



## FRASER MILNER CASGRAIN LLP

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*By Courier*

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

**Attention: Mr. J. Richard McKee, Board Counsel**

Dear Sir:

Subject: Fairborne Energy Ltd.'s Application Nos: 1402289 and 1402290  
Approval Nos.: 0331663 and 0331714, 10-35-39-24 W4M and 12-24-39-24 W4M  
**Our file no.: 517594-3**

We are writing on behalf of Fairborne Energy Ltd. ("Fairborne") in response to the request of Luscar Ltd. ("Luscar"), made pursuant to section 39 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (the "ERC Act") for a review of the Board's approval of well licences granted to Fairborne to produce coal bed methane ("CBM"). This response will also address the application made by Luscar, pursuant to section 40(1) of the ERC Act for a hearing in respect of the Fairborne well licence applications.

### Facts Relevant to the Applications

1. Fairborne accepts the facts set out in the Luscar application except as otherwise set out below:
  - (a) Fairborne accepts 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 it 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; and

- (c) Although Luscar, in its submissions to the Board, claims a right to CBM, Luscar has not and appears not to dispute Fairborne's entitlement to produce gas or that Fairborne holds the rights to produce gas at the locations in question. Further, in none of its submissions has Luscar contested that CBM is gas.

Whether a Review is warranted

2. In Fairborne's submission, the Luscar request for a review should be denied.
3. It is well established that the jurisdiction of the Board to conduct a review of its own decisions under section 39 of the ERC Act is discretionary. In Fairborne's submission, the matter raised in issue by Luscar does not warrant the exercise of that discretion in favour of the Luscar request.
4. The sole issue raised by Luscar, in the objections it originally filed with the Board and which is also the fundamental and underlying issue raised by its review application, relates to Luscar's claim to be entitled to the CBM at the locations at which Fairborne intends to produce gas.
5. Luscar's review application, in paragraph 2, defines the issue as relating to a dispute as to Fairborne's entitlement to CBM. In paragraph 7 of its review request, Luscar makes a corresponding assertion that the Board is not the appropriate forum to resolve the issue of entitlement to CBM.
6. In Fairborne's submission, this should constitute a full and complete answer to the Luscar request for a review.
7. In paragraph 11 to the Luscar submission, Luscar asserts that as a matter of law, Fairborne must be entitled to the right to produce CBM from the Luscar coal lands in order to satisfy the requirements of the legislation. This is not an accurate characterization of the law or of the relevant legislation. As Luscar's submission notes, the legislation requires Fairborne to have the right to produce gas at this location and Fairborne's right to produce gas at this location is not disputed nor questioned by Luscar. Nothing in the legislation requires the Board to distinguish gas as to its nature or character, including whether it is in the nature of CBM.
8. Fairborne accepts and acknowledges Luscar's right to raise and to have resolved, in an appropriate forum, the issue of whether the gas to which Fairborne holds the rights includes gas that is in the nature and character of CBM. That is not, though, a distinction the legislation requires the Board to make. It is also not a distinction that the Board is clothed with authority to resolve and indeed Luscar's submission acknowledges that the CBM ownership dispute "... will ultimately require at least one decision from the courts to resolve".
9. Given Luscar's acknowledgement that the issue it raises cannot be resolved by the Board in any circumstance it would not be a helpful or a useful exercise for the Board to embark upon a review for purposes of considering an issue, that even Luscar asserts is not appropriate for consideration and resolution by the Board.

10. The issue raised by Luscar does not, in any event, disclose a reasonably arguable question of law that would warrant a review by the Board. 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, confirms the Board, specifically in the context of a well licence application, is not compelled to respond in any particular fashion to a claimed right or entitlement and that its assessment of the degree of direct adverse impact due to a claimed right represents a factual finding that does not constitute an error of law.

#### Other Issues

11. Although not germane to the issue of whether a review should be undertaken by the Board, the losses speculated upon by Luscar as potentially being incurred by it, are not substantiated, are speculative and will materialize only in the contingency that Luscar is successful in eventually establishing the legal rights that it, at this stage, claims to CBM. Even if successful, none of those rights can be said to not be capable of being reasonably or adequately compensated for in damages, if indeed those rights and losses are actually established by Luscar. On the other hand, if Fairborne is frustrated in pursuing its reasonable business ventures, at this time, neither Fairborne nor the public interest associated with those business ventures will have any recourse for their loss.

#### Request for a Hearing

12. The entitlement to a hearing under section 40(1) of the ERC Act is not and should not be construed to be as simple as making the ask. Although a hearing under this section is mandatory, the underlying requirement is that there must be, for the Board's consideration, a direct and material adverse affect within the meaning of section 26 of the ERC Act and in respect of which it is open to the Board to consider and to resolve.
13. Luscar's application makes it clear that the fundamental issue proposed by Luscar to be raised, if a review is granted, is the issue of ownership or entitlement to the CBM component of the gas to which Fairborne is otherwise unequivocally entitled. All of Luscar's arguments hinge upon or relate in some manner to the issue of CBM entitlement being eventually resolved in Luscar's favour. As noted above, the distinction between gas and CBM is not a distinction embodied in the legislation administered by the Board nor is it a claim the Board is compelled to consider in any particular fashion. Moreover, it is not an issue that Luscar recognizes as appropriate for the Board to consider and as Luscar emphasizes in its submission, it is not an issue that the Board is, in any event, capable of resolving.
14. For the above reasons, it is submitted that Luscar has not identified a direct and material affect that can be construed as properly or reasonably within the Board's authority to decide which is essential to the exercise of jurisdiction by the Board under section 40(1) of the ERC Act.

15. The request for a hearing should, therefore, be denied.

All of which is respectfully submitted on behalf of Fairborne Energy Ltd.

Respectfully,

**FRASER MILNER CASGRAIN LLP**



for: A.L. McLarty  
ALM/aw

cc: Mr. Robert Donick, Luscar Ltd.  
Mr. Donald C. Edie, Q.C., Carscallen Lockwood LLP - by fax

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