

THE ALBERTA ENERGY AND UTILITIES BOARD

**IN THE MATTER OF Proceeding No. 1457147
to the Alberta Energy and Utilities Board.**

**BEARSPAW PETROLEUM LTD.;
DEVON CANADA CORPORATION;
ENCANA CORPORATION;
FAIRBORNE ENERGY LTD.;
and CARBON DEVELOPMENT PARTNERSHIP
(successor in interest to Prairie Mines and Royalty Ltd.,
formerly known as Luscar Ltd.)**

**CLIVE, EWING LAKE, STETTLER
AND WIMBORNE FIELDS**

**SUBMISSION
OF
ENCANA CORPORATION
ON ENTITLEMENT
(HEARING, PART II)**

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TABLE OF CONTENTS

I.	Introduction	1
II.	Facts	2
III.	Law	2
	A. Ownership of CBM is a Requirement of the Oil and Gas Conservation Act for a Well Licence, Pooling Order or Holding	2
	1. Well Licences	2
	2. Pooling Orders	3
	3. Holdings	3
	B. Ownership of CBM is Bona Fide Disputed	4
	1. The CNG Owners Must Prove Lease Entitlement	4
	2. Lease Entitlement is Determined by Contemporaneous Vernacular Understanding of the Substance <i>In Situ</i>	4
	3. CNG Owners Have Not Established "Natural Gas" in the Contemporary Vernacular Included CBM	5
	4. CBM Ownership is Subject to a <i>Bona Fide</i> Dispute	7
	C. The Board Cannot Determine Entitlement	12
	1. The Applicants have Acknowledged Entitlement is in Dispute	12
	2. The Board Cannot Determine Ownership of CBM Between the Coal and Gas Owners	12
	D. Science	14
IV.	Policy	14
	A. Policy of the Board is Orderly Development	14
	B. EnCana's Involvement in Coalbed Methane in Alberta	14
	C. Facilitation of Development	14
	1. Coal Owners Have No Development Veto	14
	2. Compulsory Pooling Orders Would Facilitate Development	15

3. Reducing DSUs to Quarter Sections Would Reduce Tracts Subject to Dispute	16
D. Quiet Title Before Drilling – the Only Practical Solution	16
V. Disposition of Applications	17
A. Re Devon and Bearspaw	17
1. Devon Well Licences.....	17
2. Bearspaw Well Licence	18
3. Bearspaw Pooling Order	18
B. Technical Committee	18
C. Self-Report Period Before Enforcement.....	19
VI. AUTHORITIES	20
APPENDIX A – Applications in Issue	
APPENDIX B – Ownership of Lands	

SUBMISSION OF ENCANA CORPORATION

I. Introduction

1. The issue in this proceeding is whether a CNG (conventional natural gas) owner¹ is entitled to a well licence, pooling order or a holding from the Energy and Utilities Board for CBM (coalbed methane) where ownership of it is disputed *bona fide*.
2. Devon Canada Corporation and Bearspaw Petroleum Limited sought the Board's permission to produce CBM as owners of natural gas,² and EnCana Corporation as coal owner objected on the basis that it was entitled to the CBM.
3. The Board dismissed EnCana's objections and granted various permissions for Devon and Bearspaw to produce CBM, notwithstanding the *bona fide* dispute on entitlement to CBM and for the apparent reason that CBM is "natural gas".
4. EnCana sought review and variance of those permissions, which the Board granted in light of the uncertainty surrounding entitlement to CBM, all parties having acknowledged that the ownership issue had not been resolved by the courts.
5. As there is a *bona fide* dispute on entitlement of the applicant CNG owners to CBM, the Board cannot grant the approvals sought as it has no jurisdiction to decide ownership.
6. Permitting CBM development where its ownership is disputed *bona fide* contravenes the applicable legislation and augurs against orderly development and conservation of resources.

¹ Applicants and intervenors will be referred to as CNG owners collectively, without any admission of ownership to be taken.

² See Appendix A, Applications in Issue, for particulars of the lands, formations and aerial coal ownership.

7. CBM development may nonetheless proceed either on agreement of those claiming ownership or by pooling order (with proceeds of production from disputed tracts to the Provincial Treasurer).

II. Facts

8. Devon and Bears paw came to hold rights to natural gas on the lands at issue in one of three ways:³
- a. as lessee of natural gas rights leased between 1953 and 1962 by the mines and mineral holder EnCana;
 - b. as lessee of natural gas rights from freeholders arising from transfers made between 1913 and 1921 and reserving to EnCana's either "coal and petroleum" or "coal, petroleum and valuable stone";
 - c. as lessee of mines and mineral rights leased by the Crown.

III. Law

A. Ownership of CBM is a Requirement of the Oil and Gas Conservation Act for a Well Licence, Pooling Order or Holding

1. Well Licences

9. In order to obtain a well licence an applicant must be entitled to the substance, as mandated by s. 16 of the *Oil and Gas Conservation Act*.⁴

16(1) No person shall apply for or hold a licence 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. [Emphasis added.]

10. And the applicant must also have the right to produce from the intended formation for the complete DSU, as provided in Directive 56, s.7.9.11:⁵

³ See Appendix B, Ownership of Lands, for legal descriptions and wordings of the grants and leases.

⁴ R.S.A. 2000, c O-6

36) Prior to submitting a well license application, the applicant must

b) be entitled to the right to produce the oil, gas or crude bitumen from the well or have the right to drill or operate the well for the authorized purpose;

c) acquire the right to produce from the intended formation for the complete drilling spacing unit (DSU).

2. Pooling Orders

11. Only the "owner" of a tract within a drilling spacing unit may apply for a compulsory pooling order, in accordance with s. 80 of the *Oil and Gas Conservation Act*.

80(1) The owner of a tract within a drilling spacing unit may apply to the Board for an order that all tracts within the drilling spacing unit be operated as a unit to permit the drilling for or the production of oil or gas from the drilling spacing unit.

with "owner" defined as follows:

78(a) "owner", when used in connection with a tract, includes the person who has the right or an interest in the right to drill for, produce and dispose of any oil or gas from the tract or who would have the right or interest in the absence of any contract, statute, regulation or order governing the disposition of the production. [Emphasis added.]

3. Holdings

12. To obtain a holding to drill more than one gas well per section, an applicant must own the substance underlying the entire drilling spacing unit, as the *Oil and Gas Conservation Regulations* provide that:

5.005(2) No well shall be produced unless there is common ownership throughout the drilling spacing unit.

⁵ EUB Directive 56: Energy Development Applications & Schedules (September 2005)

B. Ownership of CBM is Bona Fide Disputed

1. The CNG Owners Must Prove Lease Entitlement

13. The Alberta Court of Appeal has determined that section 16 of the *Oil and Gas Conservation Act* will be contravened "if the person who holds the well licence does not possess the right to produce the hydrocarbon authorized by the well licence".⁶
14. And the same court determined also that entitlement depends on the interpretation of the instrument that grants the rights (whether the instrument is an agreement, reservation, or grant).
15. As the CNG owners here can have and claim no entitlement but as lessees under various leases, the onus of proof of a contractual right to CBM thereunder falls on them.⁷

2. Lease Entitlement is Determined by Contemporaneous Vernacular Understanding of the Substance *In Situ*

16. By the long established and uncontroverted principle of *Borys v. Canadian Pacific Railway*, a grant or reservation of substances is to be given the meaning the word bears when the substance is *in situ* below ground.⁸
17. The vernacular meaning of the mining world, commercial world, and landowners at the time the grant was made determines the construction.⁹
18. And as confirmed by the Supreme Court recently in *Anderson v. Amoco Canada*, the time for the determination is as of the grant and before development, with initial conditions of the pool to govern the relative ownership between the parties.¹⁰

⁶ *Alberta Energy Corp. v. Goodwell Petroleum Corp.*, 2003 A.B.C.A. 277, para 93

⁷ *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2005 A.B.C.A. 46, paras 75 and 82

⁸ *Borys v. Canadian Pacific Railway* (1953), 7 W.W.R. (N.S.) 546 (Judicial Committee of the Privy Council), para 32

⁹ *Ibid.*, para 19

¹⁰ *Anderson v. Amoco*, [2004] 3 S.C.R. 3 at 28, 33-34

**3. CNG Owners Have Not Established “Natural Gas”
in the Contemporary Vernacular Included CBM**

19. Not one of the leases under which the CNG owners seek to produce mentions CBM, and so they need prove “natural gas” in the contemporaneous vernacular included CBM.
20. The CNG owners posit that CBM today may be understood as a natural gas but that does not establish CBM ownership or entitlement to produce it, as it is not reflective of the contemporaneous vernacular.
21. Moreover, it in no way speaks to the required entitlement to produce from the coal formation (*viz. strata*), a requirement on which the CNG owners are silent.

a) Not all Natural Gas is a “Natural Gas”

22. The highest courts, in *Borys and Anderson v. Amoco Canada*, made it clear that entitlement to natural gas does not provide a blanket entitlement to all types of gas that may be recovered from beneath the earth.
23. Rather, the nature of the substance *in situ* must be considered, with the result in *Borys and Anderson* that gas dissolved in petroleum belonged to the petroleum owner and not natural gas owner (even though upon recovery it was in a gaseous state).

b) Statutory Definitions do not Apply to Private Leases and Grants

24. It was held by the Alberta Court of Appeal in *Alberta Energy Co. v. Goodwell Petroleum Corp.* that Alberta energy statutes do not restrict the application of the *Borys* principles.¹¹
25. The reference to “gas” in s. 16 of the *Oil and Gas Conservation Act* does not define the meaning of “natural gas” in the leases and does not limit or expand the rights transferred by the written instruments.

¹¹ *Goodwell*, para 95

26. Nor does the definition of "coal" in the *Coal Conservation Act* (which provides that coal has its "ordinary meaning"), or the provisions relating to CBM in the *Mines and Minerals Act*, restrict or address the rights of the parties here to CBM.
27. While statutory provisions may modify mineral rights,¹² there is no indication that the legislature has intended to legislate ownership of CBM by s. 16 or any other provision – in contrast to other jurisdictions.¹³
28. The Alberta legislature has addressed entitlement to CBM in section 67 of the *Mines and Minerals Act*,¹⁴ but only with respect to lands where the Crown owns the mines and minerals.
29. The Alberta legislature has not enacted or amended any legislation that affects CBM entitlement on freehold lands. This absence of legislation leaves entitlement to be determined by interpretation of the leases and grants pursuant to the *Borys* principle.
30. The current statutory definitions do not assist in the interpretation of the leases and grants by that principle. To the extent that legislation informs the intentions of the parties to the instruments, the relevant time to consider intention is the date on which the leases or grants were made.

c) Current Scientific Opinion and Method of Extraction does not Establish Ownership

31. The assertions here of various gas owners through Mr. Mavor as to the nature of CBM and its similarities to natural gas do not establish entitlement or ownership, as they do not concern the contemporaneous vernacular meaning of the grants.

¹² *Goodwell*, para 64

¹³ In British Columbia, for example, the 2003 Coalbed Gas Act in 2003, provides:

Coalbed gas is natural gas

3 (1) Coalbed gas must be considered to be and to have always been natural gas.

...
Natural gas tenure includes coalbed gas

4 (1) A natural gas tenure, whether made before or after the coming into force of this Act, includes any coalbed gas rights.

(2) A coal tenure, whether made before or after the coming into force of this Act, does not include any coalbed gas rights

¹⁴ R.S.A. 2000, c.M-17

32. Similarly, the likeness of extraction methods for natural gas and CBM does not mean CBM is "natural gas", as the time for determining ownership is as of contracting not development and before extraction.¹⁵
33. As noted by the Supreme Court in *Anderson v. Amoco Canada*, (citing the appellate court in *Borys*):

... What was reserved to the railway company was petroleum in the earth and not a substance when it reached the surface. It is true that by change of pressure and temperature, gas is released from solution when the liquid is brought to the surface but such a change ought not to affect the original ownership.¹⁶

4. CBM Ownership is Subject to a *Bona Fide* Dispute

34. EnCana asserts ownership to CBM as it is a constituent of and intrinsic to coal, and submits that the required entitlement of gas owners to develop it is therefore subject to a *bona fide* dispute.

a) Grants and Leases Reserve "Coal"

35. EnCana is entitled to "coal" underlying the subject lands, as in each of the grants and leases that substance is expressly excluded, excepted or reserved from the grant of other interests.¹⁷

b) "Coal" was Known at the Time to Include CBM

36. It was common knowledge by the early 20th century that inflammable gas, made up primarily of methane, escapes from coal mines and from mined coal (for months afterwards, and in volumes noted as high as 1.75 times the coal's volume).¹⁸

¹⁵ *Anderson*, para 28

¹⁶ *Anderson*, para 29; *Borys*, para 32

¹⁷ See Appendix B

¹⁸ Porter, H.C. and Ovitz, F.K., *The Escape of Gas from Coal* (Washington: Department of the Interior, Bureau of Mines, Government Printing Office, 1911), p.3

37. And it has long been a legislative requirement that the owner of a coal mine provide adequate ventilation to dilute and render harmless all noxious or inflammable gases and to make the mine fit for working or travelling.¹⁹

c) CBM had Commercial Value at the Time to the Coal Owner

38. CBM could have a commercial value to coal owners -- particularly as an energy source, as has been well documented.

39. In a letter written in 1746, Dr. William Brownrigg described a laboratory he built at Whitehaven for the purpose of studying "damps and exhalations" at coal mines. The laboratory was supplied with a steady stream of firedamp, used to heat specially constructed furnaces, from an adjacent pit through lead pipes.²⁰

40. One Sir J. Lowther suggested the use of mine gas for lighting streets in the town near his mine in 1765, and lighting pit bottoms was done in the early 19th century.

41. When Britain's coal mining industry was at its most active, the methane produced by the pits was used to heat water for miners' baths and to heat pithead offices²¹ – with some collieries producing electrical energy from their methane vents, and the Cardowan Colliery famously providing the Black & White Whisky distillery methane for its fuel.²²

42. The draining of firedamp from the strata in mines by cross-measure boreholes was as of 1951 being used at over 50 collieries in Germany, Belgium, France, and elsewhere.²³

¹⁹ See, for example, Northwest Territories Ordinance, 1905, The Coal Mines Regulations Ordinance, s.39; *Coal Mines Act*, S.A. 1906, c.23, s.51 Rules 1-3; *The Coal Mines Regulation Act*, S.A. 1945, c.8, ss 109-110; *Coal Mines Act*, R.S.A. 1955, c.47, s.283

²⁰ Bromilow, J.G., "Firedamp Drainage in Great Britain", *Transactions – the Institution of Mining Engineers*, Vol. 11, 1951-1952, p. 1012.

²¹ Coxon J. and Crawford A., "Methane Recovery & Utilization at Old Boston Colliery", *Transactions of the Institute of Mining Engineers*, Vol. 114, 1954-1955, p. 999

²² Association of Coal Mine Methane Operators, www.acmmo.org/uses.htm; and see the photograph from the Scottish Mining Museum of an underground methane extraction pipe in a mine shaft, www.acmmo.org/facts.htm.

²³ Bromilow, J.G., "Firedamp Drainage in Great Britain", *Transactions – the Institution of Mining Engineers*, Vol. 11, 1951-1952, p. 1012 at 1013

43. Extensive use of mine gas as town gas occurred in Belgium in the late forties and early fifties in the Hainaut coal field and in the Saar. Gas was drained from 30 mines with almost 100 km of surface pipe lines.²⁴
44. In Germany in 1952, 8 mines used mine gas in colliery boilers²⁵ and in Italy in 1953, mine gases were used for conversion into ammonia using the Fischer-Tropsch process.²⁶
45. At the Old Boston Colliery, methane was produced for 14 years from 1954 on. A quantity of about 900 million cu. ft. of methane was extracted and put to use. By 1956, additional gas was supplied via a pipe to Haydock Workshops where it was used directly on burners for providing heat in the stores and other buildings.²⁷
46. At the end of 1958, drained firedamp was being utilized at 15 British collieries. At eight collieries, the gas was being supplied to the local Area Gas Board for general industrial and domestic use, and more were expected to supply gas by the end of 1959. The gas from seven collieries was being burned in boilers to produce steam. At one colliery, gas was used in a 2,000 kW gas turbine, and at two collieries in dual-fuel gas engines, to generate electric power.²⁸
47. In sum, firedamp (CBM) drained in West European mines was utilized in a diversity of ways, both at the mines and in consumer industries such as steelworks, coke oven, brickworks, glass works and chemical industries producing plastics.²⁹

²⁴ Williams D.J. et al., *Methane Emissions From Coal Mining*, prepared for IEA Greenhouse Gas R&D Programme, Division of Coal and Energy Technology, Australia, p. 6-16 (52)

²⁵ Williams D.J. et al., *Methane Emissions From Coal Mining*, prepared for IEA Greenhouse Gas R&D Programme, Division of Coal and Energy Technology, Australia, p. 6-7 (52)

²⁶ Williams D.J. et al., *Methane Emissions From Coal Mining*, prepared for IEA Greenhouse Gas R&D Programme, Division of Coal and Energy Technology, Australia, p. 6-8 (52)

²⁷ National Coal Board, *Drainage of Gas from Closed Mines*, Technical Committee on the Utilisation of Methane, Memorandum No. 8 – August 1969 (45)

²⁸ Bromilow, J.G., "The Drainage and Utilisation of Firedamp in Great Britain", *Colliery Guardian*, September 3, 1959, p. 97 (13)

²⁹ Boxho, J. et al, *Handbook for the Coalmining Industry in the European Community*, Coal Directorate of the Commission of European Communities, 1980, p.389

d) CBM had no Commercial Value at the Time to Gas Owners

48. As of the grants, the extraction of CBM *per se* was not profitable, as technology to extract it in an efficient manner and for sale to others did not exist apart from mining.
49. It was not until 1977 that CBM activity began in Canada, with two wells in 1977 near Canmore and attempted commercial gas production from 1978 to 1980,³⁰ and exploration activity for CBM in Alberta did not commence until the late 1980s/early 1990s.³¹

e) CBM Must be “Coal” for Safety and to Prevent Extraction Conflicts

50. Given the practical and legal obligations to vent CBM while mining coal, an interpretation of “coal” to exclude CBM would render the grants and leases of little business efficacy and create significant extraction conflicts.
51. CBM venting is either intimately connected with and necessitated by mining (as by fans, horizontal bore holes, and gob wells) or such as to significantly impair mining (as by vertical bore holes).³²
52. And separation of ownership of the substance within the coal strata – so as to divorce the CBM from the coal – necessarily results in contests of extraction rights and obligations as to the capture and sale of CBM from the coals.

f) A Reservation of “Coal” was Understood at the Time as Including the Entire Strata

53. A reservation of coal would have been understood at the time as including the strata *in toto*, as it is supposed that the parties will have contracted in the belief their words will be understood in the accepted legal sense.³³

³⁰ Dawson, F. M. et al, “An Assessment of Coalbed Methane Exploration Projects in Canada”, *Geological Survey of Canada Bulletin* 549 at p.79

³¹ EUB/AGS Earth Sciences Report 2003 03, p. 1

³² See Armbricht, C.P. “Multimineral Development Conflicts – Coalbed Methane in the Balance” (Alabama: undated).

³³ H. G. Beale, *Chitty on Contracts*, 19th ed., Vol. 1 (London: Sweet & Maxwell, 2004) at ss. 12-053

54. The jurisprudence of the United Kingdom has long reflected that a reservation, as of “coal and limestone”, reserves a right of property and absolute ownership over the stratum containing coal, and was not merely a right to enter the lands to win the minerals.³⁴

55. The same was so in Alberta, where in 1922 the court decided that an entitlement to coal meant entitlement to the strata below the surface in which the coal was contained.³⁵

g) By the *Borys* Principle the Coal Owner Owns CBM

56. The physical bonding mechanism of CBM in coal is fundamentally the same as solvation of solution gas in petroleum,³⁶ and for each, the nature of the substance that is ultimately extracted as gas is physically different when *in situ*.

57. Therefore, as solution gas was petroleum in *Borys* (being in the liquid container represented by the petroleum) so too is CBM coal by that principle (being sorbed by the coal).

h) The Grantor’s Intent was to Reserve all Value in the Coal, Present or Future – and no Indication is Shown of Intent to Give any of the Coal Away

58. Having no limit as to its coal reservation in the grants or the leases, it can only reasonably be taken that the coal owner intended to reserve the entirety of its value – whether known or not, present or future.

59. Commercial value was available from the CBM in the coal and from the gases extracted from it, whether before or after mining and whether as CBM *per se* or as a constituent of manufactured gas, and there was an obligation to vent it for safety.

³⁴ *The Duke of Hamilton v. Graham of Cambuslang*, [1871] L.R. Vol. II, 166, per Lord Westbury

³⁵ *Little v. Western Transfer and Storage Co.* (1922), 18 Alta L.R. 407 (Alta S.C., App.Div.), paras 22 and 29

³⁶ See Dr. J. Levine

60. As was observed by the court in *Borys* when considering an earlier claim by a gas owner to gas in another substance (oil with gas in solution):³⁷

... it [is] difficult to believe that either land owners, businessmen or engineers, or, indeed, the staff of the Canadian Pacific Railway or Mr. Borys, would at any time have differentiated between the oil and gas in solution. They would ... have included in petroleum all the liquid substance in the mine.

61. The same result falls here: it cannot reasonably be concluded that the coal's CBM is anything other than coal and belongs to anyone other than the coal owner.

C. The Board Cannot Determine Entitlement

1. The Applicants have Acknowledged Entitlement is in Dispute

62. In its decision dated March 9, 2006 regarding whether the test for review under section 40(1) of the *Energy Resources Conservation Act* was met, the Board noted:

... that all parties to the review requests have acknowledged that the issue of legal entitlement to coalbed methane has not been resolved by the courts.

63. And while the CNG owners may wish now to avoid the obvious dispute of CBM entitlement and ownership – requesting as they do that the Board issue a licence on a finding simply that CBM is natural gas – they cannot do so.
64. The entitlement to CBM is to be decided by interpretation of the grants and leases.

2. The Board Cannot Determine Ownership of CBM Between the Coal and Gas Owners

65. The Board's jurisdiction to interfere with property rights is limited to circumstances where it is specifically authorized by statute to do so.³⁸

³⁷ *Borys*, para. 33

66. The Board's enabling statutes, which include the *Oil and Gas Conservation Act*, the *Energy Resources Conservation Act*, and the *Alberta Energy and Utilities Board Act* and their regulations, create a scheme for the administration of resource development in Alberta.
67. The scheme permits the Board to approve development where the applicant meets certain conditions, and does not permit for adjudication of private property rights, whether expressly or implicitly.
68. The *O&GC Act's* section 16 is mandatory: no person "shall" apply for or hold a licence for the recovery of gas unless the person is entitled to the right to produce gas; and the Board is not empowered by the section to conduct an inquiry into deciding competing claims.
69. Rather, the legislative scheme is directed at preserving rights and recognizes that the Board will be unable to determine private property rights as the legislation provides for maintenance of the status quo in cases of dispute.
 - a. Section 4(d) of the *Oil and Gas Conservation Act* provides that the Act is to "afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool", which requires preservation of the status quo given the absence of adjudicatory functions.
 - b. Section 16(2) of the *Oil and Gas Conservation Act* permits the Board to cancel a licence if an owner is unable to prove to the Board that it is entitled, but allows for no adjudication.
 - c. In the context of pooling orders, s. 86(1) provides for payment to the Minister pending an order of the Court of Queen's Bench where there is a dispute as to the proceeds of production, and again adjudication is not provided for.

³⁸ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* 2006 S.C.C. 4 at paras 46 and 58, addressing the Board in its role as utilities regulator

70. The Board's legislation allows it to permit development only where entitlement is clear, which it is not if disputed *bona fide*.
71. As the Board cannot require development, but only facilitate it, the Board cannot determine entitlement and must protect the interests of the claimants so as to afford each their share of production.

D. Science

72. CBM is intrinsic to and a constituent of coal and was so understood as of the time of the grants here.
73. EnCana relies upon the opinion of Dr. J.R. Levine (filed as a joint submission with CDP) in regards to the issues raised in this matter.

IV. Policy

A. Policy of the Board is Orderly Development

74. The Board's mandate includes providing "for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta".³⁹

B. EnCana's Involvement in Coalbed Methane in Alberta

75. EnCana is an active developer of CBM in Alberta. To date it has developed some 2300 CBM wells and intends another 850 per year into the future (approximately).
76. On split title lands, EnCana quiets title before drilling – as a business practice – and has done that with parties to these proceedings.

C. Facilitation of Development

1. Coal Owners Have No Development Veto

77. The coal owners have no more of a development veto than CNG owners, who have not offered their gas lands for CBM drilling by coal owners and can be

³⁹ *Oil and Gas Conservation Act*, s.4(c)

expected to object to applications to drill for CBM from the coals (as is obvious from their argument that CBM is natural gas).

78. The coal owners want but to ensure the taking and production of CBM by CNG owners where entitlement is disputed, pending agreement of the parties claiming CBM or ultimate determination by the court.

2. Compulsory Pooling Orders Would Facilitate Development

79. EnCana does not seek to prevent issuance of licences for conventional natural gas or CBM from Crown lands.
80. Development should be permitted where entitlement to produce on some tract within the DSU is not disputed. This could occur by the granting a pooling order that requires payment of proceeds from disputed production to the Provincial Treasurer.
81. Any "owner" of a "tract" within a DSU may apply for a compulsory pooling order where the owner cannot obtain the agreement of the other owners in the DSU to enter into an agreement pooling, whether horizontal or vertical.⁴⁰
82. Where an applicant may have an undisputed right to produce CBM in a certain number of acres within a DSU (horizontal tract) production by pooling order may occur with the proceeds from the coal on an areal basis to be paid to the Provincial Treasurer.
83. Where an applicant has an undisputed right to conventional natural gas within a pool (vertical tract), production with disputed CBM may occur by pooling order, with the proceeds of the latter determined by metering⁴¹ or attribution on the basis of the mandated CBM control wells to be paid to the Provincial Treasurer.

⁴⁰ *Oil and Gas Conservation Act*, s.80(1), 86; with "tract" defined to include an area within a DSU (horizontal tract) or a pool (vertical tract) by s.78(b)

⁴¹ The Board has jurisdiction to impose requirements for metering:
11.060 The Board may require the licensee of a well to conduct or run any reasonable or conventional test, analysis, survey or log or perform any instrument calibration, and to submit to the Board the information so obtained. *Oil and Gas Conservation Regulation*

84. It was recognized by the ERCB in 1988 that compulsory pooling could apply on a vertical basis where mineral rights were divided between shallow and deep zones.⁴² The advent of CBM drilling creates another circumstance where vertical pooling can help to facilitate development while preserving the parties' rights.

3. Reducing DSUs to Quarter Sections Would Reduce Tracts Subject to Dispute

85. For sections that have one or more quarters for which entitlement is not disputed, with others for which it is disputed, reducing the DSU for that section to one-quarter will permit CBM development of the undisputed quarters – thereby permitting greater development than would otherwise be the case.

86. So, for example, where CBM entitlement is disputed for only one quarter section in the DSU, reducing the spacing units to quarter sections would permit CBM development of three quarters and leave only the one other in dispute.

87. Only those lands from which CBM alone is sought, and for which entitlement is contested to the entirety of the DSU, need await resolution of ownership issues before CBM development – absent agreement of the parties, of course.

88. This is not to suggest a blanket downspacing, but only for those sections where it is applied for or would permit development which would otherwise not proceed because of a split title dispute.

D. Quiet Title Before Drilling – the Only Practical Solution

89. Requiring the parties to quiet title prior to applying to develop CBM will facilitate efficient and orderly development of the resource.

90. A requirement of quiet title prior to development will also:

^s

18(1) On receiving an application for a licence, the Board may grant the licence subject to any conditions, restrictions and stipulations that may be set out in or attached to the licence or it may refuse the licence. *Oil and Gas Conservation Act*

⁴² In Information Letter 88-24 issued by Alberta Energy, Forestry, Lands and Wildlife, it was noted that in the event that separate pools cannot be established or maintained, a request to invoke compulsory pooling could be made.

- a. prevent capital from being stranded or foregone, as the development costs may be lost without compensation where incurred without entitlement under the lease;⁴³
 - b. preclude litigation over the entitlement to and quantum of loss (including capital);
 - c. ensure efficient developers do not bear the inefficiencies of higher cost developers (if entitlement is not established by the latter, who nonetheless are compensated for capital expended);
 - d. remove the spectre of litigation against freeholders for return of royalties paid under their leases for gas production.
91. As Williams and Meyers note in *Oil and Gas Law*, any time a conflicting claim of title is made to the minerals, development of the land becomes ultrahazardous.⁴⁴

V. Disposition of Applications

A. Re Devon and Bearspaw

92. Where there is an undisputed entitlement to production from some part of the DSU, the Board has jurisdiction to order production only with payment of the proceeds from the disputed part to the Provincial Treasurer.

1. Devon Well Licences

93. Devon applied to produce CBM from the Edmonton Group,⁴⁵ and the Board issued licences for production from the Edmonton Group, without restricting the production to CBM.
94. EnCana does not dispute Devon's entitlement to conventional natural gas, which may exist in the Edmonton Group, but submits that the well licences should have either excluded CBM or required measurement of CBM and conventional natural gas production and payment of the proceeds from CBM production to the Provincial Treasurer (vertical pooling).

⁴³ See for example: *Republic Resources Ltd. v. Ballem* (1981), 33 A.R. 365 (Q.B.)

⁴⁴ Williams and Meyers, *Oil and Gas Law*, December 2005, Pub 820, s.225

⁴⁵ Well licence Applications

95. The NE quarter of 35-33-26 W4M⁴⁶ includes two acres for which EnCana does not dispute Devon's entitlement to CBM, and Devon may therefore produce CBM from the lands under pooling order with the proceeds from the production of CBM from the disputed portions of the section to be paid the Provincial Treasurer.

2. Bearspaw Well Licence

96. Bearspaw applied to produce "gas" from the Belly River Group and "CBM" from the Horseshoe Canyon Formation in township 38,⁴⁷ and the Board issued a licence "to obtain production from the Belly River Group and the Horseshoe Canyon Formation".
97. EnCana submits that the licence for production of CBM from the Horseshoe Canyon Formation should not have been issued, but to the extent that production from both formations was necessary to make the well economical, the licence should have contained conditions on measurement of CBM and provision for payment of proceeds from production from coal to the Provincial Treasurer.

3. Bearspaw Pooling Order

98. Bearspaw sought a compulsory pooling order including all natural gas from surface to base of Belly River formation in township 37 and the Board issued that.
99. As EnCana disputes Bearspaw's entitlement to CBM under certain portions of the lands, payment of the proportion of proceeds from CBM production that corresponds to EnCana's coal ownership (areally and vertically) needs be made to the Provincial Treasurer and the Pooling Order should be so amended.

B. Technical Committee

100. The Board should order the formation of a "Technical Committee" to consider and report back to the Board in respect of the appropriate method(s) for

⁴⁶ Application 1379763

⁴⁷ Well license application 1423722

allocation production between stratigraphic tracts (e.g. coal and non-coal reservoirs), having regard to the technical issues raised in Appendix C.

C. Self-Report Period Before Enforcement

101. In order to ensure that each owner is afforded the opportunity to obtain its share of production of gas from any coal zone, all existing production of coal bed methane from disputed lands must cease immediately.
102. EnCana requests that the Board provide a three month period to allow self-disclosure and cessation of production and then employ its enforcement mechanisms to order any coal bed methane production from disputed lands to be stopped.

All of which is respectfully submitted this 19 day of September, 2006.

Code Hunter LLP



Per: _____

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Counsel for EnCana Corporation

Per: _____

Katherine Reiffenstein
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VI. AUTHORITIES

TAB DOCUMENT

Land Titles Documents and Transfers

1. 35-33-26-W4M and 15-34-26-W4M (Devon)
2. 21-38-20-W4M (Bears paw well licence)
3. 13-37-21-W4M (Bears paw pooling order)

Case Law

4. *Alberta Energy Corp. v. Goodwell Petroleum Corp.*, 2003 A.B.C.A. 277
5. *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2005 A.B.C.A. 46
6. *Borys v. Canadian Pacific Railway* (1953), 7 W.W.R. (N.S.) 546 (Judicial Committee of the Privy Council)
7. *Anderson v. Amoco*, [2004] 3 S.C.R. 3
8. *The Duke of Hamilton v. Graham of Cambuslang*, [1871] L.R. Vol. II, 166
9. *Little v. Western Transfer and Storage Co.* (1922), 18 Alta L.R. 407 (Alta S.C., App.Div.)
10. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* 2006 S.C.C. 4
11. *Republic Resources Ltd. v. Ballem* (1981), 33 A.R. 365 (Q.B.)

Statutes, Regulations and Policy Documents

12. *Oil and Gas Conservation Act* R.S.A. 2000, c.O-6, excerpt
13. EUB Directive 56: Energy Development Applications & Schedules (September 2005), excerpt
14. *Coalbed Gas Act* [S.B.C. 2003], chapter 18 (excerpt)
15. *Mines and Minerals Act*, R.S.A. 2000, c.M-17 (excerpt)
16. *Oil and Gas Conservation Regulations*, A.R. 151/71 (excerpt)
17. The Coal Mines Regulations Ordinance, N.W.T. 1905 (excerpt)
18. *Coal Mines Act*, S.A. 1906, C.23 (excerpt)
19. *The Coal Mines Regulation Act*, S.A. 1945, c.8, ss.109-110
20. *Coal Mines Act*, R.S.A. 1955, c.35
21. Information Letter 88-24, Alberta Energy, Forestry, Lands and Wildlife re Sale, Drilling and Production of Split (Shallow/Deeper) Petroleum and Natural Gas Rights

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22. Porter, H.C. and Ovitz, F.K., *The Escape of Gas from Coal* (Washington: Department of the Interior, Bureau of Mines, Government Printing Office, 1911)
23. EUB/AGS Earth Sciences Report 2003.03, "Production Potential of Coalbed Methane Resources in Alberta"
24. Armbrrecht, C.P "Multimineral Development Conflicts – Coalbed Methane in the Balance" (Alabama: undated)
25. H.G. Beale, *Chitty on Contracts*, 19th ed., Vol. 1 (London: Sweet & Maxwell, 2004), excerpt
26. Williams and Meyers, *Oil and Gas Law*, December 2005, Pub.820
27. Bromilow, J.G., "Firedamp Drainage in Great Britain", *Transactions – the Institution of Mining Engineers*, Vol. 11, 1951-1952
28. Williams. D.J. et al., *Methane Emissions From Coal Mining*, prepared for IEA Greenhouse Gas R&D Programme, Division of Coal and Energy Technology, Australia
29. Bromilow, J.G., "The Drainage and Utilisation of Firedamp in Great Britain", *Colliery Guardian*, September 3, 1959
30. National Coal Board, *Drainage of Gas from Closed Mines*, Technical Committee on the Utilisation of Methane, Memorandum No. 8 – August 1969 (45)
31. Boxho, J. et al, Handbook for the Coalmining Industry in the European Community, Coal Directorate of the Commission of European Communities, 1980
32. Dawson, F.M. et al, "An Assessment of Coalbed Methane Exploration Projects in Canada", *Geological Survey of Canada Bulletin 549*
33. Craig, E.A. and Myers, M.S., "Ownership of Methane Gas in Coalbeds", 24 *Rocky Mountain Mineral Law Institute* (1978)
34. Coxon J. and Crawford A., "Methane Recovery & Utilization at Old Boston Colliery", *Transactions of the Institute of Mining Engineers*, Vol. 114, 1954-1955

Websites

35. Association of Coal Mine Methane Operators, www.acmmo.org

APPENDIX A - Applications in Issue

Applicant	Application No.	Lands	Formation	Aerial Coal Ownership	Licence No.	Review and Variance Application No.
Bearspaw	1406764	13-37-21 W4M	All zones to the base of the Belly River Group	Crown: Area underlying lake EnCana: Balance	Pooling Order No. P290	1422781
Bearspaw	1423722	21-38-20 W4M	Belly River Group and Horseshoe Canyon Formation	EnCana	0344816	1439819
Devon	1379763	15-35-33-26 W4M (NE ¼)	Edmonton Group	EnCana	0331731	1406721
Devon	1379730	14-35-33-26 W4M (NW ¼)	Edmonton Group	EnCana	0331717	
Devon	1383127	8-35-33-26 W4M (SE ¼)	Edmonton Group	EnCana	0331748	
Devon	1379726	6-35-33-26 W4M	Edmonton Group	EnCana	0331713	
Devon	1380004	16-15-34-26 W4M (NE ¼)	Edmonton Group	Crown: 2 acres of s.15 EnCana: Balance	0331737	
Devon	1379746	14-15-34-26 W4M (NW ¼)	Edmonton Group	Crown: 2 acres of s.15 EnCana: Balance	0331730	
Devon	1379743	8-15-34-26 W4M (SE ¼)	Edmonton Group	Crown: 2 acres of s.15 EnCana: Balance	0331719	
Devon	1379737	6-15-34-26 W4M (SW ¼)	Edmonton Group	Crown: 2 acres of s.15 EnCana: Balance	0331718	

APPENDIX B – Ownership of Lands

Proceeding No. 1457147

Applicant	Land	EnCana's ownership	Nature of transfer of natural gas rights	Date of transfer of natural gas rights	Language of Grant	
Devon	NE ¼, 35-33-26 W4M, except 2 acres	All mines and minerals ¹	Lease	30 January 1962	"hereby grant and lease... all the petroleum and natural gas, natural gasoilne and related hydrocarbons other than coal, and also including sulphur as recovered in solution or in association with any of the liquid or gaseous hydrocarbons (hereinafter referred to as "the leased substances") which may be found within, upon or under the said lands..." ²	
	NW ¼, 35-33-26 W4M	All mines and minerals	Lease	30 January 1962		
	SW ¼, 35-33-26 W4M	All mines and minerals	Lease	30 January 1962		
	SE ¼, 35-33-26 W4M	All mines and minerals	Lease	30 January 1962		
	NE ¼, 15-34-26 W4M	All mines and minerals ³	Lease	30 January 1962		
	NW ¼, 15-34-26 W4M	All mines and minerals	Lease	9 July 1957		
	SW ¼, 15-34-26 W4M	All mines and minerals	Lease	26 February 1957		
	SE ¼, 15-34-26 W4M	All coal, petroleum and valuable stone	Transfer of Land to Calvin Thomas Robinson	14 March 1921		"excepting and reserving unto the Calgary and Edmonton Railway Company... all coal and petroleum and valuable stone which may be found to exist within, upon or under the said land, together with full power to work same..." ⁴

¹ Land Titles Certificate no. 761 007 597 [Tab 1]

² Devon's August 25, 2006 Submission, Schedules 4 and 5 for copies of leases

³ Land Titles Certificate 761 007 969 [Tab 1]

⁴ Land requisition [Tab 1]

Applicant	Land	EnCana's ownership	Nature of transfer of natural gas rights	Date of transfer of natural gas rights	Language of Grant
Bearspaw (well licence)	NE ¼, 21-38-20 W4M	All mines and minerals ⁵	Lease	22 December 1953	"does hereby lease...all the right, title and interest of the Lessor in and to the petroleum and natural gas, natural gasoline and related hydrocarbons, other than coal (collectively referred to as "the leased substances") which may be found within, upon or under the said lands." ⁶
	NW ¼, 21-38-20 W4M	All coal and petroleum ⁷	Transfer of Land to William White (instrument 354 BH)	31 December 1914	"... excepting and reserving unto the Canadian Pacific Railway Company, their successors and assigns, all coal and petroleum which may be found to exist within, upon or under the said land." ⁸

⁵ Land Titles Certificate no. 2441147 [Tab 2]

⁶ Bearspaw Submission filed August 25, 2006, Volume 1

⁷ Land Titles Certificate no. 181W139 [Tab 2]

⁸ Transfer of Land [Tab 2]

Applicant	Land	EnCana's ownership	Nature of transfer of natural gas rights	Date of transfer of natural gas rights	Language of Grant
	S ½, 21-38-20-W4M	All coal and petroleum	Transfer of Land to Luse Land Company Limited (instrument 3521 AX)	30 December 1913	"excepting and reserving unto the Canadian Pacific Railway Company, their successors and assigns, all coal and petroleum which may be found to exist within, upon or under the said land." ⁹
Bears paw (pooling order)	Portions of W ½, 13-37-21-W4M (96.4 acres) 13-37-21-W4M (279.5 acres) ¹¹	All mines and minerals ¹⁰ Coal, petroleum and valuable stone	Still held by EnCana Transfer of Land to Lester Verne Lohr	None 26 December 1918	n/a "...transfer to the said LESTER VERNE LOHR all its estate and interest in the said tract of land, excepting and reserving thereof and therefrom unto the Company, its successors and assigns, all coal, petroleum and valuable stone which may be found to exist in, upon or under the said land..." ¹²

⁹

Transfer of Land [Tab 2]

¹⁰

Land Titles Certificate no. 942 387 569 [Tab 3]

¹¹

Land Titles Certificate no. 772 030 713 [Tab 3]

¹²

Transfer of Land [Tab 3]