

**File No. 2005
Board Order No. 2005-1**

March 21, 2019

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 EAST $\frac{1}{4}$ OF SECTION 7 TOWNSHIP 85 RANGE 13
WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

James Michael Furze and
Theresa Michelle Furze

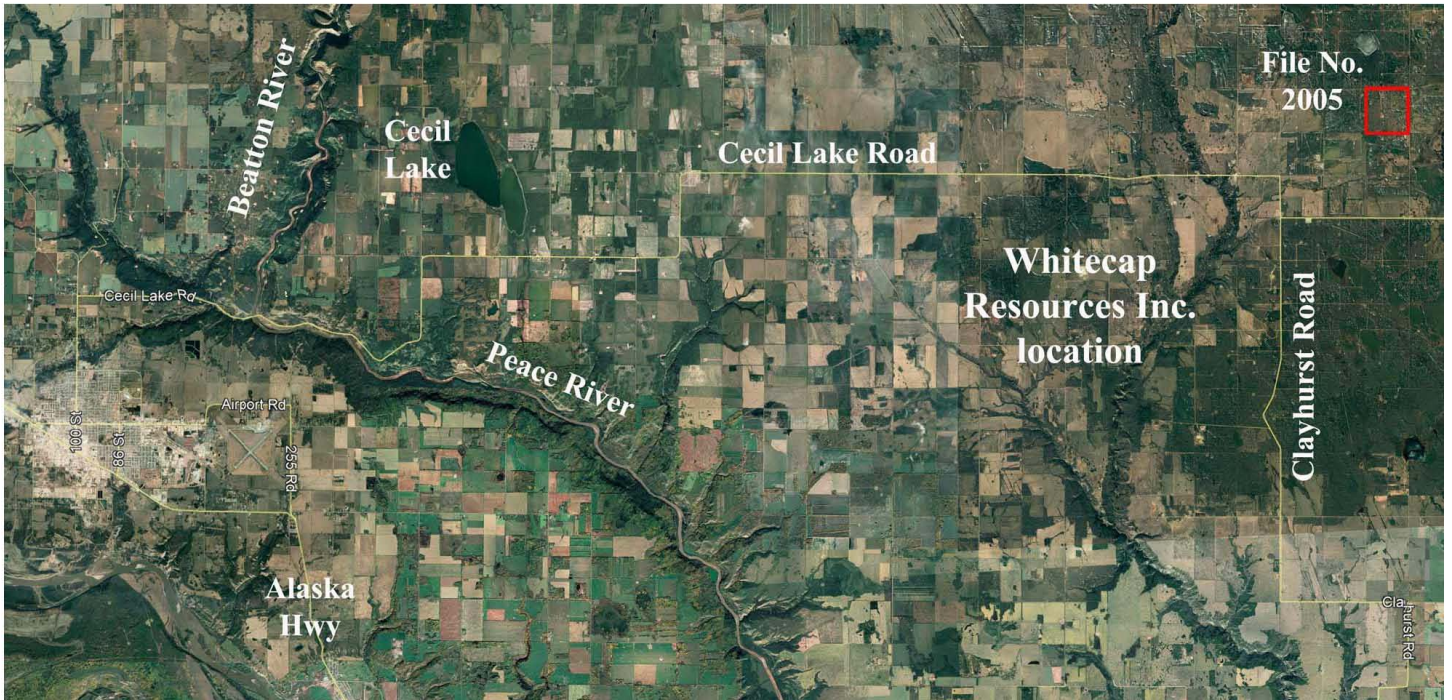
(APPLICANTS)

AND:

Whitecap Resources Inc. and
Perry Piper

(RESPONDENTS)

BOARD ORDER



Heard by written submissions.

BACKGROUND

[1] James and Theresa Furze are the owners of the Lands legally known and described as: The South East $\frac{1}{4}$ of Section 7 Township 85 Range 13 West of the 6th Meridian Peace River District. They purchased the Lands in 2018.

[2] Mr. and Mrs. Furze applied to the Board seeking payment of rent payable under a surface lease registered on the Title to the Lands entered in 1961 between Florence E. Musyowski, the then owner of the Lands, and Imperial Oil Limited for a wellsite and access road (the Surface Lease). Whitecap Resources Inc. (Whitecap) is now the operator of the well and access road on the Lands and the holder of the surface rights granted by the Surface Lease. The application alleges that Whitecap has failed to pay rent owing under the Surface Lease.

[3] In 1978, the then owners of the Lands, Clinton, Bruce and Perry Piper sold the Lands to Stuart and Denise Greer. The Greers and Pipers entered an Assignment of Rent Agreement dated November 23, 1978 whereby the Greers assigned the rents payable under the Surface Lease to the Pipers (the Assignment of Rents). The Assignment of Rents is not registered against the Title to the Lands.

[4] Title to the Lands has changed at least twice between the Greer's purchase and the Furze's purchase in 2018.

[5] Upon being served with the Furze's application, Whitecap wrote to the Board submitting that it was not the proper party to the application, but that the proper party was Perry Piper. At the Board's request, Mr. and Mrs. Furze served Perry Piper with their application.

[6] Perry Piper is represented in these proceedings by Kane Piper. Kane Piper advised that the surviving spouses of Clinton and Bruce Piper should also be notified of the proceedings and be given the opportunity to participate. The Board consequently notified Bonnie and Terry Ann Piper of the Furze's application. They are also represented by Kane Piper.

[7] Whether Mr. and Mrs. Furze are entitled to payment of rent under the Surface Lease depends on whether the Assignment of Rents effectively "runs with the land" thereby binding subsequent owners of the Lands. Mr. and Mrs. Furze take the position that the Assignment of Rents does not effectively run with the Lands, and that consequently, they are not bound by it. Mr. Kane Piper takes the position that it does and that rents payable under the Surface Lease are properly assigned. Whitecap does not take a position on this issue but continues to pay rents to Perry Piper until the matter is sorted out.

[8] I questioned the Board's jurisdiction to determine whether the Assignment of Rents effectively runs with the Lands and sought submissions from the parties on that issue. Kane Piper submits the Board does not have jurisdiction to determine whether the Assignment of Rents runs with the lands or is binding on Mr. and Mrs. Furze.

[9] Mr. and Mrs. Furze reiterate their position that the Pipers did not perform due diligence in the sale of the Lands to the Greers and that the Assignment of Rents should have been registered on Title. Since it was not, they submit the Surface Lease came with the Lands. This submission addresses the issue of whether the Assignment of Rents is binding as against the current owners of the Lands, but does not address the issue of whether the Board has jurisdiction to consider that question, which is the only issue before me at this time.

ANALYSIS

Does the Board have Jurisdiction to adjudicate Mr. and Mrs. Furze's application?

[10] The Board's jurisdiction is established by its enabling legislation, the *Petroleum and Natural Gas Act* (the *Act*). Section 147 of the *Act* provides that the Board has jurisdiction in relation to:

- a) an application under Division 5 by a person who requires a right of entry or by a landowner;
- b) an application under Division 6 for mediation and arbitration;
- c) an order for payment of costs or advance costs under Division 7;
- d) any other matter in respect of which the board has jurisdiction under this or another Act

[11] Mr. and Mrs. Furze's application is brought using Form 1E. This Form is to be used for claims under section 164, in Division 6, by a party to a surface lease for mediation and arbitration of disagreements respecting the operation of or compliance with a term of a surface lease. It may also be used for claims under section 176, in Division 8, allowing "the person entitled to receive rent or compensation" under a surface lease to make an application to the Board for various remedies if "a right holder fails to pay rent or compensation owing under a surface lease". Section 176(1) of the *Act* provides:

Failure to pay

176 (1) If a right holder fails to pay rent or compensation owing under a surface lease or order of the board granting the right holder a right of entry, on application by the person entitled to receive the rent or compensation, the board, by order, may do any one or more of the following:

- (a) suspend the right of entry with or without terms or conditions;
- (b) determine the unpaid amount and order that interest is payable on that amount;
- (c) terminate the right of entry with or without terms or conditions;
- (d) if the right of entry is terminated under paragraph (c), determine the amount of rent, if any, or compensation owing by the right holder to the date of the termination and order that interest is payable on that amount.

[12] Mr. and Mrs. Furze may bring an application under section 176 of the *Act* against Whitecap if they are the persons entitled to receive rent or compensation under the Surface Lease and Whitecap, the current right holder under the Surface Lease, has failed to pay the rent or compensation owing. Given the existence of the Assignment of Rents and the dispute as to whether it can be enforced against Mr. and Mrs. Furze, the threshold issue for the Board is whether Mr. and Mrs. Furze are persons “entitled to receive the rent or compensation” under the Surface Lease, thus allowing them to advance the claim and the Board to adjudicate the claim on its merits. Whether Mr. and Mrs. Furze are entitled to payment of rent or compensation under the Surface Lease in turn involves determining whether the Assignment of Rents created an interest in the Lands in favour of the Pipers that effectively runs with the Lands, thus disentitling subsequent purchasers, including Mr. and Mrs. Furze from claiming entitlement to payment of rent under the Surface Lease.

[13] The Board, as an administrative tribunal established by legislation, has jurisdiction to interpret its legislation, including issues that go to its jurisdiction. Its determination of those issues is then subject to judicial review (*Dunsmuir v. New Brunswick*, 2008 SCC 9; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61).

[14] In *Black Willow Bison Incorporated v. Canadian Natural Resources Limited*, Order 1919-1, February 7, 2018, the Board found it had jurisdiction in an application under sections 158 and 159 of the *Act* to determine if an existing unregistered surface lease was valid so as to provide a proper right of entry. Determining the validity of the surface lease was necessary to determining the issue of whether the company required a right of entry – a matter within the jurisdiction of the Board.

[15] Similarly in *Fell v. Bonavista Energy Corporation*, Order 1920-3, January 26, 2018, the Board found it had jurisdiction to resolve the threshold issue of whether the applicants were “landowners” within the meaning of the *Act*, which involved determining whether the area occupied by the respondent for its oil and gas operation had been expressly excepted and reserved from the original Crown grant. It went on to find that

the applicants were “landowners” and that the Board had jurisdiction to adjudicate the claims brought under sections 158 and 163 of the *Act*.

[16] On judicial review of the Board’s decision, the court found the Board was not correct in finding that the applicants were “landowners” and determined the Board did not have jurisdiction over the application before it (*Bonavista Energy Corporation v. Fell*, 2019 BCSC 255). The Court did not take issue, however, with the Board’s decision that it had the jurisdiction to determine its jurisdiction requiring, in the circumstances of that case, it to interpret a Crown grant and an Order in Council granting rights to the respondent, to determine whether the applicants were “landowners” and whether the respondent required a right of entry for its oil and gas activities.

[17] Mr. and Mrs. Furze’s application raises a threshold question, namely are they the persons entitled to receive rent or compensation under the Surface Lease? The Board may determine that threshold question going to the Furze’s standing to bring the application and the Board’s jurisdiction to hear it. The fact that the answer to that question involves determining whether the Assignment of Rents creates an interest in the Lands that effectively runs with the Lands thereby disentitling Mr. and Mrs. Furze to any claim of rents under the Surface Lease does not take the threshold question out of the Board’s jurisdiction.

[18] Mr. Piper submits this application is not one listed in section 147 of the *Act* over which the Board has jurisdiction. However, if Mr. and Mrs. Furze are the persons entitled to receive rent under the Surface Lease, then their application brought under section 176 is a matter within the jurisdiction of the Board and falls under subsection (d) of section 147 – “any other matter in respect of which the board has jurisdiction under this or another *Act*”. If Mr. and Mrs. Furze are not the persons entitled to rent under the Surface Lease, they have no standing to advance the claim and the Board has no jurisdiction. The Board has jurisdiction, however, to determine its jurisdiction.

[19] Mr. Piper submits the dispute is between landowners and third parties, not a dispute between landowners and an operator over the parties’ rights and obligations

under the *Act*. Although Whitecap has said it does not take a position on the issue of the enforceability of the Assignment of Rents, it nevertheless continues to pay rent to Mr. Piper until the issue is sorted out. In doing so, it effectively relies on the Assignment of Rents as the rationale for not paying rent to Mr. and Mrs. Furze. By not paying rent to Mr. and Mrs. Furze, Whitecap in essence denies that Mr. and Mrs. Furze are the persons entitled to receive the rent under the Surface Lease. Whitecap may continue to step back and let Mr. and Mrs. Furze and Mr. Piper argue the issue of whether the Assignment of Rents creates an interest in the Lands, but at the end of the day, if the Board determines that Mr. and Mrs. Furze are the persons entitled to receive rent under the Surface Lease and Whitecap as the right holder has failed to pay the rent owing under the Surface Lease, then it will be against the right holder that the Board may make an order under section 176 of the *Act*.

CONCLUSION

[20] Despite my initial concern, upon reflection and consideration of the parties' submissions, I conclude that the Board has jurisdiction to determine whether Mr. and Mrs. Furze are the persons entitled to receive compensation under the Surface Lease, thereby entitling them to bring an application under section 176 of the *Act*. That threshold question to the Furze's standing to bring the application and the Board's jurisdiction to consider it, may be determined by the Board. Determining the threshold question will involve determining whether the Assignment of Rents creates an interest in the Lands that runs with the Lands. As determination of that issue will determine the threshold question of the Board's jurisdiction under section 176 of the *Act*, I find the Board has the jurisdiction to make that determination.

[21] The Board will seek written submissions from the parties on the jurisdictional issue.

DATED: March 21, 2019

For the Board

A handwritten signature in black ink, appearing to read "Cheryl Vickers", with a stylized flourish at the end.

Cheryl Vickers, Chair

June 6, 2019

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 EAST $\frac{1}{4}$ OF SECTION 7 TOWNSHIP 85 RANGE 13
WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

James Michael Furze and
Theresa Michelle Furze

(APPLICANTS)

AND:

Whitecap Resources Inc. and
Perry Piper

(RESPONDENTS)

BOARD ORDER

Heard by written submissions

INTRODUCTION AND ISSUE

[1] James and Theresa Furze purchased the Lands legally known and described as: The South East ¼ of Section 7 Township 85 Range 13 West of the 6th Meridian Peace River District, in May 2018. In August 2018, Mr. and Mrs. Furze applied to the Board seeking payment of rent payable under a Surface Lease registered on the Title to the Lands entered in August 4, 1961 between Florence E. Musywowski, the then owner of the Lands, and Imperial Oil Limited for a wellsite and access road (the Surface Lease). Whitecap Resources Inc. (Whitecap) is now the operator of the well and access road on the Lands and the holder of the surface rights granted by the Surface Lease.

[2] In 1978, the then owners of the Lands, Clinton, Bruce and Perry Piper sold the Lands to Stuart and Denise Greer. The Greers and Pipers entered an Agreement dated November 23, 1978 whereby the Greers agreed that rent payable under the Surface Lease would continue to be paid to the Pipers (the Agreement). The Agreement is not registered against the Title to the Lands.

[3] Title to the Lands has changed at least twice between the Greers' purchase and the Furzes' purchase in 2018. Throughout this time, rent payable under the Lease has been paid to the Pipers, including the rent payable as of August 4, 2018, made prior to the Furzes' application to the Board.

[4] The Furzes' submit the rent owing under the Surface Lease should be paid to them, and seek an Order that all rent payable since May 2018 be paid to them. Their application raises a threshold question: are Mr. and Mrs. Furze the persons entitled to receive rent or compensation owing under the Surface Lease within the meaning of section 176 of the *Petroleum and Natural Gas Act*? That

question, in turn, involves determining whether the Agreement creates an interest in the Lands that effectively runs with the Lands. In a decision rendered March 21, 2019, the Board determined it has jurisdiction to determine this threshold issue, and by letter dated March 27, 2019 invited submissions on this issue.

[5] The Furzes submit the Agreement does not create an interest in land and does not run with the Lands. They submit they are the persons entitled to payment of rent under the Surface Lease.

[6] Whitecap takes no position on this issue and offers to make the August 2019 payment into trust pending resolution of who is entitled to receive the rent. Whitecap reserves the right to make submissions on the ultimate issue of whether an order under section 176 of the *Petroleum and Natural Gas Act* should be made following the Board's decision on the threshold issue.

[7] The Pipers, although given the opportunity to provide submissions on the threshold issue, have not done so. The Pipers did provide submissions on the earlier question of the Board's jurisdiction to determine the threshold issue, taking the position the Board did not have jurisdiction.

THE AGREEMENT

[8] The Agreement identifies the Pipers as the "Vendors" and the Greers as the "Purchasers". It identifies the Lands as the "Premises" and the Surface Lease as the "Lease". The Agreement is substantially reproduced below:

WHEREAS in consideration of the Vendor conveying to the Purchaser the lands known and described as:

...the Premises

the Purchaser agreed inter alia to enter into any agreement or agreements necessary to reserve unto the Vendor all rents, profits and other income

and compensation whatsoever payable to the Lessor or owner of the Premises under and by virtue of the ... Lease

NOW THEREFORE this Indenture witnesseth the parties hereto agree as follows;

- 1) The Purchaser shall observe all obligations and covenants of the Lessor contained in the said Lease, renewals or modifications thereof, or implied by law, including without limiting the generality hereof, any obligations imposed on the Purchaser as Lessor or as owner of the Premises pursuant to the Petroleum and Natural Gas Act R.S.B.C. 1965 C. 33, replacements amendments and regulations thereto.
- 2) All rents profits or other income or compensation whatsoever payable to the Lessor or to an owner or the owner of the premises as a result of the said Lease, renewals, or modifications thereof, and any applicable legislation, shall remain the property of and be paid to the Vendor.
- 3) The Purchaser shall immediately notify the Vendor of any notice or information given to the Purchaser under the terms of the said Lease or under the provisions of the Petroleum and Natural Gas Act R.S.B.C. 1965 C. 33, replacements, amendments and regulations thereto. The Vendor shall be entitled in the place and stead of the Purchaser, to give any notice, make application, renegotiate, or take nay other action whatsoever that might be taken by the Lessor [indecipherable] to obtain increase or continue the rents, profits, income and compensation referred to in paragraph 2 hereof. The Purchaser shall, if requested by the Vendor, execute such further documents, furnish such evidence and do such other acts and things as may be necessary to give full effect to this paragraph.
- 4) Nothing in this agreement contained shall be construed so as to give to the Purchaser any right, title or interest in the said Lease, any renewals or modifications thereof.
- 5) The Purchaser shall notify the Vendor or [sic] any intended transfer, encumbrance, or conveyance by the Purchaser of the premises or any interest therein, prior to such transfer, encumbrance or conveyance taking place, and shall by written notice bring this agreement to the attention of any prospective purchaser, encumbrancer or transferee of the premises or any interest therein. The Purchaser shall cause a prespective [sic] purchaser or transferee of the Premises to enter into an agreement with the Vendor containing the same terms and conditions as set out in paragraph 1 to 8 [sic] hereof.

- 6) Any notice required or permitted to be given under the terms of this Agreement shall be properly given if mailed, postage prepaid and registered, or delivered to the Purchaser at:
GENERAL DELIVERY
GOODLOW, BRITISH COLUMBIA

ANALYSIS

Does the Agreement create an interest in land that runs with the Lands?

[9] As determined by the BC Court of Appeal in *McDonald v. Bode Estate* 2018 BCCA 140 (*McDonald CA*), an assignment or reservation of rents payable under a surface lease may create an interest in land in British Columbia if that is the intent of the parties discernable from the objective evidence of their intentions as embodied in their agreement. The exercise of discerning intent is one of applying the principles of contractual interpretation.

[10] In *McDonald CA*, the Court upheld the trial judge's finding (*McDonald v. Bode Estate* 2017 BCSC 515 (*McDonald SC*)) that the parties' "intention to create a registrable interest that ran with the land was 'manifest from the wording of the Assignment of Rents itself and their conduct'". Both Courts' decisions include comprehensive reviews of the case law on the issue of whether agreements for the reservation or assignment of rents or royalties create an interest in the land or simply a contractual right to the rent or royalty. While not discussed in detail in these reasons, I have found their analyses and review of the case law instructive.

[11] The outcome of this dispute over entitlement to rent payable under the Surface Lease is dependent on whether the parties to the Agreement intended the Agreement to create an interest in the Lands. I find the language of the Agreement does not demonstrate that intent.

[12] I find evidence of the parties' intent in part from the language that is missing from the Agreement. In particular, there is no language of a "grant", "conveyance" or "transfer" of any "right, title or interest" similar to language in other agreements creating an interest in land. The Agreement expresses that "the parties hereto agree as follows" and thereafter sets out the various matters to which they agree.

[13] At Clause 1, the parties agree that the Purchaser shall observe all of the obligations and covenants of the Vendor. Then at Clause 2, the parties agree that "[a]ll rents, profits or other income or compensation whatsoever payable to the Lessor or to an owner or the owner of the premises as a result of the said Lease...shall remain the property of and shall be paid to the Vendor." The language does not create an assignment of the Lessor's rights to receive rents or compensation under the lease, it simply expresses that the parties agree the rents or compensation payable remains the property of the Vendor. Although it says that rents and compensation payable "to an owner or the owner of the premises", potentially implying an intent that subsequent owners are to be bound by this agreement, later language in the Agreement, in particular that at Clause 5, negates that intent.

[14] Clause 5 provides that the Purchaser shall notify the Vendor of any intended transfer, encumbrance or conveyance by the Purchase of the Lands, shall bring the Agreement to the attention of a prospective purchaser, and shall cause a prospective purchaser to enter into an agreement with the Vendor on the same terms (emphasis added). The language of Clause 5 demonstrates a clear intent that the parties' agreement that the rent would continue to be the property of the Pipers was simply a contractual arrangement between the Pipers and the Greers, and contemplates that another agreement between the Pipers and any subsequent purchaser of the lands would be entered on the same terms. If the

parties' intention was to convey an interest in land that ran with the land, it would not be necessary to cause a prospective purchaser to enter a new agreement.

[15] There is no language in the Agreement with respect to the terms being binding on heirs, successors and assigns, or purporting to bind subsequent owners of the Lands to the same terms in the absence of entering an agreement to that effect. The Pipers cannot assert that the rent or compensation payable under the Surface Lease remains their property, as agreed in Clause 2 of the Agreement, against an owner of the Lands subsequent to the Greers in the absence of that owner entering an agreement with them in the same terms, as agreed at Clause 5 of the Agreement.

[16] The fact that the parties did not take steps to register the Agreement in the Land Title Office, while not determinative, is also evidence that they did not intend the Agreement to create an interest in the Lands.

Are Mr. and Mrs. Furze the persons entitled to receive rent or compensation owing under the Surface Lease?

[17] The manifest intent of the Agreement is that it was a contractual arrangement between the Pipers and the Greers that the Pipers would continue to receive the rents payable under the Surface Lease so long as the Greer's owned the Lands, and that a subsequent purchaser was expected to enter a similar contractual agreement with the Pipers if the rents were to continue to remain the property of the Pipers. There is no evidence that subsequent purchasers entered similar agreements and the Furzes have not entered a similar agreement.

[18] I find that the Agreement does not create an interest in land and does not run with the Lands. As the Agreement does not create an interest in land running with the Lands and binding subsequent purchasers beyond the Greers, I find that

the Furzes as the current owners of the Lands step into the shoes of the Lessor under the Surface Lease and are the persons entitled to receive the rent or compensation payable under the Surface Lease capable of bringing an application under section 176 of the *Petroleum and Natural Gas Act*.

ORDER

[19] The Board will seek written submissions from the parties as to whether the Board should make an Order under section 176 of the *Petroleum and Natural Gas Act* as sought by the Furzes.

DATED: June 6, 2019

FOR THE BOARD



Cheryl Vickers, Chair

July 17, 2019

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 EAST $\frac{1}{4}$ OF SECTION 7 TOWNSHIP 85 RANGE 13
WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

James Michael Furze and
Theresa Michelle Furze

(APPLICANTS)

AND:

Whitecap Resources Inc. and
Perry Piper

(RESPONDENTS)

BOARD ORDER

Heard by written submissions

[1] On May 30, 2018, Mr. and Mrs. Furze purchased the Lands legally described as: The South East $\frac{1}{4}$ of Section 7 Township 85 Range 13 West of the 6th Meridian Peace River District. Mr. and Mrs. Furze apply under section 176 of the *Petroleum and Natural Gas Act* for an order for payment of rent owing as of August 4, 2018 under a surface lease registered on the Title to the Lands entered in 1961 between Florence E. Musyowski, the then owner of the Lands, and Imperial Oil Limited for a wellsite and access road (the Surface Lease). Whitecap Resources Inc. (Whitecap) is now the operator of the well and access road on the Lands and the holder of the surface rights granted by the Surface Lease.

[2] In 1978, the then owners of the Lands, Clinton, Bruce and Perry Piper sold the Lands to Stuart and Denise Greer. The Greers and Pipers entered an Assignment of Rent Agreement dated November 23, 1978 whereby the Greers assigned the rents payable under the Surface Lease to the Pipers (the Assignment of Rents).

[3] By email dated April 30, 2018, Mrs. Furze wrote to Whitecap questioning the Pipers' continuing right to receive the rents payable under the Surface Lease and expressing the Furze's disagreement with the terms of the Assignment of Rents. Mr. O'Shea, of Whitecap, indicated that Whitecap supported the agreement with the Pipers and were not at liberty to discuss with the Furzes the rent payable under the Surface Lease. Mr. O'Shea advised Mrs. Furze that she would have to discuss the issue with Perry Piper. Mrs. Furze's emails to Whitecap indicate Mr. Piper was not returning her phone calls.

[4] Whitecap did not pay the rent owing as of August 4, 2018 to the Furzes. The Furzes applied to the Board on August 31, 2018 seeking an order for payment of the rent owing under the Surface Lease.

[5] In a decision rendered March 21, 2019, the Board found it had jurisdiction to determine the threshold issue of whether the Furzes are persons entitled to payment of rent under a Surface Lease, which in turn involved determining whether the Assignment of Rents created an interest in land that ran with the Lands (Order 2005-1).

[6] In a decision rendered June 6, 2019, the Board found that the Assignment of Rents does not create an interest in land and does not run with the Lands. The Board found that the Furzes, as the current owners of the Lands, step into the shoes of the Lessor under the Surface Lease and are the persons entitled to receive the rent or compensation payable under the Surface Lease capable of bringing an application under section 176 of the *Petroleum and Natural Gas Act* (Order 2005-2).

[7] The Board sought submissions from the parties as to whether it should make an Order for payment under section 176 of the *Act*. Only the Furzes responded to this invitation seeking to recover the rent owed as of August 4, 2018. Whitecap previously advised the Board that it took no position on the threshold issue and offered to pay the rent owing as of August 4, 2019 into trust pending determination of entitlement. Whitecap reserved the right to make submissions as to whether the Board should make an order for payment under section 176, but did not respond to the Board's invitation to provide a submission on that issue.

[8] The Board has found that the Furzes are the persons entitled to receive the rent payable under the Surface Lease. The Assignment of Rents does not create an interest in land and run with the Lands and the Furzes are not bound by its

terms. The Furzes became the persons entitled to receive the rent under the Surface Lease upon their purchase of the Lands in May 2018 and were the persons entitled to receive the rent under the Surface Lease as of August 4, 2018 when the rent became due. Whitecap failed to pay the Furzes the rent owing as of August 4, 2018.

[9] Section 176 of the *Petroleum and Natural Gas Act* provides:

176 (1) If a right holder fails to pay rent or compensation owing under a surface lease or order of the board granting the right holder a right of entry, on application by the person entitled to receive the rent or compensation, the board, by order may do any one or more of the following:

- (a) suspend the right of entry with or without terms or conditions;
- (b) determine the unpaid amount and order that interest is payable on that amount;
- (c) terminate the right of entry with or without terms or conditions;
- (d) if the right of entry is terminated under paragraph (c), determine the amount of rent, if any, or compensation owing by the right holder to the date of the termination and order that interest is payable on that amount.

(2) If the board suspends or terminates a right of entry, the board must in accordance with the rules of the board, serve notice of the suspension or termination on the right holder, the owner of the land, the occupant, if any, and the commission.

(3) If a right of entry is suspended under subsection (1)(a) of this section, the obligations of the right holder under the surface lease or order to pay rent, if any, and compensation continue during the period of the suspension.

(4) A suspension of a right of entry under subsection (1)(a) terminates on the date set by the board.

(5) If the suspension of a right of entry is terminated under subsection (4), the board must, in accordance with the rules of the board, serve notice of the termination on the persons who received notice under subsection (2).

[10] I find that Whitecap is a right holder under a surface lease and that Whitecap has failed to pay rent owing under a surface lease to the persons entitled to receive that rent as of August 4, 2019.

[11] The Surface Lease requires the right holder to pay annual rent of \$43.48 per acre. The Board is not able to determine the amount of rent owing as it does not have information as to the size of the leased area, nor does it have information respecting any renewals of rent payable under the Surface Lease. Once the Board is able to determine the amount of rent owing, an order for payment of the rent owing as of August 4, 2018 plus interest will follow. I make the order below to enable the Board to determine the amount of rent owing.

BOARD ORDER

[12] The Surface Rights Board orders that Whitecap Resources Ltd. shall no later than **Friday, July 26, 2019** advise the Board of the amount of rent that it is obligated to pay under the Surface Lease on the Lands entered in 1961 between Florence E. Musyowski and Imperial Oil Limited. **If Whitecap fails to advise the Board of the amount it is obligated to pay in rent under the Surface Lease by Friday, July 26, 2019, the Board may suspend the right of entry with or without terms or conditions.**

DATED: July 17, 2019

FOR THE BOARD



Cheryl Vickers, Chair