



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
COURT OF APPEAL**

**Citation:** *ExxonMobil Canada Properties v. Hebron Project Employers' Association*, 2017 NLCA 28

**Date:** 20170427

**Docket:** 201401H0049 & 201401H0057

**BETWEEN:**

|                              |                                                   |
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| EXXONMOBIL CANADA PROPERTIES | APPELLANT/<br>FIRST RESPONDENT<br>BY CROSS-APPEAL |
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**AND:**

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| HEBRON PROJECT EMPLOYERS'<br>ASSOCIATION INC. | FIRST RESPONDENT/<br>APPELLANT BY<br>CROSS-APPEAL |
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**AND:**

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| RESOURCE DEVELOPMENT TRADES<br>COUNCIL OF NEWFOUNDLAND<br>AND LABRADOR | SECOND RESPONDENT/<br>SECOND RESPONDENT<br>BY CROSS-APPEAL |
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**Coram:** Green C.J.N.L., Rowe, White and Hoegg JJ.A. and Butler J. (*ex officio*)

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
Trial Division 201401G0660 (2014NLTD(G) 163)

**Appeal Heard:** April 17, 2015

**Decision Filed:** April 27, 2017

**Reasons for Judgment by Green C.J.N.L.**

**Concurred in by** Rowe and White JJ.A.

**Dissenting Reasons by** Butler J.

**Concurring with Butler J.:** Hoegg J.A.

**Counsel for the Appellant:** Stephen Penney and Ruth Trask

**Counsel for the First Respondent:** Darren Stratton

**Counsel for the Second Respondent:** Dana Lenahan Q.C. and  
Kenneth Jerrett

**Green C.J.N.L.:**

## **Overview**

[1] This appeal addresses the jurisdiction of a labour arbitrator, acting under a collective agreement imposed by a Special Project Order made under the *Labour Relations Act*, RSNL 1990, c. L-1, to make a ruling relating to access to a construction project site affecting the owner of the project who is not a party to the collective agreement.

[2] Similar, though not identical, matters were considered by this Court in a recent decision, *Long Harbour Employers Association Inc. v. Resource Development Trades Council of Newfoundland and Labrador*, 2013 NLCA 9, 334 Nfld & P.E.I.R. 53. Because disagreement by the parties to the current appeal as to the scope and import of that decision and as to whether the Court ought to reconsider and possibly modify or overturn it, and because of the general importance of the issue for the participants in special project construction regimes in the province, the Court sat as a panel of five members.<sup>1</sup>

[3] In the current case, a labour arbitrator found that three employees of a contractor working on the construction of the Hebron GBS platform at the Bull Arm Construction Site, which was leased by the appellant ExxonMobil Canada Properties [ExxonMobil] from a provincial Crown agency, had not

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<sup>1</sup> One of the members, the Hon. Gillian D. Butler, a justice of the Supreme Court of Newfoundland and Labrador, Trial Division, served as an *ad hoc* judge of the Court of Appeal for this purpose, pursuant to section 9 of the *Judicature Act*, RSNL 1990, c. J-4. Another member of the Panel, the Hon. Malcolm H. Rowe, was appointed to the Supreme Court of Canada on October 28, 2016. He deliberated upon this matter and participated in this reserved judgment subsequent to that date pursuant to authority granted by section 31 of the *Judicature Act*.

violated site policies prohibiting alcohol possession, use or consumption on the site when they had consumed alcohol off site and returned to their accommodations on the site with a level of alcohol in their blood that exceeded a prescribed prohibited level. The arbitrator concluded that the employees should be reinstated in their jobs with full compensation and benefits<sup>2</sup> and that they were to be “granted access to the site to perform their employment duties.”

[4] ExxonMobil who, as “owner” (by lease) of the site and proponent of the project, had previously denied the employees access to the site ostensibly on the basis of their alleged violation of the substance abuse policy promulgated by their contractor-employer. ExxonMobil had declared certain prohibited site activities, including the possession, use or consumption of alcohol, to be “site absolutes” the violation of which could result in permanent banishment from the worksite. ExxonMobil was not an express party to the governing site-wide collective agreement which was entered into between the respondents Hebron Project Employers’ Association (HPEA), representing all employers on the site, and Resource Development Trades Council of Newfoundland and Labrador (RDTC), representing all relevant unions and under which the arbitrator purported to act.

[5] Notwithstanding the arbitrator’s finding that the employees had not violated the substance abuse policy, ExxonMobil took the position that it nevertheless had the right to deny the employees access to the site, and thereby bring about the effective termination of their employment. ExxonMobil’s position was that, as a non-party, it was not bound by the decision of the arbitrator under the collective agreement and could therefore exercise its property rights as owner and controller of the site to deny access to anyone it chose.

[6] Although it knew about it, ExxonMobil did not participate or seek to intervene in the arbitration hearing that was held to consider the employees’ grievance that they had been wrongfully terminated and denied site access. HPEA, however, raised the issue of jurisdiction arguing that ExxonMobil had the absolute right to deny access to the site and that the contractor-employer had no choice but to dismiss the employees. Accordingly, it was argued, the arbitrator had no jurisdiction under the collective agreement to

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<sup>2</sup> The appellant does not challenge the awarding of compensation to the grievors. See appellant’s factum, paragraph 12.

reverse the denial-of-site-access decision, which was a decision of ExxonMobil's, not the employer's. The arbitrator rejected the challenge to his jurisdiction and proceeded to decide the substantive issue of whether the employees had violated any applicable policy, concluding that they had not.

[7] While, as will become apparent, it is not clear that the intent of the arbitrator was to make a direct order against ExxonMobil to provide access to the site, it is at least apparent that the arbitrator was of the view that, having determined that the employees were entitled to reinstatement, they would necessarily have to have access to the site for that purpose and he was prepared to make a declaration to that effect. ExxonMobil and HPEA, however, considered the arbitrator's award as purporting directly to order ExxonMobil to provide access to the site.

[8] HPEA sought judicial review of the arbitrator's award, arguing that the arbitrator had exceeded his authority by purporting to bind ExxonMobil when he had no jurisdiction to do so. ExxonMobil sought and was granted intervenor status.<sup>3</sup> No challenge was made to the arbitrator's finding that the employees had not violated any policy and that they were entitled, as against their employer, to reinstatement. The applications judge, reviewing the award on the basis of correctness<sup>4</sup>, declined to set it aside.

[9] For the reasons that follow, I have concluded that the decision of the applications judge denying judicial review of the arbitration award should not be disturbed and that the appeal should, accordingly, be dismissed. The result is that the award of the arbitrator declaring that the reinstated employees should be granted access to the site to perform their employment duties stands.

## **Background**

[10] ExxonMobil is the lead co-venturer in the consortium that wished to develop the Hebron and related oil fields offshore Newfoundland. It sub-leased the Bull Arm construction site from Nalcor, a Crown agency, who in turn had leased it from the Government of Newfoundland and Labrador, for the purpose of constructing, among other things, a gravity-based structure

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<sup>3</sup> I note in passing that the application for an intervention order was made without objection, under rule 7.05 of the *Rules of the Supreme Court, 1986*. ExxonMobil would, however, have had a right to apply, as a person "affected by the proceeding" under rule 54.03(4) for the right, with leave of the Court, to take part in the proceeding in any event.

<sup>4</sup> A standard of review with which I agree, given the jurisdictional issues at stake in this case.

(GBS) and assembling and integrating other portions of the oil production facilities before towing them to the Hebron field. As operator, ExxonMobil engaged contractors, among them Kiewit Kvaerner Contractors (KKC), to perform the work either directly or through subcontractors.

[11] The project site at Bull Arm was made the subject of a Special Project Order (SPO) promulgated as a regulation under section 70 of the *Labour Relations Act*. Section 70 at the relevant time<sup>5</sup> read in pertinent part:

(1) The Lieutenant-Governor in Council may by order

- (a) declare an undertaking ... to be a special project under this Act ...; or
- (b) ... declare an undertaking for the construction or fabrication of works at the Bull Arm site, including all ancillary work, services and catering to be a special project and the project so declared is a special project for all purposes of this Act.

(2) The Lieutenant-Governor in Council may, with respect to an order made under subsection (1), prescribe

- (a) the geographic site to which the declaration relates;
- (b) that a geographic site be excluded from a project order;
- (c) the employers, employer's organizations, trade unions and councils of trade unions that may be involved in collective bargaining relating to employment on the special project;
- (d) the bargaining unit for the purpose of the special project;
- (e) that a collective agreement is the collective agreement for the purpose of the special project;
- (f) those conditions and qualifications with respect to any aspect of the special project that the Lieutenant-Governor in Council considers necessary or desirable.

[12] This provision contemplates that an undertaking on certain geographic sites, including specifically the Bull Arm site, on which certain types of large and lengthy construction projects are to be conducted are to be treated as "special" for the purpose of the application of the *Act*. "Special" means "different from what is usual" (*Oxford Compact Dictionary*). Thus, the

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<sup>5</sup> Section 70 has been subsequently amended. The arbitrator in fact quoted and referred to the amended version; however, nothing turns on this with respect to the issues engaged on this appeal.

usual rules respecting labour relations and the use of the designated site do not necessarily apply. The fact that it is a specific geographic site that is delineated (and certain geographic areas can be excluded from the operation of the Order) indicates that there is an emphasis on imposing on the designated area a special regime relating to labour relations.

[13] The purpose of a special project order designation is, among other things, to promote labour peace and stability on the project, to minimize the possibility of work sector and jurisdictional disputes and thereby reduce the possibility of work stoppages and to eliminate the need for individual employer-union, as opposed to sector-wide, bargaining: James C. Oakley, *Review of Special Project Order Legislation in Newfoundland and Labrador*, a report prepared for the Labour Relations Agency, 2012, pp. 80-81. In his report, Mr. Oakley observes that there is “widespread support” for special project regimes in the province (p. 81).

[14] In accordance with paragraph 70(2)(c) of the *Labour Relations Act*, the SPO prescribed that HPEA and RDTC could be “involved in collective bargaining in relation to employment on the special project”: *Hebron Development Project Special Project Order*, NLR 78/11, s. 4. Given the legislative structure of the special project regime, that meant that these two entities had the exclusive right to deal with collective bargaining for all employment on the site.<sup>6</sup> They were the only ones permitted (“may” in s. 70(2)(c)) to do so. ExxonMobil was not mentioned.

[15] Section 5 of the SPO designated an agreement between HPEA and RDTC, which pre-dated the effective date of the SPO, as the collective agreement for the special project regulated by the SPO. HPEA and RDTC were expressed to be the only parties to the agreement. ExxonMobil is referred to therein, however, as the “owner” of the Project (Article 3.01(f)). Furthermore, Article 12.01 provided that it was understood by HPEA and RDTC that “no bargaining relationship is created by ExxonMobil ... with a Local Union, [RDTC] or any affiliate of [RDTC] by voluntary recognition or by action of law”, and Article 12.02 stipulated that any participation by ExxonMobil in the processes and administrative matters contemplated in the agreement did not create a bargaining relationship that would bind ExxonMobil to the collective agreement.

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<sup>6</sup> There were some minor exceptions mentioned in s. 3 of the SPO but they are irrelevant to this appeal.

[16] Article 13.01 of the agreement acknowledged that the “exclusive function” of the main contractors, including KKC, included the right to “discipline, suspend and discharge any worker for just cause” subject to compliance with the grievance and arbitration procedure in the agreement, which by Article 14.05 was to be final and binding on HPEA and RDTC. ExxonMobil had no expressed role in that discipline, suspension or discharge process.

[17] HPEA and RDTC also recognized, by virtue of Article 34.03, “the mutual value of improving, by all reasonable means,” safety on the jobsite. At least to that extent, safety was part of, and regulated by, the labour relations regime that was in place and endorsed by the SPO. It explains the issuance and enforcement by KKC and other contractors of site safety policies, including alcohol consumption policies, to their employees, as discussed later in these reasons.

[18] Finally, Article 14.09 provided that HPEA and RDTC “and every person bound by this agreement and every person on whose behalf the agreement is entered into” shall comply with any arbitration decision issued pursuant to the process envisioned by the agreement “and shall do or abstain from doing anything required by that decision.” Although it is clear that the SPO-sanctioned collective agreement was intended to impose obligations to comply with arbitration decisions on persons other than its formal parties, i.e. HPEA and RDTC, its absence of specificity begged the question as to who those other obligees were intended to be and whether ExxonMobil was to be included among them.

[19] “Collective bargaining” referred to in the SPO is defined in paragraph 2(1)(g) of the *Labour Relations Act* as “negotiating with a view to the conclusion of a collective agreement or the renewal or revision of the agreement” and “collective agreement” is defined in paragraph 2(1)(f) as:

A written agreement between an employer or an employers’ organization acting on behalf of employers, and a bargaining agent of employees acting on behalf of a unit of employees containing provisions respecting terms and conditions of employment and related matters.

(Underlining added.)

[20] The scope of the role of HPEA and RDTC therefore extended to all matters “respecting terms and conditions of employment” as well as all “related matters.” Those matters included site safety, as recognized in

Article 34.03 of the Collective Agreement. The corollary is that no other party was permitted to intrude into or interfere with these areas in relation to employment on the special project site.

[21] By the time the SPO was drafted and enacted, the basic structure of the project regime would have already been worked out among all the main participants. Indeed, as noted already, the collective agreement pre-dated the SPO. ExxonMobil and its co-venturers were the ultimate beneficiaries of the project. They needed access to a project site at which their contractors could carry out the required work. The SPO gave them that along with the prospect of labour peace throughout the project. In that way, they had some guarantee that the project could proceed as contemplated. The contractors engaged by ExxonMobil also benefitted because they had a guarantee of relative labour peace and had access to the site to carry out their contracted work. The unions also had the benefit of a regime that eliminated jurisdictional disputes within their own ranks and a site-wide regime for resolving job disputes between employees and their individual employers. To achieve these benefits, each participant had to give up something: the unions, their right to bargain collectively on a union-employer basis; the contractors, the right to exercise management rights individually in respect of their own employees and the individual unions (subject to the grievance arbitration process); and ExxonMobil, the right to manage and employ their property rights in a manner inconsistent with the operation of the regime from which they were benefitting. It was an example of the principle of “he who receives the benefit must also shoulder the associated burden” (See *Halsall v. Brizell*, [1957] Ch 169). The process only worked because each participant became part of an integrated benefit-burden whole.

### **The Arbitrator’s Award**

[22] The employees’ grievance as submitted to their employer, KKC, asserted that they were “wrongfully terminated from employment and wrongfully denied site access.” They were represented by RDTC at the arbitration hearing. The only responding party was HPEA on behalf of the employer. ExxonMobil did not appear at or seek to intervene at the hearing. HPEA nevertheless raised a preliminary objection to the ability of the arbitrator to deal with the substance of the grievance based on the denial of site access to the grievors by ExxonMobil as owner of the site.

[23] HPEA submitted that denial of access to the site by ExxonMobil brought the employment of the grievors to an end, thereby obviating the

necessity of dealing with the question of whether the employees should be disciplined for breach of the alcohol abuse policy. Because ExxonMobil was not a party to the collective agreement it was not bound by it and no order could be made against it, so HPEA argued. Thus, even if the grievors were entitled under the collective agreement to be reinstated, this could not occur without the agreement of ExxonMobil.

[24] RDTC, for the union, argued in response that the only reason the grievors were at the site was that they were expected to work and their activities are completely governed by the collective agreement. Regardless of who was the original author of the site absolutes, it was the employer who provided a copy of them to the union and thereby incorporated them into the employment relationship. Accordingly, submitted RDTC, the site absolutes became part of the terms and conditions of employment which is to be regulated by the collective agreement. Because the issue involves the interpretation and application of the collective agreement, the matter was arbitrable.

[25] The issue presented to the arbitrator was therefore a fairly narrow one: whether, as a preliminary matter, the arbitrator had jurisdiction to proceed with a grievance hearing *as against HPEA, representing the employer KKC*. That was the only preliminary issue that in reality could have arisen, given the fact that the grievance had only been asserted against KKC and not ExxonMobil.

[26] The arbitrator dealt with the preliminary objection and rejected it, concluding that he had subject-matter jurisdiction and *in personam* jurisdiction over HPEA. He then proceeded to deal with the merits of the grievance. For the purposes of this appeal, it is only the ruling on the preliminary objection that needs be considered.

[27] At the start of his written considerations, the arbitrator nevertheless initially stated the issue more broadly as “whether an arbitrator, acting pursuant to the terms of the collective agreement between the parties, has authority and jurisdiction to make an order binding the owner of the project, who is not a party to that collective agreement.” However, as will be seen, in reaching his conclusions, he did not address the issue in the same manner.

[28] After reviewing the legislative and regulatory context in which labour relations occur on special project sites, he concluded that there was “a special labour relations relationship” in existence and that “[t]he regulatory

scheme is meant to include all areas of labour relations including the right to discipline employees who transgress various rules established for their conduct.” After describing the labour relations regime as a “unique relationship,” he concluded:

There is no room in that relationship for the owner with respect to labour relations. It is for these two parties [HPEA and RDTC] to dictate the conditions of employment of the workforce at that site ...

To insert the owner into this equation with an overall authority to thwart the process by determining who, for labour relations purposes, can attend upon the site does not make sense. To provide the owner with such powers would be to circumvent the entire labour relations process established by the special project order and the collective agreement. There would, in essence, be a party independent of that process with a veto to all actions of the parties who are legitimately exercising the rights given to them in the special project order.

[29] In adopting this approach, the arbitrator placed reliance on the decision of this Court in the *Long Harbour* case which, amongst other things, stated that to allow a third party to deny access to a work site governed by a special project order “would have the effect of undermining the labour relations regime that was contemplated by the [special project order]” (paragraph 17). He rejected arguments that *Long Harbour* was distinguishable because the owner (the non-party) and the employer’s council (the party) were connected and could be regarded as one and the same entity. He further refused to rely on other arbitral jurisprudence (notably *Re Finning (Canada) and I.A.M.A.W., Local 99* (2005), 136 L.A.C. (4<sup>th</sup>) 129 and *Re Bantrel Constructors Co. and U.A., Loc. 488* (2007), 162 L.A.C. (4<sup>th</sup>) 122) which had held that an arbitrator has no jurisdiction over the actions of third parties who are not party to the relevant collective agreement. He distinguished those cases on the basis that the employment relationships there were not subject to a special project order as in the current case.

[30] The arbitrator concluded that he had jurisdiction to consider the grievance. He again relied on *Long Harbour*, quoting the statement from that case: “The arbitrator had subject matter and *in personam* jurisdiction to determine whether denial of site access was a violation of the collective agreement by [the employers’ association]” (paragraph 21). He then went on to determine whether the grievors’ actions justified termination and concluded that they did not.

[31] His ruling is summed up in the following paragraph:

... the dismissal of the grievors in these circumstances cannot be justified and they are to be re-instated with full compensation and benefits from the date of termination to the date of re-instatement less any mitigation.

[32] The most controversial aspect of the arbitrator's ruling, for present purposes, is how he dealt with the impact of the order for re-instatement on ExxonMobil and the actions it had taken to bar the grievors from the site. He made only two statements on this issue.

[33] The first, made at the conclusion of his ruling on the jurisdiction issue, was to the following effect: "The owner of the project is bound by the outcome of the award." The second, following the order for re-instatement against HPEA stated: "They [the grievors] are to be granted access to the site to perform their employment duties." The two statements do not necessarily mean the same thing. Their meaning and scope and what legal effect they could have on ExxonMobil however, figure significantly in this appeal.

**The Judicial Review Application** 2014 NLTD (G) 163; 359 Nfld. & P.E.I.R. 306

[34] HPEA sought judicial review of the arbitrator's decision. The issue on the review was technically, whether the arbitrator was correct in concluding that he had jurisdiction to address the grievance that had been made against KKC, as represented by HPEA. As noted, ExxonMobil sought and obtained intervenor status. It is important to appreciate, however, that the conferral of intervenor status does not entitle the intervenor to engraft its own claims onto the existing proceeding or to refashion it. The intervenor is generally limited to making submissions in respect of the existing issues in the original proceeding. Thus, ExxonMobil's submissions would have to have been directed to the issue of whether the arbitrator was correct in concluding that he had jurisdiction to address the grievance that had been made *against KKC (HPEA)*.

[35] ExxonMobil took an active part in the challenge to the arbitrator's decision. It characterized the ruling as one that determined that ExxonMobil was bound by the award. In submitting that the award should be set aside on the basis that ExxonMobil could not be bound by the award, it focused on its status as a non-party to the collective agreement and its rights as owner of the special project site.

[36] Although HPEA and ExxonMobil expressed their positions differently, the claim to quash the decision was essentially based on the submissions that (i) the arbitrator had no jurisdiction to bind ExxonMobil to the effects of the award because it was not a party to the collective agreement; (ii) the arbitrator had no jurisdiction over the dispute at all because the ability of the grievors to work was taken away by the refusal of ExxonMobil to allow them access to the site; (iii) the arbitrator misapplied the *Long Harbour* decision; and (iv) the arbitrator erred in finding that site access was a matter of labour relations within the collective agreement. In addition to these overlapping arguments, ExxonMobil also submitted that (i) a decision of an arbitrator that bound ExxonMobil prevented ExxonMobil from meeting its statutory obligations under occupational health and safety legislation; and (ii) ExxonMobil was denied procedural fairness because the arbitrator did not hear from ExxonMobil before purporting to bind ExxonMobil to the effects of the award.

[37] The applications judge considered the fundamental question at issue to be the validity of the arguments that the arbitrator had no jurisdiction to make an order affecting ExxonMobil on the issue of site access. He described the “relief” (a generally inappropriate term when describing the role of an intervenor) sought by ExxonMobil as “that the decision that ExxonMobil is bound by the Arbitrator[‘s] Award be set aside.”

[38] In addressing the issues as he saw them, the judge quoted extensively from the *Long Harbour* decision and considered submissions that it could be distinguished from the current case. He concluded that while there were factual and other differences between the two cases, the rationale underlying *Long Harbour* was nevertheless applicable with respect to resolving the fundamental issues in dispute. He stated:

[8] The applicant and the intervenor note the closer relationship in [*Long Harbour*] between Vale Inco and the Long Harbour Employers Association and the provision in the Long Harbour Employers Association articles of incorporation assigning bargaining rights to the Employers Association and the directors’ control of the association by Vale-appointed directors. In my view, these distinguishing features do not overcome the apparent distinct legal entities of these parties, the provisions of the Special Project Orders and the similar labour relations regime to which the Court of Appeal decision in [*Long Harbour*] was directed. In fact, ... the Court of Appeal noted it was unnecessary for the applications judge to address the corporate affiliations or that Vale would be bound by the ruling.

(Emphasis added.)

[39] With respect to the submission that the *Long Harbour* case could be distinguished because it dealt only with a preliminary objection and did not directly address whether an owner of a special project site could be bound by an arbitration award where the owner was not party to the governing collective agreement, he observed:

[9] The applicant and intervenor also note that the Court of Appeal in [*Long Harbour*] dealt with the issue as a preliminary objection before the arbitrator. The intervenor notes in particular that at paragraph 21 the Court of Appeal directed itself to the preliminary objection and left open the question of whether the arbitrator could legally or effectively bind Vale. With respect, I do not see that conclusion following from the rationale developed by the Court of Appeal in [*Long Harbour*]. The Court of Appeal is clear that the arbitrator had jurisdiction to determine whether denial of site access was a violation of the collective agreement in its analysis and in its statement at paragraph 21. Consistent with that determination, the Court of Appeal then continued on at paragraph 21 to confirm that the remedy (and I note not the jurisdiction), including whether Vale would effectively be bound by it was a matter for the arbitrator.

(Emphasis added.)

[40] In response to the submissions of HPEA and ExxonMobil that the *ratio* of the *Long Harbour* decision with respect to the special project regime trumping third party property rights was limited to its effect on labour relations only, and that in this case site access was not a labour relations matter, the applications judge ruled:

[12] In my view, the intentions of ExxonMobil to exercise prerogative based upon proprietary rights and to refuse access to employers [sic] where positions at the site have become reinstated by the arbitrator is an apparent instance where its ownership rights are subordinated to a legitimate labour relations outcome. To find otherwise, in my view, would materially affect the outcome of the determination effected under a legitimate labour relations scheme...

[16] The intervenor argues that dismissal from employment and banishment from the job site, as the arbitrator phrased each, are legally and practically two functions carried out by distinct entities. In the employment context, however, the fact of employment, the place of engagement of work and the conduct of work are [integral] features. In that context it is difficult to engage in jurisdictional separations within this regime. In fact, the workers' presence at the work site is [integral] and fundamental to the contract of employment. To the extent that the arbitrator exercises jurisdiction over subject-matter governed by the collective agreement, the outcome then prevails. The Special Project Order section 4

subscribes the parameters within which the collective bargaining operates. While ExxonMobil may not be a party, it may be affected by outcomes properly found within those parameters. ...

[17] ... Because of the unique circumstance engaged by the Special Project Orders and the resulting Collective Agreement, this arbitrator had full jurisdiction over the employees' entitlement or not to work in the position for which they were terminated.

(Emphasis added.)

[41] ExxonMobil also argued that, as owner of the site, it was bound by its statutory obligations under occupational health and safety legislation and had to have flexibility to manage and operate the site to enable it to comply with those obligations. Accordingly, it submitted, it could not be bound by an arbitration award which, if it were to bind ExxonMobil, might require it to act contrary to its obligations under the occupational health and safety regime. The applications judge dealt with these arguments in the following manner:

[13] ... The intervenor argues that its obligations pursuant to the *Occupational Health and Safety Act* ought to be assessed as impacting on the reasonableness of the arbitrator's view of its obligations under that regime. It has not been determined that ExxonMobil may have been in breach of those obligations in this instance. An initial review of the Act governing that regime, ... confirm[s] that the person primarily responsible for carrying out a project including but not limited to the owner and supervisors and employees are mandated with a generally stated responsibility for health and safety.

[14] The intervenor argues that its site absolute policy is directed to site safety protocols which are not principally directed through traditional labour related topics that include alcohol and drug related restrictions. However, to the extent that the site's absolute [sic] policy enters into areas governed by the labour contract, the outcome of policies may be affected coincidentally by the application of that labour regime.

[15] I am not presented here with a circumstance where the owner is bound by a legal obligation or outcome that mandates it to do something that is in direct conflict with the arbitrator's decision. If that occurred, the conflict, presumably binding the owner to comply with two conflicting legal mandates would have to be addressed by the parties affected and reasonable outcomes then sought.

(Emphasis added.)

[42] Finally, with respect to ExxonMobil's argument that it had been denied procedural fairness before the arbitrator in being able to address the

issue of jurisdiction of the arbitrator to bind ExxonMobil to the result of the award, the applications judge responded:

[18] ... ExxonMobil was aware of this grievance and it going to arbitration, however, it objects to not having notice of an intention to have it bound by a finding against it. This position, again, has to be considered in the overall context of the relationship between the parties in these Special Project Orders. The regime has the effect of having matters of legal relations specifically mandated and circumscribed as noted, and ExxonMobil has to be taken as having to have subscribed to those presubscribed parameters. In the context of labour relations and this circumstance, matters of labour within that framework may impact on ExxonMobil.

[43] The applications judge concluded that “the arbitrator was correct in his assumption and exercise of jurisdiction” (Judgment, paragraph 20) and dismissed the judicial review application. He stated:

[16] ... In the end, it is the conduct of the employees on site at the workplace that was subject to discipline and arbitral review.

[17] Consequently, the question is whether the Arbitrator had jurisdiction over the subject matter of the dispute rather than whether denial of site access by the owner of the site was disregarded and *in personam* jurisdiction over ExxonMobil exercised .... Because of the unique circumstance engaged by the special project orders and the resulting Collective Agreement, this Arbitrator had full jurisdiction over the employees’ entitlement or not to work in the position from which they were terminated.

[44] In fact, the applications judge need not have gone so far as to rely on the unique aspects of the special project regime to reach his conclusion that the arbitrator had jurisdiction to deal with the grievances. Given the fact that the issue on the judicial review was whether the arbitrator was correct in assuming jurisdiction over the dispute *as against HPEA*, once he concluded that the subject matter of the dispute related to matters arising out of the employment relationship governed by the collective agreement it followed that he had jurisdiction, as against HPEA, to deal with the merits. That was enough for him to proceed.

This view becomes clearer in his reasons in a later paragraph:

[19] The subject matter of the dispute before the Arbitrator was the conduct of employees and their work, that is, had their conduct breached their contractual obligation to warrant discipline. The terms and conditions of employment are governed by the Collective Agreement of August 31, 2011. It cannot be questioned then that the Arbitrator had jurisdiction over that subject matter. So

long as the subject matter is within the Arbitrator's jurisdiction, the outcome of the merits of the dispute is in his hands within this regime ...

[45] In reality, that was sufficient to dispose of the question on judicial review as to whether the preliminary objection to the ability of the arbitrator to deal with the merits of the grievance against KKC (HPEA) was well-founded. The question of what impact any resulting arbitration award might have had on ExxonMobil was not really before the arbitrator except, in the subsidiary sense, as part of HPEA's argument that ExxonMobil's ability to deny site access as owner of the site and non-party to the collective agreement superseded any rights flowing from the arbitration award.

[46] Consistent with this view, the applications judge in fact made no explicit finding as to whether the arbitrator was correct in his statements that ExxonMobil was "bound by the outcome of the award" and that the grievors were to be "granted access to the site to perform their employment duties." For the reasons that follow, he did not need to do so. That said, he did discuss, as indicated, the impact of the SPO regime on the relationships of the participants, including ExxonMobil, as to whether it "resulted in what could be termed additional or extra-jurisdictional authority" (Judgment, paragraph 6) with respect to ExxonMobil. It is that, of course, which is of the prime concern to ExxonMobil.

[47] It can be seen throughout the reasoning of the applications judge that, consistent with some statements in the *Long Harbour* decision, the judge was influenced by the notion that the Special Project regime had overriding impact on all activities that were being carried out at the site in relation to the construction of the GBS and that the rights of all participants in those activities, no matter what their role, were subordinated to ensuring that the effective operation of the labour relations regime, which was the purpose of the SPO designation in the first place, was not frustrated. It can therefore be said that, at least implicitly, the applications judge did not ultimately disagree with the view of the arbitrator that the grievors were entitled to continued access to the site.

[48] It is disagreement with these fundamental notions that is central to all of the arguments on appeal.

## **The Appeal and Cross Appeal**

[49] ExxonMobil (the appellant) and HPEA (the cross-appellant) advanced the same points on appeal. They each asserted that the applications judge erred:

1. In concluding that the arbitrator had *in personam* and subject-matter jurisdiction to “bind” ExxonMobil;
2. In concluding that the grievance and arbitration procedure was the “proper forum” to determine the site access issue;
3. In misapplying and misstating the limitations of jurisdiction granted to an arbitrator by the collective agreement;
4. In concluding that ExxonMobil’s site absolutes rules constituted a labour relations matter;
5. In concluding that the Special Project Order superseded the rights and obligations of ExxonMobil to control access to the site;

[50] In addition, ExxonMobil also asserted that the applications judge erred in law in concluding that the hearing in front of the arbitrator – at which ExxonMobil was not present – satisfied the requirements of procedural fairness to ExxonMobil.

[51] With the exception of the procedural fairness argument, all of the other grounds of appeal essentially boil down to an assertion of error on the part of the applications judge in not concluding that ExxonMobil, as owner of the site, could not be bound or otherwise legally affected by any arbitration award arising out of a collective agreement to which ExxonMobil was not a party with respect to its ability to deny the grievors access to the construction site. In other words, ExxonMobil’s proprietary interests in the site took precedence over all rights arising under the labour relations regime imposed by the Special Project Order.

[52] Inasmuch as this tension between property rights and labour relations rights was dealt with extensively in the *Long Harbour* case, it is necessary to examine it carefully to determine what it actually decided and, if necessary, to consider whether, if it applies to the current case, this Court ought to consider overturning or modifying it.

## **The Long Harbour Decision**

[53] In the *Long Harbour* decision, this Court unanimously upheld a dismissal of a judicial review application challenging an arbitrator’s decision

which had rejected a preliminary objection to the arbitrator's jurisdiction on the basis that the owner of the site under an SPO, who had denied two employees access to the site for engaging in an illegal strike, was not a party to the collective agreement and could not therefore be bound by any arbitration award.

[54] Unlike in the current case, the owner of the site, Vale Inco, was a member of the employers' association which was a party to the collective agreement. The association was structured in such a way that Vale retained control over the association.

[55] Vale denied the two employees in question access to the site. The employees' site-employer thereafter terminated them, claiming that the employees could no longer make themselves available for work. In response to their grievance, the employer claimed the matter was not arbitrable because the dispute did not arise out of the interpretation, application, administration or violation of the collective agreement, but instead resulted from the exercise of the property rights of a non-party to the agreement.

[56] The arbitrator rejected the preliminary objection and, on judicial review, the applications judge refused to interfere with that ruling. The arbitrator ruled that the essential nature of the dispute was a labour relations one and that the arbitrator therefore had subject-matter jurisdiction. He also held that, on the facts, Vale and the employers' association were one and the same entity and because of Vale's control over the association, the association therefore could be said to have a degree of control over the site which, as a party to the agreement, made the site access issue subject to the jurisdiction of the arbitrator.

[57] The appeal to this Court was dismissed. The Court agreed with the applications judge. In reaching its conclusion, this Court was influenced by the following considerations:

1. To accede to the argument of the employers' association, "would have the effect of undermining the labour relations regime that was contemplated by the SPO" (paragraph 17). The SPO, which applied to a specific geographic location,

... was superimposed on Vale's property at Long Harbour. In respect of labour relations matters it takes preeminence over other interests pertaining to the site, even owner's property

rights, where the exercise of those property rights would materially affect or undermine the labour relations regime.

(Paragraph 18)

By attempting to retain control over the labour relations environment without subjecting itself to the obligations imposed by the collective agreement, Vale was employing “a colourable attempt to interfere with the proper operation of the labour relations regime (paragraph 17).

2. The evidence with respect to the relationship between Vale and the employers’ association demonstrated that Vale “had effectively delegated authority to [the employers’ association] to control access to the site for labour relations purposes” (paragraph 19) and a finding by the arbitrator that denial of site access because of an allegedly illegal strike was a labour relations matter over which the arbitrator had jurisdiction (paragraph 20).
3. The fact that Vale was not a party to the collective agreement was irrelevant, since the issue was not whether Vale was bound by an arbitrator’s determination but whether the arbitrator had jurisdiction to determine whether the grievances could proceed *against the employers’ association* for breach of the agreement (paragraph 20).
4. It was not necessary for the arbitrator or the applications judge to have made any comment or ruling that either Vale and the employers’ association were effectively one and the same entity or that Vale would in effect be bound by the arbitrator’s ruling (paragraph 21).

[58] I therefore conclude that the *Long Harbour* decision:

- (a) did *not* decide that Vale was bound by the arbitration award under the collective agreement to which it was not a party;
- (b) did *not* decide that the interconnected relationship between Vale and the employers’ association was a determining factor in its analysis;
- (c) *did* decide that because the issue of site access following an illegal strike was a labour relations matter, the arbitrator had jurisdiction to determine whether the grievances could proceed *against the employers’ association*.

[59] In light of these conclusions, *Long Harbour* is not a controlling precedent with respect to resolution of the issue presented in this case. Where *Long Harbour* remains relevant, however, is in relation to its affirmation of the arbitrator's and the applications judge's general analytical approach to resolving the tension resulting from the intersection between the need for effective operation of a labour relations regime on an SPO site and the property rights of the operator/owner of the site who is not a direct participant in the labour relations regime.

[60] In the end, the resolution of the current issue depends on a policy decision as to how this tension should be resolved. It is to that issue that I now turn.

### **What this Case is Really About**

[61] It is the assertion of the primacy of property rights that provides the justification for ExxonMobil's argument that it may, outside of the SPO-imposed labour regime, regulate site access related to employees working on the site, in the interests of safety regardless of whether safety is also a matter that is relevant to labour relations (as it would appear to be by virtue of Article 34.03 of the collective agreement, and the issuance of safety-related policies by KKC and the other employers to their workers on site).

[62] The obligations of employees working on the site to observe imposed safety standards (in the absence of directly applicable minimum standards legislation) can logically arise in only two ways: (i) by imposition pursuant to the labour relations regime created by the applicable collective agreement, i.e. by standards imposed by the employer as employment obligations; or (ii) by some other authority, operating outside of the labour relations regime, which as a matter of law supersedes the rights and obligations existing in the labour regime.

[63] ExxonMobil of necessity must eschew reliance on the first method because enforcement would have to be dealt with under the grievance-arbitration system found in the collective agreement, with the ultimate decision resting with the arbitrator. To be successful on this appeal, therefore (and assuming it is necessary to decide it), ExxonMobil must necessarily have to rely on the second method, if it wishes to control the result of the dispute.

[64] While the argument may be packaged in the wrapping of enforcing site safety, it is important to note that a right to protect site safety does not exist in and of itself; it flows from the proprietary right of an owner to

control site access as it sees fit. Site safety may be the motivation for acting in this case, but the right being argued for would be equally applicable whenever ExxonMobil disagrees with any arbitration decision, whether related to site safety or not.

[65] That is why I regard the issue in this case as whether ExxonMobil may, by flexing its proprietary muscles, deny site access on any ground (except perhaps a ground prohibited by human rights legislation) and thereby disregard the effects on the operation of the labour relations regime of which it, like all others involved with the site, is a beneficiary.

### **ExxonMobil's "Ownership" Interest**

[66] The lease between Nalcor and ExxonMobil was not put in evidence. We therefore do not know, for example, what restrictions, if any, were placed on ExxonMobil with respect to the use occupation and control of the site. It would be reasonable to assume, however, that, as in any lease which is granted for a specific purpose, there would be requirements that the lessee use the property in accordance with the purpose for which it was granted. In this case, that might mean, for example, that the use would have to be in accordance with the purpose of constructing a GBS platform which, in turn, might further implicitly require enabling those performing that work to carry out their jobs in compliance with the SPO regime.

[67] What is fair to assume, however, is that ExxonMobil was not a fee simple owner with unfettered right to use the property as it saw fit; otherwise they would have been provided with a fee simple grant or at least a fee terminable on the happening of a condition subsequent (the completion of the project).

[68] It was ExxonMobil that asserted, supported by KKC, that it had the unfettered right to deny access to the site to anyone it wanted and for any purpose, however unrelated to the work on the site. As such, the burden was on them to establish that that unfettered right existed. It cannot be assumed. The other parties' acceptance for the purpose of the arbitration and judicial review application that ExxonMobil was the "owner" of the site does not carry with it a definitive conclusion that an owner's right to control site access in the context of the SPO regime that existed, was necessarily unfettered.

[69] What can be inferred from the business connections between ExxonMobil, the contractors and the unions is that they were all present at or

had an interest in the site to achieve a common objective, the construction of a GBS platform. That objective was to be achieved through the framework of an SPO, which involved the designation of the construction site as a special project. As such all participants can be presumed to be in accord with (or at least did not object to) the imposition of the restrictions contemplated by the SPO regime in order to achieve the ultimate objective. ExxonMobil cannot be considered a peripheral or bit-player in the activities performed on the site and, in fact, was involved in interactions with the contractors, including KKC, with respect to promulgation of site policies concerning behavior on the job and on the site. Indeed, it was the ultimate beneficiary of those activities and the labour peace that the SPO was designed to promote.

[70] The question for consideration in this case is whether ExxonMobil can nevertheless, when it suits them, take a position that is inimical to or undermining of the labour relations regime it was interested in and indirectly influencing.

### **The Interrelations and Effect of Relevant Site Policies**

[71] Another document that was not placed in evidence at the arbitration hearing or the judicial review hearing was the contract between ExxonMobil, as the owner of the site and party for whom the project was being conducted, and the prime contractors (e.g. KKC) who were engaged to actually perform the work. It is not clear therefore whether there were any provisions in that contract which required the prime contractors to make it a term of employment of its employees that they comply with any policies issued by ExxonMobil relating to site access.

[72] What is clear, however, is that KKC issued to its employees a “Bull Arm Worksite Substance Abuse Policy” dated October 1, 2012 which, after stating that both ExxonMobil and KKC had a responsibility “to provide a safe, productive and healthy work environment,” stipulated that the possession, concealment, transportation, supply and consumption of prohibited substances, including alcohol or drugs, at the site was “strictly forbidden” and that reporting to or performing work with alcohol levels above a certain defined limit was an offence under the policy. The result of a violation was stipulated to “result in removal from and loss of worksite privileges/access.”

[73] Two weeks later KKC issued another policy, denominated the “Bull Arm Worksite Site Absolutes Policy SOP,” the stated purpose of which was “to encourage safe behavior ... at the work place” and which, if violated “*may* result in denial of site access”. The “Site Absolutes” were defined as a set of rules established by ExxonMobil which “if violated, *will* result in denial of site access.” This statement is inconsistent with the earlier statement that violations *may* result in denial of site access. The term “denial of site access” was defined as refusal or revocation of site access privileges “for violating the Hebron Project Site Absolutes or other unacceptable conduct as deemed by [ExxonMobil].” One of the Site Absolutes stipulated: “No use or possession of alcohol or illegal drugs or noncompliance with the site substance abuse policy.” By incorporating into the Site Absolutes an obligation to comply with employer-issued substance abuse policies, and conversely, by incorporating into the KKC – issued policy an obligation to comply with ExxonMobil’s site absolute policy, ExxonMobil’s admonitions become intertwined with the labour relations policies being enforced by HEPA and RDTC at the site.

[74] Though issued by KKC, the Policy stated that it was the responsibility of KKC *and ExxonMobil* to educate all personnel about the site absolutes. The Policy also stated that “decisions for site access are made by Operator (ExxonMobil) and such decisions *could be* permanent through Project duration and cannot be challenged through grievance or arbitration.” With respect to this latter statement, it was arguably not within the power of KKC unilaterally to withdraw from grievance arbitration decisions based on site absolute rules designed to encourage safe behavior *at the work place*. That was arguably a matter of labour relations. The *Labour Relations Act* requires grievance arbitration in relation to all differences arising out of the interpretation, application, administration or alleged violation of a collective agreement (section 86(1)) and, as noted previously, a collective agreement is defined to encompass provisions respecting “terms and conditions of employment and related matters” (section 2(1)(f)). Alleged violations of policies designed to promote safety at the work place certainly fall within matters “related” to employment at the site if not directly within terms and conditions of employment itself.

[75] In addition to the foregoing employer-issued policies, ExxonMobil itself issued a “Bull Arm Site Absolutes Policy” dated March 5, 2013, with the same stated objective as the KKC policies and in essentially the same language as the KKC Site Absolutes Policy except in one respect: in

defining “site absolutes” ExxonMobil described them as a set of rules “which, if violated, *may* result in denial of site access,” while still emphasizing that the decision regarding site access remained that of ExxonMobil.

[76] What is clear from a reading of these three sets of policies is that they were all designed to achieve the same objective of safety at the work site and that their subject-matter and manner of implementation were interrelated. KKC and ExxonMobil effectively undertook joint responsibility with respect to administration and enforcement of the site absolutes regardless of what was formally stated in Article 12 of the applicable collective agreement.

[77] While ExxonMobil purported to reserve onto itself the unilateral right to deny site access to both employees and visitors, the actions that could give rise to such denial as a penalty were, at least in relation to workers on the site, actions that were very much related to work at the site. KKC, by issuing its own policies, incorporated ExxonMobil’s Site Absolute Policies into the work relationship as part of the labour relations environment. To that extent, violations of those policies were subject to the grievance and arbitration scheme contemplated by the SPO.

[78] The net result of these interrelated policies was that through the KKC-issued “Bull Arm Worksite Absolutes SOP” (the “KKC policy”), the employees were, as part of their employment relationship governed by the collective agreement, made subject to the ExxonMobil-issued “Bull Arm Site Absolutes Policy” (the “ExxonMobil policy”). Under the KKC policy, employees could be denied site access for violating the ExxonMobil policy (or for “other conduct deemed unacceptable by [ExxonMobil]”). The “site absolutes” *under both policies* included: (i) no use or possession of alcohol or drugs; and (ii) non-compliance with the site substance abuse policy.

[79] Thus, a grievance against KKC (HPEA) challenging discipline or worksite access for improper alcohol use would, of necessity, involve consideration of whether there was in fact a violation of the ExxonMobil policy because that policy was incorporated by reference into the KKC policy, the alleged violation of which would be central to any grievance/arbitration process. Accordingly, the arbitrator would have to have subject matter jurisdiction to determine whether the site absolutes defined in the KKC policy and, by extension, in the ExxonMobil policy, were violated and whether denial of site access was an appropriate remedy. It follows that the arbitrator was correct to reject HPEAs preliminary jurisdictional

objection to his dealing with the grievance. Furthermore, the applications judge was correct not to set aside that jurisdictional ruling on judicial review.

[80] The site absolutes stated in identical terms in both policies read:

No use or possession or [sic] illegal drugs or non-compliance with the site substance abuse policy.

(Emphasis added.)

The arbitrator addressed both aspects of this prohibition. He made the finding that “the evidence does not reveal that the grievors used or possessed alcohol or any other illegal drugs while on site or while at camp” (Award, p. 28). With respect to non-compliance with KKC’s site substance abuse policy he referred to the specific prohibitions therein (which provided that “personnel shall not report for work or perform work with alcohol levels equal to or in excess of [certain stipulated standards]”) and concluded that there was no violation because the grievors did not report for work nor did they perform any work. They were not on work duty but simply returned to their living quarters on site to spend the night, nor did they consume any alcohol on site (Award, p. 27).

[81] The result of these findings of fact, which involved application of the site absolute prohibitions contained in the identically-worded KKC and ExxonMobil policies, effectively deprived any decision to refuse the grievors access to the site, based on their behavior, of any legitimacy.

[82] The only remaining basis upon which ExxonMobil could therefore maintain that it could nevertheless revoke site access privileges was to assert the primacy of their proprietary rights as “owner”. There not being a violation of the ExxonMobil policy (as found by the arbitrator) and no “other unacceptable conduct as deemed by [ExxonMobil]” having been alleged, the assertion of the ability of unrestrained property rights is all that ExxonMobil is effectively left with.

### **The Nature of the Legal Regime Created by the Special Project Order**

[83] Section 70 of the *Labour Relations Act* allows the Lieutenant-Governor in Council to declare an undertaking for the construction or fabrication of works at the Bull Arm site to be a special project and to prescribe the geographic site or scope of work to which the declaration

relates. It also permits a designation of the employers, employers associations, unions and councils of trade unions that are permitted to be involved in collective bargaining related to “employment on the special project” and to designate any collective agreement that is to govern work in relation to the project.

[84] By virtue of the *Hebron Development Project Special Project Order*, the Hebron development project at the Bull Arm site was so designated as a special project. Section 4 of the Order specifically limited the parties that could be involved in collective bargaining “in relation to employment on the special project” to HPEA and RDTC and section 5 designated the specific collective agreement “for the purpose of the special project.”

[85] The arbitrator characterized the nature of this regime as follows:

... it can be seen that there is a special labour relations relationship between the employer [represented by HPEA] and the union [represented by RDTC] who are parties to this arbitration. The special project declaration deals with all matters of labour relations at the subject site and contains no provision for the involvement of the owner of the project, in this case ExxonMobil Canada Properties. ... *The regulatory scheme is meant to include all areas of labour relations including the right to discipline employees who transgress various rules established for their conduct.*

... In short, the collective agreement is replete with sections and subsections which refer to the unique relationship between the employer and this union. *There is no room in that relationship for the owner with respect to labour relations.* It is for these two parties to dictate the conditions of employment of the workforce at that site.

(Emphasis added.)

[86] I agree with this characterization. As quoted earlier, the arbitrator went on to observe that “to insert the owner [ExxonMobil] into this equation with overall authority to thwart the process by determining who, for labour relations purposes, can attend at the site” made no sense. It would effectively give ExxonMobil a “veto” over labour relations matters that were specifically consigned to other persons by the SPO.

[87] Unless one was prepared to give primacy to the assertion of property rights regardless of how doing so would undermine a legislative policy that was being enforced for the benefit for all, one is driven to the conclusion that the rights flowing from the imposed collective agreement were intended by

the legislature to have primacy over all other rights at the site that impacted on collective bargaining, which in accordance with section 2(1)(f) of the *Act*, relates to “terms and conditions of employment *and related matters*” (emphasis added). The jurisprudence based on notions of privity of contract that has had some currency in some other labour relations contexts is irrelevant in the current context where the regime is subject to an SPO.

[88] Counsel for ExxonMobil placed considerable reliance upon the Supreme Court of Canada decision in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 in support of his submission that ExxonMobil, as a non-party to the collective agreement, could not be “bound” or affected by the arbitration decision. In particular, he relied on the following passages from the judgment of LeBel J.:

[40] When a grievance arbitrator finds it impossible to resolve a dispute or part of a dispute because he or she does not have jurisdiction over the parties, the ordinary courts retain jurisdiction over the dispute. ... Such situations are likely to arise where the grievance arbitrator cannot claim to have authority over persons considered to be third parties in relation to the collective agreement and cannot render decisions against them ...

[41] The inherent limits on their *in personam* jurisdiction do not mean that grievance arbitrators have to ensure that their decisions have no effect on third parties. It is possible for third parties who do not belong to the bargaining unit, such as company managers, to be directly or indirectly affected by an arbitration award. However, these third parties will not be legally bound by the award. ... As we shall see, the mere fact that the same issue arises in the collective agreements of several different bargaining units with a single employer does not oust the jurisdiction of the grievance arbitrator in favour of the ordinary courts.

[89] *Bisaillon* involved an entirely different issue (the extent to which a labour arbitrator’s jurisdiction derived from a collective agreement ousted the jurisdiction of the courts) and its statement of the law, as applied to the material facts of that case cannot be considered to be controlling and does not dictate any result in the current case. In any event, the statements of LeBel J, which assert that inasmuch as an arbitrator’s jurisdiction and authority derive from the collective agreement under which he or she is appointed is necessarily limited to binding only those who are parties to the agreement, are unremarkable in themselves. They simply assert a privity of contract concept in the labour relations context. Those comments, however, presuppose that the authority of the arbitrator is derived solely from the agreement. In the current case, however, the issue is whether the existence of the SPO regime imposes any greater restriction on non-parties who are

involved in the operation of that regime with respect to labour relations matters. The arbitrator and the applications judge distinguished other cases based on privity of contract (*Finning and Bantrel*) on the basis that they did not deal with a special project regime. In like manner, the *Bisaillon* decision can also be distinguished on the same basis. Jurisdiction is derived, at least in part, from a different foundation that is outside of the collective agreement itself.

[90] It is clear from the reasoning of the arbitrator and the applications judge (paragraph 19) that they both regarded a determination of whether an employee was to be allowed access to the site in relation to violation of a site policy regarding improper use of alcohol as a determination in relation to a labour relations matter. I also agree with this conclusion. Accordingly, for this reason and those given earlier, the arbitrator had jurisdiction over the subject-matter of the dispute to decide the issue of whether the alcohol policies were in fact breached and to give a remedy (in this case, reinstatement) that was appropriate to that decision. While HEPA, representing KKC, was the actual party to the arbitration, ExxonMobil is nevertheless affected by the result, because its rights to act in a manner that would undermine the operation of the labour relations regime under the SPO were subordinated to the operation of the regime. As noted by the applications judge, “the fact of employment, the place of engagement of work and the conduct of work are [integral] features” and “the workers’ presence at the work site is [integral] and fundamental to the contract of employment” (paragraph 16).

[91] These conclusions are consistent with the underlying philosophical approach to the legal effect of an SPO enunciated in the *Long Harbour* decision. Given its recent provenance and the absence of any suggestion that it is directly contrary to other relevant jurisprudence in this or other Canadian jurisdictions, I see no reason why we should depart from its basic rationale.

### **The Significance of Being “Bound” by an Arbitration Award**

[92] Much of the argument in this case proceeded upon certain assumptions as to what being “bound” by the arbitration award meant.

[93] It will be recalled that the arbitrator stated early in his reasons (p. 27) that “the owner is *bound* by the outcome of the award.” Yet, when he came to describing the effect of his decision towards the end of his reasons he

simply stated that the employees “are to be granted access to the site to perform their employment duties” (p. 30) without explicitly stating that ExxonMobil was “bound” by the result or that ExxonMobil had a positive duty to allow access.

[94] That said, the arbitrator did acknowledge that KKC’s position at the arbitration was that, because ExxonMobil was not a party to the collective agreement, the arbitrator had no jurisdiction to “bind” it to the award (Award, p. 19). Furthermore, the arbitrator stated the issue to be whether he had jurisdiction to make an order “binding” the owner (Award, p. 22).

[95] As has already been noted, at the level of judicial review, the applications judge did not use the term “bind” or “bound” at all in his reasons. He described the result of his refusing to set aside the arbitrator’s award in these ways:

[12] ... [ExxonMobil’s] ownership rights are *subordinated* to a legitimate labour relations regime.

...

[16] ... While ExxonMobil may not be a party [to the collective agreement], *it may be affected by outcomes* properly found within those parameters.

...

[18] The regime has the effect of having matters of labour relations specifically mandated and circumscribed as noted and ExxonMobil has to be taken as having to have subscribed to those presubscribed parameters. In the context of labour relations and this circumstance, *matters of labour within that framework may impact upon ExxonMobil*.

(Italics added.)

[96] This use of “binding” terminology begs the question as to what, legally and conceptually, is meant when such language is used. While the basic understanding of the word is “to obligate” (Dukelow & Nuse, *The Dictionary of Canadian Law* (Toronto: Carswell, 1991), it has a variety of other and (less precise) meanings as well, depending on context (see, *SM Construction v. Folmar Electric Ltd.*, 2000 NFCA 35, 189 Nfld. & P.E.I.R. 249 at paragraph 63: restrain, put in bonds, constricted, obstructed, impose an obligation of duty on, and prevent from moving freely).

[97] I do not regard it helpful to pose the question at issue on this appeal in terms of whether the arbitrator's award "binds" ExxonMobil. It is not necessary to address whether the arbitrator had jurisdiction to bind ExxonMobil to undertake a positive duty to do something which, upon failure to perform the act, would be punishable by contempt (see *Arbitration Act*, RSNL 1990, c. A-14, s. 15 which allows an arbitration award to be registered in the Supreme Court and "enforced in the same manner as a judgment or order"). The arbitrator did not express it in those terms in his conclusion, nor did the applications judge interpret it as such. Indeed, as indicated earlier in these reasons, the question actually at issue was only whether, on a preliminary objection, the arbitrator had jurisdiction over the subject-matter in respect of the grievance against KKC (HPEA). The fact that the arbitrator may have, additionally, made statements relating to the impact of the arbitration decision on ExxonMobil does not expand the legal effect of the award. An appeal or a judicial review is made against the legal result of the award, not the expressed reasons given for that result.

[98] It is sufficient to conclude that ExxonMobil, like all other participants in and beneficiaries of the SPO regime, must respect that legal regime, including the decisions that flow out of it. That would include the obligation to refrain from undermining the regime of which it is a beneficiary. It must thus accept the labour relations and other related rulings of an arbitrator whose role is integral to the operation of the regime and which generally declare the legal situation on the site in the same way in which every citizen must abide by the law and the jurisprudence that emanates from the courts.

[99] I prefer the approach of the applications judge when he stated that ExxonMobil's rights are subordinated to the labour relations regime set up by the SPO and that ExxonMobil will necessarily be "affected by outcomes" flowing from the collective agreement that is legitimated by the SPO. ExxonMobil need only be regarded as being "bound" by the arbitrator's ruling in the same way as a citizen is bound by the general law and the precedents emanating from the courts. Even if ExxonMobil may not be subject to the law of contempt for failure to abide by a specific arbitrator's order, it will be subject to an obligation to refrain from interfering with the rights of workers which have been determined and declared as part of the operation of the SPO regime and to which all persons, including ExxonMobil, participating in or receiving the benefits of the activities contemplated by the regime are subject. Thus, if it acts in a manner that undermines, frustrates or derogates from rights so created, it will be subject

to such other civil obligations and penalties, such as the tort of inducing breach of contract, that protect the rights created.

[100] Indeed, even with respect to the one occasion when the arbitrator referred to ExxonMobil being “bound” he did not say that ExxonMobil was bound “by the award”; instead he said it was bound “by the *outcome* of the award.” That phraseology can also be interpreted in a manner consistent with the characterization of the effect of the award described by the applications judge.

[101] In *Ontario Sheet Metal Workers’ and Roofers’ Conference v. Ellis-Don Ltd.*, 2010 ONSC 3783, 268 O.A.C. 196 (Div. Ct.) the question was whether a working agreement, not in itself constituting a collective agreement, between a trades council and a construction company conferred recognition rights in favour of two other unions and thereby bound the company to those agreements. In holding that the company had agreed to respect and abide by the employment conditions of the collective agreements of the unions attached to the working agreement, the Ontario Labour Relations Board drew a distinction, which the Divisional Court upheld, between being bound by the individual collective agreements themselves (which the Board concluded they were not) and agreeing to abide by the provisions and conditions in the agreements:

[12] The Board concluded that the proper way to read the words “bound by” is to read them as synonymous with “abide by”. In each case the Board found that Ellis-Don agreed to abide by the provisions and conditions of the collective agreement but did not agree to be bound to the collective agreement.

[102] While the issues and facts in the *Ontario Sheet Metal Workers case* are entirely different from the current case, the distinction between not being bound as a party and nevertheless being required to abide by rights created by the agreement is the same sort of distinction that is relevant in the current context.

[103] There is no need to go further and engage in a mechanistic application of the doctrine of privity of contract, which does not fit the circumstances of the situation facing the parties.

[104] I therefore prefer to regard what the arbitrator did in this case as the granting of a declaratory order declaring the rights of the grievors to continue to work at the site following reinstatement. All persons associated

with the SPO are in that sense required to respect the declaration. That is sufficient to dispose of this case.

### **The Argument Based on Need to Comply with Occupational Health and Safety Requirements**

[105] ExxonMobil repeated before this Court the argument it had made before the applications judge that it could not be bound by any arbitration award because it would preclude it from complying with its obligations, as the body in control of the site, to ensure that occupational health and safety legislation was observed. It had to have the flexibility, so it was argued, to banish persons from the site who were in violation of proper occupational health and safety standards or else ExxonMobil itself would face being in contravention of the legislation.

[106] As previously noted, the applications judge rejected this submission. I agree with the judge's conclusions in this regard. The issue as presented was a hypothetical one. As the judge noted, he was not faced with a circumstance where ExxonMobil was bound by a legal obligation under the occupational health and safety legislation regarding the three grievors in question that was in direct conflict with the arbitrator's decision.

[107] If and when such a position presented itself, relevant decision-makers might have to address which legislative regime (the SPO regime or the occupational health and safety regime) would take precedence or perhaps find a way to read them so that they could operate together. It by no means follows that the occupational health and safety regime would necessarily triumph over competing legal obligations.

[108] ExxonMobil's arguments on this point are not persuasive to justify a conclusion that ExxonMobil is free to disregard an arbitrator's decision made pursuant to the SPO regime to which ExxonMobil, as well as all others involved in or as beneficiaries of the work at the site, was subject, in favour of a potentially arbitrary assertion of an untrammelled property right.

### **The Procedural Fairness Issue**

[109] ExxonMobil also argued that it was denied procedural fairness because it was not represented at the arbitration hearing and could not make the jurisdictional arguments it is now making. The applications judge concluded that ExxonMobil was aware of the existence of the grievance and if it had wished to intervene – as it did in the court – it could have done so. I

agree. Furthermore, as noted by the judge, ExxonMobil's rights in relation to regulation of the site were subject to the parameters of the SPO regime (as decided in *Long Harbour*) and it was therefore subject to the rights flowing from the operation of the regime regardless of whether it chose to appear and participate.

[110] This ground of appeal has no merit.

### **Conclusion and Disposition**

[111] The appeal should be dismissed. The applications judge was correct in concluding that the arbitrator made no error in his assumption and exercise of jurisdiction over the subject-matter of the dispute in the case and in dealing with the grievance that had been made against KKC as represented by HPEA.

[112] It is therefore not technically necessary to decide the point of whether ExxonMobil is "bound" as a non-party to the collective agreement and thereby "bound" with respect to any resulting arbitration award (in the sense of being subject to contempt for its non-observance). However, in view of the emphasis put on these arguments on the appeal and in the court appealed from, I would express the view that ExxonMobil is nevertheless subject to the rights flowing out of the labour relations regime mandated by the SPO as declared by the arbitrator. The issue is not whether the law of contract, in particular the doctrine of privity, precludes a party from enforcing a contractual obligation against a non-party. Rather it is whether the rights flowing from a legal regime imposed on a construction site must be respected by all those who are beneficiaries of the regime. The answer to that question is yes. Otherwise, ExxonMobil would have an override on all labour relations matters simply by arbitrarily exercising a purported unfettered ability, based on a naked assertion of property rights, to deny access to the site. Such a conclusion is entirely at odds with the legislative intent.

[113] In reaching this conclusion, I would not want anything I have written in this decision to be taken to circumscribe whatever rights ExxonMobil, as property owner, may have against visitors to the site who are unconnected with any of the actual work being performed at the site in circumstances that cannot be described as related to labour relations matters.

[114] Considering the seniority of counsel and the importance, complexity and novelty of the issues, I would order that the second respondent is entitled to its costs on a party-and-party basis jointly and severally against the appellant and the first respondent (who, as cross-appellant, made submissions in favour of and fully supported the appellant's position) on the basis of two counsel at column 5 of the scale of costs.

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J.D. Green C.J.N.L

I concur:\_\_\_\_\_

M. Rowe J.A.

I concur:\_\_\_\_\_

C. White J.A.

**Dissenting Reasons by Butler J.:**

[115] I agree with much that the Chief Justice has written on behalf of the majority but since I do not share his views on the characterization of the issue on appeal, the effect of the *Long Harbour* decision and whether we are bound by the Supreme Court of Canada's decision in *Bisaillon*, I cannot agree with the result.

## **Standard of Review**

[116] The applications judge reviewed the award on the standard of correctness because it was a jurisdictional issue. Correctness is also the standard which this Court must apply to our review of the applications judge's decision (*Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 12, at paragraphs 49-50 and *Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68, at paragraph 20. The correctness standard requires a reviewing court to undertake its own analysis of the question in order to decide whether it agrees with the outcome (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 50).

## **Characterization of the Issue**

[117] The majority's discussion of the arbitrator's award acknowledges that the arbitrator stated the issue as 'whether an arbitrator acting pursuant to the terms of the collective agreement between the parties, has authority and jurisdiction to make an order binding the owner of the project, who is not a party to that collective agreement'. However, the majority suggests that the arbitrator did not address the issue in the same manner (paragraph 27).

[118] With respect, I conclude that the arbitrator addressed the issue as he had stated it and concluded that ExxonMobil was 'bound by the outcome of the award'.

[119] Further, the majority concludes at paragraph 37 that the applications judge considered the issue to be whether the arbitrator had jurisdiction to make an order *affecting* ExxonMobil on site access. Ultimately, however, the applications judge characterized the issue, correctly in my view, as whether the arbitrator had jurisdiction over the subject matter of the dispute (page 5, lines 18-20 and page 17, lines 12-18). The applications judge upheld the arbitrator's decision.

[120] While the majority does not regard it as 'helpful' to pose the question at issue on this appeal as whether the arbitration award binds ExxonMobil (paragraph 97), with respect, that was the issue before this Court. I disagree with the majority's attempt to broaden the issue to whether the owner's proprietary interests took precedence over labour relations.

[121] The within appeal requires this Court to address a jurisdictional question. Did the arbitrator have jurisdiction to bind ExxonMobil to his decision?

[122] Had the arbitrator been asked whether proprietary interests took precedence over labour relations on this project site (which he was not asked), he would have lacked jurisdiction to address such a question. The Supreme Court has exclusive jurisdiction to resolve any tension or confusion between the rights of the owner and those of the HPEA or RDTC on this special project site.

### **Background and The Nature of the Legal Regime Created by the Special Project Order**

[123] In addition to the sections of the *Labour Relations Act*, the SPO and the collective agreement referenced in the portions of the majority decision relating to the background and the nature of the legal regime created by the SPO, I consider subsections 70(9), (10) and 86 of the *Labour Relations Act* (Act) to be particularly relevant. They state:

Declaration of special projects

70. ...

(9) An employers' organization that may be prescribed under paragraph (2)(c) shall have a constitution that includes all of the following:

(a) the exclusive authority to negotiate, enter into, and administer collective agreements;

...

(10) A council of trade unions that may be prescribed under paragraph (2)(c) shall have a constitution adopted with the agreement of each of the trade unions that are members of that council and that constitution shall include all of the following:

(a) provisions that vest the council with the exclusive authority to negotiate, enter into and administer collective agreements;

(d) provisions for final, binding and expeditious resolution of jurisdictional disputes without a stoppage of work;

...

Arbitration provision

86. (1) A collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the agreement or a question as to whether a matter is arbitrable.

[124] It follows that the collective agreement between the HPEA and the RDTC is the collective agreement for the purpose of this special project. Pursuant to section 86 of the *Act*, the arbitrator's jurisdiction was constrained to resolution of differences between the HPEA and the RDTC or "persons bound by the agreement or on whose behalf it was entered into".

[125] As the majority states in paragraph 18, Article 14.09 of the collective agreement used similar language, requiring the HPEA, the RDTC "and every person bound by this agreement and every person on whose behalf the agreement is entered into" to comply with any arbitration decision made under section 86 of the *Labour Relations Act*.

[126] In addition to the above, it is well established law that an arbitrator derives his jurisdiction from the collective agreement and that it is confined to labour relations matters arising from the collective agreement (*Bisaillon*, paras. 29, 33 and 39).

[127] I conclude that ExxonMobil was neither a party to the collective agreement, nor a person "bound by the agreement or on whose behalf it was entered into" and that this is sufficient to dispose of the question on appeal.

**What this Case is Really About**

[128] The majority suggests that in order for ExxonMobil to control the result of the dispute, it must establish some authority for the primacy of the property rights that it asserts. The majority views this as necessary to justify the owner's authority (outside of the SPO-imposed labour regime) to regulate site access in the interests of safety regardless of whether safety is also a matter that is relevant to labour relations. The majority concludes that no such authority was established (paragraphs 61- 63).

[129] Firstly, ExxonMobil did not attempt to control the result of the dispute between the parties to the collective agreement; it did not seek standing before the arbitrator. It was only when the arbitrator determined that the

owner was bound by his award that ExxonMobil sought intervenor status before the applications judge on judicial review.

[130] Secondly, in either case, the Agreed Statement of Facts and the documents it referenced, which were before the arbitrator, the applications judge and this Court, established the obligation of employees working on the site to observe the owner's safety standards and the owner's rights on breach. The RDTC and the grievors acknowledge this. Proof of the obligation and knowledge of it was conceded.

[131] Thirdly, with respect, the majority's position that ExxonMobil must establish authority for the primacy of property rights leads us away from the issue on the appeal. As section 86 of the *Labour Relations Act* and Article 14.09 of the Collective Agreement confirms, the arbitrator had no jurisdiction to rule on the primacy of rights of third parties. His jurisdiction was constrained to the resolution of differences between the HPEA and RDTC "or persons bound by the agreement or on whose behalf it was entered into". ExxonMobil was none of these entities.

## **Evidence**

[132] In support of the majority's broad statement of the issue, the majority reviews the evidence that was placed before the arbitrator and also refers to the lease between Nalcor and ExxonMobil, which was not evidence before the arbitrator, the reviewing judge or this Court. Because the lease was not in evidence, the majority is not prepared to assume that the owner had the right to deny access to the site to anyone it wanted and for any purpose, yet was prepared to assume that ExxonMobil "was not a fee simple owner with the unfettered right to use the property as it saw fit" (paragraphs 66-67).

[133] ExxonMobil was not a party to the arbitration. Nor can it be said that it was obligated to establish its rights under the lease with Nalcor because all parties to this appeal conceded that the owner had the right to determine site access. It was established in the evidence that the owner's safety and substance abuse policies (which affected site access) were required to be brought to the attention of every employee. As indicated in the Agreed Statement of Facts relied upon at the arbitration, the grievors acknowledged that each knew and understood the owner's safety and substance abuse policies which were referred to as Site Absolutes.

[134] The majority infers from the business connections between ExxonMobil, the HPEA, the RDTC and their members, that they “had an interest in the site to achieve a common objective, the construction of a GBS platform... [and that] that objective was to be achieved through the framework of an SPO... [and] that as such all participants can be presumed to be in accord with ... the imposition of the restrictions contemplated by the SPO regime in order to achieve the ultimate objective” (paragraph 69).

[135] I agree that this is a fair inference from the circumstances of this Special Project and the evidence that was before the arbitrator, including the Agreed Statement of Facts and the documents it referenced. I also agree that ExxonMobil “cannot be considered a peripheral or bit-player in the activities performed on the site” and that it was a “beneficiary of the activities and the labour peace that the SPO was designed to promote” (paragraph 69).

[136] What the majority is essentially saying is that the owner must have respect for the labour relations regime. I agree. However, I differ from my colleagues in that I view the respect due under this project’s “business connections” as mutual. In other words, the roles played by all of the principal parties require recognition and respect from all parties, each to the other. That means that the owner’s proprietary rights, site absolutes and responsibility for safety must also be respected.

[137] The jurisdictional question aside, it is inappropriate for this Court to give more weight to the expectations of the HPEA and the RDTC regarding respect for the labour relations regime, than to the expectations of ExxonMobil regarding respect for its right to enforce site safety, including site access. Such a determination should be made in a court where the parties whose rights are in issue are parties to the proceeding and on the basis of a full evidentiary record.

### **The Interrelations and Effect of Relevant Site Policies**

[138] At paragraph 71, the majority acknowledges that there was no evidence of the contract between ExxonMobil and the prime contractors engaged to do the work. The majority suggests that it is therefore not clear whether there were contractual provisions requiring “the prime contractors to make it a term of employment of its employees that they comply with any policies issued by ExxonMobil relating to site access”.

[139] With respect, I disagree with this statement. Employee knowledge of and requirement to comply with, the owner's site absolute policies was established in the Agreed Statement of Facts.

[140] The evidence establishes that the owner had sole discretion to deny any project personnel access to the site anytime for any violation of the site absolutes or other conduct which the owner deemed unacceptable. In the August 3, 2012 Notice of Members respecting Safety Absolutes, all HPEA members were advised that it was "imperative that your Management Team and your Site Supervisors, craft and non-craft personnel, vendors and visitors are not only made aware, but clearly understand the intent". The owner's safety absolutes were incorporated into the site orientation process.

[141] The subsequent 16 page Bull Arm Site Absolutes Policy, signed off by the identified personnel between March 15 and 22, 2013, provided the details of the site absolute violation process, tools, charter, checklist and template letters. Its stated purpose was "to encourage safe behaviour" and reinforced that "violators ... [would] be held accountable for their actions which may result in denial of access".

[142] Under this policy, if site access were denied, the owner would notify the Prime Contractor Management and it would be their responsibility to notify the individual or appropriate employer.

[143] While there may be some inconsistency between the terms of ExxonMobil's safety/substance abuse policies and those of Kiewitt Kvaerner Contractors ("KKC"), I view any inconsistency to be irrelevant for the following two reasons.

***What the policies address***

[144] Firstly, the policies do not have to be the same because they address each party's respective but different responsibilities (the owner's for site safety and KKC's for labour relations/discipline).

[145] In the context of this Special Project, it was clearly established in the evidence before the arbitrator, the applications judge and this Court, that the owner controls site access as a matter of safety. The applications judge acknowledged that the *Occupational Health & Safety Act*, RSNL 1990, c. O-3, s. 10, imposed an obligation on the owner to exercise due diligence and take positive action to ensure the safety of all workers at the site (page 13, lines 18-23). Whether an impaired person is reporting for work, attending as

a visitor or returning to accommodation on site, that person poses a safety risk and the owner's policies confirmed its exclusive right to control site access for this valid purpose.

[146] By contrast, the HPEA and RDTC control labour relations on site. When and if an employee's impairment violates the relevant contractor's workplace policies and the collective agreement is engaged, workplace discipline may result and a grievance may be filed.

[147] By virtue of the Agreed Statement of Facts and the documents it referenced (which were before the arbitrator), the parties conceded the owner's right to deny access to the special project site and in addition, each of the grievors acknowledged that they were aware of this policy. I view this as significant. As the majority confirms at paragraph 74, KKC's policy stated that "decisions for site access are made by Operator (ExxonMobil) and such decisions could be permanent through Project duration and *cannot* be challenged through grievance or arbitration". This evidence supports (a) the inference that safety overall was an acknowledged priority of all participants in the Special Project, (b) the conclusion that the owner, the HPEA and the RDTC played different roles in relation to site safety, (c) the conclusion that the owner's safety/site absolutes policies on site access were distinct from the labour relations regime, and (d) the conclusion that the owner's policies on site access could not be challenged through grievance or arbitration.

[148] While the impairment of an employee on site may be a labour relations issue, it does not follow that the owner cannot deny site access to a person in contravention of the owner's separate safety policy. Further, while violations of site access policies (at least to the extent that they affected labour relations) were subject to the grievance and arbitration scheme contemplated by the SPO, this does not address the question of whether ExxonMobil could be bound by the award of an arbitrator.

### ***Jurisdiction***

[149] Ultimately, the owner denied site access and the employer (KKC) made its own decision on the termination of the grievors' employment. The two decisions were made by different parties.

[150] KKC's decision was a labour relations matter over which the arbitrator had jurisdiction; the arbitrator restored the grievors' positions on

the basis that the wording of the KKC policy did not support discipline. No challenge is made to this decision before this Court.

[151] However, the owner's separate decision to deny access could not be addressed by the arbitrator because he lacked jurisdiction to do so under section 86 of the *Labour Relations Act* and Article 14.09 of the Collective Agreement. If the HPEA (on behalf of the affected employees) wished to challenge the owner's decision to deny site access on the basis that the wording of the policy did not support a violation, was discriminatory or illegal, or on any other basis, it had the right to file an application with the Trial Division which had jurisdiction over such a question. Site ban cases that support this conclusion are referenced in a subsequent section of this dissent.

[152] Until and unless the court with jurisdiction addressed the owner's decision, the effect of the arbitrator's award was that the employees may have been able to work for the employer elsewhere but they could not access the site controlled by the owner.

[153] The majority suggests that on the facts, there was no violation of the owner's policy and that the only remaining basis upon which ExxonMobil could revoke site privileges was to assert the primacy of their proprietary rights as owner. With respect, this focus is not helpful to the question of whether the arbitration award could bind the owner. The arbitrator had no jurisdiction to determine whether the owner's independent decision was incorrect, discriminatory or illegal.

[154] At paragraph 87, the majority addresses the tension between property rights and the special labour relations regime that applied to the site. The majority draws the conclusion that:

“[u]nless one was prepared to give primacy to the assertion of property rights regardless of how doing so would undermine a legislative policy that was being enforced for the benefit for all, one is driven to the conclusion that the rights flowing from the imposed collective agreement were intended by the legislature to have primacy over all other rights at the site that impacted on collective bargaining”.

[155] Even if I were inclined to consider whether the owner's decision was illegal (which was not an issue placed before the court), I cannot agree with the majority reasoning at paragraph 87. In my view it is reached without

consideration of the reality that the property right in question - access based upon site safety - is also a matter that benefits all persons on the site.

[156] A special project order does not curtail the property rights of a site owner and the *Labour Relations Act* does not limit an owner's property rights. I am not persuaded that the SPO gives priority to labour relations over site safety in general. In fact, I view site safety to be a far broader right insofar as it gives protection not only to those affected by the labour relations regime, but to any other on-site personnel or the general public who may access the site.

### **The *Long Harbour* Decision**

#### ***In personam jurisdiction***

[157] A principal point of my departure from the majority decision concerns the interpretation of this Court's decision in *Long Harbour*, which involved judicial review of an arbitrator's decision relating to another special project.

[158] At paragraph 58, the majority states that *Long Harbour* did **not** decide either:

- (a) that the owner (Vale) was bound by the arbitration award under the collective agreement to which it was not a party; or
- (b) that the interconnected relationship between the owner and the employers' association was a determining factor in its analysis.

[159] With respect I disagree with this interpretation of *Long Harbour*.

[160] I conclude, that, on its facts, *Long Harbour* decided:

- (a) that the owner (Vale) was bound by the arbitration award because it was the controlling member of the LHEA, and a party on whose behalf the collective agreement was entered; and
- (b) that the interconnected relationship between the owner and the LHEA was a determining factor in its analysis.

[161] Relying on these conclusions in *Long Harbour*, the arbitrator concluded in the within case that “the owner of the project is bound by the outcome of the award” (page 27).

[162] In the discussion that follows I explain why the conclusion reached in *Long Harbour* (that the owner was bound by the arbitration award), while correct on the facts in *Long Harbour*, has no influence on the outcome of this appeal.

[163] Because I

- (1) disagree with the majority on the ratio of *Long Harbour*;
- (2) consider *Long Harbour* to be distinguishable on its facts; and
- (3) conclude that it was an error for the arbitrator to rely on *Long Harbour* to make his award binding on ExxonMobil, which award was upheld by the applications judge;

I conclude, the applications judge’s decision must be set aside and the portions of the arbitration award in which the arbitrator held that ExxonMobil was bound by it (page 27) and declared that the grievors have to be given access to the site (page 30) must be struck. Let me explain.

### ***Vale’s relationship with the LHEA***

[164] Paragraphs 3 and 4 of *Long Harbour* are not set out in the majority decision and in my view are essential to an appreciation of the decision. They read:

3 ... collective bargaining “in relation to employment on the special project” (section 3) at the Long Harbour site was to be regulated by a collective agreement entered into between the Long Harbour Employers Association Inc. (LHEA), representing all contractors on site as well as the project owner (Vale Inco Newfoundland and Labrador Limited), and the Resource Development Trades Council of Newfoundland and Labrador (RDTC), representing all unions of employees working on the site. ... [underlining mine]

4 By structuring LHEA in a way that ensured that Vale would at all times retain control of LHEA, Vale became the directing mind and will for all decisions taken by LHEA. ... The by-laws of LHEA also recited that LHEA was established for the “exclusive representation” of all its members, including Vale, “in labour relations matters.” At the very least, therefore, LHEA was

contemplated as having a degree of control over the site in relation to employees working on site and in respect of labour relations matters.

[165] On its facts, Vale had purported to deny two employees access to the site. A grievance was filed against the Long Harbour Employers Association Inc. (“LHEA”) under the collective agreement relating to the denial of site access to and subsequent termination of the employees.

[166] A preliminary objection to the grievance was claimed on the basis that the decisions arose from actions taken by the owner of the property who had not been a party to the collective agreement. Thus, it was argued that the dispute did not arise out of the interpretation of the collective agreement and that remedies could not be directed against Vale as a non-party. The arbitrator rejected the preliminary objection and concluded that Vale had delegated authority for the labour relations function to LHEA “which, for all intents and purposes, is an arm of [Vale] and controlled by it” (*Long Harbour* at paragraph 8).

[167] The arbitrator in *Long Harbour* found that Vale and LHEA were “essentially one and the same entity” and that as a result of the close relationship between them, any order arising from the arbitration would be an order against Vale as well.

[168] The trial judge in *Long Harbour* held that the arbitrator had been correct in concluding that Vale had delegated all labour relations matters respecting the site to the LHEA and that **as the controlling member of the LHEA**, Vale would be bound by a decision of the arbitrator respecting labour relations matters. The trial judge rejected the LHEA’s submission that the arbitrator had in effect added Vale as a party to the collective agreement. Instead, he concluded at paragraph 45 that the arbitrator had held that:

45     Vale cannot set up a scheme **by giving itself total control of the LHEA** which essentially gives it complete control over labour relations on the site but which insulates it from responsibility for decisions which clearly arise out of the interpretation ... of the Collective Agreement entered into by the very corporation Vale established and controls for all labour relations matters on the site ... (Emphasis added)

[169] At paragraph 13 of *Long Harbour* this Court observed the following on the *in personam* jurisdiction of the arbitrator:

- 13 In deciding there was *in personam* jurisdiction, the applications judge observed that, amongst other things,
- The SPO affirmed the role of LHEA as the sole bargaining agent for all labour relations matters on site;
  - Vale was the controlling member of LHEA;
  - The construction manager and corporate counsel of Vale were two of the three directors of LHEA;
  - LHEA by-laws granted LHEA exclusive representation of all members, including Vale, in labour relations matters; and
  - The revocation of site access was expressed to be the result of the participation of the grievors in an illegal strike, a matter of labour relations.

[170] Before this Court in *Long Harbour*, the LHEA repeated the arguments it had made before the trial judge. This Court held that the trial judge had been correct in his conclusion that the arbitration award would bind Vale.

[171] While the reasons of the majority make reference to paragraphs 17 to 21 of *Long Harbour*, the paragraphs are not cited. Since they are important to my conclusion as to what *Long Harbour* decided, I set them out in full:

- 17 The applications judge was clearly of the opinion, as is evident by his comments in paragraphs 45 and 49 of his decision, that to accede to the argument of LHEA would have the effect of undermining the labour relations regime that was contemplated by the SPO, a regime that was agreed to by Vale in the development agreement with government, as designed to ensure stable labour relations at the site. I agree. By structuring the LHEA as it did with control vested in Vale, it attempted — as evidenced by the actions it took in this case — to retain control over the labour relations environment without subjecting itself to the obligations imposed by the collective agreement that was intended to govern the site. It was a colourable attempt to interfere with the proper operation with the labour relations regime.
- 18 Paragraph 70(2)(a) of the *Act* contemplates that an SPO will apply to a specific “geographic site”. The SPO in question applied to and was superimposed upon Vale's property at Long Harbour. In respect of labour relations matters it takes pre-eminence over other interests pertaining to the site, even owner's property rights, where the exercise of those rights would materially affect or undermine the labour relations regime.

- 19 In any event, it is far from clear on the evidence that Vale was unrestricted in the manner in which it could exercise its property rights in relation to the contractors and employees on site. Both the arbitrator and the applications judge recognized that the Vale-controlled LHEA purported, in the collective agreement, to assert authority over the site for certain purposes, including governing “the behaviour and conduct of all persons thereon”. They concluded that Vale had effectively delegated authority to LHEA to control access to the site for labour relations purposes. Such a conclusion is entirely consistent with the notion of an implied term in owner-contractor construction contracts that the owner will hand over the owner's land to the contractor for the purpose of allowing the contractor to perform the contract unimpeded and in the manner of his choice. See *Penvidic Contracting Co. v. International Nickel Co. of Canada Ltd.*, [1976] 1 S.C.R. 267 at pages 275-276. If the contractor is entitled to access to the site to enable him to perform the work, it follows it is the contractor, not the owner, who can determine, at least within the labour relations context, whether an employee of that contractor can access the site.
- 20 LHEA’s emphasis on the fact that Vale was not a formal party to the collective agreement and that it could not be bound by any determination of the arbitrator is beside the point. The issue before the arbitrator was not whether Vale could be bound but whether the arbitrator had jurisdiction to determine whether the grievances could proceed *against LHEA* for breach of the collective agreement. In light of the entirely reasonable finding by the arbitrator, supported by the applications judge, that Vale had effectively delegated authority to LHEA to deal with labour relations matters at the site and that a finding of denial of site access because of allegedly illegal strike behaviour was a “labour relations issue” (per the arbitrator) or a dispute arising out of the “interpretation, application, administration or violation” of the collective agreement (per the applications judge), it was the correct conclusion that the arbitrator had jurisdiction to determine the merits of that grievance and that the preliminary objection should therefore be dismissed.
- 21 In the circumstances, it was not necessary for the arbitrator or the applications judge to have made any comment, observation or finding that LHEA and Vale were essentially one and the same entity or that Vale would in effect be bound by any arbitral ruling. That is not the determining factor. The arbitrator had subject matter and *in personam* jurisdiction to determine whether denial of site access was a violation of the collective agreement by LHEA. The remedy flowing from any determination of an agreement violation, and whether or not Vale would legally or effectively be bound by or required to ensure that LHEA complied with such a ruling is a matter for the arbitrator following a merits determination. It is not a matter to speculate upon in the context of a preliminary objection.

[172] This Court in *Long Harbour* upheld the trial judge's decision (and by virtue thereof, the arbitrator's decision) based upon the structure of the LHEA with control vested in Vale as owner. A plain reading of the decision admits of no other conclusion. LHEA's representation of Vale in the collective agreement, Vale's control of LHEA, the "Vale-controlled LHEA" and Vale's "effective delegation of authority to the LHEA" (referenced at paragraphs 3, 4, 8, 10, 13, 17, 19 and 20 of the *Long Harbour* decision) are the facts that enabled the Court to conclude that "[t]he arbitrator had subject matter and *in personam* jurisdiction to determine whether denial of site access was a violation of the collective agreement by LHEA" (paragraph 21).

[173] The facts of the case before this Court are distinguishable. ExxonMobil was neither a party to the collective agreement nor a controlling member of the HPEA. The HPEA and the RDTC acknowledged the owner's right to control site access outside of the framework of the collective agreement.

### ***The Project Orders***

[174] The wording of the respective special project orders also warrants comparison. In *Long Harbour*, section 3 of the SPO referenced LHEA "representing all contractors on site as well as the project owner (Vale)". This is a clear example of the inclusion of a third party who would, by virtue of section 86 of the *Labour Relations Act* or Article 14.09 of the Collective Agreement, be bound by an arbitrator's award.

[175] However, section 4 of the SPO in the case before this Court referenced the Employers' Association as "acting for and on behalf of all contractors and sub-contractors". The parties to this appeal acknowledge that this did not include ExxonMobil.

[176] Thus, I consider the legislative basis under which *Long Harbour* was decided to be distinguishable.

### ***Evidence of a Nexus***

[177] On the facts before the arbitrator in the current case, there was no evidence of a nexus or connection between ExxonMobil and the Employers' Association as there was in *Long Harbour*. While the RDTC had asserted that an ExxonMobil director had been seen at two meetings, counsel for the

Owner asserted that on those rare occasions, they had been invited to attend and did not vote.

[178] Even if an ExxonMobil director had been seen at the two meetings, the facts of this case are quite different from the facts in *Long Harbour* where the Owner had control over and/or had effectively delegated its authority to the Employer's Association.

### ***Conclusion on the Long Harbour Decision***

[179] I therefore conclude that *Long Harbour* was correctly decided but is distinguishable from this case on its facts. I disagree that the provisions of the *Labour Relations Act*, SPO and the collective agreement at play in this case caused ExxonMobil to become a party to the collective agreement, a person bound by the Collective Agreement or a person on whose behalf the agreement was entered into. The arbitrator's award in the within case cannot bind ExxonMobil.

### **Contract Principles/Other Site Ban Cases**

[180] From the perspective of basic contract law principles, unlike *Long Harbour* (where LHEA represented the owner as a party), the collective agreement in question is a contract between the HPEA and the RDTC only.

[181] An arbitrator's jurisdiction is derived from the terms of the collective agreement and his or her award can only be binding upon the parties to the collective agreement where the evidence establishes the third party's consent to be bound by the terms of a collective agreement and any arbitration award made thereunder.

[182] In *Finning (Canada) v. International Assn. of Machinists and Aerospace Workers Local Lodge 99* (2005), 136 L.A.C. (4th) 129 (Alta. Arb.), Shell had built the Albian Sands Project and Finning was an employer who sold Albian a significant quantity of heavy haulers. Finning's employees required site access for assembly and service of the equipment.

[183] Albian Sands had a site access policy requiring all employees of subcontractors to be tested for drug use but the collective agreement between Finning and the International Association of Machinists and Aerospace Workers, Local Lodge 99 made no reference to drug testing for employees. The union argued therefore that Finning's enforcement of the site access

policy requiring drug testing would be a breach of the terms of the collective agreement.

[184] The arbitrator addressed the question as a preliminary issue of whether he had jurisdiction to adjudicate over the terms of the Alban Sands' site access policy. He held that he did have jurisdiction to hear the grievance, but that it would be confined to Finning's actions (*Finning* at paragraph 99).

[185] I cite paragraphs 81 and 84 (in part) and 90 to 91 (in full) which are relevant to the arbitrator's conclusion:

81      The Employer portrays this policy as an Alban policy that it has no option but to have employees comply with if they are to get onto the site to do their work. The Union treats it as a policy being applied to its members by their Employer that impacts on their employment contrary to their collective agreement. It will be arguing that Finning adopted or implemented Alban's policy and as such is liable for any conflict between that policy and its collective agreement obligations. ...

...

84      ... The question is, on the basis of the facts as alleged, and assuming them for now to be true, would the *employer's* conduct amount to a breach of the collective agreement? Alban's conduct alone is not sufficient, not unless something Finning has done or failed to have done triggers the obligations it has assumed in the collective agreement or has imposed on it by law that are enforceable through the collective agreement on the basis of the *Weber* line of authority.

...

90      Obviously if a "successful candidate" tries to go to work on the site and refuses to take the requisite test or fails that test, that Employee and Finning are both faced with a dilemma. However, in my view this would not be due to a contractual breach on Finning's part. Rather, it would be due to Alban's control over their worksite and their willingness to exercise that control. It might be that the Finning employee would show up at the site and be admitted, despite Alban's express policy, in which case Finning would clearly not be involved in any breach. Surely the way Alban exercises that power cannot influence whether Finning is found in breach of its collective agreement without more.

91      My conclusion on this would be different if Finning imposed its own eligibility rules or testing policies. In such a case its actions would be subject to arbitral review. However, I caution that on the evidence alleged

before me so far, the job postings and the letter do not appear to go that far.

[186] In these circumstances, the arbitrator concluded that he did not have jurisdiction to adjudicate on Albion's site access rules and testing policies but instead that his jurisdiction was confined to Finning's actions. In concluding as he did, the arbitrator had "no doubt that Albion [had] presented Finning with a firm policy that it can and will enforce through its restrictions on site access whether Finning or the affected employees like it or not" (at paragraph 80).

[187] Two years later in *U.A., Local 488 v. Bantrel Constructors Co.* (2007), 162 L.A.C. (4th) 122 (Alta. Arb.), a similar grievance came before an arbitration board. The unions in question filed policy grievances alleging that Bantrel had violated the provisions of their collective agreements by requiring union members to comply with a pre-access drug and alcohol policy. The only matter to be dealt with in the arbitration was whether employees already on site when the pre-access testing policy was implemented could be required to submit to drug and alcohol testing as a condition of continued access to the site.

[188] Similar to the facts in *Finning*, the site in *Bantrel* was owned by a third party (Petro-Can) and Bantrel had a contract with Petro-Can to construct the Edmonton diesel desulphurization unit. This contract required Bantrel to comply with Petro-Can's code of business conduct including its alcohol and drug use policy.

[189] Bantrel, as a unionized employer, had collective agreement relationships with each of the eight building trades whose employees were on the site.

[190] At paragraph 11 of his decision, the arbitrator confirmed that prior to November 15, 2004 the drug and alcohol testing policies in place on the project were those stipulated by the 2001 Canadian model for providing a safe workplace, which did not authorize random drug testing of current employees. In the summer of 2004, Petro-Can raised the issue of pre-access testing of workers dispatched to the site, and notwithstanding objections to the testing of current employees, Petro-Can adopted a pre-access policy requiring testing of all employees granted access to the site. There were no negotiations with the unions with respect to the adoption of the pre-access testing policy.

[191] On these facts, the issue before the arbitration panel was restricted to whether Bantrel had breached the collective agreements with the unions in requiring current on-site employees to be tested pursuant to the new Petro-Can policy. While the arbitration panel concluded that Bantrel's policy did not breach the collective agreement, it acknowledged that it lacked any jurisdiction to address whether Petro Canada's refusal to grant site access (for any employee who refused or failed drug testing) was discriminatory or illegal.

[192] I agree with the court's reasoning in *Finning* and the arbitrator's reasoning in *Bantrel* with regards to their conclusions respecting an arbitrator's jurisdiction.

### **Cadillac Fairview**

[193] In advance of the hearing, the Chief Justice requested that counsel address a decision that had not been cited by any party, namely *Cadillac Fairview Corp. Ltd. v. R.W.D.S.U.* (1987), 62 O. R. (2nd) 337 (H.C.J. (Div. Ct.)) aff'g [1985] O.L.R.B. Rep. 941 (Ont. Lab. Rel. Bd.). Unlike *Bisaillon*, this Court is not bound by *Cadillac Fairview* but may find it persuasive.

[194] On behalf of the RDTC, it was argued that this case stands as independent confirmation that an agreement "entered into on behalf of a party" would give an adjudicative panel jurisdiction to address an issue involving a non-party. In *Cadillac Fairview*, the Ontario High Court of Justice took a very broad approach to the interpretation of the relevant section of the *Labour Relations Act, 1995*, SO 1995, c. 1. The arbitration board relied on facts similar to those in *Long Harbour* (for example, the directors of the two parties were the same). In finding that it had jurisdiction to address an issue involving a non-party. For this reason alone, I would distinguish *Cadillac Fairview* and decline to apply its reasoning to this case.

### **Bisaillon v. Concordia University, 2006 SCC 19, [2006] 1 S.C.R. 666**

[195] In *Bisaillon*, Concordia University had offered only one pension plan to employees, unionized and non-unionized. *Bisaillon* was a unionized employee who sought to bring a class action against Concordia University regarding decisions made respecting the administration and use of the pension fund. The university challenged his motion for a class action on the basis that the grievance arbitrator held exclusive jurisdiction. At trial, the employee's motion was denied; on appeal, Mr. Bisaillon was successful.

The university appealed and the Supreme Court of Canada held that a class action proceeding was inappropriate in the circumstances.

[196] In concluding as it did, the Supreme Court addressed the jurisdiction of the arbitrator and held that he had “*in personam*” jurisdiction in respect of the employee’s individual claim against the employer. The arbitrator’s subject matter jurisdiction was also held to have been established because the issues raised by the employee were linked to the collective agreements and their application. Thus, the Supreme Court concluded that the arbitrator had jurisdiction to make a declaration on the employer’s amendments to the pension fund and to decide the appropriate remedy.

[197] At paragraphs 40 and 41 of *Bisaillon*, in the course of discussing when a court would have jurisdiction, the Court held:

- 40     When a grievance arbitrator finds it impossible to resolve a dispute or a part of a dispute because he or she does not have jurisdiction over the parties, the ordinary courts retain jurisdiction over the dispute (Gagnon, at p. 547). Such situations are likely to arise where the grievance arbitrator cannot claim to have authority over persons considered to be third parties in relation to the collective agreement and cannot render decisions against them. However, there is nothing to prevent third parties from voluntarily and expressly submitting to a grievance arbitrator’s jurisdiction, thereby bestowing jurisdiction upon him or her: *C.U.P.E. v. Canadian Broadcasting Corp.*, [1992] 2 S.C.R. 7.
- 41     The inherent limits on their *in personam* jurisdiction do not mean that grievance arbitrators have to ensure that their decisions have no effect on third parties. It is possible for third parties who do not belong to the bargaining unit, such as company managers, to be directly or indirectly affected by an arbitration award. However, these third parties will not be legally bound by the award: *Syndicat des professionnelles & professionnels du gouvernement du Québec c. Paquet*, [2005] Q.J. No. 678, 2005 QCCA 109 (C.A. Que.), at para. 40. As we shall see, the mere fact that the same issue arises in the collective agreements of several different bargaining units with a single employer does not oust the jurisdiction of the grievance arbitrator in favour of the ordinary courts.

[198] Accordingly, when an employee’s site access is denied by a third party who is not a party to the collective agreement and has not voluntarily submitted to an arbitrator’s jurisdiction, a grievance arbitrator has no jurisdiction to bind the third party to the award.

[199] This Court is bound by the principles outlined by the Supreme Court of Canada in *Bisaillon*. Since ExxonMobil was not a party to the collective agreement, had no control over the HPEA and had not “voluntarily and expressly” submitted to the arbitrator’s jurisdiction, ExxonMobil, as a third Party, could not be legally bound by the arbitrator’s award. The arbitrator’s declaration that the grievors were to be given site access cannot legally bind ExxonMobil.

[200] At paragraph 89 the majority attempts to distinguish *Bisaillon* on the basis that LeBel, J.’s comments at paragraphs 40 and 41 “presuppose that the authority of the arbitrator is derived solely from the (collective) agreement (whereas) in the current case ... the issue is whether the existence of the SPO regime imposes any greater restriction on non-parties who are involved in the operation of that regime with respect to labour relations matters”.

[201] With respect, I view the majority’s attempt to distinguish this case from the *Bisaillon* reasoning as a distinction without a difference. The SPO regime in this case added nothing to the arbitrator’s jurisdiction which was established in section 86 of the *Labour Relations Act* and Article 14.09 of the Collective Agreement. In fact, section 12.01 of the SPO confirmed that ExxonMobil’s involvement on the special project site did not create a bargaining relationship that would bind ExxonMobil to the collective agreement. These facts are acknowledged at paragraph 15 of the majority reasons. Accordingly, the applications judge erred in finding that the SPO presented a unique circumstance (page 16 of his oral decision).

[202] The issue of whether the owner could *effectively* be bound by the outcome of the arbitrator’s award is a separate question. It essentially addresses how alleged conflicts between the owner’s rights and those of the HPEA and the RDTC are resolved.

[203] It is not uncommon for third parties to be affected by disputes arising from the contractual relations of others. A tenant in a private dwelling may be affected by the owner’s decision to sell. In labour relations matters, the owner of a commercial building which has premises rented to a unionized employer may be affected by picketing.

[204] However, in each of these situations, and on the facts of the case before us, the courts retain jurisdiction over any dispute arising (*Bisaillon* at paragraphs 40-41).

[205] By assuming jurisdiction and declaring that (1) “the owner of the project is bound by the outcome of the award” (page 27) and (2) that the grievors are to be granted site access (page 30), the arbitrator exceeded his jurisdiction and the applications judge was incorrect in upholding those portions of his award.

### **Conclusion**

[206] I would allow ExxonMobil’s appeal from the application judge’s decision and strike the two portions of the arbitrator’s decision referenced above. I would award ExxonMobil costs for two counsel on column 3 in this Court and the Court below.

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Butler J.

I concur: \_\_\_\_\_

Hoegg J. A.