

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 REVIEW HEARING (PART 2)**

ARGUMENT OF APACHE CANADA LTD.

NOVEMBER 15, 2006

TABLE OF CONTENTS

INTRODUCTION..... 1

DOES THE BOARD HAVE THE JURISDICTION TO CONSIDER APPLICATIONS WHEN THERE IS A DISPUTE OVER ENTITLEMENT? 2

Introduction..... 2

CDP and EnCana’s Jurisdictional Argument..... 3

The Board Has the Jurisdiction to Consider Applications in the Face of Entitlement Disputes..... 4

There is No Distinction Between the Board’s Jurisdiction to Consider Different Kinds of Entitlement Disputes..... 6

Summary..... 7

HOW SHOULD THE BOARD ADDRESS APPLICATIONS WHEN ENTITLEMENT IS IN DISPUTE? 8

The Range of Approaches 8

Shutting-in Production 8

The Choice Between the “Regulatory” and “Legal” Approaches..... 9

Application of The Legal Entitlement Approach..... 10

The Meaning of “Satisfied”..... 10

The Legal Framework 11

Application to the Facts Before the Board..... 18

SHOULD THE BOARD PUT IN PLACE MEASURES PENDING THE ULTIMATE DETERMINATION OF LEGAL OWNERSHIP? 23

HOW THE BOARD SHOULD DEAL WITH ENTITLEMENT DISPUTES IN THE FUTURE 25

RELIEF SOUGHT 26

INTRODUCTION

1. Apache holds freehold title to, and is a lessor of, certain mineral rights in Sections 8-34-26W4, 9-34-26W4 and 17-34-26W4 which are in issue in Devon Applications 1383132, 1383134, 1383136, 1383137, 1383138, 1383139, 1383140, 1383141, 1380005, 1380010, 1380013, and 1380014.¹ Apache also has significant interests in the immediate vicinity of the areas that are the subject of this proceeding for the purpose of CBM development.² These interests include wholly owned lands, lands where Apache owns all mines and minerals excluding coal in various split-title situations, and both freehold and Crown leases.³

2. The following sets out Apache's Final Argument in this matter.

3. In its Amended Notice of Hearing dated July 27, 2006 and letter dated August 23, 2006, the Board indicated that it would consider the following issues in this part of the proceeding:

- (a) The issue of legal entitlement of CBM being produced or intended to be produced from wells that have been licensed to Bearspaw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd.; and
- (b) Any outstanding measurement and accounting issues of CBM production in connection with the said wells arising from the cancellation of Part 1 of Proceeding No. 1457147.

4. Based on these issues, and the various submissions of the parties as this matter has progressed, Apache respectfully submits that the Board needs to address three primary issues in its decision on this matter:

- (a) The Board's jurisdiction to consider applications for well licences and other authorizations when there is a dispute over entitlement;

¹ Ex. 017-003, para. 6 ("Apache's Submission").

² Apache's Submission, para. 7.

³ CBM Hearing Transcripts, 3T492, l. 24 – 3T493, l. 22.

- (b) If the Board has the jurisdiction to consider applications when there is dispute over entitlement, how it should address these applications;
- (c) If the Board authorizes CBM production, should the Board require measures to be put in place pending a final determination of legal ownership; and
- (d) While Apache understands that the Board cannot fetter its future decision-making, some guidance from the Board on how it expects to address these issues in the future.

5. In summary, Apache submits that the Board retains the jurisdiction to consider applications even when there is a dispute over entitlement. Apache further submits that on the evidence in this proceeding the Board should be satisfied that the Applicants are entitled to produce CBM and that the Board should confirm its original orders granting the applications sought. Finally, while Apache is not opposed to reasonable measures being put in place pending final determinations of legal ownership, Apache submits that the evidence fails to establish that the benefits of the proposed measures outweighs their costs and potential impacts on production. If the Board believes further consideration of these or other measures should take place, Apache is prepared to participate in this effort but respectfully submits that CBM development on split-title lands should not continue to be suspended while these efforts are underway.

6. The remainder of Apache's Final Argument addresses the primary issues identified above and, within these, various ancillary issues. Apache's Argument concludes with a brief discussion of how Apache respectfully submits that the Board should address these types of applications in the future and the relief that Apache is seeking.

DOES THE BOARD HAVE THE JURISDICTION TO CONSIDER APPLICATIONS WHEN THERE IS A DISPUTE OVER ENTITLEMENT?

Introduction

7. Both CDP and EnCana take the position that the Board does not have the jurisdiction to consider applications for well licences and other authorizations if there is a dispute over the entitlement to produce CBM. Stated succinctly, CDP and EnCana's position is that the Board has no jurisdiction to consider applications where there is a *bona fide* dispute over the legal

ownership of CBM⁴. Apache submits that EnCana distinguishes disputes over entitlement to produce CBM from other entitlement disputes, such as whether a leasehold interest is still in effect, and takes the position that the Board has the jurisdiction to process these latter applications regardless of any entitlement disputes.⁵ CDP does not have a position on the Board's jurisdiction to process applications in the event of other entitlement disputes.⁶

8. Apache submits that the Board not only has the power to consider applications if there is a dispute over entitlement but has an obligation to do so. Apache further submits that there is no distinction between entitlement disputes “at large” and CDP and EnCana’s “*bona fide* disputes over the legal ownership of CBM”. Apache submits that the Board can consider all entitlement disputes, not just a subset of these.

9. Each of these issues is addressed in more detail below.

CDP and EnCana’s Jurisdictional Argument

10. Reduced to its essence, CDP and EnCana appear to base their jurisdictional argument on the Board’s inability to finally determine questions of legal ownership.⁷

11. Apache agrees that the Board does not have the power to make final and binding determinations regarding property rights.⁸ As Fruman, J., as she then was, said in *Anderson v. Amoco*, “The regulators’ view does not determine legal ownership [. . .].”⁹ However, the Board’s jurisdiction to finally determine questions of legal ownership or entitlement does not determine whether it can consider questions of ownership or entitlement in carrying out its primary statutory obligations under the *Oil and Gas Conservation Act* (the “OGCA”).¹⁰ The latter question is simply whether, in the appropriate circumstances, the Board is authorized to consider entitlement in exercising its jurisdiction to grant licences and other authorizations. If the Board were to do so, this would not be determinative of legal ownership in any way and

⁴ EnCana: CBM Hearing Transcripts, 8T1114, ll. 9-13; CDP: Ex. 003-036 (“CDP’s Submission”), para. 26.

⁵ CBM Hearing Transcripts, 6T858, l. 20 – 6T860, l. 8.

⁶ *Id.*, 6T851, l. 20 – 6T855, l. 2.

⁷ EnCana: Ex. 007-024, (“EnCana’s Submission”) paras. 5 and 69-71.; CDP: CDP’s Submission, para. 26.

⁸ Apache’s Submission, para. 9.

⁹ *Anderson v. Amoco Canada Oil & Gas* (1998), 63 Alta. L.R. (3d) 1, para. 147 (“*Anderson v. Amoco*”).

¹⁰ Apache’s Submission, para. 9.

therefore, contrary to CDP and EnCana’s submissions, would not by definition be beyond the Board’s power.¹¹

The Board Has the Jurisdiction to Consider Applications in the Face of Entitlement Disputes

12. Apache submits that the Board does have the jurisdiction to consider – as opposed to resolve – entitlement issues, including issues of ownership, in exercising its primary jurisdiction under the OGCA.

13. In Apache’s submission, this is determined by identifying the relevant factors on the applications that are before the Board. For well licences, entitlement is expressly identified as a relevant factor in section 16(1) of the OGCA – “[n]o person shall apply for or hold a licence for a well [...] unless that person is a working interest participant **and is entitled to the right to produce the oil, gas or crude bitumen from the well [...]**” (emphasis added).

14. For holding applications, ownership or entitlement is also expressly identified as a relevant factor. Section 5.200 of the *Oil and Gas Conservation Regulations*¹² provides that a holding shall contain only a single drilling spacing unit or “whole, contiguous drilling spacing units of **common ownership**” (emphasis added). Common ownership is defined in section 1.020(2)4.

15. Finally, the “owner” of a tract within a drilling spacing unit may apply for a compulsory pooling order in accordance with section 80 of the OGCA. Section 78(a) of the OGCA defines “owner” for these purposes.

16. Apache submits that it would be contrary to well-established principles of administrative law if entitlement or ownership was identified as a relevant factor but the Board did not have the jurisdiction to consider this factor. Indeed, given that entitlement and ownership are identified as relevant factors, Apache submits that fundamental principles of administrative law not only

¹¹ *Anderson v. Amoco*, para. 147.

¹² AR 151/71, as amended.

allow the Board to consider these issues but require it to do so. If the Board did not do so, it would commit an error of law.¹³

17. As indicated above, just because the Board considers ancillary matters, such as private rights, in exercising its core jurisdiction, does not mean it is resolving these issues as a matter of private law. Instead, the Board is authorized to opine to the extent it deems necessary to decide matters falling within its jurisdiction. The Supreme Court of Canada elucidated this principle in *Bell Canada v. Canada (CRTC)*, where it stated the following:

The powers of any administrative tribunal must of course be stated in its enabling statute, but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although Courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.¹⁴

The Supreme Court of Canada recently cited this passage with approval in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*.¹⁵

18. For well licences, the power to consider entitlement is expressly captured in section 16(2) of the OGCA. Section 16(2) provides that “[i]f, 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). Accordingly, not only did the legislature give the Board the express power to consider entitlement, but it set out a process for doing so. The meaning of “satisfied” is discussed further below.

19. There is no express provision analogous to section 16(2) for holding applications or applications for pooling orders. However, as set out above, the Board has both express and implied powers to consider those matters which are necessary to exercise its core jurisdiction.¹⁶ Apache submits that this is sufficient to enable the Board to address these matters, particularly

¹³ *Oakwood Developments Ltd. v. St. Francois Xavier (Rural Municipality)* (1985), 18 Admin. L.R. 59, 69 (S.C.C.).

¹⁴ *Bell Canada v. Canada (CRTC)*, [1989] 1 S.C.R. 1722, para. 51.

¹⁵ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, para. 50.

¹⁶ *Ibid.*

when they are expressly identified as relevant factors. The contrary interpretation would be that any time a party disputes entitlement or ownership, the Board cannot consider these applications until the dispute is resolved, however long that may take.¹⁷ Apache submits that interpreting the OGCA to allow ownership disputes to trump the conservation and efficient production of resources would be an absurd interpretation of the Act.

20. Based on the above, Apache submits that there is no support for the proposition that the Board does not have the power to consider entitlement issues. Apache further submits that there is no support for the related proposition that the Board loses its jurisdiction to consider an application if there is a dispute over entitlement. To the contrary, the Board has the authority to address issues of entitlement and, having done so, to either grant, or refuse to grant, the licence or authorization in question.

There is No Distinction Between the Board’s Jurisdiction to Consider Different Kinds of Entitlement Disputes

21. CDP and EnCana attempt to limit the impact of their jurisdictional argument by distinguishing unspecified “run-of-the-mill” (Apache’s words) entitlement disputes which apparently the Board has the jurisdiction to consider¹⁸ - from *bona fide* disputes over the legal ownership of CBM – which, in CDP and EnCana’s submissions, the Board does not have jurisdiction to consider.¹⁹

22. Apache respectfully submits that there is no basis for this distinction. There is no distinction in section 16 of the OGCA between different types of entitlement disputes nor any suggestion that the Board can consider only certain types of entitlement disputes but not others. Section 16 simply requires that the Board be satisfied that the applicant is entitled to produce the substance in question, regardless of the source of that entitlement.

23. 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,

¹⁷ EnCana: CBM Hearing Transcripts, 6T844, l. 24 – 6T895, l. 4; CDP: CBM Hearing Transcripts, 6T843, ll. 3-8.

¹⁸ CBM Hearing Transcripts 6T857, l. 13 – 6T860, l. 8.

¹⁹ EnCana: CBM Hearing Transcripts, 8T1114, ll. 9-13; CDP: CDP’s Submission, para. 26

reservation, grant or, as in this case, crown lease.”²⁰ Accordingly, entitlement disputes can arise in a number of ways and can involve a myriad of considerations. Against this backdrop, there is no suggestion in section 16 that the Board can only consider entitlement in some of these cases but not if it determines that the entitlement dispute involves property rights or the dispute is *bona fide*.

24. Apache submits that the common feature of the examples identified by Fruman, J.A., is that the Board does not have the authority to finally resolve disputes regarding any of these underlying rights (i.e., the Board has no more power to resolve a lease dispute involving private rights or a dispute over the meaning or validity of a Crown grant than it does to resolve a dispute over property rights under a grant or reservation). However, the lack of authority to finally determine these issues, however they arise, did not prevent the legislature from concluding that the Board had a legitimate role under section 16(2) to consider them – to its satisfaction – in exercising its broader jurisdiction. Further, there is no basis for distinguishing between types of ownership disputes.

25. While only “ownership” as defined is in issue regarding holding orders and pooling orders, Apache submits that there is similarly no basis for distinguishing the Board’s jurisdiction to consider this form of private rights from other forms of private rights.

Summary

26. In summary, Apache submits that it is clear that the Board not only has the jurisdiction to consider entitlement and ownership in exercising its jurisdiction but, if these issues are raised, must do so since these are relevant factors under the legislation and regulations. Apache submits that it follows that there is no basis for the suggestion that the Board is prohibited from considering applications in the event there is a dispute over entitlement. Finally, Apache submits that there is no distinction between entitlement disputes involving property rights and disputes involving other private rights. The Board cannot finally resolve any of these disputes; however, this does not mean that it cannot consider them when this is relevant to the Board’s jurisdiction.

²⁰ (2003), 233 D.L.R. (4th), para. 92 (Alta. C.A.). (“*Goodwell*”)

HOW SHOULD THE BOARD ADDRESS APPLICATIONS WHEN ENTITLEMENT IS IN DISPUTE?

The Range of Approaches

27. There is clearly substantial overlap between how the Board should address entitlement disputes to CBM in general and how it should address the particular applications before it. Apache will address both of these topics in this section. Apache will address how it submits the Board should address future applications when there are entitlement disputes below.

28. A variety of positions have been put forth on this issue. Based on these positions, Apache expects that the following alternatives will generally be before the Board:

- a) The Board should only consider “regulatory” entitlement. That is, regardless of the nature or extent of a dispute over legal entitlement, if an applicant can establish that it has the *prima facie* right to produce natural gas, the Board should grant authorizations to produce CBM, even in split-title situations;
- b) If there is a dispute over entitlement, the Board can (or must) consider legal entitlement to the extent that it considers necessary; and
- c) Even if the Board has the jurisdiction to consider entitlement to produce CBM, the Board should not authorize CBM production on split-title lands until there is a definitive court ruling establishing entitlement or an agreement to quiet title.

Shutting-in Production

29. Apache submits that there is no supportable basis for shutting-in CBM production on split-title lands. This would result in these lands being drained,²¹ it could result in parties not being able to fulfill offset obligations and potentially breaching leases,²² it would likely be many years before a definitive court ruling would be made and this may still not have broad application to other split-title situations, and a natural gas rights owner’s only remedy in the absence of a

²¹ CBM Hearing Transcripts: IT 54, ll. 12-14; 3T495, l. 20 – 3T509, ll. 15-20; 4T560, ll. 19-25; 4T607, ll. 22-25; 4T610, l. 14 – 4T611, l. 7; 4T616, ll. 3-7.

²² *Id.*: 3T432, ll. 23-25; 4T615, l. 58 – 4T616, l. 23.

definitive court ruling would be to enter into an agreement quieting title with CDP or EnCana, no matter how unreasonable this may be.

30. CDP and EnCana's submissions on this form of relief, beyond their jurisdictional argument, appear to be based on the assertion that they will be irreparably harmed if production is allowed to take place pending a court determination of ownership. Apache submits that this is not a reason to shut-in CBM on these lands and that this would be inconsistent with and the Board's obligation to promote conservation and economic, orderly and efficient development under the OGCA.²³ In effect, what CDP and EnCana are asking the Board to do is to impose an injunction on development on split-title lands in the absence of applying to court and satisfying the test for doing so. An injunction is a remedy that is available from the courts to parties who feel that their interests are being irreparably harmed and the courts have a well-established test for granting an injunction in the appropriate circumstances.²⁴ Apache submits that if CDP and EnCana wish to obtain an injunction preventing production, they should apply to the courts for it. If they are successful, the parties will then have to address this situation. If not, the courts will have determined that CDP and EnCana have not satisfied the necessary requirements. In the meantime, the Board can continue to exercise its jurisdiction to promote conservation and efficient production.

The Choice Between the “Regulatory” and “Legal” Approaches

31. Between the “regulatory” and “legal” approaches, Apache is attracted to the “regulatory” approach. Apache believes that there is an argument that this approach is supportable at law, the approach is potentially simple – depending on how it is put in place – and it could lead to regulatory certainty. Notwithstanding this, Apache believes that the Board should adopt the “legal” entitlement approach. Apache has come to this conclusion because Apache believes that at its core, the entitlement to produce – however acquired - has a significant legal component and, therefore, entitlement disputes will also likely have a significant legal component.²⁵ Further, as indicated above, Apache believes that the Board not only can but must consider issues of entitlement if these arise. Accordingly, while Apache believes that the Board has some

²³ s. 4.

²⁴ *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

²⁵ *Goodwell*, para. 93.

degree of flexibility in determining what is necessary for it to be “satisfied”, Apache is concerned that if the Board simply ignores an entitlement dispute and proceeds on the basis of “regulatory” entitlement this is unlikely to satisfy the obligation to consider entitlement or ownership.

32. As set out below, Apache does not believe that adopting the legal approach means that the Board needs to undertake a full inquiry every time that an entitlement dispute arises. To the contrary, if a dispute involves generally the same facts and issues as one the Board has previously addressed, Apache believes that the Board would be legally justified in applying a lower standard or different process to be “satisfied” in those situations. Accordingly, the “legal” approach can evolve as the Board gains experience with different situations. However, since this is the first time that the Board has had an opportunity to consider the broader issue of entitlement to produce CBM on split-title lands and the specific rights before it, Apache submits that the Board should apply a “legal entitlement” approach in determining this matter.

Application of The Legal Entitlement Approach

33. Apache respectfully submits that there are three issues that the Board needs to address under this approach:

- i) The meaning of “satisfied” under section 16(2) of the OGCA;
- ii) The legal framework to apply to the question of entitlement; and
- iii) The application of the facts to the legal framework.

The Meaning of “Satisfied”

34. Apache submits that the meaning of “satisfied” is a much lower threshold than that which is proposed by CDP. For instance, in *R. v. Hurrell*, the Ontario Court of Appeal found that where an inferior court had to be “satisfied” on a warrant application, it had to import the requirements that the inferior court be “satisfied on evidence within the application and evidence is only evidence if it is under oath”.²⁶ Therefore, although evidence was required, it did not need to rise to a level of certainty, as is suggested by CDP. Similarly, in a case where the Ontario

²⁶ *R. v. Hurrell* (2002), 216 D.L.R. (4th) (Ont. C.A.) 160, para. 24.

High Court of Justice faced the issue of what the phrase “is satisfied” meant for an administrative board, it was held that it should be equated to mean “of the opinion”.²⁷

35. Consequently, Apache submits that the Board may be “satisfied” where it is presented with adequate evidence to form an opinion on a matter. This is consistent with the ordinary Canadian dictionary meaning of “satisfy”. For instance, the *Canadian Oxford Dictionary* defines “satisfy” as to “provide with adequate information or proof, convince.”²⁸

36. Apache continues to rely on its submission on this issue in its Reply Submission.²⁹

The Legal Framework

37. As the Board heard, the two leading cases dealing with legal entitlement in Canada are *Borys*³⁰ and *Anderson*.³¹ Accordingly, these should be part of the Board’s consideration. Apache submits that the Board should also consider the US Supreme Court decision in *Amoco v. Southern Ute* which expressly addresses the entitlement to CBM on split-title lands.³² While US decisions are not binding on Canadian courts, they can be persuasive when factually analogous.³³ Finally, Apache submits that the Board should have regard to *Crow’s Nest Pass Coal Company v. R.*³⁴

38. Each of these decisions is addressed in more detail below. Apache will then address Professor Lucas’ theory of outstroke.

a) *Borys v. Canadian Pacific Railway*

39. *Borys* involved a farmer, Mr. Borys, who owned land that had originally been the subject of a grant from the CPR subject to a petroleum reservation. When Imperial Oil started to drill on his lands, Mr. Borys commenced an action to determine what was included in the petroleum

²⁷ *Re Hayward*, 1934 CarswellOnt 155, p. 2

²⁸ *Canadian Oxford Dictionary*, 2nd ed., s.v. “satisfy”.

²⁹ Para. 10-20.

³⁰ *Borys v. Canadian Pacific Railway*, [1953] A.C. 217 (P.C.) (“*Borys*”)

³¹ *Anderson v. Amoco Canada Oil & Gas*, 2004 SCC 49 (“*Anderson*”).

³² *Amoco Production Co. v. Southern Ute Indian Tribe* (98-830) 526 U.S. 865 (1999) 151 F.3d 1251(U.S.S.C.) (“*Amoco v. Southern Ute*”).

³³ *Scurry Rainbow-Oil Ltd. v. Galloway Estate* (1994), 23 Alta. L.R. (3d) 193, para. 14.

³⁴ *Crow’s Nest Pass Coal Company v. R.*, [1961] S.C.R. 750 (“*Crow’s Nest Pass*”).

reservation. Mr. Borys argued that natural gas was not included in the reservation, including natural gas in solution. Imperial counterclaimed and argued that the reservation of petroleum included natural gas.

40. *Borys* ultimately went to the Judicial Committee of the Privy Council which, at the time, was the highest court in the Canadian judicial system. The Privy Council held that in determining the meaning of petroleum, the vernacular meaning at the time of the original transfer should be used, if one could be discerned.³⁵ The Privy Council also addressed the question of what subset of people the vernacular meaning is to be derived from. It accepted that the meaning of petroleum is the meaning that it had at the time for non-scientific persons concerned with its use, such as landowners, businessmen or engineers³⁶ or, with apparently no disrespect intended, the “uninstructed mind.”³⁷

41. Although a court may consider a landowner, businessman, or engineer’s opinion of the vernacular meaning of the terms, a geologist with wide experience in the oil and gas industry is considered an “expert” whose opinion would be not given any weight.³⁸ In rejecting this evidence, the Privy Council stated as follows:

Dr. Nauss however is expressing the opinion of the expert, whereas, as the appellant insists and their Lordships agree, it is in the vernacular use that the true solution is to be found. The chemist may make a distinction between different contents of the liquid substance and resolve it into its constituent parts but such treatment is purely scientific and in no sense based on the view of the ordinary man.

The finding of the learned trial judge – that gas in solution is not included in a reservation of petroleum in the earth – depends on Dr. Nauss’ evidence and not upon vernacular usage.³⁹

42. Finally, the opinion of the parties to the grant would not be considered as part of this determination.⁴⁰

³⁵ *Borys*, para. 19.

³⁶ *Ibid.*

³⁷ *Id.*, para. 27.

³⁸ *Id.*, paras. 29-31.

³⁹ *Id.*, paras. 30-31.

⁴⁰ *Id.*, para. 33.

43. The Privy Council did not have evidence before it with respect to the meaning of the term petroleum at the time of the original grant. As a result, it had to decide, purely “as a matter of construction”, what petroleum meant in relation to the substance in the ground.⁴¹ Ultimately, the Privy Council concluded that the reservation of petroleum included all liquid hydrocarbons in the ground, including solution gas.⁴²

b) *Anderson v. Amoco*

44. *Anderson* involved the clarification of a minor, but economically significant, point in *Borys*. The dispute centred on establishing the appropriate time to determine what phase a hydrocarbon was in while underground and therefore to whom it belonged. Mr. Anderson argued that the appropriate time to determine ownership is the time of development when the substance first enters the well bore. In contrast, Amoco argued that ownership is properly determined at the time of the reservation, not the time of development. The Supreme Court of Canada, relying on *Borys*, agreed with Amoco.⁴³

45. In arriving at its conclusion, the Court expressed several facts as of the time of the reservation that were either the subject of judicial determination or agreement of the parties:

- i) For connecting the west coast with the rest of Canada, the CPR was paid in money and land by the Canadian government;
- ii) Canada transferred not only the surface rights to the CPR but the entire legal interest in the land. This included all subsurface resources;
- iii) At the time, the CPR saw the main value of the land as the ability it gave them to encourage settlement near the railway. Settlement was viewed as key to the economic success of the railroad and the CPR entered in to agreements with settlers for the transfer of title to this land;
- iv) The first of these contracts transferred the CPR’s entire interest in the land to the settlers;

⁴¹ *Id.*, para. 32.

⁴² *Ibid.*

- v) In approximately 1904, the CPR began to recognize the underground value of the land they owned. As a result, they began to exclude the valuable subsurface minerals from the title when they sold land;
- vi) Initially the CPR reserved only coal from these transfers but, by 1912, they were reserving rights to all mines and minerals.⁴⁴

46. Based on the *Borys* and *Anderson* decisions, the following summarizes the relevant legal principles for determining entitlement:

- (i) To determine the legal entitlement to a particular resource, it is necessary to ascertain the vernacular meaning of the term used in the reservation at the time that it was originally reserved;
- (ii) The vernacular meaning may be ascertained by adducing evidence of what the terms to landowners, businessmen, or engineers in the relevant time period;
- (iii) If the vernacular meaning included a particular phase or state of the resource, that phase or state is to be determined while the resource is *in situ* and prior to any development; and
- (iv) In situations where different parties own the resources, it is permissible to interfere with or cause harm to the rights of the other substance owner during production of one's own resource, as long as ordinary production methods are used.

c) *Amoco v. Southern Ute*

47. As indicated, *Amoco v. Southern Ute* is a US Supreme Court decision addressing the ownership of CBM in a split-title situation. While not binding on Canadian courts, factually analogous American cases are persuasive when not in conflict with authoritative Canadian cases.⁴⁵

48. Apache submits that *Amoco v. Southern Ute* is factually analogous to the facts before the Board (and the facts that would be before a court if an entitlement dispute went to court):

⁴³ *Anderson*, para. 28.

⁴⁴ *Anderson*, paras. 3-5.

⁴⁵ *Scurry Rainbow-Oil Ltd. v. Galloway Estate* (1992), 23 Alta.L.R. (3d), para. 14.

- i) both *Amoco v. Southern Ute* and the disputes before the Board involve disputes over the ownership of CBM;
- ii) both *Amoco v. Southern Ute* and the disputes before the Board arise as a result of similar, if not identical, wording. The dispute in *Amoco v. Southern Ute* concerned reservations of “coal”.⁴⁶ The entitlement disputes before the Board arise out of fee simple grants with reservations of “coal”, “coal and petroleum” or “coal, petroleum and valuable stone”⁴⁷ and the sale of “coal” while reserving “all mines and minerals.”⁴⁸
- iii) the same time period, the early 1900’s, that was in issue in *Amoco v. Southern Ute* is in issue for a substantial number of the grants before the Board; and
- iv) both *Amoco v. Southern Ute* and the issue before the Board involve the characteristics of natural gas and coal.

49. Further, far from being in conflict with authoritative Canadian cases, the *Amoco v. Southern Ute* and *Borys* decisions are remarkably similar in approach. Just as the Privy Council decided regarding the meaning of “petroleum” in *Borys*, the US Supreme Court concluded that the meaning of “coal” was to be determined by the “ordinary and popular” meaning of the word, or the “most natural” meaning, at the time of the grant or reservation.⁴⁹ The US Supreme Court also determined that “[w]hile the modern science of coal provides a useful back-drop for our discussion and is consistent with our ultimate disposition, it does not address the questions presented to us.”⁵⁰ As indicated by the Court:

The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether congress so regarded it in 1909 and 1910.⁵¹

⁴⁶ *Amoco v. Southern Ute*, p. 1.

⁴⁷ EnCana’s Submission, para. 8.

⁴⁸ Ex 20-025; Ex. 017-005, para. 23 (“Apache’s Reply Submission”).

⁴⁹ *Amoco v. Southern Ute*, pp. 7, 14.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

50. In the result, the US Supreme Court determined that the common conception of coal when the grants were made in 1909 and 1910 was “the solid rock substance that was the [United States’] primary energy source” and did not include CBM.⁵²

51. In support of its conclusion, the US Supreme Court noted that at the time of the grants, most dictionaries defined coal as a solid fuel source. In contrast, dictionaries of the day defined CBM, then called “marsh gas”, “methane” or “fire-damp”, as a gas “contained in” or “given off by” coal, and not as coal itself.⁵³

52. Further, the Court found that Congress viewed CBM not as part of the important solid fuel resource it was attempting to conserve and manage, but rather as a dangerous waste product which escaped from coal as the coal was mined. It noted that natural gas – even from conventional reservoirs – was not yet an important energy resource and highlighted that, “Congress was well aware by 1909 that the natural gas found in coal formations was released during coal mining and posed a serious threat to mine safety”. The Court pointed to the fact that Congress had enacted a federal mine coal safety law in 1891 with ventilation standards to dilute noxious or poisonous gases. Further, the fact that coal companies at that time vented the gas, instead of preserving it, further convinced the Court that CBM was viewed only as a dangerous waste product (also noting that the natural escape of CBM from the coal distinguished CBM from other “volatile matter” which can be extracted from the coal).⁵⁴

53. The Court acknowledged evidence of limited and sporadic exploitation of CBM as a fuel prior to 1909. However, the Court held that, to the extent that Congress was aware of this exploitation, it would have viewed CBM as natural gas, a substance that it chose not to reserve, and not coal. The Court noted that the fact that Congress subsequently reserved gas rights in explicit terms only further supported its conclusion.⁵⁵

54. The Court also addressed the argument that splitting the ownership of CBM from the coal would be impractical because it would make mining the coal difficult. The Court’s response to

⁵² *Ibid.*

⁵³ *Id.*, pp. 7-8.

⁵⁴ *Amoco v. Southern Ute*, p. 10.

⁵⁵ *Id.*, pp. 8-12.

this argument was that it doubted Congress considered these problems, as it did not appear to have considered the possibility that CBM would one day be a profitable energy source developed on a large scale. However, with respect to any damage that might result to another commercially valuable estate in extracting the other, the Court held that the dispute could be resolved in the ordinary course of negotiation or adjudication but that this was a question of damage, not ownership. The Court further held that, even if it had found the CBM to be reserved as part of the coal, there would still be a split estate that would at least be as difficult to administer.⁵⁶

55. As indicated, on the basis of the above, the US Supreme Court concluded that the common conception of “coal” in the 1909 and 1910 time frame was the solid rock substance and would not have encompassed CBM.⁵⁷ Therefore, ownership and the right to produce CBM resided with the mineral rights holders, not the coal rights holders.

d) *Crow’s Nest Pass Coal Company v. R.*

56. Apache submits that the Supreme Court of Canada’s decision in *Crow’s Nest Pass Coal Company v. R.* also deserves consideration by the Board.

57. The Crow’s Nest Pass Coal Company was the successor in title to two large tracts of land in the Kootenays in British Columbia. These lands had been granted to the British Columbia Southern Railway Company in 1899 subject to a reservation of “any minerals, precious or base, (other than coal) which may be thereupon or thereunder.”⁵⁸

58. As successor in title, the Crow’s Nest Pass Coal Company argued that the reservation of minerals did not include petroleum or natural gas and therefore, it owned the petroleum and natural gas. Perhaps notsurprisingly, the Supreme Court of Canada rejected this argument and found that petroleum and natural gas were contained in the reservation of minerals.⁵⁹ However, of greater significance to the issue before the Board is the evidence that the Court relied on, and didn’t rely on, in forming this view.

⁵⁶ *Id.*, p. 13.

⁵⁷ *Id.*, pp. 7-8.

⁵⁸ *Crow’s Nest Pass*, para. 4.

⁵⁹ *Anderson v. Amoco*, para. 5.

59. Similar to the approach noted above, the Court reviewed dictionary definitions contemporaneous with the time of the grant to determine how conveyancers, landowners and commercial men would have understood the words in question.⁶⁰ Conversely, the Supreme Court of Canada rejected the evidence of three experts who gave evidence that the vernacular meaning of “minerals” did not include petroleum or natural gas at the time of the grants.⁶¹ As indicated by Davey, J.A., and adopted by the Supreme Court of Canada, the experts’ evidence “was largely argumentative and did not touch the question of how conveyances, landowners and commercial men would have understood the words.”⁶²

e) *The Issue of Outstroke*

60. The final issue that Apache wishes to address from a legal perspective is Professor Lucas’ comments concerning “outstroke”. As explained by Dean Percy, outstroke is not a concept of ownership. Rather, Dean Percy explains “outstroke” as follows:

I can best describe outstroke in a more conversational example. If I own mineral rights under your land and I own mineral rights under adjoining land, I can use the tunnels and operations under your land to remove minerals that I've obtained from beneath the adjacent land. So I can operate little trucks to remove the coal to which I have the right under my neighbor’s land and run them through tunnels in your land and to the surface of your land.⁶³

61. Outstroke concerns access, not ownership and Apache submits that there is no support for relying on the concept of outstroke to attempt to assert ownership to a particular strata and, in turn, to all substances within that strata.

Application to the Facts Before the Board

62. There are two primary sources of split-titles before the Board:

- i) grants from the CPR during the early 20th century with concurrent reservations initially of “coal” and subsequently of “coal and petroleum”, and “coal, petroleum and valuable stone”; and

⁶⁰ *Id.*, para. 24.

⁶¹ *Id.*, paras. 16-19.

⁶² *Id.*, para. 24.

⁶³ CBM Hearing Transcripts, 5T674, ll. 5-11.

- ii) the sale of “coal”, while retaining all mines and minerals, from Dome Petroleum and Hudson’s Bay Oil and Gas (“HBOG”) to TransAlta Utilities in 1982.⁶⁴

63. Based on *Borys, Anderson, Southern Ute* and *Crow’s Nest Pass*, Apache submits that the following indicia assist in establishing the vernacular meaning of coal in Alberta at each of the relevant times. Regarding the initial grants:

- i) As indicated in *Southern Ute*, at the beginning of the 1900’s, most dictionaries defined coal as the solid fuel resource, such as a “solid and more or less distinctly stratified mineral, varying color from dark-brown to black, brittle, combustible, and used as fuel, not fusible without decomposition and very insoluble.”⁶⁵
- 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;⁶⁶
- iii) These definitions are consistent with the use of “coal,” “marsh gas,” “methane,” and “fire-damp” in Western Canada during the same period. For instance in the facsimile of the 1913 edition of the *Western Canadian Dictionary and Phrase Book*, coal is described as being found in Alberta and in British Columbia. According to one authority, “British Columbia’s coal measures are sufficient to supply the world for centuries.” According to another authority, “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.”⁶⁷ This clearly refers to the solid fuel resource. Similarly, in *Canada’s Mineral Resources*, published in 1929, coal is again referred to as the primary fuel source that it was at that time. In the

⁶⁴ Ex. 20-025.

⁶⁵ *Amoco v. Southern Ute*, pp. 7-8. *Century Dictionary and Cyclopedia* (F106), p. 8; See also definitions from *American Dictionary of the English Language* (1889), *New English Dictionary on Historical Principles* (1893) and *Webster’s New International Dictionary of the English Language* (1916).

⁶⁶ *Amoco v. Southern Ute*, pp. 7-8.

⁶⁷ *Western Canadian Dictionary and Phrase Book*, facsimile of the 1913 ed., University of Alberta Press 1977.

discussion of the nature and origin of coal, coal and methane – or marsh gas – are clearly discussed as separate substances.⁶⁸

- iv) In the U.S., coal was the primary energy source at the turn of the century.⁶⁹ Similarly, coal was the primary source of energy in Alberta in the early 1900's. Coal was initially used in Alberta for supplying ranchers and incoming settlers with a combustible fuel source. It was subsequently used for powering locomotives;⁷⁰
- v) CBM did not have commercial value in Alberta in the early 1900's. Rather, consistent with its treatment in the U.S. at that time,⁷¹ CBM was a dangerous waste product which escaped from coal as coal was mined and which was the subject of regulation;⁷² and
- vi) Contrary to the evidence of “limited and sporadic exploitation” of CBM prior to 1909 in the US in *Amoco v. Southern Ute* (one example of wells being drilled into coalbeds in Pennsylvania), there is no evidence of any commercial exploitation of CBM in Alberta prior to or during the early 1900's. In fact, it was not until approximately 1912 that the CPR appears to have begun recognizing even the potential value of conventional natural gas and began to reserve “all mines and minerals” in some of their grants.⁷³

64. Based on the above, and the guidance from *Amoco v. Southern Ute*, Apache submits that the vernacular meaning of coal in the early 20th century in Alberta was the solid fuel resource that was the primary fuel source at the time. Given this, there is little, if any, evidence that suggests that the CPR intended to reserve CBM at the time of the original

⁶⁸ Moore, E.S., *Canada's Mineral Resources*, Irvin & Gordon, Limited (1929), pp. 161-162. [Apache Reply Submission Tab 10].

⁶⁹ *Amoco v. Southern Ute*, pp. 8-9.

⁷⁰ Christmas, L., *Alberta Miners-A Tribute*, Produced in Collaboration with the Alberta Chamber of Resources, Combria Publishing 1993, p. 9 (“*Alberta Miners Tribute*”) [Apache Reply Submission Tab 13]; Rasporich, A.W., *Western Canada Past and Present*, University of Calgary, McClelland and Stewart West, 1975, Chapter 6. [Apache Reply Submission Tab 14].

⁷¹ *Amoco v. Southern Ute*, pp. 9-10.

⁷² See EnCana's Submission, footnote 19.

grants and Apache submits that the Board should be satisfied that the natural gas rights holders are “entitled” to the CBM.

65. In terms of the transfers of coal from Dome and HBOG to TransAlta:

- i) The later dictionary definitions support the earlier definitions referenced in *Amoco v. Southern Ute* and above. For example, the *Gage Canadian Dictionary* published in 1983, contemporaneous with the sale of coal to TransAlta, defines coal as a “black or brownish-black combustible substance containing varying amounts of carbon, used as a natural fuel [...]”⁷⁴ The definition of coal in the *Canadian College Dictionary* is similar.⁷⁵
- ii) Conversely, the respective definitions of “fire-damp”, “methane” and “marsh gas” continue to support the conclusion in *Amoco v. Southern Ute* that these were understood to be separate substances;⁷⁶
- iii) 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;⁷⁷
- iv) In 1980, Calgary Power, which changed its name to TransAlta Utilities (“TAU”) in 1981, indicated 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

⁷³ *Anderson v. Amoco*, paras. 3-5.

⁷⁴ Apache Reply Submission Tab 13.

⁷⁵ Apache Reply Submission Tab 14.

⁷⁶ *Ibid.*

⁷⁷ *Alberta Miners-A Tribute*, p. 9. [Apache Reply Submission Tab 13].

instead of relying on natural gas it had proceeded to “acquire and dedicate coal reserves for future power generation”,⁷⁸

- v) 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;⁷⁹
- vi) 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.”⁸⁰
- vii) By the 1970’s, it was apparent that CBM could be a significant energy resource,⁸¹ and
- viii) The only assets that Dome was free to transfer to TAU were those that were not financially encumbered (i.e., the non-petroleum and natural gas assets).

66. Again, based on the above, Apache submits that the vernacular meaning of coal in the early 1980’s continued to be the solid combustible fuel it was in the early 1900’s, albeit that by this time coal was not being used to power locomotives but was primarily being used for electrical generation. Apache further submits that there is nothing in the evidence that suggests that TAU intended to acquire anything other than coal to use for electricity generation or that Dome or HBOG intended to dispose of anything other than “coal” for this purpose. On the basis of this evidence, and the legal framework set out above, Apache submits that the Board should

⁷⁸ *Calgary Power Annual Report 1980*, p. 1. [Apache Reply Submission Tab 15]

⁷⁹ See section on planning. [Apache Reply Submission Tab 16]

⁸⁰ *TAU Annual Report 1982*, Report to Shareholders. [Apache Reply Submission Tab 17]

⁸¹ *Amoco v. Southern Ute*, p.4.

be satisfied that the ownership of CBM was not transferred with the coal in these latter transactions and that it continues to reside with the mines and minerals holder.

SHOULD THE BOARD PUT IN PLACE MEASURES PENDING THE ULTIMATE DETERMINATION OF LEGAL OWNERSHIP?

67. EnCana put forward several suggestions that it submitted could facilitate the development of CBM resources where there are disputes over the legal entitlement of CBM pending legal resolution. Apache is not opposed to reasonable measures being put in place pending final court determinations of legal ownership. However, Apache submits that there were numerous concerns identified with each of EnCana's proposals and, in general, Apache submits that the evidence failed to establish that the benefits of these measures will outweigh their costs and impacts on production.

68. In respect of vertical pooling,⁸² there are a number of problems. First, there was evidence before the Board suggesting that, with multiple gas seams (as many as eighteen),⁸³ it would be impractical to undertake separate metering once a vertical pooling order was in place because of the difficulty distinguishing which formation gas was producing from.⁸⁴ Although it might be possible to separate two zones and separately meter them, this adds complexity, and therefore expense to the cost of production, and would affect the flow rates by adding backpressure on the wells.⁸⁵ Second, there is the problem of undertaking completions in different types of zones. For instance, Devon put forth evidence that it utilized high rate nitrogen "fracs" to stimulate coal zones and carbon dioxide with proppant sand to enhance the reservoir in sand formations in the Edmonton Sands. As the two types of completions are quite different, it would significantly add to costs to have more than one completion on a single wellbore.⁸⁶

69. Apache submits that the suggestion to allocate production on the basis of control wells⁸⁷ also presents problems. Many of the sands and coals are difficult to map, even in close proximity. Although a control well may provide a gross idea of an area, the discontinuous nature

⁸² See EnCana's Submission, para. 81.

⁸³ CBM Hearing Transcripts, 3T437, ll. 23-24.

⁸⁴ *Id.*, 1T71, ll. 17-24.

⁸⁵ *Id.*, 1T127, ll.2-22; 3T437, 1.19 – 3T438, 1.8; 3T505, 1. 23 – 3T506, 1.10..

⁸⁶ *Id.*, 1T73, ll. 7-15.

of coal seams means that a control well will only provide a single snapshot in time in one particular area.⁸⁸ Therefore, Apache submits that the use of a control well would base the allocation too strongly on a single well.⁸⁹ To put in additional controls wells would mean going beyond the requirements of the existing regulations and would also negatively impact the economics of the project.⁹⁰

70. Apache's main concern with a technical committee is that it would not address the fact that each well is unique and must be treated on an individual basis.⁹¹ Also, there is also uncertainty as to what the technical committee would do, who would be on it, and how long it would take to make decisions.⁹²

71. In terms of the possibility of paying revenues into the Provincial Treasurer,⁹³ all of the natural gas rights holders indicated that they would not proceed with development under such a requirement.⁹⁴ This would not provide a return on the investment. Consequently, EnCana agreed that this arrangement would fail to meet its intended purpose.⁹⁵ At the very least, introduction of such a measure would make other alternatives more attractive and make it more likely that they would go forward prior to CBM production.⁹⁶

72. With respect to the possibility of reducing drilling spacing units,⁹⁷ Apache believes this would have marginal impact on production. For example, for Centrica, it would have no impact on their development plans.⁹⁸ Similarly, in Devon's development program for the area, it would only allow five of its 165 wells to be drilled.⁹⁹ Other potential adverse effects of this approach

⁸⁷ See EnCana's Submission, para. 83.

⁸⁸ *Id.*, 3T438, ll. 9-5; 3T506, ll. 15-22.

⁸⁹ *Id.*, 1T127, l. 20 – 1T128, l. 2.

⁹⁰ *Id.*, 3T428, ll. 22-25.

⁹¹ *Id.*, 1T128, ll. 7-10.

⁹² *Id.*, 3T439, ll. 4-15; 3T506, l. 23 – 3T507, l. 5.

⁹³ See EnCana's Submission, para. 80.

⁹⁴ *Id.*, 1T74, l. 24 – 1T75, l. 2; 3T507, ll. 6-17; 3T524, ll. 5-16; 4T565, ll. 3-12.

⁹⁵ *Id.*, 7T1054, ll. 5-9.

⁹⁶ *Id.*, 3T535, ll. 16-23.

⁹⁷ See EnCana's Submission, paras. 85-88.

⁹⁸ *Id.*, 4T565, ll. 13-16.

⁹⁹ *Id.*, 1T51, l. 19 – 1T52, l. 2.

include: (i) a higher regulatory burden for the Board;¹⁰⁰ (ii) decreasing the flexibility that a mineral rights owner would have in locating wells within a section (e.g., in respect of houses or roads) resulting in greater surface conflicts;¹⁰¹ (iii) increasing offset obligations by a factor of four;¹⁰² and (iv) greater drainage issues.¹⁰³

73. Notwithstanding the above, Apache is prepared to consider reasonable measures so long as the ultimate measures are economical and practical. Apache is also prepared to participate in attempting to identify these measures. However, Apache submits that development should not remain suspended while such a process is in place.

74. If the Board is satisfied that ownership or entitlement to CBM resides with the natural gas rights holders, Apache believes that further suspension of activity on split-title lands would be inconsistent with the conservation and efficient development of these resources. As indicated above, if CDP and EnCana are not content with the Board's order in this matter they have the opportunity to go to court and seek an injunction if they feel they are being irreparably harmed. Conversely, if the Board is not satisfied that the natural gas rights holders "own" or are entitled to the CBM, the applications in question will not be granted and this issue does not arise.

HOW THE BOARD SHOULD DEAL WITH ENTITLEMENT DISPUTES IN THE FUTURE

75. As set out above, Apache believes that the Board should adopt a "legal" entitlement approach to the resolution of the issues before the Board and future entitlement issues. Apache believes that this approach best reflects the nature of entitlement issues and is most likely to withstand the scrutiny of an appeal.

76. However, Apache does not believe that the legal entitlement approach means that the Board need to conduct a fullscale inquiry every time an entitlement dispute arises. To the contrary, Apache submits that the Board would be legally entitled to narrow its approach if it were confronted with similar entitlement disputes to those which it had previously addressed. In

¹⁰⁰ *Id.*, 1T52, ll. 10-18

¹⁰¹ *Id.*, 1T52, l. 24 – 1T53, l. 2; 3T508, ll. 7-10; 3T508, l. 17 – 3T509, l. 2.

¹⁰² *Id.*, 1T53, ll. 15-17; 3T439, ll. 16-22; 3T509, ll. 6-14; 3T524, ll. 17-24.

¹⁰³ *Id.*, 1T54, ll. 12-14.

this instance, the Board may determine that it is only interested in hearing any new facts or arguments (such as judicial developments) that were not available when the Board previously considered the matter in question.

RELIEF SOUGHT

77. Apache seeks the following relief:

- i) 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.

All of which is respectfully submitted this 15th day of November 2006.

Original Signed By:

A.W. (Sandy) Carpenter
Counsel for Apache Canada Ltd.