

2023 01G _____

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

SHOAL POINT ENERGY LTD.

PLAINTIFF

AND:

HIS MAJESTY IN RIGHT OF
NEWFOUNDLAND AND
LABRADOR

DEFENDANT

STATEMENT OF CLAIM

I. Introduction

1. The Plaintiff, Shoal Point Energy Ltd. (“SPE”), brings this claim for damages against the Defendant, His Majesty in right of Newfoundland and Labrador (the “Province”) for *de facto* expropriating and constructively taking the Exploration Lands (as defined below).
2. SPE obtained a license to explore and develop the Exploration Lands situated in the extensive Humber Arm oil-in-shale play (the “**Humber Arm Project**”). SPE estimates that the Exploration Lands contain an undeveloped oil resource as large as any in North America, with the undiscovered Petroleum Initially in Place (PIIP) between 3 billion and 11.8 billion barrels of oil, and the potentially recoverable resources are between 177 million and 908 million barrels of oil, with a best estimate of 428 million recoverable barrels of oil.
3. Both before and after SPE obtained the license to develop the Exploration Lands, the Province, its representatives, and statutory decision makers, advised and actively encouraged SPE and other petroleum exploration companies that they would be able to use hydraulic fracturing to develop the Province’s offshore petroleum formations.
4. To date, SPE has expended at least \$55 million to acquire, invest in, and take steps to explore and develop the Exploration Lands and the Humber Arm Project.

5. In November 2014, the Province announced a “pause” on hydraulic fracturing (the “**Temporary Moratorium**”). Since that time, the Province has repeatedly indicated to SPE that the Temporary Moratorium was under review.
6. As a result of the Temporary Moratorium, SPE cannot proceed with the Humber Arm Project. More fundamentally, the effect of the Temporary Moratorium has been to deprive SPE all reasonable uses of the Exploration Lands and the Humber Arm Project. As such, the Province is liable to SPE for damages in the amount of at least \$483 million, representing the loss of the present value of the petroleum from the Exploration Lands and Humber Arm Project.

II. Facts

7. SPE is a corporation registered under the laws of the Province of Alberta in 2006. SPE was continued under the laws of the Province of Ontario in 2010, and under the laws of the Province of British Columbia in 2023. SPE is also an extra-provincial company under the laws of Newfoundland and Labrador having its registered office in Newfoundland and Labrador at 42 Power’s Court, St. John’s, NL Canada A1A 1B6, and its registered office outside Newfoundland and Labrador at suite 203, 700 West Pender Street, Vancouver BC Canada, V6V 1G8.
8. SPE is a petroleum exploration and development company. SPE holds the rights to approximately 220,000 acres in the near offshore of the west coast of Newfoundland.

i. Exploration License 1070

9. The Canada-Newfoundland and Labrador Offshore Petroleum Board, now called the Canada-Newfoundland and Labrador Offshore Energy Board, (the “**Board**”) is responsible, on behalf of the Province, for the regulation of petroleum-related activity in the Newfoundland and Labrador offshore area.
10. The Board’s authority is derived from the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* (the “*Accord Act*”).

- 11. On January 15, 2002, the Board selected a bid submitted by Canadian Imperial Venture Corp. (“CIVC”) and issued Exploration License 1070 (“**Licence 1070**”) pursuant to the *Accord Act*.
- 12. In or around September 2011, SPE acquired CIVC and its interest in License 1070.
- 13. License 1070 was granted with respect to the following lands (the “**Exploration Lands**”):

LATITUDE/LONGITUDE	SECTIONS	HECTARES
48°40'N 58°30'W	The portion in the offshore area and north of the land mass	5,860
48°40'N 58°45'W	The portion in the offshore area north of the land mass, excluding section 100.	15,580
48°50'N 58°45'W	The portion in the offshore area.	14,860
48°50'N 58°45'W	The portion in the offshore area.	32,690
48°50'N 59°00'W	All.	34,050
TOTAL: 103,040 Hectares		

- 14. License 1070 conferred:
 - a. the right to explore for, and the exclusive right to drill and test for, petroleum;
 - b. the exclusive right to develop the leased portions of the offshore area in order to produce petroleum; and
 - c. the exclusive right, subject to compliance with the other provisions of the *Accord Act*, to obtain a production licence.
- 15. The term of License 1070 was nine (9) years. The term consisted of two periods:
 - a. Period I, which requires the drilling of a well to validate the exploration licence as a pre-requisite to proceeding to Period II; and

- b. Period II, which requires the licensee to obtain a production license or significant discovery license.
16. Under the *Accord Act*, if the drilling of any well has been commenced on any portion of offshore area where the license applies, the exploration license continues in force while the drilling of the well is being pursued diligently and for so long after as may be necessary to determine the existence of a significant discovery (also known as “diligent pursuit”).
17. As part of License 1070, CIVC was required to, and did pay a security deposit in the amount of \$69,655.24.
18. CIVC also obtained an onshore lease in order to drill the Exploration Lands.
19. In November 2009, 100 percent of the interest in the shallow rights for License 1070 was transferred to SPE. Shallow rights within License 1070 are from the surface of the earth to the bottom of the Humber Arm Allochthon (the shale play), which bottom boundary is bounded by the “carbonate platform” formation and the “deep rights” are from bottom of the carbonate platform to the centre of the earth.
20. For 15 years, the Board granted amendments to the terms and conditions of Licence 1070, which initially extended the Period I timelines, and subsequently permitted CIVC and its successors to commence Period II operations.
21. In or around 2008, SPE’s predecessor drilled the 2K-39 test well on the Exploration Lands, which satisfied the Period I requirements for Licence 1070 and allowed SPE to proceed to Period II of same.
22. The 2K-39 well was drilled to test a conventional oil target but was a dry hole. However, the logs indicated an extensive unconventional shale oil formation. SPE decided to drill another well to test the potential of this shale play to establish a “Significant Discovery” (as defined by the *Accord Act*).
23. On January 14, 2011, the Board agreed that the 3K-39 well was being “diligently pursued” and permitted the extension of License 1070 beyond the nine-year term.

24. Due to various mechanical difficulties with the 3K-39 well, a decision was made to drill a sidetrack from the 3K-39 well in order to access a fresh hole testing. The sidetrack encountered mechanical difficulties and ultimately the sidetrack was plugged with cement.
25. On February 18, 2011, Dragon Lance Management, the operator of the well on behalf of SPE's predecessor, received an "Approval to Drill a Well" from the Board, in which the Board stated that hydraulic fracturing may be required to test that well.
26. On July 17, 2012, SPE suspended the 3K-39 well with plans to re-enter the well within 120 days to perform hydraulic fracturing upon a routine approval of a plan submitted to the DNR.

ii. The Province Encouraged the use of Hydraulic Fracturing

27. On August 27, 2010, the Board provided to SPE the criteria to be assessed when making a significant discovery application for unconventional plays. The information contemplated using hydraulic fracturing on unconventional plays in order to get sufficient flow to satisfy the requirements for a Significant Discovery.
28. Between 2010 and 2012, the Province's Department of Natural Resources ("DNR") made various representations to SPE and other petroleum exploration companies about the conventional and unconventional oil and gas potential of the west coast of Newfoundland. In doing so, it actively encouraged the use of hydraulic fracturing to develop these reserves.

iii. Application to Conduct Hydraulic Fracturing and the January 2013 Report

29. In or around July 2012, SPE applied to the Board to perform hydraulic fracturing operations.
30. On December 18, 2012, the Board advised SPE in writing that it had: (1) satisfied the diligent pursuit requirement for the 3K-39 well; and (2) was permitted to commence hydraulic fracturing operations pursuant to section 70 of the *Accord Act*.
31. On January 8, 2013, SPE applied to the Board for permission to conduct hydraulic fracturing operations via an Amended Environmental Assessment. As part of the application, SPE submitted a document entitled Amendment to the Environmental Assessment of the Port Au Port Bay Exploration Drilling Program, dated January 2013 (the "**January 2013 Report**").

32. On February 11, 2013, the Board sent a letter to SPE indicating that:
 - a. the January 2013 Report had been forwarded to government departments and agencies; and
 - b. upon review of SPE's proposed activities, the Newfoundland and Labrador Department of Environment and Conservation ("NLDEC") had determined that the project required environmental review pursuant to the *Environmental Protection Act*, SNL 2002, cE-14.2.
33. On November 4, 2013, the Province publicly announced that it would not be accepting applications for petroleum exploration using hydraulic fracturing.
34. On March 31, 2014, Morning Star Consultants LLC, completed a 51-101 Compliant Report, related to License 1070, which indicated that the total undiscovered petroleum initially in place (PIIP) under the Exploration Lands was between 3 billion and 11.8 billion barrels of oil, and the potentially recoverable resources are between 177 million and 908 million barrels of oil, with a best estimate of 428 million recoverable barrels of oil.
35. In November 2014, the Province formed the Newfoundland and Labrador Hydraulic Fracturing Review Panel (the "**Panel**") to review the implications of hydraulic fracturing operations in Western Newfoundland and the Temporary Moratorium.
36. On May 31, 2016, the Province released the Panel's final report (the "**Panel Report**"). The Panel Report concluded that many years of study, research, and the development of new government policies would be required to determine whether hydraulic fracturing could ever be used in the province of Newfoundland and Labrador.
37. Following the Panel Report, the Province announced that the Temporary Moratorium would remain in place and that any future decisions with respect to same would be based on scientific evidence and on a "social license".
38. The Province failed to act in good faith as it failed to undertake and conduct any further study or analysis arising out of the recommendations in the Panel Report or conduct any

further study or analysis of the consequences of hydraulic fracturing to support the continuation of the Temporary Moratorium.

iv. Steps Taken by SPE Following the Panel Report

39. In or around 2016, SPE filed an application to the Board to pursue work on the 2K-39 well, which is SPE's other well on License 1070. At that time, SPE requested that the Board confirm that the work on the 2K-39 well would meet the criteria of subsection 70(3) of the *Accord Act* respecting diligent pursuit of License 1070.
40. On June 8, 2017, SPE applied to the Board for permission to transfer its "diligent pursuit" designation from well 3K-39 to well 2K-39, whereby it would seek to complete the well without the use of hydraulic fracturing (the "**Transfer Application**").
41. On August 9, 2017, the Board denied the Transfer Application, but confirmed "diligent pursuit" of the 3K-39 well.
42. On August 20, 2018, the Province advised SPE that its officials were reviewing the recommendations in the Panel Report related to hydraulic fracturing and once the Province had completed a thorough examination of all factors, a determination would be made on applications for hydraulic fracturing.
43. As of the date of the filing of this claim, the Temporary Moratorium remains in place.

III. SPE's Claim Against the Province

44. SPE seeks damages against the Province for imposing the Temporary Moratorium on all hydraulic fracturing on the Exploration Lands, thereby precluding the commercial development of the Exploration Lands.

i. De Facto Expropriation and Constructive Taking

45. By implementing the Temporary Moratorium, the Province has prevented SPE from exploring and developing the Exploration Lands. In doing so, the Province has *de facto* expropriated and constructively taken SPE's interest in same, given that it has:

- a. deprived SPE of all reasonable uses of its proprietary rights in the Exploration Lands, thereby rendering them valueless; and
 - b. acquired a beneficial interest in, or an advantage in respect of, the Exploration Lands held by SPE, insofar as the Province will acquire SPE's interests in same when the Exploration Lands revert to Crown reserve areas.
46. Were it not for the Temporary Moratorium, SPE estimates that the value of the petroleum from the Exploration Lands and Humber Arm Project would be at least \$483 million.
47. The Province has not provided SPE with any compensation for the Exploration Lands.

ii. Negligent Misrepresentation

48. In the alternative, the Province negligently misrepresented that SPE would be allowed to explore and develop the Exploration Lands.
49. Between 2010 and 2012, the Province made representations that companies such as SPE would be permitted to develop unconventional offshore oil and gas plays using hydraulic fracturing techniques. In particular, without limitation:
- a. on August 27, 2010, the Board provided to SPE's predecessor the criteria to be assessed when making a significant discovery application for unconventional plays, which included the need to hydraulically fracture unconventional plays;
 - b. in the Board's 2010 Call for Bids for offshore exploration rights, both print and electronic advertisements were placed in various industry publications highlighting the unconventional offshore resource opportunities; and
 - c. in the Approval to Drill a Well from the Board, the Board acknowledged that hydraulic fracturing would be required.
50. The Province either knew, or was reckless to the possibility, that it would enact the Temporary Moratorium or similar policies preventing the use of hydraulic fracturing to develop such oil and gas reserves.

51. The Province's representations related to the availability of hydraulic fracturing for offshore oil and gas development induced SPE to conduct various exploration and development activities, including drilling the 3K-39 well.
52. SPE relied upon the Province's representations with respect to the availability of hydraulic fracturing and has suffered damages as a result.

iii. Unjust Enrichment

53. In the further alternative, the Province has been unjustly enriched because:
 - a. it received payments from SPE to acquire the License 1070;
 - b. SPE suffered a corresponding deprivation in making those payments; and
 - c. there is no juristic reason for the Province to retain the enrichment at the expense of SPE, given that those payments were premised on SPE's continued ability to develop the Exploration Lands, which was removed by the Temporary Moratorium.
54. Further, the Province has received the *de facto* acquisition of a contingent interest in the petroleum from the Exploration Lands, depriving SPE of same, and there is no juristic reason to permit the Province to retain the benefit; particularly, given that it has exercised its discretion to acquire it.

iv. Misfeasance in Public Office

55. The Province and its public officials have engaged in deliberate unlawful conduct in the exercise of public functions. In particular, in exercising and continuing the Temporary Moratorium, in failing to undertake further scientific inquiry and analysis of the consequences of hydraulic fracturing, and indicating that exploration licenses would not be issued as a result of the requirement of its social license, the Province and its public officials have breached the terms of the *Accord Act*, acted in excess of their powers, acted for an improper purpose, and have failed to act in good faith.

56. The Province and its public officials were at all times aware that their conduct was unlawful and not in good faith and that their conduct would likely injure and did injure SPE.

v. Damages

57. As a result of the Province's conduct, SPE has suffered, and continues to suffer, losses and damages, including:

- a. the loss of net present value of the Exploration Lands in the sum of \$483 million, or such other amounts to be proved at the trial of this Action;
- b. costs incurred related to the acquisition, exploration, and development of the Exploration Lands in the amount of \$55 million, or such other amounts to be proved at the trial of this Action; and
- c. such further and other amounts to be proved at the trial of this Action.

IV. Remedy Sought:

58. SPE seeks the following relief against the Province:

- a. damages in the amount of \$483 million, or such other amount to be proven at Trial;
- b. alternatively, restitution in the amount of no less than \$55 million;
- c. pre and post-judgment interest in accordance with the *Judgment Interest Act*, RSNL 1990, c. J-02;
- d. costs of this claim; and
- e. such further and other relief as SPE may request and this Honourable Court may deem just.

DATED at St. John's, in the Province of Newfoundland and Labrador this 24th day of November, 2023.

Gregory M. Smith

CURTIS DAWE

As agent for Borden Ladner Gervais LLP
Counsel to the Plaintiff, Shoal Point Energy Ltd.

Whose address for service is:

PO Box 337, 11th Floor Fortis Building
139 Water Street
St. John's, NL A1C 5J9
Attention: **Gregory M. Smith, K.C.**
E: gsmith@curtisdawe.com

As agent for:

Borden Ladner Gervais LLP

1900, 520 3rd Avenue SW
Calgary, AB T2P 0R3
Attention: Randall Block, K.C./Karen
Salmon/Andrew Pozzobon
E: rblock@blg.com / ksalmon@blg.com /
apozzobon@blg.com

To: His Majesty in Right of Newfoundland and Labrador
Office of the Minister or Deputy Minister
Department of Justice and Public Safety
4th Floor, East Block
Confederation Building
P.O. Box 8700
St. John's, NL A1B 4J6

ISSUED at St. John's, in the Province of Newfoundland and Labrador this _____ of November, 2023.

(signature)

Registrar/Registry Clerk

2023 01G _____

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GENERAL DIVISION

BETWEEN:

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PLAINTIFF

AND:

**HIS MAJESTY IN RIGHT OF
NEWFOUNDLAND AND LABRADOR**

DEFENDANT

NOTICE TO THE DEFENDANT

You are hereby notified that the Plaintiff may enter judgment in accordance with the Statement of Claim or such order as, according to the practice of the Court, the Plaintiff is entitled to, without any further notice to you unless within **ten (10)** days, after service hereof upon you, you cause to be filed in the Registry of the Supreme Court of Newfoundland and Labrador, at St. John's a Defence and unless within the same time a copy of your Defence is served upon the Plaintiff or the Plaintiff's solicitors at the Plaintiff's Solicitors' stated address for service.

Provided that if the claim is for a debt or other liquidated demand and you pay the amount claimed in the Statement of Claim and the sum of \$ _____ (or such sum as may be allowed on taxation) for costs to the plaintiff(s) or the plaintiff(s) solicitors within _____ days from the service of this notice upon you, then this proceeding will be stayed.

To: The Defendant
His Majesty in Right of Newfoundland and Labrador
Office of the Minister or Deputy Minister
Department of Justice and Public Safety
4th Floor, East Block
Confederation Building
P.O. Box 8700
St. John's, NL A1B 4J6

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DEFENDANT

AFFIDAVIT OF SERVICE

I, _____, of St. John's, in the Province of Newfoundland and Labrador, _____, make oath and say as follows:

(Personal Service)

1. On _____ (date), at _____ (time), I served _____ (identify person served) with the _____ (identify documents served) by leaving a copy with him (or her) at _____ (address where service was made). (Where the rules provide for personal service on a corporation, etc. by leaving a copy of the document with another person, substitute: by leaving a copy with _____ (identify person by name and title) at _____ (address where service was made).)

2. I was able to identify the person by means of _____ (state the means by which the person's identity was ascertained.)

(Service by leaving a copy with an adult person in the same household as an alternative to personal service)

1. I served _____ (identify person served) with the _____ (identify documents served) by leaving a copy on _____ (date), at _____ (time), with a person _____ (insert name if known) who appeared to be an adult member of the same household in which _____ (identify person served) is residing, at _____ (address where service was made), and by sending a copy by regular lettermail (or registered or certified mail) on _____ (date) to _____ (identify person served) at the same address.

2. I ascertained that the person was an adult member of the household by means of _____ (state how it was ascertained that the person was an adult member of the household).

3. Before serving the documents in this way, I made an unsuccessful attempt to serve _____(identify person) personally at the same address on _____(date).
(If more than one attempt has been made, add: and again on (date).)

(Service by registered mail as an alternate to personal service)

1. On _____(date), I sent to _____(identify person served) by registered mail with Canada Post Corporation item # _____ attached to the envelope, a copy of the _____(identify documents served).

2. Attached is the confirmation of delivery receipt obtained from Canada Post Corporation for item # _____ showing the envelope was delivered to _____(identify person served) on _____(date of receipt).

3. The item # on the confirmation of delivery receipt is identical to the item number on the registered mail receipt obtained from Canada Post Corporation for the envelope sent to _____(address where mail was delivered).

(Service by certified mail as an alternative to personal service)

1. On _____(date), I sent to _____(identify person served) by certified mail a copy of the _____(identify documents served).

2. I received the attached receipt card from Canada Post Corporation which indicates the documents were received on _____(date) and which bears a signature that purports to be the signature of _____(identify person).

(Service by regular lettermail as an alternative to personal service)

1. On _____(date), I sent to the _____(identify person served) by regular lettermail a copy of the _____(identify documents served) together with an acknowledgment of receipt form.

2. On _____(date), I received the attached acknowledgment of receipt form bearing a signature that purports to be the signature of _____(identify person).

SWORN (OR AFFIRMED) to at
St. John's, Newfoundland and
Labrador this _____ day
of _____, 20____, before me:
