IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Secunda Marine Services v. Canada (Tranport Canada Marine Safety)*, 2003 NSSC 2

Date: 20030109
Docket: S.H. 186241
Registry: Halifax

Between:

Secunda Marine Services Limited, a body corporate

Applicant

v.

Her Majesty The Queen in Right of Canada (Transport Canada Marine Safety), Board of Steamship Inspection and Canada-Nova Scotia Offshore Petroleum Board

Respondents

D E C I S I O N

Judge: The Honourable Justice Gerald R.P. Moir

Heard: November 27 and 28, 2002 at Halifax

Counsel: Peter Bryson, Q.C. and Richard J. Charney for the applicant Secunda Marine Services Limited
James Gunvaldsen-Klassen and John Young for the respondent The Attorney General of Canada
William Moreira, Q.C. and Jacqueline Scott for the respondent Canada-Nova Scotia Offshore Petroleum Board
Edward A. Gores and Kimberley Franklyn, for the Attorney General of Nova Scotia (watching)

Moir, J:

[1] Secunda Marine bought the *M.V. Panuke Sea* and refitted it so that it might be used as a standby rescue vessel at a drilling site offshore. Secunda obtained a charter from the operator of the drilling site and it began the refitting last summer. The Canadian Coast Guard publishes *Standards Respecting Standby Vessels*. The ship owner now applies at an office within the Department of Transportation for a letter of compliance, which shows that, in the opinion of a steamship inspector at Transport Canada Marine Safety, the vessel complies with the standards. As will be seen, the letter of compliance and the standards themselves fit within a somewhat more complicated regulatory regime when the standby rescue vessel is to be used at a drilling site on the Nova Scotian offshore.

[2] The issuing of a letter of compliance for the "Panuke Sea" was complicated by the layout of the vessel. A standby rescue vessel must have a marked area on its deck equipped with various rescue devices. This area is called the rescue zone. Also, the vessel must have a properly equipped helicopter winching zone where a helicopter is landed by very quickly being cabled in mid-air, hauled to the deck and clamped. Section 23 of the *Standards* requires that, "The

navigating bridge shall be so constructed that the master of the standby vessel has a view of the rescue zone and the emergency helicopter winching area whilst manoeuvring the vessel". As refit this year, a person at the helm of the "Panuke Sea" cannot look down, through the bridge window, at the main deck where the rescue zone and helicopter area are located. The view would be obstructed. However, closed circuit television cameras are mounted port and starboard outside the bridge and monitors provide the helmsman with the camera views, which show what needs to be seen. Also, the bridge includes wings on both sides and a master would be free to go to either wing and view the deck and waters and pass orders by radio to the helmsman. Or, if the master were acting as helmsman, another officer could be stationed outside to keep him advised.

[3] Clement Vallieres, a Senior Marine Surveyor at the office of Transport Canada Marine Safety and a steamship inspector, went aboard the "Panuke Sea". He did not issue a letter of compliance. Rather, he requested a letter from Secunda Marine describing the video system. The captain of the "Panuke Sea" provided the requested details and Captain John Hughes, Director of Fleet Operations at Secunda, also endorsed the video system as providing better visibility than that

found on many vessels in Captain Hughes' long experience. The *Standards Respecting Standby Vessels* contains provisions by which a letter of compliance may be issued where the vessel does not have some "fitting" or "arrangement" prescribed by the standards but does have an equally effective equivalent. It is Secunda's position now that the combination of video cameras and visibility from the wings is a sufficient compliance with s. 23 and resort to the equivalency provision is unnecessary. Section 23 does not expressly require a view with the naked eye. However, in July 2002 people at Secunda Marine and at Marine Safety had their minds upon the equivalency provisions. Indeed, in his letter responding to the request for details about the video system, the captain of the "Panuke Sea" quoted the equivalency provision and submitted that the video system met this section of the standards.

[4] Shortly after the Marine Safety office received Secunda's letters, Mr. William Vickery, Manager of Inspection Services, responded:

> The cameras and monitors have been examined on board and appear adequate for the intended operation, subject to an operational test during sea trials, and therefore a standby L.O.C. will be issued to this vessel.

This communication was sent by e-mail and by fax on July 16. However, an official of Marine Safety then spoke with Mr. David Scratch of the Offshore Petroleum Board. Mr. Scratch had already expressed his negative assessment of the proposed system and, indeed, he has sworn that he formed the impression that Marine Safety was also opposed. Mr. Scratch took the position that Marine Safety had no authority to issue the letter of compliance because equivalency had to be decided by a Technical Committee made up of representatives from both Marine Safety and the Board. On the next day Marine Safety advised Secunda that a Technical Committee was being formed to determine whether the system on the "Panuke Sea" met the equivalency requirement of s. 6 of the *Standards*, whether the video monitoring and the system of manning a wing would be "at least as effective" as that required by s. 23. Section 6 requires that a "Technical Committee" make such a decision. Under s. 2(1) of the *Standards* a technical committee is formed between "an Energy Authority and the Canadian Coast Guard". In today's circumstances we would read that as referring to the Canada-Nova Scotia Offshore Petroleum Board and the office of Transport Canada Marine Safety.

[5] So, a technical committee was quickly formed. Marine Safety appointed Mr. Vallieres, Mr. Vickery and two others, Mr. Allan Milne, the Manager of

Technical Services, and Captain Pat McGonical, a Senior Surveyor. The Board appointed only Mr. Scratch. In its arguments Secunda Marine makes reference to Mr. Scratch's qualifications and his lack of direct experience in the operation of standby vessels. The Board takes umbrage with these remarks. It should not. The Marine Safety representatives had experience and expertise in the operation of marine vessels, as did some employees of Secunda who offered their opinions. The issues raised by Secunda require a close investigation of how the committee functioned. It is Secunda's position that the committee acts only in an advisory capacity and steamship inspectors at Marine Safety ought to have issued a letter of compliance notwithstanding Mr. Scratch's opposition. It is the Board's position that no inspector could have issued a letter of compliance unless both sides of the committee agree. Since Mr. Scratch was the only Board appointment, he held a veto. If that is so, it is even more important to consider the extent to which Mr. Scratch showed interest in the assessments of those who possessed expertise he did not share. That would be relevant to finding the facts as to how the committee functioned and whether it functioned at all.

[6] As I said, the committee was formed quickly. It acted efficiently as well. Two days after Secunda Marine was advised of the need for a technical committee, the members were aboard the "Panuke Sea". Captain Mischuk, the captain of the vessel, and Captain Hughes made themselves available. Committee members inspected the vessel including the video system, the bridge and the views from the wings. Mr. Scratch made what seems a strange comment. His affidavit puts it this way: whether one "would consider driving his car on Barrington Street in rush hour without being able to see through his windshield, but using only a monitor connected to a fixed video camera on the hood of his car". This is not analogy at all and that it was spoken and repeated in the affidavit demonstrates the need for the sole Board representative to deliberate with those committee members who had actually operated marine vessels and had expertise from that perspective. The Committee determined to hold the sea trials that evening. While it was still light out a dummy would be retrieved from a fast rescue vehicle and then directly from the water and both tests would be repeated in darkness. Because of the 16 July e-mail and fax, Secunda had a reasonable expectation that the letter of compliance would follow successful sea trials. Mr. Scratch decided not to go. He swore,

> ...I did not consider it necessary that I personally go to sea on the ship and witness the tests, because I had confidence that Mr. Vallieres and Capt. McGonical would accurately report to the committee concerning the conduct and results of the tests.

He also swore, “I stated to the other members of the committee that regardless of the results of the tests, I would still need to give further consideration to the issue whether cameras were an acceptable equivalent to unobstructed visibility”.

[7] Captain McGonical and Mr. Vallieres attended the sea trials. The next morning Vickery and Milne telephoned Scratch to advise him of the findings from the sea trails. A written report would be available later that day and the inspectors’ recommendations would follow. Officials of the Canada-Nova Scotia Offshore Petroleum Board met later in the day to decide the issue. It appears they had the inspectors’ report at their meeting. It is clear they did not have the recommendations. It is the position of the Board that this meeting constituted continuing work of the technical committee even though it involved three people, two of whom were not appointed to the committee, and even though other members of the committee were not invited. The Board argues that this is possible because the Board is one-half of the decision making authority. But if this were a caucus, one would expect further deliberation with the full committee. Instead, Mr. Stretch, “as the CNSOPB representative on our

Standby Standards Technical Committee", sent an e-mail rejecting the "Panuke Sea" and he went on vacation.

[8] Mr. Scratch's e-mail was sent to Mr. Milne and copied to the two colleagues at the Board with whom Mr. Scratch had met. He included these reasons:

> Section 23 of the Standards is very specific that the bridge shall be so constructed that the master has a view of the rescue zone and the helicopter winching area whilst manoeuvering the vessel. In spite of some successful trials, involving cameras and personnel providing direction by radio, I do not believe that this arrangement meets the Standards equivalency criteria of "at least as effective as that required by these Standards". On this vessel the Master has no direct visibility of the helicopter winching area, the rescue zones on either side of the vessel or of the rescue basket recovery area on the port side. There are a number of possible scenarios where the effectiveness of the Standby Vessel could be compromised by this absence of direct visibility. According to the Standard "the paramount function of a vessel in the standby mode is to save life" and we are not prepared to accept any arrangement which may compromise that function.

Seen in light of the history leading up to it, the use of the word "we" is obviously deliberate. This was to be a decision of the Board not the technical committee. The surveyors' report, which may well have been before the Board officials, included this section titled: "Conclusions":

> During all four rescue drills the vessel, the FRC [Fast Rescue Craft] and the rescue equipment functioned very well.

> The master and the crew performed their duties excellently especially considering that they were all fairly new to the vessel and had a chance to practice these drills on this ship beforehand.
>
> The visibility of the rescue zone on deck from the control position at the after end of the wheelhouse is nil. Also, from this control position it is not possible to see the FRC in its housed position. Although it can be seen by the master when he walks over to the starboard window.
>
> It is not possible to see the man hoist on the main deck starboard side or the "EMPRA" basket when it is lowered into the water on the port side, from this after control position in the wheelhouse.
>
> There are three T.V. Cameras mounted on the after end of the accommodation housing [p]ointing aft. One directed towards the starboard side of the vessel which clearly showed the launching and recovery of the FRC. Also, the recovery of the dummy by the "Man-hoist" (fitted on the starboard side) from the FRC.
>
> The second camera is directed down the centreline of the main deck and clearly shows the rescue zone between the crash rails, the cargo area and the emergency helicopter winching area.
>
> The third camera is directed towards the port side of the vessel and clearly showed the dummy being rescued by the "EMPRA" Basket.
>
> There are three T.V. monitors mounted in front of the aft control position in the wheelhouse. Each connected to a different T.V. camera.
>
> Throughout these drills the cameras and monitors provided a very clear picture of the dummy floating in the water, the FRC when it was alongside the vessel and the dummy being rescued by the "EMPRA" basket both during daylight or twilight conditions and also when it was dark. In fact, it was easier to see the dummy floating in the water on the T.V. monitor when it was at some distance from the ship, in the dark, than by the naked eye.

The inspectors' recommendations, for which Mr. Scratch and the other Board officials did not wait, provided a general overview of the inspectors' findings. This included,

> It was clearly evident during rescue drills that it was not possible for the Master to leave the controls for more than a few seconds. Therefore, it is essential that he has a good view and good communications and this view is provided by the T.V. cameras. It is perhaps not as good as it might be with the naked eye, however, it did appear to be adequate.

The contrast with the earlier report could easily be over-emphasized. One must have in mind the supports additional to the video system. Thus, the surveyors were prepared to recommend a letter of compliance subject to certain conditions:

> Taking into consideration all of the above, in order to issue a "Letter of Compliance as a Standby Vessel" to the M.V. Panuke SEA until the "second phase" refit is completed, the following recommendations are made:
>
> 1. During rescue operations, a total of three persons to be stationed on the bridge, namely the Master, a lookout for other traffic and to answer the radios as required and an officer on the wing of the bridge. The additional officer is to be provided with a "handsfree" radio for direct communication with the Master. His duty would be to provide the Master with information of those sectors of the rescue operation that are not visible by the naked eye from the control position of the after end of the wheelhouse.
>
> This would give the vessel, whilst engaged in Standby Rescue Operations, a total crew of twelve (12).
>
> 2. Only Masters with at least two years experience in standby operations as Master, to be appointed.
>
> 3. Hands free radios to be provided to the Master, First and Second Mates. All radios to provide good clear communication.
>
> 4. A spare T.V. camera and monitor that are compatible with the three that are already fitted, to be carried on board with instructions on how to connect them to the system.

> 5. The door at the after end of the wheelhouse on the port side, to be fitted with a hook so that when the door is open, the visibility through the adjacent side window is not obscured.
>
> 6. The standby rescue operations to be restricted to waters off the East Coast of Nova Scotia only.
>
> 7. Any downtime with the close circuit T.V. system to be logged and reported to Marine Safety Dartmouth, NS.

The report closed with the recommendation for a letter of compliance effective until the end of the present season:

> When the above has been agreed to by the owners and when the vessel has been issued with all the relevant certificates required under the SOLAS Convention 1974 as amended, (International Load Line Convention, MARPOL etc.) it is recommended that a "Letter of Compliance as a Standby Vessel" be issued to the M.V. Panuke Sea.
>
> This letter of Compliance would expire on the 31st October, 2002, to coincide with the end of the summer load line season in the North Atlantic.

Secunda Marine immediately accepted the conditions recommended by the surveyors. However, no letter was issued. Secunda's subsequent efforts show it exhausted all avenues of appeal. Also, some responses show the reasoning of Board officials or steamship inspectors at Marine Safety.

[9] Mr. Vickery stated his office's reasons this way:

> Trials were conducted on the vessel, witnessed by TCMS inspectors, and their report was submitted to the Technical Committee recommending that the proposed

> arrangement be accepted provided that certain recommendations were carried out. This report was reviewed by the Technical Committee however consensus was not reached. CNSOPB were not satisfied that the proposed arrangement met the Standards equivalency criteria of "at least as effective as that required by these Standards" and as CNSOPB legislation (Accord Act) is paramount over Canada Shipping Act legislation a letter of compliance could not be issued to this vessel.

Mr. Vickery is in error when he says the technical committee reviewed the surveyors' recommendations but failed to reach consensus. On the contrary, Mr. Scratch had already stated his rejection and had left for vacation before the recommendations were delivered. Also, it is argued that these reasons are wrong in law because the steamship inspectors at Canada Transport Marine Safety, although they are designated under the Canada *Shipping Act*, derive their authority under the *Accord Act* when they issue a letter of compliance for a vessel under the Board's jurisdiction. An appeal was taken to the Board of Steamship Inspection, who found that Secunda's dispute was with the Board rather than any steamship inspector and, thus, was not appealable to the Board of Steamship Inspection.

[10] Several approaches were made to the Offshore Petroleum Board. Secunda's counsel moved the Board to refer the matter to this Court under a section of the legislation governing the Board that permits referral where a safety office issues an order. The Board declined to do so because, in its view, Mr. Scratch had

issued no order. Further, the President of the Board advised that no one had asked the Board to approve the vessel and Marine Safety was responsible to issue letters of compliance, although the Board does not always accept advice given by Marine Safety. In the face of the apparent circuitry of the Board's position and Marine Safety's position, Secunda's counsel pressed the Board's president for reasons. The president provided a detailed explanation early last September. He advised that Transport Canada Marine Safety issues letters of compliance. In cases where alternate equipment or procedures are offered, a committee is struck. In this case, a technical committee was convened but "the Technical Committee rejected the camera measures as an adequate equivalency". In fact, Mr. Scratch, in consultation with other Board officials, rejected the "camera measures".

[11] *Applicable Legislation*. In August 1968 Canada and Nova Scotia reached an agreement for "a unified administrative and fiscal regime for Petroleum Resources in the Offshore Area". The agreement provided for the establishment of a single board infused with powers falling within both federal and provincial legislative jurisdiction through the enactment of mirror legislation. This is a scheme employed to overcome one of the difficulties of

divided jurisdiction where, under our constitution, Parliament or the Legislature cannot delegate legislative power to the other: *A.-G. Nova Scotia* v. *A.-G. Canada (Nova Scotia Inter-delegation Case)*, [1951] S.C.R. 31. Where the legislators decide that a field requires regulation but good regulation demands the exercise of administrative powers or subordinate legislative powers deriving both from matters within exclusive provincial legislative jurisdiction and matters within exclusive federal legislative jurisdiction, one solution to the difficulty posed by the *Nova Scotia Interdelegation Case* is for Parliament and the Legislature to pass mirror statutes empowering a single board.

[12] Parliament enacted the *Canada-Nova Scotia Offshore Petroleum Accord Implementation Act*, S.C. 1988, c. 28, which I will refer to as the *Canada Accord Act*, and the Legislative passed *Canada-Nova Scotia Offshore Petroleum Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3, the *Nova Scotia Accord Act*. These establish by "joint operation" the Canada-Nova Scotia Offshore Board: s. 9(1) in both cases. The Board is to be treated as having been established under provincial law: s. 9(2). The Board's powers include issuing interests in any portion of the offshore, granting exploration licences, granting development and production licenses and the administration

associated with these licences. The Board also has power over petroleum operators, the subject of Part III of both statutes, which begins at s. 133 of the *Nova Scotia Accord Act* and s. 138 of the *Canada Accord Act*. The purpose of Part III is set out in s. 133A and s. 138.1. It is to promote safety, protection of the environment, conservation and joint production arrangements. The safety aspect of this purpose, which most concerns the issues in this case, includes "particularly by encouraging persons exploring for and exploiting petroleum to maintain a prudent regime for achieving safety": s. 133A(a) and s. 138.1(a).

[13] Part III concerns work. Section 134 of the *Nova Scotia Accord Act* and section 140 of the *Canada Accord Act* prohibit anyone from carrying on any work or activity in exploring, drilling, producing, conserving, processing or transporting petroleum in the offshore without an operating license and a work authorization. These are issued and administered by the Board. The scheme contemplates an operator, whether an explorer, a driller, a producer etc., applying for licences and authorizations. For the Board, Mr. Moreira likens the positions of Secunda Marine and the status of "Panuke Sea" to components in a pyramid of information at the pinnacle of which is the operator's application for a licence or authorization to explore or drill or produce *et cetera*.

[14] In identical language s. 146 and s. 153 provide for regulations. Governors in their respective Councils may make regulations "for the purposes of safety and the protection of the environment as well as for the production and conservation of petroleum": s. 146(1) and s. 153(1). This statement of purposes, which is similar to that of the statute itself, is followed by a power to make regulations described in various categories including powers to make regulations:

> (b) concerning the exploration and drilling for, and the production, processing and transportation of, petroleum and works and activities related to such exploration, drilling, production, processing and transportation.

as well as:

> (e) concerning the approvals to be granted as conditions of authorizations issued under paragraph 142(1)(b).

The federal government and the provincial government made mirror regulations. Under the definition sections, the Board must approve a vessel before it can be used as a standby. Indeed, it is defined out of being a standby vessel unless it has been approved by the Board. Because this particular power of approval is within the regulation-making authority and stands apart from the statutory provisions concerning operators and work authorizations, I conclude that the owner of a vessel could make

an application to the Board for approval of the vessel as a standby safety vessel. That did not happen in this case but this feature is to be borne in mind when the jurisdictional issue is considered. The other regulations respecting standby vessels read:

> 11. A standby vessel that has sufficient capacity and equipment to evacuate all personnel from the drill site shall be provided for a drilling operation as a means of evacuating personnel from the drill site.
>
> 12. Every standby vessel shall be equipped in accordance with the Canadian Coast Guard TP 7920E Standards Respecting Standby Vessels, as amended from time to time.

The *Standards Respecting Standby Vessels* was published by Transport Canada. It was written to inform rather than as regulations. The Coast Guard provided the *Standards* "for guidance in assessing the suitability of standby craft", such that "they indicate to all concerned the procedures and standards required for the issue of a Letter of Compliance in respect of a standby vessel." : s. 2 of the Foreword. However, as I read regulation 12, it gives the *Standards* force of law by requiring that operators or suppliers of standby safety vessels equipt the vessel in accord with the *Standards*. That is to say, the substantive provisions and the procedures established by the standards are incorporated by reference into the regulations.

[15] The functions of a standby vessel are described in section 4 of the *Standards*. These include rescuing drilling rig personnel, accommodating all personnel when a drilling rig has to be evacuated and moving in close to a rig so as to be able to respond to emergencies during helicopter landing or taking off, when work is performed overside and when work is performed in the water. Section 11 imposes a requirement for a Letter of Compliance in accordance with appendix I. Appendix I prescribes a certificate to be signed by a steamship inspector licenced under the *Canada Shipping Act* R.S.C. 1985, c. S-9. Although the applicable regulations in the circumstance of a drilling rig off Nova Scotia are those under the *Nova Scotia Accord Act* and the *Canada Accord Act*, the prescribed certificate refers to the Canada Oil and Gas Drilling Regulations and says that the certificate "is issued under the authority of the Government of Canada".

[16] Section 23 of the *Standards* provides, "The navigating bridge shall be so constructed that the master of the standby vessel has a view of the rescue zone and the emergency helicopter winching area whilst manoeuvring the vessel." and the equivalency provision reads as follows:

> 6. Where these Standards require that a particular fitting, material, appliance, apparatus, item or equipment or type thereof shall be fitted or carried on a standby vessel, or that any particular provision shall be made, or any procedure or arrangement shall be complied with, the Technical Committee may allow any other fitting, material, appliance, apparatus, item of equipment or type thereof to be made in the vessel, if it is satisfied by trial thereof or otherwise that such fitting, material, appliance, apparatus, item of equipment or type thereof or that any particular provision, procedure or arrangement is at least as effective as that required by these Standards.

[17] Thus, we see that the legislative regime at issue in this case involves mirror statutes enacted by Parliament and the Legislature, mirror regulations made by the executive branches and an incorporated statement of standards with a procedure for issuing letters of compliance. The picture is completed by having reference to a "memoranda of understanding" signed last year by the CEO of the Board and the Atlantic Regional Director of the Department of Transport. These sorts of written understandings between the Board and departments of government are authorized by the statutes in order to avoid duplication of services: s. 50 and s. 46. In this case the memorandum states that it does not impose any legal duties or create any legal rights: article 1.0 (b). Article 5.0 provides that "The Board is the lead agency in matters pertaining to oil and gas unless otherwise stipulated in Appendix C." Appendix C refers to Appendix A for responsibilities in respect of inspection and certification or Canadian registered vessels. Appendix A provides that the Board "requires" letters of

compliance for standby vessels and the Marine Safety office "At the request of the Board applies Standby Vessels Standard TP 7920 and issues [letters of compliance]". Counsel for Secunda Marine stressed these provisions, not because the memorandum creates duties or could influence interpretation of the statutes, regulations and standards, but because the memorandum demonstrates the understanding the parties had of their roles when inspectors at Transport Canada and members of the Board confronted the "Panuke Sea" application for a letter of compliance.

[18] *Issues*. The Attorney General of Canada points out that he, rather than the Crown, ought to be a named party. No one would object to an amendment. Also, I see no reason why the applicable steamship inspectors could not be named parties if that was necessary. The Attorney General also raised some more difficult preliminary issues. For the Attorney General, Mr. Gunvaldsen-Klassen argued that this court does not have jurisdiction to review any decision of the federal government or of a steamship inspector. Such review is within the exclusive jurisdiction of the Federal Court of Canada. Further, both the Attorney General and the Board submit that the issues substantively raised have become moot.

[19] The remedies sought by Secunda would declare that the steamship inspectors are obliged to issue a letter of compliance and enjoin the Board from interfering with that process. For Secunda, Mr. Charney submits that Transport had the jurisdiction to make the decision after taking advice from the technical committee, that the appropriate officials at Transport reached decisions in favour of a letter of compliance and that neither Mr. Scratch nor the Board held a veto. An alternate argument is that decisions were made in a manner which breached the rules of natural justice. It is said that the respondents fundamentally misunderstood s. 23 and that Mr. Scratch clearly failed to understand the facts. The Board's failure to bring its concerns to Secunda's attention, the failure of its representative to attend the trials or wait for the recommendations and the failure to give Secunda any opportunity to respond go to fundamental fairness. Further, the dealings raised a legitimate expectation that Secunda would receive the letter of compliance. Furthermore, the respondents failed to give reasons for their decision.

[20] First issue first, I have decided that, to the extent they may be reviewable, this court rather than the Federal Court has the responsibility to review decisions of

steamship inspectors respecting compliance with the standards for standby vessels in the offshore areas covered by the *Nova Scotia Accord Act* and the *Canada Accord Act.* However, I have concluded that the issues raised by the relief sought have become academic and ought not to be answered in this forum. Having reached that conclusion, I will not comment upon the substantive issues.

[21] ***Jurisdiction***. On behalf of the Attorney General of Canada, it was submitted that the Marine Safety office at Transport Canada "and the individual steamship inspectors involved, are federal decision-makers, pursuant to the *Canada Shipping Act* and the *Department of Transport Act*." Mr. Gunvaldsen-Klassen pointed out that steamship inspectors are appointed by the federal Governor in Council under *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 301. Their function under that legislation involves making reports to another official who has the responsibility to issue inspection certificates and Safety Convention certificates for sea-going ships: s. 317 and s. 318. The Attorney General recognizes that the steamship inspectors were not operating under the *Canada Shipping Act* when they considered the application respecting the "Panuke

Sea". In his pre-hearing brief, Mr. Gunvaldssen-Klassen put the argument succinctly:

> It is submitted that although the inspections of the Panuke Sea conducted pursuant to the Standards were undertaken pursuant to the *Accord Act (Federal)*, that given the offices they hold under their home statute, the steamship inspectors were nonetheless federal decision-makers within the meaning of the *Federal Court Act*. Although making a decision outside their home statute, they remain in pith and substance federal decision-makers and the exercise of their powers remains reviewable only in the Federal Court of Canada.

The reference to "the *Accord Act (Federal)*" is key to this argument. Mr. Moreira for the Board and Mr. Charney for Secunda take issue with the proposition that the steamship inspectors act exclusively under the federal statute when they decide whether or not to issue a letter of compliance for a standby safety vessel.

[22] The superior courts of general jurisdiction would have the power, at common law, to review decisions made under federal statutory authority, but the *Federal Court Act* reserves review exclusively to the Federal Court where the subject is "a federal board, commission or other tribunal": *Federal Court Act*, R.S.C. 1985, c. F-7, s. 18(1). Subsection 2(1) supplies this definition:

> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or

> under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1987;*

The words most essential to the present discussion are "any person or persons having [or] exercising ... powers conferred ... under an Act of Parliament".

[23] The Attorney General referred to *Cree Regional Authority* v. *Canada* (1991), 81 D.L.R. (4th) 659 (F.C.A.). One of the statutes implementing the James Bay Agreement referred to an "Administrator" or "Federal Administrator" who was to exercise certain functions "in the case of matters involving federal jurisdiction". Thus, the legislation in issue was distinct from the present because the person at issue could only exercise powers deriving from federal legislation. However, a passage from the decision does cast light on the present issue. It was argued before the Federal Court of Appeal that because the Order in Council appointing the Administrator was not a regulation and because the appointment was pursuant to the James Bay Agreement, the Administrator was not within the definition of federal board, commission or other tribunal. The Federal Court of Appeal recognized that the definition concerns the source of power exercised by the person, not the source of the appointment. At p. 676, the Court said:

> Both sides freely cited the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and the *Interpretation Act*, R.S.C. 1985, c. I-21. In my opinion it does not matter whether or not P.C. 1988-1800 is a regulation as defined in these Acts. All that matters is the source of the Administrator's power, once appointed. Hence, regardless of the characterization of the Order in Council in question, the Administrator is a "federal board" for the purposes of ss. 2 and 18 of the *Federal Court Act* in that his powers under the Agreement [were] conferred on him by the federal Act rather than by the Agreement itself. In this respect his powers are of a piece with everything else in the Agreement: they derive from the federal Act

So much is the main part of the definition dependant upon source of power that it was necessary for Parliament to exclude from the definition, and thus leave to the jurisdiction of the provincial superior courts, provincially appointed bodies that may exercise powers under federal legislation: "other than any such body constituted or established by or under a law of a province". The fact that steamship operators are appointed under the *Canada Steamship Act* does not guide resolution of the present issue. The question is whether, in deciding to grant or not to grant a letter of compliance for a standby safety vessel, a steamship operator is exercising "powers conferred by or under an Act of Parliament".

[24] Mr. Charney referred me to article 39.06 of the *Accord*, the agreement reached between Nova Scotia and Canada and which lead to the statutes and regulations that most concern us in this case. The article reads:

> The federal courts shall be vested with jurisdiction of the Offshore Area in respect of any matter to the same extent as if the matter has arisen within their ordinary jurisdiction. The provincial courts shall be vested with jurisdiction in the Offshore Area in respect of any matter arising under the laws made applicable by Parliament to the Offshore Area to the same extent as if the matter had arisen within their ordinary territorial jurisdiction. For the purposes of this Article, the Offshore Area shall be deemed to be within the territorial limits of the County of Halifax.

No attempt appears to have been made to incorporate this difficult provision into the statutes, except that s. 220 provides that every court in the province has jurisdiction in the offshore area respecting royalties and revenue sharing. However, Mr. Charney submits that the provision is given force of law by the *Nova Scotia Accord Act* and the *Canada Accord Act* and he submits that the effect of article 39.06 is to give the Federal Court and the Supreme Court of Nova Scotia current jurisdiction. This argument draws upon the long titles of the statutes and the fact that the statutes jointly implement the federal-provincial agreement. Also, it is pointed out that the statutes vest this court with jurisdiction to review orders made by safety officers: s. 190(5) and s. 198(5). Respectfully, I do not see that article 39.06 has been given force of law. The Accord statutes do not breath life into it with any explicit language. Further, the language of the article brings its own difficulties. The passive "... shall be vested ..." is not helpful. If it means Parliament shall vest and the Legislature shall vest then it is nothing more than a call for legislation which never came into being. The references to "federal courts" and "provincial courts" adds to the difficulty. This

cannot mean the singular Federal Court and the single Supreme Court of Nova Scotia. It could mean courts the judges of which are federally appointed and courts made up of provincial appointments or it could mean courts created by federal statute and both the courts created by provincial statute and the court which, though not created by statute, is within provincial legislative jurisdiction. I think that the better interpretation of s. 39.06 is that it is an expression of policy, to be refined in legislation, that all courts should have jurisdiction in the off-shore similar to the jurisdiction they exercise on mainland Nova Scotia. If that is what it means, then the exclusive jurisdiction of the Federal Court respecting review of federal boards, commissions and other tribunals would remain unaffected. If the Accord were a contract enforceable in this proceeding and at the instance of Secunda, or if the Accord were a statute, I would have to give effect to 39.06 as best as my interpretative skills would permit. My point is that it is a statement of policy too unrefined for either Parliament or the Legislature to be taken to have implicitly incorporated it in a statute.

[25] As I said before, the creation of a unified administrative board under both federal and provincial authority is one way of complying with the principle in the *Nova Scotia Interdelegation Case* while providing a single regulatory regime in a field where federal and provincial legislative authority mingle.

That describes an important aspect of the scheme of the statutes and regulations in issue and it indicates one of the central purposes of the legislation, to provide a single or unified regulatory regime in respect of the exploitation of resources off-shore. It could be argued that s. 18 of the *Federal Court Act* is inapplicable to a person or a body exercising at the same time powers conferred under an Act of Parliament and powers conferred under an Act of the Legislature. The Attorney General argues that, in such cases, it is necessary for the court to unravel the two sources of power and, if a federally derived power is being exercised then s. 18 applies by virtue of the definition. Although *Mobil Oil Canada Limited* v. *Canada-Newfoundland Off-Shore Petroleum Board* (1994), 111 D.L.R. (4th), (S.C.C.) was referred to by Mr. Charney as an example of a case where the ordinary courts reviewed a decision of the identical Newfoundland board, the Attorney General agrees that this court has jurisdiction to review decisions of the Board as opposed to those of steamship inspectors and counsel did not refer me to any authority interpreting the definition in the context of a joint federal and provincial regulatory scheme. However, I do not need to decide whether the definition applies more broadly to anyone exercising federally derived powers or more narrowly so as to exclude those jointly exercising federally and provincially derived powers. I

agree with the argument made by Mr. Charney that section 4 of the *Canada Accord Act* precludes the operation of the *Federal Court Act*. Section 4 provides that an inconsistency or conflict between the *Canada Accord Act* or regulations under it, on the one hand, and any other statute or regulation is to be resolved in favour of the *Canada Accord Act* or regulations. Having concluded that article 39.06 of the *Accord* has not been incorporated into the *Canada Accord Act*, I cannot point to one specific provision which is inconsistent with s. 18 of the *Federal Court Act*. Rather, it is inconsistent with a host of provisions. More accurately, it conflicts with an important aspect of the scheme, a joint regulatory regime. In light of Parliament's purpose in enacting the *Canada Accord Act*, I conclude that s. 4 should be broadly interpreted as excluding laws of general application that would separate acts of those empowered under the legislation according to federal or provincial source of power. If the definition under *Federal Court Act* applies broadly to those who exercise federally derived and provincially derived powers at the same time, then s. 18 of *Federal Court Act* is inconsistent with the *Canada Accord Act* and, by virtue of s. 4, s. 18 does not apply.

[26] *Mootness*. The Attorney General and the Board submitted that this Court ought not to entertain the remedies sought by Secunda because any letter of compliance issued by the steamship inspectors for the "Panuke Sea" in July 2002 would have expired by now and the vessel has been refitted so substantially that the issues of last summer will not present themselves similarly in the future. They cite *H.(L).* v. *Children's Aid Society of Halifax* (1989), 90 N.S.R. (2d) 44 (NSCA) and *Borowski* v. *Canada* (1989), 57 D.L.R. (4th) 231 (SCC). Secunda Marine says that the issues have not become moot and that, if the issues are in fact moot, this Court ought to exercise a discretion to determine them anyway. Counsel cite *Regina Senior Officer's Association* v. *Police Board of Commissioners (Regina)*, [1982] 4 W.W.R. 627 (SQB) at p. 631; *C.U.P.W.* v. *Canada* (1978), 36 N.R. 583 (CA) at p. 586; *L.I.U.N.A.* v. *U.B.C.J.A., Local 18*, [1995] O.J. No. 706 (Div. Ct.); *Electrical Power Construction Systems Association* v. *Ontario Allied Construction Trades Council* (1993), 12 O.R. (3d) 768 (Div. Ct.), and; *Carvery* v. *City of Halifax*, [1993] N.S.J. No. 110 (SC); as well as *Borowski*.

[27] As quoted earlier, the steamship inspectors recommended a letter of compliance and stated "This letter of compliance would expire on the 31st October, 2002,

to coincide with the end of the summer load line season in the North Atlantic." This court could not order the delivery of an effective document or declare that Secunda Marine is entitled to an effective document or enjoin the Board from interfering with the issue of an effective document. In my opinion, that means that the issues have become academic. The order of the Court can have no practical effect.

[28] Based upon the authorities he cited, Mr. Charney submitted that this court has a discretion to go forward where issues raised in a proceeding have become academic. Neither Mr. Gunvaldsen-Klassen nor Mr. Moreira took issue with this. The contest is as to whether this is a proper case in which to exercise a discretion. In their reply brief, Mr. Charney and Mr. Bryson argue that it is "manifestly unfair" for the government and the board to raise this issue after all affidavits had been filed. They say that the case concerns the arbitrary exercise of state authority, which compounds the unfairness of denying the applicants their day in court. Dismissal "would serve to reward delay and confusion caused by the process which confronted Secunda". In my assessment, these points go to the exercise of discretion rather than the initial question of mootness. In addition to these points, counsel say "it is entirely possible that

the circumstances which affected the Company could arise again”. If it were the case that Secunda Marine would be facing almost exactly the same factual issues as arose in July when Secunda next applies for a letter of compliance respecting the “Panuke Sea”, if it were the case that the situation of last summer is likely to be recurrent, then that much, together with the evident confusion and hassles of last summer, would much incline this court to go ahead. Although the issues are no longer live, they would came back to life later.

[29] As Mr. Moreira vigorously argued, the situation cannot be recurrent. There will be another application for the “Panuke Sea” but the facts have changed radically. As planned last summer, the vessel is now being refitted and the work should finish shortly. According to Mr. Hughes, this involves major modifications to the aft bridge and the funnels, which obstruct views from the bridge. According to him, the work “will negate the need for the installed camera system”. It is evident that that which caused Mr. Scratch or the Board to veto a letter of compliance, the obstruction of the view by naked eye from the wheel, has either been cured or much improved.

[30] There is an additional reason for refusing to exercise a discretion and determine issues that have cased to be live in this proceeding. In their brief, counsel for Secunda refer to the possibility of a claim in damages against the Board or others arising from the refusal of a letter of compliance. During argument, Mr. Charney re-affirmed that Secunda may well take action. When I asked about multiplicity of proceeding and the impact that consideration might have on the asserted discretion, Mr. Charney pointed out that parties would be bound on identical issues because issue estoppel would apply. As Mr. Moreira pointed out, that leads to further difficulties entailing the potential for serious prejudice. Of necessity, judicial review involves a degree of fact-finding without the safeguards of a trial, including the procedural safeguards and the advantage of live testimony. It will serve to demonstrate the extent to which fact-finding is important to the substantive issues in this case to point out that the affidavits include a number of controversial opinions expressed by several expert witnesses. In the circumstances, I would hesitate to decide an issue which is dead for the purposes of this application and which would be alive at a trial of the sort contemplated by Secunda.

[31] *Conclusion*. I will dismiss the application. I thank counsel for their thorough and interesting presentations, the extent of which is not apparent from this decision because I have not dealt with the substantive issues. If counsel cannot settle costs, they may contact my office to schedule a hearing or, if all agree, counsel may simply forward written submission.

J.