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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 40 Review Request by Luscar Ltd. ("Luscar")
on Devon Canada Corporation's Application No: 1395838
Our file no. 507548-4

This is to acknowledge and to respond to the opportunity provided in your letter of February 8, 2006, to comment on the review and variance request made by Luscar.

It is of concern to our client that it is being called upon by the Board to respond to issues that have been extensively addressed in previous written submissions and in an oral proceeding held by the Board on January 31, 2006. We appreciate that Luscar was required to make the application to preserve its rights. Given this circumstance we would suggest that the Board might consider, as an efficient manner of proceeding, deferring further processing of Luscar's application until a decision on those applications, where a similar decision is pending, has been made. It seems to us unlikely that the Board's consideration of several similarly-grounded applications would or should lead to potentially different results. A sequential approach to considering these applications could lead to more efficiency and consistency.

The Board, though, appears to have put its consideration of the Luscar application on a parallel track. Because the complaint made is as to the Board's decision it is obviously open to the Board to determine that it will not entertain a review on the grounds raised and to do so without inviting comments from parties that may have relied on that decision. When the Board invites third party comments it is necessarily assumed that the application has passed the Board's initial screening and that compels a response. We are at that position with respect to this Luscar application.

We believe the arguments that have previously been made on behalf of Devon with respect to substantially similar review and variance applications made by both Luscar and EnCana provide a full and complete response to the issues raised in this application by Luscar. We adopt and incorporate by reference all of those prior comments in this response.

In the event there is any lack of clarity in the positions advanced on behalf of Devon, the following is a summary of the more pertinent issues raised and Devon's position with respect to those issues:

1. Luscar asserts there is a very real likelihood that the courts will uphold the coal owner's entitlement to CBM.

Response:

This assertion demonstrates that Luscar has not been able to show an entitlement to CBM.

If Luscar is to be successful in its future claim it will be required to demonstrate that either:

- CBM is not natural gas; or
- If CBM is natural gas, that Luscar's claim to that part of the natural gas estate, characterized as CBM, has been reserved out of the natural gas estate granted to Devon as the P&NG rights holder.

At present there is no Canadian law that confirms or even implies that CBM is a substance other than natural gas. There is also no confirmation in Canadian jurisprudence that CBM has been reserved out of the estate granted to any natural gas rights holder and certainly not as to the rights held by Devon.

Hence, Luscar's confidence in how the future may unfold is not well-founded.

2. Luscar contends that the conventional natural gas owner does not hold undisputed legal title to CBM.

Response:

That is true. It can also be said to be true that the conventional natural gas owner does not hold undisputed legal title to green molecules, red molecules or any other inventive distinction that may be made with respect to the characterization of various components of the natural gas estate. The conventional natural gas owner does, though, hold undisputed legal title to natural gas. Unless and until it is demonstrated that CBM is not natural gas or that a portion of the gas estate has been legally reserved out of that estate, there is no foundation for Luscar's underlying assumption that CBM is a substance or an estate separate and distinct from the estate held by the conventional natural gas owner.

3. Luscar suggests that the onus is on Devon, as the applicant, to demonstrate its entitlement to produce CBM and that it has not done so.

Response:

Luscar is in error in its characterization of the requirement expected of a P&NG rights owner. CBM, as acknowledged by Luscar, is physically and chemically a gas. Luscar also acknowledges that there is no settled law establishing CBM as being legally anything other than a gas. Given these circumstances, unless and until it is established in fact or in law that CBM is a substance other than a gas or that the P&NG rights holder's natural gas estate does not include gas characterized as CBM, then the P&NG rights holder's obligation is to demonstrate that its entitlement is to produce gas. That coincidentally is also the requirement established by legislation. Devon has satisfied that requirement.

4. Luscar cites the Multi-Stakeholder Advisory Committee as being authority for the proposition that it is not clear who has ownership of CBM and that this is acknowledged as an open issue.

Response:

It is well known and acknowledged that claims and arguments have been advanced primarily on behalf of coal owners to suggest that CBM is an entitlement that attaches to the coal estate. It is also well known and acknowledged that the claim by the coal owners and the arguments advanced by them have not been the subject of any judicial determination in Canada. To that extent, Devon accepts that there exists an open issue.

Luscar is wrong, though, if it means to suggest by its argument that there exists a vacuum in respect of the ownership of gas produced from coal or that there is a shared ownership in CBM. Neither position is correct. To the contrary, the CBM is currently and presently owned. CBM is physically and legally a gas and as such belongs to the owner of the gas estate unless and until it is demonstrated that CBM is either not a gas or that the CBM in issue has been reserved out of the gas estate for the benefit of the coal owner. Neither proposition has been established by Luscar. Indeed, Luscar's very premise appears to be to have the Board rule on that contention in the hope that the Board's ruling will generate authority for the proposition Luscar asserts.

The Board, on the basis of the arguments and information previously tendered to it on other applications, concluded that the coal owner has not demonstrated that CBM is other than gas or that the coal owner is entitled to that part of the gas estate characterized as CBM. Coincidentally, the owner of the gas estate has demonstrated that it is entitled to produce natural gas. Hence, for now, there is only one party with the entitlement to produce and that is the party with the entitlement to produce natural gas.

5. Luscar has asserted that it is not within the discretion of the Board to issue the requested order in the absence of a definitive judicial determination as to ownership of CBM.

Response:

Luscar is again wrong and in respect of this proposition, on two counts:

- (i) The Board's statutory jurisdiction and authority is not limited or constrained by the absence of definitive judicial authority on any question. It is, moreover, a ludicrous proposition to suggest that lawful authority conferred by statute can be frustrated and rendered ineffective by an impasse created by the assertions of a party in respect of which it can be said that there is an absence of definitive judicial authority for the proposition asserted. No authority has been cited by Luscar for this proposition because there is none.
- (ii) Luscar's contention ignores that the Board has a very broad authority to make determinations of law as well as of fact in the proper exercise of the Board's statutory jurisdiction. The determination of entitlement pursuant to s. 16(1) of the *Oil and Gas Conservation Act*, for example, is an issue properly within the Board's authority to determine, collateral to the Board's right to grant a requested well licence or a holding preliminary to the issuance of a well licence.

The extent to which the Board may choose to investigate such collateral questions of law or of fact is wholly within the Board's discretion. If the Board believes that it would be worth its while to do so, it may elect to conduct a trial of an issue, in the same manner as such a trial might be conducted by a Court of Queen's Bench judge. The Board, though, is not obligated to do so and practically it would be difficult if not impossible for the Board to conduct such a trial with respect to every collateral issue raised with it. Indeed, the Board's only obligation is to make a determination and regardless of the effort devoted to making that determination, it is expected, in law, that the Board will decide the issue correctly, as may ultimately be determined by a court.

The Board, in such circumstances, will need to ask itself the question whether it has the time, the resources and the inclination to want to delve into collateral legal issues such as that raised by Luscar knowing that its decision on those issues is not and cannot be determinative of the substantive issue itself and can only be made in a collateral way for purposes of enabling the Board to exercise what is otherwise its proper jurisdiction.

6. Luscar asserts the potential for it to experience loss or prejudice if the Devon application is approved.

Response:

The loss and prejudice asserted by Luscar is, at best, speculative and contingent on the future unfolding in a way that might generate those contingencies, including the point assumed by Luscar that it will be successful in any action to quiet its claim of entitlement to CBM. The argument is, in that sense, wholly self substantiating. Whether Luscar's arguments have any actual merit will only be determined in the future and the law is quite capable of dealing with a party's legal rights that may arise in the context of such future contingencies.

7. Luscar requests, in the alternative, that the Board condition any approval so as to prohibit the co-mingling of CBM production with production from conventional natural gas zones.

Response:

The request is redundant and in any event without any reasonable merit.

Unless and until it is demonstrated by Luscar that CBM is a substance other than natural gas or that the gas characterized as CBM has been reserved out of the natural gas estate granted to Devon no basis exists for the Board to deny the application made by Devon. If no basis exists to deny the application made by Devon then *a fortiori* no basis exists for the Board to condition the Board's decision in the manner requested by Luscar. It is not and should not be the Board's task to provide for the simplification of or to assist with the quantification, or proof of any damage claim made by Luscar and particularly not on the basis of a speculative and contingent claim.

For all of the foregoing reasons it is submitted that Luscar is not a party directly and adversely affected by the Board's decision and is for that reason not entitled and does not qualify for a hearing pursuant to s. 40 of the *ERC Act*.

Yours truly,

FRASER MILNER CASGRAIN LLP

A.L. McLarty
ALM/aw

cc: Mr. Robert Donick, Corporate Counsel - Luscar Ltd.
Mr. William T. Corbett, Q.C. - Field LLP
Mr. Lorne Rollheiser - Devon Canada Corporation