

## **I. INTRODUCTION**

1. These are the Reply Submissions of Quicksilver Resources Canada Inc. in the matter of Part II of Proceeding No. 1457147, Coalbed Methane Review Hearing. Abbreviations and acronyms used in QRCI's Written Submissions of August 25, 2006 will be followed in these Reply Submissions.
2. In these Reply Submissions, QRCI will first briefly address the Joint Submission of EnCana and CDP. We will then provide Reply Submissions to each of EnCana's and CDP's individual Submissions.

## **II. REPLY TO JOINT SUBMISSION OF ENCANA AND CDP**

3. QRCI has participated in the preparation of and adopts the Joint Reply filed concurrently by the Natural Gas Rights Holders. In the Joint Reply, the Natural Gas Rights Holders tender as evidence a report prepared by Dean David R. Percy, Q.C., Faculty of Law, University of Alberta, which discusses the legal history of the differentiation of ownership rights to subsurface minerals and responds to the report prepared for CDP by Professor Alastair Lucas of the University of Calgary. In addition, the Natural Gas Rights Holders tender as evidence in the Joint Reply a response from our technical expert, Mr. Mavor, to the report prepared by Jeffrey Levine for EnCana and CDP. As stated above, QRCI relies on and adopts the Percy Report and the response from Mr. Mavor.

### III. REPLY TO SUBMISSION OF ENCANA CORPORATION

4. In these Reply Submissions, QRCI will respond to EnCana's submissions on two issues, (1) the EUB's jurisdiction in this Proceeding; and (2) EnCana's assertion that compulsory pooling orders would facilitate CBM development.

#### A. EUB JURISDICTION

5. In para. 5 of its Submission, EnCana unequivocally states that "the Board cannot grant the approvals sought as it has no jurisdiction to decide ownership". EnCana elaborates this point in Part III, Section C.2 of its Submission, beginning at the bottom of p. 12.
6. QRCI would point out, first, that the position taken by EnCana in its Submission appears not to be consistent with positions it has previously espoused in this Proceeding. Specifically, during the oral hearing on January 31, 2006 held by the Board to determine whether it would grant the review requests of EnCana and CDP, counsel for EnCana was asked by counsel for the Board whether EnCana accepted that the Board had jurisdiction to determine legal entitlement to produce CBM. The following exchange occurred (Transcripts, p. 46, line 3 to p. 48, line 4):

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- 3     **MR. LARDER:**        Yes, Mr. Chairman, just a few  
4     questions, if I may. Mr. Popowich, is it your client's  
5     position that this Board has the authority or the  
6     jurisdiction to determine who owns the coalbed methane?  
7     **MR. POPOWICH:**        Yes, and that is said with  
8     reference to Section 16 of the Oil and Gas Conservation Act  
9     and reference also, if I may, to the Goodwell decision and,  
10    from memory, paragraphs 26, 30, and I will give you one other  
11    paragraph where the Court of Appeal, Mr. Larder, recognized  
12    that it was incumbent upon the Board and they had to  
13    determine the relative ownership of the parties.  
14    **MR. LARDER:**        I would like to get your  
15    response, may be somewhat unfair if you need time to  
16    think about it, that's fine ...

17                   Sorry, I didn't turn the mike on. I had a  
18 question relating to a statement in the Anderson/Amoco trial  
19 decision, and it is found in paragraph 142 to about 147. The  
20 key section is this, and the trial judge is talking about a  
21 former chairman, who was offered as an expert witness by one  
22 of the parties, Mr. Desorcy, and she said in the course of  
23 that, specifically at paragraph 146,  
24                   "I accept that for regulatory purposes  
25                   solution gas belongs to the petroleum

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1                   owner. This is consistent with the  
2 views of numerous defendants of these  
3 actions, some of which are nonpetroleum  
4 owners."  
5                   Then she goes on to say,  
6                   "The regulators' view does not  
7 determine legal ownership of solution  
8 gas. If the regulators have  
9 misconstrued the law, their practices  
10 will have to change, however cumbersome  
11 that process might be."  
12 I thought that she might be recognizing that for regulatory  
13 purposes the Board's determination of ownership may well be  
14 different than a court's determination of ownership, and so  
15 that's why I ask the first question, did you think we had the  
16 authority to determine ownership. Do you see anything  
17 inconsistent in that short extract, given your position?  
18 **MR. POPOWICH:**           If I may, the answer is no,  
19 Mr. Larder. It may be that the two diverge, the court's  
20 determination and the Board's, but the fundamental premise or  
21 the requirement from the Board is Section 16. Section 16  
22 says determine entitlement. You can't determine entitlement  
23 unless you determine ownership. It may not bind everybody.  
24 It may not have great precedential effect to nonparties, but  
25 it is necessary, and it is required. I will go one step

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1                   further and say when the Board make these considerations, as  
2 we say that it must to get over the hurdle of entitlement,  
3 there will develop a precedential body, and it may be and I  
4 would expect that will guide the industry players.  
[emphasis added]

7. It would appear to QRCI that EnCana's position on the Board's jurisdiction has changed – dramatically – without any explanation provided by EnCana as to why its position has changed. If EnCana believes so strongly that the Board has no jurisdiction to determine the issue of entitlement to or ownership of CBM, it is difficult to understand why EnCana petitioned the Board for this review hearing.
8. Second, turning to EnCana's argument on this issue beginning at the bottom of p. 12 of its Submission, QRCI notes the following. In para. 68, EnCana submits in relation to s.16 of the OGCA that "the Board is not empowered by the section to conduct an inquiry into deciding competing claims". Similarly, in subpara. 69(b), EnCana submits that while s.16(2) of the OGCA permits the Board to cancel a licence if an owner is unable to prove to the Board that it is entitled to produce, the section "allows for no adjudication".
9. QRCI submits that EnCana's position cannot be correct. QRCI submits that the Board does have jurisdiction under s.16 of the OGCA to carry out an of assessment of whether an applicant has demonstrated that it is entitled to the right to produce. This is clearly contemplated in s.16(2), inasmuch as that subsection provides that an applicant may have to "prove entitlement ... to the satisfaction of the Board". Failure to do so may result in cancellation or suspension of a licence if it has already been granted. QRCI submits that the question is not whether the Board has power to conduct some kind of inquiry or assessment; clearly it has that power. Rather, the question is what kind of assessment or inquiry is the Board authorized to conduct? Or, as we stated in our August 25, 2006 Written Submissions, the question is what must an applicant for a well licence show to demonstrate entitlement? That is, what is the standard of proof under s.16?
10. In our Written Submissions, QRCI submitted that in the face of an objection from a third party such as EnCana or CDP, an applicant for a well licence must establish on a *prima facie* basis that it is entitled to produce. QRCI has further submitted that in most, if not all cases (including this case), this standard will be met by the applicant providing to the Board a subsisting natural gas lease. In our view, this interpretation of s.16 is logical and practical. By contrast, if EnCana is correct that the Board has absolutely no jurisdiction

or authority to conduct any kind of inquiry or assessment in such a circumstance, it follows that upon the bare assertion of an objection by a third party that the applicant is not entitled to produce, the Board is rendered powerless. It cannot inquire into the matter so as to assess the objection and adjudicate between the objector and the applicant. Nor can it issue the well licences. In effect, it is paralyzed. With all due respect, this is ludicrous.

11. Further, in para. 71 of its Submission, EnCana states that since “the Board cannot determine entitlement”, it “must protect the interest of the claimants so as to afford each their share of production”. With respect, this does not make any sense either.
12. QRCI submits that this is clearly not a case where the issue is the sharing of production. Rather, if the Natural Gas Rights Holders are correct, they are entitled to produce CBM and there would be no sharing of production with EnCana. Conversely, if EnCana is correct, it would be entitled to produce the CBM with no sharing of that production with the Natural Gas Rights Holders. It is simply incorrect to assert that the issue here is one of allocation between different parties who have established entitlement to the same production.
13. This also demonstrates, it is submitted, that EnCana’s suggestion that the Board can deal with this issue by making compulsory pooling orders does not make sense. We will deal with that argument next.

## **B. COMPULSORY POOLING**

14. In Part IV, Section C.2 of its Submission, EnCana asserts that compulsory pooling orders would facilitate development. With respect, QRCI submits that pooling is neither applicable nor appropriate as a response to the dispute concerning entitlement to produce CBM.
15. Essentially, EnCana argues that the Board can employ Part 12 of the OGCA to grant compulsory pooling orders where there is a dispute as to entitlement to produce CBM.

The suggestion is that where an applicant (a Natural Gas Rights Holder) “has an undisputed right to conventional natural gas within a pool (vertical tract), production with disputed CBM may occur by pooling order, with the proceeds of the latter determined by metering” and then paid to the Provincial Treasurer [para. 83 of the EnCana Submission]. In other words, EnCana is proposing “vertical pooling” as a means by which CBM production can occur and the rights of the competing parties will be protected.

16. With respect, QRCI submits that in fact the Board would not have jurisdiction to issue compulsory pooling orders in this situation, nor would it be appropriate to do so. EnCana’s argument is based, it is submitted, on an incorrect interpretation of Part 12 of the OGCA.
17. EnCana’s argument is predicated on the notion that pooling can be both horizontal and vertical. As will be discussed below, while vertical pooling is at least conceptually possible, it is so only in limited circumstances which do not exist in this case.
18. EnCana first suggests that pooling may be horizontal or vertical in para. 81 of its Submission. The authority cited for this is ss.80(1), 86 and 78(b) of the OGCA. The key to EnCana’s argument is actually found in footnote 40, where it is stated that the word “tract” is defined “to include an area within a DSU (horizontal tract) or a pool (vertical tract) by s.78(b)”.
19. Section 78(b) of the OGCA states:

In this Part, “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. [emphasis added]

As is evident from footnote 40, EnCana equates the word “pool”, as it is used in s.78(b), with a “vertical tract”.

20. With respect, this does not assist EnCana because the tracts which would be the subject of the pooling order must be within the same pool. But what EnCana is proposing is the pooling of interests in different pools.
21. The word pool is defined in s.1(1)(oo) of the OGCA as meaning:
- ... a natural underground reservoir containing or appearing to contain an accumulation of oil or gas, or both, separated or appearing to be separated from any other such accumulation.  
[emphasis added]
22. In this case, the CBM contained in the coal owned by EnCana (or CDP) can be thought of to exist in one pool, while the deeper gas owned by the Natural Gas Rights Holders is found in one or more separate pools. Therefore, EnCana is proposing something which the Board has no jurisdiction to do: namely, order the pooling of interests owned by separate parties (if EnCana is correct on the ownership issue) in separate pools.
23. In para. 84 of its Submission, EnCana asserts that in 1988 the ERCB “recognized” that compulsory pooling could apply on a vertical basis where mineral rights were divided between shallow and deep zones. In support, reference is made to Alberta Energy Information Letter 88-24.
24. As is noted by Nigel Bankes in his article “Compulsory Pooling Under the *Oil and Gas Conservation Act* of Alberta” (1997), 35 Alta. Law Rev. 945 at 963 [Tab 1], Information Letter 88-24 was issued to specifically deal with the severance of deep Crown mineral rights implemented by amendment of the *Mines and Minerals Act* in 1976. As further stated by Professor Bankes at p.964:

The pooling problem arises once it is determined, either by agreement between the parties, or as a result of a Board designation order, that wells drilled by the deep and shallow rights lessee have the capacity to produce from the same pool, within the same DSU. The Board will not allow both to produce [by virtue of s.15(3) of the OGCA] and there is therefore a need, as in the case of horizontal pooling, to allow each a share of production rather

than allocating the entirety of the production to one or the other of the lessees.

25. In other words, the concept of vertical pooling is limited to the unusual situation where the shallow and deep rights within a DSU have been severed in such a way that a single pool extends both above and below the shallow rights/deep rights separation line: see *Bankes* at pp. 962-963.
26. That is clearly not the case here. This is not a case of a single pool vertically straddling the demarcation line between shallow and deep mineral rights. Rather, the dispute is who is entitled to produce CBM: the Natural Gas Rights Holders or the coal owners? Regardless how the dispute is settled, whichever party is determined to be entitled to produce the CBM will not be obligated to share that production with the other. This is not an equity issue or an allocation issue. It is an ownership issue. Therefore, pooling is irrelevant and inapplicable.

### **C. CONCLUSION OF REPLY TO ENCANA**

27. QRCI has submitted above that pooling is not applicable in the circumstances of this case. If we are correct, EnCana's position becomes untenable. On the one hand, EnCana asserts that the Board has no jurisdiction or authority to determine entitlement or even inquire into the question. But that is that it is tantamount to saying that the Board is paralyzed in the face of an objection disputing entitlement. EnCana attempts to get around this by proposing compulsory pooling. However, as QRCI has submitted above, compulsory pooling is not applicable. Therefore, EnCana's position results in regulatory gridlock.
28. That is, we would be left in the following situation: a Natural Gas Rights Holder will submit a well licence application and, in support of that application, furnish to the Board a subsisting petroleum and natural gas lease. The coal owner files an objection, disputing the Natural Gas Rights Holder's entitlement to produce CBM. According to EnCana, the Board has no authority or ability to settle such a dispute. Instead, compulsory pooling is

proposed but, as has been demonstrated above, in fact pooling is not applicable in these circumstances. Therefore, EnCana's position results in the coal owner having a veto on CBM development in split title situations, merely by filing a letter of objection. The dispute would then have to be settled outside the EUB process in the Courts.

29. The end result is that the only way Natural Gas Rights Holders could proceed with CBM development is to "quiet title" before applying for a well licence, which means entering into agreements with the coal owners. While this would be undoubtedly beneficial to EnCana, as the coal owner, it is neither fair nor, from a regulatory perspective, reasonable. The Board must reject such an approach.

#### **IV. REPLY TO SUBMISSION OF CARBON DEVELOPMENT PARTNERSHIP**

30. In these Reply Submissions, QRCI will respond to two issues raised by CDP in its September 15, 2006 Submissions: (1) the nature of a Section 40 hearing; and (2) the issues of the meaning of “entitlement” and the standard of proof.

##### **A. NATURE OF A SECTION 40 HEARING**

31. In its submissions, CDP argues that because this is a hearing pursuant to s.40 of the ERCA, it is “effectively a hearing of first instance or a hearing *de novo*” [para. 8]. CDP goes on to assert, therefore, that “no inference can be drawn from the prior determination of the Board in each of the Fairborne applications and the Devon applications” [para. 9].

32. With respect, QRCI disagrees.

33. The record is clear that in the case of the Devon applications, both EnCana and Luscar (now CDP) objected to the Devon applications. The Board carefully considered those objections and dismissed them by letter dated May 26, 2005: see Exhibit 01-005-2005-05-26.

34. In its letter dismissing the EnCana and Luscar objections, the Board notes that Luscar had made objections and submissions “contained in its letters of January 3, 2005, January 25, 2005, February 18, 2005, April 12, 2005 and April 26, 2005”. Further, the Board notes that the essence of Luscar’s submissions was that the Board should deny Devon’s applications because Devon does not hold rights to produce CBM. Then, at page 3 of Exhibit 01-005-2005-05-26, the Board summarizes in seven bullets the submissions made by Luscar. This leads to only one conclusion. Luscar had an opportunity to make its case at the time it initially filed its objections. It did so. The Board considered all of Luscar’s submissions but rejected them. Accordingly, this is not a hearing *de novo*, as asserted by CDP. And contrary to what CDP asserts in para. 9 of its Submissions, an inference can and should be drawn from the prior determination of the Board in the

Devon applications. That inference is that the Board considered and rejected CDP's arguments. Therefore, in this review hearing CDP bears the onus of convincing the Board why it was wrong in dismissing its objections and granting the Devon licences.

35. With respect to the Fairborne applications, the record is clear that Luscar objected to those applications as well: see Exhibits 04-002-2005-05-26 through 04-006-2005-06-14. Notwithstanding those objections, the Board granted the Fairborne licences: see Exhibit 01-18a-2006-03-09. In doing so, the Board expressly noted that "Luscar's objection rests on the issue of CBM ownership". So, as with the Devon applications, the Board considered Luscar's objections and dismissed them. Therefore, CDP bears the same onus in the Fairborne review as it does in the Devon review: CDP must convince the Board that it was wrong to have dismissed its objections in the first place.
36. QRCI acknowledges that in its March 9, 2006 letter granting the review and variance applications [Exhibit 01-18-2006-03-09], the Board stated that EnCana and Luscar had "met the test for review by Section 40(1) of the ERCA". That may be, but in the circumstance where the party granted the review hearing had notice of the applications, objected to them and the Board considered but dismissed those objections, the resulting review hearing cannot in fairness be considered to be a hearing *de novo*. A s.40 review hearing would only be a hearing *de novo* where the review applicant was given no opportunity to object and make submissions with respect to the original application before that application was approved by the Board. In this case, both CDP and EnCana had that opportunity and availed themselves of it fully.

## **B. THE MEANING OF ENTITLEMENT AND THE STANDARD OF PROOF**

37. In our August 25, 2006 Written Submissions, QRCI submits that the issue in this Proceeding is the standard of proof required under s.16 of the OGCA. CDP appears to agree that this is an important issue. Not surprisingly, however, the standard of proof advocated by CDP is very different from that advocated by QRCI.

38. CDP's position on the standard of proof can be easily seen in the following paragraphs from their submissions:
- (a) In para. 16, CDP asserts that "in the absence of a definitive court ruling in favour of the natural gas owner", Devon could not obtain a holding order.
  - (b) In para. 25, CDP asserts that unless "the gas producers were first to obtain a judgment declaring that their entitlement to produce natural gas includes entitlement to CBM", the EUB could not be satisfied that the requirements of s.16 had been met.
  - (c) In para. 30, CDP advocates a "standard of certainty". CDP goes on to state that "if there is any chance of a court determining in the future that the gas producer's lessor is not the owner of CBM, the Board should not consider itself satisfied of the gas producer's entitlement".
  - (d) Finally, in para. 34 CDP asserts that "[i]n the absence of clear and undisputed ownership, there can be no entitlement", for the purposes of s.16 of the OGCA.
39. From all of this, QRCI understands CDP's position to be that the standard of proof of entitlement to produce under s.16 of the OGCA is 100% certainty. Surely this cannot be the case. This would mean the burden of proof under s.16 of the OGCA is higher than the burden of proof in a criminal case.
40. In fact, these various assertions by CDP of the standard of proof under s.16 are contradicted by the law cited by CDP in paras. 28 and 29 of their Submissions relating to the meaning of the word "satisfy". For example, in para. 29 CDP discusses the case *Pepper v. Alberta (Transportation Safety Board)* and specifically quotes the court as stating that on a theoretical spectrum, a standard of proof could range from a mere possibility, to reasonable and probable grounds, to balance of probabilities, to highly probable, to beyond a reasonable doubt. Nowhere on this theoretical spectrum do we find a standard of 100% certainty.

41. Moreover, as noted in both paras. 28 and 29 of CDP's Submissions, the case law demonstrates that the word "satisfy" is a fluid term which will vary with the issues involved, the circumstances, the context and the consequences of a given case. It has no fixed meaning.
42. QRCI submits that by far the most important fact that should influence or guide the Board in interpreting s.16, and specifically the standard of proof required under that section, is that the determination of entitlement to produce is being made in the context of a regulatory scheme. Under that scheme, one of the Board's primary purposes is to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta (see s.4(c) of the OGCA). The granting of licences to drill oil and gas wells is a key part of the Board's responsibility to provide for the economic, orderly and efficient development of the oil and gas resources. In s.16 of the OGCA, the Legislature has seen fit to require that any person applying for a well licence must be entitled to the right to produce the oil or gas from the intended well. To expect the EUB, in such a regulatory scheme, to apply a standard of proof of 100% certainty with respect to entitlement to produce is crazy. For the system to work, the Board must adopt a simple test for entitlement, which is both easy for applicants to understand and for the Board to apply. Requiring that a well licence applicant submit proof that it holds a subsisting lease for the lands and substances in question is just such a test. If a third party wants to dispute that the lease, which on its face confers the entitlement to produce does not in fact confer that entitlement, the proper forum for the third party to make that argument is the Courts.
43. Such a position is consistent with the proposition put by Board counsel to counsel for EnCana in the transcript excerpt quoted above in para. 6, and with which counsel for EnCana agreed: namely, that for regulatory purposes the determination of entitlement to produce (under s.16 of the OGCA) may be different than a determination of legal entitlement made by the courts.

**V. CONCLUSION**

44. Proceeding No. 1457147 arises out of review and variance requests filed by EnCana and CDP in respect of well licences and holding and spacing orders issued to Devon, Fairborne and Bearspaw. EnCana and CDP asked for and have been granted this Proceeding.
45. Yet now EnCana submits that the Board has no authority or ability to determine the very question before the Board in this Proceeding (entitlement to produce CBM) and CDP argues that the only way a Natural Gas Rights Holder can prove entitlement to produce CBM would be to first obtain a judgment from the Courts. QRCI hopes that it is not lost on the Board that these positions being advocated by EnCana and CDP are simply not reasonable. The Board should reject both EnCana's categorical position on jurisdiction and the impossibly high standard of proof advocated by CDP. Instead, the Board should do what it does best, which is to make a decision that is practical and reasonable and consistent with its role as the regulatory body governing the oil and gas industry in Alberta.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Calgary, in the Province of Alberta, this \_\_\_\_ day of September, 2007.

**McLENNAN ROSS LLP**

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Per: Gavin S. Fitch  
Solicitor for Quicksilver Resources  
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**ALBERTA ENERGY AND UTILITIES BOARD**

**IN THE MATTER OF THE *ENERGY RESOURCES CONSERVATION ACT*, R.S.A. 2000,  
C. E-10; AND THE *OIL AND GAS CONSERVATION ACT*, R.S.A. 2000, C. 0-6.**

**AND IN THE MATTER OF PART II OF PROCEEDING NO. 1457147,  
COALBED METHANE (CBM) REVIEW HEARING**

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**REPLY SUBMISSIONS OF  
QUICKSILVER RESOURCES CANADA INC.**

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