

June 16, 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 way of written submissions last received May 12, 2017
Appearances: Steven N. Carey, Barrister and Solicitor, for the Fells
Michael D. Tatchell, Barrister and Solicitor, for Bonavista Energy Corporation

INTRODUCTION AND ISSUE

[1] Mr. and Mrs. Fell are the owners of the Lands described as: The West ½ of Section 8 Township 88 Range 17 West of the 6th Meridian Peace River District (the Lands). The Fells claim that Bonavista Energy Corporation (Bonavista) continues oil and gas activities on the Lands, namely the operation of the Imp Fina Rigel well, without a surface lease, refuses to recognize their legal ownership of the Lands, and “refuses to pay a right of entry, back rent, damages, or any costs associated with the prior and continued use of the site”.

[2] There are two parts to the Fell’s claim. The first part, alleging Bonavista requires a right of entry order and claiming compensation including rent for the right of entry, is brought under Division 5, specifically section 158, of the *Petroleum and Natural Gas Act*. The second part, claiming damages and costs associated with the prior and continued use of the site is brought under Division 6, specifically section 163, of the *Petroleum and Natural Gas Act*.

[3] Bonavista applies to have the Fell’s application summarily dismissed as having no reasonable prospect of success. This application is brought pursuant to section 31 of the *Administrative Tribunals Act*, which applies to the Board by way of section 148 of the *Petroleum and Natural Gas Act*. Section 31 of the *Administrative Tribunals Act* allows the Board to dismiss all or part of an application at any time after it has been filed for various reasons including at subsection 31(1)(f) that “there is no reasonable prospect the application will succeed.”

[4] The issue, therefore, is whether all or part of the Fells application should be dismissed on the basis that it has no reasonable prospect of success.

The test under section 31(1)(f) of the *Administrative Tribunals Act*

[5] This is the first time the Board has been asked to exercise its discretion under section 31 of the *Administrative Tribunals Act* to summarily dismiss an application. The provision has been considered a number of times by the Health Professions Review Board, who has found, at least as far as the discretion to summarily dismiss a complaint under section 31(1)(f) as having no reasonable prospect an application will succeed is concerned, that the law respecting section 27(1)(c) of the *Human Rights Code* granting similar discretion to the Human Rights Tribunal is instructive and applicable. The Human Rights Tribunal, and the Courts in reviewing that tribunal's decisions on summary dismissal applications articulate the threshold as "whether the evidence takes the case out of the realm of conjecture". (See *Lee v. British Columbia (Attorney General)* 2004 BCCA 457 and *Gichuru v. British Columbia (Worker' Compensation Appeal Tribunal)*, 2010 BCCA 191).

[6] As noted by the Health Professions Review Board in *Applicant v. The College of Psychologists of British Columbia*, 2009-HPA-052(a), the provision serves a gatekeeper function. Its purpose is "to weed out applications that are unworthy of consideration" thus avoiding a waste of time and resources. The provision should not, however, provide an occasion for a "disguised adjudication of the merits where a serious issue has been raised".

[7] Similar language has also been considered by courts of appeal in considering applications for leave. In that context, the BC Court of Appeal has equated "no reasonable prospect of success" with "bound to fail" (See for example, *Cost Plus Computer Solutions Ltd. v. VKI Studios*, 2015 BCCA 467).

[8] An application for summary dismissal under section 31(1)(f) of the *Administrative Tribunals Act* necessarily involves a preliminary assessment of the merits of an application, both with respect to the law and the evidence, but the assessment is only

undertaken for the purpose of determining whether there is no reasonable prospect of success or that the application is bound to fail. The Board may assess the evidence for the purpose of determining whether the evidence takes the case “out of the realm of conjecture”. Where there are legitimate legal issues, the Board may assess the law to determine the outcome is not clear and obvious. If the Board is not satisfied that the prospect of success is unreasonable in all the circumstances, then the issues should be adjudicated by a hearing panel. The onus is on Bonavista to show that the Fell’s application has no reasonable prospect of success.

THE EVIDENCE

[9] The evidence is that Imperial Oil was granted rights to drill the Imp Fina Rigel well in 1962. At the time, the Lands belonged to the Crown. In 1964, by Order in Council Number 725 (“OIC 725), the Province of British Columbia granted Imperial Oil Limited and its successor and assigns a right of way. Portions of OIC 725 are reproduced below:

THAT Imperial Oil Limited has applied for a right-of-way over certain Crown lands for the laying down, construction, operation, maintenance, inspection, alteration, removal, replacement, reconstruction and/or repair of one or more pipelines together with the right to erect or install all the works of Imperial Oil Limited necessary for its undertaking (hereinafter collectively referred to as installations), including but without limiting the generality of the foregoing, all such compressor and other stations, structures, communication systems, including pole-lines, drips, valves, fittings, meters, and other equipment and appurtenances as may be necessary or convenient in connection therewith for the carriage, conveyance, transportation, storage and/or handling of natural gas, oil, and other liquid or gaseous hydrocarbons and any product or by-product thereof together with the right of ingress and egress to and from the same for its servants, agents, contractors and subcontractors, with vehicles, supplies and equipment for all purposes necessary or incidental to its undertakings.

AND TO RECOMMEND that pursuant to section 70 of the Land Act being Chapter 206 of the Revised Statutes of British Columbia, 1960, and all other powers thereunto enabling Her Majesty the Queen in right of the Province of British Columbia (hereinafter referred to as the Grantor), in consideration of the payment of the sum of Six Thousand, Four Hundred and Seventy Dollars and sixty-seven cents (\$6,470.67) (the receipt whereof is hereby acknowledged) doth grant unto Imperial Oil Limited , its successors and assigns (hereinafter referred

to as the Grantee), the full, free and uninterrupted right and privilege to enter, labour, and pass along, over and under the Crown lands shown outlined in red on Plans No. ..., C.G. 1130...on file in the Land Registry Office, Kamloops B.C....for all purposes necessary or incidental to the operation of a pipeline.

[10] OIC 725 includes the following terms:

2. That the Crown lands shall be used solely for the purposes aforesaid and for no other purposes.
13. That the Grantor shall at all times be entitled to the use and possession of the surface of the Crown lands and to dispose of same for any purposes whatsoever subject to the rights hereby granted.
14. That this grant is and shall be of the same force and effect to all intents and purposes as a covenant running with the land, and these presents, including all the conditions and provisions herein contained, shall extend to and be binding upon and enure to the benefit of the Grantee and the Grantor and their respective heirs, executors, administrators, successors and assigns.
25. That the Grantee, its contractors, agents or employees shall be permitted to pass or repass over the Crown lands for the purpose of ingress and egress, including the right to construct, maintain and use on the Crown access road or roads reasonably required in connection only with the exercise of the rights and privileges granted herein provided however, that the Grantee shall not extend to other parties any right to the use of such road or roads and that the Grantor reserves the right to grant rights-of-way for any purpose across or along the said road or roads.

[11] CG 1130, the plan on file in the Land title Office, shows the Imp Fina Rigel well site, a pipeline right of way and an access road. The pipeline right of way and an area for the well site are outlined in red. The access road is depicted with dotted lines that are not outlined in red. The wellsite area on the Lands is noted in the Book of Reference to the plan as 3.09 acres and the area for the pipeline right of way is noted as 4.31 acres.

[12] Imperial Oil registered its right of way granted by OIC 725 in the Land Title Office on December 8, 1969 by Charge D15450.

[13] On June 13, 1991, the Crown granted the fee simple in the Lands to Joseph Andre Belanger for consideration of \$5,330.00 subject to “a statutory right of way in favour of Imperial Oil Ltd. and Orbit Oil & Gas Ltd. registered in Land Title Office under number D15450 and PC55797 including the right of the Grantor to continue or renew it”.

[14] In 2011, the Crown consented to the assignment of the right of way from Imperial Oil to Dominion Exploration Canada and then to Bonavista.

[15] Keith and Suzanne Dietz purchased the Lands in 1996 and Mr. and Mrs. Fell purchased the Lands in 2016. The charge in favour of Bonavista is noted on the title to the Lands.

SUBMISSIONS

[16] Bonavista submits that the area of the Lands consisting of the Imp Fina Rigel well and roadways and pipeline was granted as a right of way and easement as shown on Plan CG1130 to Imperial Oil Limited by way of Order in Council dated March 17, 1964, that these rights run with the land and were transferred to Bonavista. Bonavista submits the rights conveyed by OIC 725 were expressly excepted from the original Crown Grant of the Lands and that the Fells title does not include the area shown on Plan CG1130. Bonavista says it does not require a right of entry, that it has already paid for the right to occupy and use the well site area to operate a well site, that the Fells do not own the area covered by Plan 1130 and, consequently, the Fells can have no case.

[17] The Fells submit that the Order in Council does not allow anything more than pipeline installation and maintenance, and that no right of entry exists for the well site. They argue that CG1130 is not excepted from their title to the Lands and that all OIC 725 does is grant a limited ability to use the well site area for pipeline purposes. They submit it does not grant the right to access the well site area on the Lands without compensation to them as owner and does not stand in place of a right of entry. They submit the drilling authority is not a right of entry.

[18] In the alternative, if a right of entry exists, the Fells submit they continue to suffer general loss as well as damage to the Lands for which they are entitled to compensation.

[19] In support of their respective arguments, both parties refer to various provisions in OIC 725 and the language in the original Crown grant, as well as to historical and current provisions of the *Petroleum and Natural Gas Act* and *Land Act*.

ANALYSIS

The Division 5 applications

[20] I must ask whether it is clear and obvious that a right of entry already exists over the Lands such that the Fells application under Division 5 of the *Petroleum and Natural Gas Act* is bound to fail.

[21] It is clear that the original Crown grant of the Lands to Joseph Andre Belanger was subject to Imperial Oil's rights registered as charge D15450. It is also clear that the area covered by the rights granted by OIC 725 and registered against the title to the Lands includes the 3.09 acres used for the Imp Fina Rigel well. What those rights entail, however, is at issue in the Fells' application.

[22] Determining the extent of the rights granted by OIC 725 and what rights were exempted from the original Crown grant involves interpreting OIC 725, the original drilling authority, the Crown grant, the provisions of the *Land Act* in force at the time of the original Crown Grant, and the historical and current provisions of the *Petroleum and Natural Gas Act*. Both parties advance interpretive arguments in support of their respective positions as to whether Bonavista has an effective right of entry to the Lands to operate the Imp Fina Rigel well and access road, and whether compensation is or is not owing to the Fells. These arguments are complex. I am not satisfied that the relative

merits of the parties' respective interpretations should not be considered by a hearing panel.

[23] Bonavista relies on the Court's decision in *Baird v. Salle*, 2008 BCSC1232, involving a dispute between the owners of land and the holders of water licenses to a lake on the land, some of which pre-dated the Crown grant of the land. Bonavista notes in particular the Court's finding at paragraph [41] "that the pre-existing licenses and the licenses which superseded them are exceptions to the original grant, and the defendants may exercise their rights under those licenses without the payment of compensation to the plaintiffs". Bonavista submits the decision explains the situation, albeit in a different context, that the parties to this case find themselves in.

[24] I note that the decision in *Baird v. Salle* followed a summary trial application raising a number of issues including: the interpretation of the original Crown grants and in particular the effect of notations on the grants referring to existing water licenses and whether the rights under the water licenses were reservations from the Crown grants; whether there was a trespass by the defendants; and whether the defendants were required to expropriate the plaintiff's land in order to exercise their water licenses. The Court's decision respecting the defendants' rights under the water licenses and dismissing the plaintiff's claims for declarations including that the defendants be prohibited from exercising their rights without compensation followed a thorough analysis of the background and earlier proceedings before the Environmental Appeal Board, interpretation of the original Crown grant and other documents in evidence to determine the effect of the Crown grant, and interpretation of legislative provisions in the *Water Act* and the *Land Act*. I am not able to say that the result in *Baird v. Salle* will necessarily be the result in the Fell's application in the absence of thorough consideration of all of the background, interpretation of the particular documents in issue in this case, and analysis of the applicable law.

[25] It is not appropriate for me to analyze the relative merits of the arguments advanced by both parties as to the extent of the rights granted in OIC 725, the extent of

the interest exempted by the Crown grant, and the consequent effect those rights and exempted interests have on the Fells' claims for compensation other than to say I am not satisfied that the Fells' arguments have no reasonable prospect of success or are bound to fail. Whether their arguments will ultimately succeed will be for the hearing panel to determine.

The Division 6 application

[26] The application under Division 6 includes claims for damages and loss caused by Bonavista's use of the Lands. These claims may be brought either as the owner or occupant of land subject to a right of entry or as the owner of land or occupant of land immediately adjacent to land that is subject to a right of entry. If it is ultimately found that a right of entry is not required, the Fells may nevertheless advance a claim for damages as the owner of land immediately adjacent to land subject to a right of entry.

[27] Whether there has been damage to the Lands or loss to the Fells, and whether that damage or loss was caused by Bonavista's exercise of a right of entry are properly issues for the hearing panel.

ORDER

[28] The application for summary dismissal is dismissed.

DATED: June 16, 2017

FOR THE BOARD



Cheryl Vickers, Chair