

**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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**POST HEARING SUBMISSION**

**OF**

**BEARSPAW PETROLEUM LTD.**

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THACKRAY BURGESS  
Barristers and Solicitors  
**Attention: John Gruber**  
#1900, 736 - 6th Avenue S.W.  
Calgary, Alberta  
T2P 3T7  
Phone: (403) 531-8733  
Fax: (403) 531-4720  
Solicitors for Bearspaw Petroleum Ltd.

CODE HUNTER LLP  
Barristers and Solicitors  
**Attention: Christian J. Popowich**  
#850, 440 - 2nd Avenue S.W.  
Calgary, Alberta  
T2P 5E9  
Phone: (403) 716-2378  
Fax: (403) 261-2054  
Solicitors for EnCana Corporation

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## I. Introduction

1. Proceeding 1457147 (the "Proceeding") commenced on October 16, 2006. The Alberta Energy and Utilities Board (the "Board") heard the evidence of the applicants, respondents and participants over the following two weeks, which included evidence from policy witnesses, expert technical evidence and expert legal evidence. The evidence was considered complete as at October 28, 2006.

2. On the opening day of the Proceeding, the Board set out the parameters of the Proceeding as follows:

"As stated in the amended notice of hearing proceeding 1457147, the Board will consider the following matters at this hearing. Firstly, the issue of legal entitlement of coalbed methane being produced or intended to be produced from certain wells that had been licensed to Bearspaw, Devon or Fairborne; and secondly, any outstanding measurement and accounting issues of coalbed methane production in connection with the wells involved in this proceeding. In consideration of these matters, the Board will determine if it should confirm, vary or rescind its decisions in connection with the well license, compulsory pooling and special gas well spacing applications that are subject of this review."

**Proceeding 1457147, Volume 1 Transcript, October 16, 2006, page 4, lines 4-17.**

3. This statement of the Board essentially reiterated the parameters set out in the Amended Notice of Hearing, dated July 27, 2006.

4. Bearspaw adopts its Submissions as filed in this Proceeding as Exhibits 02-010-2006-08-25 and 02-017-2006-09-29 (including all exhibits to those Submissions), but does not in this Submission intend to restate them in detail.

## II. Relief Sought

5. Bearspaw asks that the Board affirm Well License No. 0344816 ("the Well License") and Pooling Order P-290 ("the Pooling Order") (collectively, "the Approvals") as issued.

## III. Argument

### A. SUMMARY OF THE BEARSPAW POSITION

6. The Board has the jurisdiction pursuant to section 16 of the *Oil and Gas Conservation Act* ("OCGA") to decide whether an applicant for a well license or pooling order is entitled, for development purposes, to the right to produce the substance applied for. In so doing, the Board is not in any way determining the ownership/property interest with respect to the substance.
7. The Board may decide whether an applicant is entitled to the right to produce the substance specified by satisfying itself that the applicant holds a valid and subsisting mineral lease.
8. In issuing the Well License and Pooling Order, the Board made the decision that, for the purpose of carrying out its legislative mandate, coalbed methane ("CBM") is gas. This decision was made with the knowledge that EnCana claimed ownership of CBM. There has been nothing tendered in the Proceeding which suggests an error of fact, law or jurisdiction in the Board's decision. EnCana has specifically acknowledged that the Bearspaw leases at issue are valid and subsisting for conventional natural gas (Proceeding 1457147, Volume 9, October 26, 2006, page 1323, lines 8 - 11).
9. EnCana is seeking to use the Board and its process to effect a private law remedy;

namely, a *de facto* injunction against gas rights holders preventing the development of CBM reserves on split title lands where EnCana owns the coal.

## **B. JURISDICTION OF THE BOARD**

### **(i) The EnCana Position**

10. EnCana's present position in the Proceeding appears to be as follows:

- (a) the Board has no jurisdiction to determine legal entitlement to a substance once a competing claim to ownership of the substance is made;
- (b) the Board does have the jurisdiction to determine if a dispute over entitlement exists; and
- (c) once the Board determines that a dispute over entitlement exists, its jurisdiction to issue an approval is exhausted.

11. However, EnCana's position has undergone some significant alterations. It has stated that the Board has a "role" in entitlement issues, even though it has no jurisdiction. At other times EnCana has stated that the issue in the Proceeding is whether the applicants are entitled to produce CBM, then states that the Board has no jurisdiction to determine entitlement. More specifically, some of the iterations of the EnCana position are as follows:

(a) **Exhibit 07-018-2006-06-09:**

"Production is not Permissible Where There is no Undisputed Entitlement." (Page 4)

"The Board has a Role in Entitlement Disputes." (Page 7)

"The taking of coal bed methane by Devon and Bearspaw in the face of an acknowledged ownership dispute would be an interference with EnCana's property rights - which the Board is specifically not authorized by statute to permit, and cannot therefore condone." (Page 5)

(b) **Exhibit 07-019-2006-07-14:**

"To summarize briefly, EnCana submitted that where entitlement to coalbed methane is undisputed, EnCana does not object to development. For example, where the Crown or a freeholder with no objection to the taking of coalbed methane owns the coal underlying an entire drilling spacing unit, the Board has jurisdiction to issue approvals that contemplate production of coalbed methane.

However, where there is no undisputed entitlement in a drilling spacing unit, the Board does not have jurisdiction to approve production of coalbed methane." (Page 2)

(c) **Exhibit 07-024-2006-09-19:**

"Ownership of CBM is a Requirement of the Oil and Gas Conservation Act for a Well License, Pooling Order or Holding." (Page 2)

"The CNG Owners Must Prove Lease Entitlement." (Page 4)

"The Board Cannot Determine Entitlement" (Page 12)

"The Board Cannot Determine Ownership of CBM Between the Coal Owners and Gas Owners." (Page 12)

(d) **Exhibit 20-040:**

"At issue in this proceeding is whether the applicants for the wells in issue are entitled to produce CBM." (Page 1)

"Our position is that the Board should refuse to issue licenses for CBM wells in cases where freehold leases on split title lands do not specifically identify CBM, as being part of the definition of 'leased substances'." (Page 3)

"Entitlement is generally established when it is indicated on the Well License Application, in accordance with Directive 56, that no objection is made." (Page 3)

(e) **Proceeding 1457147, Volume 7 Transcript, October 24, 2006, page 1001, lines 7-12:**

"Q. Mr. Welsh, am I correct that the first argument of EnCana is that it has bona fide claims to ownership of coalbed methane and as such the Board has no jurisdiction to decide the entitlement of the applicants to the licenses and holdings sought here?

A. Mr. Welsh: That's correct."

- (f) **Proceeding 1457147, Volume 7 Transcript, October 24, 2006, page 1080, lines 18-24:**

"Q. And that step, I guess, taking steps to protect your property rights, that's what EnCana is doing in this proceeding, correct?"

A. Mr. Welsh: Correct.

Q. Okay, so you're before this Board seeking to protect your property rights, correct?"

A. Mr. Welsh: Yes."

- (g) **Proceeding 1457147, Volume 7 Transcript, October 24, 2006, page 1089, line 16 to page 1090, line 7:**

"Q. And I take it that you don't see it as a contest, because your view is that the Board can resolve these competing claims, right?"

A. Mr. Welsh: Correct.

Q. Really, all the Board can do is ensure there is no development by either side, right?"

A. Mr. Welsh: Yes, in the context of not issuing licenses on lands where people can't, or don't have the right to, correct.

Q. So your view is that we've marshalled all these resources here and heard all this evidence for the Board to decide nothing more than it can't decide; would that be accurate?"

A. Mr. Welsh: That would be - yeah, that would be accurate.

Q . That would be an accurate statement of your view and EnCana's view, right?"

A. Mr. Welsh: Yes."

- (h) **Proceeding 1457147, Volume 8 Transcript, October 25, 2006, page 1117, line 1 to page 1118, line 12:**

"Q. Okay. So then I am in correct in understanding that EnCana's position with respect to jurisdiction is that the Board's jurisdiction in this case extends only so far as determining whether there exists a bona fide dispute as to ownership?"

A. Mr. Welsh: Yes.

Q. And again, if the Board determines there is a bona fide dispute,

then EnCana says that's the end of it, right?

A. Mr. Welsh: Yes, there is a dispute, a bona fide dispute; the Board recognizes this; it's unclear that they can issue well licenses or they can't issue well licenses because of the dispute.

Q. Okay. So sir, my next question to you is, is it not the case that the Board has already determined that there is a bona fide dispute?

A. Mr. Welsh: Yes.

Q. And have not the natural gas rights holders acknowledged that there is a dispute?

A. Mr. Welsh: Yes.

Q. So then if EnCana's position is correct, does it not follow, sir, that the EUB has already exercised the entirety of the jurisdiction that it holds in this matter? Are you able to answer that?

A. Mr. Welsh: Well, I think being at this hearing indicates that they recognize that there is a dispute and that there is a directive issued regarding the issuing of licenses on the disputed lands.

Q. But you have agreed with me that the EUB has already determined that a dispute exists, correct?

A. Mr. Welsh: Yes.

Q. So what more is there for the Board to determine?

A. Mr. Welsh: I think my response to that would be that the Board has determined that there is a dispute, and the next step would be for the parties in the dispute to litigate it, go to Court to determine it if there is no settlement, a commercial settlement between the parties involved in the dispute."

12. The foregoing indicates that EnCana has neglected to clearly articulate its position before the Board. The various statements of EnCana's position are at best, vague, and, at worst, patently inconsistent. In some instances, EnCana explicitly states that the Board has no jurisdiction over property rights; in others, EnCana seeks the Board's intervention to protect its property rights.
13. Bearspaw submits that this inconsistency is not inadvertent, but rather is part of a

concerted strategy to use the Board and its processes to obtain leverage in its commercial dispute with the gas rights holders.

14. In that EnCana has stated that the Board can do nothing more than "decide that it cannot decide" (Proceeding 1457147, Volume 7 Transcript, October 24, 2006, pages 1089-1090), it must follow that none of the corollary relief (i.e. payment into trust, vertical pooling, reduced drilling spacing units, etc.) that it seeks, which EnCana asserts is in the interest of the orderly development of resources, is within the jurisdiction of the Board. Otherwise, EnCana's position must be understood to be that in split title situations, the Board has no jurisdiction to do anything other than to protect the property rights of EnCana. Bearspaw submits that this position cannot be accepted.

**(ii) The Review Application made by EnCana precludes the outcome sought by EnCana**

15. EnCana's review application was made pursuant to Section 40 of the *Energy Resources Conservation Act* ("ERCA"). Section 40(5) reads as follows:

40(5) When an application is made under this section, the Board shall, after not less than 10 days' notice to all persons affected by the order or direction, hold a public hearing of the application, and may confirm, vary or rescind the order or direction, as to the Board seems just.

[emphasis added]

16. EnCana has stated that the Board may issue the Approvals subject to certain conditions, stipulated by EnCana. Bearspaw submits that such a position is legally and practically untenable. Either the Board has been granted statutory jurisdiction to consider and approve (or decline) the applications, or it has not. The Board cannot be in a position where its jurisdiction is conditional upon a party (in this case, EnCana) agreeing that the Board has gone far enough to protect that party's interests.

17. The Board should not permit EnCana to parse the statutory provisions upon which it relies. Having sought a review hearing on the basis of Section 40 of the *ERCA*, EnCana should not be heard to argue that certain portions of that section are unavailable to the Board.

**(iii) EnCana is seeking ownership remedies, notwithstanding its assertion to the contrary**

18. EnCana's assertion that it is not asking the Board to decide ownership is not credible. This is evidenced in its Submissions, where EnCana puts forward a number of arguments (historical and technical) as to why the Board should conclude that CBM is the property of the coal owner. Further, EnCana states numerous times that its primary reason for being before the Board is to "protect its property rights" and prevent a trespass. This is evidenced in the following exchange:

"Q. Okay. And EnCana believes, sir, I take it, that the applicants, being Bearspaw, Devon and Fairborne, are either committing trespass or intending to commit trespass on substances owned by EnCana; is that fair?

A. Mr. Welsh: Correct.

Q. And those substances are the property of EnCana shareholders, correct?

A. Mr. Welsh: Correct.

Q. And that trespass is not acceptable to EnCana, correct?

A. Mr. Welsh: Correct.

Q. And that's why EnCana has brought this proceeding before this panel, correct?

A. Mr. Welsh: Correct."

**Proceeding 1457147, Volume 7 Transcript, October 24, 2006, page 1082, line 16 to page 1083, line 3**

19. As at the commencement of the Proceeding, EnCana had taken no steps in the Court of Queen's Bench to deal with issues involving its property rights, the Board being the only forum where such "ownership" issues had been brought forward. Further, throughout the Proceeding, EnCana questioned various gas rights holders as to why they had not brought a claim in the Court of Queen's Bench. Bearspaw submits that the answer is obvious. It is EnCana who argues that CBM is coal and not gas, which is contrary to conventional understanding. This is a novel claim which may or may not be accepted by the Court. It is however, illogical to argue that the gas rights holders are under an onus to refute this claim when EnCana refuses to prosecute it.
20. The fact that EnCana filed a Statement of Claim against Devon Canada Corporation at the conclusion of the Proceeding does not bring legitimacy to the EnCana position. EnCana failed in the Proceeding to provide a valid and cogent justification for its failure to prosecute an ownership claim in the Court. Its eleventh hour filing of a Statement of Claim should be viewed as an acknowledgement of this failure.
- (iv) The Board has the jurisdiction to issue the Well License and Pooling Order under the OGCA and to affirm the Well License and Pooling Order under Section 40 of the ERCA**
21. Bearspaw has previously argued that the Board has the jurisdiction to determine "regulatory entitlement" for the purposes of issuing the approvals sought and does not intend to repeat those arguments here.
22. On the issue of jurisdiction, Bearspaw submits that it cannot be argued that the intention of the Legislature was that the Board should be deprived of its statutory authority to

regulate development simply because a party makes a claim to ownership of oil and gas substances. Our courts have stated numerous times that the Board is an expert technical body charged with regulating, *inter alia*, energy development in Alberta. Contrary to EnCana's position, the Board should not be so easily deprived of its legislative mandate.

23. During the course of the Proceeding, the following exchange took place between Board Counsel and Professor Lucas, the EnCana legal expert:

Q. The Goodwell decision, I think, was clear on that point, that the Court will show us no deference on any ownership determinations.

A. Mr. Lucas: Yes.

Q. But in the Goodwell decision, the Court didn't say we couldn't make the first call?

A. Mr. Lucas: That's correct, but the risk is that, again, hypothetically on this issue, if you're not legally correct, and to put that another way, from a burden or standard perspective, it would mean that the standard would be - you could put it as highly probably or virtual certainty on that issue. So if the Board were not legally correct, there would be a high probability that, on judicial review, a court would conclude that the Board is without jurisdiction."

**Proceeding 1457147, Volume 9 Transcript, October 26, 2006, page 1344, line 23 to page 1345, line 12**

24. In this exchange, Professor Lucas appears to be expressing the view that the Board can determine entitlement under Section 16 of the OGCA where there is an ownership dispute (the authority being *Alberta Energy Co. v. Goodwell Petroleum Corp.*, (2003), 233 D.L.R. (4th) 341, 2003 ABCA 277), but, in his view, the Board's decision in this regard will be given no deference by the Court of Appeal if challenged. This view may or may not be correct, however it is contrary to the EnCana position (or at least one of them), which is that the Board's jurisdiction comes to an end once it concludes that an

ownership dispute exists.

25. EnCana has taken the position that the Board's jurisdiction to consider the applications at issue is exhausted by the finding of an ownership dispute. If this position is rejected, EnCana should not be heard to argue that the Board should prefer the evidence of Dr. Levine in deciding the entitlement issue.

**C. *ENCANA'S REVIEW APPLICATION IS NOT BONA FIDE***

26. Bearspaw submits that it is open for this Board to conclude that the review application brought by EnCana is not *bona fide*, for either or both of the following reasons:
- (a) EnCana is using Board process to obtain ownership remedies when, at the same time, it acknowledges that the Board cannot deal with ownership; and
  - (b) EnCana is using Board process to extract from gas rights holders an interest in CBM through commercial agreements.
27. Point (a) has been addressed earlier in these Submissions.
28. With respect to point (b), the outcome EnCana desires from this Proceeding is to be able to present gas rights holders on split title lands with the following ultimatum: "Do a deal with us or we will raise an ownership objection to your development application which will delay your development for up to a decade."
29. This is a significant commercial weapon, especially given EnCana's size and financial strength relative to many of the gas rights holders. Smaller gas rights holders with a significant portion of their interest in CBM may well lack the resources to wait out the lengthy Court proceedings required to deal with the ownership issue.

30. There were numerous references in the evidence of EnCana for its desire to receive a portion of the CBM rights through commercial agreements (for example, the EnCana Submission, being Exhibit 07-024-2006-09-19, and the EnCana Opening Statement, being Exhibit 20-040). In and of itself, there is nothing untoward about seeking a commercial resolution. However, it is inappropriate for EnCana to use Board process to enhance its position in commercial negotiations.
31. EnCana seeks corollary relief from the Board, notwithstanding its assertion that the Board's jurisdiction is exhausted. The relief sought is essentially the same interim relief that EnCana could request of the Court in the action which it has recently commenced against Devon Canada Corporation. Such relief is more properly considered in that action, as the Court may consider all of the factors relative to ownership which EnCana says the Board cannot consider in the Proceeding. Moreover, it will be relief specific to that particular dispute, as opposed to relief on an industry-wide basis. Although the Court remedy is consistent with accepted principles of interim protection of property rights, EnCana no doubt prefers the "industry-wide" injunction it asks the Board to grant, as that provides a more potent negotiating tool.

**D. *BEARSPAW HAS NEVER ACKNOWLEDGED UNCERTAINTY WITH RESPECT TO REGULATORY ENTITLEMENT***

32. EnCana's position rests in large part on the fact that parties have made an acknowledgement of uncertainty as to entitlement to CBM. There are numerous references to this in EnCana's Submission (Exhibit 07-024-2006-09-19) culminating in the following exchange in the Proceeding:

"Q. Okay, and I'll read that for the record:

'The Board and the applicants have acknowledged that entitlement to coalbed methane is uncertain. Therefore, Devon and Bearspaw do not have ownership and are not owners in any tract where coalbed methane is disputed.'

Do you see that?

A. Mr. Welsh: Yes.

Q. And should I understand that to mean, sir, that because the Board and the applicants have acknowledged that entitlement to coalbed methane is uncertain, the applicants are not the owners of CBM, is that fair?

A. Mr. Welsh: Yes.

Q. And so it's the acknowledgement that gives rise to the uncertainty, correct?

A. Mr. Welsh: Correct."

**Proceeding 1457147, Volume 7 Transcript, October 24, 2006, page 1090, line 13 to page 1091, line 5**

33. Bearspaw again states that it has never acknowledged a dispute over entitlement for the purposes of the issuing regulatory approvals. At the January 31, 2006 oral proceeding, the following exchange took place between the Board and counsel for Bearspaw:

"A. Correct and I suggest that what the Board did is the Board looked at the leases. The Board looked at the competing claim. The Board made the determination that CBM was, in fact, natural gas. There was no other provision in the oil and Gas Conservation Act directing it to take any other route when there was a claim for CBM, so it made the determination that it did, and that was correct.

Q. But if the ownership of CBM is undecided, unsettled judicially, how could the Board determine that the applicants for the licenses in each case were entitled to produce the mineral which they sought to produce?

A. I acknowledge that the ownership is undecided judicially, and there's been a lot of comment about what process will take place, whether it be Court of Appeal, Court of Queen's Bench, but for the purposes of issuing its licence, the Board had to determine if the rights to natural gas were held by the applicant. The Board had to determine if there was anything that directed it to do anything different when there was a claim for a particular form of natural gas. There was no such provision. The Board determined it was an application for a natural gas licence and correctly

determined the ownership, or the right to produce, I guess."

34. Given the foregoing, if any part of EnCana's position is sought to be sustained by an acknowledgement of uncertainty for regulatory purposes, this cannot apply in any way to the Approvals.

**E. *ENCANA'S POSITION IS CONTRARY TO ORDERLY DEVELOPMENT OF RESOURCES***

35. EnCana asks that Bulletin 2006-19 be continued pending Court adjudication of the ownership issue. EnCana acknowledges that a continuation of Bulletin 2006-19 would be contrary to the orderly development of Alberta's energy resources, yet is unconcerned by that fact. This is evidenced by the following exchange in the Proceeding:

"Q. Let's make it easy then, sir. Let's assume, like I accept that there is a possibility that there could be commercial terms - can we agree on that?"

A. Mr. Welsh: Okay.

Q. Can you accept, sir, the possibility that there won't be, and that it will have to be determined by the court?"

A. Mr. Welsh: That is a possible outcome.

Q. And, in that scenario, you would say that no applications should be processed until the issue of ownership has been full resolved by the court, correct?"

A. Mr. Welsh: That would follow, yes.

Q. And even if that takes a decade, correct?"

A. Mr. Welsh: Correct.

Q. And when that decade is over, the Board should then process all those applications that have stacked up, correct?"

A. Mr. Welsh: Correct.

Q .And that could be thousands, maybe tens of thousands, right?

A. Mr. Welsh: Could be.

Q. Could be. And EnCana would regard that as the orderly and efficient development of resources, would that be fair?

A. Mr. Welsh: I don't know whether that would be orderly or efficient if it was thousands of wells, but it doesn't change the fact that we want our lands developed appropriately, and that's what people that have agreements with us to develop them.

Q. Right. But you and I can agree that if the Board were to, over the next ten years, take all of these applications and put them in a stack somewhere, and then after that ten years, when that ruling is handed out take out that stack and start to process them, that wouldn't be an orderly way to do things, would it?

A. Mr. Welsh: No. I mean, that may be an outcome though.

Q. Sure, and that's an outcome that EnCana can live with, right?

A. Mr. Welsh: Absolutely."

[emphasis added]

**Proceeding 1457147, Volume 7 Transcript, October 24, 2006, page 1085, lines 16 to page 1087, line 2**

36. Bears paw submits that this enthusiasm for a prolonged moratorium is further evidence that EnCana is more interested in achieving negotiating leverage than it is in the orderly development of resources.

#### **IV Conclusion**

37. The Bears paw panel gave evidence to the effect that it believed that EnCana was seeking to have the Board issue remedies to protect its property rights. This was a reasonable conclusion in light of the fact that EnCana stated numerous times that its concern was that others were taking property that belonged to it. On all of the material before it, it is open for the Board to conclude that EnCana is, in the Proceeding, seeking

redress in respect of a property interest, albeit on an interim basis. The Board would be correct in declining the jurisdiction to do so.

38. During the Proceeding, the Board heard a great deal of evidence on issues of policy, science and law. In Bearspaw's submission, none of this evidence has cast doubt on the decisions the Board made with respect to the Approvals. In issuing the Approvals, the Board correctly appreciated what was within its legislative mandate - entitlement for regulatory purposes - and correctly appreciated what was beyond its mandate - the adjudication of property rights. The Board's decisions to issue the Approvals should stand.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2006.

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John Gruber  
Thackray Burgess  
Solicitors for Bearspaw Petroleum Ltd.