

ALBERTA ENERGY AND UTILITIES BOARD

PART 2 OF PROCEEDING NO. 1457147

**BEARSPAW PETROLEUM LTD., CARBON DEVELOPMENT PARTNERSHIP
(SUCCESSOR IN INTEREST TO PRAIRIE MINES AND ROYALTY LTD.,
FORMERLY LUSCAR LTD.), DEVON CANADA CORPORATION, ENCANA
CORPORATION, AND FAIRBORNE ENERGY LTD. CLIVE, EWING LAKE,
STETTLER AND WIMBORNE FIELDS**

FINAL ARGUMENT

OF

CANPAR HOLDINGS LTD. (“CANPAR”)

NOVEMBER 15, 2006

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EXECUTIVE SUMMARY

This proceeding raises three basic questions, which will set the path for coal bed methane (“CBM”) development in the Province of Alberta. Just as the Board must distinguish between CBM and coal, so also must the institutional differences between the Board and a court of law be taken into consideration if the Board is to fashion an enduring framework for the issuance of well licences to CBM owners.

Duty to Decide

A threshold question is whether the Board has a duty to decide who is entitled to produce CBM. If the Board declines to make this threshold determination, uncertainty could persist for more than a decade. On the other hand, if the Board makes a decision on who is entitled to produce CBM under Section 16 of the *Oil and Gas Conservation Act* (“OGCA”), economic, orderly and efficient development of CBM can proceed immediately.

Achieving Public Interest Objectives

Merely deciding entitlement is not enough. A Decision Report in this case should make a solid determination in harmony with the legal and scientific principles. Canpar’s direct interest in this proceeding relates to the 1982 Dome title split, where TransAlta Utilities, the predecessor in title to CDP, acquired “coal” and Dome/Canpar retained all petroleum and natural gas. Both Canpar and CDP take the view that any Board determination of entitlement should be consistent with what a court is likely to decide. The Board’s public interest mandates will only be achieved by determining entitlement with precision.

Weighing the Relevant Factors

The third task before the Board is to identify the relevant factors and the weight that should be accorded to each factor in making a determination. Canpar offers the following guidance:

- Board vs. Court – Pure legal interpretation of contracts is the province of the courts. But the Board has exclusive and original jurisdiction to issue well licences and is entitled to make ownership determinations under its legislation, subject only to supervision by the Alberta Court of Appeal. The Board has legal expertise and is not bound by the same rules of evidence applicable to a court. The Board also has a statutory mandate, which is relevant to its interpretation of Section 16 of the OGCA. Canpar requests that the Board be aware of its institutional differences relative to a court. Through an understanding of these differences, entitlement can be determined in line with how a court would likely decide the matter in the future.
- Carefully evaluate scientific evidence – Two experts spoke to the Board on the nature of coal. Canpar recommends the opinion of Mr. Mavor that: (1) Coal is a rock; and (2) CBM is in a gaseous phase *in situ*.
- Vernacular meaning – The common words of the grant are the most important determinant of entitlement. The term “coal” as used in the 1982 sale to TransAlta

means the solid black rock and did not include any natural gas, CBM or other gas, whether conventional or otherwise.

- Commercial context – The Board may properly consider the commercial context of the 1982 sale of coal. This commercial context – the sale of “coal to an integrated power utility, Canpar and Dome’s continuing business interest in P&NG and the terms of Dome’s Bank security – is entirely consistent with the vernacular meaning of “coal.”
- A coherent regulatory framework – Canpar suggests that the Board’s existing regulatory framework is not determinative and deserves less weight than the other factors. The courts have said that the administrative practices must conform with future court rulings, no matter how cumbersome this may be. In this case, the true nature of coal, the vernacular meaning of “coal” in the grant and the commercial context should form the basis of the Board’s determination of entitlement.

Canpar appreciates the Board’s efforts in resolving this important issue.

1.0 INTRODUCTION

1. Canpar's interest in this proceeding directly relates to its petroleum and natural gas interest in one of the parcels of land subject to the review application.¹ Canpar also has a broader interest because it owns petroleum and natural gas, coal, and mineral interests across the Province as a result of the 1979 acquisition of Siebens Oil & Gas. The 1979 transaction vested Dome and Canpar with freehold title in petroleum, natural gas, coal, and minerals, originally granted in 1670 by Charles II of England to the Company of Gentlemen Adventurers Trading into Hudson's Bay.²
2. Significantly, this particular freehold title was "split" in 1982, when TransAlta Utilities purchased "coal" from Dome and Canpar. This 1982 Dome title split is a recent example of the grant of freehold title in coal. Canpar has offered its insights to the commercial context of the 1982 title split through the testimony of officers who participated in the actual transaction.
3. In this Argument, Canpar will focus on the one parcel of land at issue in this proceeding, which engages an interpretation of the 1982 Dome title split. Canpar's position is that the 1982 sale of "coal" to TransAlta Utilities did not include CBM and, therefore, the owner of natural gas is entitled to produce CBM from this parcel of land.
4. The need for a clear demarcation between coal and CBM is set out in Section 2 of this Final Argument. Canpar respectfully requests the Board to complete its public process and issue a Decision Report to guide industry.
5. Section 3 sets out the approach that the Board should take in writing a Decision Report, which will be consistent with the relevant principles. Section 4 will examine the relevant factors and the relative weight, which should be accorded to each factor in determining entitlement under Section 16 of the OGCA.

¹ Property described as 8-34-26 W4M.

² 5 TR 633-634.

2.0 DUTY TO DECIDE

6. One of the outcomes, discussed with Mr. Berg, was that the Board issue a “one-pager”³ which would maintain the moratorium on issuing CBM licences pending private agreements or a determination by the courts, perhaps as long as 13 years in the future. Canpar submits that a failure to decide entitlement in this case is contrary to public policy, at odds with the Board’s governing legislation, and inconsistent with the recommendations of almost every participant in the proceeding as well as all of the expert legal witnesses.
7. As a matter of public policy, CBM and other unconventional gas sources are an increasingly important energy source as the Western Sedimentary Basin matures. Freehold title is particularly prominent in the CBM fairway.⁴ The Alberta Legislature has conferred on the Board broad statutory duties respecting the development of oil and gas resources in Alberta.⁵ The legislative scheme prohibits anyone from drilling a well without a licence, which can only be issued by the Board.
8. The OGCA prescribes the purposes of the legislation which are intended to guide the Board in carrying out its responsibilities:

- 4 The purposes of this Act are
 - (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;
 - (b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas;

³ 9 TR 1355, line 22.

⁴ Exhibit 20-052, page 3.

⁵ The Board is also responsible for governance of the development of coal resources and related facilities in Alberta under the *Coal Conservation Act*.

(c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta;

(d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool;

(e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta;

(f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction. [emphasis added]

9. In the context of this proceeding, section 4(c) and (d) direct the Board's mind to developing a solution that will allow well licences to be issued without undue delay. Such a solution will allow this important resource to be developed and the owner to obtain its share of production in harmony with the policy directive of the OGCA.
10. The Alberta Legislature did not envision a passive role for the Board. In managing oil and gas resources so that the policy objectives are achieved, the Board is intended to be proactive. While the legislative scheme allows appeals to the Alberta Court of Appeal on questions of law or jurisdiction,⁶ the Legislature has taken care to ensure that Board proceedings cannot be restrained by prerogative writs or removable "into any court."⁷ Canpar submits that the scheme established by the Alberta Legislature directs the Board to take a vital and proactive role in managing Alberta's oil and gas resources.
11. Further, even if the Board were persuaded to withhold issuance of some CBM well licences until a court makes a decision, there is no pending litigation with respect to lands that are the subject of the 1982 Dome title split. Canpar's evidence in this proceeding is clear that the Board should decide that the gas owner is "entitled" to produce CBM in accordance with Section 16 of the OGCA.⁸ Canpar further notes that CDP's policy

⁶ *Energy and Resources Conservation Act*, Section 41.

⁷ *Energy and Resources Conservation Act*, Section 42.

⁸ Exhibit 20-024, paragraphs 5-6; 5TR 643; 5 TR 652.

witness, Mr. Hatt, acknowledged that the Board has exclusive and original jurisdiction to issue well licences and he agreed that a Board decision should be consistent with a court's determination.⁹

12. The legal experts presented by both sides of the debate concur that the Board is entitled to issue well licences despite claims of a legal dispute surrounding title. Professor Percy observed that in legions of cases, the Board has issued approvals despite potential litigation surrounding title.¹⁰ Professor Lucas, appearing for the coal owners, went further. He testified that the Board should turn its mind to the term "entitlement" in the sense of "ownership" in Section 16 and, more to the point, it would be a serious error of jurisdiction of the Board to decline making this determination.¹¹
13. Canpar submits that the threshold question must be answered in the affirmative: The Board has a clear duty to decide the question of entitlement under the terms of Section 16 of its legislation.

3.0 ACHIEVING PUBLIC INTEREST OBJECTIVES

14. Once the Board enters the enquiry invited by Section 16 of the OGCA, the Decision Report should be structured in a way that will achieve the Board's public interest objectives. Those objectives include economic, orderly and efficient CBM resource development and ensuring that each owner of CBM has the opportunity of obtaining its share of production from the pool.¹²
15. While some of the participants in the proceeding have suggested that the Board may rely on its powers to make determinations on the definition of "gas" under the OGCA,¹³ others take the view that the Board should directly confront the issue of "entitlement" under Section 16 of the OGCA. Section 16, read together with the purpose enshrined in section 4(d) of affording each "owner" the opportunity of obtaining the "owner's" share of the production of gas, strongly suggests that the Board is expected to turn its mind to

⁹ 8 TR 1235, line 11; 1235, line 20; 1236, lines 24-25.

¹⁰ 5 TR 719.

¹¹ 9 TR 1370, line 8; 1371, line 7.

¹² OGCA, Section 4(c) and (d).

¹³ OGCA, Section 1(1)(y) and 1(1)(2)

the underlying ownership of oil and gas. It would be harmonious with the entire statute to read the requirement for “entitlement” as congruent with “ownership.” Section 16 reads in relevant part as follows:

Entitlement for well licence

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]

16. Canpar acknowledges that the Board has also been given the power to define whether CBM is “gas” in a particular case. However, deciding the issue of entitlement on this narrow definitional ground may not achieve the Board’s policy objectives for two reasons.
17. First, and as pointed out by Professor Lucas, the essential element of the interpretation of Section 16 will be reviewed by the Court of Appeal on the standard of correctness.¹⁴ In order to properly exercise its discretion, taking account of all relevant considerations, the Board is obliged to follow the common law approach to ownership.¹⁵ Accordingly, basing a determination under Section 16 of the OGCA solely on a determination that CBM is a “gas,” pursuant to Section 1(2) of the OGCA, creates a risk that the Alberta Court of Appeal could overturn the Board’s decision. This state of affairs would perpetuate the existing uncertainty. The Board can at best ensure economic, orderly and efficient CBM resource development by making a decision, which engages the essential element of “ownership”, or “entitlement”, under Section 16 of the OGCA.

¹⁴ 9 TR 1345, lines 4-12.

¹⁵ 9 TR 1345, lines 20-25; 1346, lines 1-4.

18. Second, consideration should be given to Statements of Claim being filed with the Court of Queen's Bench, a prospect forcefully raised on the last day of the proceeding in the redirect examination of the coal owner panel.¹⁶ The Board cannot, of course, prevent parties from filing whatever claims they wish in the Court of Queen's Bench. However, a studied decision rendered by a highly respected regulator – particularly a decision applying well established principles of interpretation after a full public process – will blunt incentives to resort to litigation. All industry participants will carefully review the Board's Decision Report in this proceeding. The Decision Report which considers the relevant factors of ownership, or entitlement, based on the judicial authorities and scientific evidence, will give everyone greater confidence in the Board's framework. With this needed confidence, parties will invest in CBM development. Economic, orderly and efficient CBM development will be achieved. The CBM owners will have an opportunity to realize their share of CBM production.
19. Canpar does not expect the Board to guarantee its determination in this proceeding will be identical to what a future court may decide under different fact situations. All we ask is that the Board use its expertise to formulate a decision consistent with what a court is likely to decide in the future. As Canpar understands the testimony of CDP's policy witness, a Board decision consistent with what the courts are likely to decide is considered desirable by parties on both sides of the 1982 Dome title split.¹⁷

4.0 WEIGHING THE RELEVANT FACTORS

20. Through the course of the proceeding, a number of factors emerged, which are relevant to determining whether the gas owner or the coal owner is "entitled" to produce CBM in accordance with Section 16 of the OGCA. These factors and the weight that should be accorded to each factor are set out below.

4.1 The Science of Coal

21. Canpar is mindful of the caution expressed by both of the law professors who appeared at the hearing on the weight accorded to scientific evidence by the courts in interpreting

¹⁶ 9 TR 1424.

¹⁷ 8 TR 1236, lines 24-25.

grants of petroleum substances. Professor Percy observed that courts adopt the common or vernacular meaning of terms used in conveyance documents rather than the scientific meanings of those terms.¹⁸ Professor Lucas testified that the courts clearly distinguish between the vernacular sense and the scientific sense of the words used in grants.¹⁹ Accordingly, the science of coal, while helpful, is not determinative.

22. The Board heard considerable evidence on the nature of coal in subsurface conditions. Canpar supports the evidence of Mr. Mavor. His evidence and testimony was straightforward, practical, and in line with basic physical laws distinguishing solids, gases and liquids. Canpar endorses the Joint Argument of the Natural Gas Rights Holders respecting the scientific aspects of coal and commends that argument to the Board's consideration.
23. Canpar submits that the following conclusions from the expert opinion of Mr. Mavor will assist the Board in its determinations:
- Coal is rock;
 - CBM is gas *in situ*, generally indistinguishable from natural gas produced from other rock types;
 - CBM and coal are distinct and differ from one another in the subsurface before disturbance by man. Coal is a rock that serves as the container for storage of CBM before and after the reservoir has been disturbed by man;
 - CBM is a vapour that is compressed or adsorbed in porosity (void space) within the solid rock *in situ*;
 - All generally accepted CBM reservoir models consider the coal as a rock that is the gas storage container and treat the gas as distinct from the coal; and
 - The economic value of coal and CBM are distinct.²⁰
24. Just as a court would be obliged to do in any ownership dispute surrounding CBM, a line must be drawn between the solid rock, on one hand, and the gas or vapour which adheres

¹⁸ 5 TR 668, lines 24-24; 669, lines 1-4. See also 670, lines 1-8.

¹⁹ 9 TR 1372, Lines 1-6.

²⁰ Expert opinion of Matthew J. Mavor concerning coal bed methane reservoir behaviour, page 2, Exhibit 18-01.

to the surface of the rock, on the other. Dr. Levine's view of CBM as part of a unique and complex thermodynamic system blurs the critical distinction between solid, liquid and gas. Dr. Levine's ambiguous view of the distinct physical states or phases under consideration does not assist the Board and would certainly not assist a court in resolving any ownership dispute. Mr. Mavor's conclusions, on the other hand, are authoritative, practical and in line with scientific evidence accepted by the highest court of the United States.

4.2 Intention of the Parties to the 1982 Dome Title Split

25. The grant at issue for Canpar is the 1982 Dome title split, which is described in Canpar's Revised Evidence.²¹ The actual agreement granting title to coal was entered into evidence as Exhibit 20-025. The operative language is very simple. The coal sold to TransAlta Utilities in 1982 was "...the estate in fee simple of all coal within, upon or under the lands described in Part 1 Schedule "B" hereto." The 1982 agreement did not define "coal." Neither did the 1982 agreement purport to extend the plain meaning of the black rock that is "coal" to include CBM or any other gas.²²
26. The basic question before the Board is one of interpretation of the relevant grants, including the 1982 agreement.²³ That is, did the parties to the 1982 agreement intend to convey CBM when granting "coal" to TransAlta Utilities or did they intend to retain CBM as part of petroleum and natural gas?
27. Professor Percy provided a crisp statement of the proper test to answer this question:

What was the intention of reasonably knowledgeable parties standing in the shoes of the parties to that transaction in 1982?²⁴
28. Professor Percy further testified that the common or vernacular meaning of "coal" in the grant is the proper focus of the analysis.²⁵ And it is well understood that ownership rights are determined based on initial reservoir conditions or *in situ*.²⁶

²¹ Exhibit 20-024.

²² Canpar Revised Evidence, Exhibit 20-024, paragraph 9.

²³ 9 TR 1375 per Lucas.

²⁴ 5 TR 715, lines 10-12.

²⁵ 5 TR 668, lines 24-25; 669, lines 1-4.

29. All indications are that in 1982, coal was commonly understood to be a solid black rock, not natural gas. The record is clear that there was some knowledge of coal bed methane by 1982.²⁷ It is reasonable to conclude, even today with greater knowledge of the resource, that CBM would be classed as unconventional natural gas, but natural gas nonetheless.²⁸ Even in 1991, when CBM development in Alberta was almost non-existent,²⁹ the Board and Alberta Energy considered CBM to be a form of natural gas.³⁰ It is submitted that knowledgeable people in 1982 would have regarded CBM as a “gas” and would have recoiled from any characterization of coal as including gas.
30. Certainly, it has been established on the record that, in the vernacular, “coal” is a solid rock. CDP’s policy witness Mr. Hatt testified that the common conception of coal, in the vernacular, is a solid rock substance and, “I would probably think most people would think of it as solid.”³¹ Under questioning by Mr. Larder, Dr. Levine acknowledged that the term “coal” has been used to describe the black rock for hundreds of years and offered that modern geologists have relatively little understanding of what coal is.³² On the last day of the hearing, Dr. Levine (finally) admitted to Mr. Berg that, in the vernacular sense, coal would be considered a solid.³³
31. The point is not whether it is “simplistic” to regard coal as a solid. The Board’s interpretive task is to decide what reasonably knowledgeable people would have thought “coal” was in 1982. Engineers, businessmen, landmen and geologists today take the view that coal is a solid rock. It seems quite obvious that in 1982 and earlier, coal was commonly considered to be a solid rock.
32. With respect, Canpar does not agree with Professor Lucas’ idea that historical evidence of the vernacular meaning of coal, through an expert historian, might be of assistance in

²⁶ 5 TR 670, 688.

²⁷ 4 TR 584, lines 13-25; 1 TR 59, lines 18-21.

²⁸ 3 TR 411, lines 3-16.

²⁹ 7 TR 1043, lines 16-18.

³⁰ IL-91-11; 7 TR 1041, lines 15-16.

³¹ 7 TR 1046, lines 14 – 15.

³² 8 TR 1262, lines 4-11.

³³ 9 TR 1371, lines 12-20.

establishing the meaning of “coal.”³⁴ The Board is not bound by the rules of evidence. The Board might have listened to a Professor of History on the meaning of the word “coal” if the coal owners had offered such a witness up. However, the courts have found that the evidence of English language experts do not assist in construing the terms of agreements.³⁵ Furthermore, the time of the Dome title split in 1982 is not so far removed from living memory that the assistance of a Professor of History is needed to interpret what the parties intended in the conveyance of “coal” to TransAlta Utilities.

33. Canpar submits that the vernacular or common meaning of the 1982 Dome title split can easily be determined by the Board without the assistance of linguists, etymologists (qualified or not) or Professors of History. If the Board wished to consider any external source, dictionary meanings of the word “coal” are a more useful gauge of the parties’ intentions. The courts, of course, frequently rely upon dictionary definitions in order to determine the meaning of words in instruments.
34. The meaning of the term “coal” according to a number of dictionaries published around the time of the 1982 grant, is “a mineral, solid, hard, opaque, black or blackish, found in seams in the earth, and largely used as fuel,” or “a black or brownish black solid combustible mineral substance formed by the partial decomposition of vegetable matter without free access of air and under the influence of moisture and in many cases increased pressure and temperature, the substance being widely used as a natural fuel and containing carbon, hydrogen, oxygen, nitrogen, and sulphur as well as inorganic constituents that are left behind as ash after burning,” or “a readily combustible rock containing more than 50% by weight and more than 70% by volume of carbonaceous material including inherent moisture, formed from compaction and induration of variously altered plant remains similar to those in peat”: *The Shorter Oxford English Dictionary* (1973); *Webster’s Third New International Dictionary* (1981); *Glossary of Geology* (1987).

³⁴ 9 TR 1341, lines 24-25; 1342, line 16.

³⁵ Mayson Note 17.

35. None of these definitions indicate that natural gas or coal bed methane is part of the hard, solid rock that is most essentially “coal.” Coal is a solid rock. CBM is a gas.
36. Reasonably knowledgeable parties standing in the shoes of the parties to the 1982 Dome title split would have regarded “coal” in its vernacular or common sense, which is a hard, solid rock. There is no indication, in 1982, that any knowledgeable landowner, commercial man, engineer or even geologist would consider CBM or any other natural gas as included in the term “coal.”

4.3 Commercial Context

37. In the *Borys* case, the Alberta Court of Appeal, was called upon to resolve the “sharp contention between the parties as to the meaning to be ascribed to the reservation.”³⁶ To resolve the issue, the court saw its task as to:

...ascertain the knowledge of the parties at the time of the original agreement and all the surrounding circumstances to determine, as best we may, what the parties to the agreement intended by the reservation.³⁷ [emphasis added]

38. Professor Lucas confirmed that the Board must look at all the surrounding circumstances.³⁸ In accepting the invitation of the Alberta Court of Appeal and Professor Lucas to consider all of the circumstances, however, the Board should be mindful of the extent to which consideration of extrinsic evidence can be used to interpret instruments. The Board itself, of course, is not bound by rules of evidence.³⁹ Still, if the object of the exercise is to make a determination of entitlement in line with what a court is likely to decide, consideration should be given to the acceptable use and weight to be accorded to certain kinds of extrinsic evidence respecting the commercial context under which agreements were entered into.

³⁶ *Borys v. CPR and Imperial Oil Ltd.* (1952) 4 WWR (NS) 481 (Alta SCAD) at paragraph 494

³⁷ *ibid.*, para 494.

³⁸ 9 TR 1330, lines, 11, 19-22.

³⁹ *Energy and Resources Conservation Act*, section 27(2).

39. A useful statement of the law respecting extrinsic evidence is found in Mayson “The Use of Extrinsic Evidence in the Interpretation of Written Agreements in Alberta” (2004) 42 Alta. L. Rev. 499 at paragraph 45:

Dealing first with the type of evidence to be used, the parties were entitled to present evidence relating to the “history of the transaction and the commercial setting in which they were used,” as well the “business objective of the transaction,” the “purpose for which the particular clause was inserted” and the “market in which the parties were operating.” While earlier draft agreements were generally inadmissible, other more informal documents and discussions predating the agreement have been used to establish the background of the transaction. It appears that the traditional approach was that any such evidence had to be objective rather than subjective in nature. This would exclude statements of intention made by the parties during negotiations, both in draft documents and through evidence of intention given by the parties at trial. [footnotes omitted]

40. Justice Kenny provided her opinion on the admissibility and weight to be attached to extrinsic evidence in *Microcell Connexions Inc. v. TELUS Mobility Inc.* (1999), ABQB 94:

Extrinsic evidence adduced to prove the parties’ subjective intent is inadmissible, but it is admissible as proof of the surrounding circumstances and commercial realities existing at the time the contract was entered into. However, in *Eli Lilly, supra*, Iacobucci J. states, at p.27: “indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face.” I find the discussion by Virtue J., of this Court, in *Alpine Resources Ltd. v. Bowtex Resources Ltd.* (1989), 66 Alta. L.R. (2d) (Q.B.), particularly appropriate to this discussion. Although his initial finding, that extrinsic evidence can be considered regardless of whether the contract is ambiguous or not may be inconsistent with the more recent words of Iacobucci J. in *Eli Lilly* outlined above, his subsequent comments remain applicable to those situations where the consideration of extrinsic evidence is appropriate. He said, at p. 147:

The Court can look to the history of the transaction and to the commercial setting in which the contract evolved, in order to discover the real intention of the parties from the words used in the agreement. While the Court cannot change the words of the contract, it can, if the circumstances require, give those words a

broad or loose interpretation (rather than a strict or narrow one) so as to achieve, if possible, the commercial aim and purpose of the parties. At the same time, in making use of extrinsic evidence, the Court must heed the caution stated by Laycraft J.A. in *Bank of B.C. v. Turbo Resources Ltd.* (1983), 27 Alta. L.R. (2d) 17, 23 B.L.R. 152, 148 D.L.R. (3d) 598, 46 A.R. 22 at 22-30 (C.A.):

Consideration of the commercial setting in which a contract is made is not, of course to be confused with parole [sic] evidence of the intention of the parties. That is not admissible. But the commercial setting of the contract assists in ascertaining the intention of the parties from the language they have used.

As is so often the case in law, the Court is called upon to achieve a balance between adopting a rigid interpretation based only upon the plain ordinary meaning of the words, and adopting a meaning which will carry out the aim and purpose of the parties, as discovered in an objective way from evidence outside the contract.

In these circumstances, any concerns about the value of the extrinsic evidence can be dealt with as a matter of weight, not admissibility: *Re C.N.R. and C.P. Ltd.* (1979) 95 D.L.R. (3d) 242 at 262 (B.C.C.A.). Therefore, I conclude that I may use the extrinsic evidence before the Court as an aid to interpretation if the contract is not clear and unambiguous on its face.

41. Canpar's witnesses provided evidence on three aspects of the commercial context of the 1982 agreement. First, an obvious commercial purpose of the agreement was the sale of coal to an electric utility for power generation purposes.⁴⁰ A business objective of the sale was so that TransAlta would have coal reserves for its thermal power plants. This business objective of selling coal to TransAlta for the purposes of its thermal power plants is consistent with the common meaning of "coal" under the 1982 agreement.

⁴⁰ 4 TR 584, lines 18-21; 5 TR 650, lines 7-12.

42. Second, and also related to the business objective of the transaction and the market in which the parties were operating, Canpar and Dome were in the oil and gas business.⁴¹ It would be unusual to see oil and gas operators selling natural gas, conventional or unconventional, to a coal plant operator.
43. Third, one of the vendors was Dome. Dome was precluded by the terms of its credit facilities from disposing of petroleum and natural gas.⁴² This commercial restriction is also consistent with the common meaning of “coal” as the solid black rock which does not include any petroleum or natural gas.
44. Canpar notes that it was open to CDP to provide any contradictory evidence with respect to these three aspects of the commercial context of the 1982 transaction from the standpoint of the purchaser of coal. CDP declined to do so despite presenting its panel of witnesses after Canpar completed its evidence on these points.
45. Another matter raised by Mr. Berg concerns the fact that the integrated utility that, in 1982, was TransAlta Utilities⁴³ may have included the coal cost expenditure in its rate base.⁴⁴ Professor Percy advised that this evidence could be relevant if it is consistent with the view of the original parties to the transaction.⁴⁵
46. Canpar has reviewed published Board decisions dealing with the inclusion of TransAlta’s coal into rate base. In Decision U99099, the Board noted that it had earlier approved rate base inclusion of all the coal assets TransAlta had acquired for future potential generating plants and that \$30.6 million expenditures for the coal rights were made in the period 1971 to 1984 to acquire, among other assets, coal across the Province (Dome).⁴⁶ In the earlier Decision referred to in Decision U990099, Decision E89091, the Board expressly began its discussion of coal rights and leases with the following recital of TransAlta’s evidence:

⁴¹ 5 TR 635/653/662.

⁴² 5 TR 637.

⁴³ 4 TR 584; 5 TR 662, lines 12-14.

⁴⁴ 5 TR 723, lines 14-20.

⁴⁵ 5 TR 724, lines 1-12.

⁴⁶ Decision U99099, page 726.

TransAlta noted that all of its coal properties, including those held for future potential power plants, are included in its Rate Base.⁴⁷
[emphasis added]

47. By including all its coal in rate base for future potential generating plants, TransAlta's accounting method, as approved by its regulator and built into rates, was consistent only with the ordinary meaning of coal as excluding CBM.
48. It is also interesting that, in the 1999 Decision, TransAlta proposed to write-off all coal reserves not required for the base or life extension of the PPAs.⁴⁸ TransAlta told the Board the tonnage of coal associated with future generating plants (2.63 billion tonnes) had no value. This statement to its regulator is consistent with the fact that the coal TransAlta purchased in 1982 never included CBM, which by 1999, had commercial value.
49. There is not a shred of evidence that TransAlta ever thought that the coal purchased in 1982 included CBM. It was open to CDP to advance such evidence, if it existed. It would be extremely surprising if any TransAlta officer with personal knowledge of the 1982 agreement would seek to lay claim to CBM in a way that is inconsistent with the Company's regulatory filings. TransAlta's regulated conduct is consistent with the proposition that only coal, not CBM, was purchased from Dome in 1982.

4.4 Regulatory Practice

50. Another factor that the Board might be tempted to consider is the effect of its decision on its own regulation of CBM licensees. In Canpar's view, this consideration may well be valid from the Board's own standpoint. However, it is unlikely that a court would find that the issue of entitlement to produce CBM is in any way dependent on the Board's administrative practices.
51. Justice Fruman warned that regulatory practice does not determine ownership:

[147] The regulators' view does not determine legal ownership of solution gas. If the regulators have misconstrued the law, their practices will have to change, however cumbersome that process

⁴⁷ Decision E89091, page 81.

⁴⁸ Decision U99099, page 726.

might be. The courts' function is not to preserve legally incorrect administrative positions. I accept evidence of the regulatory position for the limited purpose of dealing with the plaintiffs' fairness argument and considering settled expectations.⁴⁹

52. Canpar submits that there are ample grounds upon which the Board may find that the holders of natural gas rights are entitled to produce CBM. Canpar requests that the Board accord considerable weight to the intention of the parties as shown by the words used in the relevant grant, the scientific evidence on the nature of coal presented by Mr. Mavor, and the commercial context of the 1982 Dome title split. These factors are sufficient to decide the question of entitlement under Section 16 of the OGCA in sync with how a court would likely decide the matter.

5.0 CONCLUSION

53. Canpar requests that the Board determine that the owner of natural gas is entitled to produce CBM under titles originating in the 1670 grant by Charles II of England to the Company of Gentlemen Adventurers Trading into Hudson's Bay, including land described as 8-34-26 W4M.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November 2006.

<Original signed by>

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⁴⁹ *Anderson v. Amoco Canada Oil and Gas*, 1998 ABQB 620