

File No. 1920
Board Order No. 1920-1

March 9, 2017

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 WEST ½ OF SECTION 8 TOWNSHIP 88 RANGE 17 WEST OF THE 6TH
MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

SHANE DARRELL FELL AND
PAMELA DAWN FELL

(APPLICANTS)

AND:

BONAVISTA ENERGY CORPORATION

(RESPONDENT)

BOARD ORDER

Heard: by written submissions closing February 27, 2017
Appearances: Steven N. Carey, Barrister and Solicitor, for the Applicants
Michael D. Tatchell, Barrister and Solicitor, for the Respondent

INTRODUCTION AND ISSUE

[1] The Applicants, Shane Darrell Fell and Pamela Dawn Fell, are the registered owners of the Lands legally described as: The West ½ of Section 8 Township 88 Range 17 West of the 6th Meridian Peace River District. The Fells allege that the Respondent, Bonavista Energy Corporation (Bonavista) conducts oil and gas activities on their Lands by operating a well site known as “Imp Fina Rigel” without a surface lease. The Fells filed an application to the Surface Rights Board (the Board) claiming:

“for themselves and for the prior land owners, damages and compensation for trespass, the right of entry, back rent, loss of revenues, pre-and-post judgement interest, legal fees on a solicitor and own client basis for attempting negotiation of a surface lease in good faith prior to a Surface Rights Board application, costs, and such further and other compensation within the Surface Rights Board’s jurisdiction.”

[2] The prior landowners are Keith Wayne Dietz and Susane Lorain Dietz. The Fells identify the Dietzs as persons who are likely to be directly affected by an Order of the Board in the application.

[3] Bonavista submits the Board does not have jurisdiction for three reasons. First, they allege the Fells have divested themselves of any interest in the subject through an assignment and, therefore, have no standing to bring the application. Second, they submit it is the Dietz’s interests that are being advanced by the application but that they do not qualify as either a “landowner” or “occupant” under the *Petroleum and Natural Gas Act* to bring an application. Third, Bonavista submits the application offends the common law rules against champerty and maintenance.

[4] The Fells submit that as the owners of the Lands in issue they can bring the application. They submit there has been no assignment. They submit the Dietzs are

“occupants” within the meaning of the *Petroleum and Natural Gas Act* and that there is no champerty or maintenance. They submit further that Bonavista has attorned to the Board’s jurisdiction.

[5] The only issue at this time is whether the Board has jurisdiction over the Fell’s application. For the reasons that follow, I find the Board has jurisdiction over the Fell’s application to the extent it seeks “for themselves” the remedies sought. If the Dietzs also seek remedies under the *Petroleum and Natural Gas Act*, they must file their own application. I make no findings respecting the jurisdiction of the Board to hear an application by the Dietzs pending receipt of such application.

ANALYSIS

[6] The Board’s jurisdiction can be determined from an analysis of its enabling legislation. I will start with that analysis and then briefly address the other arguments of the parties.

Board’s Jurisdiction

[7] The Board is an administrative tribunal established by the *Petroleum and Natural Gas Act*. As such, its jurisdiction is created, defined and limited by that legislation. The jurisdiction of the Board is expressly set out in section 147 of the *Petroleum and Natural Gas Act* as follows:

- 147 The board has jurisdiction in relation to any or all of the following:
- 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.

[8] For the Board to have jurisdiction, the applicants and the subject of the application must fit squarely within section 147 of the Act as further defined and established by other provisions of the Act.

[9] Bonavista's objections to the Board's jurisdiction relate to the Fells applications brought under Division 5 and Division 6.

Division 5

[10] Division 5 of the Act deals with the Board's jurisdiction to authorize entry to private land for and oil and gas activity, subject to terms and conditions. Section 158, found in Division 5, establishes who may make an application for a right of entry and the conditions upon which an application may be made as follows:

158 A person who requires a right of entry or the landowner may apply to the board for mediation and arbitration if the person and the landowner are unable to agree on the terms of a surface lease.

[11] The terms "landowner", "right of entry" and "surface lease" are all defined in section 141 of the *Petroleum and Natural Gas Act*. An application under section 158 may be brought by either a person requiring a right of entry, as defined, or by a landowner, as defined, under circumstances where the person requiring the right of entry or the landowner are unable to agree on the terms of a surface lease, as defined.

[12] The parties do not dispute that the Fells are "landowners" as defined. They are the persons registered in the land title office as the registered owners of the Lands and are, therefore, landowners within the meaning of the Act. They can clearly make an application under section 158 if the other circumstances are met, namely that there is a "person who requires a right of entry" and the person requiring the right of entry and the landowner are unable to agree on the terms of a surface lease.

[13] "Right of entry" is defined as follows:

“right of entry” means an authorization under section 142 (d) or (e) to enter, occupy or use land for a purpose described in section 142(a) to (c).

[14] An authorization under section 142(d) is a surface lease with the landowner in the prescribed form, and under section 142(e) is an order of the board. The purposes described in section 142(a) to (c) are:

- (a) to carry out an oil and gas activity,
- (b) to carry out a related activity, or
- (c) to comply with an order of the commission.

[15] “Oil and gas activity” is defined with reference to the *Oil and Gas Activities Act* and includes “the production, gathering, processing, storage or disposal of petroleum, natural gas or both”.

[16] A “surface lease” is “a lease, easement, right of way or other agreement authorizing the entry, occupation or use of land for a purpose described in section 142(a) to (c).

[17] The Fells allege Bonavista is using the Lands for an oil and gas activity, namely the operation of the Imp Fina Rigel well, and that it is doing so without the authorization of a surface lease or an order of the Board. They allege, therefore, that Bonavista requires a right of entry. They further allege that they have attempted to negotiate the terms of a surface lease with Bonavista but have been unable to do so.

[18] I do not understand there to be a dispute that Bonavista operates the Imp Fina Rigel well on the Lands and, therefore, conducts an oil and gas activity. I understand there is a dispute as to whether Bonavista is authorized to conduct an oil and gas activity on the Lands. On the basis that Bonavista is alleged to require an authorization in either the form of a surface lease or a board order to conduct the oil and gas activity, the Fells have standing to bring an application under section 158 of the Act seeking a right of entry order and any compensation or rent associated with the right of entry. Whether a right of entry is necessary to authorize Bonavista’s use of the Lands and

whether compensation is owing will be matters for the Board to consider when it hears the merits of the application.

Division 6

[19] Division 6, entitled Board Orders Relating to Rights of Entry, deals with the Board's jurisdiction with respect to applications for damages caused by a right of entry, relief arising from disagreements respecting the operation of or compliance with the terms of a surface lease, review of rent payable under a surface lease, and termination of surface leases or board orders. Section 163, found in Division 6, provides for applications relating to loss or damage caused by a right of entry as follows:

- 163 (1) A person may apply to the board for mediation and arbitration if the person
- (a) is a landowner or occupant of land that is subject to a right of entry, and the exercise of the right of entry causes damage to the land or other land of the owner or occupant or causes loss to the owner or occupant, or
 - (b) is the owner or occupant of land immediately adjacent to land that is subject to a right of entry, and the exercise of the right of entry causes damage to the adjacent land or causes loss to the owner or occupant.
- (2) On application under subsection (1), the board may order the right holder to pay compensation to the landowner or owner or occupant for damage to the land of the landowner or owner or occupant or loss to the landowner, owner or occupant as a result of the exercise of the right of entry, including, without limitation, compensation relating to negotiation with the right holder before the application was made to the board.
- (3) The board may order that interest is payable on an amount payable under subsection (2).

[20] To the extent the Fells, as landowners, allege there is damage to the Lands or loss to them as a result of Bonavista's exercise of a right of entry, the Board has jurisdiction to hear that application.

[21] The Fells say the Dietzs are "occupants" of the Lands in their capacity as mortgagees and so their losses may be claimed in the Fell's application. However, the

person who may apply under section 163(1) and to whom the Board may order payment of compensation is the landowner or the occupant. A person, whether a landowner or occupant, must make their own application for an order requiring a right holder to pay compensation for damage to the land or loss to them as a result of the exercise of a right of entry. If the Dietzs are occupants of land subject to a right of entry, and the exercise of the right of entry causes damage to the land or loss to them as occupants of the land, they may apply to the board under section 163 for a board order requiring the right holder to pay compensation for the damage to the land of which they are an occupant or for their loss. The Fell's cannot bring an application on the Dietz's behalf for the Dietz's loss.

[22] I make no finding as to whether the Dietzs are "occupants" within the meaning of the *Petroleum and Natural Gas Act* and therefore entitled to bring an application under section 163 pending receipt of such an application.

Assignment

[23] Bonavista alleges that the Fell's have divested themselves of any interest in compensation under the Act and other remedial provisions by assigning these rights to the Dietzs. Bonavista produces a copy of an assignment of rents owing under a surface lease respecting another well site on the Lands and submits that "an unmistakable inference arises" that a similar arrangement is in place between the Fells and Dietzs with respect to Imp Fina Rigel.

[24] The Fells and Dietzs deny that there has been an assignment. The evidence that neither the Dietzs nor the Fells have ever received rent from Bonavista respecting the location of Imp Fina Rigel is by way of Affidavit based on information and belief. Bonavista submits this evidence cannot displace the allegation that there is an assignment.

[25] In this preliminary application respecting the Board's jurisdiction, I am not prepared to draw the inference from the existence of one assignment that another assignment

must exist. In any event, the alleged existence of an assignment of rents does not affect the Board's jurisdiction to hear the application brought by a landowner where it is similarly alleged that no surface lease exists although it may ultimately impact any entitlement to compensation or other remedy, if a surface lease or assignment is ultimately proven.

Champerty and Maintenance

[26] The common law rules against champerty and maintenance have no relevance to a dispute over the jurisdiction of an administrative tribunal. The tribunal's jurisdiction is established by its enabling statute. Either an application is brought by a person entitled to bring an application under the statute and relates to a matter over which an application may be brought under the statute or it does not. In the context of the jurisdiction of this Board, an application under section 158 may be brought by a landowner or a person who requires a right of entry. An application under section 163 may be brought by a landowner or an occupant of land subject to a right of entry. To the extent the Fells' application is brought under either or both of those sections and claims a remedy that may be claimed by them, the Board has jurisdiction to hear that application. If the Dietzs seek remedies under the *Petroleum and Natural Gas Act* they must advance their own application for those remedies.

Attornment

[27] The Fells submit Bonavista attorned to the Board's jurisdiction through its "silent acquiescence" of the Board's decision to bypass mediation and its participation before the Board. However, Bonavista's participation before the Board has not been other than to take issue with the Board's jurisdiction. Raising the issue and participating in a process to have that issue resolved does not mean a party attorns to the Board's jurisdiction.

CONCLUSION

[28] The Board has jurisdiction to hear the Fells applications under Divisions 5 and 6 of the *Petroleum and Natural Gas Act* to the extent those applications are brought on their

own behalf and seek remedies to which they may be entitled as landowners or as occupants.

[29] The Fells cannot advance a claim on behalf of the Dietzs. The Dietzs must advance their own claim to the extent they may be entitled to do so.

DATED: March 9, 2017

FOR THE BOARD



Cheryl Vickers, Chair