiction of Alberta's Energy and Utilities Board to Consider Broad Socio-Ecological Concerns Associated with Energy Projects" (2005) 42 Alta. L. R. 1085). Meanwhile, a general malaise spreads across the land over oil & gas activity in Alberta.

ERCB Hearing

In 2007 Petro-Canada applied to the ERCB for licenses to drill sour gas wells (gas with poisonous hydrogen sulphide concentrations of up to 15%) and construct associated pipelines along the front range of the Rocky Mountains west of Longview, Alberta. The region is home to the Pekisko Group – a coalition of ranching families seeking a moratorium on oil and gas development in the region until there is a legal and policy framework in place to ensure such development does not impair the existing grasslands landscape, the services it provides and the activities it supports (for more information on the Pekisko Group, see its [website](#)). As a result of opposition from the Pekisko Group and others to the Petro Canada application, the ERCB convened a public hearing in High River during late 2008 and early 2009 to consider the social, economic and environmental effects of the proposed sour gas development. (CTV produced a documentary on the application, see online <http://watch.ctv.ca/news/w-five/w-five-fueling-fears/#clip137197>).

Hearing proceedings were abruptly interrupted in February 2009 when an ERCB employee working on the application disclosed a personal relationship with a Petro-Canada employee also involved with the application. The ERCB suspended proceedings and hired Perry Mack, Q.C. to investigate the incident and report to the Board. The Mack Report details the role of the Petro-Canada employee as an applicant's witness during the hearing and the role of the ERCB employee as technical staff assisting the Board and its counsel with Petro-Canada's evidence during the hearing. On the basis of documentary evidence and interviews, Mack concluded as follows:

- The personal relationship between the ERCB employee and the Petro-Canada employee did not commence until after January 30, 2009;
- The ERCB employee has not had any further contact with the Board Panel (the decision-makers) respecting the Proceeding after January 30, 2009;

- The ERCB employee does not appear to have had any input into the response of the Board counsel to the Petro-Canada employee's evidence;
- The Petro-Canada employee's evidence is not within the realm of ERCB employee's area of expertise or input within the Board;
- 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
- 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.

The ERCB also received independent legal advice on the matter from David Jones, Q.C. (the Jones Opinion), likely to advise the Board on whether the proceedings were fatally tainted by the employee relationship on grounds of bias. The issue was whether the employee relationship produces a reasonable apprehension of bias on the part of the ERCB, violating the fundamental principle of natural justice that the parties are entitled to an impartial decision-maker.

On March 16, 2009 the ERCB issued its own decision to continue with the Petro-Canada application, finding that the employee relationship did not produce a reasonable apprehension of bias on the basis of the following:

- the ERCB employee is not a decision-maker in the Proceeding;
- the Panel has not yet commenced the decision making process in relation to the Proceeding because the Proceeding has not yet been completed;
- any apprehension of bias would be on the basis of the association between the ERCB employee and the Petro-Canada employee;
- 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;
- immediately following disclosure of the personal relationship between the ERCB employee and the Petro-Canada employee, the ERCB employee was removed from the file;
- since February 19, 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.

(See [Petro-Canada Sullivan Field Proceeding](#). The Mack Report is attached to the decision).

Alberta Court of Appeal

The Pekisko Group et. al. applied for leave to appeal this ERCB decision and, in support of the leave application, also applied for an Order from the Court to require the ERCB to produce internal Board emails and the Jones Opinion relied upon by the ERCB in its bias deliberations. In the successive decisions *Big Loop Cattle Co. v. Alberta (Energy Resources Conservation*

Board), 2009 ABCA 301 and *Big Loop Cattle Co. v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 302, Madam Justice Marina Paperny denies both applications.

The applicant relied on section 41(2.2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, in its request for further documents. Section 41 (2.2) reads:

If an applicant makes a written request for materials to the Board for the purpose of the application for leave to appeal under subsection (2), the Board shall provide the materials requested within 14 days from the date on which the written request is served on the Board.

The ERCB argued that it produced all materials considered by the panel in its decision, save for the Jones Opinion which it retained on the basis of solicitor-client privilege. Furthermore, the ERCB argued in any case section 41(2.2) should not be interpreted to require any more than the record of the ERCB proceeding.

It is generally acknowledged that evidence relevant to judicial review applications concerned with bias will often include evidence beyond the record of proceedings (see e.g. Jones and DeVillars, *Principles of Administrative law*, 5th ed. (Toronto: Carswell, 2009) at 451-455). Justice Paperny holds the purpose of section 41(2.2) is to require the ERCB to produce *relevant* documents in advance of a leave to appeal application. And she upholds the ERCB position that it produced all relevant documentation to the applicants. However, Justice Paperny expressly declines to address whether section 41(2.2) requires the ERCB to produce more than the record of proceedings in the context of a leave application to the Court of Appeal (2009 ABCA 301 at para. 7). This statement is odd, since she appears to have ruled on the purpose of section 41(2.2) in this case.

This decision is troubling on a couple fronts. Justice Paperny does not expressly apply case law or rules of statutory interpretation to support her ruling, even though it appears the applicant cited precedential support for its request (*Milner Power v. Alberta (Energy and Utilities Board)*, 2007 ABCA 265). Given that relevant evidence in a bias proceeding typically extends beyond the record of proceedings, how satisfactory is it that the Court of Appeal cedes to the ERCB position on relevant documentation without any legal analysis in this case? Surely the ERCB lacks the jurisdiction to dictate relevant evidence in a proceeding alleging bias on behalf the Board.

Justice Paperny's decision to deny leave to appeal the March 2009 ERCB ruling on its own bias is based on her finding that this leave application is premature since the ERCB has yet to rule on the merits of the facility application (2009 ABCA 302 at para. 6). The Pekisko Group sought leave to challenge the procedural fairness of the ruling on the basis that the ERCB failed to provide them with an opportunity to contest the findings of the Mack Report. Perhaps counsel was also mindful of the possibility that a reviewing court will refuse to grant relief to parties who acquiesce or choose not to object to an obvious procedural error (see Jones and DeVillars, *supra*

at 656) and accordingly they filed the leave application so as to remove any doubt as to their dissatisfaction with the ERCB's process here.

What is most noteworthy here in my view though is that the ERCB panel accused of bias issued its own ruling on the matter. The ERCB ruling and the Mack Report in support seem focussed on whether there was *actual* bias resulting from the employee relationship, where the law only requires an applicant to establish the *perception* of disqualifying bias (since proving actual bias is impossible). The legal test is whether a reasonable, informed person would perceive an apprehension of bias in the ERCB (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369). What the Board itself thinks on this matter is surely irrelevant to subsequent proceedings.

The ERCB ruling on its own bias also seems like a classic case of being the judge in one's own cause, and thus clearly violates principles of natural justice. This isn't the first time the ERCB has ruled on its own partiality, however in the last instance the Board (in the form of its predecessor the Alberta Energy and Utilities Board) determined its process was fatally biased and terminated proceedings (see [AEUB Decision 2007-075](#)).

The ERCB has directed plenty of effort towards saving this hearing process: suspending proceedings, independent investigations and opinions, and an interim ruling. Ultimately the issue focuses on the fact that an employee of the decision-maker has a personal relationship with an employee of one of the parties to the process. An association between the decision-maker and a party in the proceeding is a common category of disqualifying bias. And while the law is such that it is not necessarily fatal to this hearing process, the contested nature of this application together with the general perception that the ERCB interprets the public interest to favour oil and gas interests leads, in my view, to the perception of bias here no matter what safeguards were in place to prevent actual bias.