

**THE ALBERTA ENERGY AND UTILITIES BOARD**

IN THE MATTER OF Proceeding No. 1457147  
to the Alberta Energy and Utilities Board.

BEARSPAW PETROLEUM LTD.;  
DEVON CANADA CORPORATION;  
ENCANA CORPORATION;  
FAIRBORNE ENERGY LTD.;  
and LUSCAR ENERGY LTD.

CLIVE, EWING LAKE, STETTLER AND  
WIMBORNE FIELDS

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**REPLY SUBMISSION**  
**OF**  
**BEARSPAW PETROLEUM LTD.**

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September 29, 2006

**Proceeding 1457147  
(the "Proceeding")**

**Reply Submission of the Applicant  
Bears paw Petroleum Ltd. ("Bears paw")  
to the Alberta Energy Utilities Board (the "Board")**

**I. INTRODUCTION**

1. The following is Bears paw's Reply Submission in respect of Phase II of Proceeding No. 1457147 ("the Proceeding"). Bears paw relies on and incorporates into this Reply Submission its Submission dated August 25, 2006.

**II. BACKGROUND**

2. Bears paw holds an interest as the lessee of mineral lands located on the North East Quarter of Section 21, Township 38, Range 20, West of the 4th Meridian by virtue of a mineral lease ("the Section 21 Lease") dated December 30, 1953 which grants to the lessee "all the right, title and interest of the Lessor in and to the petroleum and natural gas, natural gasoline and related hydrocarbons, other than coal (collectively hereinafter referred to as 'the leased substances') which may be found within, upon or under the said lands." EnCana Corporation ("EnCana") is the ultimate lessor under the Lease.
3. Bears paw is the lessee of the entirety of Section 21 in the said Township pursuant to various other mineral leases and as such has a complete drilling spacing unit which entitles it to produce natural gas pursuant to the Lease. The leases which comprise the

Section 21 gas drilling spacing unit, including the Section 21 Lease, are attached hereto as Exhibit "A".

4. Bearspaw also holds an interest as lessee in and to a portion of Section 13 of Township 37, Range 21, West of the 4th Meridian by virtue of a natural gas lease dated July 3, 2006 which grants to Bearspaw "all mines and minerals except coal, petroleum and valuable stone" ("the Section 13 Lease"). The remainder of Section 13 in the said Township is held by other natural gas lessees.
5. Prior to entering into the Section 13 Lease, Bearspaw was lessee of Section 13 of the said Township by virtue of a natural gas lease dated July 3, 2005 which granted to Bearspaw "all mines and minerals except coal, petroleum and valuable stone" ("the Expired Section 13 Lease"). The Expired Section 13 Lease and the Section 13 Lease are attached hereto as Exhibit "B".
6. The Section 13 Lease and the Section 21 Lease are hereinafter collectively referred to as "the Leases."
7. Bearspaw applied to the Board to produce coal bed methane ("CBM") by way of a pooling order application regarding Section 13 of the said Township and well licence application regarding Section 21 of the said Township on the basis of its right to produce natural gas pursuant to the terms of the Leases. The Board approved these applications, issuing Pooling Order No. P 290 ("the Pooling Order") and Well Licence No. 0344816 ("the Well Licence").

8. EnCana objected to the Pooling Order and the Well Licence on the basis of disputed ownership of CBM. The within Proceeding is a result of EnCana's objection to the Pooling Order and Well Licence issued by the Board.

### III. **REPLY TO ENCANAS SUBMISSION**

9. EnCana states in its Submission at page 2 that "Ownership of CBM is a Requirement of the Oil and Gas Conservation Act for a Well Licence, Pooling Order or Holding." At the same time, however, EnCana has acknowledged that the determination of the ownership of CBM is a matter for the courts (see for example paragraph 5 of its Submission where EnCana states "...the Board cannot grant the approvals sought as it has no jurisdiction to decide ownership.")
10. Given the foregoing, EnCana's position can be summarized as follows: (1) the Board must determine ownership as a prerequisite to carrying out its statutory obligation to issue well licences, pooling orders or holdings; but (2) the Board cannot determine ownership.
11. Bears paw submits that such a position is untenable and is indicative of the premise that a regulator's determination of entitlement for development purposes is distinct from the determination of ownership.
12. Bears paw submits that the Board in issuing the Well Licence and Pooling Order correctly carried out its legislative mandate when it answered the following questions in the affirmative:
  - (a) Is CBM "gas" as defined by the *Oil and Gas Conservation Act*?

- (b) Do the Leases give Bears paw the right to produce "gas"?
13. EnCana's Submission appears to confuse the concepts of regulatory entitlement and ownership. Bears paw submits that the concept of regulatory entitlement, as mandated by section 16 of the *Oil and Gas Conservation Act*, refers to *prima facie* entitlement only. Any further determination of ownership resulting from contractual rights falls within the exclusive jurisdiction of the courts.
  14. The Board's practice in determining entitlement to the right to produce oil and gas substances has consistently upheld Bears paw's view. Bears paw submits that any interpretation otherwise (i.e. that regulatory entitlement and ownership are interchangeable concepts) would prevent the Board from carrying out its mandate.
  15. The EnCana Submission states at page 4 that ownership of CBM is the subject of a *bona fide* dispute. Bears paw states that it is obvious that there is a dispute where one party makes claim to property ostensibly owned by another. However, for the purposes of this Proceeding, and any other proceeding before it, the Board is required to examine the nature of the dispute. If the Board concludes that the dispute is contractual and involves private economic interests (as opposed to the public interest), it does not have the requisite jurisdiction and must decline to adjudicate the dispute.
  16. The arguments raised by EnCana from pages 4 to 12 of its Submission are clearly directed at the determination of private property rights. EnCana is asking the Board to apply scientific evidence and legal principles of contractual interpretation to reach the conclusion that the language of the Leases is such that Bears paw is not the owner of the CBM. It is Bears paw's submission that there is no conservation, environmental or other public interest component to these arguments.

17. EnCana's arguments in its Submission substantially reflect those arguments made in *Anderson*<sup>1</sup> and *Borys*<sup>2</sup>, where the Court was called upon to decide between competing private property rights claims. EnCana is likely to make such arguments in the Court of Queen's Bench, should EnCana ever decide to put its claim respecting ownership of CBM before the Court.
  
18. The Board's position has long been and remains that it does not involve itself in property/contractual disputes between industry participants. Recently, in a separate matter, the Board affirmed its position that matters of contractual interpretation were not within its jurisdiction. In correspondence dated July 10, 2006, attached hereto as Exhibit "C", the Board states as follows in paragraph 2:

"Upon review of the documentation, please be advised that the EUB does not get involved in determining the viability of contractual arrangements within the industry, but rather relies on information from those involved in the contracts (i.e. the lessor and lessee). As such, I would advise Bearspaw to forward a copy of their solicitor's June 27, 2006 submission to [redacted]. Thereafter, I would advise both parties to direct their concerns to an authority, who can decide on such contractual matters."

[emphasis added]

19. EnCana states at page 12 of its Submission that "The Applicants have Acknowledged Entitlement is in Dispute." Although Bearspaw cannot speak for the other gas producers involved in this Proceeding, Bearspaw states that it has never acknowledged that entitlement for the purposes of development is in dispute. The fact that the issue of ownership of CBM has not been decided by the courts appears clear, and is in part the result of EnCana's reluctance to bring its novel claim respecting ownership of CBM before the courts.

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<sup>1</sup> *Anderson v. Amoco Canada Oil & Gas* (2004), 241 D.L.R. (4th) 193, 2004 SCC 49 (reproduced at Tab 7 of EnCana's Submission).

20. Bears paw submits that the only policy issue before the Board in this Proceeding is whether it will abandon its long-standing interpretation of its enabling legislation in order to become the arbiter of property/contractual disputes between industry participants. Bears paw repeats its view that were the Board to do so, it would be acting outside its jurisdiction.
21. There is nothing in the EnCana Submission which suggests that the Board's decision to issue the Pooling Order and Well Licence, which issuance was the result of the application of the Board's long-standing practice and principles, was in error.
22. Having found no error, the Board must uphold its original decision. Board decisions should not be subject to amendment or reversal in order to further the economic agendas of industry participants.
23. It necessarily follows that the relief sought by EnCana, both specific to the Bears paw approvals and otherwise, should be denied.
24. Bears paw submits that EnCana's request that a Technical Committee be formed is unsupported by the facts and issues in this Proceeding. Bears paw is of the view that this relief presumes that the Board's existing reporting mechanisms are inadequate. This has not been established by EnCana in any way. In any event, Bears paw has doubts that any deficiencies in the reporting mechanisms could be adequately and expeditiously remedied by such a committee.
25. Alternatively, should the Board determine that it has the jurisdiction to adjudicate EnCana's novel claim to ownership of CBM, and thus must choose between the

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<sup>2</sup> *Borys v. Canadian Pacific Railway* (1953), 7 W.W.R. (N.S.) 546 (reproduced at Tab 6 of EnCana's Submission).

competing scientific evidence filed in this proceedings, Bears paw urges the Board to prefer the opinion contained in the expert report of Matthew J. Mavor.

IV. **RELIEF SOUGHT**

26. Bears paw asks for a determination that the Board lacks the jurisdiction to decide the contractual/ownership issue which EnCana by its review request, has brought before it.

27. Bears paw asks that EnCana's review request be denied and the Pooling Order and Well Licence be upheld as issued.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of September, 2006.



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John Gruber  
Thackray Burgess  
Solicitors for Bears paw Petroleum Ltd.