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Summary Judgement Ordered In Outstanding Coal Bed Methane Cases

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Cases commented on:

Encana Corporation v ARC Resources Ltd, 2013 ABQB 352.

Previous decisions of the Court of Queen's Bench and the Court of Appeal (*Encana Corporation v ARC Resources Ltd*, 2011 ABQB 431, aff'd 2012 ABCA 271) gave summary judgement on many of the coalbed methane (CBM) cases that had been filed in the Alberta courts. Summary judgement was granted in these cases on the basis of an amendment to the *Mines and Minerals Act*, RSA 2000, c M-17 (now s10.1) adopted in 2010 which declared CBM "to be and at all times to have been natural gas". See post here.

In this second group of cases the natural gas lessees moved for summary judgement on what seems to be the balance of these cases. The distinguishing feature of this second group of cases is that in each case the coal title was held by Encana (or Carbon) and title to other minerals including natural gas is held by successors to the original transferees who have granted natural gas leases to the applicants in these cases (at para 8).

Justice Poelman concluded that the reasoning adopted in the first group of cases was equally applicable here. It did not matter that natural gas was not expressly referred to in the transfer documents pursuant to which the applicants' lessors took title to substances other than coal (at para 34): "If title to natural gas was conveyed (which it indisputably was), then the fact that it was not specifically listed in the transfer of land is irrelevant. Title to natural gas passed and, as declared by section 10.1(1), so did title to coalbed methane."

Encana did raise one additional argument in this round based upon the claim that a ruling as to ownership might not dispose of all of Encana's tort based claims (at paras 45 - 49). In effect Encana was arguing that ownership of CBM does not necessarily afford the natural gas lessees the right to work the CBM where the result of doing so might cause harm to the coal owner which might be restrainable in trespass or might give rise to a claim of unjust enrichment. I think that Justice Poelman offers two distinctive reasons for rejecting this additional argument.

The first reason is that the existing case law (*Alberta Energy Company Ltd. v Goodwell Petroleum Corporation Ltd*, 2003 ABCA 277, *Borys v Canadian Pacific Railway,* [1953] AC 217*,* and *Anderson v Amoco Canada Oil and Gas*, 1998 ABQB 620, varied 2002 ABCA 162, 312 AR 116, aff'd 2004 SCC 49) establishes that (at para 48) the "holders of mineral rights are entitled to extract those rights, even if there is interference with and wastage of another's mineral rights" (absent evidence that the natural gas lessees were adopting unreasonable production practices – not the case here (at para 49)).

The second reason is that the legislature has implemented a regulatory scheme to address the disputes that arise by virtue of concurrent ownership through the various provisions of the *Oil and Gas Conservation Act*, RSA 2000, c O-6, the *Energy Resources Conservation Act*, RSA 2000, c E-10 and the *Coal Conservation Act*, RSA 2000, c C-17. Perhaps missing from the reasoning here is the need to establish that the jurisdiction of the Energy Resources Conservation Board or the new Alberta Energy Regulator (AER) in relation to these matters is an exclusive jurisdiction. The appropriate reference here is perhaps section 94 of the *Oil and Gas Conservation Act* which provides that: "Except where otherwise provided, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act." It might also be necessary to establish that the legislature has conferred on the ERCB\AER the authority to establish this particular category of priority dispute: *Giant Grosmont Petroleums Ltd v Gulf Canada Resources Ltd*, 2001 ABCA 174.