

## **Background Information about Split-Title Mineral Ownership**

### **What does a freehold mineral rights owner “own”?**

A mineral owner must first study his mineral title and sales contract to fully understand what minerals he indeed owns. While “minerals” include naturally occurring mineral substances, such as copper, iron, sulphur, petroleum, oil, oil sands, natural gas, coal, granite, limestone and others, the focus here is on coal or natural gas. The mineral owner must not only examine his title but determine the intent of the original buyer and seller in the case of sales agreements. If the wording of the original grant or title is ambiguous, the courts may have to interpret the facts of the cases using the laws in place at the time of the grant or transfer.

Where all the rights (coal and petroleum and natural gas) are owned by the Alberta Crown, amendments to the *Mines and Minerals Act* in 2003 clarified that coalbed methane (CBM) belongs to the petroleum and natural gas lessee. These amendments came into effect on March 17, 2004.

### **What Can we Learn from History?**

*Halsbury's Laws of England*, named after Lord Halsbury, the Lord Chancellor of England from 1895-1905, is a treatise on the laws of England. It includes every proposition of English law (whether statutory or common law). It states that “the ownership of land may be divided horizontally, vertically or otherwise either above or below the ground. Thus separate ownership may exist in strata of minerals, in the space occupied by a tunnel, or in different storeys of a building.”

This describes the notion of split title, whether in a building, in land or in mineral rights. It also explains how surface rights and mineral rights can be and are often in separate titles.

### **Lands Granted to Hudson's Bay Company**

In 1670, King Charles II granted lands (surface and minerals) in the Hudson's Bay watershed to the Hudson's Bay Company in return for the work of exploration and development of England's commercial empire. The grant contained about 1,480,000 square miles (950 million acres) of land which was known as Rupert's Land. By a complex of legislation between 1868 and 1870, the Hudson's Bay Company surrendered its grant of Rupert's Land and on June 30, 1870, that region was admitted to the Dominion of Canada.

Canada returned some land to the Hudson's Bay Company to hold for trading posts and settlement within the “Fertile Belt”. This equated to one and three quarter sections within each township in Alberta or about 2.5 million acres.

The remainder of what was formerly Rupert's Land having been admitted to the Dominion of Canada was subject to and governed by the *Dominion Lands Act*.

### **Split Mineral Title Ownership in lands subject to the Dominion Lands Act**

In 1880, the Government of Canada amended the *Dominion Lands Act* to separate surface title and disposition from the mineral title and disposition. Pursuant to that amendment, and for the purpose of raising resource revenue, the Government of Canada sold coal lands (surface and coal mining rights) separately from ordinary homestead sales from December of 1882 to March of 1907. Likewise from August of 1898 to March of 1910, the Government of Canada sold petroleum lands (surface and subsurface petroleum rights) and petroleum and natural gas lands (surface and subsurface petroleum and natural gas rights) separately from ordinary homestead parcels. The number of patents issued in this fashion for coal rights, petroleum rights or petroleum and natural gas rights is uncertain, as is the number of split mineral titles issued by way of transfer out of those patents. What is certain is that any litigation which has arisen to date respecting ownership of hydrocarbons in split mineral title situations has involved split mineral titles in what are formerly Canadian Pacific Railway lands and not Dominion lands.

### **Land Subsidies to Railroads**

On various dates after 1869, Canada granted railway companies land subsidies to aid in the construction of each particular railway. Upon its organization the Canadian Pacific Railway Company (the “CPR”) was the recipient from Canada by way of subsidy of approximately 22 million acres of land, including the mines and minerals contained in such properties. Other smaller colonization railways received similar but smaller grants of lands and minerals. Most of those smaller railways were subsequently subsumed by the CPR and the Canadian National Railway (“CNR”) upon later consolidations.

### **Split Mineral Title Ownership in CPR lands**

Settlers and farmers were seen as key to the economic success of the railroad. Accordingly, the CPR sought to sell off some of its extensive land holdings in Western Canada to settlers and farmers. Initially those settlers received title to all mines and minerals in the parcels acquired by them. Around 1902, having recognized the value of the mineral resources in the parcels which it owned, the CPR commenced reserving from its dispositions to settlers various mineral interests such as “petroleum” or “coal, petroleum and valuable stone”. After about 1912 the CPR began to reserve all mines and minerals from dispositions to settlers. These mineral interests reserved by the CPR are now primarily in the name of Encana Corporation, the ultimate successor in interest to CPR. But the significant point for our purposes is that for a period of approximately 10 years, the CPR created split titles to freehold minerals in Western Canada, and that those split freehold mineral titles are recognized under the Torrens land registration system in Alberta.

### **Litigation Respecting Split Mineral Title Ownership in CPR Lands**

Because split freehold mineral titles are recognized under the Torrens land registration system in Alberta, conflicts as to the limits or extent of ownership under those titles have inevitably arisen. As noted above, these conflicts have so far involved only owners of split mineral titles that have their origin in CPR lands. For example, in the case of Borys v. Canadian Pacific Railway and Imperial Oil Limited (1953), 7 W.W.R. (N.S.) 546, the Judicial Committee of the Privy Council was called upon to resolve what, if any, natural gas was included in the CPR’s reservation of petroleum from a transfer of the balance of its mineral rights in a parcel. The Privy Council concluded that the CPR’s reservation of petroleum included gas in solution, or contained, in the petroleum as it originally exists in the ground. In Anderson v. Amoco Canada Oil and Gas,

[1999] 3 W.W.R. 255, the issue was whether phase changes whereby gas in solution in petroleum became evolved gas as it entered the bottom of the well bore meant that Carl Anderson, the successor in title to settlers who had received all mineral rights other than the petroleum rights reserved to the CPR, was the rightful owner of the evolved gas. The Court of Queen's Bench of Alberta essentially following the Borys case found that the determination of entitlement to liquid and gaseous hydrocarbons was to be made at initial reservoir conditions, prior to human intervention. In general, this meant that gas in solution in petroleum belonged to the petroleum owner, free gas or primary gas cap gas belonged to the non-petroleum (gas) owner and gas that emerged from solution in the reservoir (i.e. evolved gas) whether at the bottom of the well bore, at the surface or anywhere in between, belonged to the petroleum owner.

### **Ownership of Coalbed Methane in circumstances of Split Mineral Title Ownership**

The issue of who owns the methane or natural gas in a coal seam ("CBM") in a parcel where there is split natural gas/coal ownership has never been litigated either with respect to coal lands that were sold out of Dominion lands or with respect to coal that was reserved by the CPR from its dispositions to settlers.

Therefore in situations where the Crown owns the coal rights in a formation and the natural gas rights in the formation are freehold owned, or vice versa, or where the natural gas rights and coal rights in a formation are split between two freehold owners, the question of whether the methane or natural gas in a coal seam in the formation is part of the coal and therefore owned by the owner of the coal rights in the formation or part of the natural gas in the same formation is at present wholly unresolved.

### **Moving Forward**

It has been argued by various stakeholders that uncertainty respecting the ownership of CBM in lands containing split titles for gas and coal could deter CBM development both in those lands and in other freehold or Crown lands within the section containing those split title lands.

The Alberta Crown takes the position that the problem of uncertainty respecting the ownership of CBM in lands containing split titles could be eliminated through agreements between owners and lessees of split coal and natural gas rights authorizing either the freehold coal lessee or the freehold natural gas lessee to conduct operations to extract the coalbed methane and prescribing the terms and conditions for the conduct of those operations. In any case where such an agreement cannot be negotiated, the conflicting owners of coal and natural gas rights always have the option of seeking a court ruling on which of the split freehold titles includes methane.