

ALBERTA ENERGY AND UTILITIES BOARD

PART 2 OF PROCEEDING NO. 1457147

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

**ARGUMENT OF THE INTERVENER
FREEHOLD PETROLEUM AND NATURAL GAS OWNERS
ASSOCIATION**

November 15, 2006

PART I INTRODUCTION

1. At the hearing of this Proceeding No. 1457147 (the “Proceeding”) EnCana Corp. (“EnCana”) and Carbon Development Partnership (“CDP”) (the “Coal Owners”) have requested that this Board:
 - a. Accept that there is a *bona fide* dispute as to the ownership of the Coal Bed Methane (“CBM”);
 - b. Suspend the well licences that form the subject matter of this Proceeding;
 - c. Amend Bulletin 2006-19 such that there will remain a moratorium on Board approvals of applications (including well license, holding and special spacing unit applications) where the legal ownership to CBM remains in issue on those freehold lands where the right to coal is owned by one party while the rights to other minerals, and more specifically natural gas, are owned by another party (“Split Title Mineral Interests”), and,
 - d. Such Bulletin would remain in effect until such time as there is either a definitive ruling by a Court in respect to the ownership of CBM on Split Title Lands or parties have come to some form of commercial agreement to allow development of CBM to move forward.
2. The Freehold Petroleum & Natural Gas Owners Association (“FHOA”) cannot support the submissions advanced by the Coal Owners.
3. The impact of such a decision by this Board would result in “Freehold” owners of Split Title natural gas rights having their interest in CBM and shallow gas rights sterilized until such time as a Court of superior jurisdiction were to provide a definitive ruling on this matter or the Freehold owners of the Split Title natural gas rights, and/or their respective lessees, were to accede to the demands of the Coal Owners.

4. As will be discussed, it is the position of FHOA that such a decision by this Board would not be in keeping with the object and purpose of the *Oil and Gas Conservation Act*.¹
5. Furthermore, such a decision by this Board may result in the Board having to review and possibly suspend well licences on other lands where the ownership to mineral rights are in dispute, including Alberta Crown lands.

PART II SUMMARY OF KEY EVIDENCE PRESENTED AT THE HEARING

6. FHOA relies upon the evidence and facts contained within its written submissions and written reply submissions that were filed and marked as Exhibits 13-001, 13-002 and 13-006.
7. FHOA also relies upon the evidence and facts presented by its witness, which evidence commences at page 601, line 16 and ends at page 619, line 18 of the hearing transcripts. The evidence and facts presented at the hearing also include Exhibits 20-026, 20-027, 20-028 and 20-029.
8. In support of its position in this matter, FHOA also relies on, *inter alia*, the following evidence and admissions of the witnesses that presented evidence at the hearing of this Proceeding:
 - a. **Evidence with Respect to Drainage and Offset Drilling Obligations**
9. FHOA's map of township T39-R25-W4M² identifies the proximity of Crown mineral interests in relation to Split Title mineral interests and clearly shows the checkerboard ownership of the mineral interests within that particular township.
10. Similarly, the witness panel for Devon Canada Corporation ("Devon") also submitted a map of T35 to T33-R26-W4M³, which also identifies the proximity

¹ **TAB A** RSA 2000, c. O-6

² Exhibit 20-027

³ Exhibit 20-003

and relationship of Crown mineral interests to Split Title mineral interests. In discussing this map the witness for Devon stated that the effect of quarter section spacing units would allow for drilling on Crown lands which would result in offset obligations on the remaining quarter sections and may result in drainage situations⁴.

11. The witness panel for Apache Canada Ltd. (“Apache”) also discussed the possibility of drainage issues arising if the development of Crown lands adjacent to Split Title mineral interests were allowed to proceed. In addition, one of Apache’s witnesses discussed his experience at the Powder River Basin where the development of the CBM occurred at different times with the result that certain lands were drained. Specifically, Mr. Herbert for Apache stated that:

“12 Q. And I understand that you have one other issue that
13 you'd like the opportunity to address from Monday's
14 proceeding regarding EnCana's downspacing proposal?

15 A. MR. HERBERT: I do.

16 Q. In particular, in reference to the map, I'd like to
17 speak to the map that Devon --

18 MR. CARPENTER: Again, I think that that was
19 Exhibit 20-003.

20 A. MR. HERBERT: And, again, in particular to
21 the fractured lands, it was given that potentially in section
22 25 in township 33-26, and there was a red triangle given,
23 that this potential location within this section could --
24 some of the consequences of it being where it's at is that it
25 could drain outside its quarter section. And in our
1 experiences, we agree.

2 But if you also extrapolate that to our
3 sections 8, 9 and 17 in 34-26 and then look at the Crown
4 sections 10, 14 -- 4, 10, 14, and 18, and in particular the
5 northeast quarter of section 4 in the southwest quarter of
6 section 10, that you will see that there are wells that are
7 located very, very closely in similar proximity to -- on
8 Crown lands to the freehold lands. And being the lessor, we
9 are concerned of drainage.

10 It has been my experience, and in the past,
11 that I've spent four years in the Powder River basin before I
12 came up to Canada four years ago; and in such a similar case,
13 between -- differences between freehold and Crown equivalent
14 BLM, that the development of those properties was not done at
15 the same time, in particular, that the BLM or equivalent
16 Crown lands didn't have environmental impact statement that
17 was current and had to be updated.

18 That led to delays up to four or five years
19 and still continues in places of the development of those BLM

⁴ Transcripts at Page 54, line 2 to Page 55, line 1

20 lands, and it was well recognized at that time that the BLM
21 lands suffered from drainage.

22 It also is our experiences that, given that
23 this reservoir is not uniform and that we have higher
24 permeabilities up in our Nevis area where average
25 permeabilities of 1 millidarcy are more typical, we have
1 average permeabilities of 40 millidarcies and in some, not
2 taking averages and instances, we've got 300 to 400
3 millidarcy rock which, in fact, we do believe will drain
4 outside the Crown sections. And in giving that, in the
5 checkerboard patterns, we've got a concern in being able to
6 develop our freehold sections.”⁵

and also,

“23 Q. I just was curious about the comment you made about the
24 Powder River basin, and you were talking about the delays of
25 four or five years with regard to the BLM leases there?

1 A. MR. HERBERT: Yes.

2 Q. Was there a resolution to that issue of drainage?

3 A. MR. HERBERT: Not that I'm aware of.

4 Q. Okay. Just one other clarification, when you talked
5 about the higher permeabilities in the Nevis area, were you
6 talking about the sands in that case or the coal?

7 A. MR. HERBERT: The coals.

8 Q. The coals. Thanks.”⁶

12. Similarly, the witness for Centrica Canada Limited (“Centrica”) also stated that by placing on hold Centrica’s drilling program there is the potential for drainage from offsetting Crown lands.⁷

13. The witness for EnCana confirmed that if development on Split Title lands is held in abeyance while EnCana waits for the courts to resolve the issue of CBM ownership, drainage may occur from the Split Title lands in those instances where adjacent lands have been developed.⁸

b. Legal Remedies That Remain Available to the Coal Owners

14. The witnesses for the Coal Owners confirmed that the Coal Owners had the ability to pursue their ownership claims by commencing legal actions in a Court,

⁵ Transcripts at Page 495, line 12 to Page 497, line 6

⁶ Transcripts at Page 512, line 23 to Page 513, line 8

⁷ Transcripts at Page 560, line 19 to Page 560, line 25

⁸ Transcripts at Page 850, line 15 to Page 851, line 19; Page 1055, line 22 to Page 1056, line 16

- and once such a claim is commenced, the Coal Owners may seek injunctive relief through the Court process, if necessary.⁹
15. Despite the availability of this remedy, the Coal Owners maintained their position that no well licences should be issued in relation to Split Title lands until the Courts resolve the issue of CBM ownership. The Coal Owners would expect that this moratorium on Split Title lands remain in place regardless of how long such a process may take.¹⁰
16. It is of importance to note that the Coal Owners position on “quiet title” is not restricted to CBM issues but applies to other instances where ownership disputes may impact the property rights of the parties.¹¹ That is, the Board’s policy should require that any authority to drill or produce requires quiet title in respect of the subject lands.¹²

c. Coal Certainty Agreements

17. The Coal Owners have also taken the position that as an alternative to obtaining a ruling on CBM ownership through the Courts, the parties could enter into “coal certainty agreements” to quiet title. The Coal Owners admitted that if the well licences are not issued and production of CBM is delayed, then the lessees of the natural gas rights may be further motivated to agree to coal certainty agreements in order to avoid: lease expiries; offset obligations; costs associated with delayed production; and, adverse court rulings. Further, it was also admitted that the greater the delay in the development of the CBM resource the greater the motivation for a natural gas lessee to enter into a coal certainty agreement.¹³

⁹ Transcripts at Page 860, lines 2 to 8 and lines 14 to 25; Page 861, line 1 to Page 862, line 6

¹⁰ Transcripts at Page 840, line 12 to 16; Page 842, line 19 to Page 843, line 15; Page 843, line 25 to Page 845, line 7;

¹¹ Transcripts at Page 852, line 3 to 13; Page 857, line 23 to Page 858, line 14

¹² Transcripts at Page 781, lines 11 to 24; Page 840, lines 12 to 16; Page 1004, lines 8 to 24; Page 1237, line 23 to Page 1238, line 12; Page 1239, line 19 to Page 1240, line 2

¹³ Transcripts at Page 1018, line 22 to Page 1021, line 18

18. With respect to quieting title through coal certainty agreements the Coal Owners further admitted that what is really meant by quieting title is for the parties to agree to share in the proceeds of production.¹⁴

d. EnCana's Assertion of CBM Ownership

19. In regard to EnCana's assertion of ownership of CBM, it is the evidence of EnCana that it did not formulate its ownership policy in relation to coal and CBM until sometime in 2002 or 2003. Furthermore, EnCana's assertion of CBM ownership was dependent in part upon its increasing knowledge with respect to CBM as well as changes in EnCana's focus on its core business.¹⁵

e. Expert Evidence Before the Board

20. In regard to the expert evidence presented at the hearing, FHOA notes that Dean Percy provided the following opinions:
- a. Entitlement must be proven to the Board's satisfaction, which is not the same as beyond a reasonable doubt;¹⁶
 - b. Licences are issued to parties on a regular basis where the parties' rights to produce, based on either ownership or lease validity, are determined by a court at a later date;¹⁷
 - c. It is highly likely that Canadian courts may make a similar distinction between coal and CBM as did the US Supreme Court in the *Southern Ute*¹⁸ case.¹⁹

¹⁴ Transcripts at Page 1188, line 9 to Page 1189, line 1

¹⁵ Transcript at Page 1185, line 5 to Page 1186, line 9; Page 1361, line 16 to Page 1363, line 4; Page 1363, line 8 to page 1364, line 14

¹⁶ Transcripts at Page 718, line 7 to Page 719, line 4; Page 721, line 5 to line 14

¹⁷ Transcripts at Page 719, line 5 to Page 720, line 6; Page 721, line 15 to Page 722, line 8

¹⁸ See **TABI** of Exhibit 13-002, *Amoco Production Co. v. Southern Ute Indian Tribe et al.* (98-830) 526 U.S. 865 (1999) 151 F.3d 1251 at page 9

¹⁹ Transcripts at 729, Page line 6 to Page 730, line 3

21. With respect to the expert evidence of Dr. Levine, it is EnCana's position that this evidence provides the fundamental technical foundation for the Coal Owners belief that there is a dispute as to ownership of the CBM that needs to be resolved through the Courts or by way of coal certainty agreements.²⁰
22. However, on cross-examination Dr. Levine made the following admissions:
- a. While Dr. Levine was asked to address the historical and vernacular meaning of coal, he has had no formal training in the fields of linguistics, etymology or lexicography;²¹
 - b. Dr. Levine believes that in the *Southern Ute* litigation another expert may have been retained to deal with historical issues;²²
 - c. Dr. Levine's report excluded various historical definitions of coal, including definitions relied upon by the US Supreme Court in the *Southern Ute* decision, if in his opinion such definitions did not support his view of coal or were not useful or helpful in describing and understanding coal; or, if he disagreed with the definition.²³
23. With regard to Dean Lucas' expert evidence FHOA notes that the following opinions were offered:
- a. To determine the intent of the parties at the time of the transaction it is misleading to look at present day usage of terms, that is, the vernacular meaning of coal at the time of the transactions (that is the title reservations) must be considered;²⁴

²⁰ Transcripts at Page 1118, lines 18 to 25

²¹ Transcripts at Page 199, line 20 to Page 200, line 7

²² Transcripts at Page 1248, lines 9 to 16; Page 1249, lines 7 to 13

²³ Transcripts at Page 1207, lines 8 to 19, Page Page 1208, line 20 to Page 1209, line 8, Page 1210, line 5 to Page 1213, line 14

²⁴ Transcripts at Page 1338, line 5 to line 16

- b. Evidence on the vernacular meaning of words would include the use of dictionaries from the time and place of the transaction and the evidence of trained historians and linguists;²⁵
- c. Insufficient evidence on the vernacular meaning of the transactions (that is the title reservations) has been tendered before this hearing and additional historical evidence is required to determine the vernacular meaning of the transaction as it would have been understood in the popular commercial sense as opposed to the scientific sense;²⁶
- d. With respect to the Board's jurisdiction, Dean Lucas suggests that under section 16 of the *Oil and Gas Conservation Act*, the Board has a statutory "power that it has to try to exercise in a proceeding of this kind" with ownership being one of the factors to be considered by the Board;²⁷
- e. If the Board fails to address the issue of ownership then the Board may essentially lose its jurisdiction.²⁸

PART III ARGUMENT

- 24. FHOA relies upon the arguments that were submitted to the Board as part of its written submissions²⁹ and its written reply submissions³⁰ and more specifically refers the Board to paragraphs 21 to 60 of the written submissions and paragraphs 2 to 28 of the written reply submission.
- 25. In addition to its submissions and reply submissions, FHOA submits the following additional arguments:
 - a. **Purposes of the *Oil and Gas Conservation Act***

²⁵ Transcript at Page 1338, line 17 to Page 1339, line 14

²⁶ Transcripts at page 1341, line 8 to Page 1342, line 6

²⁷ Transcript at Page 1343, line 22 to Page 1343, line 20

²⁸ Transcript at Page 1368, line 10 to page 1370, line 17

²⁹ Exhibit 13-001 and 13-002

³⁰ Exhibit 13-006

26. FHOA submits that the defined purposes of the *Oil and Gas Conservation Act*³¹ that are most relevant to this application include:
- “4(c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta
- 4(d) to afford each owner the opportunity of obtaining the owner’s share of the production of oil or gas from any pool”
27. The Coal Owners are advancing the position that with respect to Split Title lands, well licences should be suspended or not issued in instances where there is a dispute as to the ownership of the CBM mineral interests and that Bulletin 2006-19 should be amended such that it remains in place until such time that CBM ownership disputes are resolved.
28. The Coal Owners suggest that this position is not dependent upon or affected by: (1) the length of time that it may take to resolve any ownership disputes; (2) any offset obligations that may be incurred; (3) the expiry of any leases; or, (4) any drainage that may be suffered while the parties wait for the ownership dispute to be resolved.
29. In contrast with this position, the Coal Owners take the position that development of CBM can proceed on Crown lands and on Freehold lands where there is no Split Title in regard to the coal and natural gas interests. Similarly, the Coal Owners also suggest that development may also proceed if and when an impacted natural gas lessee accedes to a coal certainty agreement for the purpose of quieting title.
30. The Coal Owners suggest that this approach will allow for the orderly and efficient development of the CBM resources. However, the evidence of the parties suggests the opposite. That is, there appears to be agreement that the checkerboard development of CBM will result in offset obligations being triggered, the expiry of leases and the potential drainage of CBM on Split Title Lands.

³¹ *supra*, at TAB A

31. It is submitted that the Coal Owners proposed disposition of this matter is simply not in keeping and in fact is contrary to section 4(c) of the *Oil and Gas Conservation Act*.
32. Furthermore, if Split Title Lands are drained of CBM, as a result of the Coal Owners proposed disposition of this matter, then once more this would not be a result in keeping with section 4(d) of the *Oil and Gas Conservation Act*, which provides that owners of the mineral resources should have the opportunity of obtaining their share of the CBM production.
33. Once the Board grants the well licences to natural gas lessees, the Coal Owners are still entitled to pursue their claims and a full suite of remedies as against the natural gas owners and natural gas lessees. If the Coal Owners were ultimately successful in such a claim, they would presumably be entitled to damages from the natural gas owners and their lessees in relation to any losses that may be suffered as a consequence of a natural gas owner and natural gas lessee producing CBM.
34. In contrast to the preceding scenario, if the Board were to decline to issue any well licences on the basis that title to the CBM is in dispute, and the courts were to subsequently determine that the natural gas owners and their lessees are the owners of CBM, given that the Board enjoys statutory immunity it is not clear on what basis and against whom the natural gas owner could seek damages for any losses that may result from drainage of the CBM from the impacted lands.

b. Entitlement to a Well Licence Under the *Oil and Gas Conservation Act*

35. In contrast to the Coal Owner's position that the Board has no jurisdiction to determine entitlement when ownership or property rights are in dispute, FHOA submits that the *Oil and Gas Conservation Act* obligates the Board to exercise its power to determine entitlement to a well licence even if the objection to the licence is based on ownership of the resources at issue.

36. Pursuant to sections 16(1) and (2) of the *Oil and Gas Conservation Act*, so long as the Board is satisfied that an applicant is entitled to a licence then such licence should be granted. On the other hand, if entitlement cannot be proven to the Board's satisfaction, then the licence should be cancelled or suspended.
37. Only by making a determination will the Board satisfy the purpose and object of the legislation as set out in section 4(c) and (d) of the *Act*.
38. Furthermore, the opinions of both legal experts that were presented at the hearing of this Proceeding were in support of the position that the Board has the power to determine entitlement even if the issue before the Board is one of ownership of the resources.
39. With respect to how the Board should determine entitlement in regard to the subject matter before it, FHOA has thoroughly canvassed this issue in its prior submissions and refers the Board to its initial written submissions and reply submissions.
40. Based on the relevant case law and the evidence before the Board, it is submitted that pursuant to the generally accepted principles of oil and gas ownership, at the time the CPR reserved the coal, now owned by the Coal Owners, coal and natural gas were known and understood by ordinary men to be distinct substances, the vernacular meaning of coal did not include natural gas, and consequently the Coal Owners have no entitlement to produce or benefit from the production of any CBM produced or intended to be produced from the specific wells involved in the within Proceeding.

c. The Coal Owners' Proposed Remedy is Akin to Injunctive Relief

41. It is submitted that once the Board has determined entitlement to the well licences at issue, Bulletin 2006-19 should be rescinded. However, in the alternative and in the event that the Board does not exercise its powers under section 16 of the *Oil and Gas Conservation Act* then FHOA makes the following submissions in respect to Bulletin 2006-19.

42. The Coal Owners have admitted that even if the Board issues well licences to the Gas Producers, the Coal Owners may still file statements of claim and seek injunctive relief as against the Gas Producers.
43. The Coal Owners' request that the Board maintain Bulletin 2006-19 until such time that ownership of CBM is resolved in favour of one party or another is akin to or may be characterized as injunctive relief as against the natural gas owners and the lessee Gas Producers. However, the Coal Owners are seeking to obtain such relief from the Board without meeting the strict requirements that a court requires prior to granting injunctive relief.
44. In *RJR-MacDonald Inc. v. The Attorney General of Canada*³² the Supreme Court of Canada examined the requirements that must be met in order to obtain injunctive relief. In *RJR-MacDonald*, the Supreme Court used a three-part test to determine when it is appropriate to provide such extraordinary relief to a plaintiff.
45. The three part test may be summarized as follows:
 - a. Is there a serious question to be tried?
 - b. Would the party seeking the injunctive relief suffer irreparable harm if the injunction is not granted?
 - c. Does the balance of convenience favour the granting of the injunctive relief?
46. While this is procedurally is not an injunction application, the disposition being sought by the Coal Owners is similar to a request for injunctive relief. Therefore, in regard to the Coal Owners request that the Board order the extraordinary remedy of a moratorium on CBM well licence applications in respect of Split Title Lands, it may be appropriate for the Board to consider whether: (1) the Coal Owners have provided evidence of any irreparable harm if the application of

³² **TAB B** 1994 CanLii 117 (SCC), [1994] 1 S.C.R. 311

Bulletin 2006-19 is not extended; and, (2) whether the balance of convenience favours the extension of a moratorium on Split Title Lands.

47. The law of equity requires this analysis where the remedy being sought will not only impact the parties and interveners to this Proceeding, but will ultimately impact all Freehold natural gas owners and their lessees wherever such natural gas rights occur on Split Title Lands that have the potential to produce CBM.

PART IV DISPOSITION

48. In conclusion, it is submitted that pursuant to sections 4(c) and (d) of the *Oil and Gas Conservation Act* the economic, orderly and efficient development of CBM that will afford each owner the opportunity of obtaining the owner's share of the production of CBM can only be achieved if Bulletin 2006-19 is rescinded and this Board exercises its power and authority under section 16 of the *Oil and Gas Conservation Act* and makes a decision in respect to the Gas Producers entitlement to the subject well licences.
49. In regard to entitlement, it is submitted that pursuant to the generally accepted principles of oil and gas ownership, at the time the CPR reserved the coal, now owned by the Coal Owners, coal and natural gas were known and understood by ordinary men to be distinct substances, the vernacular meaning of coal did not include natural gas, and consequently the Coal Owners have no entitlement to produce or benefit from the production of any CBM produced or intended to be produced from the specific wells involved in the within Proceeding.

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

RAE AND COMPANY

Per: _____
L. Douglas Rae

Per: _____
W. Tibor Osvath

**Solicitors for the Intervener
Freehold Petroleum & Natural Gas
Owners Association**