CODE HUNTER
BARRISTERS

Christian J. Popowich
Direct: (403) 716-2378
christian popowich@codehunterllp com

Assistant: Karen Wheaton
Direct: (403) 716-2379
karen wheaton@codehunterllp com

Our File: 10451 000 CJP

April 28, 2005

VIA FAX 297.7336

Alberta Energy & Utilities Board
640 – 5 Avenue S.W.
Calgary, Alberta
T2P 3G4

Attention: Carla Giesbrecht

Dear Madam:

Re: EUB Applications No. 1379726, et al
Cagegory and Type: B140
Application for CBM Well Licences – Wimborne Field

This letter is in response to the submissions of Devon made 19 April 2005 and is necessary to clarify the issues raised by its application.

A. Devon's Submission is an Admission of the Board's Jurisdiction to Determine Entitlement

Devon states, "The Board...is not entitled to allocate property rights as among Devon, Luscar and EnCana"[emphasis added], but that both misstates the issue and ignores that Devon's submission in its effect admits the Board's jurisdiction

The Board is empowered and obliged to determine entitlement by the *Oil and Gas Conservation Act*, which provides that "no person shall apply for or hold a licence for a well ....unless that person ....is entitled to the right to produce ...or the right to drill or operate the well...", consistent with the *Act*'s stated purpose of affording each owner its share of production. [ss.16(1), 4]

The issue for the Board is entitlement and ownership – which may or may not involve a determination of property rights, but which is not an "allocation" (i.e. assignment) of private property rights as Devon states.

Without the jurisdiction to determine entitlement and ownership, the Board would not be able to decide whether Devon is entitled to the licence, and the matter would be ended By asserting that it need only and does have a *prima facie* "entitlement" and thereby satisfies s 16, Devon in effect admits the Board's jurisdiction to determine entitlement

Devon's suggestion that entitlement is established merely on a *prima facie* assertion and that the Board is not "required" or "entitled" to allocate property rights simply begs the question. If Devon says something is so, that does not make it so: the Board needs consider whether Devon has an entitlement, *prima facie* or otherwise.

B. EnCana Does not Seek an "Open-Ended Deferral"

Devon states, "it would be improper for the Board to decline the exercise of statutory authority conferred on it by acceding to the open ended deferral urged by Luscar and EnCana".

EnCana does not seek an "open-ended deferral", but a determination of Devon's entitlement to produce CBM And insofar as Devon is suggesting that such a decision is not final because appeal to the courts may be made, Devon does not show an "open-ended deferral"; it simply notes the rules of law applicable to all disputes and the time inherent in appeals.

C. EnCana Does not Say CBM is not a Natural Gas, Only That it is not "Natural Gas" Within the Grants Here

Devon states, "EnCana contends that 'CBM is not natural gas'" and suggests "the resulting implication is that CBM must, therefore, be coal".

EnCana suggests no such implication, submitting that whether "natural gas" in a grant of oil and gas includes CBM depends on the intention of the parties as recorded in the particular document

Here, the grant of natural gas by which Devon asserts entitlement does not include CBM – which Devon apparently recognizes, as it seeks a sweet coal bed methane well, not a natural gas well.

CBM is not always coal, as Luscar apparently suggests; CBM will be "coal" within the terms of the grant if that is what the parties intended. Here, the parties by the Leases and Transfer intended that "coal" would include and reserve to its owner the CBM.

D. Devon Ignores the Applicable Canadian Jurisprudence

Devon ignores the basic principles of interpretation of oil and gas grants, as established in *Borys v. C.P.R. Co.* The substances granted are determined by considering the vernacular meaning of the words at the time of the grant

Devon also ignores *Anderson v. Amoco Oil and Gas*. *Anderson* established that the nature of the substances transferred by contract is determined at initial pool conditions, not at the time of development

As the grants at issue make no express mention of CBM, Devon as applicant must prove its "right to produce natural gas entitles it to all natural gas" as of the relevant time

Devon, however, makes no reference to any such proof (e g. that CBM was "natural gas" in 1962). And Devon dismisses EnCana's submissions as "musings" or "speculative conclusions", notwithstanding EnCana's many references to case authorities, scholarly writings, legislation, and EUB considerations

Absent proof from Devon as to the nature of the substances at the time of grant, EnCana's submissions and authorities on the contemporaneous vernacular intent are incontroverted and ought to be accepted.

Devon's silence on the point suggests its case cannot be made out on the principles of *Borys* and *Anderson*.

E. EnCana Does Dispute Devon's Entitlement to the Licences Sought, *Prima Facie* or Otherwise

Devon states, "In response to our earlier submission that Devon had established a *prima facie* right to the natural gas and to the well licences sought, Luscar and EnCana did not dispute Devon's contentions"

EnCana certainly disputes Devon's contentions, both that a *prima facie* entitlement is enough and that the title documents establish Devon's entitlement to CBM.

The Board cannot issue a licence unless the applicant is entitled to it (as argued in EnCana's first submission at page 2). The applicable test is not a determination of *prima facie* entitlement, which is not found anywhere in the legislation, but s. 16 of the *Oil and Gas Conservation Act*

EnCana certainly disputes that Devon is entitled to the well licences sought – being for sweet coal bed methane (as argued in EnCana's first submission at pages 3 - 6).

F. Devon's Criticism that no Evidence of Intention to Reserve CBM was Adduced by EnCana is Without Merit

Intention is ascertained from the language used, considered in light of the surrounding circumstances and the object of the contract.

Evidence of commercial context differs from and is not extrinsic evidence of the intention of the parties Extrinsic evidence of intention is "parol evidence", which may not be used to add to or subtract from, vary or qualify the written contract [1]

Given that there is not one express mention of CBM in the grants at issue, and Devon references not a single authority to show CBM in 1962 was "natural gas", the grants cannot be so construed

If the Board requires technical and scientific evidence relevant to the commercial context – beyond that cited by EnCana in its earlier submission – it may hold an oral hearing

G. Devon Seeks to Reverse the Onus of Proof, and Invites Wasteful Litigation Rather than Consideration by a Specialized Board

Devon states its "rights and entitlements are subject only to those rights being disproved or rebutted".

Insofar as Devon suggests that its assertions without more are determinative (as, perhaps, for the purported reason that the Board cannot adjudge its entitlement), it begs the question as discussed above

Insofar as Devon suggests that EnCana must disprove the asserted entitlement of Devon, Devon ignores that, as lessee, it bears the onus to prove entitlement (see: *Freyberg*).

This is but another statement of Devon's same argument: it need only allege a right, and once it has done so it has a *prima facie* entitlement which paradoxically cannot be considered further by the Board.

Devon states, "Luscar and EnCana, should they wish to dispute the Board's decision to grant the well licences, ...may do so in a court having the jurisdiction to make a determination of ownership".

If EnCana is required to seek an injunction to prevent Devon from drilling, the onus of proof shifts to EnCana. The *Oil and Gas Conservation Act* obliges Devon to show entitlement; injunction proceedings would place the onus of proof on EnCana, in contrast

Forcing objectors to the courts -- which is the likely effect of approval of mere "*prima facie*" entitlements in the face of objections -- denies the objectors consideration of the issues by the Board in the light of its specialized knowledge.

Moreover, so as to avoid waste, which is a fundamental policy of the law, the applicant ought to quiet title before seeking the Board's approval Otherwise, whenever the courts enjoin

---

[1] *Bank of British Columbia v Turbo Resources* [1983] AJ No 873 (CA); *Gallen v. Allstate Grain Co* [1984] BCJ No 1621 (CA)

drilling or production, the costs of the application and of any exploration thereafter would be thrown away and the owner's estate likely wasted.

H. If Devon is in Default Under the Leases, it has no Ownership or Entitlement

Devon states, with respect to defaults under its leases, "it is not within the Board's proper jurisdiction to determine whether Devon is in default under its lease"

Devon has missed the point. If Devon does not hold a valid lease, Devon is not an owner and has no entitlement to the licence sought. The Board certainly must consider the issue.

As a lessee of particular zones is entitled to a well licence for those zones only, Devon may have a licence only for what it has a lease for – a matter of entitlement the Board needs and obviously does consider.

I. EnCana is not Required to Show "Prejudice"

Devon states EnCana has not "demonstrated any significant prejudice or that compensation will not be an adequate remedy for any loss that might be incurred by it".

This is not an injunction application, where the onus of prejudice or irreparable harm is on EnCana. EnCana is entitled to be heard if Devon's application will "directly and adversely affect [its] rights", which is surely the effect of Devon's capture of EnCana's CBM.

Unless Devon is prepared to post security for damage to EnCana, whether to the coals or adsorbed CBM, Devon can say neither that EnCana will not be prejudiced or that damages are adequate

J Devon's Rush for Approval Ignores the Public Interest

Devon states, "a decision of the Board to grant the proposed well licenses will also better facilitate the development of CBM properties in a timely manner, all of which is in the greater Alberta interest"

EnCana submits that there is no urgency to CBM development. It is in the public interest to take the time to definitively establish entitlements to develop the resource so that uncertainty and conflict amongst competing interests are minimized

Broad issues of public policy require not a rush to unopposed judgment as Devon seeks, but the maximization of recovery efficiencies, the minimization of extraction conflicts, and conservation and environmental concerns.

Would those concerns, and concerns of ultimate recovery of the resources *in toto*, not be in the broad public interest more than a rush to grant Devon's application?

By all accounts, this is a tremendous resource with immense value, for which EnCana suggests the public interest is best served by a full and fair hearing of the matter – not the sweeping away of the issues away with an invitation to litigation and its costs and likely waste.

Yours truly,

Christian J. Popowich

CJP/kgw

cc: Wayne Smith, EnCana

cc: Robert Donick, Luscar Ltd

cc: A L McLarty, Fraser Milner Casgrain LLP
VIA FAX 268.3100