

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, Bears paw Petroleum Ltd. (“Bears paw”), 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”).

**REPLY ARGUMENT OF
CONOCOPHILLIPS CANADA
RESOURCES CORP.
 (“CONOCOPHILLIPS CANADA”)**

DECEMBER 13, 2006

ALBERTA ENERGY AND UTILITIES BOARD

TABLE OF CONTENTS

I. INTRODUCTION1

II. THE BOARD HAS JURISDICTION TO DETERMINE ENTITLEMENT TO PRODUCE CBM.....2

III. COAL OWNERS DISREGARD PROCEDURAL FAIRNESS5

 A. The Sequestration Patent is Inadmissible5

 B. The Coal Owners Are Not Subject to Procedural Unfairness.....7

IV. THE COAL OWNERS IGNORE OR FUNDAMENTALLY MISCONSTRUE RELEVANT LEGISLATION AND JURISPRUDENCE.....9

 A. Legislation.....9

 B. Jurisprudence10

V. THE VERNACULAR MEANING OF COAL IS A HARD ROCK MINERAL14

VI. INDUSTRY EXPECTATIONS AND IMPACTS ARE DIRECTLY RELEVANT TO PROCEEDING NO. 145714715

 A. Continuance of EUB Bulletin 2006-19 Creates Negative Impacts.....16

VII. COAL OWNERS’ PROPOSED REMEDIES ARE UNACCEPTABLE17

VIII. CONCLUSIONS.....19

IX. RELIEF SOUGHT19

I. INTRODUCTION

1. In final submissions EnCana and CDP (together the “Coal Owners”) misconstrue the key issue in Proceeding No. 1457147 - entitlement to produce coalbed methane (“CBM”).¹ At the root of their arguments is an unsupported allegation that the Board cannot decide the question of entitlement to produce CBM without a court determination² or in the face of “competing claims”.³ The Coal Owners simply manufacture uncertainty where none exists. There are no issues of jurisdiction or procedural fairness that preclude the Board from making a determination on entitlement to produce CBM. Moreover, the Natural Gas Rights Holders⁴ have demonstrated entitlement to produce CBM on the basis of their leases.

2. ConocoPhillips Canada’s Reply (the “Reply”) addresses the following:

- the Board has jurisdiction to determine entitlement to produce CBM;
- the Coal Owners’ introduction of new and inadmissible documents in their final argument breaches procedural fairness;
- the Coal Owners fundamentally misconstrue relevant legislation and jurisprudence;
- there is no doubt on the basis of scientific evidence, common law and common sense that the vernacular meaning of coal is a hard rock mineral; and
- the settled expectations of industry and the impacts of Bulletin 2006-19 on CBM development are directly relevant to this proceeding and the EUB’s mandate under the *Oil and Gas Conservation Act* (“OGC Act”).

3. Some Coal Owner arguments have already been addressed in ConocoPhillips Canada’s submissions of November 15, 2006 (the “Final Argument”) and the joint technical argument of

¹ Tr. Vol. 1, page 4, lines 6-12; see also Bulletin 2006-19.

² CDP Final Argument, November 29, 2006, page 5, para. 16.

³ EnCana Final Argument, November 29, 2006, page 26, para. 124. EnCana alleges that the EUB has no jurisdiction to determine entitlement in the face of a “competing claim”, but also states at paragraph 36 of its Argument that the Board has the power to cancel a license without the need to “adjudicate competing claims”. EnCana’s positions are wholly inconsistent. Furthermore, throughout its argument EnCana uses a number of similar terms including “competing claims”, “*bona fide* dispute”, “relative ownership” “*bona fide* competing claims”, “competing ownership claims”, “competing proprietary claims” and “*bona fide* competing proprietary claims”. There are no meaningful distinctions among any of these terms with respect to the issue of Board jurisdiction to decide entitlement to produce CBM.

⁴ In this reply, as in the previous submissions of ConocoPhillips Canada, the term “Natural Gas Rights Holders” refers to ConocoPhillips Canada, Devon Canada Corporation (“Devon”), Fairborne Energy Ltd. (“Fairborne”),

the Natural Gas Rights Holders (the “Joint Technical Argument”). ConocoPhillips Canada has endeavoured to reduce repetition in this Reply. Its silence on certain issues should therefore not be interpreted as agreement.

4. ConocoPhillips Canada adopts its previous submissions and the Joint Technical Argument filed in this proceeding and continues to rely on them for the purposes of this Reply. ConocoPhillips Canada files this Reply concurrently with the Natural Gas Rights Holders’ joint reply addressing technical and scientific issues raised in Coal Owners’ arguments (the “Joint Technical Reply”).

II. THE BOARD HAS JURISDICTION TO DETERMINE ENTITLEMENT TO PRODUCE CBM

5. Legislation and jurisprudence leave no doubt about the Board’s authority. The Board enjoys both express and implied powers to determine entitlement to CBM production. The Coal Owners’ protestations to the contrary are groundless.

6. With respect to legislation, Section 16 of the *OGC Act*, among other statutory provisions,⁵ is clear that the Board has been granted legal authority to decide entitlement to produce CBM.⁶ In doing so the Board may determine questions of law and fact.⁷ Moreover, the mandatory language of Section 16(1) requires the Board, in considering an application for a well license, to decide the issue of entitlement.

7. Section 16(2) of the *OGC Act* only requires a well license applicant to satisfy the EUB that it holds rights to produce natural gas from the lands at issue, for example by providing an existing natural gas lease. The standard of proof is a balance of probabilities, not “certainty”.⁸

Quicksilver Resources Canada Inc., (“Quicksilver”) Canpar Holdings Inc. (“Canpar”) and Centrica Canada Limited (“Centrica”).

⁵ Section 94 of the *OGC Act*, R.S.A. 2000, c. O-6 and Section 16 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 also provide the Board with residual jurisdiction to issue well licences.

⁶ In its final argument CDP largely repeats its submissions of September 15th, 2006 respecting definitions of entitlement. It relies on definitions of entitlement in family, tort and employment law, definitions that are entirely inapplicable to CBM and therefore irrelevant.

⁷ See Exhibit 12-004-2006-09-29, ConocoPhillips Canada’s Reply Submission dated September 29, 2006, at pages 3-4, paras. 13-15. The power to determine law and fact were passed to the EUB upon the enactment of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, Chapter A-17.

⁸ At paragraph 133 of its final argument, CDP confuses the standard of review used by a court in reviewing a tribunal decision and the standard of proof in tribunal proceedings.

Nothing in the language of Section 16 requires the Board, as CDP alleges,⁹ to consider broad theories of ownership and property rights. Section 16 contains no restrictions on jurisdiction to determine entitlement to gas production, and certainly none on questions of ownership. Section 16 is therefore not, as the Coal Owners would have this Board believe, violated absent a court determination on ownership.¹⁰

8. Canadian jurisprudence clearly and consistently indicates that the Board has all necessary power to exercise its statutory mandate and decide on CBM production entitlement.¹¹ The Board's jurisdiction is neither limited to rubber-stamping a court determination nor removed in the face of a *bona fide* objection or "competing claim". Contrary to EnCana's mischaracterization, in *Alberta Energy Co. v. Goodwell Petroleum Corp.* the Alberta Court of Appeal did not question EUB jurisdiction to make a decision on entitlement by reviewing leases.

9. Entitlement to produce CBM can be determined on the basis of the granting clauses and leased substances definitions set out in the Natural Gas Rights Holders' leases.¹² The Natural Gas Rights Holders have demonstrated entitlement to produce all petroleum and natural gas ("PNG") by virtue of leases valid on their face, and have demonstrated entitlement to produce all petroleum and natural gas, natural gasoline and related hydrocarbons (except coal) recovered or in association with any liquid or gaseous hydrocarbons.¹³ The Natural Gas Rights Holders'

⁹ CDP Final Argument, November 29, 2006, page 59, para. 139.

¹⁰ EnCana Final Argument, November 29, 2006, page 3, para. 14

¹¹ See, for example, *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 54 Alta. L.R. (4th) 1 at 28, para. 51 (SCC); see also *Anderson v. Amoco Canada Oil & Gas* (1998) 63 Alta. L.R. (3rd) 1 at paras. 142-143 (Q.B.).

¹² It is inaccurate to state, as EnCana does at paragraph 87 of its final argument that: (i) the leases suggest CBM was reserved as coal as they require cementing to prevent flow of substances from one stratum to another; and (ii) if all 'gas' belongs to CNG producers, restrictions on flow between strata would then be irrelevant. In fact, the language in the lease forms EnCana references was used for the purposes of ensuring that there would be no formation damage caused by migration, ensure pressure maintenance and prohibit substance contamination of one stratum by another with the resultant inability to deliver the maximum total recovery of the leased substances from each stratum. That language speaks to the commitment by the lessee to preserve the integrity of each zone within the lease and to the extent that the lease granted only specific zones, the integrity of the non-leased zones.

¹³ The Natural Gas Rights Holders have discharged any "onus" to demonstrate entitlement which CDP claims at paragraph 11 of its final argument.

leases are not in any way deficient and there is no need for the Board to interpret the language of each lease independently.¹⁴

10. Throughout the course of this proceeding, the Coal Owners have taken positions on Board jurisdiction different from what they advocate in their final argument.¹⁵ EnCana's counsel, for example, previously indicated that the Board has jurisdiction to determine who owns CBM.¹⁶ EnCana's correspondence of April 28, 2005 similarly states that the Board "is empowered and obliged to determine entitlement".¹⁷ The Coal Owners now allege something quite different. EnCana's complete reversal on matters at the heart of Proceeding No. 1457147 belies its claim that it has "but furthered"¹⁸ its positions in response to Natural Gas Rights Holders' submissions.¹⁹

11. The Natural Gas Rights Holders by contrast have been consistent in only seeking a remedy respecting legal entitlement, not "competing proprietary claims",²⁰ a "property dispute"²¹ or "to compel development"²² as the Coal Owners erroneously allege. Pursuant to the *OGC Act*, deciding entitlement to CBM under grants and leases is within the EUB's authority, not a private law matter for the courts. A court determination is therefore not necessary to establish entitlement on the basis of the underlying PNG leases. However, while the EUB is not subject to the same rules of evidence as a court, procedural fairness is nevertheless required, fairness that has been contravened by CDP's introduction of new and inadmissible documents in its final argument.

¹⁴ For a further discussion of this issue please see paragraph 46 of ConocoPhillips Canada's Final Argument and Tr. Vol. 3, page 445, line 22 to page 446, line 4.

¹⁵ See, for example, Devon Final Argument, November 15, 2006, pages 3-5.

¹⁶ Transcript From Review and Variance Proceedings - Review Applications by EnCana Corporation and Luscar Ltd. Re: Devon Canada Corporation, Fairborne Energy Ltd. and Bearspaw Petroleum (January 31, 2006), page 46, lines 3-13.

¹⁷ Exhibit 07-004-2005-04-28, EnCana Letter to the EUB dated April 28, 2005, page 1.

¹⁸ EnCana Final Argument, November 29, 2006, page 28, para. 132.

¹⁹ Notwithstanding EnCana's arguments to the contrary (see EnCana Final Argument, November 29, 2006, pages 26-27, paras. 128-129), August 25, 2006 was the first opportunity in Proceeding No. 1457147 for ConocoPhillips Canada to describe its leases and grants. It in no way reflects a change in position on entitlement. EnCana's unfounded claim that the Natural Gas Rights Holders somehow "forgot" that until August 25, 2006 leases underpinned entitlement simply ignores the Board's proceeding schedule in this matter.

²⁰ EnCana Final Argument, November 29, 2006, page 5, para. 26.

²¹ CDP Final Argument, November 29, 2006, page 57, para. 135.

²² EnCana Final Argument, November 29, 2006, page 7, para. 33.

III. COAL OWNERS DISREGARD PROCEDURAL FAIRNESS

A. The Sequestration Patent is Inadmissible

12. In its final argument CDP introduces for the first time in this proceeding U.S. Patent US 6,412,559 B1 issued July 2, 2002 (the “Sequestration Patent”). CDP filed the Sequestration Patent after the close of evidence and without applying to re-open the hearing. Accordingly, the Sequestration Patent is inadmissible and Coal Owners’ argument related to it should be struck from the record.

13. Evidence exists to establish a sound factual basis for tribunal decisions. Cross-examination exists to test the reliability of allegations of fact, which is a necessary prerequisite to the Board attaching any weight to such allegations and accepting such allegations as evidence entered on the record of Proceeding No. 1457147. As CDP neither filed the Sequestration Patent at the hearing nor put it to Mr. Mavor in cross-examination, it is inadmissible. Moreover, as the patent was not appropriately entered into the record, it is not evidence, but merely an inadmissible document masquerading as evidence.

14. Section 40(5) of the Board’s Rules of Practice²³ (the “Rules”) states that “no argument may be received by the Board unless it is based on evidence before the Board”.²⁴ Since the Sequestration Patent was not previously submitted as evidence before the Board, the Coal Owners’ argument in respect of it should be struck from the record.

15. The Rules permit the Board to exclude information from the record that has not been appropriately received. The Board is master of its own process and there is a public interest aspect to Board procedure. Section 1 of the Rules states that “[t]hese Rules must be liberally construed in the public interest to ensure the most fair, expeditious and efficient determination on its merits of every proceeding before the Board”.²⁵ There is a procedural and public interest in entering evidence during a hearing rather than after its close. CDP has breached that public interest.

²³ *Alberta Energy and Utilities Board Rules of Practice*, AR 101/2001.

²⁴ *Ibid.*

²⁵ *Ibid.*

16. In its final argument, CDP uses the Sequestration Patent to challenge several aspects of Mr. Mavor's testimony on the characteristics of coal and CBM. Indeed, CDP goes so far as to recommend that the Board examine certain of Mr. Mavor's submissions "in light of the statements made in the Sequestration Patent".²⁶ CDP's action is particularly egregious because it uses the Sequestration Patent to attack Mr. Mavor's credibility when it did not have the temerity to put the document to him as a witness. CDP's introduction of the patent after the close of evidence means that Mr. Mavor now has no meaningful opportunity to respond to those attacks. Attempting to impugn a witness' credibility is an extremely serious matter. The harm in accepting the Sequestration Patent as evidence is far greater than the value in doing so.

17. If the Sequestration Patent and the Coal Owner argument it engenders remain on the record, the fairness of Proceeding No. 1457147 is threatened.²⁷ EnCana acknowledges "there is a duty of procedural fairness lying on every public authority".²⁸ Procedural fairness mandates the exclusion of the Sequestration Patent and striking Coal Owner argument pertaining to it.

18. The Natural Gas Rights Holders followed the rules and CDP did not. The consequences of excluding the Sequestration Patent should fall upon the parties who failed to submit it in an appropriate fashion, rather than subject Mr. Mavor and the PNG rights holders to potential harm by its inclusion as evidence. The Natural Gas Rights Holders would be prejudiced if the patent and related argument remained on the record. Accordingly, the Board should render the Sequestration Patent inadmissible and strike or ignore Coal Owner argument in respect of it. The Board should further ignore the Coal Owners' groundless allegations respecting procedural fairness in Proceeding No. 1457174.

²⁶ CDP Final Argument, November 29, 2006, page 43, para 101.

²⁷ On the issue of evidentiary fairness and administrative tribunals, see Macaulay & Sprague, *Hearings Before Administrative Tribunals*, 2nd ed. (Toronto, Carswell, 2002) at page 17-2.7.

²⁸ EnCana Final Argument, November 29, 2006, page 12, para. 62.

B. The Coal Owners Are Not Subject to Procedural Unfairness

19. The Coal Owners, while ignoring their own procedural shortcomings, allege that the fairness of Proceeding No. 1457147 has been compromised on the basis of “notice and disclosure, and parties”.²⁹ The Coal Owners are simply wrong on all three assertions.

20. Firstly, there is no basis for EnCana’s claim that it did not receive adequate notice. It is a general principle of administrative law that “[f]airness requires that the hearing and decision be restricted to the matters set out in the notice”.³⁰ The Board’s June 23, 2006 Notice of Hearing clearly states that it would address the “issue of legal entitlement of coalbed methane being produced or intended to be produced from wells that have been licensed to Bearspaw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd.”.³¹ Proceeding No. 1457147 addressed precisely that question. The matter was also addressed at the pre-hearing meeting where EnCana and CDP were represented.

21. After having fully participated in Proceeding No. 1457147, it is too late for EnCana to argue it did not receive sufficient notice. Instead of asking the Board for an adjournment or procedural clarification prior to, or at the commencement of, the hearing, EnCana chose to first raise the issue of the alleged notice deficiency in its November 29, 2006 final argument.

22. Unable to demonstrate actual procedural unfairness, EnCana attempts to blur the issues of notice with the Board’s authority to determine legal entitlement. The former issue is settled by the EUB’s clear and sufficient Notice of Hearing, the latter by legislation and the Board’s statutory mandate.

23. A tribunal “is not restricted to considering only the facts alleged in the notice of hearing, but should make its decision in light of all of the facts adduced at the hearing. The notice is merely an outline of the alleged facts.”³² There is therefore no requirement, as the Coal Owners

²⁹ EnCana Final Argument, November 29, 2006, page 12, para 61.

³⁰ Sara Blake, *Administrative Law in Canada*, 4th ed., (Markham: LexisNexis Canada Inc., 2006) at 29-30.

³¹ Exhibit 01-003-2006-06-23, EUB Notice of Hearing for Phase II, Part II of Proceeding 1457147, page 2.

³² Sara Blake, *Administrative Law in Canada*, 4th ed., (Markham: LexisNexis Canada Inc., 2006) at 41. See also *Quebec (Sa Majeste du Chef) v. Ontario (Securities Commission)*, [1992] O.J. No. 2232, 10 O.R. (3d) 577 at 592 (C.A.), leave to appeal to S.C.C. refused [1992] S.C.C.A. No. 580.

allege, that the Notice of Hearing must refer to the leases or grants at issue. The EUB's Notice of Hearing is not for this, or any other reason, deficient.

24. The purpose of notice is to inform any parties who may be affected by the matters to be determined at the proceeding that the proceeding is taking place, and that a decision will be made that may affect that party's rights. Proceeding No. 1457147 is only taking place as a result of the Coal Owners' request for a review and variance of the Board's decision to issue licences to Devon, Fairborne and Bears paw. Furthermore, EnCana cannot claim the Notice of Hearing is deficient, or that it was not aware that the issue of entitlement to CBM would be heard at this proceeding. It received a copy of the Board's Notice, provided written submissions as per the Board's hearing schedule, and appeared and fully participated at both the pre-hearing and the hearing itself.

25. The Board provided the Coal Owners with sufficient time to permit them to review the information and to respond to it. Any alleged deficiency EnCana claims is contained in the Notice of Hearing is not a surprise to EnCana, has not caused it any prejudice, and has been cured by the Board.³³ Indeed, any alleged defect in notice is cured by the Coal Owners' attendance at the hearing.

26. Secondly, there is no merit to the Coal Owners' argument that parties to leases or grants that establish entitlement to CBM were not heard from in Proceeding No. 1457147. The holders of natural gas rights were well represented in this proceeding. The Board gave adequate notice that ensured parties to leases for natural gas rights attended. Moreover, the Freehold Petroleum & Natural Gas Owners Association actively participated in the hearing in the interests of individuals who hold title to an estate in fee simple in mines and minerals. There is, therefore, no parties with interests in Proceeding No. 1457147 who were not heard from, unless by their own choice.

27. Thirdly, the Coal Owners suggest that the evidentiary record is somehow incomplete due to a lack of discovery process. The Board is master of its own process and is not required by its

³³ A tribunal may cure its procedural defects. (Blake, at page 23). While ConocoPhillips Canada rejects any suggestions that are procedural defects in Proceeding 1457147, to the extent that defects are alleged, they have been cured.

Rules to have discovery. Furthermore, the Coal Owners had full opportunity to ensure that the Board had a complete evidentiary record. They did so through the presentation and cross-examination of witnesses and in written submissions.

28. At no time were the Coal Owners limited in, or barred from, having their evidence on the record or testing the evidence of other parties. The hearing record is complete. At the root of their argument on discovery is a contrived attempt to blur matters of process and EUB jurisdiction to decide entitlement. In addition to being wrong on matters of process, the Coal Owners' misinterpret the substance of legislation and jurisprudence.

IV. THE COAL OWNERS IGNORE OR FUNDAMENTALLY MISCONSTRUE RELEVANT LEGISLATION AND JURISPRUDENCE

29. The Coal Owners fundamentally misconstrue relevant legislation, including in respect of the EUB's jurisdiction and mandate, definitions of gas and coal, and the necessary standards for proof of entitlement to CBM. The Coal Owners further ignore or misapply relevant case law.

A. Legislation

30. The Coal Owners mischaracterize the scope and purposes of the Board's statutory mandate. The Board's purposes in respect of oil and gas are clearly established under section 4 of the *OGC Act*. The purposes of the Board's regulatory framework are vastly broader than the Coal Owners allege. Section 4(c) of the *OGC Act*, for example, states that one of the Board's purposes is to provide for "the economic, orderly and efficient development" of oil and gas resources in Alberta.³⁴ The language of that provision in no way equates "orderly development"³⁵ with quiet title.

31. Statutory definitions of gas apply to CBM.³⁶ Coal is defined under legislation as a substance fundamentally different from gas.³⁷ The Coal Owners' assertions that "statutory

³⁴ The necessity to follow one of the Board's key statutory purposes is hardly "inexplicable", notwithstanding EnCana's hollow assertions at paragraph 30 of its final argument.

³⁵ EnCana Final Argument, November 29, 2006, page 7, para. 31.

³⁶ ConocoPhillips Canada Final Argument, November 15, 2006, pages 3-4, paragraph 7.

³⁷ ConocoPhillips Canada Final Argument, November 15, 2006, pages 4, paragraph 7.

definitions do not inform the issue of whether CBM is ‘coal’ or ‘natural gas’” are entirely mistaken.³⁸

32. EnCana’s thin basis for disagreeing with the application of statutory definitions of “coal” and “gas” is that they do not “restrict or address private party rights”.³⁹ EnCana’s concerns are irrelevant. The statutory definitions of “coal” and “gas” pertain to the nature of the substances themselves. The relevance of those definitions is not in any way tied to “private party rights”. The Coal Owners are simply trying to create a distraction from clear statutory definitions.

33. CDP incorrectly challenges the relevance of statutory definitions of gas on the basis that the substance must be gaseous at a point where it is measured or estimated. It ignores that CBM is in fact recovered in processing and gaseous at conditions under which its volume is measured or estimated. CBM is therefore completely indistinguishable from natural gas recovered from conventional reservoirs and wholly encompassed by the legislative definition of “gas”.

34. CDP also misinterprets Dean Percy’s inter-jurisdictional evidence and asserts that legislation of jurisdictions where the Crown owns CBM is not persuasive. Whether other legislative schemes pertain to Crown-owned CBM is immaterial. It is the manner in which other jurisdictions treat and characterize CBM that is informative in this proceeding. With the exception of the Australian state of Victoria, the approach of other jurisdictions is to lease CBM with petroleum rights, not coal rights.⁴⁰ Dean Percy’s evidence is clear that throughout the common law world, coal is treated as a substance separate from CBM.

B. Jurisprudence

(i) Anderson v. Amoco Canada Oil and Gas

35. At paragraphs 73 and 74 of its final argument CDP attempts to make a patently incorrect analogy between solution gas in petroleum and CBM sorbed by coal.⁴¹ It alleges that because in *Anderson v. Amoco Canada Oil and Gas*⁴² petroleum and gas were “indistinguishable” so too

³⁸ EnCana Final Argument, November 29, 2006, page 15, para. 76.

³⁹ *Ibid.*

⁴⁰ Exhibit 18-003a-2006-09-29, Dean Percy report, pages 12-13.

⁴¹ See also Final Argument of ConocoPhillips Canada, November 15, 2006, pages 19-20, paragraphs 56-59.

⁴² *Anderson v. Amoco Canada Oil and Gas*, 241 D.L.R. (4th) 193 (SCC).

CBM and coal are indistinguishable. CDP's analogy is fundamentally flawed for the simple reason that CBM is natural gas in the virgin reservoir. A hard rock mineral (coal), by virtue of human intervention and reduction of pressure, does not change to gas. Moreover, the scientific evidence led in this proceeding is also clear that CBM is not a constituent of coal.⁴³

(ii) *Little v. Western Transfer and Storage Limited*

36. At paragraphs 77 to 79 of its final argument CDP espouses a theory of strata-based ownership relying upon the *Little v. Western Transfer and Storage Limited*⁴⁴ ("Little") decision. Moreover, it suggests that there is a legal gap respecting property law concepts relevant to coal that should be filled by a strata-based ownership theory. CDP's submissions are plainly incorrect and would lead to the illogical result of coal pre-empting rights to all other minerals.

37. Dean Percy's written submissions and testimony address the flaws in, and inapplicability of, strata ownership concepts found in *Little*.⁴⁵ Moreover, the leases at issue in this proceeding themselves indicate that coal reservations are based on definitions of leased substances and not strata. There is no basis for strata-based mineral ownership and Mr. Lucas' theories on it should be rejected.

(iii) *Amoco Prod. Co. v. Southern Ute Tribe*

38. Mr. Lucas' decision to avoid addressing *Southern Ute*⁴⁶ in his written submissions and the Coal Owners' approach to downplay the relevance of that decision in final argument are curious. Dean Percy indicates that *Southern Ute* is the "most important decision in the common law world on competing ownership claims to coalbed methane" and would be persuasive in any Canadian proceeding.⁴⁷ References to *Southern Ute* in the Coal Owners' case are conspicuous by their absence.

⁴³ With respect to the science addressed in *Anderson v. Amoco*, CDP at paragraphs 107-108 of its final argument quarrels with the notion that the legal standard in Canada is the existence of three phases - solid, liquid and gas. The fact is that the Supreme Court of Canada in *Anderson v. Amoco* adopted the concept that matter must exist in one of those three physical states.

⁴⁴ *Little v. Western Transfer and Storage Limited and Edmonton Collieries Limited*, [1922] 3 W.W.R. 356 (Alta. S.C.A.D.).

⁴⁵ Exhibit 18-003a-2006-09-29, Dean Percy report, pages 14-16.

⁴⁶ *Amoco Prod. Co. v. Southern Ute Tribe*, 144 L. Ed 2d 22 (US Supreme Court) ("*Southern Ute Tribe*").

⁴⁷ Exhibit 18-003a-2006-09-29, Dean Percy report, page 18.

39. The Coal Owners state that the U.S. Supreme Court *Southern Ute* case does not “assist” on the basis that it was decided “on a statutory provision”.⁴⁸ This ignores the fundamental principles that arose from *Southern Ute*. Moreover, the context in which contractual instruments are interpreted is not divorced from the context in which statutory interpretation occurs. Contracts reflect the prevailing political, social and economic environment of the period in which they are written. The Coal Owners’ manufactured distinctions between *Southern Ute* and Proceeding No. 1457147 are therefore immaterial.

40. *Southern Ute*’s interpretive approach to subsurface mineral rights and consideration of the nature of coalbed methane make it highly relevant to Proceeding No. 1457147. It dealt with the type of reservation and terminology similar to that used in Western Canada.⁴⁹ Furthermore, *Southern Ute* is relevant to this proceeding because it unequivocally states that in the early part of the twentieth century the common understanding of coal “would not have encompassed CBM gas”.⁵⁰

41. It is also curious that the Coal Owners criticize *Southern Ute* for “seemingly to reflect settled industry expectations”⁵¹ while failing to acknowledge the settled expectations in Alberta that arise from EUB Information Letter IL 91-11. EUB Information Letter IL 91-11 confirms that the Board and Alberta Energy consider CBM to be natural gas. Accordingly, the only parties for which the principles of *Southern Ute* and the settled expectations that PNG owners have rights to CBM do not “assist” in these proceedings are the Coal Owners.

(iv) *Continental Resources*

42. The Appellate Court of Illinois decision of *Continental Resources*⁵² similarly does not assist the Coal Owners. *Continental Resources* deals with several recent oil and gas leases that contain language specific to CBM. Those leases explicitly deny Continental the right to produce

⁴⁸ EnCana Final Argument, November 29, 2006, page 15, para. 77; As the question at issue in Proceeding No. 1457147 is legal entitlement, it is irrelevant whether additional evidence respecting US statutory interpretation would make “*Southern Ute* more applicable to a Canadian private rights dispute”, as the Coal Owners allege.

⁴⁹ Exhibit 18-003a-2006-09-29, Dean Percy Report, page 21.

⁵⁰ *Amoco Prod. Co. v. Southern Ute Tribe*, 144 L Ed 2d 22, page 30.

⁵¹ EnCana Final Argument, November 29, 2006, page 16, para. 77.

⁵² *Continental Resources of Illinois Inc. v. Illinois Methane LLC*, 87 N.E. 2d 897 (Ill. App. 5 Dist. 2006) (“*Continental Resources*”).

CBM from a coal seam or void. This is not the case for the leases at issue in Proceeding No. 1457147.

43. ConocoPhillips Canada's pre-1993 leases do not contain any language specific to CBM. Nowhere does it state, in the leases prior to 1993, that the lessee does not have the right to produce CBM. In fact, CBM is not mentioned in these leases at all. *Continental Resources* is therefore distinguishable from Proceeding No. 1457147 on the basis of lease language respecting CBM.

44. In addition, *Continental Resources* is distinguishable because Illinois and Alberta have different laws on mineral rights. Illinois is a non-ownership jurisdiction.⁵³ Under the non-ownership principle, "no person owns oil and gas until it is produced and any person may 'capture' the oil and gas if able to do so."⁵⁴ The minerals in the ground are not owned until they are found and produced. While Canadian courts have avoided specific recognition of the ownership theory applicable in Alberta⁵⁵, it is submitted that Alberta law on ownership is different than that of Illinois. *Continental Resources* is therefore distinguishable from Proceeding No. 1457147 on the basis of differing ownership laws.

(v) *Borys*

45. The Coal Owners also misinterpret the *Borys*⁵⁶ decision. For example, at paragraph 89 of its final argument EnCana states that the Privy Council in *Borys* "would have differentiated between substances within the coal". In fact, nowhere in the *Borys* case is there even a reference to coal. The Coal Owners ignore that *Southern Ute* applies the same interpretive approach to distinguishing between subsurface mineral rights as *Borys* - a vernacular understanding of coal at the time of the grants in issue. The *Borys* and *Southern Ute* approach leads to the conclusion that coal in the vernacular is "hard black stuff".⁵⁷

⁵³ Williams and Meyers, *Oil and Gas Law*, Release 40, December, 2005, Pub. 820, paragraph 203.1, pages 33-35.

⁵⁴ *Ibid.*

⁵⁵ *Anderson v. Amoco Canada Oil and Gas*, (Fruman J.) 63 Alta. L.R. (3rd) 1, page 39, paras. 99-101 (Alta. Q.B.).

⁵⁶ *Borys v. Canadian Pacific Railway*, [1953] A.C. 217 (P.C.) ("*Borys*").

⁵⁷ Tr. Vol. 5, page 729, lines 23-24.

V. THE VERNACULAR MEANING OF COAL IS A HARD ROCK MINERAL

46. There is no doubt on the basis of scientific evidence, common law and common sense that coal is a hard rock mineral. The evidence of Dean Percy was clear that the application of common law, based on an understanding of coal at the time of the grants in issue, would likely result in a finding that entitlement to CBM rests with the Natural Gas Rights Holders.⁵⁸

47. On the assumption that CBM in coal is gas, Professor Lucas indicated his position is the same as Dean Percy's - that Canadian courts would decide in favour of the Natural Gas Rights Holders.⁵⁹ Based on *Borys*, courts look at the vernacular meaning at the time of the reservation in question. They do not engage, as CDP posits at paragraph 55 of its final argument, in a consideration of hypothetical questions the CPR may or may not have asked settlers at the turn of the last century.

48. The Coal Owners have not demonstrated through expert evidence that the vernacular meaning of coal at the time of the grants in issue would have included CBM. However they may seek to characterize Dr. Levine's background, he is, with respect, not a historian, linguist, lexicographer or etymologist and admitted as much under cross-examination.⁶⁰ The Coal Owners are therefore asking the Board to consider the testimony of an unqualified expert respecting the vernacular meaning of coal, and to disregard the reasoning applied by the U.S. Supreme Court in *Southern Ute*.

49. CDP incorrectly contends that evidence of a trained historian was required in this proceeding.⁶¹ The Board is master of its own procedure and not bound by the rules of evidence. In the context of reviewing agreements, courts have not found "English professors or other such experts" to be of any assistance.⁶² A history expert would not have provided any greater

⁵⁸ Tr. Vol. 5, page 729, line 18 to page 730, line 3.

⁵⁹ Tr. Vol. 9, page 1389, lines 4-10.

⁶⁰ Tr. Vol. 6, page 883, lines 10-20.

⁶¹ CDP Final Argument, November 29, 2006, page 27, paragraph 70.

⁶² Tom F. Mayson, *the Use of Extrinsic Evidence In The Interpretation of written Agreements in Alberta*, Alberta Law Review Vol. 42. No. 2 (October 2004), page 499, at 503.; see also *Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 1 Alta. L.R. (3d) 167 at 170 (Alta. C.A.) where the Alberta Court of Appeal states, "still less can a scientist or engineer testify about the meaning of ordinary English."

assistance to the EUB. Moreover, the Coal Owners themselves chose not to provide a historian as a witness.⁶³

50. With respect to scientific evidence, ConocoPhillips Canada endorses the Natural Gas Rights Holders' Joint Technical Reply and the expert submissions of Mr. Mavor. Mr. Mavor provided irrefutable evidence that coal is a rock and a solid material that serves as a container for CBM, a natural gas. Mr. Mavor's description of coal as rock and solid is not "weaponized"⁶⁴ language, it is indisputable science. By contrast, nothing in Dr. Levine's evidence supports the Coal Owners' position that coal transforms from a rock solid substance into gas. The fact that CBM is natural gas is both understood in science and settled as a matter of policy by EUB Information Letter IL 91-11.

VI. INDUSTRY EXPECTATIONS AND IMPACTS ARE DIRECTLY RELEVANT TO PROCEEDING NO. 1457147

51. The settled expectations of industry and the impacts of Bulletin 2006-19 on CBM development are directly relevant to this proceeding and the EUB's mandate under the *OGC Act*. The Coal Owners attempt to blur the relevance of EUB Information Letter IL 91-11 by suggesting that it does not address ownership questions.⁶⁵ EUB Information Letter IL 91-11 is EUB and Alberta Energy policy that speaks to the technical character of CBM. Government policy does not lose its relevance simply because it does not address an area of the law the Coal Owners might wish it to.

52. Section 1 of the EUB Rules permits the use of policy and commercial impact evidence. The Board has historically considered such evidence.⁶⁶ Alberta courts have previously applied the principle of settled expectations.⁶⁷ Indeed, the Coal Owners tactfully acknowledge that policy

⁶³ Notwithstanding the lack of Coal Owner historian witness, Mr. Welsh and Mr. Hatt addressed the large size and scope of CPR land grants of the early 1900's, which was in turn passed on to EnCana.

⁶⁴ CDP Final Argument, November 29, 2006, page 7, para 21.

⁶⁵ CDP Final Argument, November 29, 2006, page 65, para. 153.

⁶⁶ See, for example on policy, EUB Decision 2002-037, *ATCO Gas Pipelines Ltd. Disposition of Calgary Stores Block and Distribution of Net Proceeds, Part 2* (March 21, 2002), pages 3-5.

⁶⁷ See, for example, *Anderson v. Amoco Canada Oil and Gas*, (Fruman J) 63 Alta L.R. (3rd) 1 at paras. 148-158 (Alta. Q.B.); and affirmed on this point in 214 D.L.R. (4th) 272 at para. 52 (Alta. C.A.).

considerations are relevant to the Board through their own use of it in final argument.⁶⁸ The Board should therefore disregard the Coal Owner's attempts to characterize industry expectations and impacts as irrelevant.⁶⁹

53. The Coal Owners would unduly limit the Board's broad discretion to take into account relevant considerations.⁷⁰ Furthermore, the Coal Owners disregard the fundamental administrative law principles that a tribunal may not ignore relevant considerations⁷¹ and must consider all factors germane to the proper fulfillment of its statutory decision-making responsibilities.⁷² Pertinent factors include settled industry expectations and the impact of continuing EUB Bulletin 2006-19, namely a Coal Owner development veto. The impact of EUB Bulletin 2006-19 on CBM development in Alberta is directly relevant to the Board's mandate under the *OGC Act* to ensure orderly, efficient development.⁷³

A. Continuance of EUB Bulletin 2006-19 Creates Negative Impacts

54. EnCana's view that Bulletin 2006-19 "fosters orderly development"⁷⁴ is simply incorrect. In fact, EUB Bulletin 2006-19 precludes orderly development of CBM by giving the Coal Owners a veto over freehold CBM production. EUB Bulletin 2006-19 provides Coal Owners with greater leverage over gas producers and unfairly distorts the economics of CBM development to EnCana's advantage.

⁶⁸ See for example CDP Final Argument, November 29, 2006, pages 68-70, paragraphs 158 to 162 under the heading "Public Interest: Economic, Orderly and Efficient Development".

⁶⁹ CDP Final Argument, November 29, 2006, page 9, para. 28. EnCana Final Argument, November 29, 2006, page 10, paras. 45-60.

⁷⁰ David J. Mullan, *Administrative Law*, (Toronto: Irwin Law, 2000), page 115 regarding the importance of taking into account all relevant factors and page 280 regarding the normal rules of evidence not applying to administrative tribunals and agencies.

⁷¹ Sara Blake, *Administrative Law in Canada*, 4th ed, (Markham: LexisNexis Canada Inc., 2006), page 96.

⁷² *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, 226 D.L.R. (4th) 193 at 253-255.

⁷³ Drainage is a further factor that the Board may consider. As ConocoPhillips Canada explains at paragraph 86 of its Final Argument, drainage is an issue exacerbated by EnCana's proposed remedy of reducing DSU's from sections to quarter sections. The record in Proceeding No. 1457147 did not support EnCana's theoretical application of the law of capture.

⁷⁴ EnCana Final Argument, November 29, 2006, page 1, para. 6.

55. The effect of EUB Bulletin 2006-19 is that the Natural Gas Rights Holders are required to enter into coal certainty agreements with Coal Owners or pursue court action.⁷⁵ EnCana is incorrect in arguing Bulletin 2006-19 is required pending a judicial determination by the courts. Such a process would not be in the best interest of the economic and orderly development of Alberta's CBM resources, as it would only delay CBM development. Furthermore, once the Board makes its determination, there will no longer be a conflicting claim to the minerals and accordingly, development of the minerals will no longer be "ultra hazardous".⁷⁶

56. The Coal Owners' assertion that the withdrawal of Bulletin 2006-19 will lead to individual objections of all CBM production applications on split title lands is similarly incorrect.⁷⁷ Whether the Coal Owners eventually bring actions against natural gas lessees and lessors is potentially a matter for a future court proceeding and has no bearing on the Board's determination in Proceeding No. 1457147. Furthermore, rescinding EUB Bulletin 2006-19 and confirming that the Natural Gas Rights Holders enjoy all the rights and incidents of legal entitlement is a remedy that averts EnCana's threats of endless objections. It is also a remedy that removes the uncertainty that has frustrated and delayed CBM development in Alberta. By contrast, the Coal Owners' proposed remedies unacceptably foster uncertainty.

VII. COAL OWNERS' PROPOSED REMEDIES ARE UNACCEPTABLE

57. EnCana has changed its position and no longer requests that the Board order pooling and drilling spacing units⁷⁸ - they are unacceptable even as proposed alternatives to lessen title disputes and should be rejected. The Coal Owners' proposed remedies of cancelling well licenses requiring quiet title and continuing Bulletin 2006-19 are similarly unacceptable.

58. Cancellation of well licenses is neither reasonable nor mandated by law. As discussed above, the Natural Gas Rights Holders have sufficiently demonstrated entitlement to produce

⁷⁵ EnCana's inconsistencies extend to the question of PNG rights holders entering into agreements with Coal Owners. At paragraph 54 of its final argument EnCana states that PNG rights holders have not sought agreements with Coal Owners, while paragraph 79(b)(ii) states that such agreements have occurred.

⁷⁶ EnCana Final Argument, November 29, 2006, page 29, para. 139. Williams and Myers *Oil and Gas Law* refers to lands as being "ultra-hazardous" in the context of adverse possession and trespass.

⁷⁷ EnCana Final Argument, November 29, 2006, page 1, para. 6 and page 29, para 142; see also CDP Final Argument, November 29, 2006, pages 63-64, para 149.

⁷⁸ EnCana Final Argument, November 29, 2006, page 2, para. 7.

CBM. The rights and incidents of legal entitlement to produce CBM include well licenses for applicants such as Devon and Fairborne who meet legislative requirements.

59. It is incorrect to say, as the Coal Owners do, that quieting title is a requirement or even a “Board practice”⁷⁹ before a well license is issued. The evidence of Dean Percy confirmed that there have been many cases of contested oil and gas rights in Alberta where the EUB issued a license in respect of lands under dispute.⁸⁰ In addition, the Coal Owners’ assertions on quiet title are unsupported and directly contrary to the positions EnCana took in *Alberta Energy Co. v. Goodwell Petroleum Ltd.*⁸¹

60. If quieting title before issuing a license is required, then the EUB Directive 56 process for non-routine applications could not exist.⁸² Under section 3.8.2 of EUB Directive 56, an applicant files a non-routine application if it cannot meet one of the EUB’s requirements to file a routine application, including for reasons of outstanding concerns or objections. As explained in the testimony of Mr. Pyke on behalf of Fairborne, the practice has been to file Directive 56 non-routine well licence applications for lands where entitlement to CBM is in dispute.⁸³ Moreover, the Coal Owners’ arguments miss the fundamental point that quieting title is not necessary, because Natural Gas Rights holders are entitled to natural gas and therefore CBM under the terms of their leases.

61. In its discussion of remedies EnCana denies creating the impression that it waived its claims to CBM.⁸⁴ In fact, EnCana created precisely that impression in 1993 by revising its leases with ConocoPhillips Canada to exclude CBM. The absence of an express reference to CBM in EnCana’s pre-1993 leases clearly demonstrates an intention to grant CBM to the lessee of natural gas. It also shows that parties accepted that coal under the grants did not include CBM.

⁷⁹ EnCana Final Argument, November 29, 2006, page 24, para. 117.

⁸⁰ Tr., Vol. 5, page 719, lines 5-10; and Tr. Vol. 5, page 722, lines 3-8.

⁸¹ *Alberta Energy Co. v. Goodwell Petroleum Ltd.* (2003), 339 A.R. 201 (Alta. C.A.) at para 8 (“Goodwell”).

⁸² Whether a quiet title may be used in Texas and Oklahoma (EnCana Final Argument, November 29, 2006, page 25, para. 118) is not, in the face of existing EUB practice, relevant in this proceeding.

⁸³ Tr. Vol. 1, page 87, line 20 to page 88, line 3.

⁸⁴ EnCana Final Argument, November 29, 2006, page 29, para. 137.

VIII. CONCLUSIONS

62. In response to the Coal Owners' arguments and on the basis of the record in this proceeding, ConocoPhillips Canada submits that:

- CDP's introduction of the Sequestration Patent for the first time in its final argument offends procedural fairness, is contrary to Rule 40(5), and therefore should be excluded from the record;
- 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*, 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 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;
- 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*, *Goodwell*, *Anderson v. Amoco*, 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.

IX. RELIEF SOUGHT

63. For the following reasons and for the reasons set out in its Final Argument, ConocoPhillips Canada respectfully requests that the Board, having confirmed that it is the holders of natural gas rights that have legal entitlement to CBM, rescind EUB Bulletin 2006-19 and confirm that the Natural Gas Rights Holders enjoy all the rights and incidents of legal

entitlement, including the issuance of well licenses to applicants that meet legislative requirements.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF
CONOCOPHILLIPS CANADA RESOURCES CORP. THIS 13TH DAY OF DECEMBER,
2006.**

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

Per:

Alan L. Ross