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Court Confirms that Offshore Board Cannot Extend a Licence Term by Issuing a Replacement Licence

By: Nigel Bankes

Case commented on: *David Suzuki Foundation v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2020 NLSC 94 (CanLII).

This decision involves the terms of the federal and provincial legislation implementing the Atlantic Accord: Canada-Newfoundland and Labrador Atlantic Accord Implementation Act, SC 1987, Ch 3 (*Federal Act*), and Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, RSNL 1990, c C-2 (*Newfoundland Act*) (collectively the Accord legislation). I commented on earlier proceedings in this litigation (*David Suzuki Foundation v Canada-Newfoundland Offshore Petroleum Board*, 2018 NLSC 146 (CanLII)) confirming the public interest standing of the applicant here. That earlier post also provides the factual background:

> Corridor Resources Inc. (Corridor) received a nine year exploration licence (EL 1105) from the Canada-Newfoundland Offshore Petroleum Board (CNLOPB or Board) on January 15, 2008 under the terms of the Accord legislation. … As is customary, the EL was divided into two periods: Period I, five years and Period II, 4 years. In order to validate the licence for Period 2 Corridor had to commence the drilling of a well within the Period I and diligently drill through to completion. Corridor's proposal to drill proved controversial and triggered a time-consuming environmental assessment procedure. In response to this Corridor applied for and was granted an extension to Period I but in the end it was not able to drill a well as required by the EL.
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> The Board had earlier decided (February 27, 2012) that it would not issue a prohibition order under s. 55 of the *Newfoundland Act* (slightly different from the equivalent provision in s. 56 of the *Federal Act*). Such an order would have stopped the clock on the running of time under the EL. Section 55 provides that
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> > **55.(1)** The board may, in the case of
> > **(a)** an environmental or social problem of a serious nature; or
> > **(b)** dangerous or extreme weather conditions affecting the health or safety of people or the safety of equipment,
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> > by order, prohibit an interest owner specified in the order from beginning or continuing work or activity on the portions of the offshore area or a part of the offshore area that are subject to the interest of that interest owner.

> **(4)** Where, because of an order made under subsection (1) or (3), a requirement in relation to an interest cannot be complied with while the order is in force, compliance with the requirement is suspended until the order is revoked.
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> **(5)** The term of an interest that is subject to an order under subsection (1) or (3) and the period provided for compliance with a requirement in relation to the interest are extended for a period equal to the period that the order is in force.

In the end, however, the Board resolved to exercise its apparent statutory authority under s. 61(1)(b) of the *Federal Act* to request Corridor Resources to surrender EL 1005 in return for a new EL (EL 1153, available here) covering exactly the same lands. The new licence, with an effective date of January 15, 2017, has a four-year term: Period I is for three years and period II for one year. Section 61(1)(b) of the *Federal Act* provides as follows:

> **61 (1)** Subject to sections 31 to 40, the Board may issue an interest, in relation to any Crown reserve area, *without making a call for bids* where
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> **(a)** the portion of the offshore area to which the interest is to apply has, through error or inadvertence, become a Crown reserve area and the interest owner who last held an interest in relation to such portion of the offshore area has, within one year after the time they so became a Crown reserve area, requested the Board to issue an interest; or
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> **(b)** the Board is issuing the interest to an interest owner in exchange for the surrender by the interest owner, at the request of the Board, of any other interest or a share in any other interest, in relation to all or any portion of the offshore area subject to that other interest.
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> (emphasis added)

Section 69 of the *Federal Act* is also relevant.

> **69 (1)** The effective date of an exploration licence is the date specified in the licence as the effective date thereof.
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> **(2)** Subject to subsection (3) and section 70, the term of an exploration licence shall not exceed nine years from the effective date of the licence and shall not be extended or renewed.
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> **(3)** Subject to section 70, [drilling of a well commenced, or need to commence the drilling of a second well for technical or similar reasons] the term of an exploration licence entered into or in respect of which negotiations have been completed before December 20, 1985 may be renegotiated once only for a further term not exceeding four years and thereafter the term thereof shall not be renegotiated, extended or renewed.

> **(4)** On the expiration of an exploration licence, the portions of the offshore area to which the exploration licence related and that are not subject to a production licence or a significant discovery licence become Crown reserve areas.
> There are similar provisions in both the *Canada Petroleum Resources Act*, RSC 1985, c. 35 (2nd Supp.) (ss. 12, 14, 17 & 26) and in the legislation establishing the offshore regime for Nova Scotia.

> The applicants in this case, five environmental non-governmental organizations (ENGOs), sought to question the validity of the Board's decision to use its exchange power, particularly when the practical effect of exercising the power was to avoid the hard nine-year ceiling of s. 69(2) in the *Federal Act*.

As noted above, that earlier decision granted the applicants public interest standing; this most recent decision was the decision on the merits of the judicial review application.

The applicants sought judicial review of the Board's decision to issue the new EL to Corridor Resources on the basis that the Board's decision was unreasonable. In light of the Supreme Court of Canada's decisions in the *Vavilov* trilogy (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII); *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 (CanLII); *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 (CanLII)) all parties conceded (at paras 60 - 67) that the standard of review was reasonableness.

According to *Vavilov*, review on a reasonableness ground requires the Court to engage both with the internal logic of the decision as well as the statutory context for the decision. Above all, the Court must engage with the actual reasons and reasoning process of the statutory decision-maker (at para 101). The Board's decision as recorded in the Canada Gazette was very short. The Gazette notice advises that the Board, pursuant to s 61 of the federal Act and s 60 of the provincial Act, has issued

> … Exploration Licence No. 1153 … effective January 15, 2017, in exchange for a surrender of existing Exploration Licence No. 1105 issued to Corridor Resources Inc. in the Canada–Newfoundland and Labrador Offshore Area.
> The issuance of this new exploration licence equitably restores the exploration licence term to four years to afford time to complete the environmental assessment, to seek a drilling operations authorization and to validate the geological prospect commonly referred to as Old Harry.

I think that it is fairly evident that these brief "reasons" don't pass muster post-*Vavilov* either in terms of internal logic or statutory context. (*Vavilov* at para 101) However, rather than deciding against the Board on that basis Justice Rosalie McGrath offers lengthy reasons (some 60 pages) as to why the Board could not reasonably have concluded that it could use the exchange power of s 61 of the federal statute to authorize direct issuance of an EL for the self-same lands that Corridor had held under its earlier surrendered licence. In doing so, Justice McGrath engages not with the Board's decision itself but with the arguments of counsel – effectively the reasons that the Board could have given in support of its conclusion had it been so moved. It is important to say that there is much that is instructive in Justice McGrath's discussion of these arguments, and

I certainly agree with the outcome (i.e. that there was only one reasonable construction of the statute here; see *Vavilov* at para 124), but I think that the decision is methodologically suspect insofar as Justice McGrath engages with counsel's version of reasons that might have been provided to support the decision, rather than the reasons that were provided. That is not the message of *Vavilov* (at paras 83 & 96).

In this case, what I would characterize as a methodological error did not lead to a different outcome than that which I would expect by focusing on the (clearly deficient) actual reasons, *but importantly, in other cases it might*. I think that one of the lessons of *Vavilov* for statutory decision-makers is that they need to provide cogent reasons up front. A decision-maker needs to demonstrate that its decision is justifiable when it makes the decision. The decision-maker should not be able to offer different or better reasons after the fact as to why it might have been justifiable. Counsel for the statutory decision-maker also need to accept this discipline at the outset and should not be afforded the opportunity to buttress patently deficient reasons on a judicial review application. What is under review is the actual decision of the statutory body not the persuasiveness of counsel's innovative arguments that could have been made in support of the decision.

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