

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF GRANDE PRAIRIE**

BETWEEN:

**FERN SLAUENWHITE, ALAN IWASKOW,
ELIZABETH BORYSIUK, ALEX BORYSIUK,
SHEILA CRAIPLEY and WAYNE CRAIPLEY**

Applicants

- and -

**ALBERTA ENVIRONMENTAL APPEAL BOARD,
THE DIRECTOR OF ENVIRONMENTAL ASSESSMENT,
THE DIRECTOR OF STANDARDS AND APPROVALS,
CONWEST EXPLORATION COMPANY LIMITED and
THE ENERGY RESOURCES CONVERSATION BOARD**

Respondents

REASONS FOR JUDGMENT

of the Honourable Mr. Justice L.D. Wilkins

The Applicants are a group of rural residents living in the general area of the location of a proposed sour gas processing plant to be owned and operated by the Respondent, Conwest Exploration Company Limited ("Conwest"). The Applicants particularly oppose the location of the plant in the Saddle Hills area near Sexsmith, Alberta.

The completed application for gas plant development submitted by Conwest was approved for the Department of Environment by the Respondent, Director of Standards and Approvals ("the Director").

The Applicants filed a Notice of Objection to the granting of that approval with the Alberta Environment Appeal Board ("the Board") seeking a hearing before that Board to review the approval of the Director pursuant to s. 86 of the Environmental Protection and Enhancement Act, S.A. 1992, c. E-13.3 ("the Act").

The Board called a preliminary hearing to consider its jurisdiction to consider the Notice of Objection so filed. At that hearing the Board decided that the provisions of s. 87(5)(b)(i) applied to the case under consideration and required the Board to dismiss the objection of the Applicants.

The Applicants now seek a judicial review of that decision by this Court and an Order directing the Board to conduct a hearing to review the approval of the Director pursuant to s. 86 of the Act. The Applicants' challenge to the Board's subsequent decision not to review or rehear its previous decision was not pursued at the hearing and that determination will not therefore be reviewed.

The issue in this case is whether the determination by the Board of its jurisdiction pursuant to the provisions of s. 87(5)(b)(i) of the Act ought to be reviewed by

this Court.

BACKGROUND INFORMATION

Conwest originally filed applications before the Energy Resources Conservation Board ("ERCB") and Alberta Environmental Protection ("the Department") under predecessor legislation to the present Act, for approval of a new sour gas processing plant to process sour gas from gas finds made by Conwest in northwestern Alberta. Modifications to that application were made to conform with the provisions of the Act which came into force prior to approval of the application by the ERCB and the Director. As part of its application Conwest carried out a public consultation program describing its proposal.

As part of the application process Conwest submitted to the Respondent Director of Environmental Assessment ("the Director") proposals for the terms of reference of a mandatory Environmental Impact Assessment ("EIA") pursuant to s. 42(1)(a) of the Act. The Director issued terms of reference with respect to the EIA¹. Conwest submitted to the Director and the ERCB an EIA report².

¹ EA Board Return, Volume 2, Tab EA Board, Exhibit G.

² Conwest application Volume 2, Environmental Impact Assessment prepared by TERA Environmental Consultants (Alta. Ltd.) December 1993.

The Applicants filed a Statement of Concern pursuant to s. 42(6) of the Act concerning the proposed development³.

Pursuant to s. 51(a) of the Act the Director advised the ERCB the EIA report was complete.

At a four day public hearing in Grande Prairie the ERCB reviewed the application and issued a decision August 12, 1994 approving the proposed sour gas plant⁴.

Pursuant to s. 65(4)(a) of the Act the Director was obliged to consider the written decision of the ERCB in reaching a decision to issue an approval to the Conwest application. The Director issued an approval September 12, 1994⁵.

The Applicants filed a Notice of Objection to the Director's approval pursuant to s. 84(1)(a)(i) and (iv)⁶.

³ Fern Slauenwhite Affidavit filed January 27, 1995, Exhibit "A" (See also EA Board Return, Volume 2, Tab J.)

⁴ EAB Return, Volume 1, Tab (b) ERCB Decision, D94-6 (See also Conwest brief, Volume 2, Tab 1).

⁵ Conwest Brief, Volume 2, Tab 4.

⁶ EA Board Return, Volume 1, Tab (a).

The Board determined to hold a preliminary meeting pursuant to s. 87(2) of the Act and forwarded a notice to the Applicants and other parties concerning issues to be considered at that meeting⁷.

The Board considered representations at a preliminary meeting held November 2 and 3, 1994.

On December 8, 1994 the Board dismissed the Applicant's appeal pursuant to s. 87(5)(b)(i) of the Act⁸.

Counsel for the Applicants requested the EAB review that decision by letter dated December 14, 1994. After receiving submissions from all parties on the issue the Board determined that it was *functus officio* and had no authority to review its earlier decision⁹.

The Applicants then filed an Originating Notice which was subsequently amended seeking judicial review before the Court of Queen's Bench of the decisions of the EAB to set aside the Board decision to dismiss the appeal and refuse the review.

⁷ EA Board Return, Volume 1, Tab (b) (October 14, 1994). See also Conwest Brief, Volume 2, Tab 5.

⁸ EA Board Return, Volume 1, Tab (d) Appeal 94 - 012. See also Conwest Brief Volume 2, Tab 6.

⁹ Conwest Brief, Volume 2, Tab 12.

THE ISSUE

The principal issue before the Court is whether or not the Court ought to interfere with the determination of the Board that it was without jurisdiction to conduct an appeal hearing pursuant to the provisions of s. 87(5)(b)(i) of the Act. The resolution of that question requires the Court to determine what standard of review should be applied by the Court to consideration of the Board's decision.

STANDARD OF REVIEW

The first step in any application for judicial review of the decision of an administrative tribunal is to determine the appropriate standard of review¹⁰. In commenting on the general principles applicable to this question Iacobucci, J. for the majority states:

"...As was noted in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 589-90:

There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the

¹⁰ Canadian Broadcasting Corp. v. Canadian Labour Relations Board (1995), S.C.J. 4 (preliminary version) p. 22.

analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

Having regard to these and other factors, the courts have developed a spectrum that ranges from the standard of patent unreasonableness at one extreme to that of correctness at the other. In this regard see generally: H. Wade MacLauchlan, 'Reconciling Curial Deference with a Functional Approach in Substantive and Procedural Judicial Review' (1993), 7 C.J.A.L.P. 1.

[para 29] Generally speaking, where the tribunal whose decision is under review is protected by a broad privative clause, its decision is subject to review on a standard of patent unreasonableness. However, this is only true so long as the tribunal has not committed a jurisdictional error. Jurisdictional questions addressed by the tribunal are independently reviewed on a correctness standard. An error on such jurisdictional question will result in the entire decision of the tribunal being set aside.

[para 30] In distinguishing jurisdictional questions from questions of law within a tribunal's jurisdiction, this Court has eschewed a formalistic approach. Rather, it has endorsed a 'pragmatic and functional analysis', to use the words of Beetz J. in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048. In that decision Beetz J. noted, at p. 1088, that it was relevant for the reviewing court to examine:

'...not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.'

The goal is to determine whether the legislature intended that the question in issue be ultimately decided by the tribunal, or rather by the courts."

Counsel for the Board urged this Court to adopt a standard of curial deference requiring a finding of "patent unreasonableness" in the Board decision before interference by this Court. That was the standard adopted by the Supreme Court of Canada in the Canadian Broadcasting Corporation earlier cited. With respect that is not the appropriate standard in this case.

This case represents the first application for judicial review of a decision by the Board pursuant to the Act, which came into force September 1, 1993. There are no decisions dealing with the interpretation of relevant provisions of the Act or its regulations which might otherwise provide assistance to the Court in this application.

Unlike the CBC case in which a broad privative clause limiting judicial review was present, there is no such clause in the Act which might otherwise attempt to limit or preclude access to the Court in review.

The Board decision in this case was based on its interpretation of the wording of the statute and in particular the provisions of s. 87(5)(b)(i). It is the view of this Court that the Board has no special expertise or knowledge which might place it in a better position than the Court to interpret the words of the statute on a matter relating to its own jurisdiction.

In analyzing the purpose of the statute creating the Board, the reasons for its existence and the area of expertise of its members relative to the nature of the problem before the Board, the Court cannot conclude that the legislature intended that this question be ultimately decided by the Board rather than the Court. Accordingly, the proper test to be applied to the review of the decision of the Board is the standard of "correctness".

WAS THE BOARD CORRECT IN ITS INTERPRETATION OF SECTION 87(5)(b)(i)?

APPLICANTS' ARGUMENT

The Applicant argues that the Board was not correct in interpreting its own jurisdiction and that the Board should be directed by this Court to hold a full hearing of the appeal pursuant to s. 86 of the Act.

The Applicants urge that the Act and regulations passed are designed to provide a comprehensive framework for the consideration of environmental issues relative to a development of the type proposed by Conwest.

The Applicants submit that the Director is compelled by regulations issued pursuant to the Act to conduct a review of the Conwest application "to determine whether the impact on the environment of the activity...is in accordance with the Act and

regulations made under the Act."¹¹ They submit that in relation to the Conwest application the Director has failed to do so and is in breach of his duty. They point to a number of breaches of that duty being:

1. The Director has failed in this case to ensure that the environmental impact assessment required to be submitted by Conwest as part of its application was either complete or responsive to its final terms of reference. Those terms of reference require the Applicant to "describe the key construction and operation activities of the project which have implications for the environment and socio-economy of the Study Area. Provide a chart summarizing the environmental and socio-economic impacts, the significance of the impacts, the proposed mitigation strategies, and residual impacts."¹² However, the EIA submitted by Conwest as part of its application specifically indicates that "While the gathering system is clearly linked to the gas plant project, it has not been requested for inclusion in the environmental impact assessment."¹³

The Director is bound to report to the ERCB that the EIA is complete before it may be considered by the ERCB. The Applicants ask how the Director could find the EIA complete when on its face it excludes consideration of the environmental impact of

¹¹ Approvals Procedure Regulation 113/193 s. 6(1).

¹² AE Board Return, Volume 2, Tab Exhibit G. See also Conwest Brief, Volume 2, Tab 13 - Terms of Reference, p. 2 para. 2.7.

¹³ Conwest application Volume 2, Environmental Impact Assessment TERA Environmental Consultants (Alta. Ltd.) - Introductory p. 1.1, para. 2.

the gathering system and thereby fails to meet the terms of reference set by the Director?

2. The Applicants further argue that the Director was in breach of his duty to consider the environmental impacts of the whole project. They point out that the hearing before the ERCB was limited to a proposal of Conwest alone to gather new gas from its wells for delivery to the proposed plant site and the further delivery of treated products from that plant, notwithstanding that approximately 40% of the raw gas supply for the plant was to come from other suppliers of raw gas^{14 (a) and (b)}.

^{14(a)} Conwest application Volume 1, General Matters, p. 5, para. 2.4.

"2.4 Participants

Interim participation in the Conwest Sexsmith Gas Plant is as follows:

<u>Company</u>	<u>Participation (%)</u>
Conwest Exploration Company Limited	58.3
Suncor Inc.	25.5
Anadarko Petroleum of Canada Ltd.	3.6
Cimarron Petroleum Ltd.	3.6
Enron Oil Canada Ltd.	3.4
Wintershall Canada Ltd.	1.9
Petrostar Petroleum Inc.	1.8
Rigel Energy Corporation	1.5
Crestar Energy Inc.	0.2
Taurus Industries Ltd.	0.2
	100.0
	===="

3. The Applicants also take issue with the statement by counsel for the Director that the Director is not obliged to undertake any review of the sufficiency of the EIA itself or the consideration by the ERCB of environmental issues.¹⁵ They argue that the Director is obliged by the Act to set the final terms of reference for an EIA and to further certify the EIA is complete to the ERCB which must necessarily require such a review.

4. The Applicants argue that the Director's failure to conduct a proper review of all environmental impacts of this project, including the full gathering systems, in

^{14(b)} EA Board Return, Volume 1, Tab (b), ERCB Decision 94.6. See also Conwest application, Volume 2, Tab 1, p. 2, para. 1.3.

"Suncor Inc. (Suncor) has also been successful in finding new sour gas reserves in the general area and was considering a separate sour gas processing facility to satisfy its needs. Because of the Board's plant proliferation policy, Conwest and Suncor investigated the possibility of utilizing one plant. In addition, Conwest canvassed other producers in the area to determine their processing needs and to consider conserving other solution gas in the area currently being flared. As a consequence the proposed plant would process gas for Conwest, Suncor, Anadarko, Cimarron Petroleum Ltd., Enron Oil Canada Ltd., Wintershall Canada Ltd., Petrostar Petroleums Inc., Rigel Energy Corporation, Crestar Energy Inc., and Taurus Industries Ltd. The gathering system to bring the main part of Suncor's reserves, located to the south-east of the Conwest reserves east and south-east of Grande Prairie, to the proposed Conwest plant would be the subject of a separate application to the Board."

¹⁵ Fern Slauenwhite Affidavit, January 26, 1995, Exhibit "M", letter from Director's counsel, p. 2, para. 3.

accordance with the Approvals Procedure Regulation 113/93(6)1 is a "matter" which should properly be the subject of a Notice of Objection and appeal to the Board. As that review, by statute, can only take place after the Director's receipt of the decision by the ERCB, it is necessarily a "new matter" and cannot therefore be among "all of the matters" considered at the ERCB hearing. The Applicants argue that in considering the Director's review not to be a matter or a "new matter" the Board has made an error of law in the interpretation of its jurisdiction.

5. The Applicants further point to additional statements which they argue demonstrate erroneous consideration by the Board. They challenge the following comments:

- (a) "The Board further finds that even if there were new environmental matters (such as the attack on the Department's EIA scrutiny) they failed to raise them when they had an opportunity to do so."¹⁶
- (b) "Mr. Carter has not shown compelling or persuasive reasons why the Board has jurisdiction ie. he has not shown the crucial facts or any evidence that leads the Board to conclude the Director's approval is factually or legally unsound with respect to the ERCB proceedings."¹⁷
- (c) "To sustain this burden, the Carter Group must show by a preponderance of evidence that the Director acted unlawfully or abused his discretion when he relied on the ERCB's

¹⁶ EA Board Return, Volume 1, Tab (d), DECISION, p. 8.

¹⁷ EAB Board Return, Volume 1, Tab (d), DECISION, p. 10, para. 1.

decision in granting Conwest's approval. The Carter Group must do more than reprise the same evidence that was before the ERCB – or make allegations of insufficiency of evidence that has already been weighed. In appeals to this Board the burden of proof normally lies on the appellant, in this case, the Carter Group."¹⁸

- (d) "At the same time, if an approval is granted, matters which the ERCB considered during its original hearing, where the Director or his representative is present at the hearing, are not appealable to this Board where the appellant did not raise the matters with the Director during the hearing."¹⁹
- (e) "Second, where the Director has representatives at an ERCB hearing, participants must fully question the proponent and the Director at those proceedings or they risk losing the right to do so on appeal. In other words, one who fails to challenge the Department's decisions, (such as the Terms of Reference for an EIA) or fails to cross examine the Department's evidence at ERCB hearings, may not thereafter challenge the Director who has reasonably relied on ERCB evidence."²⁰
- (f) "The Board is also disturbed by the role the Department took during the ERCB hearings. (We find it astonishing that Mr. Carter did not question that role). As the ERCB decision points out, the Department was present at the ERCB hearing but the Department limited its role to cross examinations and argument only – i.e., the Department could cross-examine *others* at the hearing but *not* vice-versa."²¹

¹⁸ EA Board Return, Volume 1, Tab (d), DECISION, p. 10, para. 2.

¹⁹ EAB Board Return, Volume 1, Tab (d), DECISION, p. 12, para. 1.

²⁰ EA Board Return, Volume 1, Tab (d), DECISION, p. 13, para. 2.

²¹ EA Board Return, Volume 1, Tab (d), DECISION, p. 14, para. 1.

RESPONDENTS' ARGUMENTS

Each of the Respondents urged in their briefs that the Board had correctly determined its jurisdiction²². The essence of their submissions were that the objections of the Applicant were all based on "site selection" "matters" which had been fully vetted before the ERCB hearing in which the Applicants had fully participated.

In its brief Conwest argued that the Board was correct in interpreting the term "matters" to refer to "substantial and material facts related to the environment as opposed to the process followed by" the Director²³.

Conwest further argued that any error which might be found to have been made by the Board in some of its comments should be considered as strictly *obiter* and not as going to the essence of their decision or affecting their finding²⁴.

Conwest further urged that in the event the Court should determine to review the decision of the Board, the Court should not grant an Order in the nature of *mandamus* as requested by the Applicants directing the Board to conduct a full hearing.

²² Conwest Brief, Volume 1, p. 35, para 51(b); Director's Brief, p. 6, paras. 29 & 30; and Board Brief, p. 11.

²³ Conwest Brief, Volume 1, p. 35, para. 51(b);

²⁴ See Conwest Brief, Volume 1, p. 35, para. 51(b), p. 39, para. 56(c) and p. 40, para. 57(c), p. 40, para. 58(b).

Conwest argued that in such a case the Court should merely quash the decision of the Board and return the case back to the Board for further consideration pursuant to the provisions of s. 86 and 87 of the Act.

CONCLUSION

Applying the standard of correctness to the decision of the Board, this Court concludes that the Board has erred at law in considering its own jurisdiction and its decision must therefore be quashed.

A review of the decision of the ERCB, the Board itself, and the premise on which the EIA was developed indicates to this Court that no authority having responsibility for the environment has given consideration to the environmental impacts of the construction of a gathering system designed to deliver approximately 40% of the gas capacity of the proposed plant to the site of the plant.

To suggest that the environmental impacts of construction of that system are more properly left to a future ERCB application by the producers of that additional gas does not answer this deficiency. Given a prior approval and construction of the Conwest plant it seems to this Court that relevant environmental considerations would almost necessarily be skewed in favour of delivery of additional gas to the established plant.

The failure by the Director to consider the environmental impacts flowing from the full utilization of the capacity of the proposed plant prior to its development approval is a fundamental breach of the duty imposed on the Director to review the application under the provisions of Approvals Procedure Regulation of 110/93 s. 6(1)²⁵.

It is the conclusion of this Court that the failure by the Director to undertake the review required of him by regulation is a "matter" properly before the Board. The conduct of the Director's statutory review cannot be categorized only as a matter of site selection previously considered before the ERCB hearing. The Board was incorrect to so conclude. Indeed, it would appear to this Court to be "patently unreasonable" for the Board to reach the conclusion that the Act itself precluded the Board from determining whether or not the environmental impacts of the whole of this project had been weighed in accordance with the Act and regulations. Such a conclusion is not consistent with either the spirit or the wording of the Act.

The additional statements in the Board decision to which the Applicants have taken exception also require comment. The Board is incorrect where it suggests

²⁵ Environmental Protection and Enhancement Act - Approvals Procedure Regulation 113/93 as amended. s. 6(1)

"The review of an application shall be conducted to determine whether the impact on the environment of the activity, the change to the activity or the amendment, addition or deletion of a term or condition of an approval is in accordance with the Act and the regulations made under the Act."

that citizens objecting to the development have an onus to oppose or cross-examine representatives of the Director or Department at the ERCB hearings or to themselves gather evidence at an earlier stage of the proceedings, failing which they may lose grounds for appeal before the Board. The duty to ensure that developments of this type conform to the Act and its regulations does not rest with the Applicants or others objecting to the application. It rests with the Director.

The Director's performance of that duty can and should be reviewed by the Board to ensure that the assessment of environmental impacts has been made in accordance with the Act and regulations.

The Board should place no reliance whatsoever on any perceived deficiencies in the gathering of evidence, participation in procedures, or cross-examinations by the Applicants as a basis for limiting a right of appeal. It is not the obligation of the Applicant to ensure that all environmental impacts are reviewed by the Director. Any deficiencies in that regard must rest with the Director who has the statutory duty to ensure full consideration of environmental impacts.


For these reasons the Court orders that the decision of the Board that it is precluded by the provisions of s. 87(5)(b)(i) from holding a hearing of this objection is quashed. The Court will not however direct the Board specifically to engage in a full public hearing in accordance with s. 86 of the Act but will direct the return of the Notice

of Objection to the Board for its consideration in accordance with the provisions of s. 86 and 87 of the Act.

Included in that reconsideration will be the disposition by the Board of preliminary issues as to whether or not the Applicants are "directly affected" or the "sufficiency" of the Notice of Objection filed on behalf of the Applicants. In the decision under review the Board made no determination of those issues and accordingly they are not before this Court for review purposes. The Board's observation relating to those questions does indicate that the Board has developed an expertise and precedent relating to the consideration of those issues which indicates the Board is in the best position to make a determination on those arguments²⁸.

This application for judicial review is therefore allowed and the successful Applicants will be entitled to their costs to be taxed in accordance with the Rules of Court. Counsel are at liberty to speak to this court in the future should any issue relating to costs be incapable of resolution.

Dated at Calgary, Alberta
this 3/day of August, 1995



J.C.Q.B.A.

²⁸ EAB Return, Volume 1, Tab (d) DECISION, p. 13.

Counsel:

Mr. J. Darryl Carter on behalf of the Applicants

Mr. D.R. Haigh, Q.C. on behalf of Conwest Exploration Company Limited

Mr. D.P. Jones, Q.C. on behalf of the Alberta Environment Appeal Board

Mr. William A. McDonald on behalf of The Director of Environmental Assessment

Mr. M. Bruni on behalf of The Energy Resources Conservation Board

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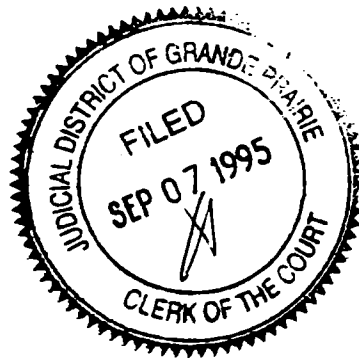
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