EXHIBIT 05-068-2006-09-29

ALBERTA ENERGY AND UTILITIES BOARD

IN THE MATTER OF THE ENERGY RESOURCES CONSERVATION ACT, Ch. E-10 OF THE REVISED STATUTES OF ALBERTA 2000;

AND IN THE MATTER OF PROCEEDING NO. 145147 RESPECTING A REVIEW HEARING IN CONNECTION WITH THE ISSUANCE OF CERTAIN WELL LICENCES, AND COMPULSORY POOLING AND SPECIAL SPACING ORDERS IN THE CLIVE, EWING LAKE, STETTLER AND WIMBORNE FIELDS

PART 2
REPLY SUBMISSION OF DEVON CANADA CORPORATION

September 29, 2006

I INTRODUCTION

1. The Submission of Devon Canada Corporation was filed on August 25, 2006.[1]

2. Devon received the submissions of CDP[2] and EnCana Corporation[3] on September 15, 2006.

3. The Amended Notice of Hearing set today as the deadline for Devon to file its reply submissions. Those reply submissions follow.

4. Devon also relies on the reports and conclusions of David R. Percy, Q.C.[4] and Matthew J. Mavor[5] filed concurrently in this proceeding with the Joint Reply of ConocoPhillips Canada Resources Corp., Devon, Fairborne Energy Ltd., Quicksilver Resources Canada Inc., Canpar Holdings Ltd., and Centrica Canada Limited.

5. Devon does not reply to each and every of the submissions of CDP and EnCana and so the absence of a response must not be taken as acquiescence on Devon's part.

II OVERVIEW

6. Although CDP and EnCana expend a great deal of effort to convince the Board otherwise, the issue to be determined by the Board was always, and remains, whether Devon is entitled to the holdings approval and to hold the well licences that the Board issued.

7. CDP and EnCana refer variously to "coalbed methane" and "CBM." CDP and EnCana can choose to use that nomenclature but it does not change the fact that the terms coalbed gas, coalbed methane, CBM, gas in coal and natural gas from coal are all intended to refer to and describe natural gas stored in coal.

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[1] Devon Submission. Terms that are not otherwise defined in this Reply Submission have the meanings ascribed to them in the Devon Submission.
[2] Submissions of Carbon Development Partnership, Successor in Interest to Prairie Mines and Royalty Ltd., Formerly Luscar Ltd. Respecting Applications Made by Fairborne Energy Ltd. and Devon Canada Corporation, dated September 15, 2006 (CDP Submission).
[3] Submission of EnCana Corporation on Entitlement (Hearing, Part II) (EnCana Submission).
[4] "The Legal History of the Differentiation of Ownership Rights to Sub-Surface Minerals," prepared by David R. Percy, Q.C., Dean and W.F. Bowker Professor, Faculty of Law, University of Alberta, September 29, 2006.
[5] "Response of Matthew J. Mavor to Information Provided by Jeffrey R. Levine Concerning Characteristics of Coal and Coalbed Methane," prepared by Matthew J. Mavor, September 28, 2006.

8. The Board has the jurisdiction to determine entitlement to well licences and holding approvals regardless of whether entitlement may be disputed. Such determination would not be conclusive of the relevant property rights for other purposes.

9. Entitlement must be proven on the balance of probabilities. Devon has clearly done so.

10. There is no shared ownership of the resource or sharing of production to be considered in this case and no pooling order should be issued. The proposal for reduced drilling spacing units (DSUs) should also be rejected.

III THE JURISDICTION OF THE BOARD

11. EnCana suggests that the Board's jurisdiction to consider ownership of gas stored in coal in the context of a well licence application is ousted by the presence of a "*bona fide* dispute."[6] This position is without authority or logic. Moreover, its acceptance would, in all likelihood, lead to problematic situations in practice.

12. This "*bona fide* dispute" test for jurisdiction is not expressed in, nor can it be inferred from, any relevant statute or case authority. So far as Devon can determine, it remains unknown in any relevant legal context. In fact, in *Anderson* v. *Amoco Canada Oil and Gas*,[7] Fruman, J. (as she then was) confirmed the jurisdiction of the Board in circumstances in which resource ownership is disputed:

> I accept that for regulatory purposes, solution gas belongs to the petroleum owner. . . . The regulator's view does not determine legal ownership of solution gas. . . . [8]

13. The jurisdiction of the Board to grant a well licence cannot depend on the sincerity of a competing claim to ownership of the resource but that is the essence of the EnCana position.[9]

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[6] EnCana Submission, at para. 5. EnCana goes so far as to claim that "[p]ermitting CBM development where its ownership is disputed *bona fide* contravenes the applicable legislation and augurs against orderly development and conservation of resources." (EnCana Submission, at para. 6). EnCana also asserts – again without citing any supporting authority – that ". . . the Board is not empowered by [section 16 of the O&GC Act] to conduct an inquiry into deciding competing claims" (EnCana Submission, at para. 67; see also EnCana Submission, at paras. 69 and 70).

[7] 1998 A.J. No. 805, ABQB 620 (*Anderson v. Amoco*).

[8] *Anderson v. Amoco*, at paras. 146 and 147.

14. It is a fundamental aspect of the Board's mandate to rule on disputes among parties and especially so when the competing positions are advanced in good faith.[10] It is, quite simply, absurd to suggest that the Board's jurisdiction to administer section 16 of the O&GC Act disappears in the face of an objection, "*bona fide*" or otherwise.

15. EnCana's position on jurisdiction reflects a fundamental misunderstanding of the role of the Board as regulator. The Board is specifically directed by section 16 of the O&GC Act to decide the issue of "entitlement" to produce the resource in considering an application for a well licence. In doing so, the Board may express, and act according to, its view of the relevant property rights. The finding of the Board would be sufficient and effective in that context but it would not be conclusive for other purposes.[11] CDP appears to concede this point.[12]

16. If the Board were to adopt the position that EnCana advocates then it should not be surprised to find in future that it is receiving "*bona fide*" objections with increasing frequency. It would also seem to be inevitable that such objections would be used routinely as a bargaining tool regardless of the supposed strength of the competing claim. Such a proliferation of "*bona fide*" objections would impede the Board in a proper and commonsense administration of its processes. In the result, the economic, orderly and efficient development of oil and gas resources in the Province would be hindered and one of the fundamental purposes of the O&GC Act would be frustrated.

IV THE CORRECT STANDARD OF PROOF

17. Whereas EnCana argues that the jurisdiction of the Board is ephemeral, CDP urges that a well licence applicant must prove entitlement to produce with certainty.[13] The upshot of both arguments is essentially the same:

> It is clear that there is a *bona fide* and serious arguable issue as to the ownership of CBM and, in the face of that *bona fide* serious

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[9] *Bona fide*: "1. Made in good faith: without fraud or deceit. 2. Sincere, genuine," *Blacks Law Dictionary* (8th ed., Thompson West, St. Paul Minn., 2004) at 186.
[10] As an example, the Board routinely decides questions of standing. Inevitably, the party seeking standing claims that its concern and participation are both *bona fide*.
[11] *Anderson* v. *Amoco*, at paras. 146-147. See also, Devon Submission, at para. 16.
[12] CDP Submission, at para. 18.
[13] CDP Submission, at paras. 21-30.

> arguable issue, *it is impossible for the Board to determine that the gas producers are entitled to produce the CBM.*[14]
>
> . . . Section 16 requires the Board to look at the hydrocarbon that is being produced and the formation from which the hydrocarbon is being produced. Where, as here, it is clear that CBM is in dispute, the Board is *precluded* from issuing a well licence or granting a holding application.[15]

18. It is well established that, in the absence of a statutory direction to the contrary, the standard of proof in administrative proceedings is a simple balance of probabilities.[16]

19. CDP focuses on the use of "entitled" in subsection 16(1) of the O&GC Act and the phrase "to the satisfaction of the Board" in subsection 16(2) and argues that, in these circumstances, they together imply a much stricter standard of proof.[17]

20. CDP claims that the Legislature:

> . . . chose to make eligibility for a well licence contingent on an applicant's proof of "entitlement" (absolutely and without condition).[18]

The problem for CDP is, of course, that the parenthetical words – absolutely and without condition – do not appear in the statute. If the Legislature had intended that the Board apply the extraordinary standard of proof that CDP advocates then it could have, and would have, said so. It did not.

21. It is telling that all of the authorities cited by CDP reflect situations in which a finding in favour of one party on a collateral issue of entitlement would leave the other party without recourse or remedy if future events altered, or cast doubt upon, the "entitlement" in question. This lack of recourse or remedy is the very reason why the courts were prepared to impose a high standard of proof.[19]

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[14] CDP Submission, at para. 26, emphasis added.
[15] CDP Submission, at para. 31, emphasis added.
[16] Blake, *Administrative Law in Canada*, (4th ed., LexisNexis Canada, Markham, 2006) at 69. For authority on this point specific to proceedings before the Board, see *Gannon Brothers Energy Ltd. v. AEUB* (1996), 178 A.R. 302, (C.A.).
[17] CDP Submission, at paras. 21-30.
[18] CDP Submission, at para. 30.
[19] See especially *Chrappa v. Ohm* (1996), 29 O.R. (3d) 222, (Ont. C.J. Gen. Div), at paras. 45 and 48; (1998), 38 O.R. (3d) 65, (Ont. C.A.) at para. 27.

22. CDP attempts to characterize the present situation as one in which the coal owners would suffer irreparable harm if the Board were to issue gas well licences to the P&NG rights holders. The claim is that the consequence of such a decision would be that:

> . . . the gas producers had irreversibly interfered with the true owner's property right in the CBM. While the true owner could claim damages for trespass and conversion from the gas producers, it could not put the CBM back underground. It would have permanently lost a fundamental attribute of property ownership, its right to exclude others from its property and to extract that resource on its own timetable and according to its own drilling program.[20]

23. With all due respect to CDP, there is no principled basis for requiring proof to a certainty of entitlement to a well licence or holdings approval. Regardless of the decision that the Board may make as to entitlement, CDP and EnCana will continue to have, as they do today, access to the Court of Queen's Bench in order to protect their alleged rights and interests.[21]

24. The correct standard of proof is a balance of probabilities and Devon has clearly satisfied that standard. CDP's contrary position is entirely without merit.

V CDP'S CHALLENGE TO THE HOLDINGS APPROVAL

25. CDP argues that Devon has not satisfied the "statutory standards" for the holdings approval.[22] Like the CDP and EnCana objections to the well licenses, this argument proceeds from a claim by the coal owner to property in the gas stored in coal. For the reasons discussed above and those in the Devon Submission, Devon submits that it has demonstrated, on the balance of probabilities, common ownership of all gas stored in coal throughout each of the holdings at issue. As such, Devon has satisfied the statutory requirements for the holdings approval.

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[20] CDP Submission, at para. 30.

[21] The remedies that could be pursued at the Court of Queen's Bench include interim injunctive relief. One usual requirement for such relief is the likelihood of irreparable harm if an injunction were not to be granted: Sharpe, *Injunctions and Specific Performance* (Canada Law Book Inc., Aurora, 1992-), at 2-26.

[22] CDP Submission, at paras. 15-18.

VI ENCANA'S REQUEST FOR POOLING ORDERS

26. EnCana claims that it does not seek to prevent the issuance of licences for "conventional natural gas or CBM from Crown lands."[23] In light of subsection 67(1) of the *Mines and Minerals Act*[24], how could it?

27. EnCana also says that development should be permitted where entitlement to produce on some tract within the DSU is not disputed and makes the novel suggestion that "[t]his could occur by the granting of a pooling order that requires payment of proceeds from disputed production to the Provincial Treasurer."[25] Devon submits that this is nothing more than a thinly masked attempt by EnCana to achieve greater leverage against parties holding P&NG lease rights. The attempt should be rejected.

28. Pooling orders are intended to achieve a sharing by the relevant tract owners of the gas from a pool.[26] As described by Bankes:

> The compulsory pooling order is one regulatory response to the introduction of spacing requirements for wells. . . . It also meets one of the main objectives of oil and gas conservation legislation, namely, to accord each owner the opportunity to obtain the owner's share of the oil and gas from the pool. Where there are multiple tract owners within a spacing unit, no party may drill a well in the absence of an agreement between all tract owners. If the parties are unable to reach agreement, for whatever reason, tract owners will be denied their opportunity to recover their share of reserves. Hence the need for a mechanism for imposing an arrangement under which all tract owners within the DSU will pool their tracts for the purpose of forming a unit to permit exploration for, and production of, the pooled substances.[27]

29. EnCana glosses over the fact that there can only be one owner of the gas stored in the coal – be it the coal owner or the P&NG rights holder. There is thus no sharing of production to be considered. A pooling order is neither available nor appropriate in these circumstances.

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[23] EnCana Submission, at para. 79.
[24] RSA 2000, c. M-17, as amended.
[25] EnCana Submission, at paras. 80 and 94-95.
[26] Bankes, Nigel, "Compulsory Pooling Under the Oil and Gas Conservation Act of Alberta", (1997) 35 Alta. Law Rev. 945, at 950-51 and 956-57.
[27] *Id.*, at 950-51, footnotes omitted.

VII ENCANA'S REDUCED DSU PROPOSAL

30. EnCana argues that for sections containing one or more quarters for which entitlement is not disputed and others for which it is disputed, reducing the DSU for such sections to one-quarter will permit development of the undisputed quarters.[28]

31. The reduced DSU proposal suggests that EnCana is anxious to avoid being seen as attempting to frustrate development. However, the proposal would cause more problems than it could possibly solve and it should be rejected.

32. In particular, although downsizing to one quarter is supposedly meant to allow more lands to be developed, it would in fact result in additional drainage of lands that are subject to an entitlement dispute. It could also trigger further offset obligations under the applicable leases – which may be the true motivation behind the proposal.

VIII CONCLUSIONS

33. The Board has jurisdiction to fully consider entitlement to produce natural gas stored in coal in the context of an application for a well licence under section 16 of the O&GC Act.

34. The standard of proof of entitlement in that context is a simple balance of probabilities and Devon has clearly satisfied that standard. The well licences and holdings approval issued to Devon must therefore be confirmed without further delay.

All of which is respectfully submitted, September 29, 2006.

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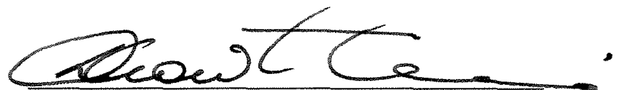

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[28] EnCana Submission, at paras. 85-88.