

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

WRITTEN ARGUMENT OF FAIRBORNE ENERGY LTD.

November 15, 2006

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## I. OVERVIEW

1. Pursuant to an Amended Notice of Hearing dated July 27, 2006 the Alberta Energy and Utilities Board (the "Board") held a public hearing to consider the issue of legal entitlement to natural gas stored in coal.<sup>1</sup> In considering this entitlement, the Board has been asked to determine the extent of its jurisdiction, the applicable standard of proof to be applied, and whether that standard has been satisfied.
2. The coal owners wish to dictate the terms of NGC (natural gas stored in coal) development on freehold lands. They wish to profit from such development without ever demonstrating a compelling or even a credible claim to ownership of the resource. Having obtained a veto on such development under Bulletin 2006-19, the coal owners now seek to maximize their bargaining position by maintaining the status quo as long as possible<sup>2</sup> and avoiding a potentially adverse adjudication of their ownership claims.
3. With Bulletin 2006-19, the coal owners have effectively obtained all the benefits of an injunction without meeting the stringent legal test to obtain one in the Court of Queen's Bench, and without any exposure to liability for the damages caused to the gas producers as a result.<sup>3</sup> The continuation of this regime is manifestly unfair to natural gas rights holders, and is not in keeping with the orderly and efficient development of the resource.
4. Unlike the coal owners, Fairborne wishes to develop the NGC resource on freehold lands. It would be wrong at law, as well as highly inequitable, for Fairborne to have its investment in the disputed resource stranded and be forced to bring legal action against the coal owners simply because the coal owners decided to object to the licenses and holdings at issue.

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<sup>1</sup> In this argument, Fairborne will use the same terminology, descriptions and defined terms as set out in its pre-hearing Submissions (Exhibit 06-023-2006-08-25) and Reply Submissions (Exhibit 06-025-2006-09-29), unless otherwise stated. Fairborne will use the term natural gas stored in coal, abbreviated to "NGC" to refer to the substance at issue in this proceeding, which substance is often also referred to as "coalbed methane" or "CBM".

<sup>2</sup> Hearing transcript, Day 7 at p. 1012, 1. 8 - p. 1013, 1.14.

<sup>3</sup> As a condition of obtaining interim injunctive relief, a plaintiff must give an undertaking to pay the defendant damages caused by the injunction, should the plaintiff fail in the ultimate result: Sharpe, *Injunctions and Specific Performance in Canada*, (Canada Law Book Inc., Aurora, 1992-), at p. 2 - 35.

5. Fairborne submits that the Board should be guided in this proceeding by the facts and law relevant to ownership of NGC on split title lands, and by the stated purposes of the O&GCA<sup>4</sup>, specifically "the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta."<sup>5</sup> These considerations require the Board to confirm the licences and holdings at issue and to rescind Bulletin 2006-19.

## II. JURISDICTION

6. EnCana alone challenges the jurisdiction of the Board to make any ruling in this proceeding, arguing that the jurisdiction of the Board is ousted by the presence of a "*bona fide* dispute". Though EnCana is not contesting Fairborne's licenses, EnCana's arguments on jurisdiction would negatively impact Fairborne were they to be accepted. Fairborne has therefore addressed these arguments below.
7. Fairborne submits that adopting EnCana's position on jurisdiction would severely and negatively impact the economic, orderly and efficient development of the NGC resource on freehold lands.<sup>6</sup> For the reasons suggested in the Part 2 Reply Submission of Fairborne,<sup>7</sup> and those expressed herein, EnCana's position should be rejected as being unsupported in law and unworkable in practice.

### (a) **The Board has jurisdiction to decide entitlement**

8. It appears that EnCana believes that in cases where entitlement to a well licence is disputed, the Board is limited to the exercise of an administrative stamping function once the courts have determined that entitlement. This view was rejected by Professor Lucas when giving evidence on EnCana's behalf<sup>8</sup> and is clearly not in keeping with either relevant legislation or case law. For the reasons given below, Fairborne submits that the

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<sup>4</sup> *Oil and Gas Conservation Act*, R.S.A. 2000, c. 0-6.

<sup>5</sup> *Ibid*, at s. 4(c).

<sup>6</sup> EnCana even seems to agree: Hearing transcript, Day 7, at p. 1084, l. 21 - p. 1086, l. 24.

<sup>7</sup> Exhibit 06-025-2006-09-29 at paras. 11 - 16.

<sup>8</sup> Hearing transcript, Day 9, at p. 1368, ll. 7-24.

legal jurisdiction of the Board to decide entitlement in the proceeding is not just clear, but beyond doubt.

(i) Legislation

9. All parties seem to agree that the Board's powers are based in its enabling legislation. The key statutory provision in this proceeding is Section 16 of the O&GCA which states:

16(1) No person shall apply for or hold a license for a well

- (a) for the recovery of oil, gas or crude bitumen,  
or
- (b) for any other authorized purpose.

Unless that person is a working interest participant and is entitled to the right to produce the oil, gas or crude bitumen from the well or to the right to drill or operate the well for the other authorized purpose, as the case may be.

- (2) If, after 30 days from the mailing of a notice by the Board to a licensee at the licensee's last known address, the licensee fails to prove entitlement under subsection (1) to the satisfaction of the Board, the Board may cancel the licence or suspend the licence on any terms and conditions that it may specify. (emphasis added)

10. This provision gives explicit authority to the Board to grant gas well licenses to a party "entitled to produce" that gas, and to determine entitlement to its "satisfaction" in each case. No restrictions on this jurisdiction, whether as to questions of ownership or otherwise, are expressed. As such, the authority of the Board to rule on entitlement in this proceeding is plain on the face of the statute, and no further inquiry into jurisdiction should be necessary.

11. To the extent that the Board's express jurisdiction under section 16 of the O&GCA may somehow be considered ambiguous or unclear, other statutory provisions specifically grant the Board jurisdiction to rule on entitlement in this proceeding:

- Section 16 of the *Energy Resources Conservation Act*<sup>9</sup> (the "ERCA") provides the Board with residual jurisdiction to take all steps necessary to fulfill its functions (such as issuing well licences), stating:

The Board, in the performance of the duties and functions imposed on it by the Act and by any other Act, may do all things that are necessary for or incidental to the performance of any of those duties or functions.

- Section 94 of the O&GCA is of similar effect:

The Board, has the exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act.

12. The coal owners seem to agree that a consideration of ownership of NGC is "necessary for or incidental to" (as per ERCA, section 16), and a "matter or question arising under" (as per O&GCA, section 94) section 16 of the O&GCA. Indeed, this is the very foundation of their objections to the well licences and holdings at issue<sup>10</sup>. Jurisdiction must therefore rest with the Board.

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<sup>9</sup> R.S.A. 2000, c. E-10.

<sup>10</sup> Hearing transcript, Day 9, at p. 1343, l. 21, p. 1344, l. 5. Professor Lucas calls ownership the "critical factor" in making a decision on the question of entitlement in this proceeding.

13. Moreover, jurisdiction to decide entitlement in this proceeding must by necessity accompany the licence granting authority of the Board. The Supreme Court of Canada recently endorsed this concept of "jurisdiction by necessary implication," and stated the relevant rule as follows:

When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.<sup>11</sup>

14. If the Board were to have authority to grant well licences only when entitlement is not disputed, the Board would in cases of dispute be powerless to fulfill its statutory purpose under section 4(c) of the O&GCA "to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta."<sup>12</sup> Further, the authority provided in O&GCA section 16(2) to determine entitlement to "the satisfaction of the Board," would be without meaning<sup>13</sup>.
15. Taken together, the relevant statutory provisions leave no doubt of the Board's power, and indeed obligation, to determine entitlement to the licences and the holdings sought in this proceeding.

(ii) Cases

16. The Board's power to decide "entitlement" in all contexts is also clear in case law. There are a number of cases in which Alberta courts have noted that the Board's regulatory jurisdiction continues in the face of legal disputes, whether as to ownership or otherwise.

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<sup>11</sup> *Atco Gas & Pipeline Ltd. v Alberta (Energy & Utilities Board)*, [2006] SCJ No. 4 (S.C.C.), at para 51 (quoting *Re: Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641 (H.C.J.)).

<sup>12</sup> O&GCA, s. 4(c).

<sup>13</sup> Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, (3d ed., Carswell, Scarborough, 2000) at p. 275: "... an interpretation [of a statute] which adds to the terms of its provisions or deprives them of meaning is not recommended."

For example, Fruman J. (as she then was) accepted that the Board had such jurisdiction despite an ownership dispute in *Anderson v. Amoco Canada Oil & Gas*<sup>14</sup>, stating:

I accept that for regulatory purposes, solution gas belongs to the petroleum owner, ...(emphasis added)

The regulators' view does not determine the legal ownership of solution gas. If the regulators have misconstrued the law, their practices will have to change, however cumbersome that process might be. The courts' function is not to preserve legally incorrect administrative positions., ...

17. Also of relevance on this point is *Alberta Energy Co. v. Goodwell Petroleum Corp.*<sup>15</sup> The Board had shut in four AEC bitumen wells that were producing initial gas cap gas along with bitumen, on the basis that AEC was not entitled to produce the gas cap under its bitumen leases.<sup>16</sup> The Court of Appeal reversed the Board decision, holding that the bitumen leases provided AEC with the requisite entitlement to produce the gas cap. Though not strictly an ownership dispute, the case concerned property rights, and the jurisdiction of the Board to make a decision on entitlement by reviewing and interpreting the leases was never questioned.

**(b) The Board is capable of exercising this jurisdiction**

18. The Board has broad expertise and is fully capable of properly considering any issues, legal or technical, that may be involved in the exercise of its mandate to determine entitlement. In the context of deciding regulatory entitlement the Board can and should inquire into ownership, to the extent it may consider such inquiry to be reasonably necessary and justified by the circumstances.

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<sup>14</sup> [1994] A.J. No. 805, (Q.B.) (at paras 146-7).

<sup>15</sup> (2003), 22 Alta. L.R. (4<sup>th</sup>) (C.A.).

<sup>16</sup> *Ibid*, at paras. 11-12, 16, 17, 72.

19. The proper approach was succinctly explained in the testimony of Dean David Percy. Dean Percy noted that where entitlement to produce the resource is at issue, "the Board has to look at sufficient information to prove entitlement to the resource to the satisfaction of the Board"<sup>17</sup>, with the Board having discretion as to how far to inquire.<sup>18</sup> While it may well be correct to suggest, as did Professor Lucas, that due to the high order position of property rights in the "legal firmament", the Board should undertake a relatively rigorous inquiry<sup>19</sup>, this does not in any way restrict the Board's authority to rule on entitlement.

### III. STANDARD OF PROOF

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

20. CDP accepts the Board's legal jurisdiction<sup>20</sup>, but attempts to invoke a particularly onerous standard of proof which would effectively remove the Board's ability to determine entitlement in this proceeding. CDP argues that under section 16 of the O&GCA, entitlement must be proven as a certainty before well licences are granted. Without a final court judgment on the specific ownership in dispute, CDP suggests the requisite level of certainty cannot exist. For the reasons expressed below and in Fairborne's Reply Submission,<sup>21</sup> this argument is without merit.
21. It is well established that in tribunal proceedings, the standard of proof is a balance of probabilities.<sup>22</sup> CDP has not yet provided any relevant authority suggesting that in this case the Board is instead required to satisfy itself to a standard of certainty. Dean Percy specifically stated in cross examination that he is aware of no such authority,<sup>23</sup> and the Alberta Court of Appeal has specifically rejected a "high degree of certainty" as the

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<sup>17</sup> Hearing transcript, Day 5, at p. 0720, ll. 7 - 15.

<sup>18</sup> Hearing transcript, Day 5, at p. 0721, ll. 3 - 12; see also p. 0717, l. 21 - p. 0718, l. 4; p. 0720, ll. 7 - 15.

<sup>19</sup> Hearing transcript, Day 9, at p. 1344, l. 6 - p. 1345, l. 12; and p. 1374, l. 6 - p. 1377, l. 13.

<sup>20</sup> CDP pre-hearing Submission, Exhibit 03-036-2006-09-15, at para 18; Hearing transcript, Day 7 at p. 1001, l. 17 - p. 1002, l. 23.

<sup>21</sup> Exhibit 06-025-2006-09-29, at paras. 17-24.

<sup>22</sup> Sara Blake, *Administrative Law in Canada*, (4<sup>th</sup> ed., Lexis Nexis Canada, Markham, 2006) at 69.

<sup>23</sup> Hearing transcript, Day 5, p. 0718, l. 21 - p. 0719, l. 2.

appropriate standard of proof, specifically endorsing the "balance of probabilities" as the standard of proof in Board proceedings on at least two separate occasions.

22. In *Mesa Operating Ltd. v. Amoco Canada Resources Ltd.*,<sup>24</sup> the issue concerned Amoco's decision to conduct an areal based pooling rather than pooling on a reserves basis. The result of an areal based pooling halved the royalty payable to Mesa. In order to assess damages, the Court of Appeal considered how the Board would have dealt with the pooling issue. The court, at paragraph 30, rejected the view that such a decision required certainty, instead determining the dispute on a balance of probabilities:

Does the Board decide the question on the balance of probabilities? It is said, on the contrary, that it requires the evidence establishing the boundaries of the reservoir to meet a more stringent test. Mr O'Brien suggested the burden was "a high degree of certainty." I have read several Board decisions. . . . On my reading of the decisions, the Board examiners give relief only when persuaded about the facts of the matter, . . . . But I do not agree that the Board denies relief unless the matter is entirely free from doubt. I suspect some degree of doubt is inevitably present in these assessments. I therefore conclude that the burden of proof required by the Board is the balance of probabilities . . . (emphasis added)

23. Two years later in *Gannon Bros. Energy Ltd. v. Alberta Energy & Utilities Board*<sup>25</sup>, the Alberta Court of Appeal reiterated its endorsement of the standard of proof on a balance of probabilities in proceedings before this Board.
24. The underlying rationale for CDP advocating a standard of certainty seems to be that it will suffer irreparable harm if the Board were to err at law in deciding entitlement.<sup>26</sup> However, in such case CDP would still be able to seek a variety of remedies in the Court

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<sup>24</sup> [1994] A.J. No. 201 (C.A.).

<sup>25</sup> (1996), 178 A.R. 302 (C.A.) at paras. 5-6.

<sup>26</sup> CDP pre-hearing Submission, (Exhibit 03-03602006-09-15), at para 30.

of Queen's Bench, including interim injunctive relief.<sup>27</sup> By definition, the availability of these remedies shows that any harm that may be suffered by CDP as a result of a ruling in this proceeding is not irreparable.

25. CDP may suggest that Professor Lucas has endorsed the view that a standard of proof requiring certainty should be utilized by the Board in this proceeding. Though Professor Lucas spoke of "a high degree of certainty,"<sup>28</sup> in discussing how the Board should approach entitlement, it is clear in context<sup>29</sup> that he was referring not to a unique standard of proof to be applied by regulators when dealing with property rights, but to the degree of rigour that the Board should apply in undertaking an inquiry into entitlement where ownership is disputed.
26. Had the Legislature wished to depart from the well established civil standard of proof on a balance of probabilities, it would have specifically expressed this intention. It did not do so. In the absence of such a legislated direction, the Board is required to act in accordance with the standard that meets the reasonable commercial expectations of the parties before it – a balance of probabilities.

#### **IV. ESTABLISHING ENTITLEMENT**

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

27. It is common ground amongst the parties that there is no deficiency in the subject applications or in the state of the relevant leasing documents. The original applications were granted by the Board on the strength of the documents first submitted and the quality of the applications, as opposed to their subject matter, has not been challenged. The only issue appears to be with respect to whether or not the gas producers were

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<sup>27</sup> The remedies that could be pursued by CDP at the Court of Queen's Bench include damages, injunctive relief and interim injunctive relief. One usual requirement for interim injunctive 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 p. 2-26.

<sup>28</sup> Hearing transcript, Day 9, at p. 1376, ll. 3-8.

granted NGC as part of the gas title or whether this substance has been reserved as part of the coal title.

28. A review of the Certificates of Title relating to coal underlying the lands on which Fairborne seeks to drill for NGC in this proceeding<sup>30</sup>, shows that the underlying grant or reservation relied on by CDP is simply one of "coal". On this basis Fairborne submits that the issue of whether NGC is owned by CDP should be decided in the same manner and with the same result for each of the Fairborne well license applications at issue.
29. All parties seem to agree that the starting point for determining how to construe the relevant grants and reservations is *Borys v. Canadian Pacific Railway*<sup>31</sup>. That case involved a 1918 transfer from the CPR reserving all "coal, petroleum and valuable stone". *Borys* established that these words were to be interpreted in their vernacular rather than scientific sense, as used by the land owners, business men or engineers of the day.<sup>32</sup>
30. As a starting point, there can be little doubt that "natural gas" and "gas" include NGC. This is consistent with numerous legislative provisions<sup>33</sup> as well as statements by the Board,<sup>34</sup> by EnCana<sup>35</sup> and by others.<sup>36</sup> With this in mind, and based on *Borys*, the issue on which entitlement in this proceeding turns is the vernacular meaning of "coal" in the relevant grants and leases.

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

31. Fairborne submits that vernacular meaning may be proven by various types of evidence, all of which must be weighed according to its probative value. Evidence of how words

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<sup>29</sup> See Hearing transcript, Day 9, at p. 1344, l. 6 - p. 1345, l. 12; p. 1374, l. 6 - p. 1376, l. 13.

<sup>30</sup> Exhibit 04-07-2005-06-14.

<sup>31</sup> [1953] A.C. 217(P.C.).

<sup>32</sup> *Ibid*, at 227.

<sup>33</sup> See Fairborne Submissions (Exhibit 05-066-2006-08-25), paras. 19-30.

<sup>34</sup> AEUB Informational Letter IL 91-11, stating "The ERCB and Energy consider coalbed methane to be a form of natural gas" (p.1).

<sup>35</sup> For example, Exhibits 20-059 (Feb 5, 2002 and July 2, 2002 letters, at p. 1) and 20-058 at p. 2, 3 and 4.

<sup>36</sup> For example, see Exhibit 20-053, CAPP position Paper, "Natural Gas from Coal in Alberta", at p. 2.

were used by courts and legislators is potentially relevant, as are dictionary definitions and industry usage. All may be indicative of how landowners, business people and engineers would have understood words in a mineral lease.

(i) Cases

32. Some guidance on the vernacular meaning of "coal" can be gained from Canadian case law. The Privy Council in *Borys* held that a reservation of "coal, petroleum and valuable stone"<sup>37</sup> excluded hydrocarbons that were in a gaseous phase *in situ*. In *Anderson v. Amoco Canada Oil & Gas*<sup>38</sup>, the Supreme Court of Canada held that the owner of all hydrocarbons "except coal and petroleum" owned all hydrocarbons in a gas phase at initial pool conditions<sup>39</sup>.
33. It can be safely taken from *Borys* and *Anderson* that in Canada, reservation of "coal" does not include any hydrocarbons in a gaseous phase at initial reservoir conditions. As set out later in this Argument, NGC is in a gaseous phase *in situ*, such that it cannot be considered to be "coal". However, regardless of the phase of NGC at initial reservoir conditions, Fairborne submits that the evidence is clear that coal and NGC are understood in the vernacular as separate and distinct substances.
34. American case law is highly persuasive in this respect. *Amoco Petroleum Company v. Southern Ute Indian Tribe et al*<sup>40</sup> is unquestionably the leading case considering the vernacular meaning of "coal".
35. Dean Percy testified as to the significance of the *Southern Ute* case. He provided a number of cogent reasons why the result in *Southern Ute* likely reflects Canadian law,

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<sup>37</sup> For the wording of the reservation, see (1951) 2 W.W.R. (N.S.) 145 (Alta. S.C.), at 147.

<sup>38</sup> [2004] S.C.C. 49.

<sup>39</sup> *Ibid*, at paras 10, 42.

<sup>40</sup> 526 U.S. 865 (1999).

and why the same result would likely follow in Canada if the present ownership dispute were to be litigated<sup>41</sup>:

- *Southern Ute* dealt with a simple reservation of coal similar to the reservation at issue in this proceeding;
- in construing the meaning of the reservation of coal, the United States Supreme Court followed an interpretive approach similar to that taken in the governing Canadian cases of *Borys* and *Anderson*;
- *Southern Ute* involved expert scientific evidence similar to that presented in this proceeding, which evidence was described very simply and summarized by the court; and
- it was a strong decision of the court, in that it was decided by a 7-1 majority.

36. After careful consideration, the seven judge majority in *Southern Ute* concluded that the term "coal" did not include NGC, stating:

...the common understanding of coal in 1909 and 1910 would not have encompassed CBM gas, both because it is a gas rather than a solid mineral and because it was understood as a distinct substance that escaped from coal as the coal was mined, rather than as part of the coal itself.<sup>42</sup>

Given that *Southern Ute* is a decision of the United States Supreme Court, it is submitted that the Board should give it considerable weight, reaching a conflicting result only for compelling reasons supported by cogent and convincing evidence.

37. The coal owners have not put forth any explanation nor have they tendered any evidence as to why the vernacular meaning of "coal" in the United States in the early 20<sup>th</sup> century

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<sup>41</sup> Hearing transcript, Day 5, at p. 677, l. 8 - p.678, l. 14.

was different than that in Western Canada at that same time, or today, or at any time in between. Fairborne submits that in these circumstances, *Southern Ute* should be followed and the licences and holdings at issue affirmed.

(ii) Legislation

38. Legislators in Canada and elsewhere are also of the view that NGC is not within the vernacular meaning of the term "coal". Alberta and British Columbia both passed laws in 2003 based on the principle that NGC comes within the meaning of the term "natural gas" but not within the meaning of the term "coal"<sup>43</sup>.

39. The *Coal Conservation Act*<sup>44</sup> also suggests that the vernacular meaning of "coal" is restricted to a solid substance:

"coal", in addition to its ordinary meaning, includes manufactured chars, cokes, and any manufactured solid coal product used or useful as a reductant or energy source or for conversion into a reductant or energy source." (emphasis added)

40. Looking beyond Canada, legislators in Australia and the United Kingdom have also tended to define NGC as a substance separate and distinct from coal<sup>45</sup>.

41. There is however one foreign jurisdiction where coal owners have been granted ownership of NGC by legislation. In the Australian state of Victoria, the governing legislation refers to "hydrocarbons within a deposit of coal or oil shale". It does not define NGC as a component or part of coal<sup>46</sup>, and therefore does not provide any support for the argument that the vernacular meaning of coal includes NGC.

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<sup>42</sup> See Note 40, at pp. 874-75.

<sup>43</sup> Percy report, Attachment "A" to Exhibit 18-002-2006-109-29, at pp. 11 - 12: *Mines and Minerals Act, s.64(1); Coalbed Gas Act, S.B.C. 2003, c. 18, s. 1, (re "coal", "coalbed gas")*, s. 4.

<sup>44</sup> R.S.A. 2000, c. C-17, s. 1.

<sup>45</sup> Percy report, Attachment "A" to Exhibit 18-002-2006-09-29, at pp. 12 - 13, and materials cited therein.

<sup>46</sup> *Petroleum Act, Victoria, 1998, s. 6(2)*.

(iii) Dictionaries

42. The court in *Southern Ute* cited numerous late 19<sup>th</sup> and early 20<sup>th</sup> century dictionary definitions of coal in the course of discerning vernacular meaning. All these definitions referred to coal as a "solid" of dark color, and without any reference to its chemical composition or constituents.<sup>47</sup> The court concluded that the vernacular meaning of coal is "the solid rock substance that was the country's primary energy source."<sup>48</sup>
43. More current dictionary definitions of coal support this conclusion. The Merriam - Webster's Collegiate dictionary defines "coal", *inter alia*, as "a black or brownish black solid combustible substance",<sup>49</sup> while the Canadian Oxford paperback dictionary<sup>50</sup> defines coal as a "hard black or blackish rock .... "
44. Dictionary definitions of "fire-damp" (a synonym of NGC) tend to define it in such a way as to infer that it is a distinct substance from coal. In *Southern Ute*, the court noted that dictionaries in the late 19<sup>th</sup> and early 20<sup>th</sup> century defined it as a gas "contained in" or "given off by" coal but not as coal itself, indicating that it was viewed as a distinct substance.<sup>51</sup>
45. More recent dictionary definitions of "fire damp" are consistent with those referenced in *Southern Ute*. As an example, the 1970 re-issue of the Oxford English Dictionary defines "fire-damp" as:

a miner's term for carburetted hydrogen or marsh-gas which is  
given off by coal, ....<sup>52</sup> (emphasis added)

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<sup>47</sup> Note 40, at p. 874.

<sup>48</sup> Ibid, at p. 874.

<sup>49</sup> 10<sup>th</sup> ed., at p. 219.

<sup>50</sup> Exhibit 20-060.

<sup>51</sup> Note 40, at p. 874.

<sup>52</sup> The Oxford English Dictionary (1970 re-issue), Vol. IV, at p. 243.

46. A further example is found in the 1983 Gage Canadian Dictionary<sup>53</sup> which defines "fire-damp" not as part of coal, but as:

"a mixture of gases, consisting mainly of methane, that forms in coal mines"

47. Fairborne is not aware of any dictionary or other non-scientific definitions of coal or NGC that suggest NGC is a component of coal, as opposed to a distinct substance given off by the coal. Just as coal is considered a solid, it would seem clear that NGC continues to be considered to be a substance "contained in" or "given off" by coal, and separate and distinct from the coal itself.

(iv) Industry meaning

48. Industry vernacular usage will usually be of importance in interpreting a lease term. Here, there is evidence strongly suggesting the industry understanding of coal as a solid substance separate and distinct from the gas stored within the coal structure. In contrast, there is no such evidence of any landowner, business person or engineer considering NGC as a constituent of coal.
49. Proof of the industry view of NGC and coal as separate substances is provided by PanCanadian's 1993 lease form.<sup>54</sup> This reflects the first attempt by industry to provide explicitly for NGC in its leases.<sup>55</sup> At that time, PanCanadian sought to exclude NGC from the grant and specifically distinguished it from coal when doing so. The definition of "leased substances" in that lease contains the exclusionary phrase: "except coal and petroleum and except natural gas derived from or associated with coal deposits".<sup>56</sup>
50. Further, EnCana's conduct suggests an acknowledgement that a lease of natural gas without coal includes NGC. Prior to the 2003 revisions to the *Mines and Mineral Act*

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<sup>53</sup> Gage Canadian Dictionary, (Gage Educational Publishing, 1983) at p. 445.

<sup>54</sup> Exhibit 20-049.

<sup>55</sup> Hearing transcript, Day 7, at p. 1049, l. 10 - p. 1052, l. 4.

<sup>56</sup> Exhibit 20-049 - see definition of "leased substances".

which clarified NGC ownership on Crown lands<sup>57</sup>, EnCana drilled a number of NGC wells on Crown lands on the strength of its natural gas leases<sup>58</sup>. EnCana also attempted in 2001 and 2002 to negotiate a farmout or joint venture with Centrica to develop NGC on Crown lands, relying on Centrica's natural gas leases to provide the required entitlement.<sup>59</sup> EnCana obviously considered NGC as "natural gas" under natural gas leases.

51. With respect to the industry view of coal, the coal owners have even acknowledged that the current common understanding of the terms "coal" would be as a solid rock substance<sup>60</sup>, similar to that view of the court in *Southern Ute*.
52. The industry scientific experts also concurred that coal is a solid. Although he believed that using the word solid to describe coal is not appropriate in the scientific sense, Dr. Jeffrey Levine acknowledged in his report<sup>61</sup>, that use of the term solid to describe coal is accurate in the vernacular sense. Mr. Matthew Mavor also made this point in his report.<sup>62</sup>

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

53. The coal owners, having requested this hearing before the Board, have offered little or no evidence to the Board to indicate that the applicable vernacular meaning of coal includes NGC. Yet, Fairborne expects that they will try to turn this lack of evidence to their advantage and urge the Board to accept the contention of Professor Lucas<sup>63</sup> that the evidence before the Board is insufficient to allow a ruling on entitlement. To accept Professor Lucas' view would be equivalent to imposing by other means the extraordinary standard of proof sought by CDP, which has been conclusively rejected by the courts.

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<sup>57</sup> R.S.A. 2000, c. M-17, at section 67(1) (which was enacted in S.A. 2003 c.18, at s. 15)

<sup>58</sup> Hearing transcript, Day 8, at p. 1180, l. 16 - p. 1183, l. 3.

<sup>59</sup> Hearing transcript, Day 8, at p. 1190, l. 14 - p. 1193, l. 24.

<sup>60</sup> Hearing transcript, Day 7, at p. 1197, ll. 8 - 12.

<sup>61</sup> Exhibit 19-002-2006-09-15, at p. 7, ll. 16-19

<sup>62</sup> Mavor report, attachment "A", Exhibit 18-001-2006-08-25, at p. 1: "Coal is a rock composed of solid carbonaceous material, ..."

<sup>63</sup> Hearing transcript, Day 9, at p. 1341, ll. 13 - p. 1342, l. 6

54. Fairborne submits that the evidence before the Board is more than sufficient. The vernacular meaning of coal, natural gas and of NGC, as understood by landowners and business people throughout the 20<sup>th</sup> century has been clearly proven. The word "coal" has at all relevant times been understood as a solid brownish-black rock, and NGC has at all material times been understood as a separate and distinct substance. These conclusions are supported by multiple evidentiary sources, and even by the words and the conduct of the coal owners themselves.

55. The suggestion that more evidence is required also seems to ignore the practice of the courts in determining vernacular meaning. In *Borys and Southern Ute*, the courts did not require expert evidence from lexicographers, linguists, etymologists or historians when assessing vernacular. Such evidence is not required by the Board either. The available evidence in the form of case law, legislation, dictionaries and industry usage is more than sufficient to prove, on a balance of probabilities, the vernacular meaning of the terms at issue.

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

56. If it is held that NGC belongs to the natural gas rights holders only if it is gaseous *in situ*, then the Board can be expected to have regard for the scientific evidence of Mr. Mavor and Dr. Levine. Fairborne adopts the submissions made in respect of that scientific evidence in the Joint Argument of the Natural Gas Rights Holders, filed concurrently with this Argument (the "Joint Argument").

57. The facts established by the scientific evidence are described in the Joint Argument. Specifically, Fairborne submits that the following significant facts were clearly established<sup>64</sup>:

- coal is a rock and therefore a solid substance;

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<sup>64</sup> Joint Argument of the Natural Gas Rights Holders, at p. 2.

- gas stored in coal is gaseous at the *in situ* temperature and pressure conditions of Alberta's coal seams; and
- coal is a container for natural gas. The two substances are easily separated.

58. To the extent that the vernacular distinction between coal and NGC depends on the phase in which NGC exists *in situ*,<sup>65</sup> the scientific evidence provides a clear result. NGC would fall clearly within the meaning of "natural gas" and not of "coal" since it exists in a gaseous phase at all times. For the same reason, and according to *Borys* and *Anderson*, NGC would fall outside the vernacular meaning of "coal".<sup>66</sup>

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

59. The coal owners cite *Little v. Western Transfer and Storage Limited*,<sup>67</sup> and a line of cases relied upon therein for the proposition that a reservation of coal gives ownership of the entire strata where the coal is located, including all other substances and minerals that may exist within that strata. This proposition is not correct in law.

60. The flaws in this were addressed by Dean Percy in his report<sup>68</sup> and during his testimony at the hearing<sup>69</sup>. The reasons provided by Dean Percy as to why the ownership by strata concept suggested in *Little* is not applicable in the present case are:

- (a) The line of cases cited by the Alberta Court of Appeal in *Little* as supporting this conclusion do not, on close examination, provide that support. The genesis of this line of cases is in *Bowser v. MacLean*<sup>70</sup>. The idea that the coal owner owns the entire strata in which the coal is found is not drawn from the reasons issued by the

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<sup>65</sup> This situation would then be similar to that in *Borys*, where the vernacular distinction between "petroleum" and other hydrocarbons depended upon whether or not the hydrocarbon was in a liquid phase, *in situ*.

<sup>66</sup> Professor Lucas conceded that this conclusion would follow if NGC, as it exists *in situ*, is in a gaseous state (Hearing transcript, Day 9, at p. 1388, l. 4 - p. 1389, l. 5.).

<sup>67</sup> [1922] 3 W.W.R. 356 (Alta. S.C.A.D.)

<sup>68</sup> Attachment "A" to Exhibit 18-03-2006-09-29, at pp. 14 - 16.

<sup>69</sup> Hearing transcript, Day 5 at p. 0673, l. 25 - p. 0677, l. 7.

<sup>70</sup> (1860), 45 E.R. 682 (Chancery).

court in *Bowser* (which deals with "outstroke" - the right to use tunnels under one parcel to transport coal from under another), but from an editor's note in an unofficial series of law reports;<sup>71</sup>

- (b) The concept of mineral ownership by strata has never been applied to resolve any competing claims to minerals within the same strata, and would lead to absurd results if adopted in those situations. To quote Dean Percy:

The transfer and reservation of coal is subject to the same rules as other minerals. Where one person owns coal rights and another owns the rights to another mineral, I am not aware of any case in which the courts have found, as Professor Lucas asserts, that the person who owns the coal strata owns all the substances (including the other mineral) within those strata. Such a conclusion would lead to absurd results and mean, for example, that where A owns rights to coal and B owns rights to petroleum and natural gas, B would have no claim to any petroleum and natural gas contained in the same strata as A's coal. There is no principle that a right to coal pre-empts the rights to all other minerals.<sup>72</sup>

61. The strata based mineral ownership theory urged by the coal owners is virtually unknown in legal scholarship and jurisprudence. It has entirely "escaped the people who wrote property law textbooks",<sup>73</sup> and has, as far as Fairborne can discern, never been cited or relied upon by any Canadian court. Even Professor Lucas admitted in cross-examination

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<sup>71</sup> Hearing transcript, Day 5, at p. 0675 l. 25 - p. 0677 l. 7; Exhibit 20 - 037 (case report with editor's note).

<sup>72</sup> Percy report, Attachment 'A' to Exhibit 18-003-2006-09-29, at p. 16.

<sup>73</sup> Hearing transcript, Day 5, at p. 0675 ll. 10 - 11; see also p. 0677 ll. 6 - 7.

that his discussion of the *Little* case does not suggest that a strata based theory of ownership regarding coal has been articulated by Canadian courts.<sup>74</sup>

62. A review of the relevant grants and leases also refutes the suggestion that title was severed based on strata as opposed to substance. Specifically, the reservations of coal relied upon by the coal owners are often contained in a definition of "leased substances"<sup>75</sup>. Older leases describe various substances and also use the phrase "leased substances" elsewhere in the document<sup>76</sup>. All relevant title documents describe the rights of the parties according to the mineral substances granted or reserved. None define these rights according to strata.
63. In summary, strata based mineral ownership is not supported by the line of cases on which it is said to be based, would lead to absurd results if applied to split mineral titles, conflicts directly with the language in the relevant leases and has not been endorsed in any legal texts or any significant body of Canada case law. The Board should reject this novel theory.

## V. PROPOSALS BY ENCANA

### (a) **Vertical pooling is of no assistance**

64. EnCana has made several suggestions to the Board about potential measures to alleviate the detrimental impacts on resource development if the Board does not make a decision in respect of NGC entitlement in this proceeding. One suggestion involves vertical pooling of gas wells. However, pooling is designed to deal with allocating production between resource owners – it does not address a dispute over ownership of the resource<sup>77</sup>. Where two parties claim ownership of the resource in its entirety, no issue of allocating

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<sup>74</sup> Hearing transcript, Day 9, at p. 1347, l. 22 - p. 1348, l. 1.

<sup>75</sup> See for example, the PanCanadian lease at Exhibit 20-049.

<sup>76</sup> See for example Exhibit 05-066(e) - 2006-08-25 (Devon leases splitting title to "petroleum, natural gas" etc. from coal) at clause 11, 3<sup>rd</sup> line.

<sup>77</sup> Bankes, Nigel, "Compulsory Pooling Under the Oil and Gas Conservation Act of Alberta", (1997) 35 Alta. Law Rev. 945 at pp. 950 - 51, 956 - 57.

the resource between the parties is in existence. Even if the law were to allow it, vertical pooling has no application.

65. Of equal importance is the testimony of the applicants and the gas producers that intervened in this proceeding to the effect that if the proceeds of production of NGC were paid to the Provincial Treasurer pending resolution of the resource ownership dispute, they would not develop the resource.<sup>78</sup> Vertical pooling would thus fail to achieve any purpose.
66. Even if there were two natural gas streams to be pooled (i.e., NGC and natural gas from carbonaceous shales or from sands), measurement of the two streams for allocation purposes would involve intractable technical problems that could significantly undercut the value of the resource and make reliable allocation impossible.
67. One measurement option suggested is metering. It is apparent on the evidence that allocation based on metering would be difficult or even impossible<sup>79</sup> and results in increased well head pressure both of which have a negative impact on the production rates and economics of the wells.<sup>80</sup> For this reason, metering is undesirable.
68. Presumably due to a recognition of the costs and production implications of metering, EnCana has suggested, as an alternative to metering, the use of control wells to allocate production. Unfortunately, control wells would not materially assist accurate allocation between the two gas streams. This is because, as stated by Dr. Levine, coal is a heterogeneous substance.<sup>81</sup> This heterogeneity makes control wells very unreliable guides to production from other wells. Control well data, even data obtained from wells

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<sup>78</sup> For example, see Hearing transcript, Day 1, at p. 0074, l. 23 - p. 0075, l. 1 (Devon) and Day 3, at p. 0456, ll. 8 - 21 (Quicksilver).

<sup>79</sup> Hearing transcript, Day 1, at p. 0071, ll. 17-24.

<sup>80</sup> Hearing transcript, Day 8, at p. 1242, l. 19 - p. 1243, l. 15; Day 3, at p. 0437, l. 16 - p. 0438, l. 5, and p. 505, l. 20 - p. 506, l. 11.

<sup>81</sup> Levine report, Exhibit 19-002-2006-09-15, at p. 1.

in close proximity, cannot be relied upon to accurately allocate production from a given well.<sup>82</sup>

69. Finally, EnCana has suggested the formation of a technical committee to study the issue and suggest a solution, in the interim keeping intact the development moratorium imposed by Bulletin 2006-19. Fairborne sees no way that a technical committee would materially assist in solving the entitlement issue now before the Board.

**(b) Reduced spacing is impractical**

70. Another EnCana proposal is a reduction of drilling spacing units for NGC wells, from one well per section to one well per quarter section. As has been indicated by several witnesses before the Board, this would result in only minimal reduction to the volume of land sterilized by Bulletin 2006-19.

71. Moreover, such a plan would result in greater potential for inequitable drainage from stranded parcels, and increased offset obligations on these stranded parcels. This would in turn prejudice the ultimate resource owner, the surface freehold owner, or both. It would result in landowners and resource owners being treated differently depending on the source of their ownership and their proximity to non split title or Crown lands.<sup>83</sup>

**(c) A "quiet title" policy unfairly empowers the coal owners**

72. The clear goal of the coal owners in this proceeding is to convince the Board to refrain from making any decision and to keep Bulletin 2006-19 in place pending a final judicial decision, thus freezing development of the resource unless such development has the consent of the coal owners. The practical effect of the type of ruling sought by the coal owners is obvious, and is similar to the situation reviewed by the Alberta Court of Appeal in *Alberta Energy Co. v. Goodwell Petroleum Corp. Ltd.*<sup>84</sup>:

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<sup>82</sup> Hearing transcript, Day 3, at p. 506, ll. 12-19, and p. 438, ll. 6-25.

<sup>83</sup> Hearing transcript, Day 3, at p. 507, l. 19 - p. 508, l. 3.

<sup>84</sup> [2003] A.J. No. 1207, (C.A.), at para. 80.

The Board decided that AEC has no right to produce initial gas-cap gas and ordered it to acquire these rights through an agreement with Goodwell. The effect of this ruling is to give the gas lessee a virtual veto over bitumen production, [See Note 31 below] diminishing the value of the oil sands lessee's rights.

73. This "quiet title" approach was rejected in *Goodwell*. The Court of Appeal was clear that a party with a right to produce a resource should not be forced by the regulator to enter into a commercial arrangement with another party claiming an interest in that production, and that the regulator must decide the rights of the parties.<sup>85</sup> The same principles are applicable in the present case, and should preclude the result sought by the coal owners.
74. Further, the quiet title approach preferred by EnCana and CDP may not provide the certainty claimed. For example, it was apparent during the hearing that Quicksilver tried this approach with EnCana, but has not received the leases from EnCana contemplated under the coal certainty agreement despite 56 requests for such since June, 2004<sup>86</sup>. EnCana continues to object to Quicksilver well license applications on the basis that they do not meet the requirements of coal certainty agreements<sup>87</sup>.
75. A coal certainty agreement may simply lead to disputes over whether a party has complied with the requirements of the coal certainty agreement. Where EnCana does not agree that such requirements have been met, it has continued to object to well licenses, just as, at present, it has objected to well license applications because it does not agree with Fairborne's interpretation of the relevant lease documents. The same course would be open to CDP. Coal certainty agreements may therefore only transfer the genesis of the dispute from the lease document to the coal certainty document.

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<sup>85</sup> Ibid, at paras 96-99.

<sup>86</sup> Hearing transcript, Day 7, at p. 1140, l. 21 - p. 1141, l. 12.

<sup>87</sup> Ibid, at p. 1141, ll. 16-20.

76. In summary, by advocating a "quiet title" approach, the coal owners seek a result that would allow them to gain a negotiating advantage over the gas producers and to dictate the commercial terms of NGC development. Given these circumstances, the statements by the Alberta Court of Appeal in *Goodwell*, and the apparent lack of success of some parties in attempting to quiet title even when coal certainty agreements exist, it is clear that forcing the parties to settle their dispute is not a fair, appropriate or practical solution.

## **VI. CONCLUSIONS**

77. Fairborne submits that the following conclusions are supported by the overwhelming preponderance of evidence and accord with established governing law:

- (a) the Board has the jurisdiction and indeed the obligation to determine the entitlement of Fairborne and the other applicants to the licenses and holdings sought, regardless of the claims by EnCana and CDP to ownership of the NGC Resource;
- (b) the Board must determine such entitlement on a balance of probabilities;
- (c) the vernacular meaning of words used in the relevant grants and leases govern construction of those documents;
- (d) there is sufficient evidence before the Board concerning the vernacular meaning of "coal" and of other key terms, as those terms appear in the relevant grants and leases;
- (e) the vernacular meaning of the unqualified term "coal" in the relevant grants and leases does not include NGC, which has always been considered a separate and distinct substance. NGC falls within the meaning of the unqualified term "natural gas" in the relevant grants and leases;
- (f) the rulings of the Board in this proceeding as to the applicable vernacular meanings "coal", "natural gas" and any other material terms should, in so far as

those terms relate to NGC, be presumptively applied by the Board when considering future well licences and holdings applications.

**VII. DISPOSITION**

78. Based upon the applicable legislation, the supporting technical interpretation and the entitlement documentation supporting Fairborne's well license application, Fairborne has satisfied the requirement of section 16 of the O&GCA that it is entitled to produce the gas that is the subject of its applications and the well licenses and holdings at issue in this proceeding should be confirmed.

79. Further, Bulletin 2006-19 should be rescinded immediately.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2006.**



Douglas E. Crowther  
Thomas P. O'Leary  
Counsel for Fairborne Energy Ltd.