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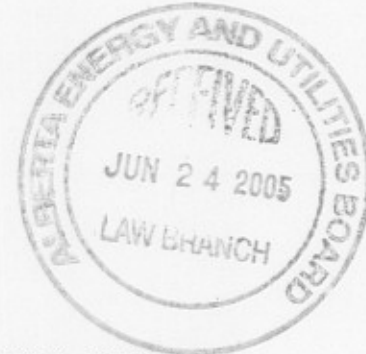
Our File: 10451.006 CJP

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

Attention: Richard J. McKee

Dear Sir:

Re: Application for Review and Variance of Decision Nos. 1380004, 1379743, 1379746, 1379737, 1379763, 1379730, 1383129, and 1379726.



EnCana Corporation seeks review and variance of the decision of the Alberta Energy & Utilities Board dated May 26, 2005 that granted to Devon Canada Corporation licenses to drill wells for coalbed methane on the lands at 15-34-26 W4M and 35-33-26 W4M.

EnCana requests that the Board rescind or stay the approvals granted to Devon until Devon has quieted title by obtaining a judicial determination as to ownership of the coalbed methane under the applicable instruments.

EnCana submits that the Board made legal errors dismissing EnCana's objections and granting Devon the licenses requested, namely:

1. determining that Devon satisfied the requirement of s.16 of the *Oil and Gas Conservation Act* R.S.A. 2000, c. O-16 by its right alone to produce natural gas, when its application was for coalbed methane wells and the coal is owned by EnCana;
2. determining that EnCana did not demonstrate it may be directly and adversely affected by the Board's decision for the sole reason that EnCana's objection rests on the issue of coalbed methane ownership.

"Natural Gas" does not Include Coalbed Methane Under these Grants

The *Oil and Gas Conservation Act* by its s.16 provides that no person shall apply for or hold a well license unless that person is entitled to the right to produce the substance. EnCana

objected to Devon's application on the basis that Devon had no such ownership under the leases and transfer at issue.

Section 16 provides that:

16(1) No person shall apply for or hold a license for a well

(a) for the recovery of oil, gas or crude bitumen, or

(b) for any other authorized purpose

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 or to the right to drill or operate the well for the other authorized purpose, as the case may be.

The section is mandatory: the Board cannot grant a license where the applicant is not entitled to the right to produce the substance sought. As said by the Court of Appeal of Alberta in *Alberta Energy Co. v. Goodwell Petroleum Corp. Ltd.*, 2003 ABCA 277:

...[section 16(1)] will be contravened if the person who holds the well license does not possess the right to produce the hydrocarbons authorized by the well license.... The application of the sections depends on the interpretation of the instrument that grants the rights. [para. 93]

In the face of a genuine and *bona fide* objection to an applicant's assertion of ownership or entitlement, a license ought not be issued unless and until the applicant demonstrates entitlement. It is not for the lessor to disprove the validity of the lease or the entitlement thereunder to the substance at issue. The law is clear that the lessee bears the onus of proving entitlement (see *Freyberg v. Fletcher Challenge* 2005 ABCA 46). And where the lease is subject to cancellation on a lessee's failure to cure a default, as here for the section 35 lands, any license granted ought to be contingent on the continuation of the lease.

The Board determined that Devon satisfied the requirement of s.16 of the *Oil and Gas Conservation Act*, by demonstrating that it has the rights to produce natural gas, the leases having not been cancelled or otherwise determined to be invalid.¹ That determination, however, misses the issue, which is whether "natural gas" under the grants at issue includes coalbed methane.

Not all gas is natural gas for the purposes of leasehold entitlement. The very ratio of the decision in *Borys v. C.P.R. Co. et al*, [1953] 2 D.L.R. 65 (P.C.) was that solution gas was not natural gas but petroleum (within the terms of the grant at issue); and *Anderson v. Amoco Canada Oil and Gas*, 2004 S.C.C. 49 determined that evolved gas was not natural gas (within the terms of similar grants). A grant of natural gas does not necessarily include coalbed methane.

¹ 26 May 2005 EUB Decision, at page 5, paragraph 1.

The highest courts have established a test for determining what substances are granted in a transfer of mineral rights (*Borys, Anderson v. Amoco Canada*). The test is the vernacular meaning of the terms at issue at the time and place of the transfer, having regard to the surrounding circumstances and commercial context. The Board made no consideration of that test here.

In effect, the Board determined that coalbed methane is natural gas – notwithstanding its express recognition that there is “no settled law on the issue of ownership of coalbed methane or on the issue of whether natural gas produced from coal is a substance other than natural gas”.

The Board concluded that the leases submitted “demonstrate sufficiently Devon’s entitlement to producible natural gas”; apparently because the leases “[were not] cancelled or otherwise determined to be invalid”.² But that, with respect, misses the issue: as said by the Court of Appeal in *Goodwell*, entitlement depends on the interpretation of the instrument. A lease may be valid, but nonetheless give no entitlement to the substance sought – as EnCana submits is the case here.

The Board cannot treat EnCana’s holdings in the same way it treats Crown holdings, which it apparently has. The Alberta legislature has mandated that a Crown lease of coal does not grant rights to coalbed methane (*Mines and Minerals Act*, s.67(1)); it has not done so for leases between private parties, as the ones at issue here are. For private party grants, each instrument must be considered (in the vernacular and as of the time of making) to determine the meaning of the leased substances.

It cannot be determined whether “natural gas” under the instruments here includes coalbed methane without a hearing and evidence from the parties on the meaning of “natural gas” at the time of contract. Historical documents and expert witnesses are likely needed to answer that question. As the Board obviously does not want to decide mineral ownership (perhaps mindful of *Goodwell*), it is respectfully submitted that the Board should have refused to grant the licenses until Devon had a declaration of ownership by the courts.

The Taking of EnCana’s Property Directly and Adversely Affects It

The Board’s dismissal of EnCana’s objection because it rested on the issue of coalbed methane ownership and not on the basis of potential surface impacts³ fails to recognize that a loss of property – or of its control – is a direct and adverse effect. Material effects are not limited to surface impacts (or equity issues for the holding). If Devon is not entitled to the coalbed methane, it is taking it without right from EnCana – and with the sanction of the Board.

Instead of deciding whether EnCana may be directly and adversely affected by Devon’s coalbed methane development, the Board dismissed EnCana’s objections prior to

² *Ibid*, at page 5, first paragraph.

³ *Ibid*, at page 5, second paragraph.

considering any consequences. In Guide 29, the Board has stated that when determining potential impacts, the following factors are considered [p.7]:

- Does the proposed project have the potential to affect safety or economical property rights? Examples of such impacts include negative effects from contaminants in water, air or soil or from noise; negative interference with livelihood or commercial activity on the land; damage to property; and concerns for the safety of persons or animals.
- Are you affected in a different way or to a greater degree than members of the general public?
- Are you able to show a reasonable and direct connection between the activity complained of and the rights or interests you believed to be affected?

It goes without saying that if EnCana owns the coalbed methane, its property rights will be interfered with and its property damaged by the Board's decision to grant the license. Had the Board considered the ways in which EnCana's property rights might be infringed, the Board could not have come to any conclusion other than that EnCana "may be directly and adversely affected".

Economic, Orderly and Efficient Coalbed Methane Development

In the face of a genuine and *bona fide* objection to entitlement and ownership – as there is here and can be expected to be for very many coalbed methane wells on lands where the title is split – for the development of the resource to be economic, orderly and efficient, title needs to be quieted before a well license is issued.

If the Board grants a license in the face of genuine and *bona fide* objections over ownership of the coalbed methane, the inevitable result will be litigation on every application relevant to EnCana lands where the applicant does not have both the coal and natural gas rights – likely involving both the Board on appeals and the applicant in the trial courts.

The same will result for individual freeholders: these issues do not apply only to EnCana and to other oil companies. When an individual freeholder who reserved petroleum or coal is faced with a gas lessee's application for coalbed methane, it can be taken from this decision that the Board will grant the license and the freeholder will need marshal sufficient resources to similarly access the courts.

Litigation of that nature after issuance of a license hardly accords with the express purpose of the *Oil and Gas Conservation Act* s. 4(c), to:

provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta.

Insofar as the Board fails to recognize that a party is directly and adversely affected where title is disputed and grants the license sought, the party (freeholder or oil company) may be without an effective remedy – even through the courts.

An application to the court for an injunction prior to a gas owner's application to the Board would be premature and lack context and an injunction application after the gas owner files an application would also be premature, as the matter would still be outstanding before the Board.

Once approval is granted, there is no effective opportunity for an injunction because the gas owner would be able to start and finish drilling the day or so after licensing and injunctive relief would be too late; and the onus in effect shifts to EnCana in that case to disprove ownership, when the law is clear that a lessee must establish entitlement.

And litigation after the Board has issued a license is wasteful: drilling costs might be thrown away, and the resource might not be conserved and fully extracted (in accordance with EnCana's plans for development). The very art and genius of resource extraction, and a company's competitive advantage, is knowing when and where to extract the resource. As with other jurisdictions (e.g. Texas), the only sensible policy is for title to be quieted first.

Coalbed methane development is a significant and increasingly vital sector of the natural gas industry in Alberta and North America. The question of who owns this valuable resource (other than on Crown lands) depends on the intention of the parties to each grant: there is no general answer.

In light of the foregoing, EnCana asks the Board to review and vary its 26 May, 2005 decision, rescinding or staying the license approvals granted to Devon until Devon has quieted title by obtaining a judicial determination as to the ownership of the coalbed methane under the applicable instruments.

Yours truly,



Christian J. Popowich

CJP/kgw

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