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By Courier

The Alberta Energy and Utilities Board
Facilities Applications, Applications Branch
640 – 5th Avenue, S.W.
Calgary, Alberta T2P 3G4

Attention: Mr. J. Richard McKee, Board Counsel

Dear Sir:

Subject: Section 39 Review Request by EnCana Corporation on Devon Canada Corporation's Application Nos: 1380004, 1379743, 1379746, 1379737, 1379763, 1378730, 1383129 and 1379726
Our file no.: 507548-4

We are writing on behalf of Devon Canada Corporation ("Devon") in response to your letter of June 28, 2005 and to the request of EnCana Corporation ("EnCana"), made pursuant to section 39 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (the "ERC Act"). EnCana has sought a review of the Decision of the Alberta Energy and Utilities Board (the "AEUB" or the "Board") dated May 26, 2005, which granted to Devon licenses to drill wells for the production of natural gas, including coal bed methane ("CBM").

The basis on which EnCana has requested a review be undertaken by the Board is that the Board erred in law in determining that:

- Devon had satisfied the requirement of section 16 of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (the "O&GC Act"); and
- EnCana had not demonstrated a direct and adverse affect from the Board's decision.

Devon's response to these contentions are set out as follows with respect to each of the issues raised.

Discretionary Relief

1. The relief available under section 39 of the ERC Act is discretionary.
2. The Board has, over the years, and in section 46 of the AEUB *Rules of Practice* established a number of criteria to guide its consideration of such applications. These criteria are important in terms of ensuring that there is reasonable finality and certainty to the Board's decisions and orders. To the extent questions of law or jurisdiction may remain unresolved, to any particular party's satisfaction, a further opportunity for appeal exists, upon leave being obtained, to the Alberta Court of Appeal.
3. The substantive legal issue that EnCana had hoped and apparently still hopes to have the Board address is: "... whether 'natural gas' under the grants at issue includes coal bed methane". This, notwithstanding that EnCana's submissions throughout its objections and its review application, have acknowledged the need for and have argued that a judicial determination of this substantive legal issue is actually required.
4. The legal issue raised by EnCana, on which it now seeks a review, was an issue that was fully argued by EnCana in its objections initially filed with the Board and in respect of which the Board made the determination that Devon did satisfy the requirements of section 16 of the O&GC Act, by demonstrating that it had the right to produce natural gas. On that basis, the Board concluded that it was not necessary for it to determine the issue of mineral ownership of CBM for purposes of its Decision with respect to the Devon well licences.
5. Because the Board has concluded, for purposes of exercising the statutory authority granted to it under section 16(1) of the O&GC Act, that it was not necessary for the Board to address the CBM ownership question and that it is generally acknowledged that the issue will only be effectively resolved by a judicial determination, the appropriate exercise of discretion by the Board is to reject the request for review.

Error of Law

6. The EnCana request for a review fails to identify any reasonably arguable question of law.
7. The EnCana request for review fails to grasp that the task assigned to the Board by the legislation does not impose on the Board a duty to determine the rights claimed by interested parties in any particular manner.
8. The recent decision of the Alberta Court of Appeal in *Dene Tha First Nation v. Alberta (Energy and Utilities Board)* [2005] A.J. No. 158, 2005 ABCA 68 confirmed the Board, in the context of a well licence application, is not compelled to consider, in any particular fashion, rights claimed by parties before the Board. The Court also concluded that the assessment of the direct adverse effect associated with the right claimed reflects a factual finding and not a conclusion of law.
9. The specific legislative provision in respect of which EnCana asserts that the Board erred prescribes that: No person shall apply for or hold a licence for a well (a) for the recovery

of oil, gas or crude bitumen ... unless that person is a working interest participant and is entitled to the right to produce the oil, gas or crude bitumen.

10. Devon's submissions to the Board show that Devon was entitled to produce gas from the zones applied for, which is a proposition that has not been contested by EnCana. Also unchallenged by EnCana is the contention by Devon that CBM is "gas". That EnCana may see and may wish to assert a distinction in the gas to which Devon is entitled as not including gas that EnCana has characterized as CBM may be important to EnCana but it is not an issue nor is it a distinction recognized by the legislation and certainly not a distinction that the Board is obligated to determine for purposes of fulfilling its legislative mandate.
11. Section 16(1) of the O&GC Act makes no attempt to distinguish between the character or type of gas that might be included in the legislative concept. EnCana's request for a review argues, in that regard, that "not all gas is natural gas for purposes of leasehold entitlement". Whether accurate or not, the function here being exercised by the Board, quite apart from EnCana's objective, was not the characterization of a leasehold entitlement. Rather what was required was for the Board to address the legislative purpose and under the legislation, all gas is, indeed, gas.
12. Hence, for purposes of administering the specific legislative provision placed in issue, the evidence is clear and uncontradicted that Devon has the right to recover gas from the zones applied for.
13. In the result, there is nothing advanced in the EnCana review application that reasonably substantiates its assertion that the Board erred in determining that Devon had satisfied the requirement of section 16 of the O&GC Act. To the contrary, EnCana's review application fails to establish that the legislative requirement necessitates that any distinction be made, by the Board, as between "gas" and "CBM" or any other characterization of gas.

No direct and adverse affect

14. EnCana has failed to show any error of law respecting the Board's determination of no adverse effect.
15. EnCana asserts that a taking of EnCana's property has occurred which constitutes a direct and adverse effect on EnCana. This assertion hinges on the assumption of two additional points, neither of which has been established by EnCana. First, as discussed above, EnCana's review request does not establish the existence of a legislative requirement for the Board to make the distinction between gas and CBM that is a critical component of EnCana's argument. Second, EnCana's underlying assertion that it, rather than Devon, is entitled to the CBM is interesting and colourfully presented but in no sense represents a settled proposition. More significantly, EnCana acknowledges it is not an issue that the Board has the jurisdiction to settle.
16. All of this renders specious EnCana's underlying assertion that it has been directly and adversely affected by a taking of its property. This is particularly so given that EnCana's

- review application acknowledges these assertions are contingent on it first being accepted that EnCana owns the CBM.
17. Hence, the proposition asserted by EnCana is not established and as important represents a conclusion EnCana acknowledges is not open to the Board to determine even if it were to entertain the review requested.
 18. In the result, it cannot be reasonably concluded from the EnCana review application that “a substantial doubt exists as to the correctness of the Board’s decision”.
 19. For all of the above reasons, Devon submits the EnCana request for review is without merit and should be denied.

Related Issues

20. Although not particularly germane to the question of whether a review should be conducted by the Board, the EnCana review request raises a few additional points that warrant a response.
21. The fact an objection may be genuine and *bona fide* cannot result in any particular or higher standard being attached to that objection. The minimum the Board should expect of all representations made to it is that they should be genuine and *bona fide*.
22. The concept that any and every claimed legal objection should be allowed to frustrate the legislative intent, pending a judicial review, is without authority, would impose a logical impasse so as to practically preclude most of that which the Board is otherwise authorized to decide.
23. It is well accepted in Canadian legal culture that for parties that may have a claim but that do not have a *prime facie* entitlement to property, such as EnCana, there is an established judicial process available to them to allow their legal claims to be pursued. That, though, is not the purpose or the function of the regulatory process established by the O&GC Act nor was it the purpose of the decision in respect of which a review is sought.
24. EnCana suggests the inevitable result of the Board’s decision may be litigation pursued on every application. Whether that is so is not important because the reality recognized and acknowledged by EnCana, is that the determination whether “natural gas”, under the relevant instrument, includes CBM will require historical documents and expert testimony. As EnCana further emphasizes the question of who owns the resource depends on the intention of the parties to each grant to which there is no general answer. If EnCana is correct in this, the determination of entitlement to CBM will be unique to each individual case and instrument, regardless of how the Board or a Court may decide the Devon application.
25. EnCana suggests injunctive relief would be ineffective. It is not clear to Devon why this might be the case, given that it is production of CBM that appears to be of concern to

- EnCana and Devon expects the wells in issue, once drilled, will produce for many years into the future.
26. The suggestion by EnCana that the issuance of a licence might be wasteful or may result in drilling costs being thrown away or may not result in the resource being conserved and fully extracted at best represents self serving hyperbole. It should be clear that the art and genius of resource extraction does not rest uniquely with EnCana nor is conservation an issue to which EnCana has any particular claim. Conservation is a primary mandate of the Board and in the absence of evidence to the contrary, it must be assumed the decision made by the Board to grant the well licences to Devon should reflect the Board's conservation mandate. Finally, if EnCana's assertion that there is a risk that drilling costs may be lost, should prove to be the case, that is a risk that Devon has incurred and should not be a concern to EnCana.
27. EnCana in its current application repeats the contentions it has made throughout that Devon should be required to quiet title by obtaining a judicial determination as to the ownership of the CBM under the applicable instruments. That may assist EnCana in enhancing its commercial leverage with Devon, but it should be clear that EnCana has available to it the same opportunity to challenge, by way of judicial proceeding, Devon's entitlement to CBM under the applicable instruments but has so far elected not to do so.

All of which is respectfully submitted on behalf of Devon Canada Corporation,

Respectfully,

FRASER MILNER CASGRAIN LLP



A.L. McLarty

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cc: Mr. Christian J. Popowich
Code Hunter LLP