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The Court confirms that coalbed methane forms part of the natural gas title and not the coal title

By Nigel Bankes

Cases Considered:

Encana Corporation v ARC Resources Ltd., 2011 ABQB 431

In 2010 the provincial legislature amended the *Mines and Minerals Act*, RSA 2000, c. M-17 (as am by SA 2010, c.20) (*MMA*) to declare that coalbed methane (CBM) is and always has been natural gas. In this case Justice Kent of the Court of Queen's Bench applied the new s.10.1 to grant summary judgement in competing actions brought by the coal owners and the natural gas lessees seeking declaratory relief as to the ownership of CBM in certain lands. The actions in question had all been commenced before the amendment was introduced and passed. The Court held that s.10.1 was a complete answer to the competing claims and concluded that the natural gas lessees were entitled to a declaration that the coalbed methane had been granted to them under the terms of their natural gas leases.

My colleague Allan Ingelson provided a post on the statutory amendment here. This judgment confirms that the legislature has definitively settled the CBM ownership issue except in those cases where the relevant title documents expressly deal with coalbed methane. The natural gas lessees themselves acknowledged that in some cases the wording of the leases was not sufficiently clear to meet the test for summary judgement and thus these cases will need to proceed to trial to establish the necessary factual foundation for interpreting the documents (at para 1).

In reaching this conclusion Justice Kent held that the plain wording of the legislation, supported by statements made by the responsible Minister on first and second reading of the Bill in the legislature, led to the conclusion that the owner of the natural gas owns the CBM. The Court held that section 10.1 of the *MMA* applies to privately owned mineral rights as well as Crown owned minerals (at paras 38 – 51). It was not necessary for the legislature to add a provision to the effect that CBM is *not* included in the coal title (at paras 52 – 60). Subsection 10.1(2) (which provides that the declaratory provision "does not affect" a pre-existing instrument explicitly addresses CBM) was not triggered by a reservation of coal. This subsection only applies where an instrument contained a specific reference to CBM and that was not the case here.

Summary judgement was appropriate in this case since it was not necessary to decide what CBM is, from either a scientific or an etymological perspective (at paras 61 – 63). The legislature had determined the matter by declaring CBM to be natural gas and thus any scientific or etymological definition would be simply irrelevant. The court was required to apply principles of statutory interpretation to assess the effect of the amendment but it was not a complex interpretative issue which required a factual foundation (at paras 66 – 67). Neither did the public

policy consideration of lessening the value of a resource without compensation preclude granting summary judgement.

In my view this was an appropriate case for summary judgement. The matter involved a pure point of law and this was the only possible interpretation of the legislation and the application of that legislation to the coal and natural gas titles in these cases. Whether the Court of Appeal will agree with that assessment remains to be seen. Consider, for example, *Canadian Natural Resources Ltd. v Encana Oil & Gas Partnership*, 2008 ABCA 267 where the majority of the Court of Appeal sent a matter back for trial in a case involving a CAPL right of first refusal. The majority held that the agreement was ambiguous and that the proper interpretation was of some significance to the industry. The majority concluded (at para 29) that "a proper interpretation may benefit from extrinsic evidence, including evidence of industry practice" notwithstanding the fact that both parties appeared content to proceed on the basis of the proffered record. The cases are distinguishable since the effect of the legislation is, as Justice Kent indicates, to rule out certain possible interpretations but the *CNRL* case does suggest that the Court of Appeal may be reluctant to rule on the record in a matter of general importance to the oil and gas industry where there is any possibility that the factual background may affect the outcome. See also my posts (Back to square one, here) on the successive judgements in *Desoto Resources Limited v Encana Corporation*, 2011 ABCA 100 where arguments as to the availability of estoppel made it unwise to grant summary judgement.

There is a passing reference in Justice Kent's judgement to the analogous declaratory legislation that was enacted at about the same time (SA 2010, c 14) to deal with the ownership of pore space (for carbon capture and storage purposes). Counsel for Encana had apparently relied on that legislation to support its argument that s.10.1 was not intended to apply to privately owned coal rights, after all, so went the argument, s.15.1 referred to "all land in Alberta" and "any land in Alberta" while such words were missing from s.10.1. Justice Kent rejected that argument. While she acknowledged that other sections in the *MMA* made it clearer to which lands they applied (at para 49), s.2 of the *MMA* provides that the Act applies to all wells, mines, quarries and mineral in Alberta "where the context so permits or requires" and it was not necessary (at para 46) that the legislation state explicitly that it applies to Crown and non-Crown minerals.