Bearspaw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd.

Part 2 of Proceeding No. 1457147—Review of Certain Well Licences and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields

March 28, 2007

Alberta Energy and Utilities Board

ALBERTA ENERGY AND UTILITIES BOARD
Decision 2007-024: Bearspaw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd., Part 2 of Proceeding No. 1457147— Review of Certain Well Licences and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields

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1 DECISION

Having carefully considered all of the evidence, the Alberta Energy and Utilities Board (EUB/Board) hereby confirms that the well licences and compulsory pooling and special well spacing (holding) orders set out in Appendix 1 were properly issued.

Further, this decision sets aside the directions given in *Bulletin 2006-19: Applications Involving Objections Relating to the Legal Entitlement of Coalbed Methane*, effective as of the date of this decision.

2 INTRODUCTION

2.1 Background—Coalbed Methane in Alberta

CBM, also known as natural gas from coal, natural gas in coal, natural gas stored in coal, coalbed natural gas, fire damp, and marsh gas among other terms, is the gas, primarily methane, producible from coal seams. Some of these terms have been used interchangeably by the parties involved in this proceeding to describe the substance referred to in this decision as CBM.

In ST98-2006: Alberta's Energy Reserves 2005 and Supply/Demand Outlook 2006-2015, the EUB estimated the remaining established reserves of CBM in Alberta as of December 2005 to be 20.9 billion cubic metres (10^9 m^3). Further, in that report the EUB estimated that production of CBM was expected to increase from 2.9 10^9 m^3 in 2005 to 19.6 10^9 m^3 in 2015, representing an increase from less than 2 per cent in 2005 to about 16 per cent in 2015 of total Alberta marketable gas production. *EUB Bulletin 2007-05: 2006 Alberta Coalbed Methane Activity Summary and Well Locations* reports that as of December 31, 2006, a cumulative total of 10 723 wells have been drilled for CBM in Alberta.

In Alberta, the Alberta Crown owns about 81 per cent of the province's mineral rights by land area. The remaining 19 per cent are Freehold mineral rights owned by the federal government (National Parks, Indian Reserves) and by companies and individuals.[1] It has been estimated that about 10 per cent of the mineral rights in Alberta, or 6 400 000 hectares, are privately owned.[2]

[1] Alberta Department of Energy, *About Freehold Mineral Tax*, available on the Web at http://www.energy.gov.ab.ca/docs/tenure/pdfs/FMT_historical_overview.pdf (March 20, 2007).
[2] Exhibit 13-001-2006-08-25 FHOA Submission at paragraph 2.

The Freehold Petroleum and Natural Gas Owners Association (FHOA) estimates that there are 40 000 to 50 000 individual owners of Freehold mineral rights in Alberta, with about 40 per cent of their members holding title to split-title mineral rights—that is, all mines and minerals except coal or all mines and minerals except coal and petroleum.[3]

2.2 History of the Applications

At various times in 2005 and 2006, Bearspaw Petroleum Ltd. (Bearspaw), Devon Canada Corporation (Devon), and Fairborne Energy Ltd. (Fairborne) filed 28 applications, which resulted in the issuance of the well licences and compulsory pooling and special spacing orders set out in Appendix 1. The applications related, among other things, to the production of gas and/or CBM in the Belly River Group, Horseshoe Canyon Formation, and Edmonton Group on split-title lands. The applications were made under the following statutory provisions:

- 26 well applications were made pursuant to sections 15 and 16 of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6. (*OGCA*) and sections 2.010 and 2.020 of the *Oil and Gas Conservation Regulations*, Alta. Reg. 151/71 (*OGCR*);
- one compulsory pooling application was made pursuant to section 80 of the *OGCA*; and
- one special well spacing (holding) application was made pursuant to section 79(4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR*.

The EUB considered the applications and related objections filed by EnCana Corporation (EnCana) and Luscar Ltd. (now Carbon Development Partnership [CDP]),[4] as more particularly set out in Appendix 1, dismissed the objections, and approved each of the applications without holding a public hearing.

2.3 History of the Review Proceeding

2.3.1 Nature of the Phase 1 Proceeding

Subsequently, the Board received review and variance applications from CDP and EnCana requesting that the Board conduct a review hearing in connection with the well licences and special well spacing (holding) and compulsory pooling orders approved by the Board in 2005 and 2006, pursuant to sections 39 and 40 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (*ERCA*).

CDP and EnCana submitted that as the fee simple owners of the coal, they were entitled to the CBM. They argued that Bearspaw, Devon, and Fairborne, as the natural gas lessees,[5] were not entitled to obtain approvals to produce the CBM underlying and within the coal lands. Bearspaw, Devon, and Fairborne opposed the review applications. On January 31, 2006, the Board held an

[3] Hearing Transcript Volume 4 at page 606, lines 11-19.

[4] Exhibit 03-036-2006-09-15 CDP Submission at paragraphs 1 to 3 inclusive: effective May 4, 2006, Luscar Ltd. changed its name to Prairie Mines and Royalty Ltd. (PMRL) and, effective June 1, 2006, PMRL sold its entire interest in the coal underlying and within the Fairborne Application Properties and the Devon Application Properties to CDP. For the purposes of this report, CDP includes PMRL and Luscar Ltd. as the context requires.

[5] Although the parties to this proceeding refer to various mineral "leases," as noted by Justice Fruman in *Alberta Energy Co. v. Goodwell Petroleum Corp.*, 2003 CarswellAlta 1394, 2003 ABCA 277, 233 D.L.R. (4th) 341 (*Goodwell*), at paragraph 75: "However, hydrocarbon leases are not leases at all, but profits à prendre, conferring a right to explore for and recover hydrocarbons."; see also paragraph 63.

oral proceeding to determine whether EnCana and CDP were affected persons under the *ERCA* and entitled to a hearing (the Phase 1 Proceeding). By letter dated March 9, 2006, the Board determined that CDP and EnCana, as the coal owners, were affected parties pursuant to section 40 (1) of the *ERCA* and granted their requests for a review hearing (the Phase 2 Proceeding). The Board registered the Phase 2 Proceeding as Proceeding No. 1457147.

From this point in this decision, the Board refers to CDP and EnCana collectively as the Coal Owners or when necessary individually by their respective names.

2.3.2 Nature of the Phase 2 Proceeding

The Board split the Phase 2 Proceeding into two parts:

- Part 1: consideration of whether interim conditions should be imposed for the measurement and accounting of CBM production in connection with wells that have been licensed to Bearspaw, Devon, or Fairborne; and
- Part 2: consideration of the issue of legal entitlement to CBM being produced or intended to be produced from the wells.

2.3.2.1 Part 1 of the Phase 2 Proceeding No. 1457147 (the Part 1 Proceeding)

A Notice of Hearing for the Part 1 Proceeding was issued on April 26, 2006, to Bearspaw, CDP, Devon, EnCana, and Fairborne. After reviewing the submissions filed by these parties, the Board decided that it was not efficient to conduct a proceeding dedicated to the issue of measurement and accounting of CBM. As a result, a Notice of Cancellation of Hearing was issued on June 15, 2006, which cancelled the Part 1 Proceeding.

2.3.2.2 Part 2 of the Phase 2 Proceeding No. 1457147 (the Part 2 Proceeding)

On May 30, 2006, the Board issued *Bulletin 2006-19*, which directed that all applications in which legal entitlement to CBM was at issue would be held in abeyance pending issuance of the Board's decision in the Part 2 Proceeding.

Bulletin 2006-19 noted that the Phase 2 Proceeding originated from certain applications for review in which the legal entitlement of CBM on Freehold mineral lands was at issue. This issue arose on Freehold mineral lands where one party is the holder of fee simple coal rights, another party is the holder of all mines and minerals other than coal, and both parties claim legal entitlement of CBM.

The Board issued a Notice of Hearing for the Part 2 Proceeding on June 23, 2006.

On July 27, 2006, an Amended Notice of Hearing was issued from the Board's offices directing new submission filing dates for the parties.

2.3.2.3 Third-Party Participants

Following the issuance of the June 23, 2006, Notice of Hearing, several companies, a trust, and a not-for-profit corporation that represents Freehold owners, requested permission to participate in the hearing. These additional third-party participants included

- Apache Canada Ltd. (Apache),

- ARC Resources Ltd. (ARC),
- Canpar Holdings Ltd. (Canpar),
- Centrica Canada Limited (Centrica),
- Computershare Trust Company of Canada (Computershare),
- ConocoPhillips Canada Resources Corp. (ConocoPhillips),
- FHOA, and
- Quicksilver Resources Canada Inc. (Quicksilver).

All of these parties, with the exception of Computershare, supported the position of Devon, Bearspaw, and Fairborne that the natural gas lessees were entitled to the CBM. Computershare was neutral.

The Board decided that only Apache, Canpar, and Computershare strictly qualified as interveners pursuant to section 26 of the *ERCA* because they asserted rights of ownership or other rights in relation to lands that were the subject of the applications. Notwithstanding, the Board granted the right to participate to all the parties listed above, including the right to present direct evidence, cross-examine, and submit final argument.

From this point in this decision, the Board refers to Bearspaw, Devon, Fairborne, and the parties listed above collectively as the Natural Gas Rights Holders or when necessary individually by their respective names.

2.4 The Part 2 Proceeding

The Board held a public hearing in Calgary, Alberta, from October 16 to 26, 2006, before Board Members M. N. McCrank, Q.C., P.Eng. (Presiding Member) and A. J. Berg, P.Eng., and Acting Board Member C. A. Langlo, P.Geol. Final argument was received after the close of the hearing, with final submissions being filed on February 12, 2007. On the basis of the final submission being filed on February 12, 2007, the Board considers the hearing to be closed on February 12, 2007.

Those who appeared at the hearing are listed in Appendix 2.

3 ISSUES

The Board considers that the relevant issues in the Part 2 Proceeding are

- technical evidence regarding the nature and development of CBM,
- jurisdiction of the Board to consider the issue of the legal entitlement to CBM in these applications,
- standard of proof required to satisfy the Board as to who has the right to produce the CBM,
- demonstration of entitlement to produce CBM, and
- review of instruments filed by the parties to demonstrate CBM entitlement.

4 OVERVIEW OF TECHNICAL EVIDENCE

4.1 Introduction

The Board has considered the technical evidence presented in this proceeding relating to the nature of CBM. The Board views important aspects of this evidence to pertain to in situ nature of the CBM at initial (undisturbed) conditions and whether the CBM is part of the coal or a separate substance. The issues considered include the physical relationship of CBM to coal and the phase of CBM at initial conditions in situ. Also of interest are the development practices used to produce CBM, as such practices control the practical development of the resource.

Accordingly, the following subsections elaborate on the Board's evaluation of these matters.

4.2 The Nature of CBM

4.2.1 Views of the Natural Gas Rights Holders

Devon and Fairborne, along with Canpar, Centrica, ConocoPhillips, and Quicksilver (jointly referred to hereafter as ConocoPhillips *et al.*), submitted that CBM is a natural gas that can be produced from coal seams. Bearspaw, ARC, and FHOA did not submit technical evidence regarding the nature of CBM, but adopted the opinion of the Joint Submission of ConocoPhillips *et al*. Apache did not submit technical evidence regarding the nature of CBM.

The Natural Gas Rights Holders submitted that adsorption, which they defined as the process of bonding gas molecules to a solid upon exposure between the solid and the gas, is the dominant storage mechanism for CBM in coal. They noted that the term sorption is synonymous with adsorption. They submitted that adsorption results from weak intermolecular physical attraction between gas and the organic material. They argued that adsorption is generally described as a physical bond and that these bonds can be broken by simple pressure reduction. The Natural Gas Rights Holders argued that this physical bond implies that there are two separate substances, gas and coal. They defined absorption as the process of taking up liquids within solids, or gases within liquids, but did not view absorption as significant, if it occurred at all.[6]

The Natural Gas Rights Holders submitted that the majority of gas stored in coal in commercial reservoirs is adsorbed within microporosity within the coal rock matrix, which consists of solid organic material. They submitted that CBM is gaseous in Alberta coals and that the adsorbed CBM occurs in a dense vapour phase in most CBM reservoirs.

The Natural Gas Rights Holders submitted that there are three states of matter—solid, liquid, and gas—and that these have been adopted in the Supreme Court of Canada decision of *Anderson v. Amoco Canada Oil & Gas*.[7] They viewed CBM, which exists both as free gas and in a highly condensed state attracted to the coal by weak physical forces, to clearly not be a solid. They argued that, for CBM compositions where methane dominates the composition, due to methane's low critical temperature and the relatively small proportions of ethane and carbon dioxide, the

[6] Hearing Transcript Volume 2 at page 212, lines 19 - 22.
[7] ConocoPhillips *et al*. Joint Final Argument, November 15, 2006, at paragraph 3. *Anderson v. Amoco Canada Oil & Gas*, 2004 CarswellAlta 941, 241 D.L.R. (4th) 193, [2004] 3 S.C.R. 3 (*Anderson*).

reservoir fluid will almost always be in the single-phase region above the critical temperature and a liquid hydrocarbon will rarely be present in CBM. They also argued that given the temperature at which gas stored in coal is found in Alberta coal reservoirs, it is impossible for it to be a liquid. Additionally, the Natural Gas Rights Holders submitted that coal is a solid and that coal cannot be broken into other components without major changes to the structure of the coal or bringing the coal to surface.

The Natural Gas Rights Holders submitted that coal is a container for CBM and that CBM is separate and distinct both from the coal rock matrix itself and from the other coal materials that may be contained within it, including water, oil, organic matter, and inorganic (mineral) matter.

4.2.2 Views of the Coal Owners

The Coal Owners submitted that the term CBM describes a methane-rich mixture of gases produced from underground coal seams and that CBM occurs within coal through a physical-chemical relationship termed sorption. They also submitted that this more generic term of sorption, which encompasses both absorption and adsorption, should be used to describe how CBM occurs within coal. The Coal Owners contended that methane molecules occur in coal in a condensed, liquid-like form due to the fact they are physically bonded within the molecular structure of the coal. They argued that the methane exists in a highly condensed form, having apparent density more akin to that of a liquid than a gas. However, they conceded that the physical association between these sorbed molecules and the other co-constituents with which they are physically bonding is not very well understood, not very well characterized, and certainly far more complex than originally understood.[8]

The Coal Owners argued that CBM is intrinsic to the coal in that it interacts physically and chemically with other coal constituents and should therefore be considered as a constituent of coal. The Coal Owners contended that coal does not merely serve as a container that holds CBM, but that sorption of methane changes the physical characteristics of the coal and hence is a part of the coal.

The Coal Owners submitted that the term coal describes a diverse class of sedimentary rocks comprised primarily of sedimentary organic matter. However, they also submitted that it differs from other varieties of fossil hydrocarbon resources, such as oil, in that it has a generally solid character and it is a multicomponent, multiphase mixture that includes liquids, sorbed vapours, and entrapped gases. They argued that coal contains fluid constituents as well, including water, oils, and gases, and that CBM is part of the coal, just like the inherent moisture and inorganic mineral matter. The Coal Owners acknowledged, however, that the clear understanding of the composition, nature, and characteristics of coal is an evolving science.[9]

4.2.3 Views of the Board

The Board notes that all parties agree that CBM is the gas produced from coal. However, the parties disagree on how CBM is stored in the coal, the interpretation of the phase of the CBM at in situ conditions, and whether the CBM is part of the coal or simply stored in the coal.

[8] Hearing Transcript Volume 8 at page 1251, lines 10 - 18.
[9] Hearing Transcript Volume 9 at page 1384, lines 1 - 25.

The Board notes that the Natural Gas Rights Holders view the primary CBM storage mechanism in coal to be adsorption, whereas the Coal Owners view sorption, which they describe as including both adsorption and absorption, to better describe how CBM occurs in coal. The Board finds that the storage mechanism for CBM in coal is not conclusively and absolutely understood. However, the Board observes that CBM can be produced to surface through wells drilled into the coals with only minor alteration (commonly hydraulic fracturing of the formation) to the coal in situ. This leads the Board to conclude that CBM is released easily from the coal and therefore is relatively weakly bonded to the coal. Based on this conclusion, the Board is of the view that adsorption is most likely the dominant storage mechanism for CBM in coal.

With regard to the phase of the CBM stored in the coal, the Natural Gas Rights Holders viewed the CBM to be a dense vapour under in situ conditions, whereas the Coal Owners viewed the CBM to be liquid-like under these conditions. The Board accepts the Natural Gas Rights Holders position that, due to the low critical temperature of methane and the dominant proportion of methane in the CBM, CBM cannot exist as a liquid at the temperatures encountered in situ. The Board therefore concludes that CBM can be considered to be gaseous in situ. In the Board's view, considering mixtures that are predominantly methane to be gaseous, not liquid, at in situ conditions is consistent with current and historical regulatory and industry practices in engineering and geology. The Board also notes that all parties agree that CBM is gaseous at surface.

With regard to coal itself, the Board notes that all parties interpret coal to be a multicomponent rock composed primarily of organic material and that a primary aspect of coal is that it has a solid nature. However, the parties did not agree on whether coal is simply a container for the CBM or whether CBM is a part of the coal. The Board notes that the Natural Gas Rights Holders argued that coal is a solid and that CBM is stored in but is not part of the coal. The Coal Owners view coal to be a multiphase material that includes CBM.

The Board notes the argument of the Coal Owners that coal can contain various components, including gas, inherent moisture, and mineral content, and that these components are all part of the coal. However, the Board does not find the evidence supporting this view to be compelling. The Board also notes the Coal Owners' acknowledgement that the clear understanding of the composition, nature, and characteristics, of coal is an evolving science. Dr. Levine stated: "Our knowledge and understanding of what it's made of has evolved continuously at the same term coal has been used to describe it."[10] He also stated: "This system can never be defined as precisely as mineral systems of relatively constrained composition. So there will always be room for further study and improvement."[11]

The Board concludes that coal is a rock composed mainly of solid carbonaceous material in which CBM is stored. Coal also includes inherent moisture and mineral content. However, unlike the CBM that the Board concludes is weakly bonded to the coal, these other constituents are viewed to be ones that cannot be separated from the coal in situ without extraordinary measures. CBM can and is produced from the coal by conventional well drilling methods.

[10] Hearing Transcript Volume 8 at page 1262, lines 7 - 9.
[11] Hearing Transcript Volume 9 at page 1384, lines 23 - 25.

The Board is of the view that the evidence before it leads it to conclude that CBM is not an intrinsic component of coal. The Board concludes that CBM is a form of gas stored in and produced from coal that is gaseous and distinct from the coal at initial in situ conditions.

4.3 The Development of CBM

4.3.1 Views of the Natural Gas Rights Holders

The Natural Gas Rights Holders contended that the development of CBM is the same as that for other forms of natural gas development with respect to the drilling, completion, and production of wells and the transportation of the produced gas. The Natural Gas Rights Holders argued that similar to other forms of natural gas, the ease of separation allows gas stored in coal to be produced with industry-wide natural gas drilling and completion techniques.

4.3.2 Views of the Coal Owners

The Coal Owners argued that the fact that CBM is produced to the surface through drillholes does not in and of itself imply that CBM is not a component of the coal. They also noted that CBM had been produced historically by coal developers and that the economic impact of CBM was inherent in the value of the coal, whether positive or negative. They further stated that CBM is formed in reaction to a technological process that imparts a compositional change to the coal.

Regarding the need to apply coal regulations to CBM drilling and development proposals, EnCana responded that the regulations that are currently in place for the natural gas industry would work for CBM development.[12]

4.3.3 Views of the Board

The Board accepts the parties' contention that CBM development uses similar development practices as other gas development. Further, the Board notes that the completion and stimulation technology used for CBM development is similar to the technology used for other low-permeability rock. Although the Board accepts that CBM was historically removed from coal seams as part of coal mining operations, the Board notes that such CBM removal was done mainly for mine safety reasons, often without capturing the gas. Further, the Board notes that in large measure the commercial production of CBM in Alberta as a gas resource has been conducted by the oil and gas sector.

The Board questions the consistency of EnCana's position that CBM is an intrinsic part of coal but that the EUB should continue to apply the current regulatory approach of using gas regulations for CBM development proposals rather than using its coal development regulations for these purposes.

The Board notes that all parties agreed that the practices associated with the development of CBM are essentially the same as those used for the development of gas from other rock types. Further, parties agreed that CBM development is more aligned with gas development than it is with coal development.

Consequently, the Board considers CBM to be gas from a commercial development perspective.

[12] Hearing Transcript Volume 9 at page 1360, lines 9 - 25.

4.4 Summary of Board Conclusions

Based on the evidence presented on the nature of CBM and coal, the storage mechanisms, the in situ phase behavior of CBM, and the technical and regulatory practices of CBM development, the Board concludes that CBM is a form of gas that should be considered to be gaseous at initial (undisturbed) in situ conditions and should not be considered to be part of the coal. Furthermore, the Board views these conclusions to be consistent with the existing statutory definition of gas found in the *OGCA*.

5 JURISDICTION OF THE BOARD TO CONSIDER THE ISSUES RAISED

5.1 Jurisdiction

5.1.1 Views of the Parties

The jurisdiction of the Board to consider the issue of legal entitlement was raised by the parties. In this proceeding, three different types of applications are relevant to this issue:

- well licence applications pursuant to sections 15 and 16 of the *OGCA* and sections 2.010 and 2.020 of the *OGCR*;
- one compulsory pooling application pursuant to section 80 of the *OGCA*; and
- one special well spacing (holding) application pursuant to section 79 (4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR*.

5.1.2 Views of Natural Gas Rights Holders

Most Natural Gas Rights Holders submitted that the Board possesses the jurisdiction, express or implied, to determine entitlement, including ownership if necessary, for the purposes of section 16 of the *OGCA* and the ownership requirements associated with compulsory pooling and special well spacing (holding) applications.[13] These Natural Gas Rights Holders argued that authority

[13] *OGCA* Part 12, includes section 80 and provides definitions for both "owner" and "tract" in sections 78(a) and 78(b) respectively. Sections 78(a) and 78(b) of the *OGCA* read respectively: "(a) 'owner', when used in connection with a tract, includes the person who has the right or an interest in the right to drill for, produce and dispose of any oil or gas from the tract or who would have that right or interest in the absence of any contract, statute, regulation or order governing the disposition of the production; (b) 'tract' means an area within a drilling spacing unit or a pool, as the case may be, within which an owner has the right or an interest in the right to drill for and produce oil or gas;"

OGCR section 5.200 reads as follows: "A holding shall contain only (a) a single drilling spacing unit, or (b) whole, contiguous drilling spacing units of common ownership."

OGCA section 1(1) (q) provides the definition for "drilling spacing unit," which is referenced in the above-noted sections of the *OGCA* and *OGCR*. It provides that "drilling spacing unit" means a drilling spacing unit prescribed by or pursuant to the regulations. *OGCR* Part 4 prescribes the regulations for drilling spacing units and target areas for wells.

OGCR section 1.020 (2) 4 provides that " 'common ownership', when that term is used in connection with a block, holding or project, means that (i) the ownership of the lessors' interests throughout the block, holding or project is the same and the ownership of the lessees' interests throughout the block, holding or project is the same, or (ii) the owners of the lessor's interests and the lessee's interests throughout the block, holding or project have agreed to pool their interests."

was not ousted by the existence of a *bona fide* dispute, since a determination of ownership was not conclusive for all purposes, only for the purposes of the *OGCA*.

Other Natural Gas Rights Holders rejected the premise that the concepts of "entitlement" and "ownership" are the same or that "ownership" is an element of "entitlement" based on a plain reading of the language contained in section 16 of the *OGCA*. They argued that pursuant to this provision, the Board has the jurisdiction to decide whether an applicant for a well licence or pooling order is entitled, for development purposes, to the right to produce the substance applied for.

5.1.3 Views of the Coal Owners

CDP submitted that the Board does have the jurisdiction to decide entitlement, including ownership, under section 16 of the *OGCA* but that the Board does not have the jurisdiction to determine underlying property rights and ownership rights for all purposes in a final way. CDP asserted that in the face of a *bona fide* dispute as to ownership, it was impossible for the Board to decide that the Natural Gas Rights Holders were entitled to produce the CBM because the standard of proof required to satisfy the Board under section 16 was one of certainty. CDP stated that in the absence of a definitive court ruling in favour of the Natural Gas Rights Holders, this standard could not be met.

EnCana submitted that the Board's authority to determine ownership of CBM is ousted if a *bona fide* dispute exists over the issue. EnCana stated that such a dispute did exist, as both the Natural Gas Rights Holders and the Coal Owners asserted proprietary claims to CBM and there was no judicial resolution of the issue. In these circumstances, EnCana argued that that the Board has no express or implied power to decide competing claims.

5.1.4 Views of the Board

The Board notes that the Coal Owners are disputing the Board's jurisdiction to determine entitlement or ownership under its enabling statutes in the Board's most common and numerous types of applications. In 2006, applications in the three types being challenged constituted about 34 740, or 59 per cent, of the approximately 58 400 applications approved by the Board. An approximate breakdown of the three types in 2006 is shown below:

- 33 000 well licence applications, including amendments,
- 40 compulsory pooling applications, and
- 1700 spacing applications, including special well spacing (holding).

The Board finds that it has jurisdiction to determine whether an applicant under section 16 of the *OGCA* "is entitled to the right to produce the oil, gas, or crude bitumen from the well …" for the purpose of granting a licence, notwithstanding that there is a *bona fide* ownership, proprietary, or other legal dispute over an applicant's entitlement. Even where it is unlikely that a Board decision on ownership or other proprietary rights under section 16 of the *OGCA* will constitute a final and binding determination between parties for all purposes, the Board finds that it must take ownership or other proprietary rights into account when deciding whether to issue a well licence.

The Board also has the authority to consider whether the statutory requirement of ownership has been met when the owner of a tract within a drilling spacing unit (DSU) applies for a compulsory

pooling order under section 80 of the *OGCA* or whether common ownership has been met in a special well spacing (holding) application under section 79 (4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR*.

The Board makes these conclusions from the analysis that follows. The purposes of the *OGCA* set out in section 4 are

(a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;

(b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas;

(c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta;

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

(e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta;

(f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

Section 3 of the *OGCA* reads:

> This Act applies to every well and facility situated in Alberta whenever drilled or constructed, and to any substance obtained or obtainable from such a well or facility, notwithstanding any terms to the contrary in any lease or grant from the Crown in right of Canada or from any other person.

In order to carry out the purposes of the *OGCA*, the Board is given broad powers; some are express and others are implied. Section 16 of the *OGCA* is an example of an express power and reads:

> 16(1) No person shall apply for or hold a licence for a well
>
> (a) for the recovery of oil, gas or crude bitumen, or
>
> (b) for any other authorized purpose
>
> unless that person is a working interest participant and is entitled to the right to produce the oil, gas or crude bitumen from the well or to the right to drill or operate the well for the other authorized purpose, as the case may be.
>
> (2) If, after 30 days from the mailing of a notice by the Board to a licensee at the licensee's last known address, the licensee fails to prove entitlement under subsection (1) to the satisfaction of the Board, the Board may cancel the licence or suspend the licence on any terms and conditions that it may specify.
>
> (3) Where a licence is cancelled or suspended pursuant to subsection (2),
>
> (a) all rights conveyed by the licence are similarly cancelled or suspended, and
>
> (b) notwithstanding the cancellation or suspension of the licence, the liability of the licensee to complete or abandon the well and reclaim the well site or suspend operations as the Board directs continues after the cancellation or suspension.

The Board considers that as a basic principle of statutory interpretation: "words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[14]

The ordinary sense of the language in this provision gives the Board jurisdiction to consider the matter of entitlement, including ownership or other proprietary rights, in carrying out its statutory duty of determining whether to issue a well licence. The words "no person shall apply...unless that person…is entitled to the right to produce the oil, gas or crude bitumen from the well" make the issue of entitlement a mandatory consideration by the Board in assessing a well licence application. There is no qualification in section 16 that limits the meaning of "entitled to the right to produce" or "entitlement under subsection (1) to the satisfaction of the Board" so as to exclude any aspect of entitlement including ownership. This is in keeping with the fact that entitlement disputes may arise from a variety of commercial arrangements. The plain meaning of these words includes ownership.[15]

Further, as discussed above, the pooling and special well spacing (holding) provisions specifically require the Board to take account of ownership. Under sections 78(a), 78(b), and 80 of the *OGCA*, the owner of a tract within a DSU must have the right or an interest in the right to drill for, produce, and dispose of gas from the tract in order to make a compulsory pooling application.[16] Similarly, an applicant for a special well spacing (holding) application under section 79 (4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR* must establish "common ownership" in the proposed DSU. In order for these sections and section 16 to be read together harmoniously, entitlement under section 16 must include ownership.

Nor do the words in the section restrict the exercise of the Board to determine entitlement solely to cases of undisputed entitlement or ownership. An applicant under section 16(2) must prove entitlement in section 16 (1) to the satisfaction of the Board. In the Board's view, this requirement would not be logical if the Board lacks jurisdiction to consider whether an applicant is entitled to the right to produce the substance in the face of a *bona fide* dispute over ownership. Given this view, the Board does not find it necessary to decide whether EnCana's objections to the applications are *bona fides*.

As indicated by Justice Fruman in *Alberta Energy Co.* v. *Goodwell Petroleum Corp.*,[17] entitlement may arise under a variety of instruments that convey mineral rights and the Board must interpret these instruments in establishing the scope of the conferred rights. If the Board were to adopt the Coal Owners' approach to jurisdiction, the Board would be hindered in performing its statutory responsibilities regarding applications for well licences, special well spacing (holding), and compulsory pooling orders whenever a party raised an objection related to entitlement to produce the energy resource or substance. This would have the effect of frustrating the Board's mandate in carrying out the purpose, objects, and application of the *OGCA* to every well situated in Alberta and any substance obtained or obtainable from such a well.

[14] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 1.
[15] CDP Final Argument dated November 29, 2006, page 52, paragraph 125: "Black's Law Dictionary (1977) 5th ed. p. 477, defines "entitle" as follows: Entitle. In its usual sense, to entitle is to give a right or legal title to. Schmidt v. Gibbons, 101 Ariz. 222, 418, p. 2d 278, 380.
[16] Supra note 13, for definition of "owner"and "tract".
[17] *Goodwell*, supra note 5, at paragraphs 44-64.

The Board notes that Acting Dean Lucas, the Coal Owners' legal expert, testified:

> …the Board has a statutory decision power under section 16, and it's a power that it has to try to exercise in a proceeding of this kind. The power has been described as a discretionary power, but that doesn't tell us very much because a discretion always has to be exercised within certain parameters that can be derived from the legislation and there are always factors that are critical and that have to be taken into account in the exercise of a discretionary power. And in this case, one of those factors and perhaps the key factor, is ownership of the rights in question.[18]

This view also appeared to be expressed by EnCana at the Phase 1 Proceeding held on January 31, 2006.[19]

There are other express provisions in its enabling legislation that give the Board the authority to fulfill its statutory functions and meet the purposes of the *OGCA*, including the determination of entitlement under section 16 of the *OGCA* and ownership in compulsory pooling and special well spacing (holding) applications. Section 94 of the *OGCA* provides that:

> …the Board has the exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act.

The Board finds that section 16 of the *OGCA* is sufficiently explicit in granting the power to determine entitlement to produce gas including CBM when considering applications for well licences.

However, even if the Board were to agree that section 16 was not sufficient, the Board considers that section 94 is even more clear in providing the Board with the necessary authority.

Contrary to EnCana's argument that the Board has no express power to decide legal questions, section 94 of the *OGCA* gives the Board the express authority to decide such questions. Section 94 provides that the Board can "determine all matters and questions arising under this Act." The plain meaning of these words includes questions of law. Under section 16 of the *OGCA*, a legal decision is required to determine whether an applicant is entitled to the right to produce the resource.

Similarly, the matters of "owner of a tract within a drilling spacing unit" for a compulsory pooling application under section 80 of the *OGCA* and "common ownership" for a special well spacing (holding) application under section 79 (4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR* require a legal determination.

In order to regulate the development of energy resources in Alberta, the Board, as a matter of course, makes legal decisions as it interprets and applies statutory provisions to the particular facts and circumstances of applications before it. The Board could not do its work without the power to make legal decisions. The Board has the express authority under specific provisions of its enabling legislation, including section 16 of the *OGCA* and the broad powers set out in section 94 of the *OGCA*.

[18] Hearing Transcript Volume 9 at page 1343, lines 8-20; page 1344, lines 1-5.

[19] Hearing Transcript January 31, 2006, at page 47, lines 19 - 25: "It may be that the two diverge, the court's determination and the Board's, but the fundamental premise or the requirement from the Board is Section 16. Section 16 says determine entitlement. You can't determine entitlement unless you determine ownership. It may not bind everybody. It may not have great precedential effect to nonparties, but it is necessary, and it is required."

Further, under section 26 of the *Alberta Energy and Utilities Board Act* R.S.A. 2000 c. A-17 (*AEUB Act*) and section 41 of the *ERCA*, an appeal from a Board decision lies only on a question of jurisdiction or law. If the Board has no authority to make legal decisions under the *OGCA*, there would be no need for the legislation to provide for appeals on questions of law. The legislature intended the Board to have the authority to make legal decisions that are subject to appeal, by way of leave, to the Alberta Court of Appeal.

Case law also supports the view that the Board has jurisdiction to decide ownership or proprietary disputes for the purpose of carrying out its statutory responsibilities. In *Anderson v. Amoco Canada Oil & Gas*,[20] Justice Fruman stated:

> I accept that for regulatory purposes, solution gas belongs to the petroleum owner….
>
> The regulators' view does not determine legal ownership of solution gas. If the regulators have misconstrued the law, their practices will have to change, however cumbersome that process might be. The courts' function is not to preserve legally incorrect administrative positions.

In *Goodwell*,[21] the Alberta Court of Appeal reversed a decision of the Board denying Alberta Energy Company Ltd. entitlement to produce certain gas-cap gas pools overlying four of its bitumen wells. Goodwell Petroleum Corporation Ltd. had the petroleum and natural gas rights to the pools in question. In setting aside the Board's decision, the Alberta Court of Appeal said:

> However, the Board's well licence interpretation in this case did not employ that technical expertise, but involved a legal determination of the right to extract resources. In order to delineate the scope of the AEC's rights under the well licences the Board had to interpret the oil sands leases, which would have required an examination of the relevant energy statutes and applicable case law.

In both these cases, the courts did not question the Board's jurisdiction to make the initial determination on entitlement. Rather, they decided that it owed little deference to these Board decisions because the standard of review on such decisions was correctness.

The Board now comments on provisions of the *ERCA*. Section 16 of the *ERCA* reads as follows:

> The Board, in the performance of the duties and functions imposed on it by this Act and by any other Act, may do all things that are necessary for or incidental to the performance of any of those duties or functions.

Although the parties disagreed about the implied powers of the Board under section 16 of the *ERCA*, the Board does not find it is necessary to invoke the implied powers granted to it under this section in order to resolve the issue of jurisdiction over the applications, for the reasons stated above. However, in the absence of the express grant of authority in sections 16 and 94 of the *OGCA*, the Board believes that section 16 of the *ERCA* gives the Board the authority.

Section 16 of the *ERCA* is a codification of the doctrine of jurisdiction by necessary implication. A number of factors are examined in order to determine whether a tribunal has been given an

[20] *Anderson v. Amoco Canada Oil & Gas,*, 1998 CarswellAlta 669, 63 Alta. L.R. (3d) 1, 225 A.R. 277, [1999] 3 W.W.R. 255 (Alta. Q.B.), at paragraphs 146 and 147.
[21] *Goodwell*, supra note 5, at paragraph 26.

incidental power.[22] Two factors would be particularly relevant to the application of this doctrine to the Board. They are

- when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate, and
- when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction.

Justice O'Leary stated in the Alberta Court of Appeal decision of *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta* (*Energy & Utilities Board*):

> The Board is a specialized and expert tribunal charged with the administration of a comprehensive set of legislation regulating all aspects of the energy industry in the Province of Alberta. It is empowered to determine issues ranging from those which are narrow and highly technical to those having broad and general implications not only for this industry but for the public. [23]

A similar view was expressed in the case of *Alberta (Energy Resources Conservation Board) v. Sarg Oils Ltd.*[24] The Alberta Court of Appeal held, at paragraph 21:

> Section 7 of the OGCA authorizes the Board to make just and reasonable orders, as it considers necessary to effect the purposes of the Act. The purposes of the OGCA, found in s. 4, include conservation of petroleum resources and pollution control. Pursuant to s. 86 of the OGCA, the Board's jurisdiction to decide matters under the Act is generally exclusive. All this supports the trial judge's conclusion about the intention of the legislature to give the Board broad authority over matters within its control.[25]

If the express power to determine legal questions, including disputed entitlement under section 16 of the *OGCA* or "owner of a tract" for pooling applications under section 80 of the *OGCA* and "common ownership" for special well spacing (holding) applications under section 79 (4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR*, is lacking, it is the Board's view that the objects of the *OGCA* and the mandate of the Board are sufficiently broad to suggest a legislative intention to implicitly confer this jurisdiction on the Board, as previously noted. These objects include the conservation of energy resources, orderly and efficient development of energy resources, observance of safe and secure operating practices by industry, pollution control, affording each owner the opportunity of obtaining its share of production, and collection and dissemination of information. In order to meet the objects, the Board must implicitly have the power to consider all the necessary statutory requirements associated with well, special well spacing (holding), and compulsory pooling applications. Section 16 of the *ERCA* provides the authority to do so if it is not expressly found elsewhere in the Board's enabling legislation.

[22] *ATCO Gas & Pipelines* v. Alberta (Energy & Utilities Board) 2006 CarswellAlta 139 2006 SCC 4, [2006] 263 D.L.R. (4th) 193, S.C.R. 140, at paragraphs 73 and 74.
[23] *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy & Utilities Board)*, 1996 CarswellAlta 689, 41 Alta. L.R. (3d) 374, [1996] 9 W.W.R. 637 (Alta C.A.), at paragraph 14.
[24] *Alberta (Energy Resources Conservation Board) v. Sarg Oils Ltd.*, 2002 CarswellAlta 913, 2002 ABCA 174, [2002] 10 W.W.R. 217. Leave to appeal refused by *Alberta (Energy Resources Conservation Board) v. Sarg Oils Ltd.*, 330 A.R. 199 (note), 311 N.R. 200 (note), 2003 CarswellAlta 405 (S.C.C. Mar 20, 2003).
[25] *OGCA*, R.S.A. 1980, c.O-5 s.86 is now *OGCA*, R.S.A. 2000, c.O-6 s.94.

5.2 Procedural Fairness

5.2.1 Views of the Coal Owners

EnCana submitted that even if the Board has the power to decide the CBM ownership issue, the Board should refrain from doing so because EnCana's right to procedural fairness had been breached. EnCana identified four breaches: lack of adequate notice about the issues to be considered at the Part 2 Proceeding, failure to provide prehearing discovery, absence of parties whose rights may be affected, and lack of a full record. CDP made no submissions on this issue.

5.2.2 Views of Natural Gas Rights Holders

The Natural Gas Rights Holders rejected EnCana's contention.

5.2.3 Views of the Board

The Board notes that EnCana argued that procedural fairness was denied to it. Further, the Board notes that EnCana contended that there was inadequate notice of the Part 2 Proceeding, a lack of a full record, an unavailability of a discovery process prior to the hearing, and the absence of interested parties from the proceeding.

EnCana submitted that the Board gave it inadequate notice that proprietary or ownership claims under the relevant instruments would be considered at the Part 2 Proceeding. EnCana stated: "[T]here was no notice here that the Board was to determine the competing proprietary claims to CBM under the leases and grants at issue."[26] EnCana cited the June 23, 2006, Notice of Hearing, Part 2 of Proceeding No. 1457147,[27] which included such phrases as "…the Board has now undertaken a review of the issue of legal entitlement of coalbed methane…" and "…the Board will consider…the issue of legal entitlement of coalbed methane" when referring to the subject matter of the hearing.

As previously noted in section 2.3.1 of this decision, the Part 2 Proceeding arose as a result of a review request by CDP and EnCana in connection with well licences and special well spacing (holding) and compulsory pooling orders granted by the Board in 2005 and 2006. During the course of the Phase 1 Proceeding, the Board received written submissions from the approval holders (namely, Bearspaw, Devon, and Fairborne), CDP, and EnCana, as well as hearing from these parties in the oral proceeding on January 31, 2006, in order to decide whether CDP and EnCana were affected parties under the *ERCA*. In a decision dated March 9, 2006, the Board held that CDP and EnCana were affected persons pursuant to section 40(1) of the *ERCA* and granted their requests for a review hearing (Phase 2 Proceeding).

The Board concludes that EnCana's grounds for requesting the review rested on the issue of disputed ownership to CBM and, in particular, the Board's failure to properly consider the relevant leases and related instruments in determining whether CBM was included in the reservation of coal or grant of natural gas rights. EnCana expressed this view clearly in letters and at the oral proceeding itself on January 31, 2006.

[26] EnCana Final Argument (Errata) November 29, 2006, at paragraph 64.
[27] Exhibit 01-003-2006-06-23 EUB Hearing Notice.

In its April 28, 2005, objection,[28] EnCana wrote:

> The issue for the Board is entitlement and ownership—which may or may not involve a determination of property rights, but which is not an "allocation" (i.e. assignment) of property rights as Devon states.

In a letter dated June 24, 2005, from EnCana to the Board,[29] EnCana submitted that the Board had erred in its decision to grant well licences to Devon when Devon's "…application was for coalbed methane wells and the coal is owned by EnCana." Also, EnCana stated that the Board had erred in dismissing EnCana's objection "for the sole reason that EnCana's objection rests on the issue of coalbed methane ownership." The letter further stated:

> It cannot be determined whether "natural gas" under the instruments here includes coalbed methane without a hearing and evidence from the parties on the meaning of "natural gas" at the time of contract.

Other submissions from EnCana included the following:

- "If Devon's submission is that the Board need not consider entitlement, that is incorrect. Sections 4(c) and 16 of the *Oil and Gas Conservation Act* make it clear that ownership is required for a licence."[30]
- Ownership of substances for the purposes of section 16 of the *OGCA* depends on the interpretation of the instrument that grants the rights (namely, the words of section 16 of the *OGCA* cannot take away or grant rights not found in the instrument).[31]
- The Board declined to interpret the leases and reservation in order to address the question of legal entitlement to CBM.[32]

Similarly, the Board considers that it is apparent from EnCana's review requests on the Bearspaw applications[33] that EnCana's grounds rested on the issue of disputed ownership or entitlement to produce CBM from EnCana's coals under the instruments at issue for 37-21W4M: section 13 (compulsory pooling) and 38-20W4M: section 21 (well licence).[34] In support of its review requests, EnCana cited certain provisions of the *OGCA*, including sections 4(d), 16, 80, and 86, certain provisions of the *OGCR*, including sections 3.050, 4.010(1), 5.005, and 15.220, and section 26(2) of the *ERCA*.

EnCana reiterated these views as the underlying issues for the Board to determine at the oral Phase 1 Proceeding hearing on January 31, 2006. Some excerpts follow:

> I think all recognize that ownership is disputed and that this is a split title issue. And where, as here, there are competing claims for a substance which wasn't expressly provided for in any of the grants or any of the leases and it's expressly recognized by the Board that there is no jurisprudence on the matter or particularly on the matter, it ought logically to be presumed that the applicant has no greater

[28] Exhibit 07-004-2005-04-28 EnCana Submission, at page 1.
[29] Exhibit 07-005-2005-06-24 EnCana Review Request.
[30] Exhibit 07-008-2005-07-27 EnCana Submission, at page 2.
[31] Exhibit 07-008-2005-07-27 EnCana Submission, at page 3.
[32] Exhibit 07-008-2005-07-27 EnCana Submission, at page 2.
[33] Exhibits 07-011-2005-10-05, 07-012-2005-11-25; 07-013-2006-01-10 EnCana Review Requests.
[34] Exhibit 07-013-2006-01-10 EnCana Review Request which attaches, among other things, certificates of title, Crown Grant, transfers, and lease pertaining to 38-20-W4M: Section 21.

> right to extract the substance than the objector, whether the applicant is a coal owner or the gas owner.[35]
>
> Entitlement needs be resolved by agreement of the parties, by the Board, or by the court if that can't result.[36]
>
> It seeks a hearing because the taking of its property may directly and adversely affect it, and on a hearing it would seek to lead evidence on the meaning of the terms of the grants at issue in situ and the vernacular meaning as of the time.[37]

Subsequently, in a decision dated March 9, 2006, the Board held that EnCana and CDP were affected persons pursuant to section 40(1) of the *ERCA* and granted their application for a review hearing.

On April 21, 2006, the Board sent a letter to the parties stating that "It is anticipated that the hearing of the second module dealing with coalbed methane ownership will commence in August or September of 2006."[38]

The Board divided the Phase 2 Proceeding into two parts, the first to deal with the issue of interim metering of CBM production and the second to deal with the legal entitlement to the CBM. In the three Notices of Hearing (the final one was the July 27, 2006, Amended Notice of Hearing) issued in connection with the Phase 2 Proceeding, the entitlement issue was expressed in a manner similar to the following:

> Part 2 of Proceeding No. 1457147 will consider the issue of legal entitlement to coalbed methane being produced or intended to be produced from the wells that have been licensed to Bearspaw, Devon, and Fairborne.

The Board sent a letter to all parties on July 27, 2006, after a meeting between Board counsel and the parties' counsel. The letter confirmed that the scope of the upcoming proceeding would include legal issues surrounding entitlement.[39]

Given the circumstances described above, the Board finds that EnCana's contention that it had not received adequate notice of the issue to be considered, is untenable. The Board accepted EnCana's review application because the Board was persuaded that EnCana was an affected person by virtue of its ownership or entitlement claim to the CBM. The Board must determine ownership, EnCana argued, based on an interpretation of the leases, titles, and other related instruments in light of the *Borys v. Canadian Pacific Railway* decision.[40] EnCana also engaged the acting dean of the University of Calgary's Faculty of Law as one of its expert witnesses in the Part 2 Proceeding to provide testimony on ownership.

Prior to the commencement of the hearing on October 16, 2006, all participants prefiled their exhibits in accordance with the process set out in the July 27, 2006, Board letter. In addition, the Natural Gas Rights Holders filed their evidence, including expert reports, and submissions on

[35] Hearing Transcript January 31, 2006, at page 19, line 19 to page 20, line 2.
[36] Hearing Transcript January 31, 2006, at page 31, lines 13 - 15.
[37] Hearing Transcript January 31, 2006, at page 45, lines 4 - 8.
[38] Exhibit 01-021-2006-04-21 EUB Correspondence, at page 2.
[39] Exhibit 01-031-2006-07-27 EUB Correspondence.
[40] *Borys v. Canadian Pacific Railway*, 1953 CarswellAlta 25, 7 W.W.R. (N.S.) 546, [1953] 2 D.L.R. 65 (Privy Council Canada) (*Borys*).

August 25, 2006, followed by CDP and EnCana on September 15, 2006, in accordance with the July 27, 2006, Amended Notice of Hearing. During this time period, Apache, Bearspaw, Canpar, Computershare, Devon, and Fairborne prefiled natural gas leases, certificates of titles, and other related instruments relevant to the applications. Similarly, Centrica, ConocoPhillips, FHOA, and Quicksilver also prefiled their own leases, summaries of their own leases, and other related instruments as part of their evidence, with the intention of showing how the granting language in these instruments was the same as the language in the instruments related to the applications.

The Board believes that EnCana had ample opportunity, time, and knowledge to respond to the ownership issue, whether the issue was described as legal entitlement in the formal notices instead of "ownership" or "proprietary rights." The existence and availability of the leases and related instruments under which Bearspaw, Devon, and Fairborne and the other Natural Gas Rights Holders claimed ownership were part of the proceeding. If EnCana was unclear about the entitlement issue, it could have sought direction from the Board within the reasonable times that the Board had set for filing of submissions at the start of hearing but EnCana did not do so.

EnCana did, of course, participate fully in the Part 2 Proceeding. EnCana called direct evidence from its staff, shared in the presentation of expert legal and technical evidence with CDP, cross-examined lay witnesses presented by the Natural Gas Rights Holders, as well as their common expert witness, and submitted final argument. There is nothing in the record leading up to the hearing that suggests that EnCana did not fully understand the issues or was hindered in any way in the full presentation of its case.

EnCana could have sought direction from the Board if EnCana believed that a discovery process was essential for the proper consideration of the entitlement issue. Under section 27 of the *Alberta Energy and Utilities Board Rules of Practice (Rules of Practice)* Alta. Reg. 101/2001, a party may ask for Information Requests, which are a form of written interrogatories, from other parties. EnCana did not seek this or any other form of prehearing discovery and has shown no prejudice from the lack of discovery. The Board cannot accept this ground as a basis for EnCana's submission that the Board denied it procedural fairness.

As pointed out by Centrica, the process leading to this decision was not insignificant.[41] The Part 2 Proceeding itself took 10 days. There were 321 prefiled exhibits, 67 documents entered as exhibits at the hearing, 2 scientific/technical experts, 2 legal experts (the respective deans of law at the University of Alberta and University of Calgary law schools), and 17 lay witnesses. Two of the largest Freehold coal owners in Alberta and ten companies that were Natural Gas Rights Holders were represented, as well as the FHOA (which mostly comprises individuals). All parties were represented by counsel, but two parties, namely ARC and Computershare, chose not to be active participants in the proceeding. The Board concludes that a full and proper record is before it.

The Board finds that the parties whose interests were directly affected by the Part 2 Proceeding did participate fully. These included Apache, Bearspaw, Canpar, CDP, Computershare, Devon, EnCana, and Fairborne. EnCana and CDP specifically filed initial objections and review requests to approvals issued to Bearspaw, Devon, and Fairborne. These approvals are the subject for determination in this proceeding. The Board is not persuaded that the absence of all parties that

[41] Centrica Reply Argument December 13, 2006, at paragraph 18.

may have an interest in the issue of legal entitlement in future applications supports the view that the Board denied procedural fairness to EnCana**.**

In summary, the Board finds that EnCana was not denied procedural fairness on any of the grounds raised by EnCana.

6 STANDARD OF PROOF REQUIRED

6.1 Views of the Natural Gas Rights Holders

The Natural Gas Rights Holders submitted that in the absence of a statutory direction to the contrary, the standard of proof in administrative proceedings is the civil law standard of a simple balance of probabilities.[42] Devon and Fairborne cited the cases of *Gannon Bros. Energy Ltd. v. Alberta (Energy & Utilities Board)*[43] and *Mesa Operating Ltd. v. Amoco Canada Resources Ltd*.[44] as authority for this view.

The Natural Gas Rights Holders rejected CDP's view that a higher standard of proof was necessary, as the plain meaning of the word "satisfaction " in section 16 of the *OGCA* was not qualified by the words "absolute or "without condition" and meant something less than "certainty."[45] If CDP's test were accepted, they asserted, the standard of proof under section 16 of the *OGCA* would be more onerous than the standard in a criminal case.[46]

6.2 Views of the Coal Owners

CDP submitted that the standard of proof for administrative tribunals is a flexible concept that depends on the importance of the matters to be established and that a party claiming ownership must have an absolute or unconditional right before the Board can be satisfied that it has established such entitlement. In the absence of a court determination of the matter, CDP argued that the appropriate standard of proof was that of certainty.

CDP asserted that the same standard of proof was required for a determination of owner in compulsory pooling applications under section 80 of the *OGCA* and for "common ownership" under section 5.200 of the *OGCR.* CDP distinguished the case law submitted by the Natural Gas Rights Holders by arguing that they applied to pooling and not property rights.

EnCana submitted that the Board's jurisdiction to determine entitlement under section 16 of the *OGCA* was ousted if a *bona fide* dispute over CBM ownership existed. In the absence of a definitive court ruling on the issue, EnCana asserted that the Board could not act. EnCana did state, however, that the onus of proving ownership in a civil law case lay with Bearspaw, Devon, and Fairborne, as lessees.

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[42] S. Blake, *Administrative Law in Canada*, 4th ed., (Markham: LexisNexis Canada, 2006), at 69.

[43] *Gannon Bros. Energy Ltd. v. Alberta (Energy & Utilities Board),* 1996 CarswellAlta 56, 178 A.R. 302, 110 W.A.C. 302 (Alta. C.A.).

[44] *Mesa Operating Ltd.* v. *Amoco Canada Resources Ltd.,* 149 A.R. 187, 1994 CarswellAlta. 89, [1994] A.J. No. 201 (Alta. C.A.)

[45] Apache Final Argument (Errata) November 15, 2006, at paragraph 35 cites: *Canadian Oxford Dictionary*, 2nd ed. (Don Mills, ON, 2004), s.v., "satisfy" as to "provide with adequate information or proof, convince."

[46] Exhibit 14-009-2006-09-29 Quicksilver Reply Submission at paragraph 39.

6.3 Views of the Board

As noted in section 5.1 of this decision, the Board concludes that it has jurisdiction to determine whether Bearspaw, Devon, and Fairborne are entitled to the right to produce CBM for the purposes of obtaining well licences and whether they are the owner of a tract within a DSU under compulsory pooling and meet the common ownership requirements for special well spacing (holding) applications. The Board must now decide what the required standard of proof is to establish these rights.

Section 16(2) of the *OGCA* requires entitlement to be proved "to the satisfaction of the Board" for well licences. The legislation does not provide similar guidance for compulsory pooling applications under section 80(3) of the *OGCA* or special well spacing (holding) applications under section 5.190 of the *OGCR*, only that the Board may order compulsory pooling and by order may establish special well spacing (holding).

A licensee under section 16 (2) must prove that that it is entitled under section 16 (1) to produce the resource to the "satisfaction of the Board." The Board accepts that the ordinary meaning of this phrase, in the context of the overall purposes of the *OGCA* and the specific authority given to it in the section to issue well licences, is for a licensee to provide the Board with adequate evidence or proof of entitlement. The *OGCA* does not require proof to the point of certainty. Such a threshold would mean that the Board would be unable to carry out its statutory duties in the face of any dispute over entitlement unless a court had previously determined the issue in a conclusive way.

The Board finds that if the legislature had intended that an applicant's entitlement (whether it arises from ownership or otherwise) to produce any substance must be proved absolutely and conclusively, the legislators would have expressly used words importing such a standard. Further, both Alberta case law and respected administrative law texts confirm that the applicable standard of proof for administrative tribunals is the normal civil law standard of proof on the balance of probabilities.[47]

Accordingly, the Board finds that the appropriate standard of proof to establish entitlement under section 16 of the *OGCA* for well licences, owner of a tract within a DSU under section 80 for compulsory pooling applications, and common ownership for special well spacing (holding) applications under section 79 (4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR* is on a balance of probabilities.

7 DEMONSTRATION OF ENTITLEMENT TO PRODUCE CBM

The Board has concluded that it has jurisdiction to determine entitlement under section 16 of the *OGCA* for well licences, an owner of a tract within a DSU for the purposes of compulsory pooling applications under section 80 of the *OGCA*, and common ownership for special well spacing (holding) applications under section 79 (4) of the *OGCA* and sections 5.190 and 5.200 of the *OGCR* and that the appropriate standard of proof is on a balance of probabilities.

[47] *Gannon Bros*, *supra* note 43; *Mesa*, *supra* note 44; *Blake*, *supra* note 42, and R.W. Macaulay and J.L.H. Sprague, *Hearings Before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002) at 17-6.

The Board now must decide the approach it will use to determine whether entitlement or ownership has been demonstrated to its satisfaction. Parties have advanced three approaches:

1) regulatory entitlement,
2) a legal or common law approach to entitlement according to the principles set forth in *Borys*, *Anderson*,[48] and *Goodwell* decisions, or
3) a strata theory of mineral ownership based on the decision of *Little v. Western Transfer & Storage Co.*[49]

In this section of the decision, the Board reviews these three approaches to assist it in its determination of which parties are entitled to produce gas including CBM from the licensed wells and receive the special well spacing (holding) and compulsory pooling orders that are the subject of the applications**.**

7.1 Regulatory Entitlement

7.1.1 Views of the Natural Gas Rights Holders

Some Natural Gas Rights Holders argued that the Board must only determine regulatory entitlement for the purpose of issuing well licences and other orders under the *OGCA* because the Board has no jurisdiction to determine private property rights, such as ownership. They argued that the Board need only look to its own legislation and a lease or other instrument granting natural gas rights that is valid on its face in order to be satisfied of an applicant's entitlement under section 16 of the *OGCA*, whether a legal dispute exists or not.

These Natural Gas Rights Holders submitted that the *OGCA*, and in particular section 1(1)(y), makes no distinction between natural gas and CBM and that in technical perspectives, CBM is gas. Further, they submitted that the Board had accepted that CBM was gas for the purposes of its legislation in 1991 when, jointly with the Department of Energy, the Board issued *Informational Letter (IL) 91-11: Coalbed Methane Regulation*. (*IL 91-11*).

Natural Gas Rights Holders also relied upon the statutory definition of coal in section 1(1)(d) of the *Coal Conservation Act*, R.S.A. 2000, c. C-17, which includes the ordinary meaning of coal. They asserted that the ordinary meaning of coal was a solid, black combustible rock and did not include gas as part of its meaning. Accordingly, a coal owner, on the basis of a reservation of coal, was not entitled to CBM, which was a gas.

7.1.2 Views of the Coal Owners

EnCana and CDP rejected the regulatory entitlement approach. They argued that a *prima facie* right to natural gas in a lease or other instrument was not sufficient to demonstrate entitlement or ownership for the purposes of the *OGCA* if a dispute existed that had not been resolved by the courts.

[48] *Anderson*, *supra* note 7.
[49] *Little v. Western Transfer & Storage Co.*,1922 CarswellAlta 81, 18 Alta. L.R. 407, [1922] 3 W.W.R. 356 (Alta.S.C. (App. Div.)).

CDP asserted that legislation in Alberta (section 67 of the *Mines and Minerals Act*, R.S.A. 2000, c.M-17 and other jurisdictions were irrelevant to the issue of disputed title to CBM between two Freehold owners, one owning the coal and the other the gas. CDP stated that in those legislative examples the Crown owned both the coal and the gas. EnCana agreed with this submission.

7.1.3 Views of the Board

The Board accepts that if the regulatory entitlement approach espoused by some Natural Gas Rights Holders is adopted, Devon, Fairborne, and Bearspaw would be entitled to produce CBM. The fundamental underpinning of this approach is that from legislative and technical perspectives, CBM is gas, as concluded in section 4 of this decision. The position is also predicated on the argument that since the Board does not have the authority to determine ownership or proprietary disputes in a conclusive way like a court, the Board need not take these issues into consideration at all when determining entitlement under its legislation. This approach would allow the Board to grant licences or related approvals to produce CBM for the purposes of the *OGCA* if an applicant can satisfy the Board it has the *prima facie* right to produce "gas" as defined by the Board's enabling legislation, even in the face of a dispute over ownership of the CBM.

Having regard to the above, a valid and subsisting lease or other instrument showing that an applicant possesses the gas rights of interest for the zones of interest for the entire DSU involved would constitute proof of that right to the satisfaction of the Board, notwithstanding an objection or dispute by a coal owner over the right to produce CBM.

The Board notes that CBM is not specifically defined as a term in any of the Board's enabling legislation, although "gas" is defined in the *OGCA* as follows:

> 1(1)(y) "gas" means raw gas or marketable gas or any constituent of raw gas, condensate, crude bitumen or crude oil that is recovered in processing and that is gaseous at the conditions under which its volume is measured or estimated.

This definition of gas includes several statutorily defined terms: raw gas, marketable gas, condensate, crude bitumen, and crude oil. These terms are defined by the *OGCA* as follows:

> 1(1)(tt) "raw gas" means a mixture containing methane, other paraffinic hydrocarbons, nitrogen, carbon dioxide, hydrogen sulphide, helium and minor impurities, or some of them, that is recovered or is recoverable at a well from an underground reservoir and that is gaseous at the conditions under which its volume is measured or estimated;
>
> 1(1)(ee) "marketable gas" means a mixture mainly of methane originating from raw gas, if necessary through the processing of the raw gas for the removal or partial removal of some constituents, and that meets specifications for use as a domestic, commercial or industrial fuel or as an industrial raw material;
>
> 1(1)(k) "condensate" means a mixture mainly of pentanes and heavier hydrocarbons that may be contaminated with sulphur compounds, that is recovered or is recoverable at a well from an underground reservoir and that may be gaseous in its virgin reservoir state but is liquid at the conditions under which its volume is measured or estimated;
>
> 1(1)(n) "crude bitumen" means a naturally occurring viscous mixture, mainly of hydrocarbons heavier than pentane, that may contain sulphur compounds and that, in its naturally occurring viscous state, will not flow to a well;

> 1(1)(o) "crude oil" means a mixture mainly of pentanes and heavier hydrocarbons that may be contaminated with sulphur compounds, that is recovered or is recoverable at a well from an underground reservoir and that is liquid at the conditions under which its volume is measured or estimated, and includes all other hydrocarbon mixtures so recovered or recoverable except raw gas, condensate or crude bitumen;

Section 1(2) of the *OGCA* reads:

> The decision of the Board is final as to whether any product or mixture comes within a definition in subsection (1) or as to whether a definition in subsection (1) is applicable in a particular case.

Based upon technical analysis and conclusions in section 4 of this decision, the Board finds that CBM falls within the *OGCA* definition of gas.

The finding that CBM is gas under the *OGCA* is reinforced when the definition of coal is examined. Section 1(1)(d) of the *Coal Conservation Act* states:

> 1(1)(d) "coal", in addition to its ordinary meaning, includes manufactured chars, cokes and any manufactured solid coal product used or useful as a reductant or energy source or for conversion into a reductant or energy source.

The ordinary meaning of coal, as discussed further in section 7.2.3 of the decision, is a black, solid, combustible rock. The result is that under the Board's statutory framework, CBM is gas, not coal.[50]

The EUB has for some time regulated CBM as gas under its enabling statutes. In 1991, the Board (then the Energy Resources Conservation Board [ERCB]) and the Alberta Department of Energy (Energy) published *IL 91-11*.[51] It stated:

> The ERCB and Energy consider coalbed methane to be a form of natural gas. As a result, all acts and regulations administered by the ERCB and Energy that pertain to natural gas also pertain to coalbed methane. Applicable legislation under the jurisdiction of the ERCB and Energy includes the Energy Resources Conservation Act, the Gas Resources Preservation Act, the Oil and Gas Conservation Act, the Mines and Minerals Act, and regulations related to these acts.
>
> It appears that most ERCB and Energy practices and policies relating to the drilling and production of conventional gas reservoirs can be applied directly to coalbed methane.

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[50] Concurrent with changes to the management of commingled production announced on October 31, 2006, in *Bulletin 2006-38*: *Implementation of Development Entities for Management of Commingled Production from Two or More Pools in the Wellbore* and the need for an effective and efficient means of collecting resource information on Alberta's CBM resources, regulations were enacted under the *OGCR* in Alta. Reg. 269/2006, in force on October 31, 2006, setting out CBM control well requirements (section 7.025) and associated data collection requirements (section 11.145). Also enacted at the same time were definitions of control well (section 1.020(2) 5 (ii)) and coal (section 1.020(2) 3.1): " 'coal' means a lithostratigraphic unit having 50% or greater by weight organic matter and being thicker than 0.30 metres…."

While the definition of coal in section 1.020(2) 3.1 was intended for the purposes of CBM control well requirements, it is consistent with that in the *Coal Conservation Act* and other common references in that it describes coal as being a rock ("litho") composed mainly of organic matter. The reference to a minimum thickness was included in the definition to allow very thin coal seams to be developed without having to meet the control well requirements.

[51] Exhibit 10-002-1991-08-26 *IL 91-11*.

IL 91-11 does not contain any specific definition of CBM other than that "the ERCB and Energy consider coalbed methane to be a form of natural gas."

Given that the Board has considered CBM to be gas for the purpose of its regulation of the oil and gas sector at least since 1991, The Natural Gas Rights Holders argue that a settled expectation has developed and the Board must continue to treat CBM as gas for regulatory purposes, including the entitlement to produce it. EnCana disagreed with this view, pointing out that the Natural Gas Rights Holders have acknowledged that the competing claims by the Coal Owners will have to be resolved in court and by entering into quieting of title agreements where potential conflicts over ownership exist. The Board finds that there is some merit to the Natural Gas Rights Holders' position, as it has treated CBM as gas since the issuance of *IL 91-11* and the industry has to a large extent conducted its affairs according to *IL 91-11*.

Effective March 17, 2004, the Alberta Government amended the *Mines and Minerals Act* so that under section 67 (1) a coal lease grants the right to coal but does not grant any rights to any natural gas, including CBM.[52] Under section 67 (2), the Minister may, upon recommendation of the Board, authorize a coal lessee to recover natural gas, including CBM, for safety or conservation reasons. There is no specific definition of CBM in the *Mines and Minerals Act.* However, section 67 applies only to Alberta Crown lands where the Alberta Crown owns all the mines and minerals. The Board agrees with EnCana and CDP that the *Mines and Minerals Act* is not pertinent to the issue before the Board where Freehold split title lands are the subject of the dispute.

The Board finds that if the regulatory entitlement approach is accepted, Devon, Fairborne, and Bearspaw would satisfy the Board that they were entitled to the right to produce CBM by showing a *prima facie* right to gas in a valid and subsisting lease or other granting instrument for the zones of interest for the entire DSU, notwithstanding objections by coal owners disputing ownership of the CBM. Although most parties have argued that the Board's analysis of entitlement must go beyond the regulatory entitlement approach, the Board believes that based on the technical discussion in section 4 of this decision and the definitions of gas in the *OGCA* and *IL 91-11,* the Board could determine that the Natural Gas Rights Holders are entitled to produce the CBM.

However, as discussed in section 5 of this decision, the Board finds that it should also consider ownership issues raised by parties in the determination of entitlement under section 16 of the OGCA and under its compulsory pooling and well spacing special (holding) provisions. The Board discusses this approach in the following section.

7.2 Legal or Common Law Approach to Entitlement

7.2.1 Views of the Natural Gas Rights Holders

Other Natural Gas Rights Holders argued that the Board was required to examine the issue of entitlement not only from a regulatory entitlement analysis, but also from a legal or common law perspective. These Natural Gas Rights Holders agreed that on a strict regulatory entitlement analysis, the Natural Gas Rights Holders were entitled to CBM under section 16 of the *OGCA*,

[52] *Mines and Minerals Act*, R.S.A. 2000, c. M-17, s. 67, as am. by *Energy Statutes Amendment Act*, 2003, S.A. 2003, c. 18, s. 15.

but stated that the concept of entitlement inherently included a consideration of ownership or other proprietary rights under section 16.

These Natural Gas Rights Holders submitted that the binding legal principles used for the determination of ownership disputes between energy resource claimants were set out in *Borys, Anderson,* and *Goodwell.* These cases, they argued, stood as authority for the principle that relevant grants and reservations must be interpreted in the vernacular, not the scientific, sense, as used by landowners, businessmen, and engineers of the day.

These Natural Gas Rights Holders asserted that on the evidence before the Board, a reservation of "coal" did not in the vernacular sense include any hydrocarbons in a gaseous state in situ in an undisturbed reservoir at the relevant times associated with the applications. These Natural Gas Rights Holders pointed to contemporary dictionary definitions of coal and CBM (known as fire damp, marsh gas, or methane) from the early part of the 1900s to the present time, the findings of the U.S. Supreme Court in *Amoco v. Southern Ute*, [53] legislation in Alberta and other jurisdictions, and the fact that industry regarded coal as a solid substance, distinct from CBM, in leases until 1993, in support for their view that the vernacular meaning of coal does not include CBM.[54]

The Natural Gas Rights Holders also argued that on a technical and scientific basis, CBM is distinct from coal in situ at initial reservoir conditions and exists in a gaseous state or phase prior to human disturbance. This issue is discussed more thoroughly in section 4 of this decision.

7.2.2 Views of the Coal Owners

EnCana submitted that the Board does not have the authority to determine entitlement to CBM if a *bona fide* dispute over entitlement exists, but argued that if it does, then on the balance of the evidence, CBM is a constituent of coal both in law according to the *Borys* and *Anderson* approach and scientifically.

CDP argued that although the Board had the authority to determine entitlement under its legislation, the Board could not do so because the standard of proof required of an applicant was that of certainty, and in the absence of a judicial resolution on CBM ownership this standard could not be met. However, the Coal Owners did accept the relevance of the *Borys* and *Anderson* approach to deciding entitlement or ownership of CBM. EnCana also submitted that it was entitled to the CBM by virtue of the strata theory of ownership.

EnCana asserted that the Natural Gas Rights Holders had not shown that at the relevant times the vernacular meaning of natural gas included CBM. EnCana submitted that natural gas was considered a "worthless and noxious substance"[55] and that there were no CBM wells until the 1970s in Alberta.

EnCana contended that CBM at the relevant times was understood in the vernacular meaning as being a constituent of the coal in situ. EnCana stated that evidence at the hearing showed that

[53] *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 119 S. Ct. 1719, 144 L. Ed. 2d 22, 1999 U.S. LEXIS 4002, 67 U.S.L.W. 4397. [Supreme Court of the United States] (*Southern Ute*).
[54] Hearing Transcript Volume 7 at page 1049 lines 10 - 25 and pages 1050 - 1052.
[55] *Goodwell*, *supra* note 5, at paragraph 34.

coal was known at the time to include CBM, that CBM had commercial value throughout the 19th century and earlier, and that coal owners were statutorily responsible for safely managing CBM during coal mining operations.[56] EnCana contended that many contemporary dictionary meanings in the early part of the 1900s defined coal in broader terms to include CBM as a constituent of coal.[57] CDP agreed that CBM in an undisturbed reservoir was also indistinguishable from and a constituent of coal as ordinarily understood at the relevant times.

CDP submitted that even if CBM and coal might be ordinarily understood as distinct substances, a reservation of only coal in the early 1900s and in 1982 included the CBM because it was the coal owners who had the statutory responsibility to safely manage CBM in the operation of coal mines, not the settlers or Canpar, which had received the gas rights. In particular, CDP submitted that there was no evidence before the Board of the common intention as between Dome Petroleum Limited (Dome) *et al.* and TransAlta Utilities Corporation (TransAlta) that resulted in the 1982 TransAlta agreement in which coal *simpliciter* was transferred to TransAlta.

EnCana characterized the *Southern Ute* case as irrelevant to the circumstances of the applications before the Board because it dealt with the interpretation of a reservation of coal in a statute, not a lease or other granting instrument. CDP agreed with this submission.

EnCana submitted that a more instructive American case was *Continental Resources of Illinois Inc. v. Illinois Methane LLC,* [58] a decision in which the court held that the gas leases in question did not give the leaseholders the right to produce CBM. The court held that included in the bundle of property rights associated with coal was the right to control CBM for mine safety and to reduce to possession any gas trapped within the coal itself, so long as the gas remained within that coal until the time of its capture.

7.2.3 Views of the Board

The Board accepts that the proper principles to apply in considering entitlement or ownership are set out in the *Borys*, *Anderson,* and *Goodwell* cases. It is important to note that the Board is not making final or conclusive decisions that bind the parties for all purposes when it finds that an applicant is the owner or otherwise entitled to produce the resource. That ultimate authority belongs to the courts. The Board is, rather, deciding that an applicant has demonstrated entitlement to the Board's satisfaction for the purpose of issuing well licences or similar requirements under the compulsory pooling and special well spacing (holding) provisions of the *OGCA* and the *OGCR*.

In the *Goodwell* case, the Alberta Court of Appeal acknowledged that in order to make a legal determination of the right to extract resources, the Board must examine the relevant leases, energy statutes, and applicable case law.[59]

[56] Exhibit 07-024-2006-09-15 EnCana Submission including Errata at paragraphs 36 to 49.
[57] Exhibit 19-002-2006-09-15 EnCana and CDP Joint Submission, Jeffrey. R. Levine *Review of Composition and Technical Characteristics of Coal and Coalbed Methane in Light of Disputed Mineral Ownership* (2006) at pages 50 to 56; and Exhibit 19-003-2006-09-15 EnCana and CDP Errata to Joint Expert Report.
[58] *Continental Resources of Illinois Inc. v. Illinois Methane LLC*, 364 Ill. App. 3d 691, 847 N.E.2d 897, 2006 Ill. App. LEXIS 285, 301 Ill. Dec. 887 (Ill. App. Ct. 5th Dist. 2006) (*Continental Resources*).
[59] *Goodwell*, *supra* note 5, at paragraph 26.

The Board notes that the cases of *Borys* and *Anderson* hold that in ascertaining the intention of parties to the relevant grants, reservations, or exceptions, the words in the instruments must be interpreted in the ordinary or vernacular, not the scientific sense, as used by landowners, business men, and engineers of the day and not according to the opinion of the parties to the instrument. The relevant words in the instruments relating to the applications are found in reservations of "coal," "coal and petroleum," "coal, petroleum, and valuable stone" or in leases that except out "coal."[60] In the case of lands originally owned by Dome and Hudson's Bay Oil and Gas Company Limited (HBOG), the then owners of the mines and minerals, it is the sale of "coal" that was split from the remainder of the mines and minerals."[61]

Although the word coal is expressed in the relevant reservations or excepted out in the leases, CBM is not. If after applying the common law principles outlined in *Borys* and *Anderson*, the Board finds that the "coal" in these instruments does not include CBM, EnCana and CDP do not own or are not entitled to the CBM.

The Board has some discretion in receiving evidence to prove any particular matter. Section 27(2) of the ERCA reads: "The Board in the conduct of its hearings is not bound by the rules of law concerning evidence applicable to judicial proceedings."

During the course of the proceeding, the parties presented evidence and argument as to the vernacular meaning of coal and CBM from the early 1900s to the present time. This included past judicial interpretations and findings, dictionary meanings from the early 1900s to the present, evidence from witnesses for Natural Gas Rights Holders and for EnCana and CDP, and historical, professional, and other articles and government publications.

For example, in the *Southern Ute* decision, the United States Supreme Court considered several dictionary definitions of coal from the early 1900s.[62] The court noted that these dictionaries defined coal as a solid fuel resource and defined CBM gas (then called marsh gas, methane, or fire-damp) as a distinct substance contained in or given off by coal. Similarly, in the Alberta Court of Appeal decision of *Knight Sugar Co. v. Alberta Railway & Irrigation Co*.,[63] the court stated, at paragraphs 7 and 8:

> Petroleum and gas are unlike coal, it is true, in that it is a solid while they are, one a liquid and the other a gas, and to that extent unlike each other.
>
> They all have one common quality, viz., that in combustion they will produce heat.

In this decision, the court was asked to interpret the scope of title passed in connection with certain land transfers and certificate of titles issued in 1913 where "all coal and other minerals" were excepted thereon. Although the court was not specifically considering the nature of coal, petroleum, and gas in this decision, the Board considers the decision as a useful judicial notice of the vernacular meaning of coal in Alberta in the early 1900s to the 1930s and one that is

[60] Exhibit 07-024-2006-09-15 EnCana Submission revised at paragraph 8.
[61] Exhibit 17-005-2006-09-29 Apache Reply Submission at paragraph 23.
[62] *Southern Ute, supra* note 53, at *874 - *875.
[63] *Knight Sugar Co. v. Alberta Railway & Irrigation Co*., 1936 CarswellAlta 15 [1936] 1 W.W.R. 416, [1936] 2 D.L.R. 125 (Alta.C.A.). Affirmed by: *Knight Sugar Co. v. Alberta Railway & Irrigation Co*.,1937 CarswellAlta 54, [1938] 1 W.W.R. 234, [1938] 1 D.L.R. 321 (Privy Council Canada).

consistent with dictionary meanings in the earlier part of the last century, as well as the decades that followed.

The Coal Owners have provided excerpts from dictionaries and other literature from the early part of the 20th century and earlier that describe coal as a substance containing many hydrocarbons, including CBM.[64] The Board notes that many of the excerpts provided were more scientific in nature and views them to reflect certain authors' scientific descriptions of coal rather than the ordinary and common meaning of coal. Therefore, the Board is not persuaded that the evidence the Coal Owners submitted was indicative of the vernacular meaning of coal at the times in question. The Coal Owners also introduced literature that outlined the use of CBM primarily in the mid-1900s in Great Britain and western Europe. Articles describing how CBM was collected and used in western Europe confirm to the Board that while coal was a solid substance mined from the earth, CBM was a gas, as those words were commonly used and understood distinct from the solid coal.

The Board observes that in *Borys*, the Privy Council did not rely on expert evidence to ascertain the vernacular meaning of petroleum. In the *Southern Ute* case, the court relied to a significant degree on the contemporary dictionary meaning of coal and CBM for the relevant time period. The Board also notes that the Supreme Court of Canada held in the case of *Crow's Nest Pass Coal Company v. R*[65] that dictionary meanings contemporaneous with the time of the grant were preferable to the evidence offered by experts on the vernacular meaning of "minerals."

The interpretative approach used in *Southern Ute* to determine ownership of the CBM is very similar to the ownership approach taken in *Borys* and *Anderson*. The American court decided the issue by ascertaining the ordinary and common meaning of "coal" in a reservation at the time it was made, albeit in legislation as opposed to a commercial instrument.

EnCana and CDP argued that there is a fundamental difference in ascertaining the intention of a legislature in enacting certain legislation in contrast to the interpretation of private contractual documents. The Board does not agree in this case that the interpretative exercise is fundamentally different because the determination of the ordinary, common meaning of "coal" in both the legislation and the private contractual documents requires a consideration of the same or similar factors: the words used in the reservation, the time period in which the legislation was passed and the documents executed, and the general social and economic backdrop at that time.

The statutory reservation in the *Southern Ute* case is similar in wording to the broad terms used in the grants and reservations found in the instruments associated with the applications. The legislation was enacted in the early 1900s and was applicable to the western United States. This compares to the time frame and region of North America that is germane to the circumstances before the Board (with the exception of the sale of "coal" to TransAlta by Dome *et al.* in 1982, as noted above and elaborated on in section 8). At that time in Canada and the United States, coal was the primary fuel source, and CBM was not produced and used as a fuel source or, if used at all, only in limited circumstances. CBM was generally regarded as a waste and noxious substance to be vented in coal mining operations for safety reasons. These factors confirmed the

[64] Exhibit 19-002-2006-09-15 EnCana and CDP Joint Expert Report pages 50 to 54; Exhibit 19-003-2006-09-15 EnCana and CDP Errata to Joint Expert Report.

[65] *Crow's Nest Pass Coal Co. v. R.*, 1961 CarswellBC 142 36 W.W.R. 513, [1961] S.C.R. 750.

dictionary meaning that the American court accepted as the vernacular meaning of coal and CBM.

Although not a unanimous decision, there was a 7-1 majority (one justice did not participate) in favour of the gas rights holders. The case is not binding on the Board, but in the absence of a Canadian decision directly on point, it is persuasive. The American court concluded that:

> …the common understanding of coal in 1909 and 1910 would not have encompassed CBM gas, both because it is a gas rather than a solid mineral and because it was understood as a distinct substance that escaped from coal as the coal was mined, rather than as part of the coal itself.[66]

In addition to the relevance of the *Southern Ute* case, there is also evidence before the Board as to a similar vernacular meaning of coal around the same time in western Canada. In the 1913 edition of the *Western Canadian Dictionary and Phrase Book*,[67] coal is described in terms that show that it was commonly regarded as a solid fuel resource that was the primary fuel of the day. A couple of decades later, coal was still being described in the same manner, as a solid fuel resource.[68]

Contemporary dictionaries continue to define coal as a solid fuel resource. For example, *Merriam-Webster's Collegiate Dictionary* [69] defines coal as a "black or brownish black solid combustible substance," and the *Canadian Oxford Paperback Dictionary* [70]defines coal as a "hard black or blackish rock." At the time of the transfer of coal from Dome *et al.* to TransAlta in 1982, the vernacular meaning of coal remained that of a solid black combustible rock. [71]

The Board notes that Dr. Levine, the Coal Owners' expert witness, acknowledged in his written evidence that the use of the term "solid" to describe coal is valid in the vernacular sense.[72] Other witnesses for EnCana and CDP also accepted coal as being a solid in the vernacular sense.[73]

This conclusion also applies to the definition of coal included in section 1(1)(d) of the *Coal Conservation Act.*

In *Borys*, the Privy Council considered what substances were included in a reservation of petroleum made by the Canadian Pacific Railway Company (CPRC). In particular, the court examined whether solution gas was properly considered petroleum or natural gas. Ultimately, the court found that solution gas was included in the reservation of petroleum. In making its determination of ownership, the court considered scientific evidence regarding phase behaviour

[66] *Southern Ute*, *supra*, note 53, at paragraph *875.
[67] Exhibit 17-006-2006-09-29 Apache Reply Argument Tab at paragraph 29: *Western Canadian Dictionary and Phrase Book*, facsimile of the 1913 ed., University of Alberta Press 1977.
[68] Exhibit 17-006-2006-09-29 Apache Reply Argument Tab at paragraph 29, E.S. Moore, *Canada's Mineral Resources* (Irvin & Gordon, Limited, 1929), pages 161 – 162.
[69] Exhibit 05-066-2006-08-25 Devon Submission at paragraph 26, *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Springfield, MA: Merriam-Webster, 1993).
[70] Exhibit 10-018f-2006-08-25 Centrica Submission, Tab F, *The Canadian Oxford Paperback Dictionary*, (Toronto: Oxford University Press, 2000).
[71] Exhibit 17-005-2006-09-29 Apache Submission, at paragraph 29.
[72] Exhibit 19-002-2006-09-15 EnCana and CDP Joint Submission, *Review of Composition & Technical Characteristics of Coal and Coalbed Methane in Light of Disputed Mineral Ownership*, at page 7, lines 16 - 19; and Errata to report in 19-003-2006-09-15.
[73] Hearing Transcript Volume 7 at page 1045 lines 1 - 25 and page 1046 lines 1 - 15.

of the hydrocarbons and the initial reservoir conditions in which the hydrocarbons existed. It held that ownership is based on the phase as determined in initial reservoir conditions. As previously stated, the court held that the vernacular meaning of the word "petroleum" was the relevant consideration, not the opinion of the parties to the grant.

As discussed above, the Board finds that the vernacular meaning of coal at the relevant times is a solid, black or blackish, combustible rock and does not include CBM. Coal is a solid in an undisturbed reservoir, as discussed in section 4 of this decision. The Board considers that CBM is a distinct gaseous substance when its ordinary meaning at the relevant times is applied and is gaseous in an undisturbed reservoir, as also discussed in section 4.

EnCana and CDP make the argument that because coal owners had the statutory responsibility to properly manage and vent CBM during coal mining operations for the safety of the coal miners,[74] a reservation of coal at the relevant times included CBM regardless of the vernacular meaning of coal. Otherwise, they argue that significant conflicts in the extraction of the resource would result.

In support of this position, the American case of *Continental Resources* is cited.[75] The court held that the lessees of "oil, all gases, liquid hydrocarbons and their constituent products" were not entitled to the CBM for two basic reasons: first, because the language in the leases specifically denied the gas lessees the right to drill for CBM; and, second, because Illinois property rights to coal included the right to control CBM in the recovery of coal because of the danger that CBM posed to miners, as well as the right to recover CBM that had been reduced to possession and not migrated away from the coal seams.

The Board prefers the *Borys* interpretative approach to determining ownership where split title exists. In the *Continental Resources* case, the court did not adopt the *Borys* interpretative approach, whereas the *Southern Ute* case did. The Illinois court referred to *Southern Ute* as one approach to determine the issue of ownership but did not use those principles in its analysis. It relied on an interpretation of a specific clause in the gas leases that prevented the lessees from drilling and producing CBM and, equally as important, a theory of ownership of coal that has not been pronounced in Canada. For these reasons, the Board does not find the case persuasive.

The Board also agrees with Dean Percy, who gave evidence on behalf some of the Natural Gas Rights Holders when he referred to the *Southern Ute* case with respect to the management and venting of CBM by coal mine operators. He wrote:

> The Court also indicated that any conflict caused when the coal owner vented methane gas owned by the gas owner would be resolved in the same manner as the conflict between the petroleum owner and the gas owner as in the *Borys* decision. It commented that it may be true that the right to mine the coal implies the right to release gas incident to coal mining where it is necessary and reasonable to do so. "The right to dissipate the CBM gas where reasonable and necessary to mine the coal does not, however, imply the ownership of the gas in the first instance. Rather, it simply reflects the established

[74] Exhibit 03-036-2006-09-15 CDP Submission Appendix A: Alastair R. Lucas, Q.C. *Report on Background and Context of the CBM Issue* (2006) at page 7.
[75] *Continental Resources, supra* note 58.

> common-law right of the owner of one mineral estate to use, and even damage, a neighbouring estate as necessary and reasonable to the extraction of his own minerals (p. 33)."[76]

The Board considers that the fact that a statutory responsibility to manage CBM for safety purposes was imposed on coal mine owners and operators would not have overturned this common law principle, but rather would be in keeping with it.

On the whole of the evidence, the Board finds evidence of dictionary definitions and past judicial findings to be particularly persuasive in ascertaining the ordinary meaning of coal at the relevant times. In the Board's view, the vernacular meaning of coal has remained consistent throughout the last century and into the current time period.

7.3 Strata Ownership

7.3.1 Views of the Natural Gas Rights Holders

The Natural Gas Rights Holders rejected the strata theory of ownership of coal in Canada, arguing that the *Little v. Western Transfer & Storage Co.* case dealt with the concept of outstroke and did not support the position that a coal owner owned the property in the coal strata and all the substances that the strata contained.

7.3.2 Views of the Coal Owners

The Coal Owners submitted that the Board should consider the strata theory of coal ownership and not reject it outrightly.

7.3.3 Views of the Board

The case of *Little v. Western Transfer & Storage Co.* was cited by CDP and EnCana for the proposition that the coal lessee owns the property in the coal strata and all other minerals, including the CBM, that the strata contains and that this ownership continues after the coal has been removed.

The Board considers this case to be concerned primarily with the right of outstroke and not with competing claims of ownership to the other minerals contained in the same geological interval. The right of outstroke gives the coal lessee the right to use the space occupied by its coal to construct tunnels into adjoining coal mines in order to transport coal mined from those adjoining lands.

As acknowledged by both expert legal witnesses, the Board finds that in Canada there is currently no right to coal that pre-empts the rights to all other minerals in the same strata or interval.[77]

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[76] Exhibit 18-003a-2006-09-29 Joint Reply of ConocoPhillips *et al.*, Attachment A: David R. Percy, Q.C. *The Legal History of the Differentiation of Ownership Rights to Sub-Surface Minerals* at page 20; also see *Goodwell*, *supra* note 5 at paragraphs 60-65.

[77] Exhibit 18-003a-2006-09-29 Joint Reply of Conoco *et al.*, Attachment A: David R. Percy, Q.C. *The Legal History of the Differentiation of Ownership Rights to Sub-Surface Minerals* at pages 14 - 16; also, Hearing Transcript Volume 6 at page 759 lines 21 - 25, page 760 lines 1 - 13 and Volume 9 at page 1347 lines 12 - 25, page 1348 line 1 (Professor and Acting Dean Lucas).

Accordingly, the Board considers that the strata theory is not relevant to the matters in this proceeding. Therefore, the Board has not given any weight to consideration to this theory in its deliberations.

8 SUMMARY OF BOARD FINDINGS—LEGAL AND TECHNICAL MATTERS

In making its determination in this proceeding, the Board is well aware that it is not making final or conclusive decisions that bind the parties for all purposes when it finds that an applicant is the owner or otherwise entitled to produce the resource. The Board clearly recognizes that ultimate authority on ownership belongs to the courts.

The Board is, rather, deciding that an applicant has demonstrated entitlement to the Board's satisfaction for the purpose of issuing well licences or similar requirements under the compulsory pooling and special well spacing (holding) provisions of the *OGCA* and *OGCR*.

As discussed earlier in this decision, for purposes of this proceeding the Board has considered the following factors in making its determination of entitlement for well licences and the ownership requirements for compulsory pooling and special well spacing (holding) orders:

- the technical understanding of CBM and of coal,
- a regulatory entitlement approach, and
- a legal or common law approach to entitlement according to the principles set forth in the *Borys*, *Anderson*, and *Goodwell* decisions.

As stated in the earlier section, the Board considers the strata theory not to be relevant to the matters in this proceeding.

In each of the above sections of this decision, the Board has determined that the balance of probabilities would indicate that Bearspaw, Devon, and Fairborne are entitled to well licences and compulsory pooling and special well spacing (holding) orders for producing the CBM subject to the specific granting language. The Board did not find, in any of the above sections of this decision, that the Coal Owners are entitled to the CBM.

The Board will now review the specific granting language in each situation to determine the entitlement for each situation.

9 REVIEW OF INSTRUMENTS FILED BY THE PARTIES TO DEMONSTRATE CBM ENTITLEMENT

9.1 Background

This part of the decision reviews the effect that a grant, reservation, or exception of coal in an instrument that conveys mineral rights has on the present entitlement to CBM for applications involving lands encumbered by such a grant, reservation, or exception.

As indicated by FHOA, a significant portion of the approximately 6 400 000 hectares of privately owned mineral rights in Alberta are owned by the successor corporations to the Hudson's Bay Company (HBC) and the CPRC.[78] Originally, all the mines and minerals, except the precious minerals reserved by the Crown, were granted to HBC and CPRC and were initially united under one title.[79] However, split-title lands started to emerge in the early 20th century with the transfer of subsurface interests from CPRC to third parties and the reservation of coal to CPRC.[80]

In this proceeding, under various instruments dated 1913 to 1963, CPRC and the Calgary and Edmonton Railway Company (CERC) (predecessors in interest to EnCana) reserved their rights to "coal," "coal and petroleum," and "coal, petroleum and valuable stone." Under various instruments dated 1982, TransAlta Utilities Corporation (predecessor in interest to CDP) purchased "coal" from Canpar and other parties (who were predecessors in interest to Apache). These transactions severed the mineral estates, which created the split titles that are the subject of this proceeding.

Some of the above-noted transactions had the effect of creating divisions of title recognized under the Torrens land registration system in Alberta (namely, where two or more separate interests reflecting ownership of subsurface rights can be registered under the *Land Titles Act*, R.S.A. 2000, c. L-4).[81] The particular lands subject to split titles that are registered under the Alberta Torrens land registration system, along with the applications they relate to, are set out below in sections 9.2.1, 9.2.2, and 9.2.3.

9.2 Summary and Identification of the Parties' Interests in the Affected Lands

9.2.1 Bearspaw Applications

With respect to the Bearspaw applications, Bearspaw is the lessee, the successor in interest to the original lessee, and the holder of a compulsory pooling order for certain mineral interests in section 21-38-20W4M and section 13-37-21-W4M. Bearspaw holds its natural gas rights in the respective DSUs for the above-noted lands in one of the following ways:

1) As the current lessee of natural gas rights leased from EnCana's predecessor in interest in 1953, where EnCana is now shown as the fee simple owner of all mines and minerals within, upon or under NE¼ of section 21-38-20W4M (as more particularly described in certificate of title number 244I147).

2) As the holder of compulsory pooling order P290, which includes portions of W½ of section 13-37-21W4M, where EnCana is shown as the fee simple owner of all mines and minerals within, upon, or under portions of W½ of section 13-37-21W4M (39 hectares [96.40 acres]

[78] Exhibit 13-001-2006-08-25 FHOA Submission at page 1 paragraphs 2 and 3.
[79] Exhibit 13-001-2006-08-25 FHOA Submission at pages 1 and 2, paragraphs 4 and 5, summarizes the extent of HBC's interests in 1869 as follows: HBC retained section 8 and all or portions of section 26 within what was referred to as the "fertile belt" and summarizes the extent of CPRC's interests in 1881 as follows: the CPRC grant included all undisposed odd numbered sections of land within twenty-five (25) miles of the rail line except sections 11 and 29.
[80] ConocoPhillips Final Argument November 15, 2006, at page 26 paragraphs 74 and 75.
[81] *Anderson*, *supra* note 7 at paragraph 5.

more or less as more particularly described in and set forth in certificate of title number 942 387 569).

The above compulsory pooling application was filed by Bearspaw in response to its inability to obtain a voluntary pooling agreement with EnCana with regard to the inclusion and ownership of the substances to be pooled.

3) As the current lessee of natural gas rights leased from other parties or their predecessors in interest (none of which have intervened in this proceeding) between 2002 and 2006,

   a) where these parties are shown in the respective leases as

      i) the lessor, being registered as owner or entitled to become registered as owner of the leased substances within, upon, or under that certain parcel or tract of land legally described as follows: all mines and minerals except coal and petroleum within, upon or under S½ of section 21-38-20W4M (as more particularly described and set forth in certificate of title number 982 043 167);

      ii) the lessor, being registered as owner or entitled to become registered as owner of the leased substances within, upon, or under that certain parcel or tract of land legally described as follows: all mines and minerals except coal, petroleum, and valuable stone within, upon, or under portions of section 13-37-21W4M (as more particularly described and set forth in certificate of title number 972 256 987); and

      iii) the lessor, being registered as owner or entitled to become registered as owner of the leased substances within, upon, or under that certain parcel or tract of land legally described as follows: all mines and minerals except coal and petroleum within, upon or under NW¼ of section 21-38-20W4M (as more particularly described and set forth in certificate of title numbers 902 181 410, 902 181 410A, 902 181 410D, 992 260 536 +1, and 022 063 737 +1);

   and

   b) where EnCana is now shown as

      i) the fee simple owner of all coal, petroleum and valuable stone within, upon, or under portions of section 13-37-21W4M (as more particularly described and set forth in certificate of title number 772 030 713); and

      ii) the fee simple owner of all coal and petroleum within, upon, or under S½ of section 21 and NW¼ of section 21-38-20W4M (as more particularly described in and set forth in certificate of title number 181W139).

   The above third parties' split-title ownership arose from transfers made between 1913 and 1918 excepting and reserving to the CPRC (predecessor in interest to EnCana) "coal and petroleum" or "coal, petroleum, and valuable stone."

   (collectively referred to as the Bearspaw Settler Grants)

4) The current lessee of natural gas rights leased from the Alberta Crown for portions of section 13-37-21W4M between 1977 and 2002 (as more particularly described in Alberta Crown Petroleum and Natural Gas Lease Numbers 0477090165, 0477010143, and 0402110076).

While the granting clauses in each of the Bearspaw Freehold leases are slightly different, they all grant rights to natural gas. "Coal" is reserved or excepted in all but one of the Bearspaw Freehold leases. Nothing in the Bearspaw Freehold leases excludes any particular form of natural gas. A summary of the granting language used in each of the Bearspaw Freehold leases for the disputed split-title lands is set out in Appendix 3.

In summary, EnCana disputed portions of the split-title lands in which EnCana is the fee simple coal owner in respect of the above-noted Bearspaw Freehold leases. EnCana takes no issue with production by Bearspaw of CBM from the above-noted Alberta Crown leases. Accordingly, the Board will not examine the issue of legal entitlement to CBM production from these Alberta Crown leases in this decision.

9.2.2 Devon Applications

Devon is the successor in interest to the original lessee of certain mineral interests in sections 35-33-26W4M, 8-34-26W4M, 9-34-26W4M, 15-34-26W4M, and 17-34-26W4M (collectively referred to as the Devon Leases). Devon holds its natural gas rights in the respective DSUs in one of the following ways:

1) As the current lessee of natural gas rights leased from Apache's predecessor in interest by various instruments dated from 1954 to 1999,

   a) where Apache is the now shown as the fee simple owner of all mines and minerals other than coal within, upon, or under section 8-34-26W4M (as more particularly described in certificate of title number 011 101 294 +61); section 9-34-26W4M (as more particularly described in certificate of title number 011 101 294 +31); and section 17-34-26W4M (as more particularly described in certificate of title number 011 101 294 +32); and

   b) where Luscar Ltd. (predecessor in interest to CDP) is now shown as the fee simple owner of all coal within, upon, or under section 8-34-26W4M (as more particularly described in certificate of title number 041 128 618 +7); section 9-34-26W4M (as more particularly described in certificate of title number 041 128 618 +11); and section 17-34-26W4M (as more particularly described in certificate of title number 041 128 618 +12).

      The above split-title ownership between Apache and Luscar Ltd. (now CDP) arose by virtue of certain agreements made among TransAlta Utilities Corporation (predecessor in interest to Luscar Ltd. [now CDP]) and predecessors in interest to Apache in 1982, pursuant to which TransAlta Utilities Corporation purchased all of the vendors' estate and interest in the coal within, upon, or under sections 8-34-26W4M, 9-34-26W4M, and 17-34-26W4M.

      (collectively, referred to as the TransAlta Grants)

2) As the current lessee of natural gas rights leased from a predecessor in interest to a party other than EnCana and Apache (which has not intervened in this proceeding) in 1963,

   a) where this predecessor in interest is shown in the lease as the lessor, being registered as owner or entitled to become registered as owner of the leased substances within, upon, or under that certain parcel or tract of land legally described as follows: SE¼ of section 15-34-26W4M (as more particularly described and set forth in certificate of title number 95 F 89); and

b) where EnCana is now shown as the fee simple owner of all coal, petroleum and valuable stone within, upon, or under SE¼ of section 15-34-26W4M (as more particularly described in certificate of title number 761 007 969).

The above third parties' split-title ownership arose from a transfer made in 1921 excepting and reserving to CERC (predecessor in interest to EnCana) coal, petroleum, and valuable stone.

(the Devon Settler Grant)

3) As the current lessee of natural gas rights leased from EnCana's predecessor in interest in 1962, where EnCana is now shown as the fee simple owner of all mines and minerals within, upon, or under portions of section 35-33-26W4M (as more particularly described in certificate of title number 761 007 597) and SW¼ and N½ of section 15-34-26W4M (as more particularly described in certificate of title number 761 007 969).

4) As current lessee of natural rights leased from the Alberta Crown for portions of section 35-33-26W4M in 1959 (as more particularly described in Alberta Crown Petroleum and Natural Gas Lease No. 117560).

In addition to the above leasehold interests, Canpar holds title to a gross overriding royalty (GORR) covering all petroleum and natural gas produced from property described as section 8-34-26W4M.

While the granting clauses in each of the Devon Freehold leases are slightly different, they all grant rights to natural gas. "Coal" is reserved in all of the Devon Freehold leases. A summary of the granting language used in each of the Devon Freehold leases for the disputed split-title lands is set out in Appendix 4.

In summary, CDP and EnCana are disputing the split-title lands in which they are the beneficial or registered owner of coal in respect to the above-noted Devon Freehold leases. However, EnCana takes no issue with production by Devon of CBM from Alberta Crown Petroleum and Natural Gas Lease No. 117560. Accordingly, the Board will not examine the issue of legal entitlement to CBM production from this Alberta Crown lease in this decision.

9.2.3 Fairborne Applications

Fairborne is the successor in interest to the original lessee of certain mineral interests in sections 17-39-24W4M, 27-39-24W4M, and 35-39-24W4M (collectively referred to as the Fairborne Leases). Fairborne holds its natural gas rights in the respective DSUs under the Fairborne Leases.

Under the Fairborne Leases, Fairborne is the current lessee of natural gas rights leased from other parties or their predecessors in interest (none of whom have intervened in this proceeding) between 1956 and 1997,

a) where these parties are shown in the respective leases as follows:

i) the lessor, being registered as owner or entitled to become registered as owner of the leased substances within, upon, or under that certain parcel or tract of land legally described as follows: all mines and minerals except coal within, upon, or under section 17-39-24W4M (as more particularly described and set forth in certificate of

title numbers 762 161 033A, 832 065 416 B, 942 210 295, 952 028 311 +3, 972 115 594 +2);

ii) the lessor, being the beneficial owner of the petroleum, natural gas, and all related hydrocarbons within upon or under section 27-39-24W4M (as more particularly described and set forth in certificate of title number 72-M-104);

iii) the lessor, being the beneficial owner of the petroleum, natural gas and all related hydrocarbons within upon or under S½ of section 35-39-24W4M (as more particularly described and set forth in certificate of title number 70-M-104);

iv) the lessor, being the beneficial owner of the petroleum, natural gas and all related hydrocarbons within upon or under N½ of section 35-39-24W4M (as more particularly described and set forth in certificate of title number 76 Q 131);and

b) where Luscar Ltd. (predecessor in interest to CDP) is now shown as the fee simple owner of all coal within, upon, or under section 17-39-24W4M (as more particularly described in certificate of title number 042 127 082 +7), section 27-39-24W4M (as more particularly described in certificate of title number 042 127 082 +12), and section 35-39-24W4M (as more particularly described in certificate of title numbers 042 127 081 +3 and 042 127 081 +4).

In addition to the above leasehold interests, Computershare holds title to two GORRs covering production from any well or wells drilled on section 35-39-24W4M.

While the granting clauses in each of the Fairborne Leases are slightly different, they all grant rights to natural gas. However, "coal" is expressly excluded, excepted, or reserved from the grant in all of the Fairborne Leases. A summary of the granting language used in each of the Fairborne Leases for the disputed split-title lands is set out in Appendix 5.

Similar to CDP's position on the Devon Freehold leases, CDP is disputing the split-title lands in which it is the beneficial owner of coal for the above-noted Fairborne Leases. CDP does not own any natural gas rights in Alberta.

9.2.4 Other Third-Party Leases (ConocoPhillips, Centrica, FHOA, and Quicksilver)

In addition to the Bearspaw Leases, Devon Leases, and Fairborne Leases, other third parties (namely, ConocoPhillips, Centrica, FHOA, and Quicksilver) filed evidence of various forms of Freehold leases and the granting language contained in those instruments. A summary of this evidence is set out in Appendices 6, 7, 8, and 9**.**

9.2.5 Summary: Board's Approach in Interpreting Instruments

Entitlement may arise by a variety of instruments that convey mineral rights, such as grants, regrants, or exceptions.[82] Given that the character of the instrument does not delineate the mineral rights conferred, the Board must

[82] See generally, *Goodwell*, *supra* note 5, at paragraphs 46 - 49**.**

- interpret the terms of the instruments—the rights granted, as well as not granted—by examining the Board's statutes and the applicable case law in order to delineate the scope of the applicant's rights; and
- make a legal determination of the applicant's right to extract the resource.[83]

As set out in sections 9.2.1, 9.2.2, and 9.2.3 of this decision, the coal rights granted, reserved, or excepted under the various instruments filed in this proceeding are now held by CDP and EnCana.

Apache, Bearspaw, Canpar, Devon, and Fairborne acknowledge that none of the instruments filed in support of their leasehold or ownership interests for the applications expressly include "CBM," "natural gas in coal," or other descriptions of CBM that have been used in this proceeding. CDP and EnCana made a similar acknowledgement in connection with the instruments filed by them. CDP and EnCana also stated that they were not relying on any documents that had not been filed as exhibits in the proceeding.[84]

9.2.6 Board's Conclusions Regarding the Meaning of Instruments—Granting and Reserving Mineral Rights

In the Board's view, ownership to CBM is based upon the original grant, reservation, or exception. Accordingly, the Board will examine the instruments filed by the parties in chronological order to determine if "coal" in the contemporaneous vernacular included CBM.

9.2.6.1 The Bearspaw Settler Grants and Devon Settler Grant—1913 to 1921

Similar to *Borys*, the Board notes that when the Bearspaw Settler Grants and Devon Settler Grant (the "Settler Grants") were agreed to, the hydrocarbon pools under the lands at issue had not been disturbed. In this regard, the Board notes that Justice Major, in *Anderson*, at paragraph 34, stated that "*Bory*s should be read as indicating it is the initial conditions of the pool that govern the relative ownership between the parties to those original contracts."

Using the framework and conclusions set out in this decision, the Board has concluded that reservation of coal by virtue of the Settler Grants resulted in only the solid, combustible rock being reserved. Accordingly, "coal" includes all hydrocarbons in solid phase under the tract of land prior to any development for the purposes of these reservations, and these reservations do not include CBM. As a result, CBM was included in the transfer of the fee simple estate of all other mineral interests (which includes natural gas) in the said lands.

9.2.6.2 TransAlta Grants—1982

The Board notes that when the TransAlta Grants were agreed to, the Devon leases for the lands in issue had not been entered into by the parties.

Having regard to the language in the TransAlta Grants, the Board concludes that the transfer of coal by virtue of the TransAlta Grants resulted in only the solid, combustible rock being sold by Dome *et al.* to TransAlta (predecessor in interest to CDP). In the Board's view, such a sale did

[83] *Goodwell, supra* note 5, at paragraphs 26, 57, 62 and 78.
[84] Hearing Transcript October 26, 2006, at page 1323 lines 14 to 25.

not in the vernacular of the day include CBM for the reasons described in section 7.2.3 of this decision. As a result, CBM was not included in the sale of coal to TransAlta (predecessor in interest to CDP). Rather, the rights to CBM remained with the other mineral interests retained by Dome *et al.* (now Apache and Canpar).

9.2.6.3 Granting Language—Bearspaw Leases, Devon Leases, and Fairborne Leases—1953 to 2006

In the Board's view, the granting language in each of the Freehold leases of Bearspaw, Devon, and Fairborne (which they have filed to demonstrate their entitlement to CBM) describe the rights of the parties according to the mineral substances (namely, natural gas or coal) granted, reserved, or excepted. The Board also notes that the reservations or exceptions of coal relied upon by the Coal Owners are contained in the definition of leased substances.

While the granting language in the Freehold leases of Bearspaw, Devon, and Fairborne are slightly different, the Board has determined that in those leases from 1953 to 2006, where it grants an entitlement to "natural gas" and reserves or excepts "coal" without further description or definition, it resulted in only the black, solid, combustible rock being reserved or excepted. In the Board's view such a reservation or exception of coal did not in the vernacular of the day include CBM for the reasons described in section 7.2.3 of this decision. As a result, CBM is included in the grant of natural gas by the fee simple owner of natural gas to the natural gas lessee in these Freehold leases.

With respect to Application No. 1406764 (namely, the compulsory pooling application), the Board notes that Bearspaw has filed

- a Canadian Association of Petroleum Landmen (C.A.P.L.) 91 (Alta) Natural Gas lease form (which was made effective on July 3, 2005), and
- a non-C.A.P.L. unknown natural gas lease form (which was made on July 3, 2006).

Both leases were both granted by Evelyn Strandquist, as lessor, for portions of section 13-37-21W4M, which comprise 279.5 acres more or less, where EnCana is the fee simple owner of the coal, and have a primary term of one year. The Board further notes that Order No. P290 was approved by the Lieutenant Governor in Council on October 19, 2005.

When Order No. P290 was approved on October 19, 2005, the July 3, 2005, Strandquist Lease was the operative lease for these lands. Given the granting language used in this lease, the Board is satisfied that Order No. P290 was properly issued.

Accordingly, based on a legal or common law approach to entitlement according to the principles set forth in the *Borys*, *Anderson*, and *Goodwell* decisions, the Board finds that the CBM well licences and other EUB approvals were properly issued to Bearspaw, Devon, and Fairborne.

10 REMEDIES SOUGHT—ADDITIONAL REGULATORY PROCESSES

10.1 Reduction in Size of Drilling Spacing Units

10.1.1 Views of the Natural Gas Rights Holders

Bearspaw, Devon, and Fairborne submitted that EnCana's suggested reduction in the size of DSUs to a quarter of a section either had little impact on their ability to develop lands in the subject areas or was impractical, as it could create more problems than it would solve. The applicants identified a number of problems associated with this proposal, such as increased administrative burden, increased land disturbance and surface owner conflicts, triggering of offset obligations within leases, decreased flexibility of the mineral rights owner in locating wells, and possible drainage of lands subject to an entitlement dispute.

10.1.2 Views of the Coal Owners

EnCana suggested for those sections that have one or more quarters for which entitlement is not disputed as well as quarter sections where entitlement is disputed, an option would be to reduce the size of the DSUs to one quarter section (from the current DSU of one section). This would permit CBM development on the undisputed quarters. EnCana added that it was not seeking to have reduced DSUs mandated by the Board in this situation, but rather had offered this as an option to lessen split title disputes.

10.1.3 Views of the Board

The Board notes that any future application for the reduction in DSUs must be in accordance with *Directive 065: Resources Applications for Conventional Oil and Gas Reservoirs* and the Board's previously set out policies and practices regarding spacing matters. The Board further notes EnCana's statement that it does not seek not to have reduced DSUs mandated by order of the Board.

Having regard for the Board's decision on this proceeding, the Board has determined that a decision regarding reduced DSUs is unnecessary at the present time.

10.2 Vertical Pooling

10.2.1 Views of the Natural Gas Rights Holders

Devon and Fairborne submitted that vertical pooling would not be of assistance, as it is designed to deal with allocating production between resource owners and therefore does not address a dispute over ownership of the resource. Bearspaw contended that given EnCana's position in the hearing that the Board can do nothing more than "decide it cannot decide," it must follow that EnCana's suggestion regarding vertical pooling must also lie outside the jurisdiction of the Board. The parties further argued that vertical pooling would raise technical problems, add to completion and measurement costs, and could result in the resource not being developed if the proceeds of production from disputed coal zones were paid to the Provincial Treasurer (now Minister) pending resolution of the ownership dispute, as suggested by EnCana.

10.2.2 Views of the Coal Owners

EnCana suggested that development should be permitted where entitlement to produce on some tracts within the DSU is not disputed and that this could occur by the Board granting a pooling order that requires payment of proceeds from disputed production to the Provincial Treasurer (now Minister). EnCana stated that any owner of a tract within a DSU could apply for a compulsory pooling order if the owner cannot obtain the agreement of the other owners in the DSU to enter into a pooling agreement, whether the interests involved are horizontal or vertical. The proceeds of the disputed CBM, to be determined by metering or attribution on the basis of CBM control wells, would be paid to the Provincial Treasurer (now Minister). EnCana added that it was not seeking to have pooling mandated by the Board, but rather had offered this as an option to lessen split-title disputes.

10.2.3 Views of the Board

The Board notes that any future application for vertical pooling must be in accordance with *Directive 065* and the Board's previously set out policies and practices regarding pooling matters. The Board also notes EnCana's statement that it does not seek not to have vertical pooling mandated by order of the Board.

Further, having regard for the Board's decision on this proceeding, the Board has determined that a decision regarding vertical pooling is unnecessary at the present time.

10.3 Quiet Title

10.3.1 Views of the Natural Gas Rights Holders

Devon and Fairborne asserted that the Alberta Court of Appeal was clear in *Goodwell* that a party with a right to produce a resource should not be forced by the regulator to enter into a commercial arrangement with another party claiming an interest in that production and that the same principles are applicable in the present case. The applicants contended that by advocating a quiet title approach, the coal owners seek a result that would allow them to use the Board process to extract an interest in CBM from gas rights holders, gain a negotiating advantage over the gas producers, and dictate the commercial terms of CBM development. It was further submitted that quieting title was unnecessary, as the Natural Gas Rights Holders are entitled to natural gas under their leases.

10.3.2 Views of the Coal Owners

EnCana and CDP submitted that requiring the parties to quiet title through entering into coal certainty agreements before applying to develop CBM was practical and would facilitate the efficient and orderly development of the resource. These parties submitted that requiring a quiet title would allow well licences to be issued on a routine basis, help avoid litigation over both entitlement and return of royalties paid, and prevent capital from being stranded or foregone. EnCana stated that it is its current practice to not make application for CBM well licences in cases where title is not quiet and that some companies routinely quiet title in other jurisdictions. CDP also submitted that it is its corporate strategy to conclude coal certainty transactions to quiet title on its coal lands.

10.3.3 Views of the Board

Having regard for this decision, the Board also rejects the suggestion that the Board require a quieting of title prior to the filing of any applications.

11 CONCLUSIONS

An examination of the technical evidence, the common law approach based on the *Borys*, *Anderson*, and *Goodwell* decisions, the terms of the applicable Freehold leases and related instruments, and the Board's regulatory regime supports the Board's conclusion that the well licences, compulsory pooling, and special well spacing (holding) orders were properly issued.

Having regard to the above, this decision sets aside the directions in *Bulletin 2006-19*, effective immediately. Processing of applications held in abeyance in accordance with this bulletin will now proceed. All processing will be subject to normal processing practices and current policies and rules.

The Board's conclusions in this decision provide a sound basis for the Board's consideration of pending and future well licence, special well spacing (holding), compulsory pooling, and any other applications involving the right to produce CBM from split-title lands where objections based on disputed entitlement or ownership to CBM are filed. That is not to say that the Board will simply dismiss such objections without any consideration of the unique facts and circumstances of the particular objection. The Board will, however, where appropriate, consider such objections in light of the conclusions made in this decision, in particular about the nature of CBM and coal and the vernacular meaning of coal and CBM at the relevant time in the decision.

Dated in Calgary, Alberta, on March 28, 2007.

ALBERTA ENERGY AND UTILITIES BOARD

<original signed by>

M. N. McCrank, Q.C., P.Eng.
Presiding Member

<original signed by>

A. J. Berg, P.Eng.
Board Member

<original signed by>

C. A. Langlo, P.Geol.
Acting Board Member

APPENDIX 1 APPLICATIONS

Bearspaw

The particulars of the Bearspaw applications, in which EnCana objects, are summarized in the table below.

Application No.	Location or Unique Well Identifier	Subject of Application	Order or Approval No.
1406764	Section 13 of Township 37, Range 21, West of the 4th Meridian (Section 13-37-21W4M) 00/09-13-037-21W4	Order prescribing that all tracts within the DSU constituting section 13-37-21W4M be operated as an unit for the production of gas from all zones to the base of the Belly River Group	P 290
1423722	02/13-21-038-20W4	B140 Category Well Licence targeting gas in the Belly River Group and CBM in the Horseshoe Canyon Formation	0344816

Devon

The particulars of the Devon applications, in which CDP objects, are summarized in the table below.

Application No.	Location or Unique Well Identifier	Subject of Application	Order or Approval No.
1383132	02/06-08-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331749
1383134	02/08-08-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331750
1383136	02/14-08-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331751
1383137	02/16-08-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331752
1383138	02/06-17-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331753
1383139	00/08-17-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331754
1383140	00/14-17-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331755
1383141	00/16-17-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331756
1380005	03/06-09-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331738
1380010	02/08-09-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331742
1380013	00/14-09-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331746
1380014	00/16-09-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331747
1377141	Section 36-33-26W4M and Sections 1, 2, 3, 8, 9, 10, 11, 14, 16, 17 of 34-26W4M	Holdings for the production of gas from the Edmonton (coals and sands) Wimborne Area	SU 4283C

The particulars of the Devon applications, in which EnCana objects, are summarized in the table below.

Application No.	Unique Well Identifier	Subject of Application	Approval No.
1379737	03/06-15-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331718
1379726	02/06-35-033-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331713
1379743	00/08-15-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331719
1383129	02/08-35-033-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331748
1379746	00/14-15-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331730
1379730	02/14-35-033-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331717
1379763	00/15-35-033-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331731
1380004	00/16-15-034-26W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331737

Fairborne

The particulars of Fairborne applications, in which CDP objects, are summarized in the table below.

Application No.	Unique Well Identifier	Subject of Application	Approval No.
1402289	02/10-35-039-24W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331663
1402290	02/12-35-039-24W4	B140 Category Well Licence targeting CBM in the Edmonton Group	0331714
1446453	00/02-27-039-24W4	B140 Category Well Licence targeting gas in the Belly River Group	0353789*
1446462	00/03-17-039-24W4	B140 Category Well Licence targeting CBM in the Horseshoe Canyon Formation	0353792*
1446465	00/05-35-039-24W4	B140 Category Well Licence targeting gas in the Belly River Group	0353794*

*Pursuant to the provisions of the licence, this well licence number expired and was cancelled on March 13, 2007.

APPENDIX 2 HEARING PARTICIPANTS

Principals and Representatives (Abbreviations used in report)	Witnesses
Apache Canada Ltd. (Apache) A. Carpenter B. Hunter	R. Herbert, P.Eng. E. Myketyn, P.Land
ARC Resources Ltd. (ARC)* R. C. Steele	
Bearspaw Petroleum Ltd. (Bearspaw) J. Gruber K. Slipp	D. Ostermann P. Wright, P.Eng.
Canpar Holdings Ltd. (Canpar) J. Lowe	M. J. Okrusko, P.Land D. J. Sandmeyer, P.Eng.
Carbon Development Partnership (CDP) W. Corbett, Q.C. D. Edie, Q.C.	B. L. Hatt, of Sherritt International Corporation
Centrica Canada Limited (Centrica) P. Linder, Q.C. J. Price	D. Phillips, C.M.A.
Computershare Trust Company of Canada* (Computershare) A. Harvie	
ConocoPhillips Canada Resources Corp. (ConocoPhillips) A. Ross D. Audino	G. J. F. Chapman, P.Land, of Legacy Land and Title Company Inc. J. C. Riley, P.Eng.
Devon Canada Corporation (Devon) and Fairborne Energy Ltd. (Fairborne) D. Crowther T. O'Leary	D. Eisner, P.Land, of Devon C. Korczewski, P.Eng., of Devon H. B. Snyder, P.Geol., of Devon D. E .T. Pyke, P.Land, of Fairborne Energy Trust

EnCana Corporation (EnCana) C. Popowich K. Reiffenstein	K. P. Welsh, P.Eng.
Freehold Petroleum and Natural Gas Owners Association (FHOA) T. Osvath	D. Spiers, P.Geol.
Quicksilver Resources Canada Inc. (Quicksilver) G. Fitch D. Farmer	D. W. Johnson L. L. Louie, P.Land
ConocoPhillips, Devon, Fairborne, Quicksilver, Canpar, and Centrica (ConocoPhillips *et al.*)	D. R. Percy, Q.C., Professor and Dean of the Faculty of Law at the University of Alberta M. J. Mavor, of Tesseract Corporation
CDP and EnCana (the Coal Owners)	A. R. Lucas, Q.C., Professor and Acting Dean of the Faculty of Law, University of Calgary J. R. Levine, Ph.D., Consultant Geologist
Alberta Energy and Utilities Board staff D. Larder, Q.C., Board Counsel T. Bews, Board Counsel B. Powell, Board Counsel T. Byrnes, P.Eng. C. Evans, P.Geol. K. Fisher J. Meckelborg S. Ramos, Geol.I.T. S. Thomas, P.Eng.	

* No witnesses appeared.

APPENDIX 3 BEARSPAW FREEHOLD LEASES

In the Board's view, the Freehold leases filed by Bearspaw can be grouped into two categories:

- EnCana lease forms (namely, leases granted by EnCana's predecessors in interest), and
- other lease forms (namely, leases granted by parties other than EnCana or its predecessors).

1 EnCana Lease Forms

Bearspaw filed the Canadian Pacific Railway Company (now EnCana) – Petroleum and Natural Gas Lease P.L. 713 Form (EnCana Lease Form P.L. 713). The EnCana Lease Form P.L. 713 grants to the lessee

> all the right, title and interest of the Lessor in and to the petroleum and natural gas, natural gasoline and related hydrocarbons, other than coal (collectively hereinafter referred to as "the leased substances") which may be found within, upon or under the said lands.

2 Other Lease Forms

The other lease forms fall into the following subcategories:

- Canadian Association of Petroleum Landmen (C.A.P.L.) lease form, and
- non-C.A.P.L. lease forms.

2.1 C.A.P.L. Lease Forms

Bearspaw filed the C.A.P.L. 91 (Alta.) form of Natural Gas Lease,[85] which grants to the lessee

> all the leased substances (as hereinafter defined) subject to the royalties hereinafter reserved, within, upon or under the said lands, together with all of the present or future right, title, estate and interest, if any, of the Lessor in and to the leased substances or any of them within, upon or under any lands excepted from the said lands and any roadways, lanes or rights of way adjoining the said lands; together with the exclusive right and privilege to explore for, drill for, operate for, produce, win, take, remove, store, treat and dispose of the leased substances and the right to inject substances into the said lands for the purpose of obtaining, maintaining or increasing production from the said lands, the pooled lands or the unitized lands and to store and recover any such substances injected into the said lands.

The "leased substances" is defined as follows:

> (e) "leased substances" means all natural gas and related hydrocarbons (except coal), and all materials and substances (except valuable stone), whether liquid, solid or gaseous and whether hydrocarbons or not, produced in association with natural gas or related hydrocarbons or found in any water contained in any reservoir.

2.2 Non-C.A.P.L. Lease Forms

The non-C.A.P.L. lease forms have been further classified into the following subcategories:

- identified lease forms, and

[85] Exhibits 02-18a-2006-09-29, 02-18b-2006-09-29 and 02-18c-2006-09-29 Bearspaw Submissions.

- unknown lease forms.

2.2.1 Non-C.A.P.L. Lease Forms—Identified Lease Form

Bearspaw filed only one identified lease form, the "M.C.S. 99" Lease Form,[86] which grants

> exclusively to the Lessee the Lands and all the Leased Substances, subject to the royalties hereinafter reserved, within, upon or under the Lands, together with all of the present or future right, title, estate and interest, if any, of the Lessor in and to the Leased Substances or any of them within, upon or under any lands excepted from the Lands and any roadways, lanes or rights of way adjoining the Lands; together with the exclusive right and privilege to explore for, drill for, operate for, produce, win, take, remove, store, treat and dispose of the Leased Substances and the right to inject substances into the Lands for the purpose of obtaining, maintaining or increasing production of the Leased Substances from the Lands, the Pooled lands or the Unitized Lands and to store and recover any substances injected into the Lands.

"Leased Substances" is defined as follows:

> "Leased Substances" means all petroleum, natural gas and all other hydrocarbons or any of them (except coal), and all materials and substances (except valuable stone), whether liquid, solid or gaseous and whether hydrocarbons or not, produced in association with petroleum, natural gas or other hydrocarbons or found in any water contained in any reservoir but only to the extent that the foregoing are included in the Certificate of Title.

2.2.2 Non-C.A.P.L. Lease Forms—Unknown Lease Form

Bearspaw filed only one unknown lease form,[87] the Strandquist Lease, which grants

> exclusively unto the Lessee all the leased substances (as hereinafter defined) subject to the royalties hereinafter reserved, within, upon or under the said lands, together with all of the present or future right, title, estate and interest, if any, of the Lessor in and to the leased substances or any of them within, upon or under any lands excepted from the said lands and any roadways, lanes or rights of way adjoining the said lands; together with the exclusive right and privilege to explore for, drill for, operate for, produce, win, take, remove, store, treat and dispose of the leased substances and the right to inject substances into the said lands for the purpose of obtaining, maintaining or increasing production from the said lands, the pooled lands or the unitized lands and to store and recover any substances injected into the said lands.

"Leased substances" is defined as follows:

> "leased substances" means all natural gas and related hydrocarbons including coal and all materials and substances (except valuable stone), whether liquid, solid or gaseous and whether hydrocarbons or not, produced in association with natural gas or related hydrocarbons or found in any water contained in any reservoir, including, without limitation, gas produced from coal bearing formations.

[86] Exhibit 02-18a-2006-09-29 Bearspaw Submission identification of "M.C.S. 99" is at top left-hand corner of first page of appended Lease and Grant dated January 8, 2003, between the Governing Council of the Salvation Army, in Canada, as lessor, and Bearspaw Petroleum Ltd., as lessee.

[87] Exhibit 02-019-2006-09-29 Bearspaw Leases no identification is marked on the upper first page of appended Natural Gas Lease dated July 3, 2006, between Evelyn Strandquist, as lessor, and Homestead Land Services Ltd., as lessee (the Strandquist Lease).

APPENDIX 4 DEVON FREEHOLD LEASES

In the Board's view, the Freehold leases filed by Devon can be grouped into two categories:

- EnCana lease forms (namely, leases granted by EnCana's predecessors in interest), and
- other lease forms (namely, leases granted by parties other than EnCana or its predecessors).

1 EnCana Lease Forms

Devon filed Calgary and Edmonton Railway Company (CERC) (now EnCana) - Petroleum and Natural Gas Lease forms.[88] The CERC Lease Forms grant to the lessee

> all the petroleum and natural gas, natural gasoline and related hydrocarbons other than coal, and also including sulphur as recovered in solution or in association with any of the liquid or gaseous hydrocarbons (collectively hereinafter referred to as "the leased substances") which may be found within, upon or under the said lands, or within, upon or under any lands excepted from the said lands, or any roadways, lanes or rights-of-way adjoining the said lands, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of the leased substances, together with such surface rights as may be required by the Lessee for its drilling and production operations on the said lands, provided the Lessor owns and occupies the said surface rights at the date of this Lease.

2 Other Lease Form—Non-C.A.P.L. Lease Forms

In the Board's view, all of Devon's non-EnCana leases can be grouped into the category of "Non-C.A.P.L. Lease Forms," which can be further classified into the following subcategories:

- identified lease forms, and
- unknown lease forms.

2.1 Non-C.A.P.L. Lease Forms—Identified Lease Form

Devon filed four Talisman Energy Inc. lease forms (collectively, referred to as the Talisman Lease Forms).[89] The Talisman Lease Forms grant to the lessee

> in all Leased Substances which may be found within, upon or under the Lands, excepting out of the Leased Substances the Lessor Royalty, together with the right and privilege to explore and drill for, win, take, remove and store the Leased Substances, or any of them and to dispose of the Leased Substances, and for such purposes to drill wells, lay pipe lines, build and install tanks, machinery, structures and roadways as may be necessary; and insofar as Lessor has the right so to grant, to recover the Leased Substances, or any of them from any lands excepted from, or roadways, lanes or rights-of-way adjoining the lands aforesaid; and insofar as Lessor has the right so to grant and for the said purposes, the right to enter upon, use and occupy the Lands and so much thereof and to such an extend as may be necessary to exploit the rights and privileges hereby granted.

[88] Exhibit 05-066d-2006-08-25 Devon Submission appends three Petroleum and Natural Gas Leases granted by Calgary and Edmonton Railway Company, as lessor (the CERC Lease Forms). The identification marked on the top corner of the first page of two of these leases cannot be clearly read.

[89] Exhibit 05-066a-2006-08-25 Devon Submission appends four Petroleum and Natural Gas Leases granted by Talisman, as lessor. It appears that the identification for two of these leases is on the top right-hand corner of the front page of the lease and identification for the other two leases is on the top left corner of the front page of the lease. The identification marked on these leases cannot be clearly read.

"Leased Substances" is defined as follows:

> "Leased Substances" means petroleum, Natural Gas and related hydrocarbons, other than coal, Heavy Oil and valuable stone, and all substances whether liquid or solid and whether hydrocarbons or not, produced in association with any of the foregoing;

"Natural Gas" is defined as follows:

> "Natural Gas" means raw gas or marketable gas whether or not the same is treated to make the same marketable other than through or in a processing plant."

2.2 Non-C.A.P.L. Lease Forms—Unknown Lease Form

Devon filed two unknown lease forms.[90] The first form, Lease S68, as amended,[91] grants to the lessee

> …the right and interest of the Lessor, in all petroleum which may be found within, upon or under the leased area for the sole purpose of drilling and operating for the same (the term "petroleum" including this Lease crude oil, crude naptha, natural gas, natural gasoline and related hydrocarbons other than coal, and also including sulphur not in solid form but as recovered in solution or in association with any of the liquid or gaseous hydrocarbons)….

The second form, the Robanske Lease,[92] grants to the lessee

> all of the lease substances within, upon or under the said lands, subject to the royalties hereinafter reserved, together with the exclusive right and privilege to explore, drill and operate for, win, take, remove, store and dispose of, the leased substances, and for the said purposes, so far as the Lessor has the right so to grant, to enter upon the said lands and use and occupy so much thereof as may be necessary or convenient for any or all of the said purposes or operations incidental thereto, or associated therewith, including drilling for, producing, treating, processing and transporting the leased substances.

The "leased substances" definition under the Robanske Lease is as follows:

> THE LESSOR, being registered as owner [or entitled, pursuant to an Agreement of Sale, unregistered transfer or otherwise howsoever, to become registered as owner] subject to such mortgages and encumbrances as are notified by memorandum underwritten or endorse hereon, of all natural gas and related hydrocarbons, all other gases, and all other substances [whether fluid or solid and whether similar or dissimilar and whether hydrocarbons or not) produced in association with any of the foregoing or found in any water contained in an oil or gas reservoir, excluding, however, coal, petroleum and valuable stone, [hereinafter called the "leased substances"].

[90] Exhibits 05-066b-2006-08-25 Devon Submission, 05-066c-2006-08-25 Devon Submission, and 05-066d-2006-08-25 Devon Submission.

[91] Exhibits 05-066b-2006-08-25 Devon Submission, and 05-066c-2006-08-25 Devon Submission appends Grant and Lease of Petroleum, Lease S68, granted by Security Freehold Petroleums Limited, as lessor, and amendments thereto.

[92] Exhibit 05-066d-2006-08-25 Devon Submission appends Gas Lease and Grant dated January 3, 1963, granted by Elias Robankse, as lessor (the Robanske Lease).

APPENDIX 5 FAIRBORNE LEASES

In the Board's view, all of the Freehold leases filed by Fairborne can be grouped into the category of other lease forms (namely, leases granted by parties other than EnCana or its predecessors), which can be further grouped into the following subcategories:

- C.A.P.L. lease forms, and
- non-C.A.P.L. lease forms.

1 C.A.P.L. Lease Forms

Fairborne filed the C.A.P.L. 91 (Alta.) form of Petroleum and Natural Gas lease.[93] The C.A.P.L. 91 (Alta.) form of Petroleum and Natural Gas lease grants to the lessee

> all the leased substances (as hereinafter defined) subject to the royalties hereinafter reserved, within, upon or under the said lands, together with all of the present or future right, title, estate and interest, if any, of the Lessor in and to the leased substances or any of them within, upon or under any lands excepted from the said lands and any roadways, lanes or rights of way adjoining the said lands; together with the exclusive right and privilege to explore for, drill for, operate for, produce, win, take, remove, store, treat and dispose of the leased substances and the right to inject substances into the said lands for the purpose of obtaining, maintaining or increasing production from the said lands, the pooled lands or the unitized lands and to store and recover any such substances injected into the said lands.

The "leased substances" under this lease form is defined as follows:

> (e) "leased substances" means all petroleum, natural gas and related hydrocarbons (except coal), and all materials and substances (except valuable stone), whether liquid, solid or gaseous and whether hydrocarbons or not, produced in association with petroleum, natural gas or related hydrocarbons or found in any water contained in any reservoir.

2 Non-C.A.P.L. Lease Forms—Identified Lease Form

Fairborne filed one identified lease form.[94] The Modified Form 57A grants to the lessee

> all the petroleum, natural gas and related hydrocarbons (except coal and valuable stone) all other gases, and all minerals and substances (whether liquid or solid and whether hydrocarbons or not) produced in association with any of the foregoing or found in any water contained in any oil or gas reservoir (all of which are hereinafter referred to as "the leased substances"), within, upon or under the lands hereinbefore described and all the right, title, estate and interest, if any, of the Lessor in and to the leased substances or any of them within, upon or under any lands excepted from, or roadways, lanes or rights-of-way adjoining the lands aforesaid, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of the leased substances.

[93] Exhibit 06-023c-2006-08-25 Fairborne Submission.
[94] Exhibits 06-023a-2006-08-25 and 06-023b2006-08-25 Fairborn Submissions appends four Lease and Grant granted by the Director, the Veterans' Land Act, as lessor, and amendments thereto (Modified Form 57A).

APPENDIX 6 OTHER THIRD-PARTY LEASES—CONOCOPHILLIPS

In its written August 25, 2006, submission,[95] ConocoPhillips reviewed and compared in Townships 32 through 40, Ranges 20 through 26 W4M:

- EnCana Lease Forms: That is, EnCana Lease Forms granting natural gas filed by Devon against similar EnCana Lease Forms granted by EnCana to ConocoPhillips.
- Other Lease Forms: That is, Other Lease Forms granting natural gas filed by Fairborne against similar forms granted by parties other than EnCana or its predecessors to ConocoPhillips.

1 Comparison of EnCana Lease Forms (re: Devon Applications)

ConocoPhillips indicated, at paragraph 18, that its specific comparison of the precise language used in the granting clause and the leased substances definitions of the 17 different EnCana lease forms used prior to the introduction of a revised EnCana Lease Form in 1993, yielded the results in the table below:

Comparison of Lease Granting Clause and Leased Substances Definition to Devon Leases Granted by EnCana or Its Predecessors

Granting clause form	Lease count	Circa	Acreage	Section count
Identical[96]	62	March 23, 1954 – February 26, 1965	11 681	18.25
Equivalent[97]	106	June 26, 1951 – July 1, 1993	19 505	30.5
Non-equivalent (lease distinguishes CBM from remaining natural gas rights)[98]	25	November 8, 1993 – October 7, 2003	11 121	17.3
Files unavailable at examination	8	-	1 625	2.5
Total	201	June 26, 1951 – October 7, 2003	43 932	68.6

ConocoPhillips also stated, at paragraph 18, that "non-equivalent" leases are those EnCana gas leases that contain specific language in the granting clause or lease substance definition and distinguish CBM as a leased or excluded lease substance.

[95] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraphs 8 to 20.
[96] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraph 18, footnote 9, which cites: "PanCanadian Forms N.R. 578-4M-3-54-A.W., N.R. 578-I-2M-3-57-A.W. and N.R. 578-2-IM-9-61-A.W."
[97] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraph 18, footnote 10, which cites: "PanCanadian Forms 551 - Rev.2, 551,551A and 551B REV. 2, 551a, 551a-Rev. 2, 551a-Rev.2 (Amended), 58 LF - 2/65, 58 REV. 1 LF-2/65, 59 AF 2/65, N.R. 586-3M-6-58-A.W., O. & G. 107-LF-2/65-2M-11-67-A.W., OG 117-2M-6-71 AF 2/65 and Unspecified formats."
[98] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraph 18, footnote 11, which cites: "PanCanadian forms 551a-93, 551a-93 - Rev.1 (01), 551a-93 - Rev.1 (02), 551a-93 - Rev.1 (95, 551a-93 Rev.1 (95 Amended), 551a-93 Rev.1 (98) and ECA-2003 (a) Parkland Amended."

ConocoPhillips also noted that in 1993 EnCana significantly amended the granting clause and/or lease substance definition in its standard form leases used in the region to distinguish CBM from the broader definition of natural gas with wording identical or similar to the following:

> "leased substances" – means natural gas only and substances produced in association therewith, whether hydrocarbon or not, except coal and petroleum and except natural gas derived from or associated with coal deposits.[99]
>
> "leased substances" – means natural gas only, including all materials and substances whether liquid, solid, or gaseous and whether hydrocarbon or not produced in association therewith or found in any water in any reservoir, but excludes petroleum, natural gas produced in association with petroleum which gas was in a liquid state in virgin reservoir conditions ("solution gas"), coal, natural gas derived from or associated with coal deposits, and valuable stone.[100]

By 2003, ConocoPhillips submitted that EnCana had further amended the lease substance definition in its standard form leases to more specifically distinguish CBM from other natural gas, with wording identical or similar to the following:

> "Coal Bed Methane" means coalbed methane, coal gas, coalbed gas, coal seam gas and all other forms of natural gas found in, derived from or directly related with coal seams, coal beds or carbonaceous shales.[101]

2 Comparison of Other Lease Forms (re: Fairborne Applications)

ConocoPhillips submitted that the granting clauses, leased substances definition, and form under the ConocoPhillips Other Lease Forms are identical with the granting clauses and leased substances definition under nine of the leases held by Fairborne that are central to this proceeding.[102]

[99] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraph 16, footnote 6, which cites "PanCanadian Petroleum Lease form 551a – 93."

[100] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraph 16, footnote 7, which cites "PanCanadian Petroleum Lease forms 551a – 93 Rev.1 (95), 551a – 93 Rev.1 (98), 551a – 93 Rev.3 (02)."

[101] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraph 17, footnote 8, which cites "EnCana Lease form ECA-2003 (a) Parkland Amended Clause 2 Para 4 (deemed well)."

[102] Exhibit 12-002-2006-08-25 ConocoPhillips Submission at paragraphs 19 to 20, footnote 12, which states: "The ConocoPhillips Canada Non-EnCana CAPL 91 ALTA leases use the exact form and bear the approximate dates as leases in the application area held by Fairborne - see Fairborne."

APPENDIX 7 OTHER THIRD PARTY LEASES—CENTRICA

Centrica prepared a summary of its Freehold mineral leases that were filed in this proceeding.[103] Based on this summary, the Board believes that the 57 Freehold leases held by Centrica can all be grouped into the category of "other lease forms" (namely, leases granted by parties other than EnCana or its predecessors). This category can be further classified into the following subcategories:

- C.A.P.L. lease forms, and
- non-C.A.P.L. lease forms.

1 C.A.P.L. Lease Forms

Centrica summarized information (which included the granting clause and definition of leased substances) from the following forms of C.A.P.L leases:

- C.A.P.L. 88 (Alta.) form of Natural Gas Lease,
- C.A.P.L. 88 (Alta.) form of Petroleum and Natural Gas Lease,
- C.A.P.L. 91 (Alta.) form of Natural Gas Lease, and
- C.A.P.L. 91 (Alta.) form of Petroleum and Natural Gas Lease.

2 Non-C.A.P.L. Lease Forms

Centrica stated that it summarized information (which included the granting clause and definition of leased substances) from the following forms of Non-C.A.P.L. lease forms:

- Farwest Business Forms Ltd.,
- Form 551,
- Form 551A,
- Form L & G 8 Alberta,
- Fletcher,
- (Unknown),
- Form WLS P&NG (L.&G.2),
- Form L & G,
- Form 91AB 3-99045-2,
- Form 91AB 3-99045-1,
- Form 88ab 3-99045-6,
- Form 88ab 3-990045-5,
- Form 88ab 3-990045-4,
- Form 88ab 3-99045-7, and
- Form 88ab 3-99045-8.

[103] Exhibit 10-019-2006-09-15 Centrica Summary of Leases.

APPENDIX 8 OTHER THIRD PARTY LEASES—FHOA

In the Board's view, FHOA filed further evidence in respect of the C.A.P.L. lease forms in use.

C.A.P.L. Lease Forms

FHOA filed the C.A.P.L. 99 Alberta Form—Petroleum and Natural Gas Lease and Grant.[104]

[104] Exhibit 20-029 FOHA C.A.P.L. Form Lease

APPENDIX 9 OTHER THIRD-PARTY LEASES—QUICKSILVER

In the Board's view, Quicksilver filed further evidence in respect of the C.A.P.L. Lease Forms in use.

C.A.P.L. Lease Forms

Quicksilver stated that the majority of its Freehold leases with individual lessors follow the basic form of the 1991 C.A.P.L. Petroleum and Natural Gas Lease or Natural Gas Lease and contain on split-title lands language the same or virtually the same as the language contained in the Bearspaw Freehold leases, Devon Freehold leases, and Fairborne Freehold leases.[105] Examples of Quicksilver's typical leases are attached to its submissions as Appendix "1".[106]

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[105] Exhibit 14-006a-2006-08-25 Quicksilver Submission at page 4, paragraph 13.
[106] Exhibit 14-006b-2006-08-25 Quicksilver Submission Appendix 1.