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Via Courier and E-Mail (Pdf)

Richard McKee
Alberta Energy and Utilities Board
640 - 5th Avenue S.W.
Calgary, Alberta
T2P 3G4

Re: Application for Review and Variance of December 8, 2005 Decision
Application No. 1423722 and Licence No. 0344816
LSD 13-21-038-20 W4M, Stettler Field
Our Reference: BPW044

Introduction

1. The following is Bears paw Petroleum Ltd.'s ("BPL") response to the Review and Variance Application of EnCana Corporation ("EnCana Submission") provided to the Alberta Energy and Utilities Board (the "Board") on January 9, 2006. The EnCana Submission concerns a well licence granted by the Board on December 8, 2005 bearing Licence No. 0344816.

Remedy Sought

2. BPL asks that the application contained in the EnCana Submission be dismissed.

Facts

3. On September 20, 2005, BPL advised EnCana of certain drilling plans it had for 21-38-20 W4M (the "Lands") (**Tab D of EnCana Submission**).

4. On October 4, 2005 EnCana provided correspondence to BPL and copied this to the Board. In this correspondence, EnCana argues that BPL is not entitled to produce natural gas from coal ("NGC") as EnCana is the successor to a reservation of coal rights (**Tab E of EnCana Submission**).

5. On October 14, 2005, BPL made application (the "BPL Application") to the Board's Facilities Group for a licence to drill a well on the Lands. BPL stated that it held the natural gas rights for the Lands. BPL submitted this application in accordance with the requirements of Directive 56 (**Tab B of EnCana Submission**).

6. In a letter dated December 8, 2005 to EnCana, the Board advised that it was of the view that the EnCana objection to the BPL application was based on the issue of rights to NGC. The Board then concluded that EnCana was not a party who may be directly and adversely affected by the Board's decision in respect of the BPL application, and its objection was dismissed (**Tab F of EnCana Submission**).

Response to EnCana's Grounds for Application

Board has Carried Out Legislative Mandate

7. The decision of the Board to issue Licence No. 0344816 complies with its statutory mandate. NGC is, in fact, gas, a proposition which is acknowledged by EnCana. Therefore, the Board's decision to issue Licence No. 0344816 does not contravene Section 16 of the *Oil and Gas Conservation Act* ("OGCA"). There is no requirement in the OGCA for the Board in assessing a licence application to consider ownership issues premised upon differing characterizations of gas. These issues are within the jurisdiction of the Court. The Board has no jurisdiction to adjudicate upon novel claims to entitlement which are premised on the relationship between emerging technologies and older grants and reservations.

Allegation of BPL's Failure to Prove Entitlement

(i) Conventional Gas

8. The initial objection raised by EnCana had nothing to do with the issue of BPL's entitlement to produce gas not found in association with any potential coal seam underlying the spacing unit for the well (ie., conventional gas other than NGC). The EnCana October 14, 2005 objection does not suggest that BPL lacks the rights to the conventional gas, nor does it suggest that the statements as to ownership contained in the BPL Application are inaccurate.

9. Similarly, the EnCana Submission does not contain a *bona fide* objection to BPL's entitlement to produce gas other than NGC. No evidence is presented to suggest that Bears paw lacks such rights. Further, there is no suggestion in either the EnCana Submission or EnCana's October 14, 2005 objection that the BPL Application was incomplete or contrary to Directive 56.

10. Therefore, to the extent that any relief sought by EnCana relies on BPL's lack of entitlement to produce gas other than NGC, such relief should be denied, pursuant to its mandate contained in the OGCA.

(ii) BPL's Entitlement Extends to NGC

11. If the Board determines that it is necessary to examine this issue, Bears paw submits the following.

12. In order to determine rights to the NGC in this case, it is necessary to examine the intention of the parties at the date of the grant or reservation. This appears to be consistent with the approach set out in the EnCana Submission. In order to assist in the ascertaining of such intention, it is useful to look at the vernacular meaning of the terms at the time of transfer. In this case, the time of conveyance and reservation was the period 1913-1914.

13. BPL submits that at that time, a reservation of coal in a grant of mineral rights was understood to be the reservation of the right to mine and produce a solid mineral

substance. At that time, NGC was not considered to have any commercial value. This has been conceded on page 5 of the EnCana Submission.

14. The vernacular meaning of the terms used in the grant is apparent from a review of the definition of coal. BPL was unable to locate a 1913 definition, however the 1943 definition of coal contained in the *Dictionary of Geological Terms* reads as follows:

A general name applied to black carbonaceous deposits, derived from accumulations of vegetable debris which have been compacted by diagenesis into firm brittle rocks exhibiting a dull or shining lustre. (Holmes) **(Tab 1)**

Therefore, any gas located within a solid seam or strata of coal remains a separate substance, gas, which is not solid, but is distinct from solid coal.

15. The Supreme Court of Canada was required to determine what was contained in a reservation in the case of *Western Minerals et al v. Gaumont et al*, [1953] 3 D.L.R. 245 **(Tab 2)**. In that decision, the Court was required to determine whether a reservation of "all mines, minerals, petroleum, gas, coal and valuable stone in or under the said land" contemplated sand and gravel. In holding to the contrary, the Court concluded that the onus of establishing that a particular substance fell within the reservation rested on the party so asserting. EnCana therefore has the onus of demonstrating that NGC was intended in circa 1913 to form part of the reservation of coal.

16. In *Stearns Oil and Gas v. Farquharson*, [1912] 5 D.L.R. 297 **(Tab 3)** the Privy Council concluded that it could not have been within the contemplation of a grantor to reserve a substance regarded as having a negative commercial value. The Privy Council stated as follows at p. 4:

At the date of this deed, January 22, 1867, the winning of mineral oil through gas wells was a comparatively new industry. This natural gas, according to a witness, did not become commercially valuable until 1880. And, according to the evidence of others, the accuracy of which did not appear to have been questioned, though gas might be found without the presence of oil, some gas was always found where oil was found, but the gas was regarded as a dangerous and destructive element to be got rid of as best it could. It did not begin to be utilized until 1890, over 20 years after

the date of the deed. The inference to be drawn appeared to their Lordships to be that the idea of preserving the ownership of this product, whose presence was regarded in 1867, and for many years after, as a dangerous nuisance, never occurred to the parties to the deed. If, in the attempt to exclude from the grant and preserve to the granting company what was then esteemed a valuable subject of property believed to be in the soil parted with namely, oil, a term was used which in its widest sense would cover this then worthless product, gas, the parties never intended, their Lordships thought to use that term in this wide sense.

(emphasis added)

17. BPL therefore submits that there can be no doubt that the circa 1913 reservation of coal to EnCana did not contemplate a reservation of NGC. At that time, NGC was likely regarded as a dangerous nuisance without economic value. The grantor was expecting to retain only the right to mine and extract coal (a solid) where it was economically feasible to do so. The grantor expected and intended that everything else was conveyed.

18. It cannot therefore be said that EnCana has met the onus of demonstrating that NGC was intended to be included in the reservation of coal. It follows that the Board was correct in concluding that BPL has the right to produce gas, including NGC, from the Lands.

19. The EnCana Submission inaccurately states the issue as being an analysis of what was intended to be conveyed. BPL submits the correct approach is to presume that it is clear that the grantor intended to convey its entire estate, subject only to what was specifically reserved. If a substance does not fall within such reservation (the onus demonstrating this being on the grantor) the rights to same are passed to the grantee.

20. EnCana argues that BPL's extraction of NGC constitutes a trespass as a result of the stratigraphic severance of the coal. However, in assessing this issue, it is, as EnCana suggests, important to look at the intentions and expectations of the parties at the time of the grant. In that NGC was regarded as a nuisance with negative commercial value, the grantor would not have objected to its removal. This is to be contrasted with the unauthorized removal of the "black carbonaceous deposits ...", which would, in the context of the circa 1913 grant, have formed the subject of a sustainable action.

21. Incidental production implies that substances to which a party has no rights are being produced as a by-product of substances rightfully produced. Bears paw is not producing NGC as "incidental production", but rather as a consequence of its right to produce gas from the Lands.

Direct and Adverse Effect

22. EnCana has correctly stated the two-branch test for direct and adverse effect as articulated by the Court of Appeal in *Dene Tha v. AEUB (Tab P of EnCana Submission)*. BPL concedes that EnCana has probably met the first branch of the test, in that any claim to ownership will constitute a right recognized by law. BPL submits that EnCana has failed to meet the second branch of the test.

23. The evidential case put forward by EnCana consists of a mere assertion that what on its face is a circa 1913 reservation of the right to mine solid coal should be construed by the Board in 2006 as the right to produce NGC. In *Dene Tha*, the Court of Appeal concluded that mere assertions of interference with rights, as opposed to evidence, are insufficient to meet the direct and adverse effect test. There is no evidence before the Board which suggests that the circa 1913 understanding of a coal reservation should be redefined as suggested by EnCana. The failure of EnCana to meet this second branch of the test in this case results in its inability to rely on Section 26 of the *Energy Resources Conservation Act* in support of a request for a hearing.

Commingled Production

24. The BPL Application indicates that it intends to drill to and test the Belly River and the Horseshoe Canyon formations, and further, that an application for commingled production may be made pending test results.

25. There is at present no commingled production from the Belly River and Horseshoe Canyon formations, with the result that Section 15.022 and 3.05 of the *Oil and Gas Conservation Regulations* are not contravened. Licence 0344816 does not offend any provision of the OGCA or the *Oil and Gas Conservation Regulations*.

Economic, Orderly and Efficient Resource Development

26. The EnCana position necessarily requires that development activity be curtailed or delayed while its claim to ownership is disputed. Since there are many differing versions of grants and reservations, the Board would be in the position of delaying development while each of these varying forms is adjudicated. Such delay would be highly detrimental to resource development in the Province because it would, among other things, hinder investment in, and the development of areas where NGC is known or believed to exist.

27. BPL submits that this extensive ownership adjudication within the regulatory framework is contrary to the Board's mandate as set out in Section 4(c) of the OGCA namely to facilitate economic, orderly and efficient resource development. This point was made in the *Dene Tha* decision at paragraph 19, where the Court stated as follows:

The First Nation also contended before us it had no duty to tell the Board specifics, and that the Board should have frozen all development while deciding the question. We cannot agree, and have seen no authority, constitutional or otherwise, requiring such a logical impasse.

Conclusion

28. The Board correctly carried out its legislative mandate where it issued Licence No. 0344816. There was no requirement for it to consider the equity arguments based on EnCana's premise that for the purposes of the OGCA, NGC should be regarded as distinct from other gas. There is no reason for the Board to vary or rescind Licence No. 0344816.

29. In any event, a cursory examination of the issue leads to the conclusion that the reservation of coal upon which EnCana relies does not include NGC. Even if the Board had the jurisdiction to consider this issue, it would undoubtedly be resolved in favour of Bears paw.

30. In that EnCana has acknowledged that NGC is gas, no argument can be made that the Board failed to properly carry out its statutory mandate. Therefore, the decision of the Board could not have had any adverse effect on EnCana. Adverse effect can only arise from a

decision of the Court on this issue as it is the Court who has the jurisdiction to decide the equity issue raised by EnCana.

31. The statutory mandate for the orderly and efficient development of resources is defeated by the relief sought by EnCana, as it is asking the Board to step outside its statutory mandate and function as a Court. Such a change can only come about at the will of the Legislature.

Yours truly,
THACKRAY BURGESS



John Gruber

JG/las
Encl.

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