

ALBERTA ENERGY AND UTILITIES BOARD

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

AND IN THE MATTER OF PROCEEDING NO. 1457147 RESPECTING A REVIEW HEARING IN CONNECTION WITH THE ISSUANCE OF CERTAIN WELL LICENCES IN THE CLIVE, EWING LAKE, STETTLER AND WIMBORNE FIELDS

(THE "PROCEEDING")

REBUTTAL ARGUMENT

**OF CARBON DEVELOPMENT PARTNERSHIP,
SUCCESSOR IN INTEREST TO PRAIRIE MINES AND ROYALTY LTD.,
(FORMERLY LUSCAR LTD.)**

January 4, 2007

1. This Rebuttal Argument is submitted in response to the Board's letter dated December 21, 2006. In this Rebuttal Argument, capitalized terms which are not defined herein have the same meanings as were ascribed to them in CDP's Final Argument, dated November 29, 2006.

2. In Paragraphs 4 and 13 of the Joint Reply Argument of ConocoPhillips Canada Resource Corp. ("ConocoPhillips"), Devon Canada Corporation ("Devon"), Fairborne Energy Ltd. ("Fairborne"), Quicksilver Resources Canada Inc. ("Quicksilver"), Canpar Holdings Ltd. and Centrica Canada Limited (the "Gas Producers"), the Gas Producers stridently allege that it is extremely unfair for CDP and EnCana Corporation (collectively referred to by the Gas Producers as the "Coal Owners") to attempt to impeach Mr. Mavor's credibility, without first putting the supposed inconsistency between his testimony and the Sequestration Patent (and Mr. Mavor's GRI Report, filed as Appendix A to CDP's Final Argument) to Mr. Mavor in cross-examination. In their Reply Arguments, each of Fairborne and Devon escalates this stridency, by alleging that it is highly improper for CDP to attempt to tender new "evidence" (Devon's and Fairborne's quotations, not CDP's) by filing the Sequestration Patent and the GRI Report without at least describing the evidence to the witness, to allow him to explain, as Devon and Fairborne put it, "the apparent contradiction".¹ ConocoPhillips and Quicksilver argue that these documents are inadmissible as new evidence at this point in the hearing. The tone of the allegations made by

¹ Again, Fairborne's language, Fairborne Reply Argument, para. 39

Fairborne and Devon continues with reference to “improper tactics”² and the need for protection of the witness against “ambush”.³

3. For the record, CDP takes umbrage at the imputation by the Gas Producers of impropriety or improper conduct by or on behalf of CDP before this Board.

Mavor’s Prior Written Materials are not New “Evidence”

4. Neither the Sequestration Report nor the GRI Report is new evidence. Mr. Mavor is the acknowledged author (at least in part) of the application for the Sequestration Patent.⁴ Certainly, as indicated in CDP’s Final Argument (at page 39, para. 93), he is listed as one of the inventors. Of greater importance is the fact that the Sequestration Patent is claimed to be his by Mr. Mavor himself. Appendix II to Mr. Mavor’s Report (Exhibit 18-001) includes a four page listing entitled “M.J. Mavor Publication List”. The first page of that list includes, under the heading “United States Patents”, the Sequestration Patent.

5. Devon⁵ and Fairborne⁶ have submitted that the GRI Report is not authored by Mr. Mavor. With respect, this is incorrect. In the Acknowledgements to the GRI Report (found at page v), Matthew J. Mavor, President of Tesseract Corporation, is identified as the author of Chapter 4 “*Coalbed Methane Reservoir Properties*” (which is the portion of the GRI Report filed by CDP as Appendix A to its Final Argument). As with the Sequestration Patent, Mr. Mavor himself listed this specific publication, with express reference to Chapter 4, as the first publication

² Devon Reply Argument para. 44; Fairborne Reply Argument, para. 40

³ Devon Reply Argument, para. 12; Fairborne Reply Argument, para. 39

⁴ Devon Reply Argument, para. 45; Fairborne Reply Argument, para. 36

⁵ Devon Reply Argument, para. 45

⁶ Fairborne Reply Argument, para. 41

referenced in his own listing of “M.J. Mavor Publication List” at the top of the final page of Appendix II to his Report.

6. Not only did Mr. Mavor explicitly claim authorship of both the Sequestration Patent and the GRI Report in his list of publications, he expressly used parts of the document of which the GRI Report forms part as credited reference material in his own Report (Exhibit 18-001). The reference for footnote number 22 (which footnote is found on page 8 of Mr. Mavor’s Report) is to the work done by Mr. Mavor and Saulsberry, J.L. as Chapter 5 in GRI Publication GRI-94/0397 entitled “Testing Coalbed Methane Wells”⁷ and referred to at page 22 of Mr. Mavor’s Report as “Coalbed Methane Well Testing”. This is the same publication in which Chapter 4 appears.

7. Mr. Corbett cross-examined Mr. Mavor on his list of publications. Mr. Corbett’s cross-examination appears at page 173 of the hearing Transcript. Having had his attention drawn to the list of publications, Mr. Mavor confirmed that it was complete and that it comprised, in part, the information upon which he based his opinions.

“Q. Am I correct in saying that, to the best of your ability, that [the publication list] sets forth a complete list of your publications, what you consider to be important aspects of your professional experience for the purpose of the evidence you’re giving to us here today?”

*A. MR. MAVOR: Well that list of publications generally are things that we document a lot of the work. So yes, it has much of the information I based my opinions on.”*⁸

8. Accordingly, the Sequestration Patent and the GRI Report have been incorporated by reference into the record and have been relied upon by Mr. Mavor himself. As such, they do not

⁷ Appendix A to CDP Final Argument, page xiii

⁸ T173, l. 24 - 174, l.6

constitute new evidence and are not inadmissible on that basis. As a consequence, CDP's Final Argument does not run afoul of Section 40(5) of the Board's Rules of Practice, as alleged by ConocoPhillips. As importantly, while it would not be unfair to Mr. Mavor for the Board to now rely upon Chapter 4 (the GRI Report), it would be unfair to allow Mr. Mavor to selectively reference one portion of his own published work (Chapter 5), which he has acknowledged forms information upon which he based his opinions, while excluding from the record another portion of the same work.

The "Rule" in *Browne v. Dunn*

9. As the sole basis for their allegations of improper conduct on the part of CDP, Devon and Fairborne have made reference to the:

*"well known and obviously fundamental rule of fairness in any administrative or judicial proceeding that if a party intends to impeach the credibility of a witness, the evidence by which the witness is to be impeached must at least be described to the witness in cross-examination so that the witness may have an opportunity to explain the apparent contradiction."*⁹

The footnote (number 56) simply states: "This rule is often referred to as the 'Rule in *Browne v. Dunn*'." Each of Devon and Fairborne has embedded several implications within this short paragraph. First, that there is a "rule" in *Browne v. Dunn*; secondly, that it is an absolute rule, applicable in all cases and without exception; and, thirdly, that it is equally applicable to all administrative proceedings, such as the Proceeding before the Board, as well as both civil and criminal cases before the courts. Further, Devon and Fairborne give no explanation as to what constitutes "notice" of intention to use prior inconsistent statements. Lastly, Devon and

⁹ Devon Reply Argument, para. 42; Fairborne Reply Argument, para. 38

Fairborne suggest that the only fair and proper solution to the present dilemma, presented by CDP's "egregious" conduct is to ignore the "improperly tendered evidence" and all submissions related to the Sequestration Patent and the GRI Report, while ConocoPhillips and Quicksilver seek a Board declaration that the Sequestration Patent and the GRI Report are both inadmissible.

10. A review of relevant caselaw, texts and articles reveals that none of the inferences that Devon and Fairborne wish the Board to draw from their statement of the "Rule in *Browne v. Dunn*" withstands scrutiny.

Is there a single "Rule" in *Browne v. Dunn* and is the "Rule" absolute?

11. This question was asked and answered in the negative in the case of *Stewart v. Canadian Broadcasting Corp.*¹⁰ ("*Stewart*") (Appendix A). In that case, after a lengthy analysis of the *Brown v. Dunn* case, Macdonald, J., stated:

*"It is now common to refer to "the rule in Browne v. Dunn" although it seems to me that the case does not establish one rule. It establishes principles."*¹¹

12. Having identified differences between the approaches and scope of the principles enunciated by the law Lords in *Browne v. Dunn*, Macdonald, J., concluded:

"It will therefore be seen that each of the three law Lords accepted that the obligation to call a witness's attention in cross-examination to the means of impeaching his or her credibility may be subject to some qualification, depending upon the circumstances of the particular case. There was no difference of opinion in respect of the circumstances before

¹⁰ *Stewart v. Canadian Broadcasting Association et al* (1997) 150 D.L.R. (4th) 24

¹¹ *Stewart, ibid*, p. 175

*the House. There was also no difference of opinion as to the discretionary nature of these principles.*¹² (emphasis added)

13. Macdonald, J., made reference to *Palmer v. The Queen* (a 1980 Supreme Court of Canada case), quoting McIntyre, J. (B.C.C.A.):

*“In my opinion, the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact, ... In the present case, Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen that his credit would be attacked if he testified to his innocence. In any event, this was made plain when he was cross examined.”*¹³ (emphasis added)

14. The “Rule” in *Browne v. Dunn* does not require that the witness be asked specific questions on the particular prior inconsistent documents, merely that sufficient notice be provided that a witness’s credibility may be impugned and even this notice may not be necessary in circumstances in which it should have been obvious to the witness that his credibility would be impugned. Macdonald, J., in rejecting a claim for protection pursuant to *Browne v. Dunn*, stated:

“Civil actions result in much greater disclosure of the factual issues than takes place in a criminal prosecution. These disclosure opportunities are relevant circumstances in applying the ratio of Palmer (supra) or the provisions of ss. 20 and 21 OEA to any civil action. The judicial discretion respecting the application of these principles means that, from the vantage point of any party to a civil action, including Mr. Greenspan, there can be no expectation of certain protection from adverse inferences and findings by reason only of opposite counsel refraining from cross-examining a witness (including a party) upon evidence which conflicts with that witness’s testimony. There can be no certainty during examination-in-chief of a witness (including a party) that counsel opposite will or will not question respecting other evidence which contradicts or

¹² Stewart, p. 177

¹³ Stewart, *ibid*, p. 179

*conflicts with the witness's testimony. In the result, it may well be necessary for each party to a civil action to protect his or her own interests including credibility by addressing during examination-in-chief issues which, in all the circumstances of the case, are reasonably foreseeable as arising".*¹⁴ (emphasis added)

15. In addition to the *Stewart* case, a singularly detailed analysis of the rules, exceptions and constraints of *Browne v. Dunn* is found in an article published as part of a series of lectures by the Upper Canada Law Society entitled "*Browne v. Dunn and Similar Fact Evidence: Isles of Change in a Calm Civil Evidence Sea*" by F. Paul Morrison and Christopher A. Wayland.¹⁵ (Appendix B) Having discussed over the course of the 23 page article, the principles of the "Rule" in *Browne v. Dunn*, its discretionary nature, its limitations and exceptions, the authors conclude:

"As set out above, the "rule" in Browne v. Dunn presents a dilemma to the trial lawyer who, for tactical reasons, may not wish to put contradictory evidence to a witness on cross-examination yet who is concerned that a failure do to so (sic) may prejudice his or her ability to rely upon the evidence later. A number of principles may be distilled from the cases to assist with the resolution of this dilemma.

First, although it is usually referred to in legal articles and texts and, indeed, in judgements as a "rule", Mewett and Sankoff are no doubt correct that there is, in reality, no "rule" in Browne v. Dunn. Not even the Law Lords who decided the case went that far. Rather, the famous case sets out a number of principles that apply to a greater or lesser extent depending upon the particular facts of each case.

Second, except in the specific case of impeachment on prior inconsistent statements, a failure to abide by the principles in Browne v. Dunn may affect the weight, but usually not the admissibility, of any contradictory evidence. Accordingly, counsel runs the risk that, if he or she fails to put contradictory evidence to a witness, that evidence may (although not invariably will) be given little or no weight by the trier of fact.

¹⁴ *Stewart, ibid*, p. 184

¹⁵ "The Law Society of Upper Canada Special Lectures 2003: The Law of Evidence", Irwin Law Company, 417

Third, although the principles do appear to crystallize into something resembling a “rule” with respect to impeachment on prior inconsistent statements, even there the courts have created a broad discretion to admit prior inconsistent statements that have not been put to a witness, provided that the witness had been on “sufficient notice” that his or her credibility would be in issue and as to the existence of the contradictory evidence.

Fourth, in light of the broad disclosure requirements in civil cases, rare will be the case that a party will not be on “sufficient notice” that his or her credibility will be in issue and of the nature of the contradictory evidence. As a result, in addition to the dilemma set out at the outset of this paper, counsel may now be faced with an additional dilemma: whether to put the contradictory evidence to one’s own witness during examination in chief, so that the witness will have an opportunity to provide an explanation -- an opportunity that may never come during the cross-examination.”¹⁶ (emphasis added)

16. Devon, Fairborne, the rest of the Gas Producers and Mr. Mavor all had ample and sufficient notice that Mr. Mavor’s credibility was an issue in this Proceeding. Mr. Mavor did not need to be referred to either the Sequestration Patent or the GRI Report because he was already aware of them, having both claimed credit for them in his Report and having had his attention drawn to the listing of publications in cross-examination. Mr. Mavor knew his evidence differed on significant matters from that of Dr. Levine. Those differences are the essence of Mr. Mavor’s Reply Report. Mr. Mavor knew that CDP and EnCana were relying upon the evidence of Dr. Levine. Unlike *Browne v. Dunn* (in which there was no cross-examination whatsoever in respect of the impugned evidence), Mr. Mavor was subjected to extensive and at times heated cross-examination. It is an absolutely unavoidable conclusion from these facts that the Gas Producers and Mr. Mavor were on notice that Mr. Mavor’s credibility might be questioned.

¹⁶ *Ibid*, pp. 440-441

17. The Gas Producers and Mr. Mavor had opportunity to provide clarification of any “apparent inconsistency” between Mr. Mavor’s testimony in this Proceeding and the Sequestration Patent or the GRI Report. They could have addressed it in any of Mr. Mavor’s Report, Mr. Mavor’s Reply Report or during his direct examination. As both Macdonald, J., in *Stewart* and Messrs. Morrison and Wayland pointed out, a party knowing of the conflict can choose to either hunker down or address it pre-emptively, in direct testimony. Knowing of the Sequestration Patent and the GRI Report, Mr. Mavor could have addressed those matters in his direct evidence, but chose not to do so.

18. The Gas Producers have invoked the “Rule” in *Browne v. Dunn* without providing the Board with the genesis, the background or any clarification of or exceptions to the “Rule” (to the extent that such “Rule” exists). CDP submits that the Sequestration Patent and the GRI Report are not new evidence. Even if those documents are considered to be new “evidence”, the circumstances of these Proceedings are such that using these published materials in argument by CDP is neither unfair nor unforeseen by Mr. Mavor nor any of the Gas Producers, nor will any of the Gas Producers be prejudiced by the Board taking the Sequestration Patent and the GRI Report into account in its deliberations.

Summary

19. In summary, CDP has done nothing improper in filing with the Board published documents prepared by Mr. Mavor prior to his appearance on the stand. These documents do not constitute new evidence. Even if they did, the “Rule” in *Browne v. Dunn* is neither absolute nor unqualified. Notice of intention to impeach credibility is sufficient. Notice is not even required in circumstances, such as exist in the Proceedings, in which it would be obvious to the witness

