

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. 1457147  
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 ARGUMENT OF DEVON CANADA CORPORATION

December 13, 2006

## **I. OVERVIEW**

1. This Reply Argument is organized in largely the same manner as Devon's Written Argument. Abbreviations and terminology used herein are consistent with those in Devon's Written Argument. Any failure by Devon to specifically take issue with any submission made by either coal owner should not be considered as indicative of agreement or acquiescence to such submission.
2. The coal owners urge a continuation of the status quo and an extension of the moratorium on NGC development without coal owner consent under Bulletin 2006-19. They have put forth a variety of arguments about jurisdiction, policy and the appropriate standard of proof in attempting to obtain this result.
3. It is submitted that none of these arguments by the coal owners has merit, and that the gas producers have clearly demonstrated entitlement to produce NGC.

## **II. JURISDICTION**

### **(a) EnCana is lacking *bona fides*.**

4. The issue of *bona fides* is barely mentioned in EnCana's Argument. It may be that EnCana has retreated from the idea that any *bona fide* objection to entitlement somehow ousts the Board's jurisdiction. If EnCana persists in this position, then Devon refers the Board to its earlier submissions on this point.<sup>1</sup>

### **(b) The Board has jurisdiction to decide entitlement.**

5. EnCana has suggested in its Argument, for the first time, that under the *Oil and Gas Conservation Act*<sup>2</sup> (the "O&GCA") the Board is not empowered to determine questions of law that might be relevant to Devon's entitlement to produce NGC under the requested licences and holding.<sup>3</sup> EnCana asserts that the O&GCA does not expressly give the Board jurisdiction to determine questions of law, as it does not contain a provision

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<sup>1</sup> Devon Written Argument, at paras. 8 - 15; Devon pre-hearing Reply Submission (Exhibit 05-068 - 2005 - 09 - 29) at paras. 11-16.

<sup>2</sup> R.S.A. 2000, c. 0-6.

similar to section 38 of the *Public Utilities Board Act*<sup>4</sup> which provides that the Board may, “as to matters within its jurisdiction, hear and determine all questions of law or of fact.”

6. EnCana seems to have overlooked section 94 of the O&GCA:

94. Except where otherwise provided, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act. [emphasis added]

7. This express power to decide all questions arising under the O&GCA includes questions of law. For this reason and for the other reasons set out in Devon’s Written Argument,<sup>5</sup> there can be no doubt that the Board has jurisdiction to determine resource ownership to the extent that such may be necessary in deciding the matter of entitlement. Even CDP and Professor Lucas seem to agree that the Board has jurisdiction.<sup>6</sup>

**(c) The Board should exercise this jurisdiction.**

8. EnCana also now submits, for the first time, that the Board should refrain from deciding Devon’s entitlement to the requested well licenses and holding based on a lack of procedural fairness<sup>7</sup>. EnCana’s main complaint in this regard seems to be that it was not given adequate notice that the Board may determine the competing proprietary claims in the course of considering entitlement under section 16 of the O&GCA.<sup>8</sup> None of the other hearing participants support this position.
9. EnCana goes so far as to suggest that until the pre-hearing submissions were made, it did not even suspect that Devon and the other applicants in this proceeding were seeking a Board determination of entitlement under the relevant leases and grants.<sup>9</sup> It is at the very least curious that EnCana would only now voice this concern despite ample opportunity to do so in both its pre-hearing submissions and during the hearing.

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<sup>3</sup> EnCana Argument, at paras. 21-25.

<sup>4</sup> R.S.A. 2000, c P-45.

<sup>5</sup> At paras. 16 - 25.

<sup>6</sup> CDP Final Argument, at para. 134.

<sup>7</sup> EnCana Argument, at paras. 61-70.

10. In any event, EnCana's complaint is entirely without merit. The record is clear that EnCana has known for some time that the Board may be determining ownership of the resource for regulatory purposes. From at least late April 2005, EnCana specifically acknowledged that ownership was at issue and argued that the Board was obligated to determine ownership.<sup>10</sup> As stated by EnCana's counsel during the January 31, 2006 oral hearing at which EnCana successfully urged the Board to hold a full hearing on legal entitlement:

...it may be that the two diverge, the Court's determination and the Board's, but the fundamental premise or the requirement from the Board is section 16. Section 16 says determine entitlement. You can't determine entitlement unless you determine ownership. It may not bind everybody. It may not have great precedential effect to non-parties, but it is necessary and it is required.<sup>11</sup> [emphasis added]

11. Moreover, EnCana and other parties were specifically notified at various times that the hearing would address "legal entitlement to coalbed methane"<sup>12</sup>, "coalbed methane ownership"<sup>13</sup> and "legal entitlement of coalbed methane"<sup>14</sup>.
12. In light of the circumstances described in the preceding paragraphs, it is disingenuous of EnCana to complain of inadequate notice.
13. EnCana also claims procedural unfairness because the steps usual in a civil proceeding (and specifically, discovery) have not taken place.<sup>15</sup> This submission is groundless, as EnCana did not ever request discovery, and has pointed to no particular prejudice arising from the lack of discovery in this proceeding.

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<sup>8</sup> EnCana Argument, at para. 64.

<sup>9</sup> Ibid, at para. 128.

<sup>10</sup> April 28, 2005 EnCana letter to EUB re: Devon (Exhibit 07-004-2005-04-28) at pp 1-2.

<sup>11</sup> January 31, 2006 Hearing Transcript, at p. 47, ll. 19-25.

<sup>12</sup> EUB letters, March 9, 2006 (Exhibit 01-018-2006-03-09) and March 28, 2006 (Exhibit 01-019-2006-03-28).

<sup>13</sup> EUB letter, April 21, 2006 (Exhibit 01-021-2006-04-21).

<sup>14</sup> Notice of Hearing, (Exhibit 01-003-2006-06-23), at p. 2; Amended Notice of Hearing, (Exhibit 01-004-2006-07-27) at p. 2.

<sup>15</sup> EnCana Argument, at para. 68.

14. For its part, CDP does not complain of unfairness. Instead, it argues that the Board should not exercise its acknowledged jurisdiction because the Board should not make prospective legal determinations, instead instituting a policy requiring quiet title.<sup>16</sup> CDP acknowledges that the Board has in many cases granted well licenses where title to the hydrocarbon was in dispute, but states that the present case is unique because the Board is proposing to prospectively address disputed entitlement without a court first dealing with the issue. No precedent for refusing jurisdiction on this basis is offered.<sup>17</sup>
15. There is simply no basis to conclude that the present circumstances are unique. To the contrary, in *Goodwell*<sup>18</sup> the Alberta Court of Appeal effectively held that the Board could and should determine disputed entitlement. It was also recognized in *Anderson*<sup>19</sup> that the Board had for years been prospectively determining entitlement to produce solution gas despite uncertainty of ownership. There is nothing unique about the Board being asked to determine entitlement in this case, and even if there were, no logical reason for the Board to refuse to decide entitlement on that basis.

### III. STANDARD OF PROOF

**(a) A balance of probabilities is the correct standard.**

16. CDP alone continues to urge the Board to adopt a standard of certainty or near certainty in considering entitlement to NGC under section 16 of the O&GCA. CDP cites in support of this proposition various cases in the tort and insurance law contexts that consider “entitlement” as requiring proof beyond doubt. It is telling that all of these authorities 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 were to alter or cast doubt upon the “entitlement” in question. This lack of recourse or remedy is the very reason why the courts in those cases were prepared to impose a high standard of proof.<sup>20</sup>

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<sup>16</sup> CDP Final Argument, at paras. 143-47.

<sup>17</sup> CDP Final Argument, at para. 143.

<sup>18</sup> *Alberta Energy Co. v. Goodwell Petroleum Corp.* (2003) 22 Alta L.R. (4<sup>th</sup>) 1 (C.A.) (“*Goodwell*”).

<sup>19</sup> *Anderson v. Amoco Oil & Gas*, [1994] A.J. No. 805 (Q.B.), at paras. 144-147 (“*Anderson*”).

<sup>20</sup> See especially *Chrappa v. Ohm* (1996), 20 O.R. (3d) 222 (Ont. C.J. Gen. Div.) at paras. 45, 48; (1998) 38 O.R. (3d) 85 (C.A.) at para 27.

17. CDP also seeks to justify the imposition of a very strict standard of proof in the present context because property rights<sup>21</sup> are at issue<sup>22</sup>. In this regard, CDP attempts to distinguish the *Mesa*<sup>23</sup> and *Gannon Brothers*<sup>24</sup> cases, both of which state that the correct standard of proof in matters before the Board is a balance of probabilities. The CDP argument is that *Mesa* and *Gannon Brothers* involved poolings, rather than licenses. With respect, this is a distinction without a difference.
18. *Mesa* and *Gannon Brothers* dealt with property rights. A pooling order that awards more or less of a pool to one party over another is every bit as much a determination and a division of property rights as would be a determination of Devon's entitlement to produce NGC. In a pooling, a party gets more of the pool or less. In this case Devon will be permitted to produce all of the NGC, or none. *Mesa* and *Gannon Brothers* are not distinguishable from the present case.
19. CDP then argues that the standard that a court would apply in reviewing a Board decision on a question of law somehow influences the standard of proof to be applied by the Board.<sup>25</sup> There is not a single authority referred to, nor one known to Devon, that suggests that the standard of review is "a useful paradigm" or otherwise relevant to determining the appropriate standard of proof before the Board. Indeed, such a conclusion is fundamentally illogical as it would have to apply to any issue of law considered by any regulatory body that is subject to appellate review. The effect would be to paralyze regulatory decision making.
20. Professor Lucas' remark that assessing property rights requires a "high degree of certainty" is also relied upon by CDP<sup>26</sup>. As set out in Devon's Written Argument, Professor Lucas was not advocating an onerous standard of proof when making those

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<sup>21</sup> "High order rights in the legal firmament" according to Professor Lucas. (Hearing Transcript, Day 6, at p. 1376, ll 3-8).

<sup>22</sup> CDP Final Argument, at para. 138.

<sup>23</sup> *Mesa Operating Ltd. v. Amoco Canada Resources Ltd.*, [1994] A.J. 201 (C.A.) ("*Mesa*").

<sup>24</sup> *Gannon Bros. Energy Ltd. v. Alberta Energy and Utilities Board* (1996), 178 A.R. 302 (C.A.) ("*Gannon Brothers*").

<sup>25</sup> CDP Final Argument, at para. 133.

<sup>26</sup> CDP Final Argument, at paras. 131-32.

statements, but was referring to the degree of rigour that this important issue warrants.<sup>27</sup> He certainly never stated that the standard of proof should be anything other than a balance of probabilities, much less explained why that could possibly be the case. It should also be noted that Professor Lucas' report did not address the issue. Professor Lucas' evidence does not meaningfully support CDP's argument, regardless of how that evidence is interpreted.

#### IV. ESTABLISHING ENTITLEMENT

21. Given the Board's jurisdiction and the relevant standard of proof to be applied, the issue remaining is for the Board to determine which party has established the better claim to NGC.<sup>28</sup>

**(a) Construction of the relevant leases turns on the vernacular meaning of "coal".**

22. CDP agrees that the issue of legal ownership turns on the vernacular meaning of the word "coal".<sup>29</sup> EnCana's submissions in this respect are difficult to follow but Devon notes that all of EnCana's arguments on ownership are based entirely on the view that NGC is part of the coal reserved to EnCana. On this basis, EnCana must be taken as accepting that the determining factor is the meaning of coal in the relevant documents.

**(b) The vernacular meaning of coal excludes NGC.**

23. The coal owners argue that the vernacular meaning of coal in the relevant leases and grants includes NGC. They rely heavily in this respect on the theory that responsibility to safely vent NGC when mining coal necessarily implies ownership.<sup>30</sup> They fail to mention that this very argument was expressly rejected in *Southern Ute*<sup>31</sup>, the leading case on the vernacular meaning of coal. They also fail to mention that this theory conflicts with Canadian law as established in *Borys*,<sup>32</sup> where the petroleum owner had

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<sup>27</sup> See Devon Written Argument, at para. 33.

<sup>28</sup> EnCana apparently agrees that this is the proper issue for the Board to determine if jurisdiction exists: see EnCana Argument, at para. 71.

<sup>29</sup> CDP Final Argument, at para. 165.

<sup>30</sup> EnCana Argument, at paras. 72, 85(d); CDP Final Argument, at para. 55.

<sup>31</sup> *Amoco Petroleum Company v. Southern Ute Indian Tribe et al*, 526 U.S. 865 (1999), at 879 ("*Southern Ute*").

<sup>32</sup> *Borys v. Canadian Pacific Railway*, [1953] A.C. 217 (P.C.) ("*Borys*").

responsibility for, but not ownership of, the portion of the gas cap that was extracted with petroleum.<sup>33</sup>

24. *Southern Ute* established that in the United States in 1909 and 1910, the common understanding of “coal” did not include NGC. EnCana seeks to distinguish *Southern Ute* on two grounds stating that: (a) it was decided “on a statutory provision”; and (b) it was decided “seemingly to reflect settled industry expectations from a decade long reliance on a government opinion of the statute.”<sup>34</sup>
25. While it is true that *Southern Ute* was decided on a statutory provision, that does not lessen its value here. What is critical about *Southern Ute* is that the Supreme Court of the United States determined and relied upon the common understanding of the word “coal” in arriving at its decision. This is the same interpretive approach mandated by *Borys* and *Anderson* when construing leases and grants. Further, no reason has been given as to why the vernacular meaning of coal in Canada during the early part of the last century would be any different than that in the United States during that same time frame.
26. As for the second ground on which EnCana seeks to distinguish *Southern Ute*, the majority reasons in *Southern Ute* never once mention “settled expectations” as a rationale for the result. The government opinion apparently referenced by EnCana was in fact withdrawn prior to the case reaching the United States Supreme Court, and the Government of the United States supported the coal owner position at the Supreme Court.<sup>35</sup> Settled expectations based on government opinion had absolutely nothing to do with the determination of the vernacular meaning of coal in *Southern Ute*.
27. In preference to *Southern Ute*, EnCana cites the Illinois Appeals Court decision in *Continental Resources*<sup>36</sup> as being instructive. However, EnCana glosses over two critical factors that formed the foundation of the decision in *Continental Resources*.<sup>37</sup> First, the reservation in that case was of the right to drill through, not into, coal seams for gas and

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<sup>33</sup> Ibid, at pp. 231-32; see also Percy Report, Attachment ‘A’ to Exhibit 18-002-2006-09-29, at p. 20.

<sup>34</sup> EnCana Argument, at para. 77.

<sup>35</sup> *Southern Ute*, at p. 872.

<sup>36</sup> *Continental Resources v. Illinois Methane*, 847 N.E. 2d 897 (Ill. App. 5 Dist. 2006) (“Continental Resources”); see EnCana Argument, at paras. 78, 90.

oil, with the lease containing a corresponding requirement that the lessee permanently case and cement all holes drilled through coal seams or mine workings.<sup>38</sup> Second, the rule of capture<sup>39</sup> is part of the law of Illinois such that there is no mineral ownership without physical possession of that mineral.

28. The leases and grants relevant to Devon's claims do not contain similar "drill through coal" language, and the rule of capture as it relates to split title mineral ownership has been expressly rejected in Canada<sup>40</sup>. Further, *Continental Resources* does not consider the vernacular meaning of the word "coal". The *Continental Resources* case is therefore of no assistance to the Board in determining NGC ownership in this proceeding.
29. CDP pays little attention to *Southern Ute*, merely suggesting that there is nothing to elevate it above the "many state cases" cited to the contrary.<sup>41</sup> However CDP fails to cite any "state case" that considered the vernacular meaning of "coal" and held that it included NGC.
30. As for the other evidence of the vernacular meaning of coal upon which Devon relies (i.e. legislation, IL 91-11, dictionaries, the conduct of EnCana as a part of the coal industry, EnCana's 1993 lease form),<sup>42</sup> the coal owners either ignore it or dismiss it as irrelevant where it is not precisely contemporaneous in time and place with the split of mineral title.<sup>43</sup> However, the simple fact is that if all evidence of vernacular that is not precisely contemporaneous with the event were to be discarded as irrelevant, interpretation of any historical document would be all but impossible.
31. There is a wealth of factual evidence that the vernacular understanding of coal, at various times and in various locations from the late 19<sup>th</sup> century through to today, has never included NGC. There is no evidence whatsoever that the vernacular understanding of coal has changed over the years, or is different in one place versus another. The only

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<sup>37</sup> Ibid, at p. 901-2.

<sup>38</sup> Ibid; see also *United States Steel Corp. v. Hoge*, 503 Pa. 140 (1983) for consideration of a similar reservation.

<sup>39</sup> Ibid.

<sup>40</sup> *Anderson*, [2004] S.C.C. 49, at paras. 36 - 39.

<sup>41</sup> CDP Final Argument, at para. 80.

<sup>42</sup> See Devon Written Argument, at paras. 46-60.

**(e) Mineral grants are of substances, not strata.**

35. In pre-hearing submissions, the coal owners argued that a bare reservation of “coal” includes all minerals that may be found within the coal strata. EnCana does not address this issue at all in its Argument. CDP’s submissions in support of this proposition address only one<sup>48</sup> of the many reasons offered by Devon as to why this proposition is incorrect at law and in any event inapplicable to the present circumstances.<sup>49</sup>
36. In advocating that this strata-based theory of mineral ownership be taken seriously, CDP relies on Professor Lucas’ statement that the idea of the lessee owning the property in the strata is “not that crazy”.<sup>50</sup> This is hardly a ringing endorsement. Unless CDP is advocating a “not that crazy” standard of proof, its submissions on strata-based mineral ownership should not be given credence.

**V. OTHER ISSUES RAISED BY COAL OWNERS.**

**(a) EnCana has changed its position**

37. At paragraph 124 of its Argument, EnCana states that:

And where, as here, there are competing claims - the Board cannot decide the dispute - and EnCana has never said to the contrary.

38. In fact, EnCana has said precisely the contrary in these very proceedings. Devon directs the Board to EnCana’s April 28, 2005 letter to the Board<sup>51</sup> and once again to the remarks of EnCana’s counsel at the January 31, 2006 oral hearing, where he stated unequivocally that the Board must “determine ownership” in these proceedings.<sup>52</sup>

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2005-04-13, at pp. 1, 3 and at Tab 1). This is identical wording to that contained in the Devon lease relating to that quarter section.

<sup>48</sup> CDP addresses only the issue raised in Dean David Percy’s evidence that the source of the doctrine is in an editor’s note in an unofficial reporting series, rather than in the case (*Bowser v. MacLean*) normally cited as being the first to stand for that proposition, saying effectively that the Board may not look behind the Court of Appeal’s statements in the *Little* case: CDP Final Argument, at para 79.

<sup>49</sup> The numerous reasons why this proposition should not be accepted in law are summarized in Devon’s Written Argument, at paras. 67-71.

<sup>50</sup> Hearing Transcript, Day 6, at p. 772, l.16.

<sup>51</sup> Exhibit 07-004-2005-04-28, at pp. 1-2.

<sup>52</sup> January 31, 2006 Hearing Transcript, at p. 47, ll. 20 - 25.

sensible conclusion to be drawn is that NGC has always been considered as a separate and distinct substance from coal, and is not included in any reservation or grant of coal at issue in these proceedings.

**(c) The evidence before the Board is sufficient to establish vernacular meaning.**

32. CDP and EnCana make similar arguments that the “full record” required to determine the competing claims of ownership is not before the Board.<sup>44</sup> This issue was largely addressed in Devon’s Written Argument<sup>45</sup>.
33. In addition to those submissions, it is noteworthy that neither EnCana nor CDP specify any relevant and potentially available evidence that is not before the Board. In Devon’s case, (and contrary to CDP’s submission), all of the documents under which title to coal was split off from title to natural gas and other minerals are in fact before the Board,<sup>46</sup> or the language of the coal reservation is acknowledged.<sup>47</sup> Devon is unaware of what further evidence could be required to provide a “full record”. Regardless, no such evidence was adduced by the coal owners.

**(d) The scientific evidence shows that NGC is a distinct, gaseous substance at initial reservoir conditions.**

34. The scientific evidence becomes relevant only if it is held that the vernacular meaning of the word coal in the relevant grants and leases may include NGC depending on its physical state *in situ*. With respect to the scientific evidence on this issue, Devon adopts the submissions made in the Joint Reply Argument of the Natural Gas Rights Holders filed concurrently with this Reply Argument.

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<sup>43</sup> EnCana Argument, at paras. 73, 74, 76(a); CDP Final Argument, at paras. 41-44, 153-54.

<sup>44</sup> EnCana Argument, at para 69, CDP Final Argument, at para 53.

<sup>45</sup> See paras 61-63.

<sup>46</sup> Apart from the “Section 8 lands” (see Exhibit 05-066(a)-2008-08-25) Devon understands that the documents splitting title are the leases appended to Devon’s pre-hearing Submissions (Exhibit 05-066(a-e)-2008-08-25). On the Section 8 lands, mineral title was split by a transaction between Dome and TransAlta in 1982, the relevant grant being of “all coal within upon or under” the lands. (see Exhibit 20-025, at p. 4, clause 1.1(a), and Part I of Schedule ‘B’).

<sup>47</sup> With respect to the Southeast Quarter of 15-34-26 W4, (See Exhibit 05-066- 2006(e)-08-25) (the “Section 15 lands”) EnCana has disagreed that Devon has produced the lease splitting title. This is of no significance as EnCana acknowledges the reservation under which it considers title was split as being of “coal, petroleum and valuable stone” as evidenced on the relevant Certificates of Title (Exhibit 07-003-

**(b) Devon has not changed its position**

39. Surprisingly, EnCana accuses Devon of changing position as to what is required to show entitlement under Section 16 of O&GCA.<sup>53</sup> This allegation is apparently based on the fact that Devon argued that this hearing was unnecessary. Of course, once the Board made a decision to hold this hearing into legal entitlement, Devon made submissions on that subject. This provides no reasonable basis for suggesting that Devon changed its position.

**(c) CDP's attempt to tender new "evidence" in Argument.**

40. CDP has submitted with its Final Argument a document referred to as the "Sequestration Patent",<sup>54</sup> which was not put to Mr. Mavor during his cross-examination. The Sequestration Patent is apparently authored by Mr. Mavor, at least in part. The obvious purpose of introducing this document is to impeach Mr. Mavor's testimony and his credibility as a witness.<sup>55</sup>
41. The Joint Reply Argument of the Natural Gas Rights Holders makes it abundantly clear that the Sequestration Patent does not in fact contradict Mr. Mavor's report or his testimony, nor does it provide any support for the coal owners' position.
42. Further, it is highly improper for CDP to submit this document with its Final Argument. It is a well known and obviously fundamental rule of fairness in any administrative or judicial proceeding that if a party intends to impeach the credibility of a witness, the evidence by which the witness is to be impeached must be at least described to the witness in cross-examination so that the witness may have an opportunity to explain the apparent contradiction.<sup>56</sup>
43. This principle has been described quite properly as "not only a rule of professional practice in the conduct of a case"<sup>57</sup>, but also "essential to fair play and fair dealing with

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<sup>53</sup> EnCana Argument, at paras. 128-131.

<sup>54</sup> CDP Final Argument, at paras. 93, 99-101, and Appendix B.

<sup>55</sup> This is clear on review of para 101 of CDP's Final Argument, where CDP urges the Board to examine Mr. Mavor's evidence in light of allegedly contradictory statements made in the Sequestration Patent.

<sup>56</sup> This rule is often referred to as the "Rule in *Browne v. Dunn*".

<sup>57</sup> *Browne v. Dunn* (1893), 6 R 67 (HL) at p. 70.

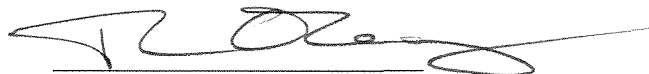
witnesses”.<sup>58</sup> The purpose of this rule is to protect against the ambush of a witness by means of not giving the witness the opportunity to state his or her position respecting later evidence which is alleged to be contradictory.<sup>59</sup>

44. Mr. Mavor has been precluded from addressing and explaining the Sequestration Patent due to the improper tactics employed by CDP. Devon submits that in these circumstances, the only fair and proper approach to follow is for the Board to ignore the improperly tendered evidence and all CDP's submissions related to such.<sup>60</sup>
45. Though they are not authored by Mr. Mavor, these same principles apply to the excerpts from the Whitson and Brule text entitled “Phase Behaviour”<sup>61</sup> submitted by EnCana with its Argument, and to the document referred to as the “GRI Report”<sup>62</sup> that was submitted with CDP’s Final Argument. Neither document in fact contradicts Mr. Mavor’s evidence, but neither was put to him in cross examination. As a matter of fairness, the Board should ignore these documents and all of the submissions that CDP and EnCana make in reference to them.

## **VI. CONCLUSION**

46. The coal owners have failed to provide any cogent reasons for the Board to abandon its jurisdiction to decide entitlement under section 16 of the O&GCA or to depart from a standard of proof on a balance of probabilities. It remains abundantly clear that Devon is entitled to produce NGC, and that the well licenses and holding requested by Devon should be confirmed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED DECEMBER 13, 2006.**



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<sup>58</sup> Ibid, at p. 71.

<sup>59</sup> *Stewart v. CBC* (1997), 150 D.L.R. (4<sup>th</sup>) 24 (Ont. Gen. Div.) at p. 180.

<sup>60</sup> *Enco Industries Ltd. v. Allendale Mutual Ins. Co.* (1987), 62 O.R. 766 (C.A.), at pp. 772-73.

<sup>61</sup> EnCana Argument, Appendix

<sup>62</sup> CDP Final Argument, Appendix B