ALBERTA ENERGY AND UTILITIES BOARD

IN THE MATTER OF the *Alberta Energy and Utilities Board Act,* R.S.A. 2000, c. A-17 (the "EUB Act"), and the regulations made thereunder; and

IN THE MATTER OF section 40(1) of the *Energy Resources Conservation Act,* R.S.A. 2000, c. E-10, (the "ERC Act") and the regulations made thereunder; and

IN THE MATTER OF Part 2 of Proceeding No. 1457147, Bearspaw Petroleum Ltd. ("Bearspaw"), Carbon Development Partnership (Successor in Interest to Prairie Mines and Royalties Ltd., Formerly Luscar Ltd.) ("CDP"), Devon Canada Corporation ("Devon"), EnCana Corporation ("EnCana"), and Fairborne Energy Ltd. ("Fairborne"), in relation to the Clive, Ewing Lake, Stettler and Wimborne Fields; and

IN THE MATTER OF Alberta Energy and Utilities Board ("EUB" or "Board") Bulletin 2006-19 ("Bulletin 2006-19"); and

IN THE MATTER OF EUB Notice of Hearing dated June 23, 2006 ("Notice of Hearing"); and

IN THE MATTER OF EUB letter to Legal Counsel dated July 27, 2006 ("Letter to Counsel").

ARGUMENT OF CONOCOPHILLIPS CANADA RESOURCES CORP.

("ConocoPhillips Canada")

November 15, 2006

ALBERTA ENERGY AND UTILITIES BOARD
ARGUMENT OF CONOCOPHILLIPS CANADA
NOVEMBER 15, 2006

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ARGUMENT OF
CONOCOPHILLIPS CANADA RESOURCES CORP.
("CONOCOPHILLIPS CANADA")

I. INTRODUCTION AND SUMMARY OF POSITION

1. The fundamental issues before the Board in Phase 2 of Proceeding No. 1457147 ("Proceeding No. 1457147") are whether natural gas stored in coal[1] is a gas and whether ConocoPhillips Canada, Devon Canada Corporation ("Devon"), Fairborne Energy Ltd. ("Fairborne"), Quicksilver Resources Canada Inc., ("Quicksilver") Canpar Holdings Inc. ("Canpar") and Centrica Canada Limited ("Centrica") (collectively referred to as the "Natural Gas Rights Holders") have legal entitlement to natural gas stored in coal. ConocoPhillips Canada's written argument (the "Argument") addresses these issues in the context of statutory construction, the common law, scientific evidence as well as natural gas industry impacts and settled expectations.

2. Proceeding No. 1457147 involves a review, at the request of EnCana Corporation ("EnCana"), and Carbon Development Partnership ("CDP"), (together the "Coal Owners"), of the Board's previous decisions on 28 applications filed by Bearspaw Petroleum Inc. ("Bearspaw"),[2] Devon[3] and Fairborne[4] for well licenses, special gas well spacing and compulsory pooling orders. The Board has been asked to determine if it should confirm, vary or rescind its previous decisions,[5] the outcome of which will affect all potential CBM developers.

3. EUB Bulletin 2006-19 applies to the entire natural gas industry and states that all applications respecting legal entitlement to produce natural gas in coal are held in abeyance

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[1] The terms coalbed gas, gas in coal, gas from coal, coalbed methane or CBM are all intended to refer to and describe natural gas stored in coal. They are used interchangeably in these submissions.
[2] On October 26, 2005 and December 8, 2006, the Board approved a compulsory pooling application and a well licence application submitted by Bearspaw in the Ewing Lake and Stettler Fields. On March 9, 2006, the Board determined pursuant to section 40(1) of the *ERC Act*, that EnCana was an affected party.
[3] On May 27, 2005 and July 14, 2005, the Board approved 12 licence applications and a holding application submitted by Devon in the Wimborne field. On March 9, 2006, the Board determined Luscar Ltd., now CDP, was an affected party pursuant to section 40(1) of the *ERC Act.* Also on May 27, 2005, the Board approved eight well licence applications for Devon in the Wimborne Field. On March 9, 2006, the Board determined EnCana was an affected party pursuant to section 40(1) of the *ERC Act.*
[4] On May 26, 2005 and May 27, 2005, the Board approved two well licence applications submitted by Fairborne in the Clive Field. On March 9, 2006, the Board determined Luscar, now CDP, was an affected party. On March 10, 2006, the Board approved three well licence applications submitted by Fairborne in the Clive Field. By letter dated April 21, 2006, the Board determined Luscar, now CDP, was an affected party.
[5] Tr. Vol. 1, page 4, lines 13-17.

pending the outcome of Proceeding No. 1457147.[6] The Board's statutory mandate to issue well licenses is set forth in Section 16 of the *Oil and Gas Conservation Act,* R.S.A. 2000 c. O-6 ("*OGC Act*").

4. In this Argument, ConocoPhillips Canada provides an introduction and summary of its position at Section I followed by a description of the relevant regulatory scheme, including its application to the issues of jurisdiction and standard of proof, at Section II. A discussion of rights to exploit gas under the common law is found at Section III. ConocoPhillips Canada's summary of technical and scientific evidence is set out at Section IV, a more detailed version of which is found in the Natural Gas Rights Holders' joint technical argument (the "Joint Technical Argument"). Section V addresses the Natural Gas Rights Holders' rights to produce natural gas under lease terms. Section VI pertains to the Coal Owners' impact on the natural gas industry and the inadequacy of their proposed "remedies". Finally, relief sought is dealt with at Section VII. ConocoPhillips Canada files this Argument concurrently with the Joint Technical Argument which exclusively addresses technical and scientific issues pertaining to coal and gas stored in coal.

A. Relief Sought

5. ConocoPhillips Canada requests that the Board rescind EUB Bulletin 2006-19 and make the following key findings which are fully supported by the evidence adduced in Proceeding No. 1457147:

- EUB Information Letter IL 91-11 confirms that the Board and Alberta Energy consider CBM to be natural gas, a position consistent with the *OGC Act*, the U.S. Supreme Court Decision of *Amoco Prod. Co. v. Southern Ute Tribe*,[7] and legislation of other jurisdictions;

- the Board has not only the jurisdiction, but also the statutory mandate under section 16 of the *OGC Act* to determine entitlement to CBM;

- the Natural Gas Rights Holders have met the requisite standard for well license applications by virtue of grants pursuant to subsisting petroleum and natural gas ("PNG") leases valid on their face, and have demonstrated entitlement to produce all petroleum and natural gas, natural gasoline and related hydrocarbons (except coal) recovered in solution or in association with any liquid or gaseous hydrocarbons;

[6] EUB Bulletin 2006-19 Applications Involving Objections Relating to the Legal Entitlement of Coalbed Methane (May 30, 2006). See also [Exhibit 12-004a-2006-09-29], Tab 20. Please note that all transcript references contained in this Argument refer to the final transcripts containing errata prepared by Amicus Reporting Group.
[7] *Amoco Prod. Co. v. Southern Ute Tribe*, 144 L. Ed 2d 22 (US Supreme Court) ("*Southern Ute Tribe*").

- CBM is natural gas in coal, the right to exploit which has been granted to the Natural Gas Rights Holders under the leases at issue in this proceeding, and under all leases with similar language;
- a reservation of coal, in the vernacular and fully consistent with the analytical approach in *Borys*[8] *Goodwell*[9]*, Anderson v. Amoco*[10] and *Southern Ute Tribe* decisions, is the reservation of a hard rock mineral. CBM is gas and no credible scientific theory demonstrates that CBM production techniques cause a hard rock mineral to change its state to a gas; and
- development of CBM by the Natural Gas Rights Holders is in the public interest.

B. Legislation and Policy Establish Natural Gas Rights Holders' Entitlement to CBM

6. The fact that both the EUB and Alberta Energy "consider CBM to be natural gas"[11] is clear in, and settled by, EUB Information Letter IL 91-11. A decision that CBM is not a part of coal is consistent with the approach of other jurisdictions, Board policy and Alberta legislation including Section 4(c) of the *OGC Act* that mandates economic, orderly, efficient natural resource development. Therefore, any determination which departs from the position taken in EUB Information Letter IL 91-11 represents a major, unwarranted policy reversal.

C. Under Statute CBM is Natural Gas

7. By reference to "raw gas", "methane" and "marketable gas", the *OGC Act* defines "gas"[12] as "a mixture mainly of methane"[13] and "recovered or recoverable at a well from an underground reservoir and that is gaseous at the conditions under which its volume is measured or estimated".[14] The evidence is clear that CBM in Alberta is overwhelmingly methane.[15] Moreover, CBM is irrefutably a gas at the surface where measured and in the reservoir under conditions prior to human disturbance.[16] The statutory definition of "gas" therefore also applies

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[8] *Borys v. Canadian Pacific Railway*, [1953] A.C. 217 (P.C.) ("*Borys*").
[9] *Alberta Energy Co. v. Goodwell Petroleum Corp. et al* (2003), 339 A.R. 201 (Alta. C.A.) ("*Goodwell"*).
[10] *Anderson v. Amoco Canada Oil and Gas,* (Fruman J) 63 Alta L.R. (3rd) 6 (Alta. Q.B.); 241 D.L.R. (4th) 193 (SCC).
[11] EUB Information Letter 91-11, Coalbed Methane Regulation, August 26, 1991, See [Exhibit 12-004a-2006-09-29], Tab 14. See also, A.R. Lucas and C.D. Hunt, *Canada Energy Law Service,* (Toronto: Thompson & Carswell), page 30-3283, paragraph 378.
[12] *OGC Act,* Section 1(1)(y).
[13] *OGC Act,* Section 1(1)(ff).
[14] *OGC Act,* Section 1(1)(ee).
[15] Tr. Vol. 7, page 983, lines 21-24; Tr. Vol. 7, page 984, lines 4-6.
[16] [Exhibit 18-001-2006-08-25] Mavor Report, August 25, 2006, page 20.

to CBM.[17] By contrast, the *Coal Conservation Act*[18] defines coal as a substance fundamentally different from gas.[19] Section 16 of the *OGC Act* compels the Board to issue a well license to a party demonstrating an entitlement to "gas". Even if the Board were not bound by the legislative definitions of "gas" it is indisputable on the basis of scientific evidence and the common law that CBM is natural gas. Furthermore, the Board has full authority to make this determination.

D. The Board Has Jurisdiction to Decide CBM Entitlement

8. The Board derives its authority from a number of statutes that create a single regulatory regime with each statute read in the context of the others, and with a view to the overall regime.[20] The *Alberta Energy and Utilities Board Act* R.S.A. 2000 c. A-17 ("*AEUB Act*") [21] and the *OGC Act*[22] grant the EUB jurisdiction to decide entitlement to produce CBM. Moreover, Section 16(1) of the *OGC Act* requires the Board to decide the issue of entitlement "to the right to produce the oil, gas or crude bitumen from the well".[23] The Board has all necessary jurisdiction to exercise its statutory mandate, including the ability to make legal

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[17] Dr. Levine testified that the composition of gas stored in Alberta's Mannville and Horseshoe Canyon coal is above 80% and 90% methane respectively. Tr. Vol. 7, page 984, lines 4 to 6 and Tr. Vol. 7, page 983 lines 21-24; See also [Exhibit 18-001-2006-08-25] Mavor Report, August 25, 2006, page 12.

[18] *Coal Conservation Act,* R.S.A 2000, c. C-17.

[19] Subsection 1(1)(d) of the *Coal Conservation Act,* R.S.A 2000, c. C-17 defines "coal", in addition to its ordinary meaning, as including manufactured chars, cokes and any manufactured solid coal product used or useful as a reductant or energy source or for conversion into a reductant or energy source.

[20] *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.* [2001] A.J. No. 864, para. 22 (Alta. C.A.) ("*Grosmont*").

[21] Section 15 of the *Alberta Energy and Utilities Board Act,* R.S.A. 2000, c. A-17, establishes that "for the purposes of carrying out its functions, the Board has all of the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and PUB [Public Utilities Board] that are granted and provided for by any enactment or by law".

[22] Section 4 of the *OGC Act* grants the EUB broad jurisdiction over oil and gas issues. Section 7 of the *OGC Act* provides the Board with the power to make any just and reasonable orders to affect that Act's purposes.

[23] Section 16 of the *OGC Act* explains that

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

determinations.[24] Therefore, contrary to the assertions of the Coal Owners, a court ruling in favour of the Natural Gas Rights Holders is not required, nor is the test for jurisdiction a "*bona fide* dispute".

E. Natural Gas Rights Holders Meet the Necessary Standard of Proof of Entitlement

9. In tribunal proceedings the standard of proof is a balance of probabilities. A balance of probabilities is a less onerous standard than "certainty". Section 16(2) of the *OGC Act* requires that a party must prove entitlement to produce oil, gas or crude bitumen "to the satisfaction of the Board". An applicant, by submitting a well license application, certifies to the Board that it is the holder of production rights. By demonstrating a right to produce natural gas pursuant to their leases, Natural Gas Rights Holders have met the standard of proof required by Section 16(2) of the *OGC Act*. Pursuant to Section 16(2) of the *OGC Act*, if there is a grant of natural gas under a lease that is valid on its face, then the well license should be issued. The *OGC Act* requires this approach for an orderly and efficient regulatory regime. The Board need only look at the granting clause and the leased substances definition of the Natural Gas Rights Holders' leases to determine CBM entitlement. As there are neither material differences between the Natural Gas Rights Holders' leases nor suggestions by the Coal Owners that the leases have been improperly executed or entered into, there is no requirement to interpret the language of each lease independently. This approach is consistent with relevant policy, legislation, the common law as well as with the EUB's own practice in the case of contested leases.

F. The Natural Gas Rights Holders Have the Right to Exploit Natural Gas Under the Common Law

10. At common law, entitlement depends on the interpretation of the instrument that grants the rights at issue.[25] The Board need not develop a new theory of ownership or entitlement in this proceeding.[26] Where disputed ownership of various subsurface minerals is vested in different parties, courts interpret the relevant instruments on the basis of a vernacular understanding as at the time of the grant.[27] The vernacular meaning of coal is uncontroversial.

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[24] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 54 Alta. L.R. (4th) 1 at 28, para. 51 (SCC) ("*ATCO Gas*").
[25] *Goodwell,* at page 219, para. 78.
[26] *Anderson v. Amoco Canada Oil and Gas,* (Fruman J) 63 Alta L.R. (3rd) 6, at page 39 (Alta. Q.B.); 214 D.L.R. (4th) 272 at page 283 (Alta. C.A.) and 241 D.L.R. (4th) 193, at 204, para. 35 (SCC) ("*Anderson v. Amoco*").
[27] *Borys,* at page 226-227, *Southern Ute Tribe*, at page 30.

It is a hard rock mineral.[28] Coal was reserved under the instruments at issue. Natural gas and related hydrocarbons, including CBM, were granted to the Natural Gas Rights Holders with the scope of the grant including more than just natural gas.[29]

11. Rights were split in the early 20th century with the transfer of land and the reservation of coal to the Canadian Pacific Railway ("CPR"). While there is no Canadian jurisprudence that deals with the precise issue of whether rights to CBM belong to the natural gas owners[30], the U.S. Supreme Court decision of *Southern Ute Tribe* applied the same interpretive approach to distinguishing between subsurface mineral rights as *Borys*.[31] *Southern Ute Tribe* is conspicuously ignored by the Coal Owners. The Court in *Southern Ute Tribe* unequivocally concluded that in the early part of the 20th century coal "would not have encompassed CBM gas".[32] That determination would be persuasive in a Canadian proceeding and falls within the principles that guide Canadian courts on the use of U.S. precedent.[33] The application of the common law, as exemplified in *Southern Ute Tribe*, would therefore likely result in a finding that entitlement to CBM rests with the Natural Gas Rights Holders on the basis of a vernacular understanding of coal at the time of the grants in issue.[34] Dean Percy's evidence strongly confirmed this.

12. Misconstruing *Borys* and *Anderson v. Amoco*, the Coal Owners make a patently incorrect analogy between solution gas in petroleum and CBM sorbed by coal.[35] *Anderson v. Amoco* established that a subsequent phase change does not change ownership. Solution gas that was "liquid substance in the mine"[36] remained the property of the petroleum owner. The Coal Owners' analogy is fundamentally flawed for the simple reason that CBM is natural gas in the

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[28] Even Dr. Levine acknowledged that the vernacular understanding of coal in the early 1900's was as a hard rock mineral. Tr. Vol. 8, page 1210, line 25 to page 1211, line 25.

[29] See, for example, the granting clause at paragraph 15, page 7 of ConocoPhillips Canada's August 25, 2006 submissions [Exhibit 12-002-2006-08-25] which refers to "all petroleum and natural gas, natural gasoline, and related hydrocarbons other than coal and also including sulphur as recovered in solution or in association with any of the liquid or gaseous hydrocarbons (collectively hereunder the "leased substances") which may be found within, under or upon the said lands…".

[30] [Exhibit 18-003a-2006-09-29], Dean Percy Report, page 14.

[31] *Borys*; See also [Exhibit 18-003a-2--6-09-29], Dean Percy Report, page 18.

[32] *Southern Ute Tribe*, at page 30.

[33] See, for example, *Telstar Resources Ltd. v. Coseka Resources Ltd.,* (1980) 24 A.R. 562 at paragraph 12 (On-line) (Alta. C.A.); *Scurry-Rainbow Oil v. Galloway Estate* (1994), 157 A.R. 65 at paragraphs 13-14 (On-line) (Alta. C.A.); and *Bank of Montreal v. Enchant Resources Ltd.* (1999), 255 A.R. 116 at paragraph 29 (On-line) (Alta. C.A.).

[34] Tr. Vol. 5, page 729, line 18 to page 730, line 3.

[35] [Exhibit 07-024-2006-09-15], EnCana Submissions, September 15, 2006, page 11.

[36] *Borys,* at page 227.

virgin reservoir. A hard rock mineral (coal), by virtue of human intervention and reduction of pressure, does not change to gas.

G. Coal In The Virgin Reservoir Does Not Become Gas

13. ConocoPhillips Canada adopts the technical and scientific submissions set out in the Joint Technical Argument and the evidence of Matthew J. Mavor. The Supreme Court of Canada recognizes three distinct phases of matter - solid, liquid or gas.[37] For the Coal Owners to prove that the production of CBM involves a phase change they must demonstrate that, applying the vernacular meaning, a hard rock mineral changes to gas. Such a change is impossible.[38] By contrast, Mr. Mavor's evidence is unequivocal that CBM is natural gas in the virgin reservoir, before and after human disturbance.

H. The Natural Gas Rights Holders Have the Right to Produce Natural Gas Under The Terms of The Leases

14. EnCana is a successor to the CPR and Pan-Canadian Petroleum Ltd. ("PanCanadian"). Over many years the CPR, with its vast landholdings, granted the right to recover petroleum and natural gas. In return, royalties were paid on the production. This remains the case. The fact that EnCana now holds the rights and is a gas producer in its own right does not change this fundamental historical bargain. A railway, not a coal producer, granted the leases. The CPR has not been in the business of developing coal. Moreover, there is no instance of a Coal Owner applying for a licence to develop CBM by virtue of their rights to coal.[39]

15. Subsequent to the original grants, EnCana developed a shallow gas strategy that includes CBM development.[40] In 1993, for example, EnCana revised its lease form with ConocoPhillips Canada to exclude CBM.[41] Prior to 1993 EnCana did not exclude CBM from its ConocoPhillips Canada leases. To further pursue their shallow gas strategy, the Coal Owners submit that

[37] *Anderson v. Amoco*, at 195, para. 2 (SCC).
[38] Dr. Levine relied on scientifically unrecognized terminology such as "liquid-like" and "unique thermodynamic state" which would be inapplicable to the Supreme Court of Canada's determination in *Anderson v. Amoco* that all matter exists in either a gas, liquid or solid.
[39] Tr. Vol. 8, page 1145, lines 13-17. See also, Tr. Vol. 8, page 1181, line 18 to page 1182, line 1.
[40] Tr. Vol. 8, page 1178, lines 7-10.
[41] The first instance of this amendment by EnCana is in a lease dated November 8, 1993 between PanCanadian Petroleum Limited, as lessor, and Atlantis Resources Ltd., as lessee [Exhibit 20-049]. The actual definition of "leased substances" in the lease is "leased substances means natural gas only and substances produced in association therewith, whether hydrocarbon or not, except coal and petroleum and except natural gas derived from or associated with coal deposits". Other Natural Gas Rights Holders note the 1993 exclusion of CBM. See for example, the

previous grants did not include CBM. There is no basis for their position under the language of historical grants, law or regulation.

I. Manufactured Uncertainty Is Contrary To The Economic, Orderly and Efficient Development of CBM in Alberta

16. EUB Bulletin 2006-19 prevents a CBM developer from drilling on split-title lands without agreement from the Coal Owners. EUB well applications stopped as a result.[42] For their part, Coal Owners have never pursued EUB well licenses based on their coal rights.[43] If there cannot be development until a court ruling or a quieting of title arrangement with the Coal Owners, then CBM development over an extremely large geographic area is frozen.[44] Continued uncertainty over entitlement to CBM will frustrate and delay ConocoPhillips Canada's development of its leasehold interests and the economic, orderly and efficient development of CBM in Alberta.[45] Delay provides significant leverage to the Coal Owners in respect of province-wide CBM development. The result is that, contrary to the public interest, the Coal Owners enjoy a veto over freehold CBM production.

J. EnCana's Proposals Are Extraneous To Proceeding No. 1457147

17. EnCana's proposed "remedies" are based on an erroneous assumption that the issue of ownership has been decided in their favour. In fact, there is no legitimate ownership issue. Uncertainty respecting ownership has simply been manufactured by EnCana and its "remedies" share this common root. EnCana requests that the Board forbear from making a clear determination or to delay that decision. The greater the delay, the greater the Coal Owners' leverage over Natural Gas Rights Holders. EnCana's proposals therefore do not address the fundamental issue of entitlement to produce CBM, are in its self-interest and are contrary to the public interest in economic, orderly, efficient development of oil and gas resources in Alberta.

K. Conclusions

18. Legislation, common law and science all establish that CBM is natural gas in the virgin reservoir. ConocoPhillips Canada's leases, among those of the other Natural Gas Rights Holders,

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experience of Quicksilver at Tr. Vol. 3, page 434, line 15 to page 435, line 4; and Centrica at Tr. Vol 4. page 558, line 22 to page 559, line 4.

[42] Tr. Vol. 3, page 433, lines 7-8.

[43] Tr. Vol. 8, page 1184, lines 8-11.

[44] Tr. Vol. 8, page 1176, lines 16-18.

[45] [Exhibit 20-019] ConocoPhillips' Opening Statement, Page 3.

grant rights to petroleum and natural gas, natural gasoline and related hydrocarbons (except coal) recovered in solution or in association with any liquid or gaseous hydrocarbons. Regulatory uncertainty respecting the development of CBM is contrary to the public interest and directly impacts ConocoPhillips Canada's ability to do business in Alberta. ConocoPhillips Canada therefore seeks a disposition that ensures a stable regulatory environment and facilitates the economic, orderly and efficient development of CBM. For all of the foregoing reasons, ConocoPhillips Canada respectfully submits that the Board should rescind EUB Bulletin 2006-19.

II. EUB POLICY AND LEGISLATION

19. There is an established policy and legislative regime for natural gas development**.** That framework determines the Board not only has a legislative mandate to determine entitlement to CBM, but also that statutory definitions of "gas" include CBM. The Board has exclusive jurisdiction pursuant to section 1(2) of the *OGC Act* and section 1(2) of the *Coal Conservation Act* to determine whether CBM is gas or coal.[46]

A. EUB Information Letter IL 91-11 Establishes That CBM Is Natural Gas

20. EUB Information Letter 91-11 states that both the EUB and Alberta Energy "consider CBM to be natural gas".[47] EUB Information Letter IL 91-11 also states that "all acts and regulations administered by the ERCB and [Alberta] Energy that pertain to natural gas also pertain to coalbed methane".[48] Furthermore, the *Canadian Energy Law Service*, a publication that bears Professor Lucas' name, concludes on the basis of EUB Information Letter IL 91-11 that "[t]he guiding regulatory principle is that coalbed methane is considered to be natural gas".[49]

21. EUB Information Letter IL 91-11, as well as the applicable jurisprudence and regulatory regime, creates a settled industry expectation that CBM is gas.[50] In this proceeding the Board received evidence that commercial life in Alberta's oil and gas industry has for many years been based on that understanding.[51]

22. EnCana was aware of EUB Information Letter 91-11 on or about the time the Board issued it.[52] EnCana agrees that in the vernacular the EUB used in 1991, CBM is natural gas[53] and that EUB Information Letter IL 91-11 applies to the development of CBM on freehold lands

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[46] Section 1(2) of the *OGC Act* states:

> The decision of the Board is final as to whether any product or mixture comes within a definition in subsection (1) or as to whether a definition in subsection (1) is applicable in a particular case.
>
> Section 1(2) of the *Coal Conservation Act* states:
>
> A decision by the Board as to whether a definition in subsection (1) is applicable in a particular case is final.

[47] EUB Information Letter IL 91-11, August 26, 1991, page 1.

[48] EUB Information Letter IL 91-11, August 26, 1991, page 1.

[49] [Exhibit 20-057] A.R. Lucas and C.D. Hunt, *Canadian Energy Law Service*, (Toronto: Thompson & Carswell), page 30-3283, paragraph 378.

[50] Settled expectations are a finding of fact based on evidence concerning the prevailing regulatory environment. See, for example, *Anderson v. Amoco,* page 282 paragraph 52 (Alta. C.A.). "The trial judge did not make a palpable or overriding error in her fact finding. In particular, she did not err in finding that the settled expectations of the industry are that solution gas is owned by the petroleum owner. Her finding was based on evidence concerning the regulatory environment in Alberta and the leasing arrangements made by the CPR as petroleum owner"

[51] [Exhibit 12-004-2006-09-29] Reply Submissions of ConocoPhillips Canada, September 29, 2006, page 8.

[52] Tr. Vol 8, page 1187, lines 15-18.

in Alberta.[54] EnCana itself states that EUB Information Letter IL 91-11 created settled industry expectations in respect of its own "development practices"[55] and "operational issues with the development of coalbed methane".[56]

23. As EnCana's evidence indicates, parties govern their affairs based on the state of regulation. Since the Board issued EUB Information Letter 91-11, there has been regulatory certainty and settled industry expectations that CBM is natural gas and PNG owners have rights to CBM.[57] Any variation of it must be made with great care. There is no sound basis in Proceeding No. 1457174 to disrupt the expectations created by EUB Information Letter IL 91-11.

B. Legislation Indicates that Gas and Coal are Distinct Substances

24. The Board's powers are very broad and derived from a number of statutes that create a single regulatory regime. Each statute within that regime should be read in the context of the others and with a view to the overall scheme.[58] Consistent with scientific evidence led in this proceeding, Alberta legislation establishing a framework for energy regulation confirms that gas and coal are distinct substances.

25. Section 16 of the *OGC Act* requires the EUB to issue a well license to a party demonstrating entitlement to "gas". Legislative descriptions of "gas" and "coal" are directly relevant to the exercise of determining entitlement to those substances.

26. CBM is captured by the *OGC Act* which defines "gas" by reference to "raw gas", "methane" and "marketable gas". The *OGC Act* defines "gas" as:

> gas means raw gas or marketable gas or any constituent of raw gas, condensate, crude bitumen or crude oil that is recovered in processing and that is gaseous at the conditions under which its volume is measured or estimated

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[53] Tr. Vol. 7, page 1049, lines 2-9.
[54] Q. All right, and my question for you simply is, would you agree, sir, that while IL 91-11 may not speak to the ownership of freehold lands, the information letter applies to development of CBM in Alberta generally, whether Crown or freehold, correct?
A. MR. WELSH: It speaks to operational issues with the development of coalbed methane, yes.
Q. So your answer is yes?
A. MR. WELSH: Yes. [Tr. Vol 8, page 1163, lines 9-17].
[55] Tr. Vol. 7, page 1044, lines 14-15.
[56] Tr. Vol. 8, page 1163, lines 14-15.
[57] [Exhibit 12-004-2006-09-29] Reply Submissions of ConocoPhillips, September 29, 2006, page 8.
[58] *Grosmont*, at paragraph 22.

"Raw gas" in turn is defined as:

> a mixture containing methane, other paraffinic hydrocarbons, nitrogen, carbon dioxide, hydrogen sulphide, helium and minor impurities, or some of them, that is recovered or is recoverable at a well from an underground reservoir and that is gaseous at the conditions under which its volume is measured or estimated.[59]

"Marketable gas" is defined as:

> a mixture mainly of methane originating from raw gas, if necessary through the processing of the raw gas for the removal or partial removal of some constituents, and that meets specifications for use as a domestic, commercial or industrial fuel or as an industrial raw material.[60]

"Methane" is described as:

> in addition to its normal scientific meaning, a mixture mainly of methane that ordinarily may contain some ethane, nitrogen, helium or carbon dioxide.[61]

27. By contrast, the *Coal Conservation Act*[62] defines coal as a substance fundamentally different from gas.

> "coal", in addition to its ordinary meaning, includes manufactured chars, cokes and any manufactured solid coal product used or useful as a reductant or energy source or for conversion into a reductant or energy source.[63]

28. Under these statutory definitions, natural gas produced from coal seams is "gas" and not "coal". CBM is simply natural gas that is "mainly methane" (i.e. 80% to 90% methane),[64] is recovered in processing and that is gaseous at the conditions under which its volume is measured or estimated. In this respect, CBM is completely indistinguishable from natural gas recovered from conventional reservoirs. Equally, CBM is not "coal", given the "ordinary meaning" of

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[59] *OGC Act,* Section 1(1)(tt).
[60] *OGC Act,* Section 1(1) (ee).
[61] *OGC Act,* Section 1(1)(ff).
[62] *Coal Conservation Act,* R.S.A 2000, c. C-17.
[63] *Coal Conservation Act,* R.S.A. 2000, c. C-17, Section 1(1)(d).
[64] Tr. Vol. 7, page 984, lines 4-6.

"coal" as a solid, black or blackish, combustible rock[65] and the vernacular definitions of coal at common law Dean Percy addressed in his evidence.[66] Thus, by statute, CBM is "gas".

29. In addition to distinct descriptions of gas and coal, Alberta legislation unambiguously distinguishes between rights to gas and coal. Specifically, under section 67(1) of the *Mines and Minerals Act*[67] coal lessees are only granted the right to recover natural gas in very limited circumstances related to safety.[68] Other jurisdictions such as British Columbia have taken a similar approach.

30. As Dean Percy discussed in his expert evidence, Alberta's policy and legislative approach is consistent with other jurisdictions. In delineating rights to Crown owned minerals, legislators in Canada, Australia and the United Kingdom distinguish between rights to coal and rights to coalbed methane.[69] For example, the British Columbia legislature is very clear that the intent behind the B.C. *Coalbed Gas Act*[70] is "if someone owns the natural gas rights, they own the coalbed gas. If they just own the coal, they don't own the coalbed gas".[71]

31. To the extent that the EUB finds that the Coal Owners are entitled to CBM, it will be a significant and unwarranted departure from the settled expectations set out in EUB Information Letter 91-11, the approach of other common law jurisdictions and Alberta legislation. Alberta statutes and the common law establish clear distinctions between, and rights to, gas and coal. They are equally clear on the question of Board jurisdiction.

C. The Board has Statutory Jurisdiction to Determine Entitlement to CBM

32. The Board exercises jurisdiction over oil and gas pursuant to the *OGC Act*. Section 4(c) of the *OGC Act* stipulates that a purpose of that Act is "to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources in Alberta". This statutory purpose guides the Board in its determination of CBM entitlement. The legislative intent is that the Board take an active role in managing the province's oil and gas resources.

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[65] See, for example, the dictionary definitions spanning the time period of 1893 through 1916, cited at page 30 of *Southern Ute Tribe*; and [Exhibit 20-060] Alex, Bissett, *Canadian Oxford Paperback Dictionary* (Don Mills: Oxford University Press, 2000) at page 177.
[66] Tr. Vol. 5, page 729 lines 14 to page 730, line 3.
[67] *Mines and Minerals Act,* R.S.A. 2000, c. M-17, section 67(2).
[68] *Ibid.*
[69] Tr. Vol. 5, page 673, lines 20-24; See also, [Exhibit 18-003a-2006-09-29] Dean Percy Report, September 29, 2006, pages 10-13.
[70] *Coalbed Gas Act,* S.B.C. 2003, c. 18.
[71] [Exhibit 20-56] Volume 14, No. 7 of Hansard, see also Tr. Vol 8, page 1167, line 18 to page 1168, line 8.

33. It is within the Board's authority to make a regulatory determination on entitlement that does not establish or define property rights for other purposes.[72] The *AEUB Act* establishes Board jurisdiction to interpret section 16 of the *OGC Act* and determine entitlement to produce CBM.[73]

34. The Board's jurisdiction to consider entitlement to CBM arises not only from its originating legislation, but also from the authority to interpret statutes it administers, including the *OGC Act*.[74] The mandatory language of Section 16(1) of *OGC Act* requires the Board, in considering an application for a well license, to decide the issue of entitlement "to the right to produce the oil, gas or crude bitumen from the well".[75]

35. In addition to the Board's explicit statutory powers to render a decision on entitlement, the "doctrine of jurisdiction by necessary implication"[76] applies. All powers conferred by an enabling statute include not only those expressly granted but also, "by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature".[77] Canadian courts are clear that when legislation creates a comprehensive regulatory framework, administrative bodies must have the necessary jurisdiction to accomplish their statutory mandate.[78] In the case of the *OGC Act*, that statutory mandate includes ensuring the orderly, economic and efficient development of oil and gas resources in Alberta.[79]

36. The position of EnCana[80] and CDP[81] is that the Board does not have jurisdiction to issue any CBM authorizations in the face of a "*bona fide* dispute"[82] or without a definitive court ruling in favour of the Natural Gas Rights Holders. The Coal Owners' positions are without merit and not based on any relevant jurisprudence.

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[72] Dean Percy at Tr. Vol. 5, page 721, line 15 to page 722, line 8; see also Mr. Welsh agreement that the EUB could make a decision respecting "regulatory entitlement" at Tr. Vol. 7, page 1093, lines 11-22.
[73] See Section 15 of the *AEUB Act.*
[74] Indeed, even Professor Lucas indicates that the Board "has jurisdiction to carry out this proceeding and make a decision". Tr. Vol 9, page 1368, lines 19-20.
[75] *OGC* Act, Section 16.
[76] *ATCO Gas,* at paragraph 51.
[77] *Ibid.*
[78] *Ibid.*
[79] *OGC Act,* Section 4(c).
[80] Tr. Vol. 6, page 844, lines 12-15.
[81] Tr. Vol. 6, page 841, lines 12-16.
[82] [Exhibit 07-024-2006-09-15], EnCana Submission, September 15, 2006, page 1, paragraph 5; See also Tr. Vol 8, page 1115, lines 18-25; Tr. Vol. 7, page 1001, lines 8-13; Tr. Vol 7, page 1059, lines 10-23; and Tr. Vol 7, page 1064, line 24 to page 1065, line 2.

37. With respect to "*bona fide* disputes", if the Board lost jurisdiction every time it faced a party's complaint, it would be unable to address many of the matters it is routinely called upon to decide. Its role as a regulator would be diminished and with it the ability to ensure economic, orderly and efficient development of natural resources in Alberta. The Board is not so handcuffed and its mandate so limited as the Coal Owners suggest.

38. The Board's historic practice has not been to divest its jurisdiction in the face of a dispute. There have been many cases of contested oil and gas rights in Alberta where the Board has issued a license in respect of a mineral disposition that is under dispute. [83] To do otherwise results in unworkable restrictions on development across Alberta's oil and gas industry.

39. The Coal Owners acknowledge that an effect of a "*bona fide* dispute" denying the Board jurisdiction may be several years' delay before resolution of CBM entitlement.[84] This delay in turn negatively impacts the economic, orderly and efficient development of CBM production in Alberta.

40. The Coal Owners also incorrectly claim that a court determination is required. The Board's jurisdiction to decide that the Natural Gas Rights Holders have entitlement to produce CBM is clear under the *AEUB Act*. Tribunals need not defer the question of jurisdiction to a court and may determine the scope of their powers.[85] The Board has considerable technical expertise[86] and "the power to determine questions of law or fact in matters properly before it".[87] Even CDP acknowledges that the Board has exclusive and original jurisdiction to issue well licenses.[88]

41. There is no doubt about the Board's jurisdiction. There is no need for a prior court determination before EUB jurisdiction can be exercised nor may its jurisdiction be removed by a

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[83] Tr. Vol. 5, page 719, lines 5-10; and Tr. Vol. 5, page 722, lines 3-8.
[84] Tr. Vol 7, page 1003, lines 13-19.
[85] *McLeod v. Egan*, [1975] 1 S.C.R. 517 at 519 (SCC).
[86] The EUB's technical and scientific knowledge is directly relevant to a consideration of CBM. As Fruman J. stated in *Goodwell,* at page 208, the EUB has "considerable technical expertise in addressing issues concerning hydrocarbon exploration, development, production and conservation, and balancing competing policy interests among industry participants, government and the public".
[87] EUB Decision 2002-048 (May 23, 2002), page 6; Similarly, Mr. Hatt acknowledges the Board's technical and legal expertise at Tr. Vol 8, page 1235, lines 18-24.
[88] Tr. Vol 8, page 1235, lines 20-24.

bona fide dispute. There is also no doubt about the standard of proof upon which the Board exercises its jurisdiction.[89]

D. The Standard of Proof for Entitlement is a Balance of Probabilities

42. In tribunal proceedings the standard of proof is a balance of probabilities.[90] Within a proceeding, that standard does not change.[91] A balance of probabilities is a less onerous standard than "certainty".

43. The standard of proof applicable to civil proceedings before Canadian courts is also a balance of probabilities, not "certainty".[92] It is illogical for the Coal Owners to expect the EUB to apply a standard of proof which is higher than that required of the Alberta Court of Queen's Bench. Moreover, there is no legal basis to do so.

44. Pursuant to section 16(2) of the *OGC Act*, a party must prove entitlement to produce oil, gas or crude bitumen "to the satisfaction of the Board" which is a lower standard than "certainty". Through evidence on leases led in this proceeding, the Natural Gas Rights Holders have irrefutably demonstrated entitlement to produce natural gas and related hydrocarbons among other substances. [93]

45. ConocoPhillips Canada, for example, has leasehold interests for lands located in Alberta townships 32 through 40, ranges 20 through 26 that are in the area of the disputed Fairborne and Devon wells. Furthermore, ConocoPhillips Canada holds leases in the exact form and bearing generally the same dates as leases held by Devon and Fairborne. These leases contain granting

[89] CDP agrees that the EUB "has the jurisdiction to address the statutory standard that must be met and whether the applicants have met or can meet the circumstances in that statutory standard". Tr. Vol 7, page 1002, lines 11-21.
[90] See, for example, *V.(K.) v. College of Physicians & Surgeons* 173 D.L.R (4th) 431 (Alta. C.A.), leave to appeal to S.C.C. refused. See also testimony of Dean Percy at Tr. Vol. 5, page 718, line 23 to page 719, line 4. At Tr. Vol. 9, page 1345, lines 6 to 9 Professor Lucas appears to confuse standard of proof with the issue of a tribunal's determination on a question of law attracting a standard of review of correctness.
[91] Sara Blake, *Administrative Law In Canada*, 4th ed. (Markham: Butterworths, 2006), page 69.
[92] Sopinka, Lederman and Bryant, *The Law of Evidence In Canada* (Toronto: Butterworths, 1992) at page 143.
[93] The grants under leases in issue are broader than just natural gas. For example, the granting clause in Devon's leases refer to "all the petroleum and natural gas, natural gasoline, and related hydrocarbons other than coal and also including sulphur as recovered in solution or in association with any of the liquid or gaseous hydrocarbons". The granting clause on paragraph 15, page 7 of ConocoPhillips' August 25, 2006 submissions [Exhibit 12-002-2006-08-25] is similar to many leases held by Devon that are the subject of this proceeding. The relevant Devon leases are set out at Schedule 4 of Appendix A to its August 25, 2006 submissions [Exhibit No. 05-066d-2006-08-25].

language and rights granted to ConocoPhillips Canada which are identical or substantively the same as the granting language and rights granted to Devon and Fairborne.[94]

46. The record indicates, and the Coal Owners do not challenge, that there are no material differences among the Natural Gas Rights Holders' leases.[95] The Board therefore need not engage in the unwieldy exercise of interpreting the language of each lease independently.

47. Section 16(2) of the *OGC Act* only requires a well license applicant to satisfy the EUB that it holds the rights to produce natural gas from the lands at issue. This is accomplished by providing an existing natural gas lease.[96] The EUB need only look at a lease's granting clause and the leased substances definition to determine who is entitled to CBM. The wording under Natural Gas Rights Holder leases is clear as to how parties choose to divide respective rights.[97]

48. The type of instrument at issue is immaterial.[98] The key matter is interpretation of the language dividing rights to subsurface minerals. It is irrelevant with respect to determining entitlement that the Natural Gas Rights Holders have a right to explore for and recover rather than "own" substances. It is a distinction without a difference.

49. The Board has a great degree of discretion in determining whether entitlement has been demonstrated.[99] By providing a natural gas lease, a Natural Gas Rights Holder meets the requisite standard of proof for *OGC Act* Section 16 and satisfies the Board on a *prima facie* basis that it holds the rights to produce natural gas from the lands in issue. The approach is consistent with EUB Information Letter IL 91-11 and legislation, and is necessary for the *OGC Act* regulatory regime to function effectively.

50. Section 16 of the *OGC Act* involves a determination of entitlement within that Act's regulatory framework. Interpretation of a statute includes a consideration of its overall

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[94] [Exhibit 12-002-2006-08-25] Submissions of ConocoPhillips Canada, August 25, 2006, pages 2-10; other Natural Gas Rights Holders also indicted similarities between their leases and those of Devon and Fairborne. See, for example, testimony of Quicksilver at Tr. Vol. 3, page 445, line 22 to page 446, line 4.
[95] Mr. Welsh indicated that a determination on one lease would "clarify a multitude of leases". Tr. Vol. 7, page 1036, line 23 to page 1037, line 9.
[96] A number of parties noted the relative ease with which the Board could determine entitlement. See for example testimony of Centrica at Tr. Vol. 4, page 566, lines 1-9.
[97] See, for example, Devon's leases set out at Appendix A to its August 25, 2006 submissions [Exhibit No. 05-066d-2006-08-25].
[98] In the *Goodwell* decision, for example Fruman J. stated that "[t]he right to produce could be acquired by agreement, reservation, grant or…crown lease". *Goodwell,* at page 222, paragraph 93.
[99] See, for example, testimony of Dean Percy at Tr. Vol 5, page 721, lines 11-14.

regulatory context.[100] The *OGC Act* requires the Board to provide for the economic, orderly and efficient development of Alberta's natural resources.[101] The applicable standard of proof is not divorced from this requirement.

51. A standard of "certainty" is a higher threshold for determining entitlement than the *OGC Act* requires. It would directly impede the Act's purpose of providing for economic, orderly and efficient oil and gas development in the public interest. Even the Coal Owners acknowledge if the Board were to apply a "certainty" standard of proof there could be delays to orderly CBM development.[102] Due to the very large Alberta land holdings held by the Coal Owners, the impact would be extensive and far-reaching. Sterilization of development is manifestly not in the public interest.

52. Section 16 of the *OGC Act* compels the Board to issue a well license to a party demonstrating an entitlement to "gas". Even if the Board were not guided by the legislative definitions of "gas" and "coal", scientific evidence and the common law establish that gas stored in coal is natural gas.

[100] Tr. Vol 9, page 1347, lines 4-11, See also *Grosmont,* paragraph 22.
[101] *OGC Act,* section 4(c)
[102] Tr. Vol. 7, page 1005, line 14 to page 1006, line 17.

III. THE NATURAL GAS RIGHTS HOLDERS HAVE THE RIGHT TO EXPLOIT NATURAL GAS UNDER THE COMMON LAW

53. Canadian and U.S. courts adopt the common law approach to defining the rights vested in different parties to subsurface minerals. The common law approach interprets the relevant instruments on a vernacular understanding, as of the date the instrument was executed, and is clear that ownership is determined at *in situ* conditions prior to human intervention.

54. The application of the common law to relevant leasing and scientific evidence led in Proceeding No. 1457147 confirms that the Natural Gas Rights Holders have the right to exploit natural gas and therefore have entitlement to CBM because:

- in the vernacular coal is a hard rock mineral;
- CBM is natural gas in the virgin reservoir;
- coal was reserved;
- natural gas and related hydrocarbons including CBM were granted under lease to the Natural Gas Rights Holders.

55. In their evidence, the Coal Owners fundamentally misinterpret the common law for the following reasons:

- the *Borys* and *Anderson v Amoco* decisions do not lead to a conclusion that CBM in coal is fundamentally the same as solvation of solution gas in petroleum;
- the common law is clear that a Canadian court, on the basis of a vernacular understanding of coal, would find that ownership to CBM rests with the Natural Gas Rights Holders;
- it is unnecessary for the EUB to choose a new theory of ownership in order to decide Proceeding No. 1457174; and
- the owner of coal strata does not, under law, own all the substances contained within the strata.

A. Solution Gas in Petroleum is Not Analogous To CBM

56. The starting point from which to assess any analogy between solution gas in petroleum and CBM is that CBM exists as natural gas in the virgin reservoir and the leases at issue in this proceeding unequivocally grant natural gas to PNG rights holders. The Privy Council in *Borys* dealt with solution gas dissolved in petroleum. It decided that petroleum and natural gas were separate and distinct substances and that the distinction between them depended on their state in reservoir conditions. The Privy Council further concluded that gas dissolved in petroleum

belonged to the petroleum owner. Misconstruing *Borys* and *Anderson v. Amoco*, the Coal Owners make a patently incorrect analogy between solution gas in petroleum and CBM sorbed by coal.[103]

57. Firstly, the Coal Owners' analogy fails because the evidence is clear that CBM is natural gas in the virgin reservoir. In addition to the Coal Owners' evidentiary shortcomings, the law indicates that an analogy to solution gas in petroleum is false. In the *Anderson v. Amoco* decision, for example, on the basis of the language of original grants, hydrocarbons in liquid (including gas that had subsequently evolved) under virgin reservoir conditions were the property of the petroleum owner.[104] The fact that solution gas was trapped in petroleum was of no consequence because it did not change original rights to that petroleum.

58. *Anderson v. Amoco* established that a subsequent phase change does not change ownership. Hence solution gas that was "liquid substance in the mine" remained the property of the owner of the petroleum. At trial, Madam Justice Fruman had before her the evidence of Board member Mr. Gerry DeSorcy, explaining that the Board applied the rule that solution gas was the property of the petroleum owner and this in part led to settled expectations.[105]

59. The Supreme Court of Canada in *Anderson v. Amoco* was also clear that any phase changes that occurred after a well was drilled into a pool do not alter the ownership created by reservation.[106] Applying the *Anderson v. Amoco* and *Borys* principles to Proceeding No. 1457147 requires the Coal Owners to demonstrate that the settled vernacular meaning of "coal", namely a hard rock mineral, changes phase to a gas through the reduction of pressure caused by human intervention. The scientific evidence adduced in this proceeding demonstrates that the Coal Owners' position is patently false. CBM is gas at the surface. For *Anderson v. Amoco* to have any application, the Coal Owners must go further and establish that the same gas that emerges at the surface must have been a "hard rock mineral" under virgin reservoir conditions. Dr. Levine's evidence stopped short of suggesting this absurd result.[107]

60. The U.S. Supreme Court *Southern Ute Tribe* decision applied the same analytical framework as *Borys* and *Anderson v. Amoco* to the question of ownership and unequivocally

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[103] [Exhibit 07-024-2006-09-15], EnCana Submissions, September 15, 2006, page 11.
[104] *Anderson v. Amoco,* at page 206, paragraph 42 (SCC).
[105] *Anderson v. Amoco,* at page 54, paragraph 144 to page 55, paragraph 147 (Alta. Q.B.).
[106] *Anderson v. Amoco,* at page 204, paragraph 34 (SCC).
[107] See, for example, Tr. Vol 6, page 920, line 4; Tr. Vol. 6, page 926, line 6-8.

held that CBM belongs to the PNG rights holder. It is well established that U.S. determinations can be relied upon in Canadian proceedings.[108]

61. CBM is natural gas in the virgin reservoir. It is natural gas under the common law and for the purposes of Section 16 of the *OGC Act*. As explained by Dean Percy in his testimony, it is highly likely that a Canadian court would apply *Southern Ute Tribe* and confirm that the PNG rights holders were granted the rights to CBM.[109] The coal owners' attempts to contort the principles of *Borys* and *Anderson v. Amoco* are entirely without merit.

B. Leases Are Interpreted on the Basis of Vernacular Understanding

62. Canadian courts define parties' split-title lands rights through an interpretation of relevant instruments in their vernacular context, as of the date the instrument was executed.[110] Courts find that vernacular meanings prevail over scientific ones[111] and look at the intention of both the grantor and grantee.[112] The U.S. Supreme Court *Southern Ute Tribe* decision adopts the same interpretive approach as in *Borys* to distinguishing between sub-surface mineral rights.[113]

63. *Southern Ute Tribe* concludes that in the Western United States in the first decade of the twentieth century, the common understanding of coal would not have encompassed CBM.[114] The timing of rights granted in that decision is similar to the timing of the CPR grants. As discussed above, the *Southern Ute Tribe* case would be persuasive authority in a Canadian proceeding.[115]

64. The application of the *Southern Ute Tribe* case to the dispute before the Board would likely result in a Canadian court, on the basis of a vernacular understanding of coal, finding that entitlement to CBM rests with the natural gas rights holders. As Dean Percy states:

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[108] See, for example, *Telstar Resources Ltd. v. Coseka Resources Ltd.,* (1980) 24 A.R. 562 at paragraph 12 (On-line) (Alta. C.A.); *Scurry-Rainbow Oil v. Galloway Estate* (1994), 157 A.R. 65 at paragraphs 13-14 (On-line) (Alta. C.A.); and *Bank of Montreal v. Enchant Resources Ltd.* (1999), 255 A.R. 116 at paragraph 29 (On-line) (Alta. C.A.).
[109] Tr. Vol. 5, page 729, lines 14 to page 730 line 3.
[110] Tr. Vol 5, page 668, line 21 to page 669, line 4.
[111] Tr. Vol 5, page 671, lines 12-16; Tr. Vol. 9, page 1372, lines 2-6.
[112] Tr. Vol. 5, page 714, lines 18-23.
[113] In his report submitted on September 15, 2006, Professor Lucas did not address *Southern Ute Tribe.*
[114] The US Supreme Court in *Southern Ute Tribe* indicated "…the common understanding of coal in 1909 and 1910 would not have encompassed CBM both because it is a gas rather than solid mineral and because it was understood as a distinct substance that escaped from coal as the coal was mined rather than as part of the coal itself". Dr. Levine stated that "in terms of common usage, the word "solid"…is valid to describe coal". Tr. Vol. 8, page 1205, lines 24-25. Mr. Welsh similarly concluded that CBM in the vernacular is a gas. Tr. Vol. 8, page 1134, lines 18-19.

> A. MR. PERCY: If the courts were faced with deciding what was meant by natural gas and what was meant by CBM, they would start off by saying what's the vernacular understanding of the two substances.
>
> When I read the Amoco and Southern Ute decision, I was struck by, first of all, the similarity of the approach of the United States Supreme Court to the *Borys* case, and it occurred to me back in 1999 when I put that case on my syllabus that coal -- the US Supreme Court concluded what was meant by coal in the vernacular. The answer was hard black stuff. What was meant by natural gas? Stuff existing in a vaporous state.
>
> So it's been my feeling that it's highly likely that the Canadian courts would make a similar distinction.[116]

65. On the assumption that CBM in coal is gas, Professor Lucas indicated his position would be the same as Dean Percy - that Canadian courts would decide in favour of the Natural Gas Rights Holders.[117] The Board does not need to develop a new theory of ownership in this proceeding to reach the same determination.

C. No Need For A New Theory of Ownership

66. The Coal Owners allege that Canadian courts have not settled on a theory of oil and gas ownership[118] and there is no similar ownership theory in respect of coal.[119] This ignores the numerous Canadian authorities that recognize natural resources can be owned *in situ*, that a royalty interest is an interest in land, and the effect of a Certificate of Title in a Torrens System.

67. The *Anderson v. Amoco* decision dealt with a common instrument that defined the rights of each party. On that basis, each level of court applied the analytical approach established by *Borys* and determined that a new theory of ownership was not required.[120] It is similarly not required in this proceeding.

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[115] [Exhibit, 18-003a-2006-09-29] Dean Percy Report, Natural Gas Rights Holders' Reply submissions, September 29, 2006, page 18; By contrast, the state court decisions relied upon by the Coal Owners are inapplicable to the Western Canadian/ CPR grants context and are based on US state law which varies widely between states.
[116] Tr. Vol. 5, page 729, lines 14 to page 730 line 3.
[117] Tr. Vol. 9, page 1389, lines 4-10.
[118] [Exhibit 03-036-2006-09-15], Lucas Report, September 15, 2006, page 10.
[119] Tr. Vol. 9, page 1347, line 22 to page 1348, line 1.

[120] *Anderson v. Amoco,* at page 39 (Alta. Q.B.); *Anderson v. Amoco,* at page 283 (Alta. C.A.); and, *Anderson v. Amoco,* at page 204, paragraph 35 (SCC).

D. Coal Owners Misinterpret Law on Outstroke and Strata

68. Coal and CBM are distinct substances within strata in the same manner as gas and oil are distinct substances within an oil reservoir. The Coal Owners' conclusion that the party who owns coal strata owns all the substances (including the other minerals) contained within the strata is logically and legally flawed.[121] While Professor Lucas suggests that this approach has been accepted in a number of U.S. states,[122] in view of the variances in law between states and idiosyncratic deed wording facing state courts, the U.S. state experience would be inapplicable to Alberta.[123]

69. The Coal Owners' conclusions respecting strata are erroneously based on the concept of outstroke and are without merit. [124] Outstroke means "liberty to work on an adjoining mine from the demised mine"[125] and as Dean Percy indicates in his testimony, the concept is largely inapplicable to the CBM dispute before the Board. Reference to ancient and rarely referred to precedent is wholly unnecessary. The relevant issue has been, and always will be, the common instrument dividing the substances.

[121] Tr. Vol. 5, page 674, lines 12-18.
[122] Tr. Vol. 6, page 772, line 22 to page 773, line 4.
[123] [Exhibit 18-003a-2006-09-29], Dean Percy Report, September 29, 2006, pages 16-18.
[124] Tr. Vol. 5, page 675, line 15 to page 677, line 7.
[125] [Exhibit 18-003a-2006-09-29], Dean Percy Report, September 29, 2006, page 15, citing Halsbury's Laws of England (Volume 31, 4th ed., 2003 Reissue), par. 331.

IV. SCIENTIFIC EVIDENCE PROVES THAT CBM IS NATURAL GAS IN THE VIRGIN RESERVOIR

70. Mr. Mavor's evidence in Proceeding No. 1457147 is unequivocal that CBM is gaseous in the virgin reservoir. ConocoPhillips Canada adopts the submissions set out in the Joint Technical Argument and the expert evidence of Matthew J. Mavor led in this proceeding. Those submissions address technical and scientific issues pertaining to coal and CBM and reach the following key conclusions:

- coal is a rock and a rock is solid material;
- CBM is gaseous at *in situ* temperature and pressure conditions in Alberta coal seams;
- CBM in Alberta coal seams is overwhelmingly (80% - 90%) methane;
- CBM is a gas before and after disturbance by man;
- weak attractive forces between gas stored in coal and organic material in coal do not cause a phase change; and
- gas stored in coal can be easily separated from coal.

71. The Coal Owners' claims to entitlement require proving that coal, a hard rock mineral,[126] by the reduction of pressure through human intervention changes phase to a gas. This is patently false. The Supreme Court of Canada in *Anderson v. Amoco* accepted a definition of "phase" which referred to three distinct physical states of matter, namely solid, liquid or gas.[127] Accordingly, under Canadian jurisprudence, a phase change must be from one of those states to another.

72. The Board heard evidence from Dr. Levine that does not suggest a phase change envisioned by the Supreme Court of Canada in *Anderson v. Amoco*. He relied on ambiguous terminology including "liquid-like"[128] and "unique thermodynamic state"[129] which does not reflect a distinct physical state of matter under either scientific or legal principles. Nothing in Dr. Levine's evidence supports the Coal Owners' proposition that coal transforms from a rock solid substance into a gas. By contrast, Mr. Mavor provided irrefutable evidence that coal is a solid substance that serves as a container for CBM and that CBM is natural gas.

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[126] Dean Percy confirmed that under its settled vernacular meaning coal is a hard rock mineral. Tr. Vol. 5, page 729 lines 14 to page 730 line 3.
[127] *Anderson v. Amoco*, at page 195, paragraph 2 (SCC).
[128] Tr. Vol. 6, page 794, line 1.
[129] Tr. Vol. 6, page 830, line 9.

73. From a scientific and technical perspective, CBM falls squarely within the terms of the Natural Gas Rights Holders' lease grants. Their leases generally grant all petroleum and natural gas, natural gasoline and related hydrocarbons (except coal) recovered in solution or in association with any liquid or gaseous hydrocarbons. These lease terms give the Natural Gas Rights Holders the right to exploit CBM.

V. THE NATURAL GAS RIGHTS HOLDERS HAVE THE RIGHT TO EXPLOIT CBM UNDER THEIR LEASE TERMS

74. Around the year 1881, the CPR received a 25 million acre land grant from the Canadian government that included title to subsurface petroleum and natural gas.[130] The CPR subsequently retained roughly 8.3 million acres in petroleum and natural gas rights in the province of Alberta.[131] All mines and minerals were initially united under one title. Split-title lands emerged in the early 20th century with the transfer of subsurface interests from the CPR to third parties and the reservation of coal to the CPR.[132]

75. CPR and PanCanadian are EnCana's predecessors in title.[133] Those companies, and predominantly the CPR, granted the leases at issue in this proceeding.[134] The CPR was and is a railway company, not a coal developer.[135] There are no coal mines owned or operated on the lands at issue in this proceeding.[136] It strains credulity to suggest that the CPR reserved or retained the right to exploit natural gas in coal.

76. Under the CPR and PanCanadian leases, the rights to pursue natural gas and petroleum were granted many years ago.[137] CPR and PanCanadian entered into leases with third parties in good faith.[138] On the basis of those arrangements, PNG development also occurred and continues to occur in good faith. No zonal restrictions existed under the leases at issue.[139] The CPR, a railway, granted PNG rights with the expectation of PNG development.[140] In return royalties were paid.[141] CPR, PanCanadian and EnCana have all benefited from that bargain through the payment of royalties.[142] The Coal Owners ignore this fundamental historic bargain.

77. EnCana has recently developed a shallow gas strategy that includes CBM development.[143] To pursue that strategy, EnCana now wants to obtain a different grant than its

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[130] Tr. Vol. 8, page 1170, lines 3-9.
[131] Tr. Vol. 8, page 1170, lines 9-14.
[132] For a historical overview, see *Anderson v. Amoco,* at pages 196-197 (SCC). See also testimony of Dean Percy at Tr. Vol. 5, page 711, lines 2-8.
[133] Tr. Vol. 8, page 1170, lines 15-18.
[134] Tr. Vol. 8, page 1170, line 22 to page 1171, line 1.
[135] Tr. Vol. 8, page 1171, lines 2-5.
[136] Tr. Vol. 8, page 1171, lines 6-9.
[137] Tr. Vol. 8, page 1171, lines 10-12.
[138] Tr. Vol. 8, page 1171, lines 13-15.
[139] Tr. Vol. 8, page 1172, line 21 to page 1173, line 2.
[140] Tr. Vol. 8, page 1171, lines 16-21.
[141] Tr. Vol. 8, page 1171, lines 22-23.
[142] Tr. Vol. 8, page 1174, line 8 to page 1175, line 3.
[143] Tr. Vol. 8, page 1178, lines 7-10.

corporate predecessors previously agreed to and which granted PNG rights in good faith. There is no basis under law, regulation or the historical grants themselves to do so.

78. Neither CDP nor EnCana previously applied to the EUB for a CBM well license on the basis of its coal rights.[144] Prior to this proceeding, the Coal Owners had not sought any type of declaration on entitlement to produce CBM.[145] Only recently did EnCana start to distinguish in any way between CBM and other types of natural gas.

79. ConocoPhillips Canada's leases entered into with EnCana prior to 1993 do not exclude CBM or any other types of gas.[146] In 1993, EnCana revised its lease form with ConocoPhillips Canada whereby the leased substances definition and/or granting clause was amended to exclude CBM.[147] As Fruman J. stated in the *Goodwell* decision, for a proper interpretation it is necessary to consider, in respect of instrument terms "the rights granted as well as the rights that were not granted".[148]

80. The absence of the express reference to CBM in EnCana's pre-1993 leases with ConocoPhillips Canada demonstrates the intention of the parties was to not reserve CBM, but to instead grant CBM to the lessee of natural gas. Such a proposition is consistent with the historical value of CBM at the time of the grant when coal was the valuable resource, and not CBM.

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[144] Q. No, sir, but my question was, Has EnCana ever made application to the EUB for a well licence to drill a CBM well on the strength of its ownership of the coal rights alone?
A. MR. WELSH: Correct. We haven't done that to this point. Tr. Vol. 8, page 1145, lines 13-17. See also Tr. Vol. 8, page 1181, line 18 to page 1182, line 1 and Tr. Vol. 8, page 1182, lines 17-22; Tr. Vol. 8, page 1184, lines 8-13.

[145] Tr. Vol. 8, page 1143, lines 2-6.

[146] [Exhibit 12-002-2006-08-25] ConocoPhillips Canada's Submissions, August 25, 2006.

[147] The first instance of this amendment by EnCana is in a lease dated November 8, 1993 between PanCanadian Petroleum Limited, as lessor, and Atlantis Resources Ltd., as lessee [Exhibit 20-049]. The actual definition of "leased substances" in the lease is "leased substances" means natural gas only and substances produced in association therewith, whether hydrocarbon or not, except coal and petroleum and except natural gas derived from or associated with coal deposits". Other Natural Gas Rights Holders note the 1993 exclusion of CBM. See for example, the experience of Quicksilver at Tr. Vol. 3, page 434, lines 21 to page 435, line 1; and Centrica at Tr. Vol. 4, page 558, line 22 to page 559, line 4.

[148] *Goodwell,* at page 219, paragraph 78.

VI. COAL OWNERS' INDUSTRY IMPACTS AND REMEDIES ARE HARMFUL TO CBM DEVELOPMENT

A. Manufactured Uncertainty Is Contrary To The Economic, Orderly and Efficient Development of CBM in Alberta

81. The CPR was a holder of a huge land base.[149] The CPR's corporate successor, EnCana, now holds a very large land position in Alberta exceeding eight million acres.[150] CDP has coal rights in over 1000 sections of Alberta.[151] As Mr. Welsh confirmed, if there cannot be development until a court ruling[152] or a quieting of title arrangement with the Coal Owners, then development over an extensive area is frozen.[153] Coal Owners' objections to Natural Gas Rights Holders' well license applications and therefore give rise to manufactured regulatory uncertainty and resulting sterilization of development contrary to the public interest.

82. EUB Bulletin 2006-19 prevents a CBM developer from drilling on split title lands without agreement from a Coal Owner. The result is that, contrary to the public interest in the economic, orderly, efficient development of oil and gas resources in Alberta, the Coal Owners enjoy a veto over freehold CBM production. As long as the uncertainty over who owns CBM continues, and Natural Gas Rights Holders are required to enter into coal certainty agreements with EnCana or seek court action, EnCana stands to profit.

83. Continued uncertainty over entitlement to CBM will frustrate and delay ConocoPhillips Canada's development of its leasehold interests and the economic, orderly and efficient development of coalbed methane in Alberta. ConocoPhillips Canada's year 2007 estimates propose capital spending of $20 million for development of its EnCana leasehold interests within the Three Hills area, lands which are the subject matter of Proceeding No. 1457174.[154] This development will be frustrated or delayed as a result of uncertainty over the entitlement to CBM.[155] In addition to ConocoPhillips Canada's experience, a number of other natural gas

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[149] Tr. Vol. 8, page 1170, lines 5-9.
[150] Tr. Vol 8, page 1170, lines 10-14.
[151] Tr. Vol 8, page 1179, lines 23-25.
[152] Which could take an extensive period of time. The *Anderson v. Amoco* matter took over 13 years to decide, a fact that did not concern EnCana. Tr. Vol 6. page 842, lines 23 to page 843, line 8.
[153] Tr. Vol 8, page 1176, lines 16-18; see also statements of Mr. Hatt at Tr. Vol. 6, page 846, line 22 to page 847, line 2.
[154] Tr. Vol. 3, page 529, line 21 to page 530, line 4.
[155] *Ibid.*

industry participants are subject to the negative impacts of Coal Owners' veto over CBM development,[156] impacts that are not addressed by EnCana's shared ownership proposals.

B. EnCana's Proposals Are Inappropriate For This Dispute

84. The Board heard substantial evidence in Proceeding No. 1457174 on EnCana's proposed "remedies".[157] Those proposals are based on the erroneous assumption that the Board has already decided the question of entitlement in favour of the Coal Owners. All EnCana "remedies" share a common root of regulatory uncertainty manufactured by the Coal Owners. Moreover, those proposals are unworkable, exclusively in EnCana's self-interest and contrary to the public interest in economic, orderly, efficient development of oil and gas resources in Alberta. EnCana seeks delay and continuation of regulatory uncertainty that provide it with greater leverage over PNG rights holders, while failing to address the fundamental issue of entitlement to produce CBM.

85. EnCana proposes vertical pooling with payment of proceeds to the Alberta Provincial Treasurer.[158] This approach ignores the fact that there can be only one owner of CBM. As Mr. Johnson states "this is not about sharing, it is about ownership".[159] Moreover, vertical pooling is unworkable[160] as an interim measure and results in the deferral or cancellation of Natural Gas Rights Holders' CBM development strategies.[161]

86. EnCana's proposal for reduced spacing units also fails. It is flawed for reasons that include the loss of efficient reserve development,[162] complications with respect to offsets[163] and

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[156] Quicksilver's witnesses, for example, indicate that "[t]he uncertainty that's created by the situation surrounding entitlement to produce CBM on split-title lands is having a significant direct and adverse effect on Quicksilver" Tr. Vol. 3, page 431, lines 10-13. They further state "[t]his moratorium affects us as well as our freehold lessors. So basically the longer this goes, we are stopped from being able to drill on these lands" Tr. Vol. 3, Page 433, lines 5-8. As another example, Centrica witnesses state "[w]ith the drilling plans on hold, it's essentially a deferral of our cashflow that's incoming on capital we've expended There is also a potential for drainage from offsetting Crown lands". Tr. Vol. 4, page 560, lines 22-25.
[157] [Exhibit 07-024-2006-09-15] Submissions of EnCana, September 19, 2006, pages 15-17.
[158] *Ibid,* page 15-16.
[159] Tr. Vol. 3, page 437, lines 11-12; see also testimony of ConocoPhillips Canada at Tr. Vol. 3, page 524, lines 11-16; similarly Centrica at Tr. Vol. 4, page 564, lines 14-19.
[160] Devon, for example, speaks to the unworkable nature of the proposal at Tr. Vol. 1, page 71, lines 21-24, "…it would be difficult to measure and distinguish which gas comes from which formation once you have the vertical pooling in place. Impossible if I might say".
[161] See testimony of ConocoPhillips Canada at Tr. Vol. 3, page 535, lines 11-23 and Tr. Vol. 3, page 536 lines 3-11; similarly Centrica at Tr. Vol. 4, page 565, lines 3-12.
[162] Tr. Vol. 3, page 439, line 20 to page 440, line 2.
[163] Tr. Vol. 3, page 526, lines 15-19.

drainage on lands subject to dispute.[164] Even Mr. Welsh concluded that the reduction of DSU's from sections to quarter sections is problematic because it triggers offset obligations and creates a greater risk of drainage.[165]

87. Finally, quieting title[166] is unacceptable because it creates delay that benefits Coal Owners and is in turn contrary to the purposes of the Section 4(c) of the *OGC Act*. EnCana, for example, has not taken steps to quiet title through the courts for the past 15 years.[167] Moreover, quieting title is unnecessary, because Natural Gas Rights Holders are entitled to natural gas under their leases.

88. Coal Owners' leverage over Natural Gas Rights Holders increases with delay. The longer the delay a PNG rights holder faces in extracting CBM, the greater its motivation for entering into a coal certainty agreement with a Coal Owner.[168]

89. EnCana's proposals are based on shared ownership and motivated by their interest in uncertainty and delaying resolution. They ignore the fact that the purpose of Proceeding No. 1457174 is to ascertain entitlement to produce CBM, an issue that has not yet been decided.[169] Shared resource or production ownership is irrelevant to this hearing and, therefore, no pooling order should be issued. Other proposals including DSUs, the creation of a technical committee[170] and metering[171] prolong regulatory uncertainty, among other negative results, and should therefore also be rejected.

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[164] Tr. Vol. 3, page 509, lines 15-20.
[165] Tr. Vol. 7, page 1055, lines 22-25 and Tr. Vol. 7, page 1056, lines 13-16.
[166] EnCana defines quieting title as a resolution of ownership, either by agreement or a court decision. Tr. Vol. 8, page 1238, lines 5-12.
[167] Tr. Vol. 8, page 1188, lines 9-13.
[168] Tr. Vol. 7, page 1019, line 22 to page 1020, line 1; Tr. Vol. 7, page 1020, line 4 to page 1021, line 19. The record further shows that EnCana has been very slow to issue a coal certainty lease under its coal certainty agreements. Tr. Vol. 8, page 1142, lines 6-9.
[169] Tr. Vol. 1, page 4, lines 6-12.
[170] For example, the problems of a technical committee are addressed by Quicksilver at Tr. Vol. 3, page 439, lines 4-15.
[171] As EnCana's panel acknowledged, there may be economic and conservation issues arising from a separate metering remedy. Tr. Vol. 8, page 1242, line 17 to page 1243, line 7.

VII. SUMMARY AND RELIEF SOUGHT

90. The evidence in this proceeding is clear that CBM exists as natural gas *in situ* and the leases at issue grant natural gas, among other substances, to the Natural Gas Rights Holders. The common law, legislation, EUB Information Letter IL 91-11 and scientific evidence all overwhelmingly support the conclusions that coal is a solid material and CBM is natural gas. The Coal Owners fail to demonstrate that the Board does not have jurisdiction to determine entitlement to CBM production or that the standard of proof is anything more than a balance of probabilities. Moreover, there are no public interest grounds to grant the Coal Owners' request. To the contrary, there is a strong public interest in, and legislated requirement for, the economic, orderly, efficient development of oil and gas resources in Alberta. Rescinding Bulletin 2006-19 will ensure that development.

91. For the foregoing reasons, ConocoPhillips Canada respectfully submits that CBM is natural gas and that the Natural Gas Rights Holders have legal entitlement to CBM. ConocoPhillips Canada further requests that the EUB, having confirmed that it is the holders of natural gas rights that have legal entitlement to CBM, rescind Bulletin 2006-19 and confirm that the Natural Gas Rights Holders enjoy all of the rights and incidents of legal entitlement, including the issuance of well licences to applicants that meet legislative requirements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF CONOCOPHILLIPS CANADA RESOURCES CORP. THIS 15TH DAY OF NOVEMBER, 2006.

CONOCOPHILLIPS CANADA RESOURCES CORP.
by its Counsel Borden Ladner Gervais LLP

Per: ______________________________
Alan L. Ross