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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: Sections 39 and 40 Review Request by Luscar Ltd. on Devon Canada Corporation's Application Nos: 1379726, 1380014, 1380013, 1380010, 1380005, 1383141, 1383140, 1383139, 1383138, 1383137, 1383136, 1383134 and 383132
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 Luscar Ltd. ("Luscar"), made pursuant to section 39 of the *Energy Resources Conservation Act* ("the ERC Act"). The request of Luscar is for a review by the Alberta Energy and Utilities Board (the "AEUB" or the "Board"), for a stay of the Board's Orders and for a hearing pursuant to section 40(1) of the ERC Act, all in respect to the decision that granted to Devon licences to drill wells for the production of natural gas, including coal bed methane ("CBM").

Facts Relevant to the Application

1. Devon accepts the facts as outlined by the Luscar submission to the Board dated June 24, 2005, except as otherwise set out below:
 - (a) Devon acknowledges Luscar's right to raise an issue as to the entitlement to CBM but submits the dispute and the characterization of the issue represents the subjective view of Luscar and is not established as a fact;
 - (b) Luscar's intention and objectives before the Board are also not established as a fact but rather represent the unsubstantiated, subjective characterization of Luscar. Luscar's intentions, objectively considered, are equally consistent with an attempt

by Luscar to utilize the regulatory process as a vehicle to leverage a commercial arrangement in advance of it being established by Luscar that it has any legitimate or legal commercial position to barter;

- (c) The Board provided to Luscar an extensive opportunity to make submissions to the Board with respect to the Devon applications, which opportunity was fully exercised by Luscar in correspondence and in submissions made by Luscar, to the Board, dated January 3, 2005, January 25, 2005, February 18, 2005, April 12, 2005 and April 26, 2005; and
- (d) No dispute has been raised by Luscar that Devon is entitled to produce natural gas from the wells and the zones in respect of which the well licences placed in issue have been granted.

Summary of Conclusions

- 2. In summary, in Devon's submission, the Luscar request for a review should be denied for a number of reasons that are set out as follows:
 - (a) The application for a review fails to raise any reasonably arguable error of law or jurisdiction and particularly no arguable issue germane to the decision made by the Board. Moreover, the request for review does not raise any substantial doubt as to the correctness of the Board's decision;
 - (b) It is well established that the jurisdiction of the Board to conduct a review under section 39 of the ERC Act is discretionary. In Devon's submission, the matters raised in issue by Luscar do not warrant the exercise of that discretion in favour of the Luscar request;
 - (c) The substantive issue raised by Luscar hinges entirely on a determination that gas, as granted to Devon by the Petroleum and Natural Gas Leases held by Devon, does not include gas in the form or character of CBM;
 - (d) It is acknowledged by Luscar (paragraph 7 of Luscar's submission) that the Board is neither the appropriate tribunal nor does it have the jurisdiction to resolve the question as to whether Devon's Petroleum and Natural Gas Leases are inclusive of CBM;
 - (e) The legal remedy Luscar seeks, which is to force Devon to a position of quieting its title to the gas it proposes to produce, is a remedy that, in converse terms, has been and continues to be equally open and available to Luscar to pursue in the context of Luscar challenging any entitlement that Luscar believes Devon may not be entitled to pursue; and
 - (f) The Board is not compelled by its legislation to respond in any particular fashion to a claimed right or entitlement. In any event, the degree of direct adverse impact

due to a claimed right represents a factual finding that does not constitute an error of law.

Error of Law

3. Luscar asserts the Board erred by drawing conclusions that:

- CBM is natural gas for all purposes;
- That the natural gas owner owned the CBM and had all entitlement to produce it; and
- By assuming Devon's leases conveyed the right to Devon to produce CBM.

Luscar also asserts that the Board erred by drawing these conclusions in the absence of any evidence.

4. In Devon's submission, the Luscar assertions are neither accurate nor of substantive merit. Specifically the Board made no determination nor was it required to make a determination that CBM is natural gas for all purposes. To the contrary, as acknowledged by Luscar, the Board indicated it did not need to determine the issue of mineral ownership of CBM for the purpose of Devon's applications. Luscar construes this as a *de facto* determination of the issue. Devon disagrees and submits the Board was not required under the relevant legislation to make the distinction between gas and CBM that Luscar assumes was made.
5. Consistent with the obligation imposed upon the Board by the relevant legislation, the Board considered and had uncontested evidence before it that Devon was and is entitled to produce all natural gas from the wells and zones it applied for. It is only the convenient switching from a gas to a CBM characterization that has enabled Luscar to contrive an argument that the legislation has not been fully honoured.
6. Luscar should not, in any event, be credibly heard to argue that it has an entitlement to CBM and as such is entitled to the opportunity and protection provided by the legislation to an owner of gas, while at the same time asserting that CBM and natural gas need to be distinguished for purposes of the Board's administration of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (the "O&GC Act").
7. At issue in the Board's decision are well licences granted to Devon. The specific issue raised by Luscar is that Devon's applications failed to satisfy the provisions of section 4(d) and section 16(1) of the O&GC Act. These legislative provisions refer only to gas. Neither provision distinguishes as to the character or type of gas, such as CBM, being a required consideration.
8. The complaint raised by Luscar is that an ownership distinction can and should be drawn as between CBM and other natural gas. That may be a legitimate claim for Luscar to advance, but it is not an issue inherent in or that is recognised by the legislation. Whether Luscar is correct in the position it advocates, the distinction it seeks to draw does not exist

either implicitly or explicitly in the legislation that is administered by the Board. Hence, the Board's legislative obligation does not in any manner require it to make the distinction urged upon it by Luscar.

9. A fact not denied by Luscar, is that CBM is gas. It follows that the term "gas", as used in section 4 and section 16 of the O&GC Act, is for purposes of the legislation, inclusive of CBM. Hence, as determined by the Board, it did not need to determine the issue of ownership of CBM as distinct from other gas, for purposes of Devon's applications.
10. The law in Alberta, as set out in *Dene Tha First Nation v. Alberta (Energy and Utilities Board)* [2005] A.J. No. 158, 2005 ABCC 68, clarifies that the Board is not compelled by legislation relating to well licencing requirements to respond to every possible claimed right. Moreover the degree of direct adverse effect associated with a claimed right gives rise to an issue of fact for the Board and not a question of law.
11. Luscar's assertion that the Board is somehow constrained from exercising the proper and legitimate authority bestowed upon it by the relevant legislation "in the absence of definitive judicial authority" is, with respect, a proposition that is without any legal foundation and would impose a logical impasse so as to practically preclude most of that which the Board is otherwise authorized to do. In paragraph 19 of its reasons in *Dene Tha First Nation*, the Alberta Court of Appeal rejected a similar proposition.
12. All of Luscar's equity-type arguments are predicated on the proposition that, CBM is gas within the meaning and context of the legislation. That merely confirms that the Board was correct in determining, as it did, that it did not need to determine the separate issue of ownership of CBM as distinct from any other characterization of gas.
13. In result, the errors asserted by Luscar do not exist because
 - The Board concluded only that CBM is natural gas for purposes of the applicable legislation;
 - A determination of the separate ownership of CBM, as distinct from natural gas, was, for purposes of the legislative requirement, unnecessary; and
 - The Board concluded Devon had an entitlement to produce gas that satisfies the legislative requirement.

Moreover, the evidence strongly supported each of these conclusions. If the Board did not address CBM as distinct from natural gas it had no legislative obligation to do so.

14. The exercise of jurisdiction by the Board to grant a review is discretionary, the exercise of this discretion as requested is not appropriate or warranted.
15. Devon has acknowledged and continues to acknowledge the issue raised by Luscar as to its claim to ownership and entitlement to CBM. Devon, however, also agrees with Luscar's

position that a definitive ruling with respect to ownership of CBM is and will only be available from a Court.

16. Given these acknowledgements, Devon submits there is no issue raised by Luscar's application for a review that could or would materially address the substantive issue that Luscar seeks to have considered by the Board. It would, in Devon's submission, be unreasonable for the Board to conduct a review if the purpose of that review would only enhance Luscar's bargaining position *vis-à-vis* Devon and would not actually satisfactorily answer the fundamental issue raised by Luscar.
17. If the Board exercises its discretion to deny the review request made by Luscar, that will not leave Luscar without a remedy. To the contrary, Luscar will have and has had available to it the very same remedy that it seeks to have the Board impose upon Devon. The opportunity exists for Luscar to seek judicial relief as to the ownership issue and in respect of which Luscar asserts that a judicial ruling is required for a resolution in any event.
18. In result, no merit is shown in the exercise of discretion by the Board in favour of Luscar's review application.

Luscar Request for a Stay

19. Devon understands Luscar's request for a stay or suspension of the Board's Orders affecting to be requested only in the context of the review request being granted.
20. Absent a review being granted, it is premature to address this request for a stay or for a suspension.

Request for a hearing pursuant to section 40(1) of the ERC Act

21. The material provision of section 40:
 - allows a person "affected by an Order or Direction made by the Board without the holding of a hearing to, within 30 days after the date on which the Order or Direction was made, apply to the Board for a hearing"; and
 - prescribes that when an application is made under this section, the Board shall hold a public hearing of the application.
22. In Devon's submission, the Luscar request is without merit and should be rejected.
23. Luscar is not a person affected without the holding of a hearing. Luscar was provided with a full and adequate opportunity to be heard and was heard on all of the issues on which Luscar wished to be heard.
24. Luscar appears to have assumed, erroneously, that a hearing within the meaning of section 40(1) of the ERC Act means an oral hearing. There is no basis in law for such an assumption. To the contrary, it is well accepted that a hearing means an opportunity to be

heard, which in most cases can be more than adequately effected through written submissions.

25. A hearing, for purposes of the ERC Act, means, notice, a reasonable opportunity of learning the facts bearing on the application, a reasonable opportunity to furnish evidence relevant to the application and an adequate opportunity of making representations by way of argument. This is confirmed by section 26(2) of the ERC Act and by section 4 of the *Administrative Procedures Act*, R.S.A. 2000, c. A-3. Section 26(3) of the ERC Act and section 6 of the *Administrative Procedures Act* both made it clear that a hearing does not afford an opportunity for a party to make oral representations if the authority affords the party an opportunity to make representations adequately in writing. Luscar has been provided with a full and adequate opportunity to be heard as required at law.
26. Because Luscar has had and has fully exercised its opportunity to be heard with respect to the Devon applications, Luscar is not entitled to the relief available pursuant to section 40 of the ERC Act.
27. In any event, the issue raised in respect of which Luscar seeks a further hearing, is an issue that Luscar acknowledges is not within the scope or jurisdiction of the Board to resolve. Given this acknowledgement as to the issue that is fundamental to Luscar's position, it cannot be credibly argued or concluded that Luscar has been "affected by an order or direction made by the Board".

Should the Board have any questions or wish any elaboration with respect to any of the points raised above, we would be pleased to address those matters.

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

Respectfully,

FRASER MILNER CASGRAIN LLP



A.L. McLarty
ALM/aw

cc: Mr. Robert Donick, Luscar Ltd.
Mr. William Corbett, Q.C., Field LLP