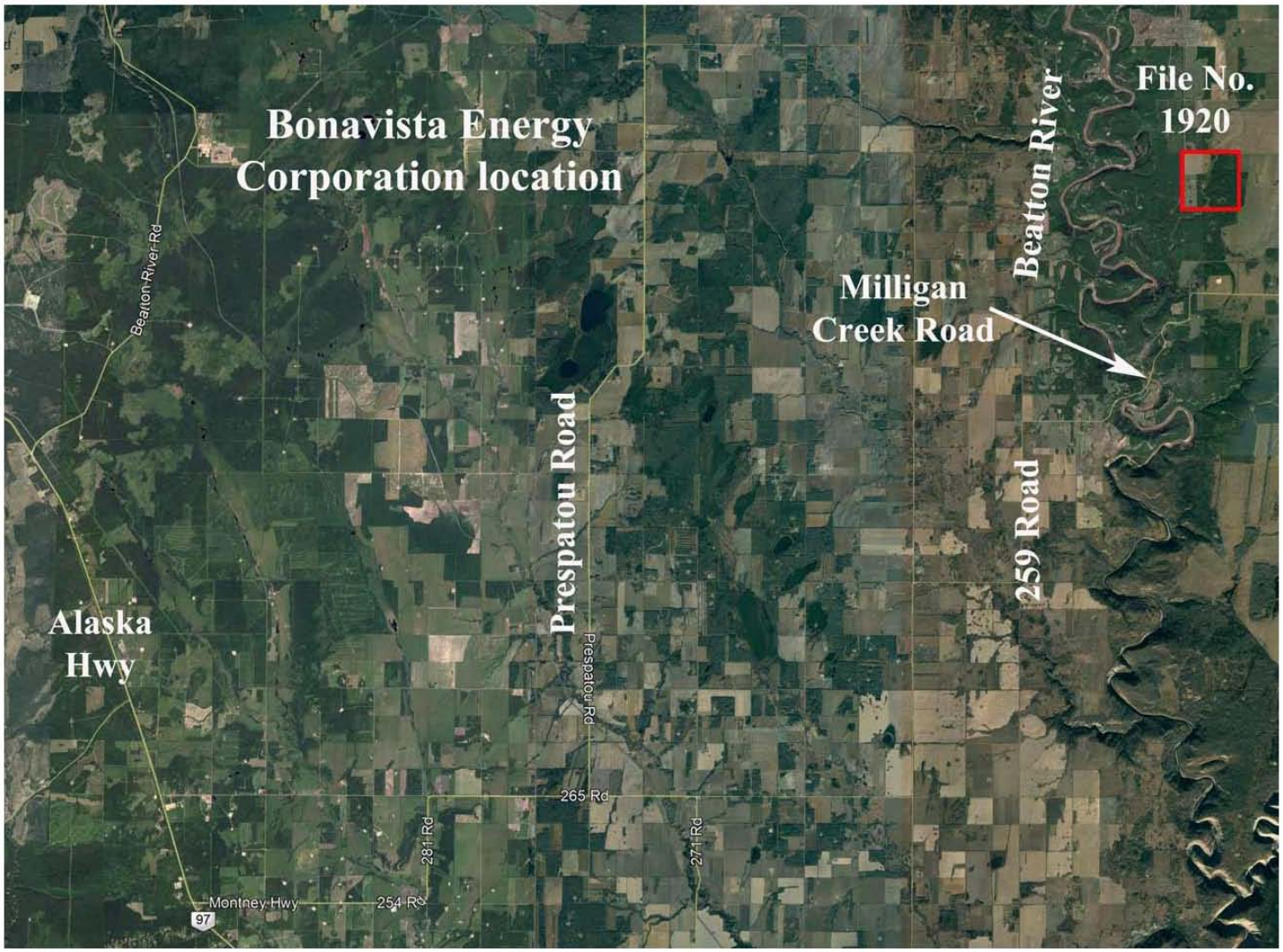
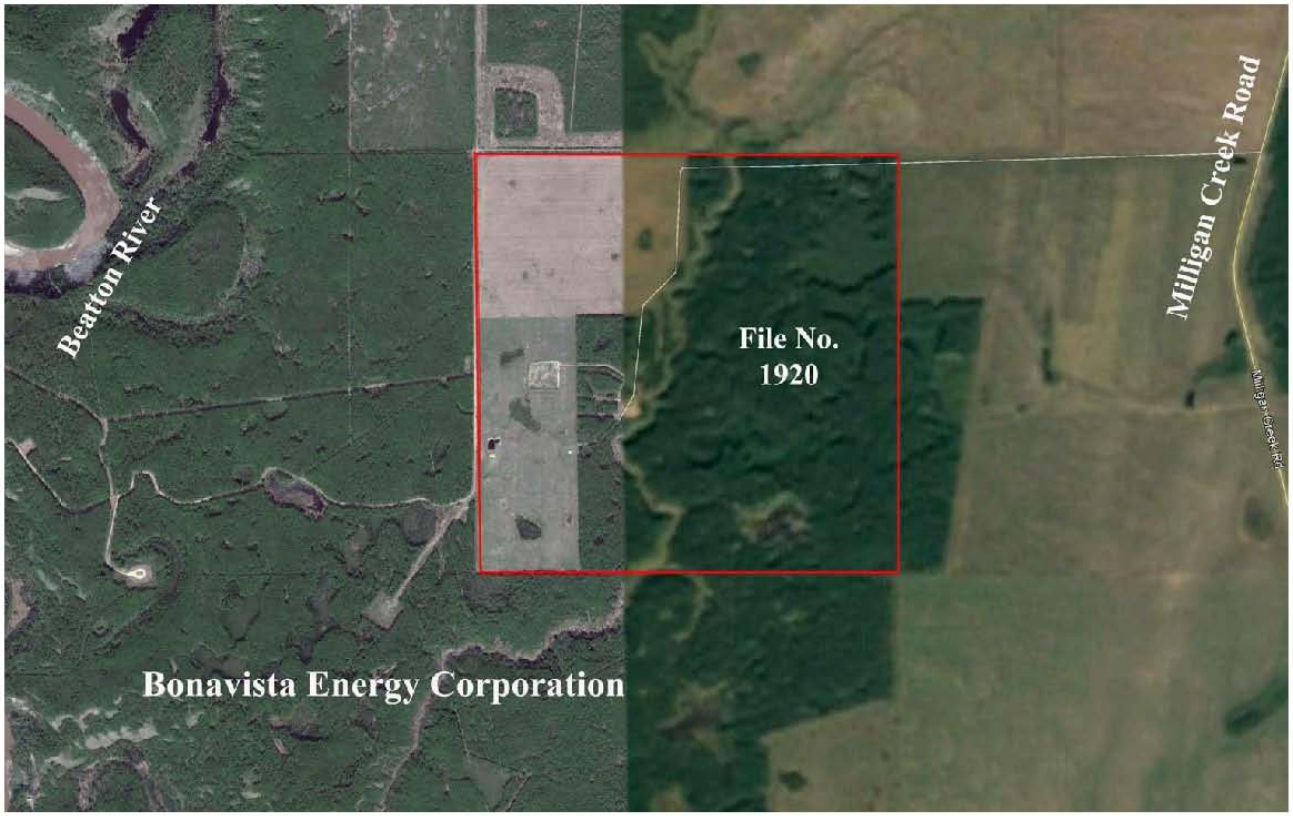

Bonavista Energy
Corporation location
File No.
1920
Beatton River
Milligan
Creek Road
Beaton River Rd
Prespatou Road
259 Road
Alaska
Hwy
Prespatou Rd
265 Rd
281 Rd
271 Rd
Montney Hwy
254 Rd
97


Beaton River
File No.
1920
Milligan Creek Road
Milligan Creek Rd
Bonavista Energy Corporation

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

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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

File No. 1920
Board Order No. 1920-2

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

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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 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 Fell's 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

File No. 1920
Board Order No. 1920-3

January 26, 2018

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 closing December 20, 2017
Appearances: Steven N. Carey, Barrister and Solicitor, for the Fells
Michael D. Tatchell, Barrister and Solicitor, for Bonavista Energy Corporation

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INTRODUCTION

[1] This is a second application by the Respondent, Bonavista Energy Corporation (Bonavista), challenging the jurisdiction of the Board to hear an application brought by Shane and Pamela Fell under sections 158 and 163 of the *Petroleum and Natural Gas Act* (the *Act*). Bonavista submits the Fells cannot bring their claims within the provisions of the *Act* because, in its submission, the well site in respect of which the Fells claim Bonavista requires a right of entry is on Crown land, and neither Shane nor Pamela Fell is a "landowner" within the meaning of the *Act*. Bonavista submits that Crown land is beyond the jurisdiction of the Board.

[2] The Fells dispute that the wellsite area is Crown land. They say they are the owners of the land and that Bonavista operates the well site known as Imp Fina Rigel without a proper right of entry.

[3] Bonavista submits the Board does not have jurisdiction to resolve the threshold issue of who owns the land in question. It says "it is not the province of the SRB to make declarations of title where there is a conflict as to who is actually the owner of the land in question" but that these are "threshold issues for the Supreme Court".

[4] In the alternative, Bonavista submits that if the Board decides it has jurisdiction to address the threshold issue, it should confirm it lacks jurisdiction to entertain the Fells' application.

[5] The Fells submit the Board has jurisdiction to make a determination of ownership as between parties to an application, that the Board has jurisdiction to hear the Fells' application, and that any interpretation of rights must wait for a full hearing.

PRELIMINARY MATTER

[6] In the covering letter providing Bonavista's submissions on this jurisdictional challenge, counsel requested that the Board conduct a hearing to hear the parties' submissions and determine whether it has jurisdiction. I take this request to be for an oral hearing. Counsel does not provide any reasons in support of this request.

[7] The issues raised in this application are questions of law. The Board has been provided with evidence by way of Affidavit and there has been no request from any party to cross-examine any of the affiants, nor do I see the need for any such cross-examination. The evidence is not in dispute and there are no issues of credibility. The dispute involves interpretation of legislation and other documents about which both parties have provided written submissions.

[8] I do not see a need for an oral hearing but will proceed to hear the application by way of written submissions as originally contemplated when the process and dates for written submissions were established.

BACKGROUND

[9] The predecessor to Bonavista, Imperial Oil Limited (Imperial Oil), was granted rights to drill the Imp Fina Rigel well in 1962. At that time, the land in issue belonged to the Crown.

[10] In 1964, by Order in Council Number 725 (OIC 725), the Province of British Columbia granted Imperial Oil and its successors and assigns a right of way granting "the full, free and unencumbered 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", on various terms.

[11] Plan 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 on several parcels including the West ½ of Section 8 Township 88 Range 17 West of the 6th Meridian Peace River District (the Lands). The pipeline right of way and an area for the well site are outlined in red on Plan CG 1130. 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 on the Lands 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 subject to "a statutory right of way in favour of Imperial Oil Ltd. and Orbit Oil & Gas Ltd. registered in the Land Title Office under number D15450 and PC55797 including the right of the Grantor to continue or renew it".

[14] Keith and Suzanne Dietz purchased the Lands in 1996.

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

[16] In 2016, Mr. and Mrs. Fell purchased the Lands and became the owners registered in the Land Title Office. The charge in favour of Bonavista, registered as D15450, is noted on the title to the Lands.

[17] In their application to the Board, the Fells claim that 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".

[18] There are two parts to the Fell's claim. The first part alleges Bonavista requires a right of entry and claims compensation including rent for the right of entry. The second part claims damages and costs associated with the prior and continued use of the site.

[19] In its first application challenging the Board's jurisdiction to hear the Fells' application, Bonavista submitted the Board did not have jurisdiction because the Fells had divested themselves of any interest through an assignment, the Fells were advancing the interests of the former landowners who do not qualify under the *Act* to bring an application, and the application offended the common law rules of champerty and maintenance. In that application, Bonavista did not dispute that the Fells are "landowners" as defined in the *Act*.

[20] The Board determined it had jurisdiction to hear the Fells' application to the extent it was brought on their own behalf (*Fell v. Bonavista Energy Corporation*, Board Order 1920-1, March 9, 2017).

[21] Bonavista then brought an application to the Board seeking to have the Fells' claims summarily dismissed as having no reasonable prospect of success pursuant to section 31(1)(f) of the *Administrative Tribunals Act*. In that application, Bonavista alleged, as it does now, that the area of the Lands on which the Imp Fina Rigel well, roadway and pipeline are located was granted as a right of way and easement as shown on Plan CG 1130 to Imperial Oil by way of OIC 725, that these rights run with the land and were transferred to Bonavista. Bonavista submitted 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 CG 1130. Consequently, Bonavista submitted that it does not require a right of entry, the Fells do not own the

land covered by Plan CG 1130, and the Fells' application should be dismissed as having no reasonable prospect of success.

[22] In dismissing Bonavista's application (*Fell v. Bonavista Energy Corporation*, Board Order 1920-2, June 16, 2017), the Board said:

> [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 Fell's 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.
>
> …
>
> [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 Fell's claims for compensation other than to say I am not satisfied that the Fell's 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.

[23] Bonavista sought judicial review of Board Order 1920-2. In its petition for judicial review, Bonavista asserted that the Board has no jurisdiction over the Fells' claims on the basis that the land in issue remains Crown land. Adair, J. dismissed Bonavista's petition on the grounds that it was premature. She found that Bonavista had failed to make a clear and direct challenge to the Board's jurisdiction over the Fells' claims on the particular grounds put forth in the petition for judicial review of Order 1920-2. She

found the Board had never been asked, nor had the opportunity, to consider a challenge to its jurisdiction based on the grounds asserted in the petition, namely that the land over which Bonavista enjoys statutory rights-of-way remains Crown land and is beyond the jurisdiction of the Board.

[24] Bonavista challenges the Board's jurisdiction to hear the Fell's application in this application on the basis that the Fells are not "landowners" within the meaning of the *Act* and that the land in issue is Crown land beyond the jurisdiction of the Board. First, however, Bonavista challenges the Board's jurisdiction to even make these "threshold" determinations.

ISSUES

[25] Does the Board have jurisdiction to resolve the threshold issue of whether the Fell's are "landowners", which involves determining whether the OIC 725 land shown on Plan CG 1130 was expressly excepted and reserved from the Crown grant to Belanger?

[26] If so, was the OIC 725 land shown on Plan CG 1130 expressly excepted from the Crown grant to Belanger and are the Fell's "landowners" within the meaning of the *Act*?

[27] Does the Board have jurisdiction to hear the merits of the Fells' application?

ANALYSIS

Does the Board have jurisdiction to resolve the threshold issue of whether the Fell's are "landowners", which involves determining whether the OIC 725 land shown on Plan CG 1130 was expressly excepted and reserved from the Crown grant to Belanger?

[28] The issue Bonavista submits the Board does not have jurisdiction to address is the same issue raised in its earlier application to have the Fells' claim dismissed as having no reasonable prospect of success. Bonavista submitted in that application, as it does now, that title to the land covered by OIC 725 did not pass to Belanger with the original Crown grant and consequently did not pass to the Fells on their purchase of the Lands.

Bonavista argued then, and as it does now, that the land granted as a right-of-way by OIC 725 to Imperial Oil was expressly reserved from the Crown grant, and that consequently the Fells' application under the *Act* had no reasonable prospect of success.

[29] For the reasons quoted above, I dismissed that application. I said the issue was complex and that the relative merits should be determined by a hearing panel. Without assessing the relative merits of the parties' arguments, I was not satisfied that the Fells' argument that the rights registered against the Lands did not give Bonavista a right of entry to operate the Imp Fina Well was bound to fail.

[30] Bonavista now submits that the Board does not have the jurisdiction to resolve the issue raised in its previous application at all. For the reasons that follow, I find that the Board does have the jurisdiction to consider and determine the "threshold" issue raised by Bonavista. This issue is part of determining whether the land is land over which the Board has jurisdiction and whether the Fells are "landowners" within the meaning of the *Act*, and therefore entitled to bring the application.

[31] The Board, as an administrative tribunal established by legislation, has jurisdiction to interpret its enabling legislation, including to determine 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).

[32] The Board is a specialized tribunal established under the *Act* to resolve certain types of disputes respecting access to "land", between "landowners", and persons who require a "right of entry", all defined terms, to that "land" for oil and gas activities, and to determine compensation and damages arising from a "right of entry". The *Act* provides definitions, including those just noted and others, which circumscribe the Board's jurisdiction. In order to exercise its jurisdiction, and indeed determine whether it has jurisdiction to resolve a claim, the Board must interpret the words of its enabling

legislation and determine whether the persons bringing claims are entitled to bring those claims, whether the land affected is land over which the Board has jurisdiction, and whether the remedies sought are within the scope of what the Board is authorized to provide.

[33] In this case, the Fells say they are “landowners”, within the meaning of the *Act*, and that Bonavista is engaged in oil and gas activities without the required “right of entry”, within the meaning of the *Act*. Bonavista says the Fells are not “landowners”, the land in issue is “Crown land”, and it does not need a “right of entry”. Whether the Fells are “landowners”, within the meaning of the *Act* and whether Bonavista requires a “right of entry” within the meaning of the *Act* are matters within the Board’s jurisdiction.

[34] In the circumstances of this case, determining these issues will be more complex than usual. As I said in Order 1920-2 determining these issues will involve interpreting OIC 725, the original drilling authority, the Crown grant, the various other documents referenced by the parties and the current and former provisions of the *Land Act* and *Petroleum and Natural Gas Act*. But the fact that a resolution of these issues will be more complex than usual and involve interpretation of documents not normally necessary to resolve threshold questions like whether an applicant is a “landowner” within the meaning of the *Act*, does not take the issues outside of the Board’s jurisdiction. In order to assess whether the Fells can bring an application under Parts 5 and 6 of the *Act*, the Board must have the jurisdiction to engage in this analysis and make the necessary determinations as to whether the Fells are indeed “landowners”, whether the land in issue is “Crown land”, and whether Bonavista requires a “right of entry”, all within the meaning of the *Act*.

[35] Bonavista submits that a declaration of title is not within the Board’s statutory power of decision. The Fells are not seeking a declaration of title. The Fells are saying they are the owners of land that is being used for an oil and gas activity without a right of entry and seek remedies from the Board. They say they have been unable to negotiate a surface lease with Bonavista. Bonavista says it has the requisite authority

to enter the Lands to conduct its oil and gas activity. Whether it does or does not, and whether the Fells are entitled to compensation or damages are matters within the Board's jurisdiction to determine.

Was the OIC 725 land shown on Plan CG 1130 expressly excepted from the Crown grant to Belanger and are the Fell's "landowners" within the meaning of the *Act*?

[36] It is well established that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. v. Zibbler, Siblin & Associates, Inc., et al* [1998] 1 SCR 27).

[37] The Board's mandate under the *Petroleum and Natural Gas Act* is to resolve, by mediation and arbitration, disputes between "landowners", as defined, and persons who require entry to "land", as defined, for oil and gas activities.

[38] In accordance with section 142 of the *Act*, persons may not enter, occupy or use "land" for oil and gas activities without either negotiating a surface lease with the "landowner" or obtaining an order of the Board.

[39] The definition of "land" is set out at section 141(1) as follows:

> "land" means the surface of land other than restricted land or unoccupied Crown land;

[40] The definitions of "restricted land" and "unoccupied Crown land" are found at section 1 of the *Act* as follows:

"restricted land" means any of the following:

> (a) Crown land that is used or occupied by or on behalf of the government;
> (b) land granted by the government to a railway company under an Act that is used or occupied by or on behalf of the railway company;

> (c) Crown land to which access is restricted or prohibited under another Act;
>
> "unoccupied Crown land" means Crown land, other than restricted land,
>
> (a) in respect of which there has been no disposition of an interest in the surface on the land under the Land Act, or
> (b) that is subject to
> (i) [2015-26-49]
> (ii) a licence under section 39 of the Land Act
> under which a person is granted
> (iii) non-intensive occupation or use of the land, or
> (iv) occupation and use of an extensive area of Crown land for commercial recreational purposes.

[41] "Crown land" is also defined at section 1 as follows:

> "Crown land" means ungranted Crown or public land that belongs to the government, whether or not any water flows over or covers it.

[42] Bonavista does not assert that the land in issue constitutes either restricted land or unoccupied Crown land. It says, however, that the land is "Crown land" as defined in the *Land Act*. The definition of "Crown land" in the *Land Act* is:

> "Crown land", …means land, whether or not it is covered by water, or an interest in land, vested in the government.

[43] For the purpose of determining the Board's jurisdiction, however, the definition of "Crown land" set out in the *Act*, is the definition that applies, not the definition in the *Land Act*.

[44] Division 5 of the *Act* deals with the Board's jurisdiction to authorize entry to "land" for an oil and gas activity, subject to terms and conditions. Section 158 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.

[45] The definition of “landowner” is set out at section 141(1) as follows:

> “landowner” means the owner of land that is subject to a right of entry or a proposed right of entry.

[46] The term “owner” is also defined at section 141(1) as follows:

> “owner”, in relation to land, means either of the following:
>
> (a) a person registered in the land title office as the registered owner of the land or as its purchaser under an agreement for sale;
> (b) a person to whom a disposition of the land has been issued under the *Land Act*,
>
> but does not include the government;

[47] A “landowner”, therefore, includes the person registered in the land title office and the person to whom a disposition of Crown land has been made under the *Land Act*. The Board does not have jurisdiction over ungranted Crown land that belongs to the government, but does have jurisdiction over Crown land in respect of which there has been a disposition under the *Land Act* as well as land registered to a person other than the government in the land title office.

[48] The Fells are the persons registered in the Land Title office as the registered owners of the Lands. Bonavista says, however, that the Lands do not include the OIC 725 lands shown on Plan CG 1130 but that those lands are owned by the Crown and granted to Bonavista as a right of way in accordance with OIC 725. It is necessary, therefore, to determine whether the OIC 725 lands shown on Plan CG 1130 are owned by the Crown or whether ownership passed to Belanger with the Crown grant.

[49] The relevant provisions of the Crown grant dated June 1991 to Joseph Andre Belanger are reproduced below:

> …in consideration of the sum of $5,330.00 of lawful money of Canada now paid by the Grantee to the Grantor (the receipt of which the Grantor acknowledges), the Grantor grants to the Grantee, in fee simple, the parcel of land and premises situate in the Peace River Assessment Area in the Province of British Columbia, described as follows:
>
> > West half of Section 8, Township 88, Range 17, West of the Sixth Meridian, Peace River District
>
> as shown on the official plan confirmed by the Surveyor General of the Province of British Columbia and coloured red on the annexed plan.
>
> PROVIDED THAT the estate herein granted is subject to:
>
> (a)…
> (b) all subsisting grants to, or subsisting rights of any person made or acquired under the Mineral Tenure Act, Coal Act or Petroleum and Natural Gas Act or under any prior or subsequent enactment of the Province of British Columbia of like effect;
>
> (c) a statutory right-of-way in favour of Imperial Oil Ltd. and Orbit Oil & Gas Ltd. registered in the Land Title Office under number D15450 and PC55797 including the right of the Grantor to continue or renew it;
>
> EXCEPTING AND RESERVING, nevertheless to the Crown, the rights, benefits privileges and obligations of the Grantor of the statutory right-of-way registered in the Land Title Office under No. D15450 and PC55797.
>
> EXCEPTING AND RESERVING, nevertheless to the Grantor, its successors and assigns the exceptions and reservations of the interests, rights, privileges and titles referred to in section 47 of the Land Act.

[50] Bonavista submits the Crown grant expressly excepts the OIC 725 lands; the Fells submit it does not and that Bonavista is confusing reserved rights in the Crown grant with reservations of title. For the reasons that follow, I agree with the Fells that the Crown grant does not except the OIC 725 land from the grant of the fee simple interest in the Lands to Belanger.

[51] First, the “annexed plan” referred to in the Crown grant as showing the parcel granted in fee simple, shows the whole of the Lands inclusive of the area covered by Plan CG 1130, but with the exception of a roadway, coloured red. The roadway area is a brownish colour.

[52] Bonavista argues the colouring of the plan associated with the Crown grant is irrelevant to the validity of OIC 725 and its enforceability against the registered owner of the Lands at any given time. I agree that the colouring of the plan on the Crown grant is irrelevant to an interpretation of the rights granted by OIC 725, but it is entirely relevant to whether the OIC 725 land and in particular that area shown in Plan 1130 is exempted or excepted from the Crown grant. The Crown grant specifically confers the fee simple interest in the parcel shown in red on the annexed plan. The colouring on the plan annexed to the Crown grant shows the area covered by Plan CG 1130 in red. The land covered by Plan CG 1130 is therefore included in the Lands granted by the Crown grant. The road, designated in a colour other than red, does not pass to the grantee in accordance with either the terms of the Crown grant or (what is now) section 57 of the *Land Act*.

[53] Second, the first “excepting and reserving” clause in the Crown grant excepts and reserves to the Crown the “the rights, benefits privileges and obligations of the Grantor of the statutory right-of-way registered in the Land Title Office under No. D15450”, not the fee simple interest in Plan CG 1130. The fee simple estate in the Lands is subject to the statutory right-of-way registered against title as charge D15450. If the fee simple underlying title to the land covered by Plan CG 1130 were exempted, the description of the land being conveyed would expressly exempt Plan CG 1130. It does not.

[54] Section 40(4) of the *Land Act* contemplates that the land comprising the servient tenement to a right of way granted by the Crown can cease to become Crown land, while rights of the grantor are reserved. That section provides:

> 40 (4) An easement or right of way granted before or after May 1, 1970 may be continued or renewed by the minister for the period he or she believes proper, despite the Act or the *Land Title Act*, and even if the servient tenement has ceased to be Crown land.

[55] The rights of the Crown as grantor of a right of way to continue and renew a right of way continue even if the underlying title to the servient tenement ceases to be Crown land. The first "excepting and reserving" clause in the Crown grant reserves the "rights, benefits, privileges and obligations of the Grantor of the statutory right-of-way registered in the Land Title Office under No. D15450", consistent with section 40(4) of the *Land Act*. It does not expressly reserve title to the land covered by the right of way.

[56] The second "excepting and reserving" clause excepts and reserves to the Crown "interests, rights, privileges and titles referred to in section 47 of the Land Act." Section 47 of the *Land Act* in force at the time reserved various rights to the Crown to enter and use the land for various purposes, and provided that a disposition did not convey title to minerals, petroleum and gas found in or under the land, but did not apply to except the fee simple interest in a portion of the land unless that exception was made expressly. There is no such express exception in the language of the Crown grant to Belanger. (The whole of section 47 of the *Land Act* in force at the time of the Crown grant is reproduced at Appendix "A".)

[57] I conclude that the "excepting and reserving" clauses do not expressly except and reserve to the Crown the fee simple interest in any portion of the Lands.

[58] Bonavista argues that section 23(2)(a) of the *Land Title Act* operates to expressly except the OIC 725 lands from the Crown grant to Belanger. Section 23(2)(a) of the *Land Title Act* is set out below:

> 23 (2) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple

> to the land described in the indefeasible title, subject to the following:
> (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown

[59] Section 23(2)(a) of the *Land Title Act* makes a grant of indefeasible title subject to the "subsisting conditions, provisos, restrictions, exceptions and reservations…contained in the original grant or contained in any other grant or disposition from the Crown", but as discussed above, the exceptions and reservations in the Crown grant to Belanger, do not expressly reserve title to the Crown in the OIC 725 lands. The Lands are conveyed in the Crown grant subject to the rights conveyed by OIC 725, which rights are registered against title as charge D15450. But there is a difference between conveying indefeasible title to the Lands subject to the right of way granted by OIC 725, and excepting title to the lands over which the right of way is granted from the grant of indefeasible title. The language of the Crown grant does the former and not the latter.

[60] Section 23(2)(a) operates to confirm that the OIC lands are in fact not excepted from title. Section 23(2)(a) says the indefeasible title is conclusive evidence "that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to" the subsisting conditions etc. (emphasis added). The land described in the indefeasible title is "THE WEST ½ OF SECTION 8 TOWNSHIP 88 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT". The land described in the indefeasible title is not the West ½ of Section 8 Township 88 Range 17 West of the 6th Meridian Peace River District, EXCEPT PLAN CG 1130. If the description of the Lands in the indefeasible title expressly excepted Plan CG 1130, then I would agree that the indefeasible title did not include an estate in fee simple to the land covered by Plan CG 1130, but only to those portions of the Lands other than those covered by Plan CG 1130. The description of the Lands in the original Crown grant and in the current indefeasible title naming the Fells as registered owner is the whole of the described ½ section, without any exceptions other than the road.

[61] I conclude that the original Crown grant did not except Plan CG 1130 from the grant of the fee simple interest to the Lands. It conveyed the fee simple interest in the whole of the Lands described subject to the rights granted by OIC 725 and registered by charge D15450.

[62] As the registered owners of the whole of the Lands described in the title, it follows that the Fells are "landowners", and may bring the application under Division 5 and 6 of the *Act*. Whether Bonavista requires a "right of entry", however, will depend on the rights conveyed by OIC 725. A determination of those rights should be left to the panel.

Does the Board have jurisdiction to hear the merits of the Fells' application?

[63] I conclude the Board does have jurisdiction to hear the merits of the Fells' application. The land in issue is "land" and is not "restricted crown land", "unoccupied Crown land", or "Crown land" within the meaning of the *Act*. The Fells are the registered owners of the Lands. There is no dispute that Bonavista operates the Imp Fina Rigel well on the Lands and that operation of the well is an "oil and gas activity" under the *Act*. The issue will be whether Bonavista already has the right to enter, occupy and use the Lands for its oil and gas activity by way of the rights granted by OIC 725 and charge D15450 registered against the title to the Lands or whether it needs a "right of entry". The land is, therefore, subject to a proposed right of entry and the Fells are "landowners" within the meaning of the *Act*.

[64] The Board has jurisdiction to hear the Fells' applications.

CONCLUSION

[65] The Board has jurisdiction to interpret the terms used in the *Act* in order to determine any threshold issues necessary to resolve an application. In the context of this case, the Board necessarily has the jurisdiction to resolve the issue raised by Bonavista's defence to the Fell's application, specifically the question of whether the

OIC 725 lands shown on Plan CG 1130 were expressly excepted and reserved from the Crown grant to Belanger. This is a threshold issue to determining whether the Fells are "landowners" within the meaning of the *Act*.

[66] I conclude that the lands shown on Plan CG 1130 were not expressly excepted from the Crown grant to Belanger. The Fells are the registered owners of the fee simple interest in the whole of the Lands as described in the title. Their fee simple interest in the whole of the Lands, inclusive of the area covered by Plan CG 1130 is subject to the rights conveyed by OIC 725 registered as charge D15450. What those rights entail, whether Bonavista requires a "right of entry", and whether any compensation is owed to the Fells are matters within the jurisdiction of the Board and will be for the panel hearing the merits of the Fells' application to determine.

[67] I determine only that the Fells are "landowners" within the meaning of the *Act* and that their application is within the jurisdiction of the Board.

ORDER

[68] The Respondent's application is dismissed.

DATED: January 26, 2018

FOR THE BOARD

_____
Cheryl Vickers, Chair

APPENDIX A

47. (1) A disposition of Crown land under this or another Act

(a) excepts and reserves the following interests, rights, privileges and titles:

(i) a right in the Crown, or any person acting for it, to resume any part of the land which is deemed necessary by the Crown for making roads, canals, bridges or other public works, but not exceeding 1/20 part of the whole of the land, and no resumption may be made of any land on which a building has been erected, or which may be in use as a garden or otherwise;

(ii) a right in the Crown , or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any minerals, precious or base, including coal, petroleum and any gas or gases, which may be found in, on or under the land, and to use and enjoy any and every part of the land, and of its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting and use;

(iii) a right in any person authorized by the Crown to take and occupy water privileges and to have and enjoy the rights of carrying of water over, through or under any part of the land granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the land, paying a reasonable compensation to the grantee, his successors and assigns; and

(iv) a right in any person authorized by the Crown to take form any part of the land granted, without compensation, gravel, sand, stone, lime, timber, or material which may be required in the construction, maintenance or repair of a road, ferry, bridge or other public work; and

(b) conveys no right, title or interest to minerals as defined in the *Mineral Act*, coal, petroleum as defined in the *Petroleum and Natural Gas Act*, or to gas, that may be found in or under the land; and

(c) conveys no right, interest or estate to highways, within the meaning of the Highway Act, existing over or through the land at the date of the disposition.

(2) Subsection (1) applies whether or not express words are used in the disposition, but is subject to subsection (3).

(3) A disposition of Crown land under another Act that expressly authorizes the disposition on terms different from those referred to in subsection (1) may be made on those terms, and in that case the disposition shall refer to the Act that authorizes the different terms and state the terms on which the disposition is made.

(4) A disposition of Crown land may, by express words, except or reserve to the Crown rights and privileges more extensive than those referred to in subsection (1).

(5) For all purposes, including section 23 of the Land Title Act, every disposition of Crown land shall be conclusively deemed to contain express words making the exceptions and reservations referred to in subsection (1) of this section, except to the extent that the disposition is made on different terms as authorized by subsection (3).

(6) The power given by subsection (4) to except and reserve rights and privileges includes a power to create a right of way, and where this is done

(a) the Crown is, with respect to the right of way, a grantee,
(b) the right of way shall be conclusively deemed to be necessary for the operation and maintenance of the Crown's undertaking; and
(c) section 214 of the *Land Title Act* applies.