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

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