

**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**

**REPLY ARGUMENT**

**OF**

**CANPAR HOLDINGS LTD. (“CANPAR”)**

**DECEMBER 13, 2006**

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## 1.0 INTRODUCTION AND OVERVIEW

1. Canpar is in receipt of Arguments filed by CDP and EnCana dated November 29, 2006. Canpar will reply to the Argument presented by CDP. CDP is the successor in title to TransAlta Utilities Corporation. TransAlta acquired “coal” in the 1982 transaction involving Dome and Canpar, referred to as the 1982 Dome title split. It is the interpretation of the 1982 Dome title split and the Board’s task is interpreting this particular grant, which is of most concern to Canpar. Failure to respond to any particular argument should not be construed as agreement or acceptance on the part of Canpar.
2. CDP’s position on the Board’s duty to decide has some common ground with Canpar’s view that the Board has the power, and indeed duty, to decide “entitlement” under Section 16 of the *Oil and Gas Conservation Act* (“OGCA”). Admittedly, CDP would prefer the Board to do nothing until a court issues a determination some time in the future. Still, CDP’s argument is clear that the Board has authority to apply scientific and legal principles and rightly determine entitlement under Section 16 of the OGCA.<sup>1</sup>
3. In connection with the onus or degree of certainty which would support a Board determination, CDP seeks a high degree of precision. A process where a party merely “checks the box” to show entitlement is not sufficient for CDP. Canpar concurs that, at least for the 1982 Dome title split which is within recent memory and has a rich context, the Board should make a determination in line with how a court would determine entitlement. Canpar believes this standard is met by determining which party, on a balance of probabilities, holds title to coal bed methane (CBM).
4. CDP falls short in dealing with the relevant evidence before the Board. A review of CDP’s Argument discloses a selective use of the sworn testimony and, in some cases, a complete omission of any consideration of highly relevant factors. For example, Dr. Levine’s equivocation on the nature of coal is offered as the key point of evidence. But CDP misstates or misapprehends Mr. Mavor’s evidence, expert evidence which assists the Board’s fact-finding responsibilities. The record allows the Board to find that CBM is gas *in situ*.

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<sup>1</sup> CDP Argument, paragraph 29(e).

5. Canpar is also concerned that the crux of “entitlement” – the vernacular meaning of “coal” – has been downplayed by CDP. In the case of the 1982 Dome title split, CDP glosses over the entire commercial context for the transaction. Most conspicuous in its absence is any discussion by CDP of TransAlta’s regulatory practice of including all its coal assets in rate base.
6. Why has CDP ignored the recommendation of its own legal expert to examine “all of the circumstances” in interpreting the grant? It appears that CDP has been blinded by its commercial desires. CDP’s failure to confront the critical points of vernacular meaning and commercial context goes beyond normal advocacy.
7. In the vernacular, “coal” is a solid black rock. This was accepted by CDP’s own policy witness Mr. Hatt and, on the last day of the hearing, by Dr. Levine. The commercial context of the 1982 Dome title split – the sale of coal to a power utility, Canpar and Dome continuing to operate in the oil and gas space, the restrictions contained in Dome’s credit facilities, and TransAlta’s subsequent conduct in rate basing all of its coal assets – show beyond question that CBM was never intended to be included in the “coal” purchased by TransAlta in 1982. Indeed, it is curious that CDP believes the evidence of a historian might be useful in divining the intention of the parties. If history is relevant, why has CDP ignored the very recent history of TransAlta’s regulated conduct in placing all of its coal assets into rate base?

## **2.0 DUTY TO DECIDE**

8. CDP acknowledges that the Board has jurisdiction to determine entitlement under Section 16 of the OGCA.<sup>2</sup> In making this argument, CDP quotes the testimony of Professor Lucas on the Board’s statutory decision-making power under Section 16 of the OGCA. However, CDP goes on to recommend that the Board “need not embark on a detailed study of underlying property rights” and suggests that the Board can fulfil its statutory mandate by “by concluding the Gas Producers have not met the obligation imposed on

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<sup>2</sup> CDP Argument, paragraph 134.

- them by the legislation.”<sup>3</sup> It seems that CDP would give the Board jurisdiction to decide with one hand, and tell the Board that it need not actually make a decision, with the other.
9. It seems curious to acknowledge that the Board has the duty and power to determine entitlement, but invite the Board to decline consideration of the very legal and scientific evidence, which has been presented in this Proceeding. Certainly, a failure to account for the question of legal ownership raises a serious risk of inviting review by the Alberta Court of Appeal, according to Professor Lucas.<sup>4</sup> More to the point, the Board has a statutory mandate under the OGCA, which must be carried out.
10. CDP provides no convincing rationale on how the Board would possibly justify a failure to fully investigate property rights necessary to determine entitlement under Section 16 of the OGCA. CDP seeks to minimize the adverse effects of the failure to make a determination by claiming that freehold mineral lands represent less than 20% of the lands in Alberta.<sup>5</sup> However, the evidence presented at the Proceeding shows that freehold title is particularly prominent in the CBM fairway.<sup>6</sup> Further, in suggesting that producing CBM under a clouded title will simply move the forum of dispute to the courts,<sup>7</sup> CDP ignores its own policy witness’ testimony that a Board decision should be consistent with how a court would ultimately decide the matter.<sup>8</sup>
11. CDP’s attempt to paint the Board into a passive corner is contrary to the command of the legislation. The statutory objectives of economic, orderly and efficient development and affording each owner its opportunity of obtaining its share of gas production, cannot be left for future uncertain court proceedings to resolve. The Board must discharge its duty to decide.

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<sup>3</sup> CDP Argument, paragraph 141.

<sup>4</sup> 9 TR 1344, lines 9-19.

<sup>5</sup> CDP Argument, paragraph 159.

<sup>6</sup> Exhibit 20-052, page 3.

<sup>7</sup> CDP Argument, paragraph 160.

<sup>8</sup> 8 TR 1235-37.

### **3.0 ACHIEVING PUBLIC INTEREST OBJECTIVES**

12. CDP's submission on the standard of proof for "entitlement" under Section 16 of the OGCA is "beyond a balance of probabilities."<sup>9</sup> The evidentiary basis for this standard is Professor Lucas' testimony that property rights are high order rights and consequently would require a "high degree of certainty."<sup>10</sup> Canpar would observe that Professor Lucas did not testify to any particular standard, which must be adopted by the Board under Section 16 of the OGCA. In fact, Subsection 16(2) reveals a legislative intention that the particular standard in any case is "the satisfaction of the Board," not the more exacting standard proposed in CDP's argument.
13. There is no indication in any of the authorities dealing with ownership of other petroleum substances, such as *Borys* or *Anderson v. Amoco*, that any standard of proof beyond the normal "balance of probabilities" standard is necessary in interpreting a grant. Based on Mr. Hatt's concurrence that a Board decision should be in line with how a court would likely decide the matter, the Board should determine entitlement based on the usual standard of a balance of probabilities.<sup>11</sup>
14. Canpar requests that the Board consider all of the evidence, determine the relevance of each point of evidence and the weight to be accorded to it, and determine, on the standard of a balance of probabilities, which party is entitled to produce CBM.

### **4.0 WEIGHING THE RELEVANT FACTORS**

15. The relevant factors that ought to inform the Board's decision on entitlement are quite straightforward. First, the Board may make findings of fact on the "science" of the coal based on the expert evidence and the Board's own internal expertise. Second, the Board must determine the terms of the grant, in the vernacular. Finally, "all of the circumstances," including the commercial context and regulatory practice, may be taken into consideration in order to assist interpretation of a particular grant.

#### **4.1 Science of Coal**

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<sup>9</sup> CDP Argument, paragraph 131.

<sup>10</sup> Quoted by CDP at paragraph 131.

<sup>11</sup> 8 TR 1235-1237.

16. CDP's argument rests almost exclusively on Dr. Levine's evidence. In fact, CDP acknowledges that if the Board rejects the evidence of Dr. Levine, CDP has no case.<sup>12</sup> In this Reply Argument, Canpar relies on the Joint Reply Argument filed by the National Gas Rights Holders, and will supplement that Joint Reply Argument with reference to two key points on the Board's powers to make findings of fact on the science of coal.
17. First, CDP claims that the Board must unreservedly accept the evidence of Mr. Mavor and unequivocally reject the evidence of Dr. Levine in order for the gas producer applications to succeed.<sup>13</sup> While it is certainly possible for the Board to reach such a conclusion based on the evidence, the choices are not as binary as CDP would have the Board believe. The Board is an expert tribunal entitled to make findings of fact based on the evidence before it. An important finding of fact is whether CBM is gas *in situ*. Mr. Mavor's opinion is crystal clear that CBM is gas *in situ*. Mr. Mavor's evidence is in accord with the findings of the United States Supreme Court, as pointed out by Mr. Larder's examination of Dr. Levine.<sup>14</sup>
18. What is Dr. Levine's view on the critical question of whether CBM is gas *in situ*? He is not sure in his own mind. In responding to Mr. Larder on the science of the United States Supreme Court, he acknowledged that we can call the substances "gasses when they are still within coal,"<sup>15</sup> but wasn't really sure if they had the physical characteristics of gasses when they are in the coal structure. CDP's argument quotes just one example of Dr. Levine's testimony, which underscores this witness' inability to classify CBM as one of the three phases of gas, liquid or solid.<sup>16</sup> As also acknowledged in CDP's argument, even when pressed during cross-examination, Dr. Levine was unable to definitely classify CBM *in situ* as any one of the three phases.
19. It is not necessary for the Board to accept or reject Dr. Levine's inability to classify the state of CBM *in situ*. Even though Dr. Levine is unable to characterise the state of CBM

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<sup>12</sup> CDP Argument, paragraph 85.

<sup>13</sup> CDP Argument, paragraph 85.

<sup>14</sup> 8 TR 1256, lines 18-25, 1257, lines 1-20.

<sup>15</sup> 8 TR 1258, lines 1-2.

<sup>16</sup> CDP Argument, paragraph 105.

*in situ*,<sup>17</sup> the Board may make a robust and practical determination, based on the evidence of Mr. Mavor and its own internal expertise, that CBM is gas *in situ*. In making such a determination, the Board would be in accordance with the findings of a highly respected court of law, the United States Supreme Court.

20. Second, Professor Percy testified that, if CBM is found to be in a gaseous or vaporous state, it is highly likely that a Canadian court would reach the same determination as the United States Supreme Court.<sup>18</sup> Later, CDP's own legal expert, Professor Lucas acknowledged that he, like Professor Percy, considered it likely that if the proposition of Mr. Mavor that the CBM in coal is vapour or a gaseous state, ownership would be with the natural gas owner.<sup>19</sup>
21. Accordingly, CDP is not correct in suggesting that the Board must unequivocally reject the evidence of Professor Levine in order to reach a determination in this Proceeding. Just because Dr. Levine is unable or unwilling to make a call does not freeze the Board's fact-finding process. The Board is expected to make a finding of fact, for the purposes of Section 16 of the OGCA, as to whether CBM exists in a gaseous state *in situ*. If this finding of fact is answered in the affirmative, it follows from the testimony of both of the legal experts that the holder of natural gas rights owns CBM.

#### **4.2 Intention of the Parties to the 1982 Dome Title Split**

22. Psychologist Leon Festinger identified the phenomenon of "cognitive dissonance" in 1956. Cognitive dissonance explains why people invent ways to ignore facts and seek out information that is consonant with their own views.<sup>20</sup>
23. CDP's argument on the interpretation of the 1982 Dome title split is a classic example of cognitive dissonance. CDP wants to believe that TransAlta acquired CBM when it purchased "coal" from Dome and Canpar in 1982. How does CDP resolve its desire in the face of dissonant evidence on the vernacular meaning of "coal", the commercial

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<sup>17</sup> CDP Argument, paragraph 95.

<sup>18</sup> 5 TR 729, lines 5-25, 730, lines 1-3.

<sup>19</sup> 9 TR 1388, lines 15-25, 1389, lines 1-10.

<sup>20</sup> [http://en.wikipedia.org/wiki/Cognitive\\_dissonance](http://en.wikipedia.org/wiki/Cognitive_dissonance)

context of the 1982 transaction, and TransAlta's subsequent conduct? As shown below, CDP simply avoids considering any information that will increase its dissonance.

#### 4.2.1 Vernacular Meaning of "Coal"

24. CDP spends some time in its argument talking about the legal authorities on what comprises the "vernacular." Less time is spent on the actual evidence of the vernacular meaning of "coal" at the time of the relevant grants, in particular, the 1982 Dome title split.
25. CDP cites Dr. Levine's report as evidence respecting the understanding of reasonably knowledgeable people involved in the coal industry in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. CDP goes on to make the remarkable claim that Dr. Levine's report is the "only evidence on this issue and is relevant to any discussion of the vernacular usage of the word 'coal'."<sup>21</sup>
26. Dr. Levine's lack of expertise as a linguist or etymologist was exposed by Mr. Crowther's cross-examination. Dr. Levine's selective use of dictionary definitions was demonstrated by Mr. Linder's cross-examination of the witness. Moreover, Dr. Levine's views on the vernacular, as acknowledged by CDP's Argument,<sup>22</sup> was restricted to a period well before the 1982 Dome title split.
27. While relying on Dr. Levine's unstudied and out-of-date views on the vernacular, CDP completely ignores the most powerful evidence of the vernacular meaning of "coal" on the record of the Proceeding:
  - In 1982, there was knowledge of CBM, which would even today be classified as unconventional natural gas.<sup>23</sup>
  - Within 10 years of the 1982 Dome title split, the EUB and Alberta Energy thought CBM to be a form of natural gas.<sup>24</sup>
  - Both Mr. Hatt and Dr. Levine acknowledged under cross-examination that, in the vernacular, coal is considered to be a solid rock substance.<sup>25</sup>

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<sup>21</sup> CDP Argument, paragraph 84.

<sup>22</sup> CDP Argument, paragraph 84.

<sup>23</sup> Canpar Argument, paragraph 29.

<sup>24</sup> Canpar Argument, paragraph 29.

- Dictionary definitions *circa* 1982 define coal as a solid rock. None of the definitions include CBM as “coal,” a “part of coal,” an “inherent constituent of coal” or otherwise.<sup>26</sup>

28. The weight of all of the evidence presented at the Proceeding shows that “coal” is most essentially a black solid rock that does not include CBM. Canpar submits that the evidence on the vernacular is clear: no knowledgeable landowner, commercial man, engineer or even geologist would consider CBM or any other natural gas to be including in the term “coal” in 1982 or at any time earlier.

#### 4.2.2 Commercial Context

29. Nowhere is CDP’s failure to consider the facts more pronounced than on the commercial context of the 1982 Dome title split. Canpar provided subjective evidence on what it intended in the transaction. Canpar also provided objective evidence on the commercial context – the sale of coal to a power utility, Canpar and Dome continuing to operate as natural gas producers and the restrictions contained in Dome’s credit facilities. This evidence was produced under oath, was available for testing under cross-examination and, moreover, CDP had ample opportunity to provide rebuttal evidence. Finally, Canpar provided references in the Board’s published decisions showing that TransAlta placed all its coal assets in rate base and told the Board in 1999 that surplus coal had no economic value.
30. CDP’s failure to respond the commercial context of the 1982 Dome title split is contradicted by the very authorities it cites: The intention of the parties is to be determined by “the facts and circumstances then existing” and “all of the surrounding circumstances.”<sup>27</sup> CDP’s failure flies in the face of its own witness, Professor Lucas, who underlined a need to consider the “understanding of reasonable people who were knowledgeable about the commercial context of each particular transaction.”<sup>28</sup>

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<sup>25</sup> Canpar Argument, paragraph 30.

<sup>26</sup> Canpar Argument, paragraph 34.

<sup>27</sup> CDP Argument, paragraphs 49 and 50, citing the Trial Decision and Court of Appeal in *Borys*.

<sup>28</sup> 6 TR 759, lines 14-1, cited at CDP Argument, paragraph 68.

31. CDP tries to dismiss all of the surrounding circumstances as the “bald statements” of Canpar’s witnesses.<sup>29</sup> CDP also claims that a court would not allow evidence of the commercial context to be admitted into evidence.<sup>30</sup>
32. As noted in Canpar’s Argument, the Board is not bound by the rules of evidence.<sup>31</sup> Still, in order to ensure that the Board’s determination in this Proceeding is consistent with how a court would decide the matter – an objective supported by CDP’s policy witness Mr. Hatt<sup>32</sup>– an evaluation of admissibility of each particular aspect of the commercial context is warranted.
33. First, CDP is correct that statements of subjective intention of the parties would not be admissible in a Court because of the rule of parol evidence. Again, the Board is not bound by the parol evidence rule. CDP itself cites Mr. Okrusko’s testimony that CBM was not even contemplated as being part of the transaction.<sup>33</sup> CDP therefore feels able to rely on subjective intention where it suits its (flawed) theory that nobody turned their mind to CBM. However, CDP does not read further in the transcripts where Mr. Okrusko provided unequivocal evidence on Canpar’ subjective intention during his discussion with Mr. Berg:
- Q. So when you say not contemplated, you mean there was a contemplated decision not to sell it?
- A. MR. OKRUSKO: That’s right.<sup>34</sup>
34. This evidence – that it was a contemplated decision on the part of Canpar not to sell CBM – is a statement of subjective intention. While the Board is entitled to consider this evidence, it is likely that a court would not consider such evidence of subjective intention. For this reason, Canpar’s Argument did not cite this evidence on subjective intention of Canpar.

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<sup>29</sup> CDP Argument, paragraph 57.

<sup>30</sup> CDP Argument, paragraph 64.

<sup>31</sup> Canpar Argument, paragraph 38; citing *Energy and Resources Conservation Act*, Section 27(2).

<sup>32</sup> 8 TR 1237, lines 1-2.

<sup>33</sup> CDP Argument, paragraph 57.

<sup>34</sup> 4 TR 591, lines 1-3.

35. Instead, Canpar focused on the objective commercial context of the transaction. These objective matters include the “history of the transaction and commercial setting in which they were used,” the “business objective of the transaction” and the “market in which the parties were operating.” This type of evidence is readily admissible before the Alberta courts for the purposes of interpretation of written agreements.<sup>35</sup> Likewise, in the discussion of the *Turbo Resources* case by Justice Kenny in *Microcell Connexions*, consideration of the commercial aim and purpose of the parties was admissible to aid a court in the interpretation of a contract that is not clear and ambiguous on its face.<sup>36</sup>
36. Again, the Board is not bound by the same rules of evidence as a court and may freely consider all of the circumstances. In the interests of ensuring that its decision is in harmony with how a court would likely decide the matter, the Board is certainly at liberty to consider the history of the transaction and the commercial setting, the business objectives of the transaction and the markets in which the parties were operating.
37. Clearly, there are three aspects of the commercial context of the 1982 Dome title split, which were presented by Canpar’s witnesses under oath, that can assist the Board in considering “all of the circumstances of this title split.” These three aspects are:
- The sale of coal to an electric utility for power generation purposes;
  - That Canpar and Dome were operating in the oil and gas business; and
  - Dome was precluded from the terms of its credit facilities from disposing of petroleum and natural gas.<sup>37</sup>
38. This is not a case where Canpar’s witnesses were “looking back at 1982 with 21<sup>st</sup> century goggles and were speculating on intentions,”<sup>38</sup> as suggested by CDP. These three objective aspects of the commercial setting are matters of fact presented by Canpar’s witnesses under oath. Under the normal rules of contractual interpretation, if there was

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<sup>35</sup> Mason “The Use of Extrinsic Evidence and the Interpretation of Written Agreements in Alberta” (2004) 42 Alta. L. Rev. 499 at paragraph 45, cited in Canpar Argument paragraph 39.

<sup>36</sup> Canpar Argument, paragraph 40.

<sup>37</sup> Canpar Argument, paragraph 41-43.

<sup>38</sup> CDP Argument, paragraph 60.

doubt as to the meaning of the word “coal” in the 1982 Dome title split, an Alberta court would consider all three of these aspects of the surrounding circumstances.

39. The final piece of evidence on the intention of the parties to the 1982 Dome title split is TransAlta’s conduct in including coal cost expenditures in its rate base. Mr. Berg raised this issue during the proceeding with the Canpar witnesses and, later, with Professor Percy.<sup>39</sup> In its final Argument, Canpar provided references to the Board’s published decisions. These Board decisions showed that TransAlta included all of its coal properties, including the coal acquired in the 1982 Dome title split, in its rate base.<sup>40</sup> The 1999 Decision also provided TransAlta’s view that the tonnage of coal associated with future generating plants had no value.<sup>41</sup>
40. How does CDP deal with the evidence of TransAlta’s conduct? CDP completely ignores this evidence. All we are left with is a blanket statement that the “Board ought to place no or little weight on evidence proffered by Canpar on that regard.”<sup>42</sup> TransAlta’s statements to its regulator and the Board’s published decisions are well within the institutional knowledge of the Board. The Board is certainly entitled to rely on these matters in making determinations.
41. So also would this evidence be admissible in a court of law, as explained by Professor Percy, because the EUB Decision shows that the original parties to the 1982 Dome title split were of the same mind in believing only coal was purchased by TransAlta.<sup>43</sup> Canpar would add that there is ample judicial precedent for the admission of regulatory evidence when interpreting contracts.<sup>44</sup>

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<sup>39</sup> Canpar Argument, paragraph 45.

<sup>40</sup> Canpar Final Argument, paragraph 46.

<sup>41</sup> Canpar Argument, paragraph 48.

<sup>42</sup> CDP Argument, paragraph 65.

<sup>43</sup> 5 TR 724, lines 1-12.

<sup>44</sup> *TransCanada Pipelines Ltd. v. Northern & Central Gas Corp.* (1981), 128 D.L.R. (3d) 633; affirmed 146 D.L.R. (3d) 293 (Ont. C.A.), a case involved a contract for the sale of natural gas which included a Force Majeure clause, which that the defendant was relying on to exempt themselves from liability for losses resulting from to an explosion and several strikes. The clause was held to be ambiguous thus allowing the consideration of extrinsic evidence. The evidence brought forth were proceedings that had been held previously before the National Energy Board between the same parties relating to the same clause. This evidence demonstrated that the defendants understood that the Force Majeure clause left them unprotected from the situations that occurred (para 21); see also

42. The failure of CDP to provide any rejoinder to the commercial context of the 1982 Dome title split, including TransAlta's subsequent conduct as reflected in the Board's own decisions, leads inevitably to the conclusion that the original parties to this grant contemplated that CBM was not included in the "coal" purchased by TransAlta.

## 5.0 CONCLUSION

43. Canpar requests that the Board determine that the owner of natural gas who 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 13<sup>th</sup> day of December, 2006.**

*<Original signed by>*

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*Lakewood 1986 Development Ltd. Partnership v. Fletcher Challenge Petroleum Inc.* (1994), 25 Alta. L.R. (3d) 326, which involved the interpretation of a Gas Farmout and Option Agreement and its indemnification clause. The plaintiffs claimed that the clause indemnified them from paying take-or-pay carrying costs, which were deducted by the defendants before revenues were paid from the defendants to the plaintiffs. In its analysis of the case, the Court allowed evidence of the "commercial matrix" which included commercial purpose, background, and context (para 20). The evidence admitted contained extracts from reasons of the National Energy Board in several hearings that had addressed the same issue (para 22).