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Clarification of CBM Ownership on Freehold Lands in Alberta

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Cases Considered:

Bill 26, *Mines and Minerals (Coalbed Methane) Amendment Act, 2010*, Legislative Assembly of Alberta, Third Session, 27th Legislature, 59 Elizabeth II

One of the obstacles to coalbed methane (CBM) development on freehold lands in Alberta has been uncertainty regarding ownership of CBM on split title freehold lands. CBM ownership disputes have arisen when one person holds the title to natural gas and a different person holds the coal rights for the same parcel of land. Ron Liepert, the Minister of Energy, introduced Bill 26 in the Alberta legislature on October 27, 2010. After the first and second readings of the Bill, the Committee of the Whole passed an amended version on November 23, which includes one additional section.

The Energy Resources Conservation Board (ERCB) in 1991 reported that both the Board and the Alberta Department of Energy considered CBM within Crown Lands to be a form of natural gas (see ERCB Information Letter 91-1). Since 2003, s.67(1) of the *Mines and Minerals Act*, R.S.A. 2000, c. M-17, has indicated that "A coal lease grants the right to the coal that is the property of the Crown…but…does not grant any rights to any natural gas, including coalbed methane." However, in the case of split title freehold lands, the CBM ownership issue has not been resolved and disputes between coal owners and natural gas owners have arisen including *EnCana Corp.* v. *Devon Can. Corp.*, Alberta Court of Queen's Bench Action No. 0601-14382, 0601-12266, 0601-12267, *Re Bearspaw Petroleum Ltd.* (2007), AEUB Decision No. 24, and *EnCana Corp.* v. *Devon*, 2008 ABQB 232, [2008] A.J. 403 (Q.B.). The proposed November 2010 amendment to the *Mines and Minerals Act* is directed toward reducing the current level of uncertainty surrounding CBM ownership and enhancing security of tenure for CBM developers.

Bill 26

Subsection 10.1(1) of the Bill declares coalbed methane "to be and at all times to have been natural gas." This subsection is consistent with s.67(1) of the *Mines and Minerals Act*. In regard to previous contracts, subsection (2) provides that s.10.1(1) does not affect existing contracts executed by natural gas owners or lessees of Crown natural gas rights that specifically provide coal owners or lessees with rights to CBM. The second subsection states that:

> (2) Subsection (1) does not affect a provision contained in any conveyance, agreement, agreement for sale, licence, permit or other contract made subsequent to the original disposition from the Crown of natural gas rights in any land by
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> (a) the owner of the title to the natural gas in the land, or

(b) any person holding natural gas rights through the owner of the title to the natural gas in the land

that specifically grants rights in respect of coalbed methane to the owner of the title to the coal in that land, or to any person holding coal rights through the owner of the title to the coal.

Claims Against the Crown and Other Parties

To reduce the potential for claims and actions arising from the change to the *Mines and Minerals Act*, subsection 10.1(3) of Bill 26 provides that a natural gas owner and "any person holding natural gas rights through that owner, has no right of action and shall not commence or maintain proceedings against the Crown, the owner of the title to the surface of the land or coal, or any person holding coal rights through the coal owner…for damages or compensation because of extraction, production or removal" of CBM that "occurred before" the *Mines and Minerals (Coalbed Methane) Amendment Act*, comes into force. This provision is very similar to s.6(3) of the B.C. *Coalbed Gas Act,* S.B.C. 2003, c. 18.

Corresponding to s.6(1) of the B.C. *Coalbed Gas Act*, s.10.1(5) of Bill 26 states that "No person has a right of action and no person shall commence or maintain proceedings" either (a) "to claim damages or compensation of any kind…from the Crown, or (b) "to obtain a declaration that the damages or compensation referred to in the preceding clause "are payable by the Crown."

Expropriation or Takings Claims

In *Gulf Canada Resources Limited* v. *Alberta*, 2001 ABQB 286, the Crown was subject to compensation claims from mineral developers for alleged natural gas rights expropriation, after the Alberta Energy and Utilities Board decided that Crown natural gas lessees could not produce gas from wells in light of the reported detrimental effect on oil sands production (See also *Giant Grosmont Petroleums Ltd.* v. *Gulf Canada Resources Ltd.*, 2001 ABCA 174). Since the adoption of the B.C. *Coalbed Gas Act*, the Alberta Government has had seven years to observe and consider the response of coal owners and natural gas owners in British Columbia to provisions similar to those proposed in Bill 26. To discourage takings claims by coal owners and other persons holding coal rights through the owner of the title to coal, s.10.1(4) of Bill 26 states that "it is deemed for all purposes, including for the purposes of the *Expropriation Act*, that no expropriation occurs as a result of the enactment of this section." This provision is similar to s.6(2) of the B.C. *Coalbed Gas Act.* Overall the provisions in Bill 26 mirror the approach adopted by the B.C. Government in 2003.

By clarifying CBM ownership on freehold split title lands in Alberta, the Provincial Government will remove one obstacle to additional development of this energy resource.

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