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July 21, 2005

Alberta Energy and Utilities Board
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VIA FAX (403) 297-7031

Attention: Mr. Richard McKee, Board Counsel

Dear Sir:

EUB Applications No. 1379726 et al
Applications for Well Licences and
EUB Application No. 1377141
Application to Establish a Holding
(the "Devon Applications")
Decision dated May 26, 2005
Application for Review and Variance and Application for a Hearing



We have been provided with Mr. McLarty's letter dated July 15, 2005 on behalf of Devon responding to applications for review and variance and request for a hearing dated June 24, 2005 (the "Luscar Applications") filed by Luscar Ltd. ("Luscar"). This letter constitutes the reply submissions of Luscar in respect of the captioned applications. Capitalized terms used in this letter and not defined herein have the same meanings as were ascribed to them in the Luscar Applications.

1. In its response submissions, Devon makes much of the fact that Luscar has not contested that coalbed methane ("CBM") is gas. Devon is correct in one respect and one respect only. Luscar has not at any time contested that CBM is gas. However, Devon then attempts to characterize this election by Luscar as somehow conclusive in determining the matters before the Board. It is not. By way of analogy, nothing chemically distinguishes solution gas from gas cap gas. This "fact" did not preclude the courts from recognizing separate owners of the two types of natural gas, ultimately granting the first to the petroleum owner and the latter to the natural gas owner¹. Neither should the fact that CBM and conventional natural gas are both comprised primarily of methane be determinative or even persuasive to the Board in this case. Luscar's failure to argue one way or the other is simply irrelevant to the Board's determination of the issues before it.

¹ *Borys v. C.P.R. Co. et al* [1953] 2 DLR 65 (JCPC)

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2. The first key issue in respect of the Devon Applications is whether Devon, as the applicant, has satisfied its statutory obligation to its entitlement to both the conventional natural gas and the CBM. Luscar agrees with Devon that the *Oil and Gas Conservation Act* (R.S.A. 2000, c. O-6, as amended (the "O&GC Act") does not explicitly distinguish between CBM and conventional natural gas. In this regard, Devon has repeatedly argued that CBM is "gas" within the meaning of the O&GC Act. However, contrary to Devon's allegation, this does not support Devon's conclusion that the Board need not concern itself with Luscar's request for review. The onus is on Devon, as the party who asserts that it is entitled to produce "gas"² as contemplated by the O&GC Act. If "gas" includes CBM, then Devon must demonstrate its entitlement to conventional gas and to CBM in order to satisfy the statutory requirements. For the reasons set out in the Luscar Applications, Devon has not, and cannot, demonstrate that entitlement in the face of Luscar's contrary claim. Irrespective of what Devon's petroleum and natural gas leases may purport to grant (that is, whether or not CBM is expressly included as part of the defined "gas" substances under that lease), if the natural gas owner had no right to CBM, then that owner could convey no leasehold title to CBM.
3. Devon alleges that Luscar's submission that the Board is not the appropriate forum to resolve the issue of entitlement to CBM constitutes a complete answer to Luscar's request for a review. Devon further suggests it would not be helpful or useful for the Board to embark upon a review in these circumstances. To be clear, what Luscar seeks is the Board's determination that, because it is not the appropriate forum for determining fundamental property rights as between the natural gas owner and the coal owner, the Board erred in issuing approvals which, of necessity, relied upon such a *de facto* determination of rights accruing to the natural gas owner. The question is not whether the Board ought to have effectively determined property rights. The question is whether the Board effectively did so and erred in so doing. This is both useful and a perfectly legitimate basis upon which the Board can and should review its earlier decision.
4. Luscar concurs with Devon's conclusion that the Alberta Court of Appeal in the *Dene Tha'*³ case determined that assessment of the degree of direct and adverse impact in any given circumstance is a question of fact. However, that simply precludes the Court of Appeal from reviewing the Board's determination of such a matter. Nothing prohibits the Board itself from reviewing its own decision, including, as necessary, the degree of adverse impact required to trigger the Board's protection. Luscar submits that the Luscar Applications demonstrate that the Board has erred in law by determining property rights between Devon and Luscar. Further, and contrary to Devon's allegation, a review by the Board of its own earlier order, decision or direction pursuant to Section 46 of the Rules of Practice is not restricted solely to an error of law. Paragraphs 13 and 14 of the Luscar Applications relate to factual matters, rather than issues relating to errors of law.
5. Devon alleges that Luscar's request for a hearing should be dismissed because Luscar has not demonstrated a direct and material adverse effect. In reply, Luscar submits that, had

² *Freyberg v. Fletcher Challenge Oil and Gas Inc. et al*, 2005 ABCA 46 (Alta. CA)

³ *Dene Tha' First Nation and Alberta Energy and Utilities Board et ux*, [2005] A.J. No. 158, 2005 ABCA 68

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the courts already quieted title in the hands of the coal owners, there could be no question that Devon's actions would directly and adversely affect Luscar and its property rights. Luscar is no less directly and adversely affected simply because the rights it claims are contingent upon a future event.

6. Devon further alleges that Luscar has erroneously concluded that a hearing, in the context of the Devon Applications, means an oral hearing. In the context of these applications, Luscar has indeed concluded that no hearing has yet occurred and that an oral hearing ought to have been conducted and should still be conducted upon Luscar's request pursuant to Section 40.
7. Luscar concurs with Devon's conclusion that an oral hearing is not required to be conducted in all circumstances. However, there are a number of examples in the Board's Rules of Practice in which "hearing" implies an oral hearing. Subsection (4) of both Sections 46 and 47 (which relate specifically to applications for review and rehearing, respectively) expressly direct the Board to determine the preliminary questions posed in those situations "with or without a hearing". Luscar submits that, in that context, "hearing" necessarily means an oral hearing. More importantly, it is the Board's consistent past practice in non-routine applications (being those in which all objections have not been resolved between the applicant and those persons who are or may be adversely affected by the application, such as the Devon Applications) for the Board to hold an oral hearing. Conversely, Luscar understands that, in those circumstances in which the Board determines that a proceeding should be by way of written submission, rather than an oral hearing, the Board routinely expressly advises all parties of that process at the commencement of the proceeding. The Board does not normally retroactively "deem" a series of correspondence to have constituted a written hearing. Luscar therefore submits that it was (and is) reasonable for Luscar to conclude that the Board would, in the normal course, have held an oral hearing in respect of the contested, non-routine Devon Applications prior to issuing the decision Luscar now requests be reviewed.
8. Luscar notes that, despite arguing that Luscar has had an opportunity to be heard, Devon has not specifically submitted that the written exchange of correspondence filed with the Board in connection with the Devon Applications actually constituted a "hearing", within the meaning of Section 40 of the ERC Act. There has been no hearing. Therefore, Luscar has not yet had a full opportunity to test Devon's evidence, through cross-examination, to present Luscar's own evidence, and to make arguments based on that complete record.

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In summary, Luscar has been and will be directly and adversely affected by the Board's decisions in the captioned matter. The reasons set out above and in the Luscar Applications are valid and persuasive reasons for the Board to exercise its discretion to review its approvals issued to Devon in respect of the Devon Applications and to hold a hearing in connection with the Devon Applications.

All of which is respectfully submitted.

Yours very truly,

Luscar Ltd.

Per: _____


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