

Date: 20071010

Docket: T-955-05

Citation: 2007 FC 1044

Ottawa, Ontario, October 10, 2007

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

HEARTLAND RESOURCES INC.

Applicant

and

**SABLE OFFSHORE ENERGY INC.
and MARITIMES & NORTHEAST
PIPELINE MANAGEMENT LTD.**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This appeal, pursuant to section 101 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEB Act or Act), is from an Arbitration Committee's decision dismissing Heartland Resources Inc.'s (Heartland or the Appellant) compensation claim under Part V of the NEB Act for damages suffered as a result of the construction of a natural gas processing plant, a pipeline and related

pipeline infrastructure by Sable Offshore Energy Inc. (SOEI) and Maritimes & Northeast Pipeline Management Ltd. (M&NP) (collectively the Respondents).

Background

[2] The Appellant holds a mineral exploration licence (licence) issued under Nova Scotia's *Mineral Resources Act*, S.N.S. 1990, c.18. The licence entitles the Appellant to search and prospect for minerals and to extract minerals for test purposes in the approximately 1800 acres covered by the licence in the Goldboro/Seal Harbour, Guysborough County areas in Nova Scotia.

[3] The Respondents are involved in the Sable Offshore Energy Project. In 1998, the Respondents served notices pursuant to section 87(1) of the NEB Act on the Appellant. SOEI's notice, related to the construction of a natural gas processing plant and other pipeline facilities. M&NP's notice was for its proposed natural gas pipeline and other pipeline facilities.

[4] The National Energy Board (NEB) approved the Respondents' applications. Subsequent to obtaining the approval, SOEI acquired the title to the approximately 200 acres of land on which its gas plant and other pipeline facilities are located. Similarly, M&NP acquired the title to approximately 3.64 hectares of land and the necessary easements for its installations. These lands fall entirely within the area covered by the Appellant's licence.

[5] Following an unsuccessful attempt at negotiation initiated by the Appellant pursuant to subsection 88(1) of the NEB Act, the Appellant served a notice of arbitration on the Minister

pursuant to section 90(1) of the Act. The Appellant's request was for a determination of the compensation due for damage it sustained by reason of the Respondents' exercise of the powers granted to them under the Act. After receiving written submissions from the parties, the Minister appointed an Arbitration Committee to resolve the dispute.

Arbitration Committee's decision

[6] The Arbitration Committee concluded that the Appellant's claim was beyond its jurisdiction to award damages as provided in section 97 of the Act. The Committee found that the Appellant had failed to establish that the damages it claimed were "caused by" the Respondents as required by section 84 of the Act and that the Appellant was not an "owner of lands" as contemplated by section 90 of the Act.

[7] The Arbitration Committee also considered the merits of the claim in the event that it had erred on the issue of jurisdiction. The Committee concluded that there was no convincing evidence to establish any diminution in the value of the Appellant's mineral exploration licence or damages as a result of the Respondents' activities.

[8] The Appellant raises the following issues:

1. Did the Committee err in law in finding that it did not have jurisdiction and/or in refusing to exercise its jurisdiction?

2. Did the Committee err by failing to deal with the issue of costs as required by section 99 of the NEB Act?

3. Did the Committee make erroneous findings of fact without regard to the material before it?

[9] Prior to the hearing, the Appellant abandoned its ground of appeal concerning the admissibility of certain evidence and at the hearing indicated that it would not pursue any further an argument based on a breach of a principle of natural justice.

Appellant's submissions

[10] There are two aspects to the jurisdiction issue. First, the Appellant submits it was beyond the Arbitration Committee's authority to rule on its own jurisdiction. Second, the Appellant submits the Committee erred in concluding that it did not have jurisdiction to award the claimed compensation.

[11] The Appellant relies on *Balisky v. Canada (Minister of Natural Resources)*, 2003 FCA 104 as authority for the proposition that if there is a right to compensation under the NEB Act, there is a right to arbitration. The Appellant adds that, in effect, this same proposition was confirmed in *Maritimes and Northeast Pipeline Ltd. v. Elliott*, 2004 F.C. 553 (F.C.) aff'd 2005 FCA 229.

[12] As to the Arbitration Committee's authority to rule on its own jurisdiction, the Appellant takes the following position. Under subsection 91(2) of the NEB Act, an Arbitration Committee shall not be appointed unless the Minister is satisfied that the matter referred to in the notice of arbitration is a matter to which Part V of the NEB Act applies. Moreover, subsection 97(1) provides that an arbitration committee shall determine all compensation matters referred to in a notice of arbitration served on it. The Appellant contends that by appointing the Arbitration Committee the Minister determined that the matter of compensation set out in the Appellant's notice of arbitration was one to which the statutory arbitration provisions in Part V apply. Relying on the decision in Elliott, the Appellant submits that the Minister may not lawfully appoint an Arbitration Committee unless the circumstances come within the statutory provisions. Accordingly, the role of the Arbitration Committee is limited to a determination of all compensation matters referred to in the notice of arbitration as required by subsection 97(1) of the Act.

[13] The Appellant also points out that the Respondents made submissions to the Minister objecting to the appointment of an Arbitration Committee. The Appellant maintains that the Minister's determination that the Arbitration Committee had jurisdiction was binding on the Committee and, as such, the issue was *res judicata* having already been decided. The Appellant submits that if the Respondents were of the view that the Minister erred, they should have brought a judicial review proceeding as in the Balitsy and Elliott cases. By raising the issue of jurisdiction with the Arbitration Committee, the Respondents were, in effect, appealing the Minister's decision to the Committee.

[14] The Appellant also argues that having “attorned” to the negotiation provision in Part V of the Act, the Respondents accepted that the Appellant was an “interested person” and could not question the jurisdiction of the Committee.

[15] The Appellant adds that the wording of the Respondents’ section 87 notices demonstrates an acknowledgement on their part that the Appellant is an “owner of lands” and has interest “in” lands.

[16] As to the issue of the jurisdiction to award compensation, the Appellant submits that the Arbitration committee erred in law in finding that it was not an “interested person” as contemplated in section 75 of the NEB Act.

[17] The Appellant submits that the decision in *Balisky* stands for the proposition that when a company that has been given the authority to construct and operate a pipeline takes land or causes damage arising from the construction or operation of the pipeline and compensation is not agreed upon with the person whose land is taken or who suffers damage, either party may serve a notice of negotiation or arbitration. The legislative intent is to make whole anyone who suffers loss as a result of the activity of the company.

[18] Subsections 112(1) and 81(1) of the Act establish a “controlled area” of thirty meters and forty meters respectively in all directions from a pipeline. The Appellant submits that because of the restrictions imposed by these two provisions, the Appellant cannot meaningfully explore or mine its property in the controlled areas without leave of the NEB. In addition to the significant

impact on the value of its licence, this will result in delay, costs and the added risk that the NEB may not grant leave or may impose heavy restrictions.

[19] The Appellant submits that in *Balisky* Justice Rothstein held that section 84 of the Act does not exclude claims arising from the operation of subsection 112(1). Further, the Court recognized that a claim for damages in relation to a “controlled area” was an appropriate matter for consideration by an arbitration committee.

[20] The Appellant maintains that the Committee erred by failing to consider and recognize the tangible restrictions and significant impact on it arising from the Respondents’ construction, presence and operation of the pipeline infrastructure.

[21] The Appellant also raised an ancillary issue concerning costs. The Appellant argues that the Respondents having invoked proceedings under Part V of the Act, the Committee was obliged pursuant to section 99 of the Act to consider the matter of costs even though it had concluded that the Appellant was not a “person interested”.

Relevant Statutory Provisions

[22] The following are the relevant statutory provisions:

National Energy Board Act, R.S.C. 1985, c. N-7

Definitions

"lands" means lands the acquiring, taking or using of which is authorized by this Act or a Special Act, and includes real property and any interest or right in real property or land and, in the Province of Quebec, any immovable, any right in an immovable and the right of a lessee in respect of any immovable. Those interests and rights may be in, to, on, under, over or in respect of those lands;

"pipeline" means a line that is used or to be used for the transmission of oil, gas or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property, or immovable and movable, and works connected to them, but does not include a sewer or water pipeline that is used or proposed to be used solely for municipal purposes;

Définitions

«terrains » Terrains dont l'acquisition, la prise ou l'usage est autorisé par la présente loi ou par une loi spéciale. Les dispositions les concernant s'appliquent également aux biens réels et intérêts fonciers, ainsi qu'aux droits et intérêts afférents et, dans la province de Québec, aux immeubles ainsi qu'aux droits afférents et aux droits des locataires relativement aux immeubles. Ces droits et intérêts peuvent porter sur la surface ou le sous-sol de ces terrains.

«pipeline» Canalisation servant ou destinée à servir au transport du pétrole, du gaz ou de tout autre produit, et reliant une province et une ou plusieurs autres provinces, ou s'étendant au-delà des limites d'une province ou de la zone extracôtière, au sens de l'article 123, y compris les branchements, extensions, citernes, réservoirs, installations de stockage ou de chargement, pompes, rampes de chargement, compresseurs, systèmes de communication entre stations par téléphone, télégraphe ou radio, ainsi que les ouvrages, ou autres immeubles ou meubles, ou biens réels ou personnels, connexes à l'exclusion des égouts ou canalisations de distribution d'eau servant ou destinés à servir uniquement aux besoins municipaux.

PARTIE V

POUVOIRS DES

COMPAGNIES

POUVOIRS GÉNÉRAUX

Pouvoirs

73. Sous réserve des autres dispositions de la présente loi et de toute loi spéciale la concernant, la compagnie peut, dans le cadre de son entreprise :

a) pénétrer sans autorisation sur tout terrain, appartenant ou non à la Couronne et situé sur le tracé de son pipeline, et y faire les levés, examens ou autres préparatifs requis pour fixer l'emplacement de celui-ci et marquer et déterminer les parties de terrain qui y seront appropriées;

b) acquérir et détenir les terrains ou autres biens nécessaires à la construction, à l'entretien et à l'exploitation de son pipeline, et disposer, notamment par vente, de toute partie des terrains ou biens devenue, pour

PART V

POWERS OF PIPELINE

COMPANIES

GENERAL POWERS

Powers of company

73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,

(*a*) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;

(*b*) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline and sell or

otherwise dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline;

(*c*) construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;

(*d*) join its pipeline with the transmission facilities of any other person at any point on its route;

(*e*) construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance and operation of its pipeline;

(*f*) construct, maintain and operate branch lines, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for a pipeline;

(*g*) alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their

quelque raison, inutile aux fins de la canalisation;

c) construire, poser, transporter ou placer son pipeline sur, à travers ou sous les terrains situés le long du tracé du pipeline;

d) raccorder son pipeline, à un point quelconque de son tracé, aux installations de transport appartenant à d'autres personnes;

e) construire et entretenir les chemins, bâtiments, maisons, gares et stations, dépôts, quais, docks et autres ouvrages utiles à ses besoins, et construire ou acquérir des machines et autres appareils nécessaires à la construction, à l'entretien et à l'exploitation de son pipeline;

f) construire, entretenir et exploiter des branchements et exercer à cette fin les attributions qu'elle a à l'égard du pipeline;

g) modifier, réparer ou cesser d'utiliser tout ou partie des ouvrages mentionnés au présent article et les remplacer par d'autres;

h) transporter des hydrocarbures par pipeline et fixer les moments où se

stead;

(*h*) transmit hydrocarbons by pipeline and regulate the time and manner in which hydrocarbons shall be transmitted, and the tolls to be charged therefor; and

(*i*) do all other acts necessary for the construction, maintenance and operation of its pipeline.

fait le transport, la manière dont il se fait, ainsi que les droits à percevoir en l'espèce;

i) prendre toutes les autres mesures nécessaires à la construction, à l'entretien et à l'exploitation de sa canalisation.

Damages and compensation

75. A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers.

Indemnisation

75. Dans l'exercice des pouvoirs qui lui sont conférés par la présente loi ou une loi spéciale, la compagnie doit veiller à causer le moins de dommages possibles et, selon les modalités prévues à la présente loi et à une loi spéciale, indemniser pleinement tous les intéressés des dommages qu'ils ont subis en raison de l'exercice de ces pouvoirs.

Protection of mines

79. No company shall, without the authority of the Board, locate the line of its proposed pipeline, or construct the pipeline or portion thereof, so as to obstruct or interfere with or injuriously affect the working of or the access or adit to a mine then open, or for the opening of which

Protection des mines

79. La compagnie ne peut, sans l'autorisation de l'Office, établir le tracé d'un pipeline ou le construire, en tout ou en partie, d'une façon qui nuirait à l'exploitation d'une mine soit déjà ouverte, soit en voie d'ouverture légale et connue du public, ou en gênerait l'accès.

preparations are, at the time of the location, being lawfully and openly made..

Right to minerals

80. A company is not, unless they have been expressly purchased, entitled to mines, ores, metals, coal, slate, oil, gas or other minerals in or under lands purchased by it, or taken by it under compulsory powers given to it by this Act, except only the parts of them that are necessary to be dug, carried away or used in the construction of the works, and, except as provided in this section, all those mines and minerals shall be deemed to be excepted from the transfer of the lands, unless they have been expressly included in the transfer documents.

Protection of pipeline from mining operations

81. (1) No person shall work or prospect for mines or minerals lying under a pipeline or any of the works connected therewith, or within forty metres therefrom, until leave therefor has been obtained from the Board.

Compensation for severance, etc., of mining property

Droit sur les minéraux

80. La compagnie n'a, à moins de les avoir expressément achetés, aucun droit sur les mines, minerais ou minéraux, notamment métaux, charbon, ardoise, pétrole ou gaz, du sol ou sous-sol des terrains qu'elle a achetés ou dont elle a pris possession en vertu des pouvoirs coercitifs que lui confère la présente loi, à l'exception de ceux dont l'extraction, l'enlèvement ou l'usage sont nécessaires à la construction des ouvrages; sous réserve des autres dispositions du présent article, ces mines et minéraux sont réputés exclus du transfert de ces terrains s'ils n'y ont pas été expressément mentionnés.

Protection du pipeline contre les opérations minières

81. (1) Sauf autorisation expresse de l'Office, la prospection et l'exploitation de gisements sont interdites, dans un rayon de quarante mètres du pipeline ou des ouvrages connexes.

Indemnité

83. Sur ordre de l'Office, la

83. A company shall, from time to time, pay to the owner, lessee or occupier of any mines such compensation as the Board fixes and orders to be paid for or by reason of any severance by a pipeline of the land lying over the mines, the working of the mines being prevented, stopped or interrupted, or the mines having to be worked in such manner and under such restrictions as not to injure or be detrimental to the pipeline, and also for any minerals not purchased by the company that cannot be obtained by reason of the construction and operation of its line.

Application restricted

84. The provisions of this Part that provide negotiation and arbitration procedures to determine compensation matters apply in respect of all damage caused by the pipeline of a company or anything carried by the pipeline but do not apply to

(a) claims against a company arising out of activities of the company unless those activities are directly related to

(i) the acquisition of lands for a pipeline,

compagnie verse au propriétaire, au locataire ou à l'occupant d'une mine l'indemnité déterminée par l'Office pour couvrir les dommages engendrés par la présence du pipeline : fragmentation du terrain qui recouvre la mine, interruption ou cessation d'exploitation de celle-ci, nécessité de veiller à ne pas nuire au pipeline ou à ne pas l'endommager et restriction que cela entraîne pour l'exploitation et, enfin, perte des minéraux, non achetés par la compagnie, que la construction et l'exploitation de la canalisation rendent impossibles à obtenir.

Application et exceptions

84. Les procédures de négociation et d'arbitrage prévues par la présente partie pour le règlement des questions d'indemnité s'appliquent en matière de dommages causés par un pipeline ou ce qu'il transporte, mais ne s'appliquent pas :

a) aux demandes relatives aux activités de la compagnie qui ne sont pas directement rattachées à l'une ou l'autre des opérations suivantes :

(i) acquisition de terrains pour la construction d'un pipeline,

(ii) the construction of the pipeline, or

(ii) construction de celui-ci,

(iii) the inspection, maintenance or repair of the pipeline;

(iii) inspection, entretien ou réparation de celui-ci;

(b) claims against a company for loss of life or injury to the person; or

b) aux demandes dirigées contre la compagnie pour dommages à la personne ou décès;

(c) awards of compensation or agreements respecting compensation made or entered into prior to March 1, 1983.

c) aux décisions et aux accords d'indemnisation intervenus avant le 1^{er} mars 1983.

Définition de « propriétaire »

85. Pour l'application des articles 86 à 107, «propriétaire » désigne toute personne qui a droit à une indemnité aux termes de l'article 75.

Definition of "owner"

85. In sections 86 to 107, "owner" means any person who is entitled to compensation under section 75.

Modes d'acquisition

86. (1) Sous réserve du paragraphe (2), la compagnie peut acquérir des terrains par un accord d'acquisition conclu avec leur propriétaire ou, à défaut d'un tel accord, conformément à la présente partie.

Methods of acquisition

86. (1) Subject to subsection (2), a company may acquire lands for a pipeline under a land acquisition agreement entered into between the company and the owner of the lands or, in the absence of such an agreement, in accordance with this Part.

Avis d'intention d'acquisition

87. (1) Après avoir déterminé les terrains qui peuvent lui être nécessaires

Notice of proposed acquisition

of lands

87. (1) When a company has determined the lands that may be required for the purposes of a section or part of a pipeline, the company shall serve a notice on all owners of the lands, in so far as they can be ascertained, which notice shall set out or be accompanied by

(a) a description of the lands of the owner that are required by the company for that section or part;

(b) details of the compensation offered by the company for the lands required;

(c) a detailed statement made by the company of the value of the lands required in respect of which compensation is offered;

(d) a description of the procedure for approval of the detailed route of the pipeline; and

(e) a description of the procedure available for negotiation and arbitration under this Part in the event that the owner of the lands and the company are unable to agree on any matter respecting the compensation payable.

pour une section ou partie de pipeline, la compagnie signifie à chacun des propriétaires des terrains, dans la mesure où leur identité peut être établie, un avis contenant, ou accompagné de pièces contenant :

a) la description des terrains appartenant à celui-ci et dont la compagnie a besoin;

b) les détails de l'indemnité qu'elle offre pour ces terrains;

c) un état détaillé, préparé par elle, quant à la valeur de ces terrains;

d) un exposé des formalités destinées à faire approuver le tracé détaillé du pipeline;

e) un exposé de la procédure de négociation et d'arbitrage prévue à la présente partie à défaut d'entente sur quelque question concernant l'indemnité à payer.

Demande de négociation

Request for negotiations

88. (1) Where a company and an owner of lands have not agreed on the amount of compensation payable under this Act for the acquisition of lands or for damages suffered as a result of the operations of the company or on any issue related to that compensation, the company or the owner may serve notice of negotiation on the other of them and on the Minister requesting that the matter be negotiated under subsection (3).

Request for arbitration

90. (1) Where a company or an owner of lands wishes to dispense with negotiation proceedings under this Part or where negotiation proceedings conducted under this Part do not result in settlement of any compensation matter referred to in subsection 88(1), the company or the owner may serve notice of arbitration on the other of them and on the Minister requesting that the matter be determined by arbitration.

Duties of Minister

88. (1) À défaut d'entente entre la compagnie et le propriétaire sur toute question touchant l'indemnité, notamment son montant, à payer en vertu de la présente loi pour l'achat de terrains ou pour les dommages causés par les activités de la compagnie, la compagnie ou le propriétaire peut signifier à l'autre partie et au ministre un avis demandant que la question fasse l'objet de la négociation prévue au paragraphe (3).

Demande d'arbitrage

90. (1) Pour passer outre à la procédure de négociation ou en cas d'échec de celle-ci sur toute question visée au paragraphe 88(1), la compagnie ou le propriétaire peut signifier à l'autre partie et au ministre un avis d'arbitrage.

Obligations du ministre

91. (1) Dès qu'un avis d'arbitrage lui est signifié, le ministre :

91. (1) Where the Minister is served with a notice of arbitration under this Part, the Minister shall,

(a) if an Arbitration Committee exists to deal with the matter referred to in the notice, forthwith serve the notice on that Committee; or

(b) if no Arbitration Committee exists to deal with the matter, forthwith appoint an Arbitration Committee and serve the notice on that Committee.

Exception

(2) The Minister shall not take any action under subsection (1) where the Minister is satisfied that the matter referred to in a notice of arbitration served on the Minister is a matter

(a) solely related to the amount of compensation that has been previously awarded by an Arbitration Committee and that, under the award, the amount is not subject to a review at the time the notice is served; or

(b) to which the arbitration procedures set out in this Part do not apply.

Determination of compensation

a) si un comité d'arbitrage a déjà été constitué pour régler la question mentionnée dans l'avis, signifie à celui-ci l'avis d'arbitrage;

b) dans le cas contraire, nomme un comité d'arbitrage et signifie l'avis à celui-ci.

Exception

(2) Le paragraphe (1) ne s'applique pas dans les cas où le ministre est convaincu que la question mentionnée dans l'avis d'arbitrage qui lui a été signifié :

a) soit ne porte que sur le montant de l'indemnité accordé antérieurement par un comité d'arbitrage, lequel montant n'était pas, aux termes de la décision, susceptible de révision à la date de signification de l'avis;

b) soit est exclue de la procédure d'arbitrage.

Détermination de l'indemnité

97. (1) Le comité d'arbitrage doit régler les questions d'indemnité

97. (1) An Arbitration Committee shall determine all compensation matters referred to in a notice of arbitration served on it and in doing so shall consider the following factors where applicable:

(*a*) the market value of the lands taken by the company;

(*b*) where annual or periodic payments are being made pursuant to an agreement or an arbitration decision, changes in the market value referred to in paragraph (*a*) since the agreement or decision or since the last review and adjustment of those payments, as the case may be;

(*c*) the loss of use to the owner of the lands taken by the company;

(*d*) the adverse effect of the taking of the lands by the company on the remaining lands of an owner;

(*e*) the nuisance, inconvenience and noise that may reasonably be expected to be caused by or arise from or in connection with the operations of the company;

mentionnées dans l'avis qui lui a été signifié, et tenir compte, le cas échéant, des éléments suivants :

a) la valeur marchande des terrains pris par la compagnie;

b) dans le cas de versements périodiques prévus par contrat ou décision arbitrale, les changements survenus dans la valeur marchande mentionnée à l'alinéa *a*) depuis la date de ceux-ci ou depuis leurs derniers révision et rajustement, selon le cas;

c) la perte, pour leur propriétaire, de la jouissance des terrains pris par la compagnie;

d) l'incidence nuisible que la prise des terrains peut avoir sur le reste des terrains du propriétaire;

e) les désagréments, la gêne et le bruit qui risquent de résulter directement ou indirectement des activités de la compagnie;

f) les dommages que les activités de la compagnie risquent de causer aux terrains de la région;

g) les dommages aux biens meubles ou personnels,

(f) the damage to lands in the area of the lands taken by the company that might reasonably be expected to be caused by the operations of the company;

(g) loss of or damage to livestock or other personal property or movable affected by the operations of the company;

(h) any special difficulties in relocation of an owner or his property; and

(i) such other factors as the Committee considers proper in the circumstances.

Appeals

101. A decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court within thirty days after the day on which the decision, order or direction is made, given or issued or within such further time as that Court or a judge thereof under special circumstances may allow.

Construction of facilities across pipelines

notamment au bétail, résultant des activités de la compagnie;

h) les difficultés particulières que le déménagement du propriétaire ou de ses biens pourrait entraîner;

i) les autres éléments dont il estime devoir tenir compte en l'espèce.

Appels

101. Appel d'une décision ou d'une ordonnance du comité d'arbitrage peut être interjeté, sur une question de droit ou de compétence, devant la Cour fédérale dans les trente jours du prononcé ou dans le délai ultérieur que le tribunal ou un de ses juges peut accorder dans des circonstances spéciales.

Interdiction de construire ou d'excaver

112. (1) Sous réserve du paragraphe (5), il est interdit,

112. (1) Subject to subsection (5), no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under a pipeline or excavate using power-operated equipment or explosives within thirty metres of a pipeline.

sans l'autorisation de l'Office, soit de construire une installation au-dessus, au-dessous ou le long d'un pipeline, soit de se livrer à des travaux d'excavation, avec de l'équipement motorisé ou des explosifs, dans un périmètre de trente mètres autour d'un pipeline.

Mineral Resources Act, S.N.S. 1990, c.18

Definitions

2. In this Act,

...

(h) "exploration licence" means a licence by which the holder thereof is granted, pursuant to Section 28, the right to search and prospect for minerals within an area designated in the licence;

...

Rights conferred

38. Subject to Sections 39, 40 and 101, the rights conferred by a licence are, and are limited to, prospecting and searching for minerals, extracting minerals for test purposes and applying for a mining lease for all or a part of the area held under a licence.

Prohibited entry or working of private land

39. No licensee, legal representative of the licensee or person acting on behalf of the licensee shall enter upon, pass over or work private land for the purpose of gaining access to and working the licence except with the consent of the owner or tenant or pursuant to Section 100.

Prohibited entry or working of Crown lands

40. No licensee, legal representative of the licensee or person acting on behalf of the licensee shall enter upon and work Crown lands except with the consent of the Minister or of a person designated by the Minister and upon such terms and conditions as are specified by the Minister.

Standard of Review

[22] SEOI submits that although determinations regarding jurisdiction, a question of law, are usually reviewed on a standard of correctness, in *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77, the Supreme Court of Canada qualified this general proposition and held that a wider degree of deference ought to be accorded to expert tribunals when the factors of the functional and pragmatic approach (particularly expertise) indicate that such deference is the legislative intention.

[23] Relying on *Pelletier v. Gazoduc Trans-Quebec & Maritimes Inc. (1999)*, 68 L.C.R 286 (F.C.), SEOI submits that an Arbitration Committee has expertise entitling it to some deference on questions of law. In the present case, SOEI argues that the Committee's determinations on the questions of jurisdiction should be reviewed on a standard of reasonableness. M&NP agrees with this position.

[24] The Respondents also submit that Arbitration Committee's findings of fact should be reviewed against a standard of patent unreasonableness.

[25] The Appellant submits that all appeals under section 101 of the NEB Act are to be reviewed on a standard of correctness. The Appellant also adds that since perverse findings of fact can amount to an error of law, no deference should be given to the Committee's factual determinations.

[26] Given that the issues of jurisdiction in this case are questions of law, the Committee's findings on jurisdiction will be reviewed on a standard of correctness. Further, as these issues are determinative of the outcome of this appeal, a consideration of the parties' positions on the standard of review applicable to the Committee's findings of fact is unnecessary.

Analysis

[27] In my opinion, the Appellant's position with regard to the Committee's authority to rule on its own jurisdiction is not supported by the statutory provisions or the jurisprudence. Upon being served with a notice of arbitration under paragraph 91(1)(b) of the NEB Act, the Minister is obliged to appoint a Committee and to serve the Committee with the notice of arbitration. Paragraph 91(2)(b) provides, however, that if the Minister is satisfied that the matter is one to which the arbitration procedures under Part V do not apply, the Minister shall not appoint a Committee.

[28] First, it should be observed that section 91 only concerns the duties of the Minister upon being served with a notice of arbitration. It does not concern the Committee's authority to consider its own jurisdiction. Second, having regard to the obligation imposed on the Minister to refer the matter to arbitration unless he is satisfied that the arbitration provisions do not apply and the fact that at this stage of the process the Minister may not have sufficient evidence on which to make a

determination concerning the applicability of the provisions lead to the conclusion that paragraph 91(2)(b) simply provides for an initial screening by the Minister of those matters he is satisfied do not fall within the arbitration provisions.

[29] As to the Appellant's reliance on the statement in *Elliott* at paragraph 14 that the Minister is obliged to "ascertain whether or not the claim is one for which compensation is provided by the statute", this was said in the context of a discussion concerning the Minister's statutory duty under paragraph 91(2)(b). It does not stand for the proposition that a referral to arbitration is determinative of the Arbitration Committee's jurisdiction.

[30] With respect to the Appellant's reliance on section 97 that the Committee must determine all matter of compensation referred for arbitration and not engage in a consideration of jurisdiction, statutory entitlement is a fundamental question and the starting point for any determination regarding compensation.

[31] I also reject the argument based on the section 87 notice. It is trite law that consent to jurisdiction cannot confer jurisdiction on a court or tribunal that it does not otherwise have.

[32] Finally, section 101 of the Act provides for an appeal from a decision of an Arbitration Committee on a question of law or jurisdiction to this Court. In *Gazoduc* at paragraph 13, in the context of a discussion of an earlier provision in the legislation regarding the same right of appeal from an Arbitration Committee's decision on jurisdiction, Justice Denault stated that "[t]here is no

doubt that the Arbitration Committee not only had the authority, but also the obligation to rule on its contested competence.”

[33] The remaining jurisdictional question is whether the Committee erred in concluding that the claim was not within its jurisdiction under Part V of the NEB Act.

[34] The statutory entitlement to compensation is found in section 75 of the NEB Act. A company is required to make full compensation to all “persons interested” for damage sustained by them by reason of the exercise of the powers granted to the company by the Act.

[35] While section 75 creates an entitlement to compensation, it must be read in the broader context of Part V of the Act and, in particular, the negotiation and arbitration provisions.

[36] The NEB Act provides that a company or an “owner of lands” may initiate the negotiation proceedings pursuant to subsection 88(1) and the arbitration proceedings under subsection 90(1) by serving the relevant notice on the Minister. According to subsection 88(1) and incorporated by reference in subsection 90(1), to come within the arbitration provisions of the Act two criteria must be met. First, the party seeking arbitration must be either a company as defined in the Act or an “owner of lands”. Second, the compensation being sought must come within the purview of section 84.

[37] Although “owner of lands” is not defined in the legislation, section 85 states that the word “owner” used in sections 86 to 107 means any person entitled to compensation under section 75. As to the definition of “lands”, it is found in section 2 of the Act. It reads:

"lands" means lands the acquiring, taking or using of which is authorized by this Act or a Special Act, and includes real property and any interest or right in real property or land and, in the Province of Quebec, any immovable, any right in an immovable and the right of a lessee in respect of any immovable. Those interests and rights may be in, to, on, under, over or in respect of those lands;

It should be noted that this definition of “lands” came into force in 2004. However, any difference between this definition and the earlier version is not material to this discussion.

[38] However, in *Elliott*, Justice Layden-Stevenson concluded that the meaning of the word “lands” in subsection 90(1) was not restricted to the section 2 definition. Instead, it “means ‘lands’ as that term is ordinarily used and understood.”

[39] As noted above, the Appellant’s mineral exploration licence was issued under Nova Scotia’s *Mineral Resources Act*. Section 38 of this Act provides that the “rights conferred by a licence are, and are limited to, prospecting and searching for minerals, extracting minerals for test purposes and applying for a mineral lease for all or part of the area held under a licence.” Sections 39 and 40 provide that the holder of an exploration licence may only enter onto private or Crown lands with the consent of the owner/tenant or the responsible Minister.

[40] In *Nova Scotia Business Capital Structure v. Coxheath Gold Holding*, [1994] N.S.J. No. 480, the Nova Scotia Court of Appeal considered the nature of the rights conferred by an

exploration licence. Although the Court was considering the earlier version of section 38 found in the *Mineral Resources Act 1975*, S.N.S. c. 12, the changes to the provision are not material for the purposes of this discussion. The Court observed that the rights conferred by a licence issued under the Act were “entirely dependant on the wording of the statute.” The Court concluded that there was nothing in the Act from which it could be found that “the Legislature intended to confer a proprietary right in the lands or minerals covered by the licence.” As the *Mineral Resources Act* only confers on the holder of a mineral exploration licence the rights detailed above, the Appellant does not have an interest in land and is, therefore, not an “owner of lands” for the purposes of the negotiation and arbitration provisions of the Act.

[41] The Appellant also submits that the fact that it was served with the section 87 notice demonstrates that the Respondents at that time were of the view that it was a “person interested” within the meaning of the Act. As well, it applied for and was granted status at the detailed route hearings and was found to be a “landowner” by the Board. First, as pointed out by the Respondents, the Appellant was served with the section 87 notices as a holder of the “mineral rights or claims on the land” and not as a landowner. Further, the notices stated that no rights were required from the Appellant. Second, quite apart from the fact that there was no acknowledgment on the part of the Respondents that the Appellant was an “owner of lands” the Appellant’s right or interest is derived from the statute under which it was granted and not from the section 87 notices.

[42] As to the Appellant’s assertion that in its decisions in relation to the detailed route hearings the Board found that it was a landowner, the statement relied upon was a general statement

regarding the importance of establishing positive working relationships with those parties holding “rights in the land” made in the context of Respondents’ failure to consult with the holders of mineral exploration licences. In my view this falls far short from being a determination that the Appellant is an “owner of lands” as that term is used in the negotiation and arbitration provisions of the legislation. I also note that the specific objections raised by the mineral exploration licence holders including the Appellant were dealt with in separate chapters in the reasons entitled “Mineral Rights Objections”. In these chapters, there is nothing to support the Appellant’s contention that the Board viewed the licence holders as landowners.

[43] Finally, contrary to the Appellant’s submission, the *Balisky* decision does not stand for the broad proposition that any claim for compensation in relation to a “controlled area” is an appropriate matter for consideration by an Arbitration Committee regardless of the nature of the claimant’s interest. In that case, unlike in the present case, the claim for compensation was advanced by the owner of the lands in the controlled area. Further, the analysis is confined to the interests of landowners.

[44] For the above reasons, I conclude that the Arbitration Committee was correct in finding that it did not have the jurisdiction to consider the Appellant’s claim for compensation. Having so concluded, I also reject the Appellant’s argument that the Committee was obliged pursuant to section 99 of the Act to consider the matter of costs even though it had concluded that the Appellant was not a “person interested”.

[45] Accordingly, the appeal will be dismissed with costs to the Respondents.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The appeal is dismissed with costs to the Respondents.

“Dolores M. Hansen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-955-05

STYLE OF CAUSE: HEARTLAND RESOURCES INC v
SABLEOFFSHORE ENERGY LTD et al.

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: February 8, 2007

REASONS FOR JUDGMENT: HANSEN J.

DATED: October 10, 2007

APPEARANCES:

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