

NOVA SCOTIA COURT OF APPEAL

Citation: *Shin Han F & P Inc.v. Canada-Nova Scotia Offshore Petroleum Board*,
2014 NSCA 108

Date: 20141205

Docket: CA 421670

Registry: Halifax

Between:

Shin Han F&P Inc.

Appellant

v.

Canada-Nova Scotia Offshore Petroleum Board

Respondent

Judges: Farrar, Scanlan, and Bourgeois JJ.A.

Appeal Heard: October 6, 2014, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Farrar, J.A.;
Scanlan and Bourgeois, JJ.A. concurring.

Counsel: Eric Durnford, Q.C., for the appellant
Raymond Larkin, Q.C., for the respondent

Reasons for judgment:

Background

[1] The Canada-Nova Scotia Offshore Petroleum Board (Petroleum Board) regulates the development of petroleum resources in the Nova Scotia offshore area. It granted the appellant an exploration license for a parcel of offshore lands based on the amount of expenditure proposed for exploration in those lands. Pursuant to the terms of the license, the appellant was required to deposit 25% of the proposed exploration expenditure as security. Failure to do so would result in the cancellation of the license.

[2] The appellant failed to make the deposit. The Petroleum Board gave notice of its proposed decision to cancel the exploration license. The legislation provides a mechanism for the person affected to request a hearing, which then requires the Board to direct that the matter be heard by the Oil and Gas Committee (the Committee). After considering the recommendation of the Committee, as required by the governing legislation, the Petroleum Board concluded that the failure of the appellant to comply with the exploration license warranted cancellation of the license and it did so.

[3] The appellant sought judicial review of the Petroleum Board decision. By oral decision dated October 10, 2013 (now reported as 2013 NSSC 341) Justice Gregory M. Warner dismissed the judicial review application.

[4] The appellant appeals to this Court arguing that: the reviewing judge applied the wrong standard of review; the Petroleum Board erred in accepting the Committee's recommendation; the reviewing judge erred in finding that the Petroleum Board did not rely upon irrelevant considerations; and, there was a reasonable apprehension of institutional bias on the part of the Petroleum Board.

[5] For the reasons that follow I would dismiss the appeal and award costs to the respondent in the amount of \$2,000.

Facts

[6] On June 25, 2008, the Petroleum Board issued a call for bids for exploration licenses for two parcels of offshore lands including a parcel in the western region of the Scotia Basin, 275 kilometers southwest of Sable Island. Bidding was based

on the amount proposed for expenditure on the exploration of the parcel, research and development and education and training (the “Work Expenditure Bid”).

[7] The call for bids included a requirement that the successful bidder deposit 25% of its Work Expenditure Bid as security for the performance of work by no later than the third anniversary of its license. Failure to post this deposit (the Work Deposit”) would result in the cancellation of the license. The Work Deposit was refundable to the extent of 25% of expenditures made exploring for petroleum in the area covered by the exploration license.

[8] The appellant was the successful bidder for one of the parcels, based on a Work Expenditure Bid of 129 million dollars. The Petroleum Board issued an Exploration License to the appellant effective January 1, 2009, conferring the right to explore, drill and test for petroleum in the parcel.

[9] The Exploration License included provisions relating to the Work Deposit. Paragraphs 4(b) and 5(a) of Exploration License No. 2420 provide as follows:

4. LICENSE DEPOSIT

(b) In the event that the Work Deposit is not posted by the third anniversary of this License, the License Deposit will be forfeited and this License cancelled.

5. WORK DEPOSIT

(a) The total Work Deposit required to be posted as security for the performance of work is 25% of the Work Expenditure Bid as set out in Schedule A (the “Work Deposit”). The Work Deposit is required to be posted no later than the third anniversary of this License. No interest will be paid on the Work Deposit. Failure to post the Work Deposit as security for the performance of work will result in the cancellation of this License and forfeiture of the License Deposit.

[10] On January 27, 2011 the Petroleum Board notified the appellant that it had adopted a new Work Deposit Deferral Policy for current exploration licenses. The Work Deposit Deferral Policy identified the criteria that would be considered by the Petroleum Board should the holder of an exploration license apply for a Work Deposit deferral.

[11] No request for a Work Deposit Deferral was received by the Petroleum Board from the appellant within 120 days before the Work Deposit was due; the timeframe set out in the Policy. On October 28, 2011, the Petroleum Board wrote to the appellant as follows:

In accordance with the terms and conditions of EL 2402, Shin Han F&P is required to post 25% of the Work Expenditure Bid as security for the performance of work by no later than the third anniversary of the license. This deposit is referred to as the Work Deposit. Failure to post the Work Deposit as security for the performance of work will result in the cancellation of the license.

Your License Deposit, in the amount of \$50,000.00 was posted as a condition of the issuance of Exploration License 2420. This deposit will be refunded in full upon posting of the Work Deposit. In the event that the Work Deposit is not posted on or before January 3, 2012, the License Deposit will be forfeited.

The Work Expenditure Bid for EL 2420 was \$129,000,000.00. There are no approved Allowable Expenditures to offset the Work Deposit for EL 2420. A Work Deposit, in the amount of \$32,250,000.00 is required to be posted on or before January 1, 2012.

...

[12] On December 15, 2011, approximately two weeks before the due date for the Work Deposit, the appellant wrote to the Petroleum Board requesting an extension of its exploration license.

[13] The Petroleum Board considered the extension request to be a request to defer the posting of the Work Deposit. On December 21, 2011, it responded to the appellant's extension request as follows:

I am writing in response to the letter received from James R. Gogan of Breton Law Group on December 15th, 2011. While this letter refers to an extension of Exploration License 2420, we take this to be a request to defer the posting of the required work deposit for a period of six to twelve months. The Board has considered the information by Shin Han F&P and has decided that a deferral will not be granted.

The current Work Deposit Deferral Policy, which has been posted on the Board's website since January 26th, 2011 and which was sent to you with our letter of January 27th, 2011, identifies the criteria and conditions that will be considered by the Board if companies holding ELs apply for a Work Deposit Deferral. Upon review of your request, it was determined that it is not in accordance with the Board's published Work Deposit Deferral Policy.

In accordance with the terms and conditions of EL 2420, Shin Han F&P is required to post 25% of the Work Expenditure Bid as security for the performance of work by no later than the third anniversary of the license. This Work Deposit, in the amount of \$32,250,000.00 is required to be posted on or before January 1st, 2012, as indicated in our reminder letter of October 28th, 2011.

...

[14] The appellant did not make the required Work Deposit by the third anniversary of its Exploration License.

[15] On January 18, 2012 the Petroleum Board wrote to the appellant noting that the Work Deposit had not been posted as required, and gave notice under Section 126 of the **Canada-Nova Scotia Offshore Resources Accord Implementation Act**, S.C. 1988, c. 28 (the **Federal Act**) and Section 125 of the **Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act**, S.N.S. 1987, c. 3 (the **Nova Scotia Act**) requiring compliance within 90 days of the date of notice:

... This letter serves as notice that Shin Han F&P Inc. must comply with sections 4(b) and 5(a) of EL 2420 within ninety days (90) after the date of this notice. Failure to comply by this deadline will result in the cancellation of EL 2420 and the forfeiture of the \$50,000 License Deposit posted for EL 2420.

[16] On April 20, 2012 the appellant made a request to the Petroleum Board for an extension of time to post its Work Deposit. On May 14, 2012 the Petroleum Board rejected this request.

[17] On April 25, 2012 the Petroleum Board gave “Notice of Proposed Decision” which included the following passages:

1. Description of Proposed Decision

Pursuant to subsection 126(2) of the C-NSOPRAIA and subsection 125(2) of the C-NSOPRAI(NS)A, the Board proposes to cancel Exploration License (EL) 2420 because the interest owner has failed to meet the requirements of sections 4(b) and 5(a) of EL 2420. The interest owner of EL 2420 did not comply within ninety days after the January 18, 2012 compliance notice from the Board.

[18] On May 30, 2012 the appellant requested a hearing on the proposed decision before the Committee in accordance with Subsection 127(3) of the **Federal Act** (Subsection 126(3) of the **Nova Scotia Act**). It provides:

127(3) Any person receiving a notice pursuant to subsection (2) may, in writing, request a hearing within the thirty-day period referred to in that subsection and, on receipt of such a request, the Board shall direct the Committee to appoint a time and place for a hearing and to give notice thereof to the person who requested the hearing.

[19] On June 22, 2012 the Petroleum Board referred the appellant's request for a hearing to the Committee, and directed the Committee to conduct a hearing on the proposed decision.

[20] By agreement of the parties, the hearing proceeded by written submissions. In its written submissions, the appellant asked the Committee to reconsider the decision of the Petroleum Board to refuse to defer the appellant's Work Deposit.

[21] After considering the evidence filed and the submissions of the parties, the Committee issued its report. It first addressed the Work Deferral Deposit issue which it characterized as follows:

Is it for the Committee to assess the correctness of, review, or make recommendations upon the decisions of the Board refusing deferral of this license holder's Work Deposit?

On the issue the Committee concluded:

On the issue of the Committee's jurisdiction, the Committee has determined that the only matter before it is the Proposed Decision of the Board:

"Pursuant to subsection 126(2) of the C-NSOPRAIA and subsection 124(2) of the C-NSOPRAI(NS)A, the Board proposes to cancel Exploration License (EL) 2420 because the interest owner has failed to meet the requirements of section 4(b) and 5(a) of EL 2420. The interest owner of EL 2420 did not comply within ninety days after the January 18, 2012 compliance notice from the Board."

[22] On the merits of the matter referred to it, the Committee made the following recommendation:

The Oil and Gas Committee recommends that the Board adopt and implement its Proposed Decision which reads as follows:

"Pursuant to subsection 126(2) of the C-NSOPRAIA and subsection 124(2) of the C-NSOPRAI(NS)A, the Board proposes to cancel Exploration License (EL) 2420 because the interest owner has failed to meet the requirements of sections 4(b) and 5(a) of EL 2420. The interest owner of EL 2420 did not comply within ninety days after the January 18, 2012 compliance notice from the Board."

[23] The Committee found that the appellant had failed to comply with the condition in the Exploration License that it post a Work Deposit of 32.25 million dollars by January 1, 2012, and recommended that the Petroleum Board implement its proposed decision.

[24] The Committee concluded its reasons for its recommendation with the following:

Looked at in this context, it is not difficult to understand the Board's assertions that acceding to this request would:

- Lead to similar requests from other license holders, to which, on the basis of consistency, the Board would have to accede;
- Undermine confidence in the land tenure system; and
- Impede the exploration of petroleum in the Nova Scotia Offshore Area.

Even if the Committee's jurisdiction were unlimited, the Committee's recommendation would be to cancel EL 2420 and refuse a deferral. But it is worth noting, again, that the Committee acknowledges its lack of jurisdiction over earlier decisions of the Board relating to work deposit deferral requests. The license holder has not explained how it would be possible not to cancel the license without granting a *de facto* deferral of the Work Deposit. Granting of a deferral of any kind would be contrary to the prior decisions of the Board which are beyond the authority of this Committee to review. Taking all of this into account, the Committee has no doubt about its decision. The Committee recommends that the Board adopt and proceed to implement its Proposed Decision which for convenience we reproduce again ...

[25] On January 30, 2013 the Petroleum Board reviewed the Committee's report and considered its recommendations. The Petroleum Board then decided to make an order cancelling the Exploration License and forfeiting the appellant's \$50,000.00 License Deposit because of its failure to comply with paragraphs 4(b) and 5(a) of the Exploration License. The Petroleum Board minutes record its decision:

The Board members all agreed that if EL 2420 was not cancelled because of the Interest Owner's failure to post the required work deposit, this would:

- Likely lead to similar requests from other license holders, to which, on the basis of consistency, the Board would have to accede;
- Undermine confidence in the land tenure system; and
- Impede the exploration of petroleum in the Nova Scotia Offshore Area.

There was a consensus among the Board members that, for the reasons stated in the Committee Report, which the Board accepts and concurred with, the recommendation of the Committee should be accepted.

[26] On March 5, 2013 the Petroleum Board ordered that the Exploration License be cancelled and that the \$50,000.00 License Deposit be forfeited to the Receiver General of Canada. On March 6, 2013 the Petroleum Board notified the appellant of its decision and order:

Pursuant to subsection 126(2) of the Federal Accord Act (subsection 125(2) of the Provincial Accord Act) the Board has decided to cancel EL 2420 because the interest owner has failed to meet the requirements of section 4(b) and 5(a) of EL 2420 (i.e. failed to post with the Board the required \$32,250,000.00 Work Deposit). In making its decision, the Board was of the opinion that not cancelling EL 2420 would:

- Lead to similar request from other license holders, to which, on the basis of consistency, the Board would have to accede;
- Undermine confidence in the land tenure system; and
- Impede the exploration of petroleum in the Nova Scotia Offshore Area.

Enclosed is a copy of the Cancellation Order for EL 2420, dated March 5, 2013, and recorded in the Registry System as Notice 9209. The \$50,000.00 License Deposit has been forfeited to the Receiver General of Canada.

[27] Pursuant to s. 127(11) of the **Federal Act** (s. 126(11) of the **Nova Scotia Act**), the appellant applied for judicial review of the Board's decision and order. Warner, J. dismissed the application. As noted above, the appellant appeals that decision to this Court.

Issues

[28] In its factum the appellant lists four issues. I would restate the issues and address them in the following order:

1. Did the reviewing judge err in determining that the standard of review applicable to the jurisdictional issue was reasonableness?
2. Did the reviewing judge err in concluding that the decision of the Board cancelling the appellant's exploration license was reasonable?
3. Did the procedure chosen by the committee create a reasonable apprehension of institutional bias?

Standard of Review

[29] The appropriate approach for a court of appeal to take when reviewing the lower court's decision in a judicial review was recently addressed by the Supreme Court of Canada in **Agraira v. Canada (Public Safety and Emergency Preparedness)**, 2013 SCC 36. The question for an appellate court is simply whether the court below identified the appropriate standard of review and applied it correctly. The Court in **Agraira** put it succinctly:

[47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

[30] This is the standard of review which I will apply to the first two issues which I have identified above.

[31] The third is a new issue raised on appeal which was not argued before the reviewing judge. The first question for this Court is whether we will entertain the ground of appeal. If we do, there would be no deference owed as we would be deciding it in the first instance.

Issue #1 Did the reviewing judge err in determining that the standard of review applicable to the jurisdictional issue was reasonableness?

Issue #2 Did the reviewing judge err in concluding that the decision of the Petroleum Board cancelling the appellant's exploration license was reasonable?

[32] The appellant's argument under these grounds of appeal has two prongs: first, it says that the reviewing judge erred when he applied the reasonableness standard to the Committee's determination that it did not have jurisdiction to consider whether the Petroleum Board should have refused the appellant's requests for deferral of the work deposit. Second, it says that the reviewing judge erred in finding that the Petroleum Board's decision to cancel the license was reasonable.

[33] In order to address these arguments some further background is necessary.

[34] The **Federal Act** and the **Nova Scotia Act** create a discrete administrative regime in which the Petroleum Board has specialized expertise. The Petroleum Board manages Nova Scotia Offshore Petroleum Board resources for the benefit of

the people of Nova Scotia and Canada as a whole. Its decisions enjoy the protection of a privative clause.

[35] The purpose of both Acts is to implement the Canada-Nova Scotia Offshore Petroleum Resources Accord. The objectives of the Accord included the following:

- 1.02 (a) to achieve the early development of Petroleum Resources in the Offshore Area for the benefit of Canada as a whole and Nova Scotia in particular.

”

- (f) to ensure the continuance of a stable offshore administrative regime for the industry consistent, insofar as is appropriate, with regimes established for other offshore areas in Canada;

[36] To achieve the purpose of the legislation and the objectives of the Accord, Parliament and the Nova Scotia Legislature delegated regulation of Nova Scotia offshore petroleum resources to the Petroleum Board. The functions of the Petroleum Board are set out in Section 18(1) of both **Acts** as follows:

18(1) The Board shall, in addition to performing the duties and functions conferred or imposed on the Board by or pursuant to this Act, perform such duties and functions as are conferred or imposed on it by the Accord, to the extent that such duties and functions are not inconsistent with this Act or any regulations made thereunder.

[37] Under the **Act**, the Petroleum Board manages Nova Scotia offshore petroleum exploration and development. This includes the granting and cancellation of exploration licenses. Section 68 of the **Federal Act** (Section 71 of the **Nova Scotia Act**) describes the effect of an exploration license:

68. An exploration license confers, with respect to the portions of the offshore area to which the license applies,
- (a) the right to explore for, and the exclusive right to drill and test for, petroleum;
 - (b) the exclusive right to develop those portions of the offshore area in order to produce petroleum; and
 - (c) the exclusive right, subject to compliance with the other provisions of this Part, to obtain a production license.

[38] Exploration licenses are issued after a public call for bids. Section 61(4) of the **Federal Act** and Section 64(4) of the **Nova Scotia Act** govern the call for bids:

61(4) A call for bids shall specify

- (a) the interest to be issued and the portions of the offshore area to which the interest is to apply;
- (b) where applicable, the geological formations and substances to which the interest is to apply;
- (c) the other terms and conditions subject to which the interest is to be issued;
- (d) any terms and conditions that a bid must satisfy to be considered by the Board;
- (e) the form and manner in which a bid is to be submitted;
- (f) subject to subsection (5), the closing date for the submission of bids; and
- (g) the sole criterion that the Board will apply in assessing bids submitted in response to the call.

[39] The sole criterion used by the Petroleum Board in selecting a successful bidder is the amount of proposed exploration expenditures. An exploration license may be subject to terms and conditions. Section 70(1) of the **Federal Act** (Section 73(1) of the **Nova Scotia Act**) provides as follows:

70(1) An exploration license shall contain such terms and conditions as may be prescribed and may contain any other terms and conditions, not inconsistent with this Part or the regulations, as may be agreed on by the Board, subject to sections 32 to 37, and the interest owner of the license.

[40] The **Acts** also provide for the cancellation of licenses, including exploration licenses. Section 126 of the **Federal Act** (Section 125 of the **Nova Scotia Act**) provides as follows:

126(1) Where the Board has reason to believe that an interest owner or holder is failing or has failed to meet any requirement of or under this Part or Part III or any regulation made under either Part, the Board may give notice to that interest owner or holder requiring compliance with the requirement within ninety days after the date of the notice or within such longer period as the Board considers appropriate.

(2) Notwithstanding anything in this Part but subject to sections 32 to 37, where an interest owner or holder fails to comply with a notice under subsection (1)

within the period specified in the notice and the Board considers that the failure to comply warrants cancellation of the interest of the interest owner or holder or any share in the interest held by the holder with respect to a portion only of the offshore area subject to the interest, the Board may, by order subject to section 127, cancel that interest or share, and where the interest or share is so cancelled, the portions of the offshore area thereunder became Crown reserve areas.

[41] Where the Petroleum Board gives notice of a proposed cancellation, the affected party may request a hearing by the Committee. After a hearing, the Committee makes recommendations for the Petroleum Board to consider. In this regard, Section 127 of the **Federal Act** (Section 120 of the **Nova Scotia Act**) includes the following subsections:

127(6) On the conclusion of the hearing, the Committee shall submit to the Board its recommendations concerning the proposed order, decision or action of the Board, together with the evidence and other material that was before the Committee.

(7) Before making any order or decision or taking any action in respect of which a hearing has been held, the Board shall consider the recommendations of the Committee.

[42] The Committee is constituted for various purposes under the **Act** including its functions under Section 127 of the **Federal Act**. The Committee functions independently and includes persons with specialized, expert or technical knowledge of petroleum issues. Sections 145 and 146 of the **Federal Act** provide in part:

145(1) The Board may, for the purposes of this Act and the Provincial Act, establish a committee to be known as the Oil and Gas Committee, consisting of not more than five members, not more than three of whom may be employees in the public service of Canada or of the Province.

146(1) The Board shall appoint as members of the Committee at least two persons who appear to the Board to have specialized, expert or technical knowledge of petroleum.

[43] The **Acts** contemplate judicial review of a decision of the Petroleum Board to cancel rights, including those provided by an exploration license. Section 127(11) of the **Federal Act** (Section 126(11) of the **Nova Scotia Act**) provides:

127(11) Any order, decision or action in respect of which a hearing is held under this section is subject to review and to be set aside by the Supreme Court of Nova

Scotia in accordance with the practice and procedure established by or pursuant to the Provincial Act.

[44] At the same time, however, the **Acts** provide that the Petroleum Board's decisions are final. Section 31 of both **Acts** provides:

31. Subject to this Act, the exercise of a power or the performance of a duty by the Board pursuant to this Act is final and not subject to the review or approval of either government or either Minister.

[45] In **Hibernia Management Development Company Ltd. v. Canada-Newfoundland and Labrador Offshore Petroleum Board**, 2008 NLCA 46, the Newfoundland Court of Appeal concluded that a provision in the governing **Act**, which is the same as Section 31 in this case, should be characterized "as at least a partial privative clause".

[46] The **Acts** indicate that cancellation decisions are subject to judicial review, but that deference is owed to the determinations of the Oil and Gas Committee and the decisions of the Petroleum Board.

[47] Under the first prong of the appellant's argument, with respect to the standard of review, it says the Committee's determination that its jurisdiction was limited to the proposed order to cancel the exploration license, is to be reviewed on a correctness standard. It says the Committee's jurisdiction was broad enough to review and make recommendations on the Board's refusal of the Work Deposit Deferral. The appellant argues that the determination was a question of jurisdiction arguing the Committee was incorrect in limiting itself to consideration of the cancellation of the Work Permit. It says that the reviewing judge erred when he applied a reasonable standard to the Committee's decision.

[48] With respect, I cannot agree.

[49] The applicable provisions of the **Federal Act** are the following:

126. (1) Where the Board has reason to believe that an interest owner or holder is failing or has failed to meet any requirement of or under this Part or Part III or any regulation made under either Part, the Board may give notice to that interest owner or holder requiring compliance with the requirement within ninety days after the date of the notice or within such longer period as the Board considers appropriate.

(2) Notwithstanding anything in this Part but subject to section 32 to 37, where an interest owner or holder fails to comply with a notice under subsection (1) within

the period specified in the notice and the Board considers that the failure to comply warrants cancellation of the interest of the interest owner or holder or any share in subject to the interest, the Board may, by order subject to section 127, cancel that interest or share, and where the interest or share is so cancelled, the portions of the offshore area thereunder become Crown reserve areas.

127. (1) In this section, "Committee" means the Oil and Gas Committee established pursuant to section 145.

(2) The Board shall, not less than thirty days before making any order or decision or taking any action in respect of which it is expressly stated in this Part to be subject to this section, give notice in writing to the persons the Board considers to be directly affected by the proposed order, decision or action.

(3) Any person receiving a notice under subsection (2) may, in writing, request a hearing within the thirty day period referred to in that subsection and, on receipt of such a request, the Board shall direct the Committee to appoint a time and place for a hearing and to give notice thereof to the person who requested the hearing.

(6) On the conclusion of the hearing, the Committee shall submit to the Board its recommendations concerning the proposed order, decision or action of the Board, together with the evidence and other material that was before the Committee.

(7) Before making any order or decision or taking any action in respect of which a hearing has been held, the Board shall consider the recommendations of the Committee. [Emphasis added]

[50] It is clear that committee review does not apply to every order of the Petroleum Board. The **Federal Act** specifies that it only applies to actions "in respect of which it is expressly stated in this Part to be subject to this section". The language used is unambiguous. The committee review process is not available as a general review of all Petroleum Board actions but instead is only activated for certain decisions.

[51] Sections 74, 79, 82 and 126 are the only sections in Part 2 of the **Federal Act** that are expressly subject to s. 127. Three features of the legislation are instructive:

1. The language of s. 127 is clear. The committee review process is only triggered when the Petroleum Board takes an action which is expressly stated to be subject to the section;
2. Sections 74, 79, 82 and 126 all use similar language to identify that decisions under these sections are subject to s. 127. In each case it is clear that the specific decisions or actions of the Petroleum Board are

subject to s. 127. The Petroleum Board's decision to refuse a Work Deposit Deferral is not subject to review under s. 127; and

3. Section 31 provides that the Petroleum Board's decisions are final:

Subject to this Act, the exercise of a power or the performance of a duty by the Board pursuant to this Act is final and not subject to the review or approval of either government or either Minister.

This is further evidence the Legislators intended committee review to only apply to specific actions.

[52] The **Federal Act**, s. 126 and s. 127, preclude the Committee from considering the appellant's arguments that it ought to have been granted a work deferral permit. Although the Committee refers to its "jurisdiction" in interpreting the sections, in my view, it is an issue of statutory interpretation not a question of jurisdiction.

[53] I refer to **Canadian National Railway Co. v. Canada (Attorney General)**, 2014 SCC 40 where the Court held:

[61] To the extent that questions of true jurisdiction or vires have any currency, the Governor in Council's determination of whether a party to a confidential contract can bring a complaint under s. 120.1 does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter (see *Dunsmuir*, at para. 59). Rather, it is simply a question of statutory interpretation involving the issue of whether the s. 120.1 complaint mechanism is available to certain parties. This could not be a true question of jurisdiction or vires of the Governor in Council — the decision maker under review in this case.

[54] Similarly, the Committee was simply considering a question of statutory interpretation involving the issue of whether all decisions of the Petroleum Board were subject to review by the committee. It determined they were not. That is not a true question of jurisdiction.

[55] The reviewing judge properly cited and applied the law in determining the appropriate standard of review. I will not cite all of his reasons but rather his conclusions with which I agree:

[62] When the Committee dealt with the question of whether it could consider the decisions of the Board refusing to extend the time for the Applicant to file a Work Deposit, as questions of jurisdiction, they were not in fact questions of

jurisdiction but questions of law. For this I rely upon the analysis in *Coates v Nova Scotia*, 2013 NSCA 52, paragraphs 43 to 45.

[63] In summary, the questions subject to this judicial review are questions upon which the Board should be granted deference.

[56] The reviewing judge arrived at the correct standard of review and properly applied it.

[57] The appellant's argument on this point fails.

[58] I will now turn to the second part of the appellant's argument under these grounds of appeal – whether the decision of the Petroleum Board to cancel the license was reasonable.

[59] Justice Joel E. Fichaud of this Court undertook an extensive analysis of what constitutes reasonableness in **Coates v. Nova Scotia (Labour Board)**, 2013 NSCA 52 concluding:

[46] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11, 14-17, Justice Abella for the Court discussed the meaning of "reasonableness" (quoted below, para 57). In *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2, para 15, this Court recently summarized those principles:

Reasonableness is neither mechanical acclamation of the tribunal's conclusion nor a euphemism for the court to impose its own view. Rather the reviewing court shows respect for the Legislature's choice of a decision maker, by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of possible outcomes. [citing *Newfoundland and Labrador Nurses' Union*].

[60] The reviewing judge's reasons for determining that the decision of the Board was reasonable are relatively short and I will reproduce them here:

[68] The Board notified the Applicant on March 6, 2013, that it had cancelled the License and provided clear reasons. The Board's reasons are consistent with the report of the Committee, made January 25, 2013, and its recommendations that the Board proceed with the cancellation. The Report of the Committee included determination of facts and policy recommendations with respect to the breach of the terms of the License.

[69] The reasoning of the Committee is clear, both as to the requirements of the License and the failure of the Applicant to post the Work Deposit required by the License.

[70] On the policy issue as to whether the Applicant's failure to comply with the License warranted cancellation, the Committee's reasoning shows that it was concerned about requiring a license holder to adhere to the terms of the license, failing which it would impair the development of the offshore petroleum resources.

[71] The Committee report went on to consider the applicable legislation and the objectives of the Board.

[72] The report of the Committee considered whether it would be fair to other bidders to allow the Applicant to change the terms of the License after the fact.

[73] The factual and policy determinations of the Committee are understandable; meet the requirements of legitimacy and transparency, and fall within the range of reasonable outcomes based on the facts and the law.

[74] The decision of the Board to cancel the Applicant's License, as communicated in its March 6, 2013, letter, reflects the obligation of the Board to consider the recommendations of the Committee and the binding effect of the determinations of fact by the Committee.

[75] The Board's March 6, 2013, letter indicates its opinion that not cancelling the Applicant's License would lead to similar requests by other license holder, to which, on the basis of consistency, the Board would have to accede, thereby undermining confidence in the land tenure system and impeding the exploration of petroleum in the Nova Scotia Offshore Area.

[76] This directly reflected the factual determinations of the Committee and its assessment of the policy considerations flowing from the failure of the Applicant to comply with the terms of the License.

[77] I conclude that the Board's reasoning is transparent and justifiable on the facts and the law. It falls within the range of reasonable outcomes and is therefore reasonable. The application for judicial review is dismissed.

[61] The appellant takes issue with the reviewing judge's determination that the decision was reasonable for the following reasons:

1. The Committee fettered its own discretion by interpreting its powers so narrowly (there is some overlap with this argument and the jurisdictional argument);
2. The reviewing judge failed to make a finding on the issue of fettering of discretion;
3. The Committee took irrelevant and erroneous considerations into account, in particular:

- a. it erroneously concluded that the appellant had failed to submit a work plan within the required time and to file a report on the annual anniversary;
- b. Its reliance on irrelevant considerations led it to conclude that not cancelling the appellant's license would impede the exploration of petroleum by the Nova Scotia Offshore.

[62] The appellant's arguments on each of these items fail.

[63] I have already addressed the issue of the Committee's determination of its statutory mandate.

[64] The appellant's argument that the Committee fettered its discretion by limiting its mandate to make recommendations on the proposed order is the same argument as the jurisdictional issue. It is without merit. Justice Warner committed no error in failing to address this argument.

[65] The appellant's final point on this issue - the Committee took irrelevant and erroneous considerations into account - also fails. It is not disputed that the Committee was mistaken when it concluded that the appellant had failed to submit a work plan within the required timeframe and to file a report on the annual anniversary. The Board, however, was well aware of the Committee's erroneous assessment of the evidence with respect to timeliness of the appellant's performance to file reports as required by the Exploration License.

[66] The Minutes of the Board dated January 30, 2013, provide:

Mike McPhee pointed out an error in the Report on page 20, where it states that the Interest Owner submitted the Work Plan 9 months late and an annual report on the Work Plan over a year late. In fact, it was the first and second annual reports on the Work Plan that were submitted late. After several reminders from Board staff, both of these reports were submitted 21 days late.

[67] The Board's cancellation of the exploration and the policy reasons for doing so were not influenced by the Committee's error. Consideration of the Committee's recommendations was done with full awareness of the Committee's error.

[68] At this point, I think it is appropriate to point out that the Committee's role is to conduct a hearing and make recommendations on the proposed order. The

Committee was not the decision-maker. It exercised no discretion of its own. The focus of the judicial review is on the decision of the Board, not on the recommendations of the Committee.

[69] Justice Warner's focus, appropriately, was on the Board's decision. The reasonableness of the Board's decision is supported by its reasons and the record. As Warner, J. noted, the Board notified the appellant on March 6, 2013, that it had decided to cancel its Exploration License and provided the following reasons:

As you know, based on a request from Shin Han F&P Inc. ("Shin Han"), an Oil and Gas Committee was established in accordance with subsection 127(3) of the Federal Accord Act (subsection 126(3) of the Provincial Accord Act). The Oil and Gas Committee Hearing process occurred in November and December 2012. A report with recommendations was provided by the Oil and Gas Committee to the Board on January 25, 2013 (subsection 127(6) of the Federal Accord Act & subsection 126(6) of the Provincial Accord Act). At a January 30, 2013 meeting, the Board considered the Oil and Gas Committee recommendation that it proceed with the cancellation of EL 2420 (subsection 127(7) of the Federal Accord Act and subsection 126(7) of the Provincial Accord Act).

Pursuant to subsection 126(2) of the Federal Accord Act (subsection 125(2) of the Provincial Accord Act) the Board has decided to cancel EL 2420 because the interest owner has failed to meet the requirements of section 4(b) and 5(a) of EL 2420 (i.e. failed to post with the Board the required \$32,250,000.00 Work Deposit). In making its decision, the Board was of the opinion that not cancelling EL 2420 would:

- Lead to similar request from other license holders, to which, on the basis of consistency, the Board would have to accede;
- Undermine confidence in the land tenure system; and
- Impede the exploration of petroleum in the Nova Scotia Offshore Area.

[70] The Board's reasons for its decision must be seen in the context of the Committee's report of January 25, 2013 and the Committee's recommendation that the Board proceed with the cancellation of the appellant's Exploration License. By this I mean the Board considered and adopted the recommendations of the Committee. As a result, it is necessary to review the Committee's recommendations to determine whether the Board's adoption of them was reasonable.

[71] The report of the Committee included determinations of facts and policy recommendations with respect to breach of the terms of the Exploration License. The Committee found as follows:

The terms and conditions that would apply to an EL issued in respect of this Call for Bids were clearly articulated in the Call for Bids documents. Of specific relevance to the matter at hand was the condition which required that a Work Deposit of 25 percent of the Work Expenditure Bid be posted with the Board no later than the third anniversary of the license; and that failure to do so would result in cancellation of the license. This meant that Shin Han F&P Inc. knew, before it submitted its \$129 million bid, that it would have to post a Work Deposit of \$32.25 million with the Board on or before January 1st, 2012.

These requirements were also contained in sections 4(a) and 5(b) of EL 2420 when it was issued to Shin Han F&P Inc. on January 1st, 2009. The conditions read as follows:

4(a): In the event that the Work Deposit is not posted by the third anniversary of this license, the License Deposit will be forfeited and this license cancelled.

5(b): The total Work Deposit required to be posted as security for the performance of work is 25% of the Work Expenditure Bid as set out in Schedule A(the "Work Deposit"). The Work Deposit is required to be posted no later than the third anniversary of this license. No interest will be paid on the Work Deposit. Failure to post the Work Deposit as security for the performance of work will result in the cancellation of this license and forfeiture of the License Deposit.

The Work Deposit for EL 2420 was not posted by January 1st, 2012, or by April 18th, 2012, and it appears the license holder was still not in a position to post it at the time it filed its evidence for this hearing in the fall of 2012.

[72] The reasoning of the Committee is clear both as to the requirements of the Exploration License and the failure of the appellant to post the Work Deposit required by that license.

[73] On the policy issue as to whether the appellant's failure to comply with the Exploration License warranted cancellation of the license, the Committee considered whether requiring a license holder to adhere to the terms of the license would impair the development of offshore petroleum resources:

Similarly, the Committee does not accept the assertion that requiring the license holder to adhere to the terms of the license will impair the development of offshore petroleum resources in the Nova Scotia Offshore Area. In fact, it is the considered view of the Committee that the opposite is true. Firstly, the evidence

of the license holder provides little comfort that EL 2420 will receive any serious exploration activity for as long as Shin Han F&P Inc. remains the license holder, and the evidence and submissions of Shin Han F&P Inc. have in effect resulted in longer extension or deferral requests being made in the fall of 2012 than were made at the end of 2011 or in April of 2012.

More importantly, the Board argues in its submissions to the Committee that to proceed beyond the three year period in these circumstances, as the license holder proposes, would compromise the land tenure system in the Nova Scotia Offshore Area. A very likely manifestation of that compromise would be a loss of confidence in the land tenure system by other potential interest holders and some consequent decline in exploration for offshore petroleum in the Nova Scotia Offshore Area. As the Board puts it in its Submission "It will also result in a lack of confidence in the system which could lead to parties losing interest in the Nova Scotia Offshore Area." The Committee has considerable empathy with this point of view. This is precisely the sort of consideration that the Board must weigh when confronted with requests for leniency by individual interest owners. If a license holder has shown it has not met its obligations, even after generous accommodation being allowed to it, then it has been given ample opportunity and the license should be offered up in the usual way to other companies which may mount a more effective exploration program in the area.

[74] The Committee's report went on to consider the applicable legislation and the objectives of the Canada-Nova Scotia Offshore Petroleum Resources Board:

Both pieces of legislation are entitled "Accord Implementation Acts". The Accord in question is "The Canada-Nova Scotia Offshore Petroleum Resources Accord". The essential purpose of the legislation therefore, is to implement the Accord. That Accord lists seven objectives, the very first of which is:

"To achieve the early development of Petroleum resources in the Offshore Area for the benefit of Canada as a whole and Nova Scotia in particular"

In Article 2.01 of the Accord the Government of Canada and the Government of Nova Scotia agree:

"...to establish by legislation, a Canada-Nova Scotia offshore Oil and Gas Board ("the Board") and to empower the Board to act in all such matters relating to Petroleum Resources as are in accordance with this Accord"

There can be little doubt that the public interest with which the Board is charged with protecting and advancing is the early development of the Nova Scotia offshore petroleum resources. Any action of the Board which impeded, or had the potential to impede, the development of these resources would be an irresponsible regulatory action. It would fly in the face of the Board's legislative and Accord mandate and obligations; and violate the first objective of the *2012 Federal Cabinet Directive on Regulatory Management*.

Extending the deadline for the posting of the Work Deposit for EL 2420, while it may be regarded as an act of consideration for this license holder, would be an abrogation of the Board's duty to protect and promote the public interest. It is clear the public interest in this case is "*...the early development of Petroleum resources in the Offshore Area.*" A series of rolling deferrals of work deposits would promote slow, not rapid, development. It is equally clear that the holder of the public interest in this case is "*Canada as a whole and Nova Scotia in particular*" and not the holder of EL 2420.

[75] The report of the Committee then considered whether it would be fair to other bidders to allow the appellant to change the terms of the license after the fact concluding:

Looked at in this context, it is not difficult to understand the Board's assertions that acceding to this request would:

- Lead to similar requests from license holders, to which, on the basis of consistency, the Board would have to accede;
- Undermine confidence in the land tenure system; and
- Impede the exploration of petroleum in the Nova Scotia Offshore Area.

[76] The factual and policy determinations of the Committee are understandable and transparent and the Board's decision to adopt the recommendations was reasonable.

[77] The decision of the Board to cancel the appellant's Exploration License as communicated in its letter of March 6, 2013 also reflects the obligation on the Board to consider the recommendations of the Committee.

[78] The Board's consideration of the Committee's recommendation and its adoption of that determination that the Exploration License should be cancelled fall within the range of reasonable outcomes based on the facts and the law.

[79] The reviewing judge did not err in his application of the reasonableness standard to the Board's decision.

[80] I would dismiss this ground of appeal.

Issue #3 Did the procedure chosen by the committee create a reasonable apprehension of institutional bias?

[81] The appellant asks that this Court consider an issue not raised in the Notice for Judicial Review and not argued before the reviewing judge. It says that there is a reasonable apprehension of bias affecting the Board's decision. It argues that the Board was an active, adversarial participant before the Committee. It further argues the general counsel of the Board acted as an advocate for the Board before the Committee and was also a voting member of the Board and one of the ultimate decision-makers.

[82] The appellant acknowledges that the general rule is that new issues cannot be raised on appeal. In support of its argument it says that this is an exception to the general rule and relies upon the Supreme Court of Canada decision in **Quan v. Cusson**, 2009 SCC 62 where the Court held:

[37] Further guidance as to the appropriate test is provided by *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, relied on by Sharpe J.A. below. There, the Ontario Court of Appeal explained the circumstances in which an exception will be made to the rule:

An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. [para. 102]

[83] I am not satisfied that the interests of justice require that this argument be considered for the first time at this level. Nor am I satisfied that there is a sufficient evidentiary record and findings of fact to do so.

[84] I accept the respondent's argument on this point that it has been prejudiced by the failure of the appellant to raise the matter before the reviewing judge. As counsel for the respondent points out, had the issue been raised below he would have had an opportunity to submit affidavit evidence with respect to the procedure followed and the reasons for it, including argument with respect to the respective roles of the Petroleum Board and the Committee.

[85] There is evidence on the record that the Committee prepared draft rules for the conduct of the hearing, with input from counsel for the appellant, which included identification of the Board as a party respondent. The Committee gave the appellant the opportunity to express "any concerns or input on them".

[86] The recommendations of the Committee include the comment that:

The license holder, through counsel, has agreed to a set of hearing rules and consented to the procedures pursuant to which the hearing was conducted. No alternative process or procedures were suggested by the license holder to deal with these concerns.

[87] If we were to hear this ground of appeal, the respondent would be denied the opportunity to provide evidence about the conduct of the hearing and the extent to which counsel for the appellant consented to the participation of the Petroleum Board as a party.

[88] The second point argued by the appellant is that the general counsel for the Board not only participated as an advocate for the Board in an adversarial capacity before the Committee but was a voting member of the Petroleum Board and was involved in the decision to cancel the license.

[89] The record does not support that the general counsel for the Board was a voting member of the Petroleum Board on the decision to cancel the appellant's Exploration License. In the minutes of the Petroleum Board meeting, the general counsel is referred to, but not described as, a Petroleum Board member. Again, had the point been raised below, evidence could have been submitted relating to the general counsel's participation in the proceedings before the Petroleum Board and the decision-making process.

[90] For these reasons, I would not entertain this ground of appeal.

Conclusion

[91] The appeal is dismissed with costs to the respondent in the amount of \$2,000 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Scanlan, J.A.

Bourgeois, J.A.