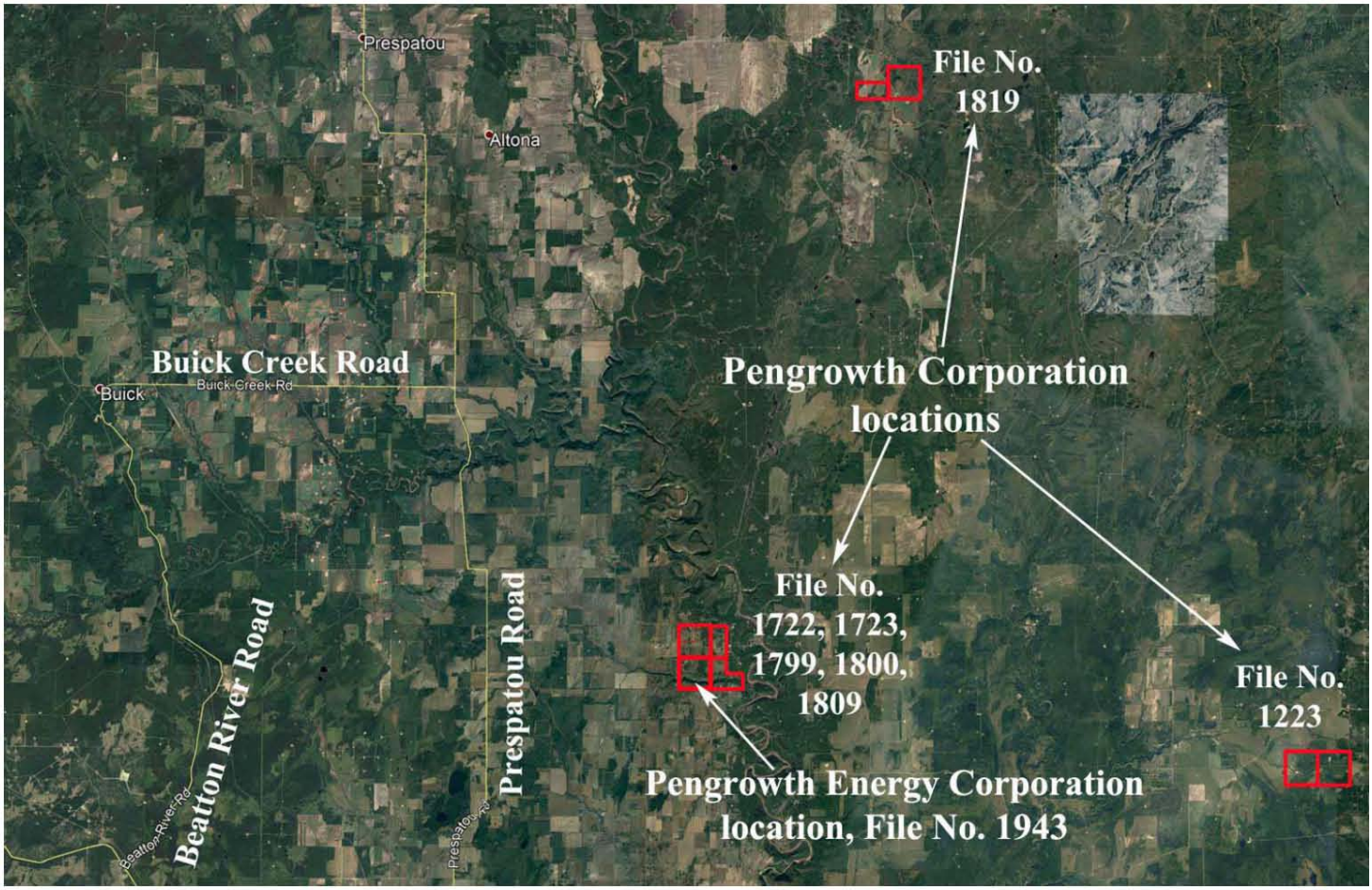
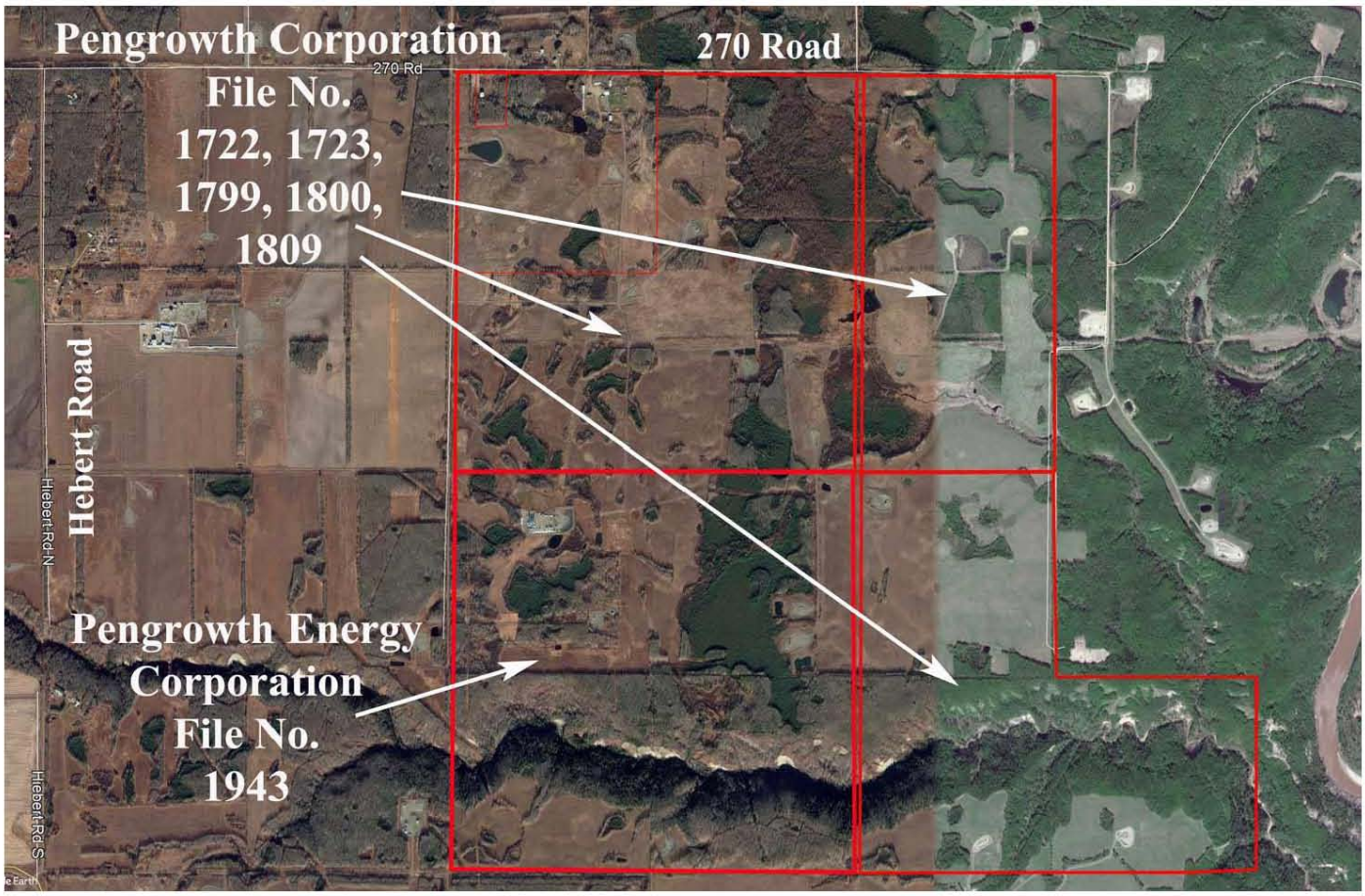

Prespatou
Altona
File No.
1819
Buick Creek Road
Buick
Buick Creek Rd
Pengrowth Corporation
locations
Beatton River Road
Prespatou Road
File No.
1722, 1723,
1799, 1800,
1809
File No.
1223
Pengrowth Energy Corporation
location, File No. 1943


Pengrowth Corporation
File No.
1722, 1723,
1799, 1800,
1809
270 Road
270 Rd
Hebert Road
Hiebert Rd N
Pengrowth Energy
Corporation
File No.
1943
Hiebert Rd S

File No. 1223
Board Order No. 204A-2

May 5, 2010

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
First: Section 35, except the most westerly and southerly 80 feet
Second: Section 36, except the most westerly 80 feet, both of
Township 87 Range 15, W6M, Peace River District

(The "Lands")

BETWEEN:

PENGROWTH CORPORATION

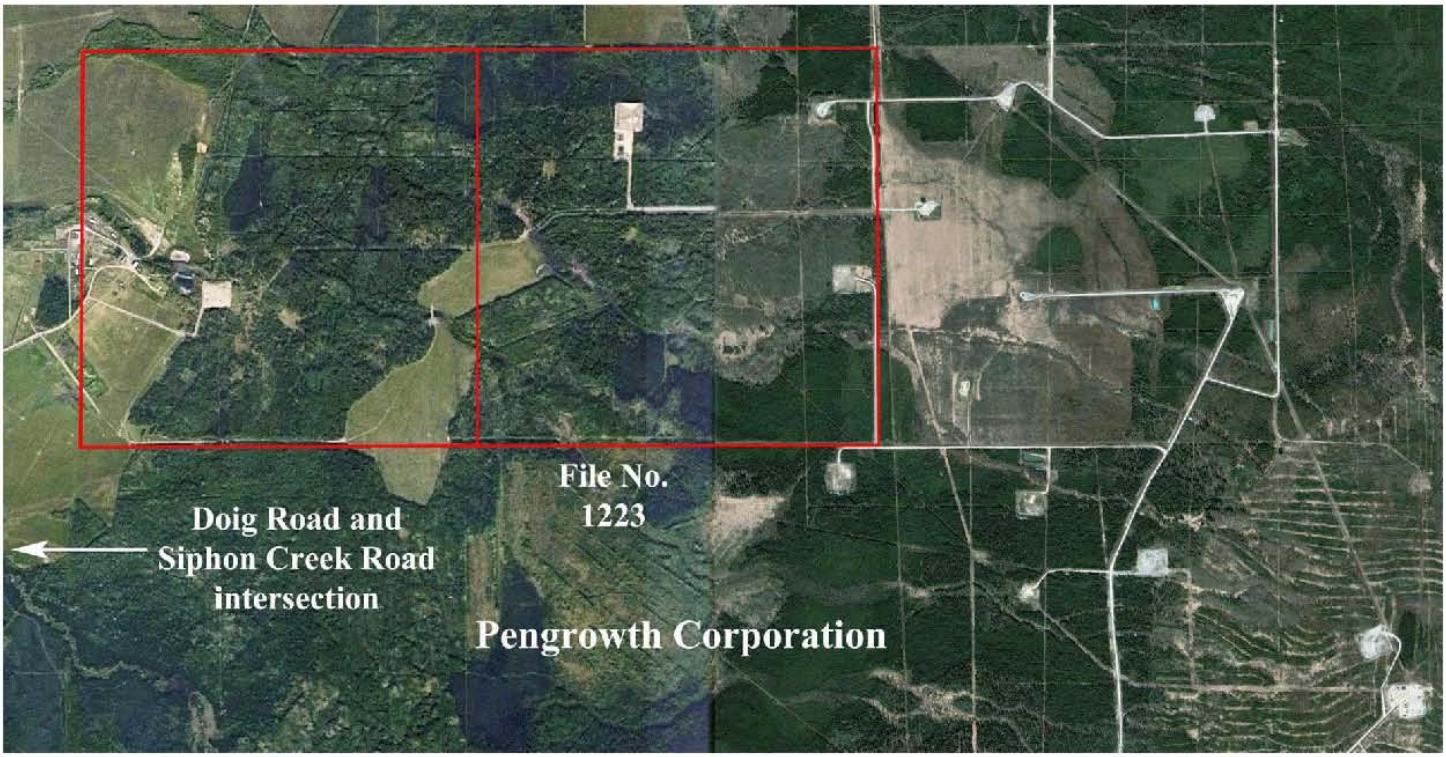
(APPLICANT)

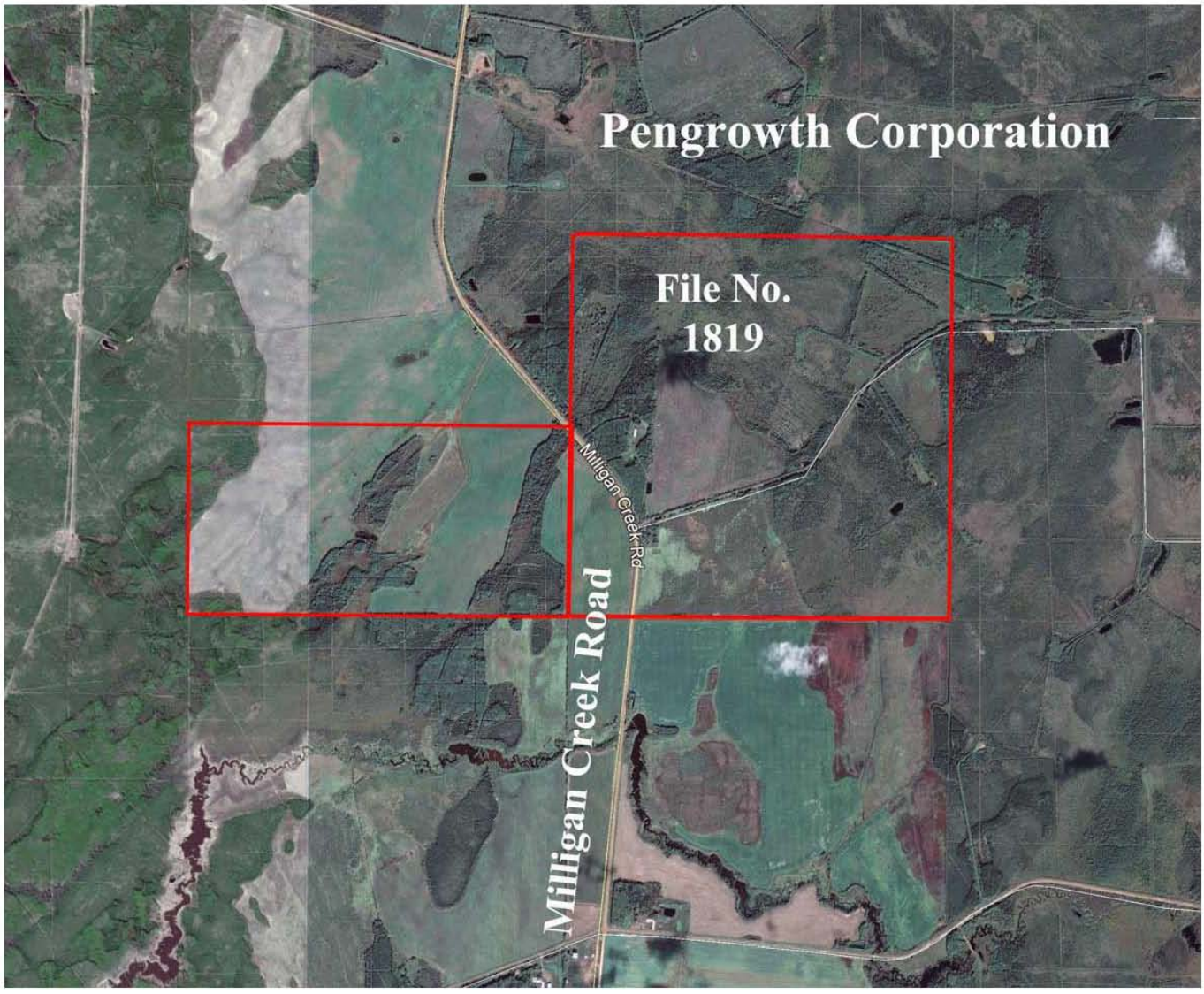
AND:

CLOVER FARMS LTD.

(RESPONDENT)

AMEND ORDER


File No.
1223
Doig Road and
Siphon Creek Road
intersection
Pengrowth Corporation


Pengrowth Corporation
File No.
1819
Milligan Creek Rd
Milligan Creek Road

This Order is issued pursuant to section 26(2)(b) of the *Petroleum and Natural Gas Act* at the request of the Applicant, and amends all previous Orders in these proceedings.

Equatorial Energy Inc. has gone through several corporate name changes and amalgamations as follows:

1. Name change from Equatorial Energy Inc. to Resolute Energy Inc. on November 14, 2002;

2. Certificate of Amalgamation from Resolute Energy Inc. to 6385206 Canada Inc. and 6385206 Canada Inc. to Esprit Exploration Ltd. on May 2, 2005;

3. Certificate of Amalgamation from Esprit Exploration Ltd. to Pengrowth Corporation on January 1, 2010.

The Board amends Orders 204A-1, 204A, 204M-1 and 204M by deleting the name Equatorial Energy Inc. and substituting Pengrowth Corporation.

Dated May 5, 2010

FOR THE BOARD

Cheryl Vickers
Chair

File Nos. 1722, 1723, 1799, 1800, 1809

Board Order No. 1722-1

February 5, 2015

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
THE SOUTH WEST ¼ OF SECTION 23 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDAIN PEACE RIVER DISTRICT
THE SOUTH WEST ¼ OF SECTION 22 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDAIN PEACE RIVER DISTRICT, EXCEPT THE WEST 14 FEET
PARCEL A (N32516) OF THE NORTH WEST ¼ OF SECTION 22 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
THE NORTH WEST ¼ OF SECTION 14 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
LOT 1 SECTION 22 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT PLAN 16657
(The "Lands")

BETWEEN:

Leonard William Peters and
Tamara Lynn Peters

(APPLICANTS)

AND:

Pengrowth Corporation

(RESPONDENT)

BOARD ORDER

Heard: January 13, 2015 in Fort St. John
Appearances: Leonard and Tamara Peters on their own behalf
Tom Owen, Barrister and Solicitor, on behalf of Pengrowth Corporation

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INTRODUCTION

[1] The Applicants, Leonard and Tamara Peters, are the owners of the Lands legally described as:

> THE SOUTH WEST ¼ OF SECTION 23 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDAIN PEACE RIVER DISTRICT
> THE SOUTH WEST ¼ OF SECTION 22 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDAIN PEACE RIVER DISTRICT, EXCEPT THE WEST 14 FEET
> PARCEL A (N32516) OF THE NORTH WEST ¼ OF SECTION 22 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
> THE NORTH WEST ¼ OF SECTION 14 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
> LOT 1 SECTION 22 TOWNSHIP 88 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT PLAN 16657 (the Lands)

[2] The Respondent, Pengrowth Corporation (Pengrowth), has several surface leases on the Lands for various oil and gas activities.

[3] The Peters have eight applications for review of rent payable under the surface leases pursuant to section 166 of the *Petroleum and Natural Gas Act* (SRB files 1722, 1723 and 1809 (a) through (f)), and applications for damages pursuant to section 163 of the *Petroleum and Natural Gas Act* and alleging non-compliance with the terms of a surface lease pursuant to section 164 of the *Petroleum and Natural Gas Act* with respect to surface leases on the SW ¼ of section 23 (SRB file 1799) and the SW ¼ of section 22 (SRB file 1800). These leases are also the subjects of rent review applications (SRB files 1722 and 1809(c) respectively).

[4] Following unsuccessful mediation, the Board joined the applications for arbitration. The Board scheduled the arbitration and dates for the production of evidence. Pengrowth failed to meet its deadline for the production of evidence. For reasons given in a letter dated December 23, 2014, the Board denied Pengrowth's application for an extension of time to produce evidence and for an adjournment of the arbitration.

[5] I will deal with the section 163 and 164 applications first, then will consider the various rent reviews.

THE SECTION 163 AND 164 APPLICATIONS

File 1799

[6] This application includes a claim under section 163 for damages, and seeks relief under section 164 for alleged non-compliance with a surface lease originally executed March 31, 2006 between the Peters and Pengrowth granting Pengrowth entry to and use of land for an access road on the SW ¼ of section 23. Essentially, what both applications seek is compensation for the use of an access road by an additional road user and an access road use agreement that includes reasonable compensation to the landowner. The Peters allege that the access road is also used by Bonavista, without their consent and without a secondary road use agreement in place, and that this additional use of the access road causes them additional loss and damage.

[7] The applications under sections 163 and 164 against Pengrowth for damages are not the appropriate route for seeking compensation for the use of the road by an unauthorized secondary user, where as here, there is no evidence that the secondary road use has been authorized by Pengrowth. Further, other than an allegation that increased use of the road equates to increased nuisance and disturbance, there is no evidence of specific loss or damage to the Peters caused by the use of the road by others.

[8] As Bonavista does not have the right to use the access road under the surface lease or otherwise by agreement with the Peters, their use is unauthorized. However, as Bonavista has apparently been using the access road for some time without objection from the Peters, they may be said to have a revocable license for its use. That license may be revoked with reasonable notice from the Peters and their advice that they wish to enter an agreement with Pengrowth and Bonavista respecting Bonavista's use of the road. If the Peters, Bonavista and Pengrowth are not able to come to a tri-party agreement respecting Bonavista's use of the road, the Peters or Bonavista may apply to the Board for a right of entry order. If the Board is satisfied Bonavista's use of the road is required for an oil and gas activity, it will grant Bonavista right of entry. In that event, the Board will mediate and, if necessary, arbitrate the compensation payable to the Peters arising from Bonavista's use of the road.

[9] The applications under section 163 and section 164 against Pengrowth with respect to the surface lease on the SW ¼ of section 23 are dismissed.

File 1800

[10] This application includes a claim under section 163 for damages, and seeks relief under section 164 for alleged non-compliance with a surface lease originally executed August 11, 1993 between Bowtex Energy (Canada) Corporation and 433517 B.C. Ltd (the landowner at the time) granting Bowtex entry to and use of land "for any and all purposes as may be necessary or useful in connection with its operations". The area covered by the surface lease contains an oil well, now operated by Pengrowth, and an access road.

[11] In the section 163 application, as with the application discussed above, the Peters allege there are multiple users of the access road and no road use agreement. As discussed above, the Peters may give notice to any unauthorized users of the road to cease using the road and seek to enter a road use agreement. If an agreement is not reached, either party may apply to the Board for a right of entry order and to resolve any issues respecting compensation. There is no evidence that the use of the road by others is with Pengrowth's knowledge or agreement, nor is there evidence as to the specific loss or damage caused by the use of the road by others. The section 163 application is dismissed.

[12] In the section 164 application, the Peters make a couple of different claims. First, they allege that the surface lease is being used to access another surface lease on land not owned by the Peters. The Peters allege that the well site area of the surface lease is used as an access road to connect to another surface lease for an access road and well site on the NE ¼ of section 22. They also allege the western boundary of the well site area is used as an access road to connect to another access road. They submit that use of the well site area as an access road is not in compliance with the surface lease and ask that the lease be amended.

[13] As indicated above, the surface lease on SW 22 provides that "The Lessor… leases to the Lessee, the 'leased lands' to be held by the lessee as tenant…for any and all purposes and uses as may be necessary or useful in connection with all its operations…." This is a very broadly worded grant that does not restrict the lessee to a particular use of the leased lands, and cannot be said to prohibit the use of the lease area as an access road if that use is "necessary and useful" in connection with the lessee's operations. I find that the lease does not require amendment to allow the use described by the Peters.

[14] Second, the Peters sought compensation for two triangular pieces of 121 square metres and 190 square metres on NW 22 and SW 22 extending from the north east corner of the surface lease on the SW ¼ of section 22 as part of the access road into the NE ¼ of section 22. The access road is the subject of a surface lease on NE 22, which is not a parcel owned by the Peters. The lease

on NE 22 which extends onto the NW ¼ of section 22 and the SW ¼ of section 22 creating the small triangular areas was originally negotiated when both NW 22 and SW 22 were owned by the same people that owned NE 22. The Peters purchased NW 22 in 2005 and SW 22 in 2008. At the time of these purchases, there was no discussion with the previous owner about this lease and the Peters were not aware that the lease extended into their parcels until the situation was brought to their attention sometime later. The lease is registered against the Title to SW 22 but is not registered against the Title to NW 22.

[15] Pengrowth objected that the Board did not have jurisdiction in the section 164 application with respect to any claim involving the triangular pieces because the Peters were not a party to the surface lease. Section 164(1) provides that "A party to a surface lease may apply to the board for mediation and arbitration in" certain circumstances. Pengrowth submits that as the Peters are not a party to the surface lease creating the triangular areas on their land, they have no standing to bring an application under section 164 with respect to that lease and the Board has no jurisdiction.

[16] I agree that the Board cannot deal with any claim by the Peters respecting the portions of the surface lease on their lands to which they were not a party. That does not mean they are without remedy, however.

[17] With respect to the 121 square metre area of access road on the NW ¼ of section 22, which is not registered on Title, as in the situations above where access was not authorized by the landowner, Pengrowth may be said to have a revocable license to access this area which the Peters may terminate with reasonable notice. If the parties cannot come to an agreement with respect to Pengrowth's access to this portion of land, either party may apply to the Board for a right of entry order and for the Board assistance in resolving the compensation payable to the Peters.

[18] The 190 square metres of access road on the SW ¼ of section 22 is registered on Title and provides a "right of entry" within the meaning of the *Petroleum and Natural Gas Act.* The Peters as the landowners whose land is subject to the right of entry, are subject to the provisions of sections 165 and 166 of the *Petroleum and Natural Gas Act* for rent review, and assuming the requisite conditions for an application are met with respect to timing and notice, may invoke those provisions to request a rent review to determine the appropriate rent payable for the lease area on their land.

[19] The applications under section 164 with respect to the SW ¼ of section 22 are dismissed.

THE RENT REVIEWS

[20] The Peters filed eight applications for rent review: 1722, 1723, and 1809(a) through (f). File 1809(e) was intended to relate to a lease signed March 11, 1997 for a well site and access road on the SW ¼ of section 23. As the Peters did not provide the correct lease document in their materials, this application has been adjourned to be dealt with separately. If the application is not resolved between the parties, the Board will schedule a separate arbitration and new dates for the production of evidence by both parties.

Issue

[21] For the remaining seven applications, the issue is to determine whether the annual rent payable under each of the surface leases should be revised to reflect the actual and ongoing loss to the landowners arising from Pengrowth's use and occupation of the Lands.

Facts

[22] The date, area, use and current and requested rent for each lease, as well as the effective date of the rent review are summarized in the chart below:

Board File	Lease Date	Lands	Area of Lease (acres)	Description	Current Annual Rent	Requested Annual Rent	Effective Date of renewed rent
1722	March 31, 2006	SW 23	1.72	Access road	$1,500	$2,750	March 31, 2010
1723	July 31, 1996	SW 22	.07	Meter site	$1,000	$2,500	July 31, 2010
1809(a)	April 7, 2006 replacing a lease effective July 28, 1994	SW 22	2.53*	Access road	$1,915	$3,200	July 28, 2012
1809(b)	April 7, 2006 amending an agreement dated June 25, 1995 providing for annual payment effective October 14, 1995	SW 22	1.17	Oil spill cleanup	$1,000	$5,000	October 14, 2012

1809(c)	August 11, 1993	SW 22	6.62	Well site and Access road	$8,200	$10,600	August 11, 2012
1809(d)	September 20, 1995	Parcel A NW 22	4.86	Well site and Access road	$4,000	$7,800	September 20, 2012
1809(f)	October 13, 2005 replacing a lease dated March 11, 1997	NW 14	4.74	2 well site and Access Road + remote sump covered by separate agreement dated October 27, 2000	$3,400	$8,800	March 11, 2012

*according the Peters' evidence; a survey plan was not included with the lease.

[23] The Peters purchased NW 22 and SW 23 in 2005 and purchased SW 22 and NW 14 in 2008. Mr. and Mrs. Peters have a cow calf operation on the Lands and on four contiguous quarter sections (NE and SE 22, NW 23, and NE 15) that they lease. Of the land that they own and rent, 580 acres may be used for forage. They typically have 140 cow/calf pairs in their herd.

[24] The soil classification for the Lands is Class 3, which has some limitations but which grows excellent forage. The Peters have been working at rejuvenating and improving the land to increase its carrying capacity. Mr. Peters does not harvest a hay crop anymore but all of the forage grown is either used to graze the cattle or is left to rejuvenate the land in order to improve the land for the long term.

[25] The Peters' residence and farm buildings are located on the NW ¼ of section 22.

Legal Framework

[26] The purpose of a rental payment is to address the immediate and ongoing impact to the landowner and to the lands of an operator's activity on private land (*Dalgliesh v. Worldwide Energy Company Ltd* (1970) 75 W.W.R. 516 (Sask DC)). The rental payment is to compensate for actual or reasonably probable loss or damage caused by an operator's continuing use of the lands. In an application for rent review, any revised rent is payable for the period following the effective date, not for past losses. In determining a revised annual rent with reference to actual loss and on consideration of the relevant factors, an analysis of probable future use of the land and probable future losses must be undertaken (*Canadian Natural Resources Ltd. v. Bennett, et al*, 2008 ABQB 19).

[27] Rent for the occupation and use of private land for an oil and gas activity is to compensate the landowner for actual ongoing loss, not to remunerate the landowner for an operator's use of their land. In that way it is different from rent negotiated in the market for other uses of private land where a landowner may expect to be remunerated by a tenant for granting a tenant the right to use and occupy their land and where the rent a landowner will be willing to accept and that which a tenant may expect to pay will largely be determined by market forces.

[28] The onus is on the applicants, Mr. and Mrs. Peters, to establish their ongoing prospective losses and to establish that an increase to the rental payment under each lease is warranted to compensate for ongoing losses (*Progress Energy Canada Ltd. v. Salustro* 2014 BCSC 960). The Board must base its finding with respect to loss on the evidence before it. The burden of providing evidence to substantiate loss rests with the applicant.

[29] Section 154 of the *Petroleum and Natural Gas Act* sets out the factors the Board may consider in determining the initial compensation or annual rent payable for the use and occupation of private land. Those factors are as follows:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;
(c) a person's loss of right or profit with respect to the land;
(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any of other rights of entry with respect to the land;
(h) money previously paid for entry, occupation or use;
(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

[30] Not all of the above factors will be relevant in every case or in the determination of annual compensation as opposed to initial compensation for an entry. There are no factors or criteria established by regulation.

[31] Section 154(2) of the *Petroleum and Natural Gas Act* further provides that in determining an amount to be paid on a rent review application, the Board must consider any change in the value of money and of land since the date the surface lease was originally granted or last renewed.

Evidence and Findings

[32] Of the factors enumerated in section 154(1) of the *Petroleum and Natural Gas Act*, the Peters' evidence and submissions focused on their loss of income from the Lands, nuisance and disturbance, and other surface lease agreements.

Loss of Income

[33] Mr. Peters' evidence was that Pengrowth occupies 32.4 acres of the Lands. (My addition of the lease areas above equals 26.14 acres). Mr. Peters' evidence was that he could raise 36 more calves without Pengrowth's activity. Although his evidence was that he kept records with respect to his cattle operation, he did not provide any records to substantiate the claim that he could raise an additional 36 calves if Pengrowth did not occupy a portion of the Lands.

[34] Mr. Peters' evidence was that forage land leases for about $25/acre, which is about what he pays for the land he leases. The cost of leasing an additional 32.4 acres of land, therefore, would be about $810 annually.

[35] The Peters provided cattle market reports for the fall of 2014 but did not provide any evidence of their actual income from their cattle operation. I have no evidence of the value per acre of the forage or what it would cost to purchase hay to replace loss of forage due to the lease sites.

Nuisance and Disturbance

[36] Mrs. Peters' evidence was that the leases on their Lands create traffic, noise and dust. She said the gates are frequently left open requiring rounding up of cattle from surrounding property. She said service crews leave garbage in the leased areas and the access roads are frequently used by hunters and snowmobilers. She said it is difficult to know who is a legitimate user of the access roads and who is not. She said the road is not always graded before the service trucks come in so they sometimes get calls for their tractor to pull service trucks out. She said when the snow is plowed, it is left blocking access. I accept that the Peters experience nuisance and disturbance associated with the various leases. The difficulty is to quantify the loss associated with that nuisance and disturbance.

[37] With respect to the lease that is the subject of file 1722, Mr. Peters' evidence was that two companies use the access road causing increased nuisance and disturbance in the form of traffic, noise, and time spent monitoring, picking up garbage, and checking that gates are closed. His evidence was the cattle are turned into this quarter every year for 21 to 27 days and are also fed there in the winter. Time and effort is spent all summer long to make sure the gates are shut. Someone goes out in the winter every 3-5 days to check the

gate. The Peters use the road to bring bales out to the cows in the winter, but Mr. Peters' evidence was that they could still feed the cattle without the road. I accept that the Peters expend time they would not otherwise have to spend to ensure the safety of their cattle, pick up garbage, and otherwise monitor the lease area, although the evidence does not assist with quantifying the amount of time spent.

[38] Mr. Peters' evidence was that the meter site which is the subject of File 1723 is accessed frequently by instrumentation people, a propane truck and maintenance crews. It is not clear how this access causes loss to the Peters other than by the impact of general intangible nuisance associated with traffic.

[39] With respect to file 1809(a), the Peters' evidence is the lease area for this access road is 2.53 acres, although this area is not confirmed by a survey plan attached to the lease. As Pengrowth has not taken issue with the Peters' evidence with respect to the size of the lease, I accept it is 2.53 acres. The access road extends south from the meter site that is the subject of File 1723 to the southern boundary of the quarter section. Pengrowth is the only user of this access road. The Peters provided no evidence of specific nuisance and disturbance or other losses associated with this lease.

[40] With respect to the oil spill clean-up lease that is the subject of File 1809(b), Mr. Peters' evidence was that he does not know what is in this site and does not know whether contamination has migrated to surrounding land. He sees this site as creating a blight or stigma on his property. His evidence was that he puts an electric fence around the site to keep the cattle out. It takes him 5 hours each time to erect and take down the electric fence, which he typically does three times a year. When the cattle are grazing in that area, the electric fence has to be monitored daily, an activity that takes about 30 minutes.

[41] Mr. Peters' evidence was that the herd grazes in this area for about 25 days annually. The time required for fence monitoring would therefore be around 12-13 hours annually. Including the time spent putting up and taking down the fence three times annually, I find Mr. Peters spends approximately 30 hours annually in relation to his cattle operation as a direct result of this lease.

[42] With respect to the lease that is the subject of File 1809(c), Mr. and Mrs. Peters both gave evidence that they have observed others besides Pengrowth using this access road. This lease was the subject of a rent review arbitration in 2001 where use of the road was an issue (*Rose Prairie Wolfe Ranch Ltd. v. Encal Energy Ltd*., Board Order No. 338ARR, May 11, 2001). The Board found there was extraordinary nuisance and disturbance as a result of the use of the access road and set the annual rent at $7,250 effective August 11, 1999 inclusive of all losses. It is not evident form the Board's reasons how much of

this award was attributed to nuisance and disturbance. Pengrowth currently pays $8,200 annually for this lease.

[43] The lease that is the subject of file 1809(d) is the closest to the Peters' residence and farm buildings. The well on this site used to have a pump jack, which has been removed. Pursuant to this lease, use of the access road is shared by the lessor and lessee, and the road must be kept open for use by the lessor. Other than through general loss of use of the well site area, the evidence does not establish specific ongoing prospective loss associated with this lease.

[44] File 1809(f) relates to a lease signed October 13, 2005 replacing a lease dated March 11, 1997. The original lease was for a well site on the NW ¼ of section 14 and an access road on both the NW ¼ of section 14 and the NE ¼ of section 15. The total area of the original lease, according to the documentation filed with the Peters' application, is 6.54 acres of which 3.8 acres are located on the NW ¼ of section 14. The IOP attached to the 2005 lease identifies a lease extension of .94 acres on the NW ¼ of section 14 and a proposed remote sump of .64 acres straddling the boundary between NE 15 and NW 14 and occupying area in both quarters. The total lease area for the well site and well site extension on the NW ¼ of section 14 is 4.74 acres.

[45] There are two wells on this site, although the lease agreement only permits a single well. Both wells are within the boundary of the original lease area. The Peters seek additional compensation for the second well, but their evidence does not establish additional loss associated with the second well. Mr. Peters agreed he incurred no additional loss of use or nuisance and disturbance as a result of the second well. The 2005 lease indicates consideration of $250 was paid to the owners when the lease was signed, and the owner acknowledges "first year consideration" was already paid for the leased area in accordance with the 1997 lease. Other than the general loss of use of the lease area, the evidence does not establish specific ongoing and prospective loss associated with this lease.

[46] The Peters purchased the NW ¼ of section 14 in 2008. Mr. Peters' evidence was that for two years following their purchase of this property, they received a payment of $1,800 which they understood to be rent for the remote sump. The payment was subsequently terminated although they have not been told why. They have been told the remote sump was cleaned up but they do not believe a Certificate of Restoration has been issued. The Peters ask that the annual payment of $1,800 which they received in 2009 and 2010 be reinstated.

[47] Exhibit 4 is a copy of a Remote Sump Agreement dated October 27, 2000. This agreement requires a single payment of $1,500 for use of the remote sump area. Included with the Peters' original application is a Memorandum of Understanding dated July 18, 2003 requiring additional rent for 2001 and 2002 of $1,500 per year, and requiring crop loss of $300 be paid for 2003, 2004 and

2005. These agreements do not create a lease of the area used for the remote sump and do not require an ongoing annual payment that is subject to a rent review.

[48] It is not clear from the evidence whether Pengrowth actually continues to occupy and use the area used as a remote sump.

Other leases

[49] John Ross provided evidence of his own recent rent review negotiation involving 12 wells operated by CNRL. His evidence was he did not know how the final rent was determined or how much was attributed to various factors, but that it amounted to $1,200 per acre overall. Mr. and Mrs. Ross run a cow calf operation similar to that operated by the Peters, approximately 30 miles north of Fort St John. His evidence was his operation was basically the same as the Peters raising cow/calf pairs and cultivating pasture/hay with a grain crop rotation every few years. He said the leases make it more difficult and more expensive to farm the land. His evidence was they experience vandalism as a result of the oil company's access and they have to deal with trespass, traffic, and ongoing monitoring. He did not provide evidence relating to the specific impacts of each lease or the specific rent payable for each lease.

[50] Sten Petersen provided evidence of his recent rent review settlement with Penn West at $1,225 per acre. His evidence was his land is closer to the Peters that the Ross' land. Mr. Petersen grows barley, wheat, peas, canola and fescue on his lands. Issues with weed control were a factor in his negotiations. Mr. Petersen's settlement (found at Tab 7P of Exhibit 1) was effective February 2013. The total annual rent of $5,750 includes $1,612 for crop loss calculated at $350 per acre, $3,750 for nuisance and disturbance, and $388 for "other". His evidence was the payment for "other" was an amount the land man tacked on in the end so they could "make the deal".

[51] Mr. Peters gave evidence that his request of $7,800 annual rent for the lease in application 1809(d) was based on a lease on neighbouring land that he rents and for which the landowner recently signed a rent renewal for $1,600/acre. He acknowledged that there is a functioning oil well on that site, and two cemented in water wells. He was not familiar with the terms of his neighbour's lease and did not provide a copy. The evidence with respect to this comparable is nothing more than anecdotal and carries no evidentiary weight.

[52] The Peters provided copies of other leases at Tab 7 of Exhibit 1. The lease at Tab Q was originally signed in 1991 and involves a well site and a long access road of 4.47 acres. Mr. Peters' evidence was that the owner received $5,000 annual rent for the access road as of 2006. The documentation allegedly

supporting this rent review, however, is unsigned and is of no evidentiary value. In any event, there is no evidence as to how the $5,000 was arrived at.

[53] The lease at Tab R was originally signed in 1990 for a well location known as 8-27-87-18. It is followed by an email suggesting annual rent for this well location of 4.61 acres is now $6,000 and that annual payment for another well location known as 01-27-87-18 of 3.88 acres is $5,045. The email is of no value. Not only does it not provide reliable evidence of an actual agreement, but it provides no information as to the effective date of any renewed rent, how the rent was determined or other circumstances impacting the negotiation.

[54] Tab S is purportedly an Agreement dated June 8, 2011 respecting a meter site. The document is unsigned and has no evidentiary value.

[55] Tab T is a Table purporting to provide information respecting two 2011 rent reviews of Pengrowth sites on land leased by the Peters. Copies of the respective agreements are not in evidence. There is no information as to how the rent was determined. The table amounts to nothing more than hearsay and has no evidentiary weight.

[56] While the Board may consider other leases, it has found on many occasions that other leases are of limited to no assistance in a rent review application unless they are capable of substantiating a clear pattern of dealings. The rent negotiated to compensate for ongoing prospective losses in one case does not establish another landowner's probable ongoing loss or create an entitlement by another landowner to the same amount. In particular, comparison of a global payment in another lease on a per acre basis is inappropriate if compensation for factors such as nuisance and disturbance was not determined on a per acre basis. Compensation for factors such as nuisance and disturbance will be dependent on the particular circumstances of each case, and unless the evidence establishes that the circumstances giving rise to a particular element of compensation are the same or highly similar, the compensation agreed to in one case does not substantiate loss in another case.

[57] I find the evidence provided of other leases does not establish a pattern of dealings.

Change in the Value of Land and Money

[58] Section 154(2) of the *Petroleum and Natural Gas Act* requires the Board to consider any change in the value of land or money since rent was last negotiated. I have no evidence of the change in the value of money. The Peters provided a Table at Tab 6 of Exhibit 1 prepared by Aspen Grove Property Services setting out the median price per acre of large acreages in the North Peace from 2005 to 2010. No one spoke to this evidence to provide context for

the evidence such as the criteria for selection of sales, or to relate the conclusions to the value of the Lands or any change in the value of the Lands that are the subject of these applications.

Analysis and Conclusions

[59] It is clear that the Peters put a considerable amount of effort into bringing forward these applications and preparing for the arbitration. Despite statements by former employees of Pengrowth of a willingness to negotiate, Pengrowth has been generally unresponsive to the claims. It appears that Pengrowth did not provide any meaningful response to the claims until having to engage in the arbitration process, which is unfortunate, as meaningful engagement earlier on may have assisted with a resolution to some or all of the claims and less time and expense incurred by all parties and the Board. Despite the effort by the Peters, however, and the non-responsiveness of Pengrowth, the Peters' claims for the most part reflect a misunderstanding of the legal framework for the payment of annual rent as compensation for ongoing actual and prospective loss, and of the burden upon them to provide evidence to substantiate a claim of ongoing and prospective loss to support the requested rent increases.

File 1722

[60] This application involves the lease of 1.72 acres for use as an access road on the SW ¼ of Section 23. Apparently two companies use the road, although use of the road by other than Pengrowth is not authorized by a secondary road use agreement. Compensation for loss associated with additional nuisance and disturbance caused by other road user needs to be negotiated with the other user or determined by the Board with the participation of the other user, as discussed above in relation to File 1799.

[61] The current rent paid for this site is $1,500; the Peters request an increase to $2,750. The evidence does not support ongoing prospective loss of this amount. If I assume that in 2010 the land was worth the suggested median price per land of $680 indicated by Aspen Grove Property Services, the current rent exceeds the value of the land. If I calculate loss on the basis of the cost to rent additional forage land at $25/acre, the ongoing annual loss would be $43. If I assume the Peters experience crop loss of $350/acre (which is not established by the evidence but which is the rate attributed to crop loss in Mr. Petersen's recent rent renegotiation), loss for this factor would equate to $602. While I accept that there is nuisance and disturbance associated with this site, I am not satisfied on the evidence that the current rent of $1,500 needs to be increased to compensate for this factor.

[62] I find the annual rent of $1,500 for this site continues to be appropriate as of March 31, 2010.

File 1723

[63] This application involves the lease of.07 acres on the SW ¼ of section 22 for use as a meter site. The current annual rent is $1,000; the Peters seek an increase to $2,500. Given that this is such a small site and the lack of any specificity to the evidence with respect to nuisance and disturbance or other loss associated with this site, I am not satisfied that the current rent of $1,000 does not adequately compensate for probable ongoing losses.

[64] I find the current rent of $1,000 continues to be appropriate as of July 31, 2010.

File 1809(a)

[65] This application involves the lease of 2.53 acres for an access road on the SW ¼ of section 22 that extends south from the meter site discussed above. The Peters' provided no evidence of specific nuisance and disturbance associated with this site. Their only submission with respect to this site was that it had been some time since rent was reviewed so it was time for an increase.

[66] The current annual rent is $1,915; the Peters seek an increase to $3,200. If I assume that the 2010 value of the land is $680/acre, the current rent exceeds the 2010 value of the land. I have no evidence of the value of the land in 2012, relevant to the date of this rent review. If I assume crop loss of $350/acre, loss for this factor would equate to $885.50. Loss based on the cost to rent replacement forage land would be considerably less.

[67] The evidence does not support ongoing loss attributed to this site at the requested increase. I find the current rent of $1,915 continues to be appropriate as of July 28, 2012.

1809(b)

[68] This application involves the lease of 1.17 acres on the SW ¼ of section 22 for oil spill clean-up. The current annual rent for this site is $1,000; the Peters seek an increase to $5,000.

[69] The evidence establishes that Mr. Peters spends approximately 30 hours annually in relation to the cattle operation that he would not have to spend but for the presence of this lease. In the absence of evidence to substantiate the value of a particular landowner's time, the Board has applied $50/hour in past cases to compensate landowners for their time incurred in relation to a company's activity on their land. The current rent of $1,000 falls short of compensating for this specific loss, and should be increased.

[70] In addition to compensation of $1,500 related to time spent associated with this lease, the compensation should acknowledge ongoing loss of rights, loss of use and income, and other general nuisance and disturbance. Pengrowth submitted annual rent of $2,000 would be appropriate. I am concerned that $2,000 may not adequately compensate for additional loss beyond that incurred as time spent, but am not satisfied the requested increase to $5,000 is substantiated. I find annual rent should be increased to $2,500 effective October 14, 2012 to compensate for probable ongoing prospective losses associated with this lease.

1809(c)

[71] This application involves the lease of 6.63 acres on the SW ¼ of section 23 used as a well site and access road. The access road is used by multiple users without a road use agreement. I have discussed the Peters' remedy with respect to the multiple users above in relation to the applications in File 1800. The evidence indicates that consideration of additional nuisance and disturbance arising from the multiple road users was a factor in increasing the rent in the past. Using the same assumptions discussed above, the current rent already substantially exceeds possible land value and income loss. The evidence does not support a further increase to the current annual rent and I find the current rent of $8,200 continues to be appropriate as of August 11, 2012.

1809(d)

[72] This application involves the lease of 4.86 acres on the NW ¼ of section 22 used for a well site and access road. The current annual rent is $4,000; the Peters seek an increase to $7,800.

[73] This is the lease that is closest to the Peters' residence. The evidence is that this lease used to have a pump jack on it but the pump jack has been removed, thereby lessening the ongoing nuisance and disturbance from noise from this lease. Under the terms of this lease, the owner maintains the right to use the access road.

[74] Mr. Peters based his requested increase on a recent rent review at $1,600/acre on the neighboring quarter section that he leases, however the terms of that agreement are not in evidence for comparison sake. The evidence is that the neighboring lease does have an operating pump jack on it, so a greater payment for nuisance and disturbance from that lease may be warranted. It is not known whether the neighbouring owner maintains use rights comparable to those retained in the subject lease.

[75] As discussed above, one owner's agreement does not establish another owner's loss or entitlement to rent in the absence of evidence of a clear pattern

of dealings. The evidence falls far short of establishing a pattern of dealings in this case, and with respect to the particular comparable relied on to support an increase for this lease, the evidence nothing more than anecdotal.

[76] The evidence does not support the requested increase and I find the current rent of $4,000 continues to be appropriate as of September 20, 2012.

1809(f)

[77] This application involves the lease for 4.74 acres on the NW ¼ of section 14 for a well site and access road. Although the lease agreement only authorizes use of the site for a single well, the attached IOP clearly indicates an area for a well extension suggesting the purpose of the new lease was to add a second well to the site. There are two wells on this site. While the presence of the second well does not appear to conform to the lease agreement, the Peters did not bring this application under section 164 of the *Petroleum and Natural Gas Act* alleging non-compliance with the terms of the lease, and consequently, Pengrowth has not had the opportunity to respond to this issue. If necessary, an application seeking a remedy under section 164 of may be the subject of a separate application.

[78] The current annual rent under this lease is $3,400; the Peters request an increase to $8,800. The evidence does not substantiate ongoing loss to this extent as a result of this lease and I find the current rent of $3,400 continues to be appropriate as of March 11, 2012.

[79] The application also includes a claim for rent for an area used for a remote sump. The lease does not cover use and occupation of the remote sump area and does not include rent for use of this area. As the lease does not cover this area, there is no basis for an application for review of rent payable for use of this area under the lease.

[80] The remote sump agreement (Exhibit 4) does not create an ongoing lease of this area and does not create a contractual obligation for the continued payment of rent. The extent of the evidence with respect to this site is that the Peters received payments in 2009 and 2010 which they attributed to use of this site, but have not received a payment since. The Peters were told the site has been cleaned up although they have not seen a Certificate of Restoration.

[81] There is no evidence that Pengrowth actually continues to use this site. If it does not, there is no ongoing reason for rent. If it does, and the parties cannot come to terms on a lease for its use, an application for right of entry and to determine compensation may be made. If there is ongoing damage to the land or to the Peters as a result of the use of this site as a remote sump, a claim for damages may be brought as a separate application.

ORDER

[81] The Surface Rights Board orders as follows:

File 1722: Pengrowth Corporation shall continue to pay annual rent of $1,500 to the Peters for the rent period commencing March 31, 2010.

File 1723: Pengrowth Corporation shall continue to pay annual rent of $1,000 to the Peters for the rent period commencing July 31, 2010.

File 1799: The applications under sections 163 and 164 of the *Petroleum and Natural Gas Act* are dismissed.

File 1800: The application under section 163 of the *Petroleum and Natural Gas Act* is dismissed. The Board does not have jurisdiction with respect to the application under section 164 of the *Petroleum and Natural Gas Act*.

File 1809(a): Pengrowth Corporation shall continue to pay annual rent of $1,915 to the Peters for the rent period commencing July 28, 2012.

File 1809(b): Pengrowth Corporation shall pay annual rent to the Peters of $2,500 effective October 14, 2012.

File 1809(c): Pengrowth Corporation shall continue to pay annual rent of $8,200 to the Peters for the rent period commencing August 11, 2012.

File 1809(d): Pengrowth Corporation shall continue to pay annual rent to the Peters of $4,000 for the rent period commencing September 20, 2012.

File 1809(e): The application is adjourned generally.

File 1809(f): Pengrowth Corporation shall continue to pay annual rent of $3,400 to the Peters for the rent period commencing March 11, 2012.

DATED: February 5, 2015

FOR THE BOARD

_____
Cheryl Vickers, Chair

File No. 1819
Board Order No. 1819-1

March 21, 2014

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
DISTRICT LOT 1296 PEACE RIVER DISTRICT
DISTRICT LOT 1297 PEACE RIVER DISTRICT, EXCEPT THE NORTH 25 METRES

(The "Lands")

BETWEEN:

Buffalo Ranch B.C. Ltd.

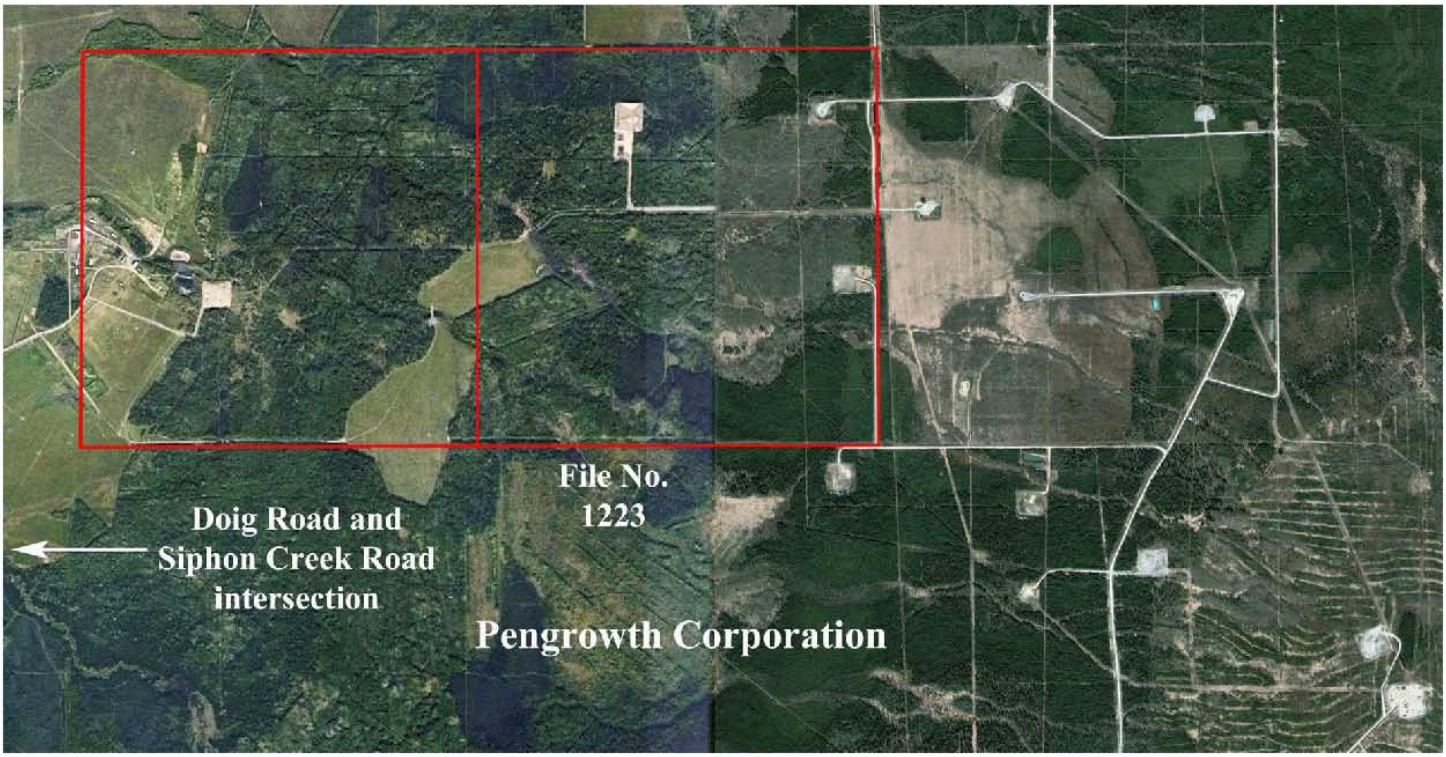
(APPLICANT)

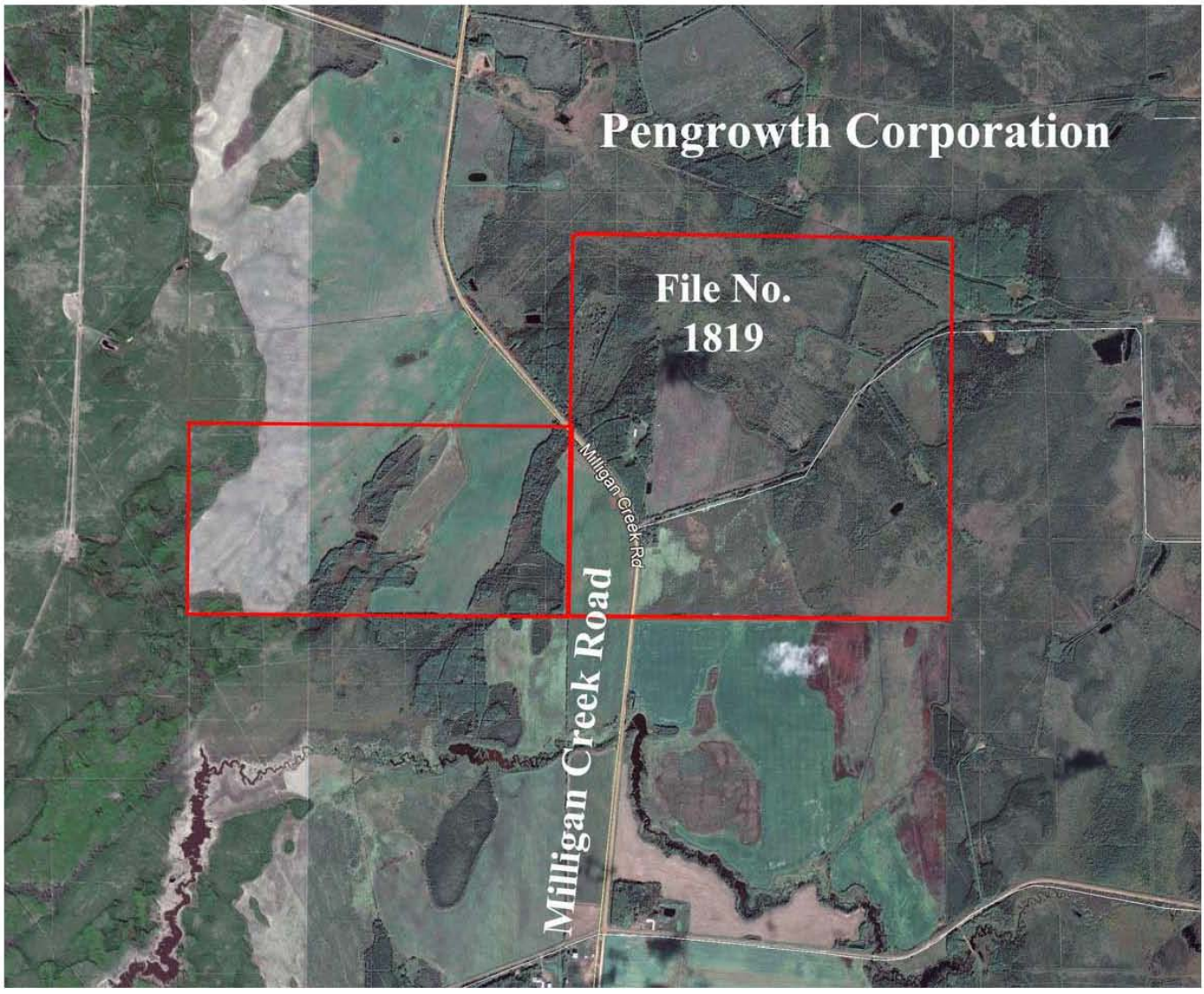
AND:

Pengrowth Corp.

(RESPONDENT)

BOARD ORDER


File No.
1223
Doig Road and
Siphon Creek Road
intersection
Pengrowth Corporation


Pengrowth Corporation
File No.
1819
Milligan Creek Rd
Milligan Creek Road

Heard by way of written submissions closing February 7, 2014
Appearances: Donna M. Iverson, Barrister and Solicitor, for the Applicant
Thomas R. Owen, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] Buffalo Ranch B.C. Ltd. ("Buffalo Ranch"), the owner of the Lands, applies to the Board for unpaid rent from the surface rights holder, Pengrowth Corporation ("Pengrowth") under an existing surface lease.

[2] In October 1997, Buffalo Ranch and Encal Energy Ltd., (later Calpine Canada Resources Ltd. ("Calpine")) executed a surface lease (the "Lease") for a wellsite and access roads on the Lands.

[3] On or about November 9, 2001, Buffalo Ranch and Calpine signed a document titled "Final Release and Consent" (the "Release") in which the parties acknowledged and declared the Lands had been restored and reconditioned to the satisfaction of Buffalo Ranch and that the Lease had been terminated and surrendered.

[4] In July 2002, Calpine assigned the Lease to Pengrowth. Pengrowth says section 143(3) of the *Petroleum and Natural Gas Act*, RSBC 1996, ch. 361 (the "*Act*") applies:

> **"termination date"**, in relation to a right of entry, means ...in all other cases, the date on which the commission has issued, under the *Oil and Gas Activities Act*, a certificate of restoration for the land.
>
> (3) If the term of a surface lease or order of the board granting a right of entry ends before the termination date, the rental provisions of the surface lease or order continue to apply until the termination date unless the landowner and the right holder otherwise agree or the board otherwise orders under this Part.

[5] Pengrowth says the rental provisions of the Lease ceased as the landowner and Pengrowth had agreed, in the Release, to the Lease's termination. Therefore, Pengrowth does not owe Buffalo Ranch unpaid rent.

[6] Buffalo Ranch says the Release is not valid and enforceable. If the Release is valid, Buffalo Ranch says it did not discharge Pengrowth from its obligation to continue to pay rent under the Lease until a Certificate of Restoration (COR) had been issued. It seeks the following orders:

i) that Pengrowth pay back rent from November 2002 to November, 2013 plus interest in accordance with the *Court Order Interest Act*, RSBC 1996, c. 79;
ii) a declaration that Pengrowth continue to pay rent until it has obtained a COR and obtained an Order from the Board unless Buffalo Ranch otherwise agrees;
iii) that Pengrowth pay to Buffalo Ranch $1,000 for the time spent to prepare for and participate in the determination of this matter; and
iv) that Pengrowth pay to Buffalo Ranch its actual and reasonable expenses related to this arbitration.

[7] The issues for me to decide are whether the Release is valid and whether section 143(3) applies to the circumstances of this case. The parties agreed the Board would proceed to determine these issues before Buffalo Ranch's application for back rent is arbitrated on its merits. If I determine the Release is valid and that section 143(3) applies to discharge Pengrowth's rental obligations, then the application does not proceed further.

ISSUES

[8] The issues for the Board to determine are whether the Release is a valid release and if so, does it effectively release Pengrowth from its obligation to pay rent as contemplated by section 143(3) of the *Act*?

FACTS

[9] The Lease provides for annual rent payments of $2,380.00 for the drilling and operation of a well. In paragraph 13, the Lease provides for early termination of the Lease after the expiration of the second year of the term and upon not less than 90 days written notice to the owner, in which case there shall be no refund to the company of any advance rent paid. The company, Calpine, paid advance rent to Buffalo Ranch from October 2001 to September 30, 2002. There have been no further rental payments.

[10] Marilyn Parker, a former bookkeeper for Buffalo Ranch, signed the Release in November 2001. There is no dispute that Ms. Parker had authority to act on behalf of Buffalo Ranch.

[11] The Release states that, in consideration of the sum of $100, Buffalo Ranch "...hereby acknowledge and declare that the portions of the aforesaid land occupied/leased and used in the drilling of the said wellsite have been restored and reconditioned to our satisfaction." It goes on to state that "(w)e further declare that we have no objections to the issuance of a Certificate of Restoration by the BC Oil and Gas Commission and that the subject Surface Lease is hereby terminated and surrendered."

[12] In November 2002, Calpine sent a letter to Buffalo Ranch informing Buffalo Ranch that Calpine had assigned the Lease to Pengrowth and that Pengrowth would "now assume all responsibilities as the Grantee/Lessee effective July 1, 2002."

[13] There was no further communications between the parties until 2009. In 2009, June Volz took over as representative of Buffalo Ranch and requested a review of the rent under the Lease. Pengrowth responded that rent was not payable because of the Release. In 2010, Pengrowth sought permission to access the Lands for soil sampling to meet the requirements for obtaining a COR. It was at this time that Buffalo Ranch became aware that a COR had never been obtained. Buffalo Ranch has refused access to Pengrowth and has reoccupied the leased area.

IS THE RELEASE VALID AND ENFORCEABLE?

Parties' Submissions

[14] Both parties refer to case law that set out principles in the interpretation of releases. In particular, the BC Court of Appeal in *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291, set out the following principles:

i) no particular form of words are necessary to constitute a valid release and that any words which show an evident intention to renounce a claim or discharge an obligation is sufficient;
ii) the rules relating to the construction of a written contract apply;
iii) a general release will be construed in light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed;
iv) the release will not be construed as applying to facts NOT within the knowledge of the parties at the time of execution; and,
v) the construction of any individual release will necessarily depend upon its particular wording and phraseology.

[15] Buffalo Ranch also relies on the principle that, if the Release is drafted by the non-releasing party, any ambiguity must be resolved by construing the Release in favour of the interest of the releasing party, i.e. Buffalo Ranch (*Dawson v. Tolko Industries Ltd.*, 2010 BCSC 346).

[16] Buffalo Ranch submits the wording of the Release is so ambiguous as to render it unenforceable. In construing the language of the Release itself where firstly, Buffalo Ranch acknowledges and declares that the leased lands have been restored and reconditioned to their satisfaction and, secondly Buffalo Ranch has no objection to the issuance of the COR and that the lease is

"terminated and surrendered", Buffalo Ranch argues that the termination of the Lease is to take place when and if the COR is obtained, not before. Buffalo Ranch submits the most logical interpretation of the Release is that the Lease is to be terminated and surrendered upon the issuance of the COR. The Release does not specifically say the rental provisions of the Lease were no longer in effect, therefore, rental payments continue to apply until the issuance of the COR. Also, Buffalo Ranch points out that the Release says the parties "declare" and not that the parties "agree".

[17] In reviewing the circumstances of the Release, Buffalo Ranch says Calpine was aware at the time of the execution of the Release that it was necessary for Calpine to obtain a COR in order to restore the wellsite. Therefore, the termination and surrender of the Lease must be tied to this requirement. The assignment of the Lease to Pengrowth in 2002 is evidence that Calpine and Pengrowth both considered the Lease remained in existence. Pengrowth disagrees and says the letter of notification of the assignment of Lease is no more than an acknowledgment that there is still a COR obligation outstanding, not that the rental provisions in the Lease continue to apply until the COR's issuance.

[18] Buffalo Ranch submits that the Release does not specifically state that the rental provisions in the Lease are no longer in effect. It argues the consideration paid under the Release was consideration for Buffalo Ranch's acknowledgement and declaration that the land had been restored and reconditioned to their satisfaction, not for release of rental obligations. Therefore, there was no consideration paid to induce Buffalo Ranch to terminate the rental provisions of the Lease. Given this lack of consideration, Buffalo Ranch submits there is no valid contract between Calpine and Buffalo Ranch as it relates to the release of the rental obligations under the Lease.

[19] In response, Pengrowth points to the first principle of interpreting releases set out in *Kaiser*, supra, namely "(n)o particular form of words is necessary to constitute a valid release...and any words which show an evident intention to renounce a claim or discharge the obligation are sufficient." Pengrowth says the document's title, the fact it was signed by the landowner and was for consideration are all evidence of this intent. When looking at the overall context, the use of the term "declare" rather than "agree" in the Release is immaterial. Pengrowth does not dispute the fact that the Release does not say the rental provisions are no longer in effect and that the $100 consideration paid does not cover agreement to abate rent. But, it submits clause 13 of the Lease addresses this as the parties agreed in this clause that the Lease could be terminated early and if so, that Buffalo Ranch could retain any advance rent paid by the company, which it did.

[20] Buffalo Ranch submits that clause 13 does not state that future rent is not payable upon early termination and, in any event, clause 13 requires 90 days written notice of early termination but there is no evidence this notice was given.

It argues the clause cannot be used to bypass the provisions of section 143 of the *Act*.

Board's decision

[21] I find the language of the Release is not ambiguous. The Release clearly indicates that the parties intended the Lease to be terminated and surrendered.

[22] In applying the principles on the interpretation of releases set out in *Kaiser, supra,* the Release is not ambiguous in discharging the rental obligations under the Lease. The document is titled "Final Release and Consent" and speaks of the Lease being "terminated and surrendered". It would be absurd to interpret this to mean that only certain provisions of the Lease are terminated, for example provisions relating to access and use of the Lands, but other provisions remained in effect, such as the rental provisions. There is nothing to indicate in the language of the Release that termination of the Lease is tied to the issuance of the COR. The Release states that Buffalo Ranch declares there are no objections to the issuance of a COR and the lands had been restored and reconditioned to its satisfaction, "and" that the Lease was terminated and surrendered, not if the COR is issued, the Lease is terminated. If the intention was that the rental obligations under the Lease continued to apply until the COR was issued, the Release would have stated that the Lease was terminated except for the rental obligations or that the Lease is terminated when the COR is issued. That is not what the Release says. It says the Lease is "terminated and surrendered". The intention of the parties is clear that the Lease, and the obligations contained within it, were discharged and terminated upon execution of the Release.

[23] The parties' intention to discharge the rental obligations is confirmed by the fact that neither Calpine nor Pengrowth continued to pay rent or use the Lands, and the fact that Buffalo Ranch did not demand rent under the Release for approximately 8 years after execution of the Release. The assignment of the Lease is puzzling, however, this alone does not override the fact that many years went by without either party acting on the rights and obligations set out in the Lease.

[24] Calpine paid Buffalo Ranch consideration for the Release. Clause 13 of the Lease allows for early termination and Buffalo Ranch kept the advance rent paid after the termination of the Lease. Buffalo Ranch states there was no evidence that 90 days written notice was provided as required by clause 13, however, even if that is the case, the Release clearly sets out the intention to terminate the Lease and well over 90 days have elapsed since that time.

IF THE RELEASE IS VALID, DOES SECTION 143(3) APPLY?

Parties' Submissions

[25] Buffalo Ranch says the "termination date" under section 143 is a defined date, namely "the date on which the commission has issued, under the *Oil and Gas Activities Act,* a certificate of restoration of the land." It submits that as a COR has not been issued on the Lands, the Lease has not been terminated in accordance with the legislation.

[26] Buffalo Ranch says the parties did not "otherwise agree" to terminate the rental provisions of the Lease as allowed under section 143(3) of the *Act* and therefore, the rental provisions "continue to apply until the termination date". It says the scheme of the *Act* requires that a precondition to the termination and surrender of a lease is that a COR be obtained, and that the rights holder shall continue to pay rent until that COR is issued or the parties otherwise agree, neither of which has occurred here.

[27] Buffalo Ranch submits that if Pengrowth is successful in its argument that it does not have to pay rent due to the operation of the Release, the intention of the legislature requiring surface lease sites to be properly and environmentally restored and requiring a COR be obtained to ensure proper restoration will have been effectively bypassed. It says allowing the rights holder to stop paying rent in circumstances where the rights holder has failed to obtain a COR effectively condones their conduct, and argues the rights holder should not benefit by its neglect to obtain a COR until after the landowner made inquiries about the rent. Pengrowth submits that section 143(3) applies squarely to the facts of this case and that no back rent is payable. Section 13 of the Lease gave the company the right to terminate the Lease early and addressed the issue of whether the rental provisions would continue to apply. Calpine paid rent to Buffalo Ranch up to September 2002, and although the Release was executed in November 2001, the balance of the rent paid in advance was not refunded. No further rent was demanded by Buffalo Ranch or paid by Calpine or its successors, and Buffalo Ranch reoccupied the Leased area. Pengrowth submits that both parties considered the Lease to be terminated.

Board's Decision

[28] Having found that the Release is valid, section 143(3) operates to effectively discharge Pengrowth from its rental obligations under the Lease. The rental provisions of the Lease do not continue to apply until the termination date because the landowner and the right holder have "otherwise agreed".

[29] The intention of the legislation is that a COR be obtained by rights holders before termination and that rental provisions will apply until the COR is issued, unless the parties to a surface lease otherwise agree or the Board to otherwise orders. In this instance, the parties agreed that the lease was terminated and

that rental provisions were no longer payable in advance of the COR being issued. Although, Buffalo Ranch may have assumed that a COR would be obtained shortly after the Release was signed, and Calpine/Pengrowth neglected to obtain the COR, Buffalo Ranch did agree to terminate the Lease including its rental provisions prior to the issuance of the COR. The intent of the parties' agreement on termination of the rent is confirmed by their actions after execution of the Release.

CONCLUSION

[30] The Release is a valid release. Therefore, under section 143(3), there is no obligation on Calpine/Pengrowth to continue to pay rent under the Lease prior to the issuance of the COR, and as such, no back rent is owing to Buffalo Ranch. Both parties asked for an Order for costs pursuant to section 168 of the *Act.* As Buffalo Ranch has been unsuccessful in its application, their application for cost is dismissed. As for Pengrowth's application for costs, I make the following orders:

a) Pengrowth shall confirm to the Board and Buffalo Ranch, by April 4, 2014, whether they are proceeding with an application for costs and if so, shall provide their submissions in support of the application.
b) Buffalo Ranch shall have the opportunity to respond to Pengrowth's cost application, in writing, by providing their submissions to the Board and Pengrowth by April 18, 2014.
c) Pengrowth shall provide to the Board and Buffalo Ranch their response, in writing, by April 25, 2014.

DATED: March 21, 2014

FOR THE BOARD

Simmi K. Sandhu, Vice Chair