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Cancellation of a Nova Scotia Exploration License for Failure to Tender a Work Deposit

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Case commented on: *Shin Fan F & P Inc v Canada-Nova Scotia Offshore Petroleum Board*, 2013 NSSC 341

In this straightforward decision Justice Gregory Warner of the Nova Scotia Supreme Court declined to grant judicial review of a decision of the Canada-Nova Scotia Offshore Petroleum Board to cancel Shin Han's exploration license (EL) for failure to tender a work deposit.

Shin Han acquired its EL, effective January 1, 2009, on the basis of a successful work bid of $129 million. Under the terms of the bidding documents and its EL Shin Han was required to post a license deposit of $50,000 to have the license issued to it and then, by the third anniversary of the license, post a further deposit in the amount of 25% of the bid. The purpose of the delay "was to allow interest owners three years to assess geology, raise financing, or attract a farm-in partner before posting these potentially large financial requirements" (see the Work Deposit Deferral Policy at 1). Clause 5(a) of Shin Han's EL provided that "Failure to post the Work Deposit as security for the performance of the work will result in the cancellation of this License and forfeiture of the License Deposit."

In January 2011 the Board adopted a Work Deposit Deferral Policy. Under the terms of that policy the holder of an EL might apply for an extension of up to two years if it could meet the following criteria:

> 1. Demonstrate that the interest owner has been actively evaluating and exploring the prospectivity of their lands by providing specific qualitative and quantitative examples (eg. Seismic data interpretation of a significant amount of data).
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> 2. Demonstrate that the delay is beyond the control of the interest owner. For example, by providing a detailed explanation of the unforeseeable extraordinary adverse circumstances (eg. Major environmental or social issue that impedes the ability to proceed with exploration activities such as the 2010 Gulf of Mexico BP incident or a major global disruption in the economy) that necessitated the request to defer the posting of the Work Deposit. Also demonstrate why these circumstances could not have been anticipated or mitigated to allow the lands to be explored in the normal timeframe.
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> 3. Demonstrate that the interest owner has sufficient resources available to carry out acceptable exploration on their lands or alternately provide details on the efforts made to acquire resources internally and/or externally to carry out acceptable exploration on their lands.

> 4. Demonstrate that the interest owner has been diligently conducting technical assessments by providing a detailed report of all technical assessments completed for the exploration licence during the current tenure.
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> 5. Demonstrate that the interest owner will diligently pursue exploration of the lands during the extension period. This could be addressed by providing a detailed report and timeline, with key milestones identified, of the proposed work to be completed on the lands during the extended period.

An application for an extension had to be filed with the Board no later than 120 days before the third anniversary date.

Shin Han did not apply for an extension and on October 28, 2011 the Board wrote to Shin Han reminding it of the need to post the deposit. Two weeks before the due date Shin Han wrote to the Board requesting an extension of its license. The Board generously elected to treat this as an application to defer tendering the work deposit but still rejected the request on the grounds that the application was not in accordance with the Board's published policy.

At the beginning of January the Board served notice under s 126 of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c. 28 (*CNSOPRAIA*) to the effect that Shin Han had 90 days to comply with the obligation to post the work deposit, failing which its license would be canceled and its $50,000 license deposit forfeited. Shin Han failed to do so but did submit an application for an extension of time to post its deposit (which the Board rejected in May.) Section 126(1) of the *CNSOPRAIA* 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.

The Board followed up its January notice with a "Notice of Proposed Decision" as to cancellation served under s 126(2) of the *CNSOPRAIA*. Section 126(2) provides that:

> (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 become Crown reserve areas.

The reference to s 127 serves to allow the licensee to receive notice of a proposed decision and the opportunity to contest that decision before a body known as the Oil and Gas Committee which must consider the request and then make recommendations to the Board before the Board finalizes its decision. The section also provides for judicial review of any resulting decision on the following terms:

> (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.

Shin Fan referred the matter to the Committee which considered the request and issued written reasons in which the Committee agreed with the Board's proposed decision that the license should be cancelled. The failure to do so would (as quoted at para 30):

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

The Board considered the Committee's recommendations and issued the order cancelling the licence whereupon Shin Han brought this application for judicial review.

The Court concluded that the standard of review of this decision was that of reasonableness. The Court noted that while section 127(11) expressly authorized judicial review, other sections of the legislation (e.g. s 149 which provides that findings of the Committee on questions of fact are binding and conclusive) constitute (at para 44) "at least a partial privative clause". The Court also noted that the Board was interpreting its own statute and the decision engaged the Board's expertise. Furthermore the decision involved questions of fact and policy and not general questions of law.

In applying that standard to the matter at hand, Justice Warner considered both the recommendations of the Committee and the decision of the Board, concluding in each case that the factual and policy determinations were understandable, transparent and justifiable and fell within the range of reasonable outcomes (at paras 72 – 77).

Comment

As I said in the introduction, this was a straightforward case and there is therefore little to comment on in the decision itself. Everyone except Shin Han seems to have done what was expected of them. But what a set of expectations! Sections 126 and 127 (which are replicated in both the *Canada-Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3, ss 123-124 and the *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd supp) (*CPRA*)) are an astonishing example of the nanny state bending over backwards to protect oil and gas companies. It is not clear to me why a licensee should be entitled to such an extensive suite of substantive and procedural protections which include: (1) a notice that gives the licensee the right to cure the default, (2) a notice of proposed decision that the licensee can contest before an expert Committee, and (3) a right of judicial review of any resulting decision which review is not confined to points of law or jurisdiction! In an industry that is fully familiar with drop-dead rules in relation to the failure to drill and the failure to make timely delay rental payments (see, for example, *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2005 ABCA 46 and *Polaris Resources et al v Canada-NL Offshore Petroleum Board et al*, 2006 NLTD 143 (CanLII)), this collection of protections seems entirely unnecessary and incredibly wasteful and inefficient. The roots of this collection of privileges go back to the government's decision to get rid of the National Energy Program. At the time it was thought to be necessary to include a number of

provisions in the *CPRA* (which is the model for the Accord legislation on these points) designed to limit the government's discretion (e.g. the use of a single bidding variable, expert assessment of declarations of significant and commercial discovery and these appeal provisions) and to assure industry that it would be well treated if it chose to invest in Canada. But that was then, and this is now and it's time to review these cotton wool provisions. It should be easier than this for the Board to cancel a license for non-payment of a work deposit.