

**ALBERTA ENERGY AND UTILITIES BOARD**

**PART 2 OF PROCEEDING NO. 1457147**

**IN THE MATTER OF  
BEARSPAW PETROLEUM LTD., CARBON DEVELOPMENT  
PARTNETSHIP (SUCCESSOR IN INTEREST TO PRAIRIE MINES  
AND ROYALTY LTD., FORMERLY LUSCAR LTD.), DEVON  
CANADA CORPORATION, ENCAN CORPORATION AND  
FAIRBORNE ENERGY LTD.  
CLIVE, EWING LAKE, STETTLER AND WIMBORNE FIELDS**

**SUBMISSION OF THE INTERVENER  
FREEHOLD PETROLEUM AND NATURAL GAS OWNERS  
ASSOCIATION**

**August 25, 2005**

## PART I. - STATEMENT OF FACTS

1. The Freehold Petroleum & Natural Gas Owners Association ("FHOA") is a federally incorporated, not-for-profit corporation whose mission is to provide information and education to individuals who hold title to an estate in fee simple in mines and minerals (or some of the minerals), to seek greater fairness for these individual "Freehold Owners" or "Freeholders", and to act as their common voice.
2. Approximately ten percent (10%) of the mineral rights in Alberta, or six million four hundred thousand hectares, are privately-owned<sup>1</sup>.
3. A significant portion of these 'freehold' mineral rights are owned by the successor corporations to the Hudson's Bay Company ("the HBC") and the Canadian Pacific Railway Company ("the CPR").
4. The HBC was granted all lands draining into Hudson's Bay by King Charles II of England in 1670. The grant included all mines and minerals except the precious minerals reserved by the Crown. In 1869, the Dominion Government purchased 19/20ths of these lands from the HBC for 300,000 pounds sterling. The HBC retained sections 8 and all or portions of section 26 within what was referred to as the 'fertile belt' and sold these lands in farm-sized portions to western Canadian settlers. During the period prior to 1908, HBC lands were sold without reservation and the settlers acquired title to the surface and all subsurface mines and minerals not previously reserved by the Crown. Subsequently, in land sales to settlers the HBC reserved all mines and minerals not reserved by the Crown for its own account.<sup>2</sup>
5. In 1881, the Dominion Government granted the CPR ten million (10,000,000) hectares of land as partial consideration for the CPR building and operating a transcontinental railway. The Dominion Government grant included all subsurface mines and minerals except for precious minerals that were reserved to the Crown. The grant included all undisposed odd numbered

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<sup>1</sup> TAB A Enquiry Into Reserves and Consumption of Natural Gas in the Province of Alberta, R.J. Dinning, Commissioner, March, 1949, at page 27

<sup>2</sup> TAB B Bennett Jones, LLP & Nigel Bankes, *Canadian Oil and Gas*, 2<sup>nd</sup> ed. (Markham: Butterworths, 1993) at paragraph 1.35; 1.38 (see also: "Freehold Ownership of Oil and Gas", A. Lucas, in *Introduction to Oil and Gas Law*, Copyright 1982, Canadian Association of Petroleum Landmen at page 36; "History of the Canadian Pacific Railway", W. Kaye Lamb, 1977, MacMillan Publishing Co. Inc., New York, N.Y.; and, "The Oil and Gas Lease in Canada", Ballem, J.B., 1999, 3d, University of Toronto Press, Toronto, at page 13)

sections of land within twenty-five (25) miles of the rail line except sections 11 and 29<sup>3</sup>. The CPR sold farm-sized portions of this land grant to western Canadian settlers in order to raise funds for railway construction and to encourage traffic on its line.

6. For the first two decades following its 1881 grant, the CPR sold land to settlers without reservation. Sometime in the early 1900's, the CPR began to reserve "all coal" for its own account<sup>4</sup>.

7. Subsequently, the CPR changed its reservation to include "all coal and petroleum" and, in some instances, "all coal, petroleum and valuable stone". It was not until approximately 1912, that the CPR recognized that its belief that natural gas was "a worthless and noxious substance"<sup>5</sup> was incorrect and began to reserve all mines and minerals for its own account<sup>6</sup>.

8. As a consequence of CPR's land settlement policies we now have Freehold lands in which title to coal in certain lands is held by one party while title to the other mines and minerals within the same parcel of land, including natural gas, are owned by another party ("Split Title Lands").

9. CPR has assigned the majority of the mineral rights retained by it to EnCana Corp. ("EnCana"), the successor of PanCanadian Petroleum Ltd., and Carbon Development Partnership ("CDP"), the successor of Luscar Ltd (and collectively referred to as the "Coal Owners").

10. Freehold mineral rights are concentrated in southern Alberta<sup>7</sup> primarily within those areas that have been identified by the Alberta Geological Survey as containing stratigraphic intervals prospective for coal bed methane ("CBM") development in the Horseshoe Canyon formation, the Belly River group and the Mannville group (the "CBM fairways")<sup>8</sup>.

<sup>3</sup> *Bankes, ibid* at paragraphs 1.36, 4

<sup>4</sup> **TABC** *Anderson v. Amoco*, [2004] S.C.R. 3 at paragraph 5 (a date of 1904 is referenced); *Bankes, supra* at paragraph 1.38 (states that coal was reserved as early as 1902)

<sup>5</sup> **TABD** *Alberta Energy Company Ltd. v. Goodwell Petroleum Corporation Ltd.*, 2003 CarswellAlta 1394 [2004] 8 W.W.R. 116 at paragraph 34

<sup>6</sup> *Anderson, supra*, Note 3, at paragraph 5

<sup>7</sup> **TABE** Alberta Energy Maps of "Alberta Crown & Privately Owned (Freehold) Minerals" and "Freehold Ownership Distribution" and Alberta Geological Survey Map of "Stratigraphic Intervals Containing Coal Zones with CBM Potential"

<sup>8</sup> *ibid*

11. Split title mineral rights are checker-boarded with Crown mineral rights and full title Freehold mineral rights throughout the CBM fairways<sup>9</sup>.

12. To date, three thousand one hundred and twenty (3,120) individuals representing approximately fifteen thousand (15,000) Freehold Owners have joined FHOA. Approximately forty percent (40%) of these freeholders own Split Title Lands.

13. The interests of Freeholders, including many FHOA members, have been directly impacted by Alberta Energy and Utilities Board (“EUB”) Bulletin 2006-19. By placing a moratorium on EUB approvals of applications (including well license, holding and special spacing unit applications) where the legal entitlement to CBM is in issue pending the outcome of this Proceeding No. 1457147 (the “Proceeding”), this bulletin prevents a CBM developer from drilling on gas spacing units that include Split Title Lands unless the CBM developer has some form of agreement with the Coal Owner.

14. As a result, CBM developers confronted with imminent freehold lease expiries or offset obligations are essentially at the mercy of the Coal Owners.

15. In turn, many of FHOA’s members have already been served with notices of force majeure by their lessees thereby preventing them from mitigating drainage.

16. Those Freeholders and FHOA members whose Split Title Lands arose by virtue of CPR transfer agreements worded identically to those in issue in this Proceeding will clearly be directly and materially impacted by the outcome of this Proceeding.

17. EnCana has stated that title needs to be quieted before a well license is issued on Split Title Lands and that the inevitable result of the EUB granting a well license in the face of its objections over CBM ownership will be litigation on every application relevant to EnCana lands, likely involving the EUB in appeals and the well license applicant in litigation<sup>10</sup>.

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<sup>9</sup> *ibid*

<sup>10</sup> **TAB F** June 24, 2005 Letter to the EUB re: Application for Review and Variance of Decision Nos. 1380004, 1379743, 1379746, 1379737, 1379763, 1379730, 1383129 and 1379726; see also Common Exhibit 03-020-2005-06-24 Luscar (now CDP) Review Request

18. However, unless the outcome of this Proceeding addresses entitlement to CBM on Split Title Lands which arose by virtue of CPR transfer agreements, Freeholders with Split Title Lands can expect the sterilization of their mineral rights to continue so long as they or their lessees refuse to accede to the demands of the Coal Owners.

## **PART II. - POINT IN ISSUE**

19. Do the Coal Owners, EnCana and CDP, have legal entitlement to CBM produced or intended to be produced from the specific wells and licences at issue in this Proceeding No. 1457147?

## **PART III. - DISPOSITION OF PROCEEDING SOUGHT**

20. FHOA seeks an order from the EUB stating that the Coal Owners have no legal entitlement to CBM produced, or intended to be produced, from the specific wells and licences at issue in this Proceeding No. 1457147.

## **PART IV. — ARGUMENT**

21. It is submitted that the Coal Owners, on the basis of their unsubstantiated claims of CBM ownership, are using this regulatory process to hinder and prevent legitimate CBM producers and Freeholders from developing CBM. This course of action precludes the orderly and efficient development of CBM, which is in the public interest, while allowing the Coal Owners to obtain business advantages over the parties that are entitled to the CBM.

22. The basic principles of mineral ownership, on Split Title Lands, has been established by the Privy Council in *Borys v. CPR and Imperial Oil Limited*<sup>11</sup> and recently confirmed by the Supreme Court of Canada in *Anderson v. Amoco Canada Oil and Gas*<sup>12</sup> and are relevant in determining entitlement to CBM on Split Title Lands.

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<sup>11</sup> **TAB G** *Borys v. CPR and Imperial Oil Limited*, 1953 CarswellALta 25, [1951] 4 D.L.R. 427, Reversed [1952] 3 D.L.R. 218, Affirmed [1953] 2 D.L.R. 65

<sup>12</sup> *Anderson, supra*, Note 3

23. Therefore, to the extent that entitlement to CBM is an issue before this Board, it is submitted that the current jurisprudence clearly supports the position that the owners of the natural gas rights are also entitled to CBM.

24. The Split Title Land at issue in *Borys* was the NE/4-19-50-27 W4M (the "NE/4-19"), which was transferred to Simon Borys from the CPR on December 27, 1906. In the conveyance CPR reserved to itself, its successors and assigns "all coal, petroleum and valuable stone which may be found to exist within, upon or under the said land"<sup>13</sup>.

25. On September 21, 1949, the CPR leased to Imperial Oil Ltd. ("Imperial") "the petroleum (hereinafter referred to as the leased substance) which may be found within, upon or under the said land and the right to work, win and carry away the same"<sup>14</sup>. Relying on this lease, Imperial applied to the predecessor of the EUB for a license for a well on the NE/4-19. Over the objections of Michael Borys (the then owner of NE/4-19), the well license was granted.

26. Borys then initiated an action in the Alberta Supreme Court seeking a declaration that he was the owner of the natural gas within, upon or under the NE/4-19 and an interlocutory and permanent injunction restraining the CPR and Imperial from using, removing, wasting, interfering with or otherwise disposing of his natural gas, whether this gas was contained in the gas cap or in solution within the petroleum<sup>15</sup>.

27. CPR and Imperial took the position that the reservation of the petroleum included not only the oil but also the gas cap gas and the solution gas.<sup>16</sup>

28. The Privy Council in *Borys* concluded that those substances found in the form of gas *in situ* was not the subject of the CPR reservation and was the property of Borys.<sup>17</sup> On the other

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<sup>13</sup> *Borys, supra*, Note 11 at paragraphs 2 and 3

<sup>14</sup> *Borys, supra*, Note 11 at paragraph 3

<sup>15</sup> *Borys, supra*, Note 11 at paragraphs 10 to 13

<sup>16</sup> *Borys, supra*, Note 11 at paragraph 17

<sup>17</sup> *Borys, supra*, Note 11 at paragraph 18

hand it was held that the petroleum reservation included all of the substances contained in solution or liquid in the ground regardless of whether it changed phase at the surface.<sup>18</sup>

29. In *Anderson*, the Split Title Lands that were before the Supreme Court of Canada were lands sold by CPR between 1907 and 1912 where CPR reserved its right to petroleum in addition to just coal, or coal and valuable stone.<sup>19</sup>

30. The parties agreed that the petroleum owner was entitled to all hydrocarbons in the liquid phase, while in the ground, and the non-petroleum owner was entitled to all hydrocarbons in the gas phase, while in the ground. What the parties could not agree upon, and the issue before the Court, was at what point in time should the phase of the respective substances be determined.<sup>20</sup>

31. Following its review of the *Borys* decision, the Supreme Court of Canada held that in Split Title Lands the reservation of the petroleum interest divided ownership of the oil and gas on the basis of the phase of the hydrocarbon under initial conditions at the time of the contract for the sale of the property. Phase changes following the drilling of any wells did not impact upon the ownership of the respective substances.<sup>21</sup>

32. It is submitted that the Privy Council ruling in *Borys*, as recently confirmed by the Supreme Court of Canada in *Anderson* stands for the following propositions:

- a) petroleum and gas, though each is a combination of the same elements, are separate substances<sup>22</sup>;
- b) the substance which is found in the form of gas *in situ* is not the subject of a reservation of "all coal, petroleum and valuable stone which may be found to exist within, upon or under" the land<sup>23</sup>;
- c) the vernacular meaning of the words in a reservation must prevail over the scientific meaning if the vernacular meaning can be ascertained<sup>24</sup>;

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<sup>18</sup> *Borys, supra*, Note 11 at paragraph 32  
<sup>19</sup> *Anderson, supra*, Note 3 at paragraph 6  
<sup>20</sup> *Anderson, supra*, Note 3 at paragraphs 25 and 26  
<sup>21</sup> *Anderson, supra*, Note 3 at paragraph 44  
<sup>22</sup> *Borys, supra*, Note 11 at paragraph Headnote, 14 and 18  
<sup>23</sup> *Borys, supra*, Note 11 at paragraph 18

- d) petroleum means a substance formed from a hydrocarbon admixture in its liquid form when in position in its container under ground<sup>25</sup>;
- e) the time for determining the ownership of petroleum is prior to human disturbance at the date of the transfer<sup>26</sup> or the contract for sale, not at some later date when the petroleum has been found to exist within the lands<sup>27</sup>; and
- f) phase changes that occur after original ownership has been determined do not affect entitlement to the gas or petroleum.

33. In *Borys*, having ruled that the petroleum reserved by the CPR was the substance, as it existed in the ground and not at the surface, the Privy Council was then faced with the difficulty of determining the vernacular meaning of petroleum within the ground when the ordinary man was only concerned with petroleum at surface:

“...The ordinary man, when asked, ‘What is petroleum?’ is only concerned with the substance which he can buy or sell after it is recovered and can be delivered as an article of commerce.”<sup>28</sup>

...

“...their Lordships would observe that they find it difficult to believe that either land owners, business men or engineers, or, indeed, the staff of the Canadian Pacific Railway or Mr. Borys, would at any time have differentiated between the oil and the gas in solution. They would, in the view of the Board, have included in petroleum all the liquid substance in the mine ...”<sup>29</sup>

34. The same difficulty does not apply to coal and CBM in the ground. In the early 1900’s both coal and coal damp (the name then given to the explosive mixture of CBM and air which cost so many coal miners their lives) were not just well known to land owners, business men, engineers and the staff of the CPR, they were notorious.

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<sup>24</sup> *Borys, supra*, Note 11 at paragraph 19 and 20

<sup>25</sup> *Borys, supra*, Note 11 at paragraph 34

<sup>26</sup> *Anderson, supra*, Note 3 at paragraph 34

<sup>27</sup> *Anderson, supra*, Note 3 at paragraph 44

<sup>28</sup> *Borys, supra*, Note 11 at paragraph 26

<sup>29</sup> *Borys, supra*, Note 11 at paragraph 33

35. For example, in 1902, at approximately the same time that the CPR began to reserve coal for its own account<sup>30</sup>, an explosion in an under ground coal mine in the Crowsnest Pass killed more than one hundred coal miners and made headlines throughout western Canada and around the world. This was by no means the first or last coal mine disaster in western Canada. It is unique in that, following the explosion, the local newspaper announced that one T. G. Shawnessy had contributed \$3,000 to a fund established for the families of the deceased miners. The CPR controlled the company that operated the colliery and Mr. Shawnessy was then president of the CPR<sup>31</sup>.

36. Similarly, the Supreme Court of the United States, in reviewing the issue of ownership of CBM determined:

“It is evident that Congress viewed CBM gas not as part of the solid fuel resource it was attempting to conserve and manage but as a dangerous waste product, which escaped from coal as the coal was mined. Congress was well aware by 1909 that the natural gas found in coal formations was released during coal mining and posed a serious threat to mine safety. Explosions in coal mines sparked by CBM gas occurred with distressing frequency in the late nineteenth and early twentieth centuries.”<sup>32</sup>

...

“That CBM gas was considered a dangerous waste product which escaped from coal, rather than part of the valuable coal fuel itself, is also confirmed by the fact that coal companies venting the gas to prevent its accumulation in the mines made no attempt to capture or preserve it. The more gas that escaped from the coal once it was brought to surface, the better it was for the mining companies because it decreased the risk of dangerous gas buildup during transport and storage.”<sup>33</sup>

37. FHOA submits that the ordinary man in the early 1900’s when asked, “What is coal?” would have been expected to reply with simple words describing the substance as a brown or black rock found in the ground and used for fuel. Would that same ordinary man have included gas in coal? Not likely. Even today many of the ordinary citizens who comprise FHOA’s membership conceive of subsurface oil and gas pools as subterranean lakes filled with oil and

<sup>30</sup> *Banks, supra* Note 2

<sup>31</sup> **TAB H** “Fernie’s Horror”, The Cranbrook Herald, May 29, 1902: online  
<<http://www.crowsnest.bc.ca/fernief01.html>>

<sup>32</sup> **TAB I** *Amoco Production Co. v. Southern Ute Indian Tribe et al.* (98-830) 526 U.S. 865 (1999) 151 F.3d 1251 at page 9

<sup>33</sup> *Southern Ute, ibid*, at page 10

gas and do not understand that the pores in apparently solid rocks act as reservoirs for oil and gas.

38. While not binding on this Board, it is submitted that the analysis of CBM ownership by the US Supreme Court in the *Southern Ute* case is helpful and provides some guidance to this Board.

39. At issue in *Southern Ute* were mineral rights that were subject to the U.S. Government's Coal Lands Acts of 1909 and 1910. These Acts authorized land patents to be issued to individuals subject to "a reservation to the United States of all coal in said lands...".<sup>34</sup> Among the lands patented to settlers were former Southern Ute reservation lands. In 1938, the U.S. restored to the Tribe, in trust, those former reservation lands that the U.S. still retained title too, including the coal that was reserved pursuant to the 1909 and 1910 Acts.<sup>35</sup>

40. The question before the Court was whether the Southern Ute Tribe owned the beneficial interest to the CBM in those instances where they held the beneficial title to the coal.

41. Similar to *Borys* and *Anderson*, in order to determine whether a reservation of coal included CBM, the U.S. Supreme Court held that the answer did not turn on what scientists know today but whether Congress, in 1909 and 1910, regarded CBM as a constituent of coal.<sup>36</sup>

42. The U.S. Supreme Court held that:

"...the common understanding of coal in 1909 and 1910 would not have encompassed CBM gas, both because it is a gas rather than a solid mineral and because it was understood as a distinct substance that escaped from coal as the coal was mined, rather than as a part of the coal itself."<sup>37</sup>

43. Regarding any changes in phase or state, while solution gas is a liquid at initial reservoir conditions, it is submitted that CBM is a gas at both initial reservoir conditions and at the surface (except for those minor quantities of CBM that are dissolved in the water). Once again the *Southern Ute* case may provide some guidance to this Board where the U.S. Supreme Court found the following facts:

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<sup>34</sup> *Southern Ute*, *ibid*, at page 3

<sup>35</sup> *Southern Ute*, *ibid*, at page 4

<sup>36</sup> *Southern Ute*, *ibid*, at page 7

<sup>37</sup> *Southern Ute*, *ibid*, at page 8

“The coalification process generates methane and other gases. ... Because coal is porous, some of that gas is retained in the coal. CBM gas exists in the coal in three basic states: as free gas; as gas dissolved in the water in coal; and as gas “adsorped” on the solid surface of the coal, that is, held to the surface by weak forces called van der Waals forces. ... These are the same three states or conditions in which gas is stored in other rock formations. ...”<sup>38</sup>

44. In regard to EnCana’s land transfer policies, EnCana acknowledges that CBM had no commercial value at the time of the transfers which gave rise to Split Title Lands and that the substance was considered dangerous<sup>39</sup>.

45. The CPR drafted the contracts that gave rise to Split Title Lands and the transfer agreements that resulted in titles being issued. The CPR, if it had chosen to do so, could have reserved natural gas, which includes CBM, for its own account. The Court of Appeal of Alberta attributes the CPR’s failure to do so to CPR’s mistaken belief that natural gas was a dangerous and noxious substance<sup>40</sup>.

46. EnCana would now argue that because of the dangerous nature of CBM “the parties would not have intended ... transferring that gas from the coal owner to the parties who received the land by the transfers.”<sup>41</sup>

47. That is, as a party to the sale and subsequent transfer to the settlers, the CPR was apparently so concerned with the settlers’ welfare, according to EnCana, that it retained dangerous CBM for its own account. It is submitted that this argument is contrary to the specific finding of facts in *Alberta Energy Company v. Goodwell*, and other jurisprudence, and is without merit.

48. EnCana has also argued that its interest in coal is corporeal and material as distinct from a *profit a prendre* which is an incorporeal interest.<sup>42</sup>

49. The Coal Owners’ only source of an interest in Split Title Lands is the reservation contained in the transfer agreements drafted by the CPR.

<sup>38</sup> *Southern Ute, ibid*, at page 7

<sup>39</sup> **TAB J** Encana January 9, 2006 Submissions re: Application for Review and Variance of December 8, 2005 Decision Application No. 1423722 and Licence No. 0344816 LSD 13-21-038-20 W4M, Stettler Field, at page 6

<sup>40</sup> *Goodwell, supra*, Note 5

<sup>41</sup> Encana Submissions, *supra* Note 39 at pages 5 and 6

<sup>42</sup> Encana Submissions, *supra* Note 39 at page 6

50. The transfer agreements giving rise to the Split Title Lands at issue in the within Proceeding have not been produced by the Coal Owners. However the wording of the transfer agreements giving rise to EnCana's interest in the west half and south west quarter of section thirteen, township thirty-eight, range twenty west of the fourth meridian as described by EnCana<sup>43</sup> is identical in form to certain of the transfer agreements in issue in *Anderson*<sup>44</sup> and similar in form to the reservation in issue in *Borys*<sup>45</sup>.

51. In *Goodwell*, the Alberta Court of Appeal considered the legal effect of the CPR reservation in *Borys*. Fruman J.A., for the unanimous Appeal Court, acknowledged that the CPR transferred its entire fee simple interest in the lands to Mr. Borys subject to its reservation which is, at law, a re-grant by Mr. Borys to the CPR of the subject matter of the reservation, and was treated as such by Lord Porter in *Borys*. Fruman J.A. cited *Anger and Honsberger Law of Real Property* for the authority that:

[T]he term "reservation" [...] is frequently used to signify some incorporeal right which the grantor is to have over what is granted, such as the right to hunt or fish, or a right of way. It then operates as a regrant of the right by the grantee to the grantor.<sup>46</sup>

52. In *Gibbs v. Grand Bend*, the Ontario Court of Appeal reached the same conclusion respecting the legal effect of a reservation, noting that in conveyancing practice the words "except and reserving", analogous to the words used by the CPR in the transfers respecting the Appellants' lands:

"... in conveyancing practice the words "except and reserving" usually introduce the creation in favour of landlord of an easement, or of a *profit a prendre*, such as the free running of water and soil coming from adjacent buildings, the right to make and maintain sewers under the demised premises, rights of way and other easements over the demised premises, or sporting rights."

...

"These sources indicate that a reservation, unlike an exception, confers only a

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<sup>43</sup> Encana Submissions, *supra* Note 39 at page 2

<sup>44</sup> *Anderson, supra*, Note 3

<sup>45</sup> *Borys, supra*, Note 11

<sup>46</sup> *Goodwell, supra*, Note 5 at paragraphs 46, 48 and 50

limited right to use the lands to which it applies. It does not purport to retain title to the subject land....<sup>47</sup>

53. Prior to transferring lands to the settlers, the CPR was the owner of an estate in fee simple in the lands. The effect of the transfer was to extinguish the CPR's fee simple estate in the land including all subsurface minerals and grant the entire fee simple estate to the settler. Subsequent to the transfer, the CPR's proprietary rights were rooted in its reservation, not in its prior fee simple estate. The CPR held property in the form of non-possessory rights over the land. The right to take the profits from land in which the owner of the right has no possessory interest is *a profit a prendre*.

54. The Coal Owners did not acquire their interest in coal as purchasers for value and, as such, can have no greater legally binding entitlement to coal than that of their predecessor in interest.

55. EnCana has also argued that its reservation of coal constitutes a stratigraphic severance including the right to exclusive possession of the three-dimensional space occupied by the coal.

56. Should EnCana's position be accepted then it would follow that the owners of all mines and minerals subject to the reservation to the Coal Owner would have a co-equal right to exclusive possession of the balance of the subsurface three dimensional space subject only to the Coal Owner's reservation.

57. In the particular case of a reservation in the same form as that set forth by EnCana<sup>48</sup> the Freehold owners would own the entirety of the three dimensional space except for "all coal and petroleum which may be found to exist".

58. In *Anderson*, FHOA argued before the Supreme Court that Michael Borys owned everything within the three dimensional space beneath his land, subject to the CPR's reservation, including the gas in the primary gas cap of the Leduc D-3 pool beneath his lands and the geological strata which contained the gas, petroleum and water. What the CPR owned was a right to the minerals specifically reserved including petroleum which Lord Porter ruled was a

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<sup>47</sup> **TAB K** *Gibbs v. Grand Bend* 1995 CarswellOnt 1056 129 D.L.R. (4<sup>th</sup>) 449 at paragraph 25 and 27  
<sup>48</sup> EnCana Submissions, *supra* Note 43


liquid in the ground. FHOA argued that any gas which evolved from liquid petroleum in the normal course of production was no longer liquid in the ground and when this substance was 'found to exist' it would exist as gas within Mr. Borys' property and hence belong to him. This argument was unsuccessful.

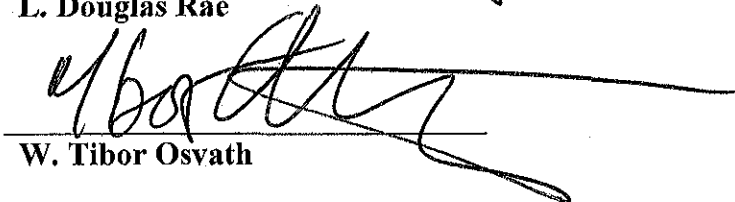
59. It is submitted that the principles of law followed by the Supreme Court in *Anderson* preclude the stratigraphic severance postulated by EnCana.

60. In conclusion, it is submitted, that pursuant to the generally accepted principles of oil and gas ownership, at the time the CPR reserved the coal, now owned by the Coal Owners, coal and natural gas were known and understood by ordinary men to be distinct substances, the vernacular meaning of coal did not include natural gas, and consequently the Coal Owners have no entitlement to produce or benefit from the production of any CBM produced or intended to be produced from the specific wells involved in the within Proceeding.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25th day of August, 2006.

**RAE AND COMPANY**

for Per:   
 L. Douglas Rae

Per:   
 W. Tibor Osvath

**Solicitors for the Intervener  
 Freehold Petroleum & Natural Gas  
 Owners Association**

## PART V – LIST OF AUTHORITIES

**TAB A** Enquiry Into Reserves and Consumption of Natural Gas in the Province of Alberta, , R.J. Dinning, Commissioner, March, 1949, at page 27

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**TAB I** *Amoco Production Co. v. Southern Ute Indian Tribe et al* (98-830) 526 U.S. 865 (1999) 151 F.3d 1251 at page 9

**TAB J** Encana January 9, 2006 Submissions re: Application for Review and Variance of December 8, 2005 Decision Application No. 1423722 and Licence No. 0344816 LSD 13-21-038-20 W4M, Stettler Field, at page 6

**TAB K** *Gibbs v. Grand Bend* [1985] 26 O.R. (3d) 644 (Q.L.) (Ont.CA)