

CANADA / JUDGMENT

Bonavista Energy Corporation v. Fell

2017 BCSC 2406

COURT

Supreme Court of British Columbia

DECIDED

11 October 2017

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2017 BCSC 2406 Bonavista Energy Corporation v. Fell IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bonavista Energy Corporation v. Fell, 2017 BCSC 2406 Date: 20171011 Docket: S177099 Registry: Vancouver Re: The decision of the Surface Rights Board of British Columbia, Order No. 1920-2, dated June 16, 2017 Between: Bonavista Energy Corporation Petitioner And Shane Darrell Fell, Pamela Dawn Fell, Surface Rights Board of British Columbia and Attorney General for the Province of British Columbia Respondent Before: The Honourable Madam Justice Adair Oral Reasons for Judgment Counsel for the Petitioner: M. Tatchell Counsel for the Respondents Shane Fell and Pamela Fell: S.N.D. Carey No other appearances Place and Date of Hearing: Vancouver, B.C. October 10, 2017 Place and Date of Judgment: Vancouver, B.C. October 11, 2017

- [1] THE COURT: The petitioner, Bonavista Energy Corporation, applies for judicial review in relation to a decision of the Surface Rights Board. The decision was made in the course of addressing an application made to the Board by the respondents Shane and Pamela Fell.
- [2] Bonavista (and its predecessors in title) conducted and continue to conduct oil and gas extraction activities on lands in the Peace River District (the "Lands"). The Fells are the registered owners of the Lands. Bonavista relies on a statutory right-of-way registered on the Fells' fee simple title. The Fells' position before the Board is that the statutory right-of-way allows for pipeline installation maintenance, but not entry on the Lands for oil and gas extraction or any other purpose.
- [3] The Fells' application before the Board has been brought under the Petroleum and Natural Gas Act, R.S.B.C. 1996, c. 361, and requested a right of entry order and compensation regarding Bonavista's access to the Lands, and for compensation for alleged loss and damages caused to the Fells and the Lands as a result of Bonavista's activities. The Fells' application has yet to be adjudicated on the merits by the Board.
- [4] In its petition for judicial review, Bonavista asserts that the Board has no jurisdiction over the Fells' claims, and seeks orders accordingly. The specific Board decision challenged on judicial review is a decision rendered June 16, 2017, and indexed as Board Order 1920-2.

- [5] For the reasons that follow, I conclude that the petition must be dismissed as premature. In my opinion, there are adequate alternative remedies available that should be exhausted by Bonavista before seeking judicial review. Moreover, in the proceedings before the Board resulting in Order 1920-2, Bonavista failed to make a clear and direct challenge to jurisdiction, and it raises arguments in its petition that the Board has not yet had the opportunity to consider on the question of its jurisdiction. The Board should first have the opportunity to consider these arguments in the context of a clear and direct challenge to jurisdiction.
- [6] Beginning at para. 11 of part 2 of the petition, Bonavista sets out a detailed chronology relating to the Lands and grants and interests in the Lands, in support of its more general argument that the Board has no jurisdiction over the Fells' claims because the land on which Bonavista enjoys statutory right-of-way rights remains Crown land and is beyond the jurisdiction of the Board.
- [7] However for my purposes, the procedural chronology is key.
- [8] Earlier this year, Bonavista brought two preliminary applications before the Board for summary dismissal of the Fells' claims. The applications were brought under s. 31 of the Administrative Tribunal Act, S.B.C. 2004, c. 45 (the "ATA") which provides: Summary dismissal 31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
- (a) the application is not within the jurisdiction of the tribunal;
 - (b) the application was not filed within the applicable time limit;
 - (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the application was made in bad faith or filed for an improper purpose or motive;
 - (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the application will succeed;
 - (g) the substance of the application has been appropriately dealt with in another proceeding.
- (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.
- (3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.
- [9] The first application was made on February 6, 2017, and is found at tab 6 of the Board Record. There, Bonavista challenged the Board's jurisdiction pursuant to s. 31(1)(a) of the ATA. In its written submissions filed on the application, Bonavista stated (at para. 9) that "It

is true that the Applicants [the Fells] do qualify as landowners for the purposes of" the Petroleum and Natural Gas Act. However, in the judicial review petition, Bonavista's position is that the Fells do not qualify as landowners as defined in s. 141 of that Act (see the petition at paras. 9 and 10, and in particular para. 10(b), and also para. 13).

- [10] On March 9, 2017, the Board rejected Bonavista's challenge to jurisdiction and determined it had jurisdiction to hear the Fells' claims. The Board's decision, indexed as Board Order 1920-1, is found at tab 13 of the Board Record. At para. 3, the adjudicator summarizes Bonavista's reasons for saying the Board had no jurisdiction. None of the reasons now advanced in the petition were asserted before the Board. The adjudicator also noted (at para. 5) that "The only issue at this time is whether the Board has jurisdiction over the Fells' application." The adjudicator concluded that the Board had jurisdiction. After noting (at para. 11) that the term "landowner" (among others) is defined in s. 141 of the Petroleum and Natural Gas Act, the adjudicator commented (at para. 12) that "The parties do not dispute that the Fells are 'landowners' as defined." Later in Order 1920-1, the adjudicator said (at para. 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.
- [11] No reconsideration request in respect of Order 1920-1 was made, nor was judicial review sought.
- [12] On April 7, 2017, Bonavista filed submissions in respect of an application under ATA s. 31(1) (f) for dismissal of the Fells' claim on the grounds that there was no reasonable prospect the claim would succeed. Bonavista's submissions are found at tab 19 of the Board Record. Although much of the chronology found in para. 12 of the petition is included in the submissions, there is no clear or direct challenge to the Board's jurisdiction, in contrast to the position taken by Bonavista in the petition (see, in particular, paras. 13 and following). Rather, the argument advanced to the Board was that the facts revealed by the chronology "are unassailable to the effect that Mr. and Mrs. Fell have no case," and therefore they had no prospect of success.
- [13] The Board's reasons in Order 1920-2 were published on June 16, 2017, and are found at tab 32 of the Board Record. Bonavista's application was dismissed. No reconsideration request in respect of Order 1920-2 was made either. Instead, on July 27, 2017, Bonavista filed its application for judicial review.
- [14] The result is that the Board has never been asked, nor had the opportunity, to consider a challenge to its jurisdiction based on the grounds now asserted in the petition. The arguments on which Bonavista now relies have not yet been made to the Board in the context of a clear and direct challenge to its jurisdiction.

- [15] Reconsideration of the Board's orders is available under s. 155 of the Petroleum and Natural Gas Act, which provides, in subsection (1): The board, on its own motion or on application, may reconsider an order of the board, and may confirm, vary or rescind the order.
- [16] As Greyell J. notes in *Miller v. ARC Resources Ltd.*, 2017 BCSC 25, at para. 18, Rule 17 of the Board's Rules deals with applications for reconsideration and provides: 17(1) The Board may reconsider an order of the Board and may vary or rescind the order under section 155(1) of the Act if the Board is satisfied that any of the following circumstances exist:
- (a) there has been a change in circumstance since the making of the Board's order;
 - (b) evidence has become available that did not exist or could not have been discovered through the exercise of reasonable diligence at the time of the making of the Board's order;
 - (c) the Board made a jurisdictional error including a breach of the duty of procedural fairness, or a patently unreasonable error of fact, law or exercise of discretion in respect of matters within the Board's jurisdiction.
- (2) An application for reconsideration must be in writing and a copy of the application must be delivered to each other party.
- (3) An application for reconsideration must state the grounds for reconsideration and must include as appropriate, a statement of the change of circumstances since the making of the board order, a summary of any new evidence relied on in support of the reconsideration, and the details of any alleged jurisdictional error.
- (4) The Board may determine the procedures to be followed on a case by case basis in order to determine whether to conduct a reconsideration and how a reconsideration will be conducted.
- [17] Bonavista argues that none of the circumstances described in Rule 17(1), and specifically Rule 17(1)(c), exists in this case, and therefore reconsideration would not be available. However, in my view, that submission relies on too narrow a reading of Rule 17(1)(c). It provides for reconsideration where the Board has made a jurisdictional error. The words following, beginning with "including," are inclusive. They are not an exhaustive list of the types of jurisdictional errors for which reconsideration may be available.
- [18] Moreover, where jurisdictional arguments are not clearly and directly raised before the tribunal, it is premature to bring a judicial review. It is inconsistent with the limited supervisory role of the court to take over the tribunal's work: see *HMTQ. v. Swetlishoff*, 2010 BCSC 1252, at paras. 33 to 35.
- [19] For those reasons, the petition is dismissed.
- [20] The Fells are, as the successful parties, entitled to their costs on Scale B and I so order.
- [21] That concludes my ruling. "Adair J."

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