

CODE HUNTER

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Our File: 10451.010 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 Pooling Order No. P 290
Compulsory Pooling Application No. 1406764
Ewing Lake Field: Section 13-37-21 W4M



EnCana Corporation seeks review and variance of the 26 October 2005 decision of the Alberta Energy & Utilities Board granting the application of Bearspaw Petroleum Ltd. for a compulsory pooling order for the subject lands.

EnCana requests that the Board vary the order to limit pooling to a single formation or direct the metering of production from each formation and payment of all proceeds to the Provincial Treasurer pending resolution of the ownership of coalbed methane (CBM) produced from the lands.

EnCana makes this request pursuant to the *Energy Resources Conservation Act*, s. 39 and to the *Alberta Energy and Utilities Board Rules of Practice*, s. 46.

Errors

EnCana submits that the Board made legal errors in dismissing its objection and granting the compulsory pooling order, namely:

1. Ordering unit operation to permit the production of gas from all zones to the base of the Belly River Group through a single well, rather than restricting the order to a pool or a productive zone;
2. Failing to expressly recognize the ownership claim of EnCana to CBM and the consequent dispute between it and Bearspaw over ownership and entitlement to the right to produce such; and

3. Failing to order that production be metered separately at the formations containing coal and that revenues associated with the disputed lands be paid to the Provincial Treasurer in trust pending court order or settlement by the parties.

Facts

EnCana is the owner in fee simple in all mines and minerals of the lands underlying 96.4 acres on the west half of the subject section and in fee simple in all coal, petroleum and valuable stone underlying another 279.5 acres of that section.

Bearspaw is lessee of conventional natural gas and CBM underlying approximately 261 acres of the section by Crown lease, and also claims a conventional natural gas lease from an individual for the lands underlying the aforesaid 279.5 acres.

In September 2004, Bearspaw sought EnCana's agreement to pool natural gas from the surface to the base of the Belly River formation for the section, but absent exclusion of CBM the agreement could not be made as Bearspaw would be taking EnCana's CBM.

Bearspaw refused to exclude CBM from the pooling agreement and on 22 June 2005 made an application to the Board for a compulsory pooling order in the drilling spacing unit constituting the section.

EnCana on 21 July 2005 objected to Bearspaw's application on the basis that CBM was not excluded from the requested pooling order; and Bearspaw responded on 15 August that ownership of coal did not entitle EnCana to CBM.

The Board by letter of 18 August 2005 sought Bearspaw's clarification on ownership and pooling of the coal strata, and Bearspaw responded on 23 August 2005 that it had the right to "all natural gas underlying the lands" simply because it had lease rights to natural gas.

The Board on 20 September 2005 dismissed EnCana's objection as it was "satisfied" that Bearspaw's leases gave it the right to all natural gas and "determined" no direct and adverse effect to EnCana as pooling orders have the same provisions for all parties.

On 26 October 2005 the Board granted Bearspaw's application to operate as a unit all tracts within the lands from surface to base of the Belly River.

Grounds

1. *Pooling Orders being limited to a single formation, the Board erred in granting one here for all formations to the base of Belly River.*

The Board exceeded its jurisdiction in ordering that the tracts within the drilling spacing unit be operated as a pooling unit with respect to all formations to the base of the Belly River Group.

By the *Oil and Gas Conservation Act*, a pooling unit is available only for the formation to which it is proposed to drill or from which it is proposed to produce the substance.

80(1) The owner of a tract within a drilling spacing unit may apply to the Board for an order that all tracts within the drilling spacing unit be operated as a unit to permit the drilling for or the production of oil or gas from the drilling spacing unit.

(2) The applicant shall state in the application

(a) the legal description of each tract within the drilling spacing unit and the ownership of that tract,

(b) the formation to which the applicant proposes to drill or from which the applicant proposes to produce,

...

(3) The Board may, with the approval of the Lieutenant Governor in Council, order that the tracts within the drilling spacing unit be operated as a unit with respect to the formation referred to in subsection (2)(b).

(4) An order made under subsection (3) shall provide for the following matters:

(a) for the drilling and operation of a well on the drilling spacing unit, or, if a well that is capable of, or that can be made to be capable of, production from the formation in respect of which the order is made has been drilled on the drilling spacing unit before the making of the order, for the future operation of that well;

By the Regulations to *Oil and Gas Conservation Act*, only one well is to be produced from each pool in a drilling spacing unit and no well is to be produced unless there is common ownership throughout the drilling spacing unit.

5.005(1) Only one well shall be produced from each pool in a drilling spacing unit unless otherwise authorized by the Board.

(2) No well shall be produced unless there is common ownership throughout the drilling spacing unit.

By *Directive 065*, part 1.5.3.3 –the Board is to limit a pooling order to the known productive zone or major productive zone where formations are in dispute.

The formation subject to the pooling order would be referenced in the order. In previous pooling applications where there has been a dispute about which formations should be subject to a pooling order, the EUB decided to limit the formation subject to

the order to the known productive zone or to the major productive zone (Examiner Reports 91-6, 95-2).

As acknowledged in the Board's own decisions concerning applications for pooling orders from surface through many formations, as here, it has authority to name only formations shown on evidence to be capable of production. [Examiner's Report E 91-6; E 95-2].

The compulsory pooling of "gas from all zones to the base of the Belly River Group" is an order not even contemplated by the *Act*, and the Board had no jurisdiction to issue it.

2. *Bearspaw having no entitlement to CBM from EnCana's coals, the Board erred in granting the Pooling Order for all gas without noting the ownership dispute and requiring metering.*

The Pooling Order licences Bearspaw's taking of EnCana's CBM.

Bearspaw may have the CBM under the Crown leases as legislation deems "natural gas" granted thereunder to include CBM – but it certainly does not have that under the private leases, there being no such law for private leases.

The purposes of the O&GC Act are to afford each owner the opportunity of obtaining the owner's share of production of oil or gas from any pool, yet the Board's order permits Bearspaw to recover CBM which EnCana claims.

4 The purposes of this Act are:

- (d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool;

Where a dispute arises as to the person entitled to receive the production allocated to a tract by a pooling order, the O&GC Act provides that the proceeds of sale of the production shall be paid to the Provincial Treasurer in trust pending an Order of the Court of Queen's Bench or until a settlement has been reached by the parties.

86(1) If a dispute arises as to the person entitled to receive the production allocated to a tract in accordance with an order of the Board made pursuant to this Part, the operator or unit operator:

- (a) shall sell the production with respect to which the dispute has arisen,
- (b) may pay out of the proceeds of sale the costs and expenses payable with respect to the tract, and
- (c) shall pay the balance of the proceeds to the Provincial Treasurer to be held by the Provincial Treasurer in trust pending an order of the Court of Queen's Bench or until a settlement has been reached by the parties.

(2) When money is paid to and held by the Provincial Treasurer under subsection (1),

(a) the owner is not entitled to any interest or penalty, and

(b) the payment of the money for the purposes of any contract or other arrangement is deemed to have been made when the money was paid to the Provincial Treasurer.

In granting Bearspaw's application, the Board has determined in effect that "natural gas" under private leases includes CBM – a finding without support by the courts.

And in failing to order that the formations each be metered and the proceeds held in trust, the Board has licensed Bearspaw's taking of property to which it might not be entitled and left EnCana without recourse (there being no means to measure the losses).

The Pooling Order may have the same provisions for all parties as the Board noted (20 September), but that does not preclude a direct and adverse effect to EnCana: EnCana is the only party whose CBM is being improperly taken.

As was ordered by the Board where the validity of a subject lease was in dispute, the revenue needs be placed in trust pending settlement of judicial determination of the ownership issue of CBM here. [Examiner's Report E 95-2].

The Pooling Order needs be varied to permit production from a single zone, or it needs require metering at each zone and payment of the proceeds in trust.

Yours truly,



Christian J. Popowich

CJP/kgw

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