

ALBERTA ENERGY AND UTILITIES BOARD

**IN THE MATTER OF THE *ENERGY RESOURCES
CONSERVATION ACT*, C. E-10 OF THE REVISED
STATUTES OF ALBERTA 2000;**

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

REPLY SUBMISSION OF APACHE CANADA LTD.

SEPTEMBER 29, 2006

INTRODUCTION

1. In accordance with the Board's Amended Notice of Hearing dated July 27, 2006 and letter dated August 23, 2006, the following sets out Apache Canada Ltd.'s ("Apache") Reply Submission in this matter.
2. As indicated in Apache's Submission,¹ Apache holds freehold title to certain mineral rights, and is a lessor of such rights, in Section 8-34-26W4, Section 9-34-26W4, and Section 17-34-26W4, which are the subject of Devon Canada Corporation's ("Devon") applications and to which Carbon Development Partnership ("CDP") disputes ownership of the CBM. Accordingly, Apache will focus its Reply on CDP's Submission.² However, given Apache's other significant holdings in the vicinity of the areas that are the subject matter of these proceedings, Apache will also reply to EnCana Corporation's ("EnCana") Submission³ from time to time.
3. This submission generally follows the outline of the CDP's Submission. Where Apache has not expressly responded to a matter raised in either CDP or EnCana's Submissions, this should not be taken as acquiescence or agreement with those matters.
4. As indicated in Apache's Submission, Apache reserves the right to make full submissions at the conclusion of the hearing based on all of the evidence and arguments submitted in this proceeding.⁴

ENTITLEMENT

5. At paragraphs 21 to 26 of CDP's Submission, CDP makes two submissions:
 - i) "entitled" or "entitlement", as used in subsections 16(1) and 16(2) of the *Oil and Gas Conservation Act* ("OGCA") means ownership; and

¹ Ex. 17-003-2006-08-25, Apache Submission, para. 6.

² Ex. 03-036-2006-09-15 ("CDP's Submission").

³ Ex. 07-024-2006-09-15 ("EnCana's Submission").

⁴ Apache Submission, para. 5.

- ii) proof of entitlement, as used in subsection 16(2) of the OGCA, must be “a sure thing,”⁵ “unqualified by either substantive or procedural considerations,”⁶ “beyond dispute,”⁷ or “certain and beyond doubt.”⁸
6. Apache does not believe that either section 16 or the jurisprudence goes so far as to support CDP’s first submission that “entitled” means ownership. Apache submits “entitled” means the right to produce. As indicated by Fruman, J.A. in *Alberta Energy Company Limited v. Goodwell Petroleum Corporation Limited*, “[t]he right to produce could be acquired by agreement, reservation, grant or, as in this case, crown lease.”⁹
7. Apache strongly disagrees with CDP’s second submission that the mere use of the word “entitled” in subsections 16(1) and 16(2) of the OGCA means that a party can only establish that it is entitled to something if it can show its entitlement is certain and beyond doubt. Apache also strongly disagrees with the other measures that CDP has used to define this threshold.
8. CDP relies on the use of “entitled” in three types of cases to attempt to support its proposition: a 1916 case involving a separation deed;¹⁰ a case concerning the *Canada Labour Code*;¹¹ and a series of cases concerning the prevention of double recovery in tort and insurance claims when a claimant is already entitled to insurance or disability payments.¹²
9. Apache submits that the “entitlement” cases that CDP relies on are simply not relevant to the issue faced by the Board. In particular, none of the “entitlement” cases that CDP relies on addresses the standard that a statutory tribunal should apply to prove entitlement to its satisfaction. Rather, each of these cases dealt with the use of entitlement in the absence of any direction as to how this should be considered. This is not the situation

⁵ CDP’s Submission, para. 23.

⁶ *Ibid.*, para. 24.

⁷ *Ibid.*

⁸ *Ibid.*, para. 25.

⁹ (2003), 233 D.L.R. (4th), paras. 92-93 (Alta. C.A.).

¹⁰ *Gordon v. Gordon* (1916), 32 D.L.R. 626 (Ont. C.A.).

¹¹ *Thompson v. Motorways (1980) Ltd.*, 1996 CarswellNat 2136 (T.D.), aff’d 1998 CarswellNat 2790 (F.C.A.).

under the OGCA. Under the OGCA, the test for proof of entitlement is expressly set out in subsection 16(2):

(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. (Emphasis added).

SATISFACTION OF THE BOARD

10. Under the heading Standard of Proof Required, CDP addresses its interpretation of the meaning of “satisfied” in subsection 16(2) of the OGCA. CDP submits that there is no fixed meaning to satisfied¹³ and concedes that in administrative proceedings, such as before the Board, satisfied may mean a “balance of probabilities” but goes on to suggest, without citing any authority for this proposition, that it may also be a more strict standard.¹⁴ In a civil proceeding, CDP submits that “satisfied” will commonly be on a balance of probabilities, although it then again goes on to suggest, based on the cases on “entitlement” set out in its submission, that it may also be a standard of “certainty”.¹⁵
11. Notwithstanding that CDP appears to acknowledge that “satisfied” normally means a balance of probabilities, it adopts the standard of certainty. As set out at paragraph 30 of CDP's Submission, “[i]f there is *any chance* of a court determining in the future that the gas producer's lessor is not the owner of CBM, the Board should not consider itself satisfied of the gas producers' entitlement” (emphasis added). It goes on to indicate that “[t]he Board cannot be “satisfied,” *if it must take a guess*, no matter how educated and considered, about which contender will likely be adjudicated to be entitled to produce CBM” (emphasis added).¹⁶ Finally, CDP concludes by indicating, apparently as an expression of law, that “[w]here, as here, it is clear that CBM is being produced from

¹² CDP's Submission, paras. 23-24.

¹³ CDP's Submission, para. 29.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ CDP's Submission, para. 30.

coal seams, and that ownership of CBM is in dispute, *the Board is precluded from issuing a well licence or granting a holding application*” (emphasis added).¹⁷

12. What CDP does not acknowledge, but which necessarily flows from its analysis, is that all disputes over entitlement would be subject to the same test. The wording of section 16 of the OGCA does not distinguish between disputes over the ownership of CBM and other entitlement disputes. Under CDP’s test, if there were any dispute over entitlement, the Board would be precluded at law from issuing a well authorization or holding application regarding the substance in question.
13. CDP does not provide any judicial authority that finds that “satisfied” means “certainty”, nor any judicial support for the proposition that the Board is legally precluded from issuing a well licence or granting a holding application where there is any dispute as to entitlement.
14. The only substantive argument that CDP relies on to support its standard of certainty is that it would be wrong for the Board to pre-judge the merits of the respective claims to ownership over CBM (or presumably other disputes over entitlement) because this has the potential to interfere with the “true owner’s” property rights and this could not have been intended by the legislature.¹⁸
15. With respect, Apache submits that there is no support for this argument. Under CDP’s test, whereby the Board is precluded from proceeding in the face of an entitlement dispute, it is equally, if not more likely, that the “true owner” will be shut-in and face the risk of having their production drained by neighbouring third parties. CDP does not address how this consequence supports their interpretation. If a party disputing entitlement is not satisfied with a determination by the Board, it has a number of avenues that it can pursue, including seeking a review and variance of the Board’s decision, appealing to the Court of Appeal, or commencing a civil case over entitlement. Apache submits that there is no reason to prohibit the Board from addressing these disputes.

¹⁷ *Ibid.*, para. 31.

¹⁸ *Ibid.*, para. 30.

16. Further, contrary to CDP’s Submission, Apache submits that it is clear that the legislature did intend that the Board have the power to “pre-judge” the merits of disputes over entitlement by expressly giving it the power to inquire into entitlement under subsection 16(2). If the legislature had intended that the Board could not grant a well authorization or other approval where there is any dispute over entitlement, it would have said so. In this case, subsection 16(2) could have read something like:

“If there is any dispute that the person applying for or holding a licence for a well under subsection (1) is entitled to the right in question, the Board shall not grant the licence applied for and, if a licence has been granted, shall cancel the licence on any terms and conditions that it may specify.”

17. The legislature did not do so. To the contrary, it provided that the Board could grant well licences, even where entitlement is disputed, where the Board is satisfied of proof of entitlement. Apache submits that there is no reason to prohibit the Board from addressing these disputes.
18. Similarly, if the legislature had intended that an applicant must prove entitlement under subsection 16(2) “unqualified by either substantive or procedural obligations,” “beyond dispute...in every way,” or to a “certain[ty] and beyond doubt,” as asserted by CDP, the legislature could have easily used any of these forms of words in subsection 16(2). Again, it did not do so.
19. In summary, Apache submits that there is no support for the proposition that “satisfaction” means “certainty” under subsection 16(2) of the OGCA. As indicated in the Supreme Court of Canada’s decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*:

37. For a number of years now, the Court has adopted E. A. Driedger’s modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁹

¹⁹ 2006 SCC 4, para. 37.

20. The grammatical and ordinary meaning of satisfy is to “provide with *adequate* information about or proof of something.”²⁰ This is consistent with its context in subsection 16(2) where, as indicated, the legislature clearly allows the Board to consider questions of entitlement. It is also consistent with the objectives of conservation and the economic, orderly and efficient development of the resource under the OGCA,²¹ while leaving final resolution of disputes over entitlement, if necessary, to the Courts. Finally, this meaning is supported by the use of satisfied in other sections in the OGCA.²²

APPLICABLE AUTHORITIES FOR DETERMINING ENTITLEMENT TO CBM

21. In paragraph 34, CDP indicates that “[o]wnership of CBM is disputed as between CDP and EnCana, as coal owners and the lessors of the applicants.” CDP goes on to indicate that the appropriate time for applying the test in *Borys* is the time of the grant of mines and minerals by the CPR reserving coal (that is, 1906 to 1912).
22. Apache does not dispute the position of CDP and EnCana as coal owners. However, Apache does not understand CDP’s comment regarding being “lessor of the applicants”, at least in the case of the Devon Applications challenged by CDP.
23. As indicated in paragraph 6 of Apache’s Submission, Apache is the lessor of the rights in question to Devon. CDP’s interest in these lands is restricted solely to the ownership of “coal.” On these lands, the “coal” title was split from the remainder of the mines and minerals in 1982 when Dome Petroleum Limited (“Dome”) and Hudson’s Bay Oil and Gas Company Limited (“HBOG”), the then owners of the mines and minerals, transferred the coal rights to TransAlta Utilities Corporation (“TAU”). Apache understands that the coal title was subsequently transferred in 2001 from TAU to Fording Coal Limited (“Fording”) and from Fording to Luscar Ltd. (“Luscar”) in 2004. As indicated in CDP’s

²⁰ *The Concise Oxford English Dictionary*, 10th ed., s.v. “satisfy”.

²¹ OGCA, s. 4.

²² In subsection 24(3), a transfer of a licence must be in a prescribed form and have proof of execution “satisfactory to the Board.” Paragraph 82(1)(b) provides that the Board may vary a pooling order when “it is satisfied” that it is appropriate to do so. Section 92(a) requires records to be attributed to individual wells in the battery or group in a manner “satisfactory to the Board.” None of these provisions suggest that satisfaction means certainty.

Submission, CDP cannot have acquired a greater title through this series of transactions than TAU originally acquired from Dome and HBOG.²³

24. Apache agrees with CDP that the tests in *Borys* and *Anderson* are relevant to the question of entitlement. As indicated in its Submission, Apache also submits that the Supreme Court of Canada decision in *Crow's Nest Pass Coal Co. v. R.* is also relevant.²⁴ The *Crow's Nest Pass* case established that the word "minerals" should be construed to mean mineral substances including petroleum and natural gas for reservations occurring in the late 19th century.²⁵

U.S. POSITION

25. CDP goes on to indicate that a number of the parties referred to U.S. authorities, and particularly, the decision of the U.S. Supreme Court in *Amoco Petroleum Co. v. Southern Ute Indian Tribe* ("*Amoco*"). CDP then attempts to distinguish the *Amoco* decision and submits that US jurisprudence is of limited assistance because many US states have adapted theories of ownership that are not necessarily consistent with Canadian jurisprudence. It does not provide any support for this proposition. CDP also relies on the fact that there is American authority to the effect that the right to drill through coal did not include the right to recover the absorbed CBM.²⁶
26. Apache disagrees with CDP's submissions on the US Supreme Court decision in *Amoco*. The Alberta Court of Appeal in *Scurry Rainbow-Oil Ltd. v. Galloway Estate*, held that factually analogous American cases are persuasive when not in conflict with authoritative Canadian cases.²⁷

²³ CDP's Submission, paras. 39-40.

²⁴ [1961] S.C.R. 750.

²⁵ *Ibid.*, para. 40.

²⁶ CDP's Submission, para. 35.

²⁷ (1994), 23 Alta. L. R. (3d) 193, para. 14.

27. Apache submits that the *Amoco* and *Borys* cases are actually remarkably similar in approach and the circumstances in the *Amoco* case were very close to the circumstances the Board is faced with:
- i) in both *Borys* and *Amoco*, the Court concluded that the issue was to be determined by looking at the intention of the parties at the time of the grant or reservation (in the *Amoco* case this involved looking at the intention of the US Congress as opposed to private parties. This is simply a different application of the test, not a ground for distinguishing the case);
 - ii) both *Amoco* and the current situation involve disputes over the ownership of CBM;
 - iii) both situations arise as a result of similar, if not identical, wording; generally, the ownership of mines and minerals versus ownership of coal;
 - iv) the same time period is at issue in both proceedings (at least for the earlier grants. The later grants (circa 1982) can be determined using the same principles); and
 - v) both *Amoco* and the current situation involve the characteristics of natural gas and coal.

THE VERNACULAR MEANING OF COAL

28. CDP does not address the vernacular meaning of coal. EnCana does address the vernacular meaning in its submission.²⁸ Apache submits that it is not necessary for the Board to engage in a detailed investigation of the vernacular meaning of coal, or other wording in the grants in question, to address the issue before the Board. As set out at paragraph 16 of Apache's Submission, Apache believes that there is adequate guidance in existing materials and jurisprudence to constitute satisfactory proof for the Board's purposes that title to CBM lies with the natural gas or mineral rights holder, and not with the coal rights holder.

²⁸ EnCana's Submission, paras. 34-61.

29. However, in the event that the Board wishes to inquire into this issue, whether to address the issue directly or to obtain comfort in comparing the vernacular meaning of coal in Alberta at the relevant times with the decision in *Amoco*, Apache believes the following indicia are of assistance:
- i) as indicated in *Amoco*, at the beginning of the 1900's, most dictionaries defined coal as the solid fuel resource;²⁹
 - ii) in contrast, dictionaries of the day defined CBM – then called “marsh gas,” “methane,” or “fire-damp” – as a distinct substance, a gas “contained in” or “given off by” coal, but not as coal itself;³⁰
 - iii) these definitions are consistent with the use of “coal,” “marsh gas,” “methane,” and “fire-damp” in Western Canada during the same period;³¹
 - iv) these definitions are also consistent with the definitions in Canadian dictionaries during the period (circa 1982) when the coal in question was transferred from Dome and HBOG to TAU;³²
 - v) as in the U.S.,³³ coal was the primary source of energy in the early 1900's. In Alberta, coal was initially used for supplying ranchers and incoming settlers. It was subsequently used for powering locomotives and for domestic purposes;³⁴
 - vi) contrary to EnCana's submissions, CBM did not have commercial value to coal miners in Alberta in the early 1900's. Rather, consistent with the approach in the

²⁹ *Amoco, supra*, pp. 7-8.

³⁰ *Amoco, supra*, pp. 7-8.

³¹ *Western Canadian Dictionary and Phrase Book*, facsimile of the 1913 ed., University of Alberta Press 1977 (“there can never be a fuel famine in Alberta as long as there are miners left to dig coal out of the earth and cars to haul it to the consumers”); Moore, E.S., *Canada's Mineral Resources*, Irvin & Gordon, Limited (1929), pp. 161-162.

³² *Gage Canadian Dictionary*, Gage Educational Publishing Company, 1983, s.v. “coal,” “fire-damp,” “marsh gas,” “methane”; *Funk & Wagnalls Canadian College Dictionary*, Fitzhenry & Whiteside Limited, 1986, s.v. “coal,” “fire-damp,” “marsh gas,” “methane.”

³³ *Amoco, supra*, pp. 8-9.

³⁴ Christmas, L., *Alberta Miners-A Tribute*, Produced in Collaboration with the Alberta Chamber of Resources, Combria Publishing 1993, p. 9; Rasporich, A.W., *Western Canada Past and Present*, University of Calgary, McClelland and Stewart West, 1975, Chapter 6.

U.S.,³⁵ CBM was treated as a dangerous waste product which escaped from coal as coal was mined;³⁶

- vii) it was not until approximately 1912 that the CPR appears to have began recognizing the possible value of natural gas and began reserving all mines and minerals in their grants;³⁷
- viii) following the introduction of diesel locomotives and the extension of natural gas pipelines for domestic heating, the primary interest in coal switched from underground mines to large strip and open pit mines. These mines were used for supplying coal to electrical generating stations and for supplying coke to export markets;³⁸
- ix) in 1980, Calgary Power, which in 1981 changed its name to TransAlta Utilities (previously defined as TAU), highlighted that it had recognized coal as “the fuel of the future 30 years ago when additional economic hydro-electric sites were becoming scarce” and a “thermal base was required to meet Alberta’s growing need for electric energy.” Because natural gas was recognized to have expanded potential as a premium fuel and as a raw material for other industry, Calgary Power/TAU indicated that it had proceeded to “acquire and dedicate coal reserves for future power generation”,³⁹
- x) in 1981, TAU highlighted that planning was one of its primary responsibilities in the supply of electric service. In consequence, it indicated that the primary energy sources that were needed to fuel new generating plants had to also be considered. To meet this need, TAU indicated that it gave priority to acquiring sufficient coal reserves at the lowest possible cost, while still evaluating alternative energy sources;⁴⁰

³⁵ *Amoco, supra*, pp. 9-10.

³⁶ See EnCana’s Submission, footnote 19.

³⁷ *Anderson v. Amoco*, 2004 SCC 49, paras. 3-5.

³⁸ *Alberta Miners-A Tribute, supra*, p. 9.

³⁹ *Calgary Power Annual Report 1980*, p. 1.

⁴⁰ *Ibid*, see section on planning.

- xi) in 1982, TAU announced that it had entered into an agreement with Dome Petroleum to acquire 90 percent of Dome’s coal holdings in Alberta, “amounting to approximately one billion tonnes of recoverable coal.” TAU indicated that the Dome transaction, along with other acquisitions and previously acquired holdings “ensure[d] a long-term fuel supply for [TAU’s] thermal generating plants.”⁴¹

RELIEF SOUGHT

30. As indicated in its Submission, at present Apache expects that it will seek the following relief at the conclusion of this proceeding:

- i) An Order dismissing the review and variance applications of CDP, and/or an Order confirming the Board’s original Orders, on those applications in which Apache has a direct interest; and
- ii) Guidance from the Board regarding how it will address the issue of legal entitlement to CBM on split-title lands in the future, including the information and notice requirements for Applications on split-title lands, the expected process the Board will follow when issues of entitlement are raised, and the general approach the Board will take on these issues.

31. Apache reserves the right to amend this relief or seek alternative relief based on the evidence and argument in this proceeding.

All of which is respectfully submitted this 29th day of September, 2006.

Original Signed by

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⁴¹ TAU Annual Report 1982, Report to Shareholders.