

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

REPLY TO THE ARGUMENT OF ENCANA CORPORATION

OF

BEARSPAW PETROLEUM LTD.

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Proceeding 1457147
(the "Proceeding")
Reply to the Argument of EnCana Corporation
of Bearspaw Petroleum Ltd. ("Bearspaw")
to the Alberta Energy Utilities Board (the "Board")

I. INTRODUCTION

1. The following is the Bearspaw Reply to the Argument of EnCana Corporation ("EnCana"). Bearspaw will not repeat the points contained in its earlier Submissions, but reiterates its reliance thereon.
2. Unless otherwise indicated, capitalized terms in this Reply Argument have the same meaning as set out in Bearspaw's earlier Submissions.

II. ARGUMENT

(i) Ownership is not a Requirement of Entitlement for Development Purposes

3. The Amended Notice of Hearing issued by the Board (Exhibit 01-003-2006-06-23) states that the purpose of the Proceeding was to determine the issue of legal entitlement. It is Bearspaw's submission that this simply means that the Board intended to consider whether there was entitlement pursuant to the provisions of the OGCA.
4. The EnCana position, both in written argument and in oral testimony, operates from the premise that the words "entitled to the right to produce" as contained in section 16 of the *Oil and Gas Conservation Act* ("the OGCA") are to be accorded the same meaning as "ownership," or that ownership is an element of entitlement. From this, EnCana argues that Bearspaw is not entitled to the right to produce coalbed methane ("CBM") unless it

establishes ownership before the Board. EnCana then states that since the Board cannot determine ownership, it cannot issue the Approvals.

5. EnCana has not offered any binding or persuasive legal or regulatory authority for its assertion that "ownership" and "entitlement to the right to produce a substance" are so inextricably bound that they are properly regarded as the same legal concept. This is simply a novel legal proposition that EnCana urges upon the Board, similar to EnCana's novel claim that "gas" produced from coal is in fact not really gas at all.
6. Bearspaw submits that EnCana's assertion that the concepts of entitlement and ownership are the same (or at least interdependent) should be rejected. Given the fact that this premise underpins EnCana's entire position in the Proceeding, it is Bearspaw's submission that the argument of EnCana must therefore fail.
7. The legislature could have included language in section 16 of the OGCA to clearly make the undisputed legal ownership of a substance a pre-condition to the issuance of a license. It was open to the legislature to use language in section 16 such as "working interest owner" or to use language that would prohibit the issuance of a license "unless that person owns the oil gas or crude bitumen" if it had intended the outcome sought by EnCana.
8. Obviously, the legislature chose the language that appears in section 16 and in doing so, recognized that the Board as a regulator could not effectively carry out its mandate if it were to become either an adjudicator of ownership claims, or of the *bona fides* of such claims.
9. This reveals another contradiction in the EnCana position as EnCana seemingly asks the Board to assess the *bona fides* of its claim, which is a question of law involving an assessment of evidence and the application of principles of statutory interpretation. EnCana then states at paragraph 15 of its Argument that the Board is not permitted by the OGCA to deal with questions of law.

10. In the submission of Bears paw, the language of section 16 was carefully chosen to ensure that the Board does not become paralyzed in the very manner that EnCana desires.
11. In asserting that a determination of regulatory entitlement in favor of Bears paw is necessarily a determination of ownership, EnCana implies that the Board has decided that the ownership of CBM rests with Bears paw, and that EnCana is without a remedy. Clearly this is not the case, as the Board has explicitly stated that the issuance of a license is not a determination of ownership (paragraph 35 of EnCana's Argument).
12. EnCana has filed a claim in the Court of Queen's Bench claiming ownership of CBM. It is open to EnCana to bring forward evidence and argument in a preliminary application before the Court seeking to enjoin the defendant producer from producing CBM pending a final determination of the issue. If the facts and law are as clear as EnCana asserts in the Proceeding, EnCana should have little doubt that an injunction will be granted and its property rights thereby protected.
13. EnCana has used the phrases "ownership" and "entitlement" interchangeably throughout the entire Proceeding in an attempt to blur the distinction intended by the legislature between the two concepts. EnCana does so because unless the separate concepts of ownership and entitlement (for regulatory purposes) are morphed into one, the EnCana position must fail. Bears paw urges the Board to reject the premise that the concepts of entitlement and ownership are the same.
14. Contrary to EnCana's Argument at paragraph 14, Bears paw has never posited that the "mere assertion" of gas rights is sufficient for the issuance of the Approvals. An applicant is required to demonstrate to the Board that it has a valid and subsisting mineral lease. A party who wishes to raise legal arguments respecting the validity of the mineral lease, or to

argue that the mineral lease does not grant what the words say it grants, may put that position before the Court, on both an interim and final basis.

(ii) Responses to Specific Points Raised in EnCana's Argument

15. Bears paw will not in this Reply Argument take issue with each specific point in EnCana's Argument, as EnCana's positions have been addressed in earlier Bears paw Submissions. Bears paw will respond to several of the points made by EnCana as follows, but states that it should not be inferred that it concurs with the points in EnCana's Argument that are not specifically addressed to in this Reply Argument.
16. At paragraph 9 of its Argument, EnCana states that *"Unless the claims of the coal owners are ignored or the competing claims adjudicated, a CNG owner cannot in any way be 'entitled to the right to produce' the CBM..."* Bears paw states that in issuing the Approvals, the Board is not ignoring the EnCana claim, but is simply recognizing that such a claim is properly dealt with in another forum.
17. At paragraph 12 of its Argument, EnCana states that *"The CNG producers have no express entitlement to CBM..."* Contrary to this assertion, Bears paw does have express entitlement to CBM as a consequence of its leases which grant explicit entitlement to "gas." Bears paw states that it is the EnCana claim that is implicit. EnCana asserts that CBM is a constituent of coal, and, by necessary implication, is the property of the coal owners. Bears paw states that the evidence in the Proceeding does not support this assertion, however EnCana is free to make this argument in its Court action.
18. At paragraph 14 of its Argument, EnCana states that *"...the Board would need to ignore competing ownership claims and the law that section 16 is violated absent ownership."* No authority has been presented for the proposition that section 16 of the OGCA is violated absent the resolution of an ownership dispute. In *Alberta Energy Co. v. Goodwell Petroleum*

Corp., 2003 ABCA 277 (Exhibit 02-010c-2006-08-25), the Court confirmed that section 16 is violated where the “right to produce” is absent. The Court stated at paragraph 93 of *Goodwell* that “[section 16] will be contravened if the person who holds the well licence does not possess the right to produce the hydrocarbon authorized by the well licence.” The Court did not, as EnCana implies, make undisputed ownership a pre-condition to the issuance of well licenses.

19. At paragraph 16 of its Argument, EnCana states that *"The Board can never as a matter of law be satisfied that the CNG producers have entitlement of CBM in the face of bona fide competing property claims to CBM."* Bears paw submits that the Board can be satisfied on the issue of entitlement if it separates the concept of regulatory entitlement from that of legal ownership as required by the OGCA.

20. At paragraphs 23 to 25 of its Argument, EnCana states that *"...the maxim expression unius est exclusion alterius operates to create the presumption that the exclusion is not the result of oversight. The lack of an express power to decide questions of law under the OGCA is in stark contrast to those it [the Board] has under the Public Utilities Board Act, which expressly grants the EUB authority to decide questions of law and the powers of a court..."* The suggestion that the Board lacks the jurisdiction to interpret and apply the OGCA is absurd as the interpretation and application of this statute is squarely within the statutory mandate of the Board. Further, it is illogical for EnCana on the one hand to submit lengthy legal argument to the Board respecting the interpretation of section 16 of the OGCA, and, on the other hand, to assert that the Board has no jurisdiction to consider these arguments.

21. At paragraph 29 of its Argument, EnCana states that *"... the doctrine of jurisdiction by necessary implication limits the Board's powers to only what is rationally related to the purpose of the regulatory framework - namely, conservation and prevention of waste as*

determined by the Alberta Court of Appeal in Giant Grosmont." The Board's mandate is set out in section 4 of the OGCA, and the passage cited by EnCana from *Giant Grosmont* does not stand for the proposition that this mandate is limited to conservation and waste prevention.

22. At paragraph 32 of its Argument, EnCana states that "*Development cannot be mandated...*" Bears paw's position does not require that the Board "mandate" development. The Board exists to "regulate" development in accordance with the statutes which it administers and to provide a set of procedures to govern the process by which development applications are made and, in some cases, opposed. The decisions referenced by EnCana in paragraph 32 of its Argument, which decisions were made by the Board in the context of bitumen recovery, are not authority for the proposition that the Board should freeze development of CBM in the face of a novel ownership claim.
23. At paragraph 37 of its Argument, EnCana cites section 4 of the OGCA and states that "*The legislative scheme is directed at preserving rights.*" Again, no authority is offered for this proposition. Bears paw submits that the legislative scheme is more accurately described as being directed at the orderly development of resources in the public interest of all Albertans, which is not served by the outcome sought by EnCana.
24. At paragraph 51 of its Argument, EnCana states that "*The facts are simply that the CNG producers cannot develop what they have not proven they own.*" Here again, EnCana simply asks the Board to assume that entitlement requires a finding of ownership. This is not the case from a plain reading of section 16 of the OGCA and the arguments in favour of this interpretation advanced by EnCana are not convincing.
25. At paragraph 116 of its Argument, EnCana states "*Quiet title before a license is not a "policy" as the CNG producers say, but a legal requirement as there can be no entitlement*

without it." Again, EnCana offers no authority for the assertion that in Alberta, quiet title is a precondition to development. Bearspaw urges the Board to reject this assertion.

26. In regards to paragraphs 119 to 137 of EnCana's Argument, Bearspaw states that it has asserted in its Post-Hearing Submission, filed on November 15, 2006, that the EnCana position, through its various transformations, is not *bona fide*, and that it is open to the Board to consider this. However, contrary to EnCana's suggestion, Bearspaw's submission that the Approvals were properly granted is not based on EnCana's lack of *bona fides*. Bearspaw submits that the Board's decision should rest upon both the interpretation of its own jurisdiction and the interpretation of the relevant provisions of the OGCA.

27. In paragraphs 138 to 142 of its Argument, EnCana makes the veiled threat that it will clog the Board's process by filing objections to all applications for the development of CBM on lands where EnCana is the coal owner. Bearspaw is confident that the Board will reject such posturing and decide EnCana's review application according to the principles of jurisdiction and statutory interpretation that Bearspaw has advocated in the Proceeding.

III. CONCLUSION

1. Although there has been a great deal of evidence (both scientific and policy) and argument brought forward in the Proceeding, none of it has cast any doubt on the original decisions made by the Board with respect to the Bearspaw Approvals. Again, Bearspaw points out that the decision to issue the Approvals was made by the Board with the knowledge of the challenge by EnCana, and the basis for such challenge.
2. EnCana has now brought its claim for ownership before the Court and is free to seek interim relief from the Court to protect its property rights if it so chooses.
3. Bearspaw asks that the Board uphold the Approvals as issued and rescind Bulletin 2006-19.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2006.

John Gruber
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Solicitors for Bearspaw Petroleum Ltd.