

**ALBERTA ENERGY AND UTILITIES BOARD**

IN THE MATTER OF PART 2 OF PROCEEDING NO. 1457147,  
COALBED METHANE (CBM) REVIEW HEARING

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**CENTRICA CANADA LIMITED  
REPLY SUBMISSION AND AUTHORITIES  
(DECEMBER 13, 2006)**

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## **I. Introduction**

1. This is Centrica's Reply to the Closing Arguments submitted by Carbon Development Partnership ("CDP") and EnCana Corporation ("EnCana") in Proceeding No. 1457147.

2. Centrica adopts its previous submissions and further relies upon the Joint Reply filed on behalf of the Natural Gas Rights Holders addressing technical and scientific issues raised in the Coal Owners' Closing Arguments.

3. In this reply, Centrica addresses the Coal Owners' arguments on jurisdiction, procedural fairness and the persuasive value of the *Southern Ute* case to the CPR split-title issues. This reply also deals with the sufficiency and compelling nature of the evidence which establishes the Applicants' entitlement to produce CBM from freehold lands in Alberta.

## **II. The Board Has Jurisdiction**

4. EnCana argues that the Board has no express or implied power to decide the issue of ownership of CBM under its empowering statute, the *Oil and Gas Conservation Act*, R.S.A. 2000 c.O-6 (the "*OCG Act*").<sup>1</sup> In direct contrast, CDP's position is stated at paragraph 122 of CDP's Closing Argument as follows:

"The Board has jurisdiction and, in fact a statutory mandate, to address "entitlement" and "ownership" of the underlining resource is (sic) key element of that determination."

5. EnCana's position on the issue of jurisdiction also is completely at odds with the evidence of EnCana and CDP's joint legal expert in this proceeding, Dean Lucas, whose evidence on jurisdiction was as follows:

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<sup>1</sup> EnCana Closing Argument, para. 3 and paras. 17-43; *OCG Act* at Exhibit 10-18a-2006-08-15.

“Well, the Board has a statutory decision power under Section 16, and it’s a power that it has to try to exercise in a proceeding of this kind.”<sup>2</sup>

6. EnCana’s position on jurisdiction is also in direct conflict with its own counsel’s representations to the Board during the January 31, 2006 oral Hearing. During that hearing, Mr. Popowich represented to Board counsel that not only did the Board have jurisdiction under Section 16 of the *OGC Act*, but under the *Goodwell* decision the Alberta Court of Appeal had “recognized that **it was incumbent upon the Board and that they had to determine the relative ownership of the parties.**”<sup>3</sup>

7. Moreover, EnCana’s argument that the Board has no jurisdiction to decide competing ownership claims would require the Board essentially to abrogate its statutory responsibilities mandated under Sections 4, 16 and 94 of the *OGC Act*.<sup>4</sup> In short, EnCana argues that the Board should so narrowly construe its own powers and responsibilities so as to decline to provide for the economic, orderly and efficient development of oil and gas resources whenever any two parties claim to have *genuine* competing claims as to the ownership of a resource within the Board’s express statutory jurisdiction. With respect, EnCana’s argument would frustrate the intent of the Legislature under Section 94 of the *OGC Act*, which expressly states that:

**“The Board has the exclusive jurisdiction to examine, enquire into, hear and determine all matters and questions arising under this Act.”**<sup>5</sup>

8. EnCana’s proposition that the enabling legislation of the Board does not expressly provide the power to decide competing ownership claims is simply wrong. The *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 (the “*AEUB Act*”) specifically provides the Board with the same powers as the Energy Resources Conservation Board (“*ERCB*”) and the Public Utilities Board (“*PUB*”):

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<sup>2</sup> Hearing Transcripts, page 1343, lines 8-10.

<sup>3</sup> January 31, 2006 Hearing Transcripts, page 46, line 3 to page 48, line 4.

<sup>4</sup> *OGC Act*, *supra* note 1.

<sup>5</sup> *Ibid.*

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.<sup>6</sup>

9. Contrary to EnCana's contention, the fact that one piece of legislation grants an express power while the other does not contradicts the plain reading of Section 15(1) of the *AEUB Act*, which clearly provides that the Board has the same functions as the PUB for the "purposes of carrying out its functions." These functions are not limited to those carried out under specific legislation; rather, the Board derives its authority from a number of statutes, including, *inter alia*, the *AEUB Act* and the *OCG Act*. The Court of Appeal has held that in the context of the regulatory scheme created by these statutes, "each statute within that regime should be read in the context of the others and with a view to the overall scheme."<sup>7</sup>

10. It is submitted that the maxim *expressio unius est exclusion alterius* does not apply. Having regard to the grant of powers in Section 15(1) of the *AEUB Act* and the regulatory scheme created by all of the statutes, the Board has all of the powers provided for in the enabling legislation of the ERCB and the PUB, including those provided in section 38 and 39 of the *PUB Act*.

11. EnCana's arguments with respect to "implied" powers are similarly flawed. First, the Natural Gas Rights Holders are not asking the Board to "compel development" as suggested by EnCana.<sup>8</sup> The Natural Gas Rights Holders merely ask the Board to carry out its responsibilities mandated under Sections 4, 16 and 94 of the *OGC Act*. Part of those mandated responsibilities include "to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta",

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<sup>6</sup> *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 15(1) (the "*AEUB Act*") [Tab 1]

<sup>7</sup> *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*, 2001 CarswellAlta 1058 (C.A.) at para. 22, see Tab 2 to EnCana Closing Argument. In *Giant Grosmont*, the Court of Appeal at para. 42 rejected the Appellants' argument that *expressio unius* applied because the Appellants failed "to consider the provisions of the OGCA within the context of the Energy Statutes as a whole."

<sup>8</sup> EnCana Closing Argument, paras. 30-33.

which is provided in Section 4(c) of the *OGC Act*.<sup>9</sup> There is no need to “imply” any other purpose as the Board’s enabling legislation clearly contemplates the within application.

12. Further, even if the “incidental powers” quoted by EnCana<sup>10</sup> from the *Atco Gas* decision are considered, it is submitted that the Board has jurisdiction to make its determination as to the Natural Gas Rights Holders’ entitlement to the right to produce for the purpose of issuing licenses. Specifically, the jurisdiction sought is “necessary to accomplish the objects of the legislative schemes and is essential to the Board fulfilling its mandate”, the first of the circumstances contemplated in that decision.<sup>11</sup> Indeed, this has been effectively codified in Section 16 of the *Energy Resources Conservation Act*,<sup>12</sup> which provides that:

“The Board, in the performance of its duties and functions imposed on it by this Act and by any other Act, may do all things that are **necessary for or incidental to** the performance of any of those duties or functions.”  
[Emphasis added.]

13. In short, Encana’s position that this Board has no jurisdiction to decide the issue of entitlement to CBM is inconsistent with its own previous representations to this Board; inconsistent with its own expert evidence given by Dean Lucas; inconsistent with the Board’s empowering statute; and is based upon a flawed interpretation of the scope of this Board’s powers and mandate. As fairly conceded by CDP at paragraph 140 of its Closing Argument:

“... CDP does not see the Board jurisdiction coming to an end in the face of a *bona fide* dispute as to ownership of CBM. The Board has legislatively imposed obligations and, in CDP’s opinion is required to act in accordance with its legislative mandate.”

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<sup>9</sup> *OGC Act*, *supra* note 1. EnCana’s suggestion that this purpose is “inexplicable” at paragraph 30 of EnCana’s Closing Argument is non-sensical, as this is one of the enumerated purposes of the *OGC Act*.

<sup>10</sup> EnCana Closing Argument, para. 28, quoting from *Atco Gas & Pipelines Ltd. v. Alberta Energy and Utilities Board*, 2006 CarswellAlta 139 (S.C.C.) at para. 73, see Exhibit 07-026-2006-09-15.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (“*ERC Act*”) at Exhibit 10-021-2006-09-29.

### **III. There Has Been No Lack Of Notice Or Procedural Unfairness**

14. EnCana further argues that the Board should not carry out its statutory mandate in the present circumstances for reasons of procedural fairness.<sup>13</sup> Again, CDP does not share EnCana's zeal on this point.

15. Again, with Mr. Popowich having insisted that **"it was incumbent upon the Board and that they had to determine the relative ownership of the parties"**<sup>14</sup> and with EnCana not having objected to the manner in which the Hearing was being conducted, it rings hollow for EnCana to raise procedural fairness for the first time in its Closing Argument. Indeed it is EnCana who seeks to take advantage of procedural fairness by objecting to the process after all of the evidence is in, the Natural Gas Rights Holders have submitted their Closing Arguments and all parties have invested extensive time and money into a hearing that was convened at the request of the Coal Owners.

16. In any event, the Board invited all interested parties to participate fully in the proceedings and the two major Coal Owners in the Province fully participated by counsel and through witnesses, without objection. Surely, it does not now lie in the mouth of EnCana to complain of a lack of notice or other imagined unfairness in closing argument.

17. In addition to Mr. Popowich's oral submissions, the Board may take note of the following correspondence and steps taken wherein EnCana participated in establishing the process that was followed in this Proceeding:

- Letter dated June 24, 2005 to the Board (Exhibit: 07-005-2005-06-24), Mr. Popowich states: "It cannot be determined whether "natural gas" under the instruments here includes coalbed methane without a hearing and evidence from the parties on the meaning of "natural gas" at the time of contract."
- Letter dated July 27, 2005 to the Board (Exhibit: 07-008-2005-07-27), Mr. Popowich states: "If Devon's submission is that the Board need not consider entitlement, that is incorrect. Sections 4(c) and 16 of the *Oil and Gas Conservation Act* make it clear that ownership is required for a license."

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<sup>13</sup> EnCana Closing Argument, para. 3 and paras. 61-70.

<sup>14</sup> January 31, 2006 Hearing Transcripts, page 46, line 3 to page 48, line 4.

- In a letter dated April 28, 2006 from Mr. Popowich to the Board (Exhibit: 07-016-2006-04-28), Mr. Popowich stated: EnCana sought review and variance on the basis that it was directly and adversely affected..., and that a hearing was required on the issue of entitlement and preserving the parties' rights pending resolution of that issue..."
- By letter dated April 21, 2006 from the Board, the parties were advised that "it is anticipated that the hearing of the second module dealing with coalbed methane ownership will commence in August or September of 2006."
- On April 26, 2006 (Exhibit: 01-001-2006-0426), the Board issued a Notice of Hearing for this Proceeding advising inter alia, that "Part 2 of Proceeding No. 1457147 will consider the issue of legal entitlement to coalbed methane being produced or intended to be produced from the said wells."
- On June 23, 2006 (Exhibit: 01-003-2006-06-23), the Board issued a Notice of Hearing regarding Part 2 of Proceeding No. 1457147. This Notice confirmed that the issue of legal entitlement of coalbed methane would be considered by the Board.
- By letter dated July 19, 2006 (Exhibit: 01-030-2006-07-19), the Board informed the parties that a meeting of counsel would be held on July 25, 2006 at the Board offices. The Board advised that the purpose of the meeting would be to discuss *inter alia*, the "scope of issues". The meeting was attended by most of the parties, including counsel for EnCana, and ultimately the parties agreed that the issues would fall under the following broad categories: legal, scientific and technical (see Exhibit: 01-031-2006-07-27).
- Ultimately, an Amended Notice of Hearing was issued by the Board on July 27, 2006 (Exhibit: 01-004-2006-07-27), again confirming what the nature of the proceeding was, being that the Board would consider the issue of legal entitlement of coalbed methane.

18. In this Proceeding, there were 321 pre-filed exhibits, 67 documents exhibited at the Hearing, 4 experts (2 scientific/technical and 2 legal), 17 lay witnesses gave evidence, and 12 parties appeared and were represented by counsel. EnCana's submission in closing argument that it would be unfair and inappropriate for the Board to decide a contentious issue without proper notice and complete evidence mocks the effort of everyone involved in this Proceeding.

IV. ***Southern Ute* Is Persuasive And Directly Applicable To The CPR Split-Title Lands**

19. CDP concedes that the United States Supreme Court case of *Southern Ute*<sup>15</sup> may be persuasive in Canada but says that there is nothing which elevates it above other State decisions to the contrary. CDP and EnCana both argue that *Southern Ute* is not of assistance because it dealt with the interpretation of a statute and, therefore, the intention of the Legislature is supposed to have been derived from the broader external context of the issue.<sup>16</sup>

20. With respect, these arguments are flawed and do not in any way undermine the strong persuasive value of the *Southern Ute* decision. This was a strong decision from the highest Court in the United States on the very issue that is before this Board. While *Southern Ute* dealt with a reservation of coal in a statute rather than in a private instrument, the Court adopted the very same interpretive approach that the Canadian Courts have followed since the *Borys* case was decided by our Privy Council. The time frame and historical context are directly applicable to the issues arising out of the split in titles that occurred in Canada on the CPR lands from 1904 through 1912. Moreover, in terms of the external context that was considered by Congress, the Court found that **“Congress viewed CBM gas not as part of the solid fuel resource ... but as a dangerous waste product, which escaped from coal as the coal was mined.”** The Court noted:

“That CBM gas was considered **a dangerous waste product** which escaped from coal, rather than part of the valuable coal fuel itself, is also confirmed by the fact that coal companies venting the gas to prevent its accumulation in the mines made no attempt to capture or preserve it.” [Emphasis added.]

The Canadian Courts have found that these same considerations applied in the historical circumstances giving rise to the split-titles on the CPR lands. In the *Goodwell* decision, the Alberta Court of Appeal commented that the CPR grants

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<sup>15</sup> *Amoco Prod. Co. v. Southern Ute Tribe*, 144L. Ed. 2d 22 (US Supreme Court) (“*Southern Ute*”), see Exhibit 10-026-2006-09-29 at pages 8-9.

<sup>16</sup> CDP Closing Argument paras. 80-82; EnCana Closing Argument para. 77; Lucas testimony at Hearing Transcript pages 1335-6.

had been made: “In the mistaken belief **natural gas was a worthless and noxious substance**”.<sup>17</sup> [Emphasis added.]

21. The same point was made in the appeal decision in *Borys v. C.P.R. and Imperial Oil Ltd.* 1952 CarswellAlta 3 [Tab 2] in the dissenting decision of Macdonald J.A. At paragraphs 19 and 20, Justice Macdonald commented on the historical circumstances as follows:

“Natural gas was known to exist in some sections of the province in 1906, and in Medicine Hat it was used commercially to a very limited extent. But it was a **"waste dangerous product"** then, according to Dr. Nauss (A.B. p. 182) and for many years thereafter. In the 1920's and 1930's measureless quantities of natural gas were burned and destroyed in Turner Valley because apparently no market for it existed, and its preservation would serve no useful purpose...

**I do not think the Canadian Pacific Railway Company was concerned in 1906 to retain to itself natural gas for which no commercially profitable market was then available, and which was wasted or destroyed as soon as produced.** It was not until 1912 that it expressly reserved gas...” [Emphasis added.]

22. The same point was made by the Privy Council in *Borys* at pages 8 and 9, as follows:

“... **in 1906 the tendency was to regard gas as a danger and a nuisance rather than a help.**”<sup>18</sup> [Emphasis added.]

23. Similarly, in *Anderson*, the Supreme Court of Canada took note of the historical circumstances giving rise to the split titles on the CPR lands as follows:

“Canada transferred to the CPR not only the surface rights but the entire legal interest in the land. This included all subsurface resources. At the time, the CPR saw the main value of the land as the ability it gave them to encourage settlement near the railway. Settlement was viewed as key to the economic success of the railroad, and the CPR entered into agreements with settlers for the transfer of title to this land. The first of these contracts transferred the CPR’s entire interest in the plots of land to the settlers.

It was approximately 1904 when the CPR recognized the underground value of the land they owned. As a result, they began to exclude the valuable subsurface

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<sup>17</sup> *Southern Ute*, *supra* note 15 at pages 8 and 9.

<sup>18</sup> *Borys v. Canadian Pacific Railway*, [1953] AC 217 (P.C.) (“*Borys*”) at Exhibit 10-018d-2006-08-25.

minerals from the title when they sold land. Initially the CPR reserved only coal from the transfer but by 1912 they were reserving rights to all mines and minerals. This decision of title created “Split Title Lands” which are recognized under the Torrens land registration system in Alberta, and two or more separate interests reflecting ownership of surface and subsurface rights can be registered under the *Land Titles Act*, R.S.A. 2000, c. L-4.”<sup>19</sup>

24. Given this historical context, Dean Percy testified that the *Southern Ute* case would be found to have persuasive precedential value in Canada.<sup>20</sup> Specifically, he outlined the following factors in support of this views:

- “...there are few common law cases dealing with coalbed methane that any of us involved in this proceeding have been able to discover.”
- “...it is a decision of the United States Supreme Court, a very senior court, and one which in the technical Canadian doctrine of precedent has persuasive value in Canada.”
- “...it deals with a simple reservation of coal...”
- “..it deals with a very fundamental question of mineral title and one which is similar to titles that were being created in western Canada at the same time where reservations of coal in early CP grants were also going on.”
- “...it takes the same interpretive approach to deciding what was coal and what was natural gas and other resources, which were not reserved to the United States Government, it takes the same approach as the Borys case did in Canada.”
- “...it described very simply and summarized the expert evidence as the nature of coalbed methane, coalbed methane found in the western United States.”

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<sup>19</sup> *Anderson v. Amoco Canada*, 2004 CarswellAlta 941 (S.C.C.) (“*Anderson*”), see Exhibit 10-018e-2006-08-25 at paras. 4-5.

<sup>20</sup> Hearing Transcripts, pages 677-78.

- “It was also a strong US Supreme Court decision in that it was decided by a 7 to 1 majority.”

25. By contrast, EnCana would like this Board to ignore the *Southern Ute* decision and, instead, follow the “instructive” considerations of the Illinois Appeals Court in *Continental Resources v. Illinois Methane*.<sup>21</sup> In fact, the *Continental* decision is distinguishable on both the facts and on the legal doctrines applied. In particular, the legal doctrines relied upon are particular to the state of Illinois and conflict with the prevailing principles of oil and gas law in Alberta.

26. On the facts, the leases considered by the Court in *Continental* denied the right to produce CBM from a coal seam or void. Specifically, the Court noted that the “reservation of the right to drill through the coal does not include the right to drill into the coal and develop CBM.”<sup>22</sup> In *Continental*, the leases were for the right to drill *through* coal, not into coal. In the case before the Board in this hearing, the Leases provide the right to produce gas from the entirety of the subsurface, and do not specify the container or other location of the gas to be produced. Thus, this case is distinguishable on the wording of the leases considered.

27. The case is also distinguishable on the law. The Court relies upon the “container space doctrine,” applicable in Illinois, to come to the conclusion that the CBM in the coal mine voids form part of the coal owners’ estate. This specific doctrine is explained by the Court to state that the holder of coal rights also holds the rights to the void after the coal is mined. Alberta jurisprudence does not recognize such a doctrine.

28. Further, the Court in *Continental* also applied the rule of capture in making its conclusions in this case. The rule of capture has no place in the current analysis before the Board, as it has been limited in application to circumstances involving the division of ownership based on surface land ownership. Indeed, the Supreme Court of Canada in the

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<sup>21</sup> EnCana Closing Argument at paras. 78 and 90.

<sup>22</sup> *Continental Resources v. Illinois Methane Inc.* 87 N.E. 2d 897 (Ill. App. 5 Dist. 2006) (“*Continental*”) see Tab 18 to EnCana’s Closing Argument at para. 608.

*Anderson*<sup>23</sup> decision confirmed that the rule would have no application to split-title situations:

“Applying this rule to parties who have agreed to divide their interest under the same tract of land would defeat the purpose of the contract. This is because if it applied, the party who reduced the substance to possession by drilling the well and producing the hydrocarbons would be entitled to all of them, and the other party would have no claim. At the time the CPR sold the land to the settler they agreed to divide the property on certain terms. To hold that either party could later take the other party’s property with impunity would defeat the purpose of the reservation.”

29. For these reasons, it is submitted that the reasoning in the *Continental* decision is neither applicable in Alberta nor “instructive” and should not be considered by the Board in making its determination.

**V. The Evidence Establishes The Applicants’ Entitlement To Produce CBM**

***Leases establish entitlement; Onus is on Coal Owners to prove otherwise:***

30. In terms of substantive argument, the closing submissions of EnCana and CDP boil down to their joint contention that the Applicants have not met the evidentiary standard required in order to satisfy the Board of their entitlement to produce CBM for well licenses or to show common ownership for holding orders. In fact, the evidence tendered in this Proceeding has been comprehensive, compelling and sufficient to enable the Board to decide the fundamental issue of entitlement to CBM in favour of the Natural Gas Rights Holders.

31. Each of the Applicants and other Natural Gas Rights Holders have submitted leases and supporting documentation to support their entitlement to produce natural gas from the subject lands. Based upon the Board’s practice over the past 15 years since the issuance of Bulletin IL-91, and the statutory definitions of “gas” and “coal” contained in the *OGC Act* and the *Coal Conservation Act*<sup>24</sup>, the Applicants have provided sufficient

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<sup>23</sup> *Anderson, supra* note 19.

<sup>24</sup> *OGC Act, supra* note 1, Section 1(1); and *Coal Conservation Act*, R.S.A. 2000, c.C-17 (“*CC Act*”) at Exhibit 10-018b-2006-08-25.

materials to the Board to establish their entitlement to the applicable well licenses and holding orders.

32. To the extent that the Coal Owners object to the Board following its past practice and carrying out its clear statutory mandate, the onus lies on them and not the Natural Gas Rights Holders to prove that the reservations of coal dating back to the early 1900s should somehow be interpreted as excepting out CBM from the clear grants of natural gas to the grantees.

***Statutory Definitions establish that CBM is Natural Gas:***

33. It is crystal clear that CBM is natural gas under the statutory definitions of “gas” and “coal” under the *OGC Act* and the *CC Act*.<sup>25</sup> In short, it is beyond any doubt that CBM fits within the statutory definition of “gas” as natural gas which “is recovered in processing and that is gaseous at the conditions under which its volume is measured or estimated”. The only answer that EnCana and CDP have to this self-evident conclusion is to claim that the statutory definitions are irrelevant because they define the substance with reference to the point of measurement, which takes place after human intervention in the underground reservoir.<sup>26</sup> Centrica respectively submits that the Board is a creature of statute and cannot simply ignore statutory definitions that go directly to the heart of its mandate and address the very core issue that it is charged with determining in the within Proceeding.

34. Rather, Centrica respectfully submits that the statutory definitions are determinative of the manner in which the Board should fulfill its obligations in determining entitlement under Section 16 and common ownership under Section 5 of the *OGC Act*. The fact that the Board is directed by its empowering statutes to look at the issue of regulatory entitlement from a different perspective than the manner in which a Court would adjudicate the issue of private property rights in no way provides support for CDP and EnCana’s argument that the Board should simply ignore the definitions

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<sup>25</sup> *Ibid.*

<sup>26</sup> CDP Closing Argument at paras. 33-34; and EnCana Closing Argument at para. 76.

contained in its own statute. Indeed, Directive 056 expressly recognizes and provides for just such an outcome by providing that the issuance of a well license by the Board does not constitute a legal determination or confirmation of mineral entitlement or the right to produce hydrocarbons or to conduct other activities for other purposes.<sup>27</sup>

35. Whether or not the Board finds the application of its statutory definitions determinative of the issue of entitlement to CBM, it is respectfully submitted that the very same result is achieved by the application of common law principles. It is common ground amongst all of the parties that the proper approach to interpretation under the common law is to interpret the words used in the original grants in accordance with their plain and ordinary meaning, as they were used in the vernacular at the time of the original grants. As explained by Dean Percy, this principle of interpretation, as established in the case of *Borys*, has become a general principal of interpretation under Canadian law which has been applied to achieve uniform results in cases which involve different documents of title and different subsurface minerals.<sup>28</sup>

***CPR did not re-grant to itself a worthless and noxious substance:***

36. The historical context of the CPR split-title lands as described above in the *Borys* and *Anderson* decisions and also as will be described below in the *Goodwell* decision, is that, natural gas was considered at the time to be a worthless and noxious substance. Given the dangers posed by CBM gas to coal miners, CBM was considered to be a “dangerous waste product” given off by coal. The point was made by the Court in *Southern Ute* as follows:

“In contrast, dictionaries of the day defined CBM gas -- then called “marsh gas,” “methane,” or “fire-damp” -- as a distinct substance, a gas “contained in” or “given off by” coal, but not as coal itself. See, e. g., 3 Century Dictionary and Cyclopedia 2229 (1906) (defining “fire-damp” as “the gas contained in coal, often given off by it in large quantities, and exploding, on ignition, when mixed with

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<sup>27</sup> EUB Directive 056 at Exhibit 10-002-2005-09-12.

<sup>28</sup> Joint Reply Submission – Expert Report of David R. Percy, pages 6-10 at Exhibit 18-003a-2006-09-29.

atmospheric air"; noting that "fire-damp is a source of great danger to life in coal-mines")."<sup>29</sup>

37. In *Goodwell*, the Court expressly found that at the time of the subject grants, the CPR held "the mistaken belief **natural gas was a worthless and noxious substance**".<sup>30</sup>

38. Hence, having granted and transferred to the settlers all of its interests in the subject lands, it is completely absurd to think that the CPR would then have re-granted back to itself anything other than substances that it considered to be valuable. In examining the legal effect of the CPR reservation in its grant to Simon Borys, the Alberta Court of Appeal in *Goodwell* expressly found that "a reservation is simply a regrant" and that:

"A grant is a conveyance or transfer of property. A reservation occurs when the original owner (grantor) conveys certain property rights to a new owner (grantee), but retains other property rights for itself. The retained right is newly created out of the land that is transferred, for example, an easement or a right to certain minerals.[FN19] A reservation operates as a regrant of the retained right because it is created out of the conveyed property and is then (notionally) transferred back to the original grantor. See A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property*, 2nd ed., vol. 2 (Aurora: Canada Law Book, 1985), at 1289-1291"<sup>31</sup>

39. In view of the historical context of the CPR split-title lands, the only reasonable interpretation of the original grants is that the CPR reserved or re-granted back to itself those substances that it considered valuable. The point was made in *Goodwell* as follows:

"In the mistaken belief **natural gas was a worthless and noxious substance**, the C.P.R. originally sold land to homesteaders, reserving "coal, petroleum and valuable stone." As a result, the railway held the rights to petroleum and the settlers held the rights to natural gas."<sup>32</sup> [Emphasis added.]

40. In the result, the historical context which is described in the case law dictates the proper interpretation of the original CPR grants in question in this Proceeding. CBM was

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<sup>29</sup> *Southern Ute*, *supra* note 15 at page 8.

<sup>30</sup> *Alberta Energy Co. v. Goodwell Petroleum Corp. et al.*, 2003 CarswellAlta 1394 (Alta.C.A.) see Exhibit 10-025-2006-09-29 at para. 34.

<sup>31</sup> *Ibid* at para. 48.

<sup>32</sup> *Ibid* at para.34.

notoriously considered to be a noxious and dangerous by-product that was given off by coal. By reserving “coal”, the CPR regranted to itself the valuable solid fuel coal rock and not the dangerous waste “fire damp”, which we now call CBM. This is precisely the reasoning that the Court in *Goodwell* adopted in finding that “the settlers held the rights to natural gas”. This Board should follow the same approach in finding that the settlers (and their successors in interest) also now hold the rights to the CBM gas stored in coal, which was similarly mistakenly believed to be a worthless and noxious substance.

***Coal Owners’ complaints of deficient evidence are without merit:***

41. Both CDP and EnCana complain that the Natural Gas Rights Holders have not adduced sufficient evidence to satisfy the Board as to their entitlement to produce CBM. CDP claims that there is no direct evidence of the language used in the relevant transfers of lands that were tendered in this Proceeding. EnCana claims that there is no contemporaneous evidence of the vernacular meanings of the words used in the original grants. There is no merit to these complaints.

42. The evidence of the words used in the original grants was put before the Board in a number of different forms. In Appendices A and B to EnCana’s Submissions of September 15, 2006, EnCana provided the specific language of the very grants that are at issue in the pending Applications.<sup>33</sup>

43. In addition, under EnCana’s authorities filed with its original Submission in this Proceeding<sup>34</sup>, EnCana filed copies of each of the relevant title documents and transfers, including copies of the original transfer documentation from the Canadian Pacific Railway dating back to the early part of the century.

44. Furthermore, in a document entitled CBM Split – Title in Alberta, EnCana’s senior legal counsel and one of its oil and gas solicitors prepared materials on CBM which included representative samples of common fee simple severances.<sup>35</sup> These

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<sup>33</sup> Exhibit 07-024-2006-09-19, EnCana’s Submissions Appendices A and B.

<sup>34</sup> Exhibit 07-025-2006-09-15.

<sup>35</sup> Exhibit 20-052.

materials included copies of CPR – Settlor Severances (including a copy of the grant to Simon Borys), a copy of the granting language under the PanCanadian Petroleum Limited transfer to CanPac Minerals Limited; a copy of the grant of coal to Dome Petroleum; a copy of the primary grant exclusion in the lease to the California Standard Company; and a copy of the common leasehold grant of “petroleum, natural gas and related hydrocarbons (except coal)”.

45. The above referenced evidence establishes that the original grants which are in dispute all provided for the transfer and grant of all of CPR’s interests in the subject lands, but reserving “coal” or “coal, petroleum and valuable stone.” It has not been suggested by anyone in this Proceeding, including EnCana as a successor to the CPR, that there was any modifying language whatsoever contained in the original grants that would provide any further context for the reservation of “coal”. This is entirely consistent with the Canadian case law cited above wherein the historical context of these grants has been described. These facts were also confirmed by EnCana’s corporate representative, Mr. Welsh, during cross-examination.<sup>36</sup>

46. CDP put into evidence its coal titles<sup>37</sup>, which it acquired as a successor in interest to Luscar Ltd. and Fording Coal, which interests were derived from the coal rights reserved under the original CPR grants. As such, CDP’s interests arose from the same split-title severances of the CPR lands it took place in the early part of the twentieth century, the language of which transfers is before the Board.

47. As a practical matter, the Natural Gas Rights Holders did not have access to any better evidence than that which has been presented. Indeed, EnCana is the party best positioned to present this type of evidence as a successor to the CPR. EnCana did so by presenting the evidence through the Exhibits that are referred to above, which included the exact language of the grants in question. It hardly lies in the mouths of the Coal Owners at this stage of the Proceeding to say that EnCana’s own evidence as to exact language of the grants is insufficient or should not be relied upon.

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<sup>36</sup> Hearing Transcript, pages 1171-72.

<sup>37</sup> Exhibit 04-007-2005-06-27.

48. With respect to EnCana's contention that it is the only party to have led evidence of the contemporaneous vernacular of the meaning of the words used in the original grants, the fact is that the best evidence of common usage and ordinary meaning of words is to be found in the dictionaries of the day. Definitions from five authoritative dictionaries of the day were cited and relied upon by the United States Supreme Court in *Southern Ute*, and tendered as evidence in this Proceeding. In addition, the current relevant dictionary definitions from the Canadian Oxford Dictionary were put into evidence. Each of these definitions was put to Dr. Levine, who was the witness that EnCana and CDP put forward on the issue of the vernacular and scientific meaning of the term "coal".

49. Dr. Levine says that as part of his assignment, he studied the common meaning and understanding of the term "coal" and the use of language and terminology as of the early 1900s.<sup>38</sup> Despite providing a one-sided dissertation on the subject in his Report, Dr. Levine made the following admissions under cross-examination:

- **"The term "coal" has been used to describe this black rock for hundreds of years."**<sup>39</sup> [Emphasis added.]
- "It's my feeling that both in the past and present day usage that for all but a select community of scientists, the term "coal" is applied to a rock that has certain characteristics that don't infer anything specific regarding its composition, just its general properties."<sup>40</sup>
- **"I'm just saying in terms of common usage, the word "solid," yes, is valid to describe coal."**<sup>41</sup> [Emphasis added.]

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<sup>38</sup> Hearing Transcripts, pages 1202-03.

<sup>39</sup> Hearing Transcripts, page 1262, lines 6-7.

<sup>40</sup> Hearing Transcripts, page 1204, lines 4-9.

<sup>41</sup> Hearing Transcripts, page 1205, lines 24-51.

- “Use of the term 'solid' to describe coal is valid only in the vernacular sense where it may be used to describe a material that is firm or compact in substance.”<sup>42</sup>

50. In addition, in EnCana’s Written Submission filed September 15, 2006, at paragraph 36, EnCana itself led evidence of the common knowledge prevailing at the time of the original grants concerning the existence of gas stored in coal in the following terms:

“It was common knowledge by the early 20<sup>th</sup> 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).” [Citing: 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]

51. In the result, the evidence of contemporaneous vernacular before the Board includes the historical context of the CPR split-title grants as set forth in the Canadian case law cited above; the dictionary definitions of the day and of today which reveal a consistent common usage and understanding over the course of over a century of “coal” as a solid, black or blackish, combustible rock; the notorious knowledge of “fire damp” in the early 1900s as a worthless and noxious substance that escaped from coal mines; and the admissions of EnCana and CDP’s own self-proclaimed language expert who testified that the **“term ‘coal’ has been used to describe this black rock for hundreds of years”** and that **“in terms of common usage, the word "solid," yes, is valid to describe coal.”**<sup>43</sup>

52. In the circumstances, there is more than sufficient evidence for the Board to draw its own conclusion as to the ordinary and vernacular meaning of the words used in the original CPR grants for the subject lands. It is submitted that the proper approach for this Board to follow is the same as that taken by the Privy Council in the *Borys* decision, which was as follows:

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<sup>42</sup> Exhibit 19-002-2006-09-15 at page 7 lines 16-17.

<sup>43</sup> Hearing Transcripts, page 1262 lines 6-7 and page 1205 lines 24-51.

“In reaching this conclusion their Lordships have not taken into consideration the view or belief of either Mr. Borys or the Canadian Pacific Railway in 1906 or thereafter as to what was included in the term petroleum. Probably they had none and, in any case, it has to be remembered that what has to be sought is the vernacular meaning of the word "petroleum" and not what opinion was held by the parties to the grant, but indeed their Lordships would observe that they find it difficult to believe that either landowners, business men or engineers, or, indeed, the staff of the Canadian Pacific Railway or Mr. Borys, would at any time have differentiated between the oil and the gas in solution. They would, in the view of the Board, have included in petroleum all the liquid substance in the mine, and this view in no way conflicts with the testimony of the appellant's lay witnesses.”<sup>44</sup>

53. With respect to what evidence was available to be called, Mr. Spiers, on behalf of the Freehold Petroleum & Natural Gas Owners Association, testified that the original grants date between 1902 and 1912 and that anyone having direct knowledge of those grants would be 100 years old and that no one would have any recollection or direct knowledge of the original transfer agreements.<sup>45</sup> Indeed, as indicated by the Privy Council in *Borys* in the excerpt quoted above, it is not the subjective views or beliefs of either the Canadian Pacific Railway or the grantees that should be taken into consideration. Rather, the Privy Council effectively put themselves into the shoes of reasonable land owners, businessmen, engineers or, indeed, the staff of the CPR to determine what was intended using the vernacular meaning of the words used in the grants.

54. Based on the foregoing, it is respectfully submitted that this Board is in just as good a position as a Court of law would be to determine the intention of the parties to the original grants based on the ordinary meaning of the words used by the parties. Then, as now, in common usage “coal” meant the solid, black or blackish, combustible rock. “Coal” was understood to be the solid rock fuel and did not encompass the dangerous waste product of “methane” or “fire damp”, which was understood to be a distinct substance. By its reservation of “coal”, the CPR did not intend to regrant to itself the noxious and worthless substance that is now known as CBM.

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<sup>44</sup> *Borys*, *supra* note 18.

<sup>45</sup> Hearing Transcripts, page 618.

## VI. Conclusions

55. The Board has jurisdiction and the statutory mandate to hear and determine the issue of entitlement of the Applicants and the other Natural Gas Rights Holders to produce CBM and to be granted well licenses and holding orders under the *OGC Act*.

56. There has been no lack of notice nor procedural unfairness in the manner in which the Board has conducted this Proceeding.

57. The *Southern Ute* decision of the United States Supreme Court is persuasive authority in Canada on the issue of entitlement to CBM and shares a similar historical context to the legal issues arising out of the CPR split title lands.

58. The evidence tendered in this Proceeding clearly establishes the Applicants' entitlement to produce CBM under the natural gas leases and supporting documentation submitted to the Board. Based upon the Board's practice over the past 15 years since the issuance of Bulletin IL-91 and the clear statutory definitions of "gas" and "coal" contained in the *OGC Act* and *CC Act*, the onus rests with the objecting Coal Owners to prove that their reservations of coal dating back to the early 1900's should be construed as also including natural gas stored in coal.

59. The historical context of the CPR split-title lands as described in the leading Canadian cases of *Borys*, *Goodwell* and *Anderson*, establish that natural gas was considered at the time of the original grants to be a worthless and noxious substance. By reserving coal out of the original grants it could not have been the intent of the CPR to have re-granted to itself the dangerous waste product which is now known as CBM.

60. There is more than sufficient evidence of the vernacular and common usage of the words contained in the original grants by virtue of the historical context of the CPR split-title lands set forth in the leading Canadian case law; the dictionary definitions of the day; EnCana's own evidence of the notorious knowledge of "fired damp" in coal mines in the early 1900's; and the admissions of EnCana and CDP's own expert witness who studied

both the scientific and the common usage of the term “coal” as of the early 1900’s and conceded that, in the vernacular, coal has been used to describe this black rock for hundreds of years.

61. In the result, this Board is in as good a position as a Court of Law to determine the ordinary meaning of the reservation of coal in the original CPR grants. It is respectfully submitted that, following the same approach adopted in *Borys* and consistent with the finding of the US Supreme Court in *Southern Ute*, this Board should conclude that the reservation of coal did not and does not include CBM.

62. Based on all of the scientific evidence tendered in this Proceeding, CBM is a gas both *in situ* and after human intervention. Centrica relies on the Joint Reply on technical issues in this regard.

63. In the final result, the Board should conclude that the Natural Gas Rights Holders are entitled to produce CBM for the purposes of determining whether to grant well licences and holding orders.

**VII. Relief Sought**

64. Centrica respectfully requests that the Board rescind EUB Bulletin 2006-19 and grant well licenses and holding orders in favour of the Natural Gas Rights Holders upon receiving acceptable documentation in support of such applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13<sup>th</sup> day of December, 2006.

**PEACOCK LINDER & HALT LLP**

Per: 

Peter T. Linder, Q.C.  
Johanna C. Price

Solicitors for Centrica Canada Limited