



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

Citation: *Unifor Local 2121 v. Newfoundland and Labrador
(Labour Relations Board)*, 2019 NLCA 55

Date: September 10, 2019

Docket Number: 201601H0088

BETWEEN:

UNIFOR LOCAL 2121

APPELLANT

AND:

NEWFOUNDLAND AND LABRADOR
LABOUR RELATIONS BOARD

FIRST RESPONDENT

AND:

HIBERNIA MANAGEMENT AND
DEVELOPMENT COMPANY LIMITED

SECOND RESPONDENT

AND:

HIBERNIA PLATFORM EMPLOYERS'
ORGANIZATION

THIRD RESPONDENT

AND:

BAKER HUGHES CANADA COMPANY

FOURTH RESPONDENT

AND:

BELFOR PROPERTY RESTORATION

FIFTH RESPONDENT

AND:

CROSBIE SALAMIS LTD.

SIXTH RESPONDENT

AND:

HALLIBURTON CANADA ULC

SEVENTH RESPONDENT

AND:

IMPORT TOOL CORPORATION LTD.

EIGHTH RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR
ASSOCIATION OF QUALITY
PERSONNEL

NINTH RESPONDENT

AND:

WOOD GROUP PSN CANADA INC.

TENTH RESPONDENT

AND:

SPECTROL ENERGY SERVICES INC.

ELEVENTH RESPONDENT

AND:

TAM INTERNATIONAL OIL
SERVICES LTD.

TWELFTH RESPONDENT

AND:

VALLOUREC CANADA INC.

THIRTEENTH RESPONDENT

Coram: Green, White and O'Brien, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division - 201501G2553

Appeal Heard: June 19 & 20, 2017

Judgment Rendered: September 10, 2019

Reasons for Judgment by: Green J.A.

Concurred in by: White and O'Brien JJ.A.

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Counsel for the Twelfth Respondent: Robert Andrews, Q.C.

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Green J.A.:

[1] This appeal involves a challenge to a decision of a judge on judicial review of a labour relations board decision dealing with the scope and operation of sections 38.1 and 56.1 of the *Labour Relations Act*, RSNL 1990, c. L-1. The issues in this case arise in the context of addressing the question as to which employers of workers on the Hibernia oil production platform offshore Newfoundland and Labrador are required to be members of a statutorily-mandated employers' organization for the purpose of negotiating, and being governed by, a single collective agreement regulating work on the platform.

Overview

[2] Labour relations on the Hibernia platform are, in certain respects, governed by a special statutory regime. Notwithstanding the fact that there are numerous employers working on the platform in various capacities, there must be a single bargaining unit which is statutorily defined as comprising "all employees employed on the platform except those employees the [Labour Relations Board] determines are employed in construction and start up on the platform." (*Labour Relations Act*, s. 38.1). In addition, all employers of such employees are required to be members of one employers' association for the purpose of negotiating a single comprehensive collective agreement regarding work on the platform (s. 56.1).

[3] The Labour Relations Board decided that the phrase "employees employed on the platform" in s. 38.1 should be interpreted as excluding employees who did not have "a significant attachment to the platform." Furthermore, the Board formulated a presumptive test for determining when "significant attachment" occurred. The test focused examination of the evidence of significant attachment on circumstances where workers had worked at least

24 days in a selected 90 day period. The consequences of application of such a test were that, if nothing else was to be considered: (i) workers who did not work the required 24 days would be excluded from the bargaining unit; (ii) employers of such workers would also be excluded from the bargaining regime (unless they also employed other workers who had a significant attachment to the platform); and (iii) employees and employers who by happenstance did not meet the required level of activity (24 days) in the particular 90 day period that had been selected, but who might have met it in another 90 day period, would also be excluded.

[4] The result, therefore, was that certain persons, beyond those in construction and start-up, who worked on the platform from time to time were excluded from the bargaining unit even though the language of s. 38.1 did not expressly address such exclusions. The corollaries of this result included: (i) those excluded employees would not be entitled to any union representation or protection under the Hibernia collective agreement (although they might have protection under another collective agreement to which their employer might be subject), because only one bargaining unit, represented by the appropriately-certified union, was allowed to exist with respect to labour relations on the platform; and (ii) employers of only such excluded employees would not be required to be members of the employers' association of which all other employers were statutorily required to be members for the purpose of collective bargaining and application of the one collective agreement.

Background

(a) The Significant Attachment Principle and the 24/90 Test

[5] Unifor, the appellant in this appeal, is the certified bargaining agent for the employees working on the platform. It became aware that there were certain employers of workers who it believed were within the scope of the bargaining unit that were not members of the Hibernia Platform Employers' Organization (HPEO), the organization that by virtue of s. 56.1 was required to represent and bargain on behalf of all employers who had employees on the platform. Unifor sought a declaration under ss. 17 and 18 of the *Labour Relations Act* that such employers, the Fourth to Thirteenth respondents on the appeal, (hereinafter sometimes referred to as Baker, Belfor, Crosbie, Halliburton, Import Tool, NLAQP, Wood Group, Spectrol, Tam International and Vallourec respectively) were deemed to be employers employing employees on the platform within the meaning of s. 38.1 and that they, accordingly, were required to be members of and be represented by HPEO and were bound by the collective agreement.

[6] In addressing the questions posed, the Board adopted the “significant attachment” principle to determine which employees and employers were caught by s. 38.1 and, further, adopted the 24/90 test as the starting point for determining whether significant attachment existed in a given case.

[7] The significant attachment principle and the 24/90 test were first enunciated in a previous decision of the Board which addressed the scope of s. 38.1 in the context of an application for certification by the predecessor of Unifor with respect to the statutorily-defined bargaining unit on the platform (*Hibernia Management & Development Co. v. F.F.A.W.-C.A.W.*, [2001] Nfld. L.R.B.D. No. 3, 68 C.L.R.B.R. (2d) 161; hereinafter, the *Certification Decision*).

[8] Section 38.1 of the *Act* provides:

38.1 (1) Where the board receives an application with respect to employees employed on an offshore petroleum production platform, the unit appropriate for collective bargaining is the unit comprising all the employees employed on the platform except those employees the board determines are employed in construction and start up on the platform.

(2) Where the board receives an application for certification with respect to employees employed on an offshore petroleum production platform in relation to construction and start up on the platform, the board shall deal with the application in accordance with section 38 [the provision dealing with applications for certification generally].

(3) For the purposes of an application for certification with respect to employees employed on an offshore petroleum platform, the licensed operator of the platform shall be considered to be the employer of the employees for the purpose of the board’s consideration of the application.

[9] The *Certification Decision* in part justified the placement of the significant attachment gloss on s. 38.1 based on a purposive reading of the section in the light of its genesis from a recommendation in a report prepared by Morgan Cooper who had been engaged to make recommendations as to the form and structure of the collective bargaining regime that should be applied on offshore oil production platforms (Morgan C. Cooper, “Labour Relations Processes on Offshore Oil Production Platforms, April 25, 1997; hereinafter, the *Cooper Report*). The Board noted that its interpretation of s. 38.1 was “consistent” with the discussion in the *Cooper Report*.

(b) The Cooper Report

[10] In recommending that there be a single bargaining unit for the purpose of collective bargaining in relation to workers on offshore petroleum production platforms and that employers of such workers be represented by one employers' organization, Cooper had commented:

In the case of offshore production platforms, there is a strong community of interest among employees in such matters as work location, work hours, working conditions and methods of remuneration. Apart from shift rotations under which employees will eat, sleep and work together for two or three weeks, employees share the social disruption and isolation as well as risks of working offshore in an environment with extremes of temperature, wind, rain and snow. ... [T]here is no evidence to suggest that the interests of all employees cannot be reflected in one set of negotiations and one collective agreement.... [A] strong case emerges for the imposition of single location bargaining units encompassing all employees, professional or otherwise.

(Cooper Report, pp. 273 & 274)

[11] Cooper drew a distinction, however, between the "core" workforce and the "supplementary" workforce (construction and start-up personnel) and recommended that the latter be excluded from the bargaining unit:

The extended periods of time for which the licensed operators ... will utilize a supplementary workforce (twelve to eighteen months in the Hibernia development) provide additional support for the promulgation of a policy distinguishing between the supplementary and core workforce. The merits of such a policy are more pronounced when one considers that a number of the construction workers in Hibernia's supplementary workforce are members of the bargaining unit created under the Lieutenant-Governor in Council's special project designation; other members of the supplementary workforce will be employees of the manufacturers of machinery and equipment installed on the platforms; and still others will be employees of specialized contractors who will not employ members of the core workforce. Although these supplementary employees should not be precluded from collective action if they so desire, it is clear that their community or communities of interest would be distinctly different from the core workforce. This difference favours the separation of construction and commissioning employees from the core workforce for collective bargaining purposes. It follows that the Consultant's previous endorsement of one bargaining unit for employees of offshore oil production platforms must be qualified with the additional comment that the bargaining unit should encompass all employees on offshore oil production platforms with the exception of construction and start-up personnel.

(Cooper Report, pp. 280-281. Emphasis added.)

[12] Cooper recommended a statutorily-defined bargaining unit in much the same, but not identical, language to that of what ultimately became s. 38.1. He recommended language defining the bargaining unit as “all employees *on* an offshore oil and gas production platform,” whereas s. 38.1 used the phrase “all employees *employed on*...”.

[13] It is worth observing that the *Cooper Report* was written at a time before petroleum production was underway in the offshore. The report was understandably focused on whether start-up and construction personnel should be included in the bargaining unit governing the steady-state or core workforce. It did not explicitly address whether other employees who might be providing sporadic or transient work on the platform after construction and start-up were completed should be included or excluded. To take a simplistic example, it did not address whether workers employed by, say, an on-shore plumbing company to respond to a specific problem on the platform and who might not be back again for an extended period of time (or ever), and in the meantime might be working elsewhere on shore on jobs unrelated to the platform, would have a sufficient “community of interest” (to use the words employed by Cooper justifying the recommended single bargaining unit) to justify inclusion in that bargaining unit. It is this latter question, however, which has come to the fore in the current application.

[14] While it is true that Cooper did recommend in his report that “a strong case emerges for the imposition of a single bargaining unit encompassing *all* employees” [p. 29; my emphasis], that comment was made in the context of a discussion relating to whether there should be an exclusion of professional employees, like engineers, geologists and geophysicists, from the bargaining unit. He concluded that professionals should not be excluded. It is questionable how much one can extrapolate from such statements for the purpose of determining whether Cooper intended that other transient workers, working on the platform following start-up, should also be treated the same as construction and start-up workers and excluded from or included in the bargaining regime.

[15] Considerable argument during the appeal in this Court was directed to what could be extrapolated from the *Cooper Report* as to what he had intended the ultimate bargaining regime on the platform to look like. It must be remembered, however, that while the *Cooper Report* was the genesis of the amendments to the *Labour Relations Act* and may be helpful as legislative history, at the end of the day it is the actual language in s. 38.1 that has to be interpreted and applied.

(c) The Certification Decision

[16] In determining, for certification purposes, which workers should be included within the statutorily-defined bargaining unit, described in s. 38.1 as “all the employees employed on the platform” (except those in construction and start-up work), the Board concluded that the intent of s. 38.1 was:

... to avoid multiple bargaining units. Employees with a significant attachment to the platform, who return for work for more than one tour of duty on the platform and who perform work similar to the steady state workforce, should not be placed in a position where they would be excluded from the platform bargaining unit.

[17] In reaching this conclusion, the Board rejected the submission of Hibernia Management and Development Company Limited (HMDC) that “ad hoc” employees were not “employed on the platform” within s. 38.1 because they had no attachment to the workforce; they were laid off at the end of their tour of duty with no commitment to be recalled and with freedom to work elsewhere without any commitment to be available for recall. The Board concluded, instead, that:

... this difference in terms of employment between ad hoc and steady state employees is not a reason to exclude the ad hoc employees from the bargaining unit. Although there may not be a commitment to recall an ad hoc employee following layoff, most of the ad hoc employees are recalled to multiple tours of duty.

[18] That conclusion led to the formulation of a test based on an *actual* “significant attachment” to the platform regardless of the legal or specific long term commitment to platform work. The Board then proceeded to “review the number of days worked by each of the ad hoc employees to determine which of those employees have a significant attachment to the platform.” To do so, it became necessary, as is the case in most certification applications, to determine the time period during which the investigation into whether a given employee met the bargaining unit criteria was to be undertaken. Further, within that time period, once determined, it was necessary to determine a test that would assist in identifying whether the degree of attachment was “significant” in a given case.

[19] The Board chose its investigation-testing period to be the 90 day period prior to the date of receipt of the application for certification. Its rationale for doing so was that “90 days is also the period of time considered by the Board under Rule 49(1) of the *Labour Relations Board Rules of Procedure*, within which to determine the validity of any membership card for the purpose of determining membership in good standing with the Union.”

[20] To determine whether attachment within the 90-day period was significant in a given case, the Board concluded that the number of days of work should involve more than one tour of duty (which, subject to weather or transportation problems, was 21 days) within the period. It concluded:

The Board has considered 24 days within 90 days to be a reasonable indication of significant attachment to the platform. Twenty four days represents one half of the maximum number of days [that are allowed to be worked within a 90-day period], and more than one tour of duty. One tour of duty within 90 days would not usually indicate a significant attachment.

[21] Having made those rulings, the Board went on and applied the 24/90 test to each of the positions in dispute and made determinations as to whether they fell within or outside of the bargaining unit. It is worth noting, however, that the Board observed that the 24/90 test was not “absolute”:

The above criteria applied by the Board to establish significant attachment are not absolute. In the event the Board finds there are factors to justify including or excluding a particular employee on the basis of significant attachment to the platform then the Board will take those factors into account. There is no evidence of such factors with respect to these ad hoc employees.

[22] Although the Board determined that it was not necessary to depart from the 24/90 test in respect of the degree of attachment of the ad hoc employees to the platform, it did so in respect of certain other employees, who were involved in provision of well services. These employees did not necessarily meet the 24/90 criterion with respect to tours of duty on the platform. Nevertheless, the Board concluded that the nature of their work onshore, which involved pre-job preparation and post-job reporting, amongst other things, meant that these positions were “dedicated to the Hibernia platform and part of the established role complement.” Accordingly, they had “a significant attachment to the platform, having regard to their offshore days, bump days and shop days” and were to be included as “employed on the platform” within s. 38.1 for the purposes of certification.

[23] The forgoing analysis and rulings of the Board relative to certification figured prominently in the Board decision that is under consideration in the current appeal. In view of the fact that the issues that arose before the Board in the current matter did not arise in the context of a certification application, a fundamental question is whether the tests formulated in the *Certification Decision* can be said to have any meaningful application in the present context.

(d) The Labour Relations Board Decision

[24] The issue in dispute in this case came before the Board in two stages. Following Unifor's application for a declaration that the employers in question should be required to be members of the employers' organization pursuant to s. 56.1 and were bound by the applicable collective agreement, HMDC made a preliminary application to the Board for a determination as to whether the remedy sought by Unifor could be obtained through sections 17 and 18 of the Act. It submitted that what Unifor was trying to do was to amend membership in HPEO in a manner that was not permitted by s. 38.1. In HMDC's submission, the employers who, following certification, were required to become members of HPEO, were only those who were employers at the time of the certification order. Accordingly, HPEO was not required to add other employers as members of its organization who may subsequently be employing workers on the platform. HPEO relied on s. 56.1 which placed an obligation on the operator of the platform (in this case, HMDC) to form an organization (in this case, HPEO) of all "employers of employees *affected by the application*" (emphasis added), that is, the certification application.

[25] In response, Unifor argued, relying on the *Certification Decision's* endorsement of the intent of s. 38.1 being to avoid multiple bargaining units on the platform, that it was implicit from the legislation that all employees employed on the platform are meant to be members of the bargaining unit, and hence the employers of those employees would have to be members of the employers' association whether before, at or after certification.

[26] The Board sided with Unifor's position (*Communications, Energy and Paperworkers Union of Canada, Local 60N v. Hibernia Management Development Company Limited and Hibernia Platform Employers' Organization* [2011] L.R.B.D. No. 6; hereinafter, the *Preliminary Ruling*). It held that it was never intended that membership in HPEO would be static or that there should be two types of employers on the platform, those who abided by the collective agreement and those who did not: "the purpose of HPEO's existence is to act as bargaining agent for all employers on the Hibernia platform" [Emphasis in original]. The Board concluded:

[67] The current situation on the platform appears to be that there are employers (at least 7) who have employees working on that platform and those employers may be employing those employees outside the terms of the Collective Agreement. This is exactly the situation Section 38.1 was created to avoid.

...

[75] Sections 17 and 18 when read together, grant the Board the authority to hear the Application brought by the union in this instance. To the extent that the merits of the application were argued in this case, the board finds that the Hibernia platform is an organized worksite and members of the bargaining unit on that site are pursuant to Section 56.1 represented by [Unifor] and are subject to the collective agreement between CEP [the predecessor to Unifor] and HPEO. Employers who employ employees on that site are bound to become members of the HPEO and their rights and interests are to be negotiated by HPEO in the collective agreement processes.

[27] HPEO sought reconsideration of this preliminary ruling but it was rejected and no separate judicial review of those decisions was sought.

[28] Having concluded that membership in HPEO included employers who had become employers of employees employed on the platform subsequent to the certification order, the Board then set a hearing to determine “remaining issues” relating to whether the Board should compel *specific* employers to become members of HPEO on the basis that their employees were “employed on the platform” within s. 38.1(1).

[29] In addressing that question at the subsequent hearing, as noted at the beginning of these reasons, the Board, by a majority, applied the significant attachment principle and 24/90 test that had been developed in the *Certification Decision*. For the purposes of the application of the 24/90 test, the majority selected the 90 day period immediately prior to Unifor’s filing its initial application for determination of the employers’ status.

[30] The Board explained its decision to select the 90 day period:

[16] In an effort to identify potential employers of employees on the platform, i.e. those who would be affected by this application, the Board ordered that HMDC provide a list of Persons on Board (POB) Hibernia for a 90-day period in 2010. The Board selected the 90 days prior to the Union filing the application in file 5280 [the file number relating to the *Preliminary Ruling* referred to earlier] as a random 90-day period to review which persons or positions were on board on an average day during an average period of time. While the parties argued that this was not providing a true picture of who or what positions were on board throughout the course of a full year, it was meant to provide the Board with a sampling of what positions on the platform were part of the day to day role complement in order to help determine whether these employees were “employed on the platform” and therefore ought to be included in the bargaining unit. In other words, the Board wanted to assess, as was discussed in the [*Certification Decision*], whether those positions are ones that are “**dedicated to the Hibernia platform and part of the established role complement,**” and whether

those employees have a significant attachment to the platform.... HMDC provided the list of persons on board during that 90-day period and provided a list of the employers who had employees on Hibernia for 24 out of those 90 days during that period.

[17] In using a sample of time, the Board is aware that it may not have captured every employer of employees on the platform and may not have obtained a list of exactly every individual or position who has been on Hibernia since 2010. However, the purpose of the order was to try and ascertain who and what positions were being affected by the Union's application in this matter and what employees were employed on the platform.

(Emphasis in original.)

[31] From the foregoing, it is clear that the Board recognized the limitations of a 90-day window for scrutinizing evidence of significant attachment. It purported to treat the snapshot of that period's evidence as a "sampling" of what positions were part of the "day to day role complement" of the platform. There is nothing to indicate that the Board was banishing from its consideration, or refusing any party from presenting, any other evidence that could reasonably be said to be directed to the issues of work-dedication to the platform in respect of specific workers, in the sense of being part of the "established role complement."

[32] HMDC and the other respondents argued that the individuals employed by the employers under scrutiny did not share a community of interest with the employees already in the bargaining unit because they did not have fixed rotations, did not have fixed end dates of work, did not spend all their time on board actually working and did not receive priority with respect to transportation to and from the platform. As well, they were paid in a different format, involving day rates and the platform was not their primary or sole place of employment (LRB Decision, para 181). As such, it was argued, they were not part of the core workforce. The Board approached the matter by asking the question: Do the employees of the intervenors have a longer term interest in the terms and conditions of employment on Hibernia like the members of the bargaining unit do?

[33] The Board relied on the *Certification Decision*'s determination to include ad hoc employees within the bargaining unit even though they may not have had a long term continuing employment relationship on the platform. They, in the Board's view, could, depending on how frequent was their contact with the platform (defined by the 24/90 test), be said to have a "significant attachment" to the platform.

[34] The Board applied that analysis to the current case and it held that employees of Belfor, Halliburton, Import Tool, Spectrol, Tam International and Vallourec did not have a significant attachment in respect of the positions in question and hence were excluded from the bargaining unit, with the consequence that their respective employers did not have to become members of HPEO by virtue of the presence of their positions. In the case of the employees' positions of Crosbie Salamis, on the other hand, a significant attachment was demonstrated and membership of the company in HPEO was therefore mandated. With respect to Baker and Wood Group some of their employees' positions were determined to have a significant attachment and some were not. Because Baker and Wood Group had some employees who were in the bargaining unit, they also had to become members of HPEO.

The Judicial Review Application

[35] Unifor sought judicial review of the Board's ultimate decision. It submitted that:

1. The Board lacked jurisdiction and was *functus officio* with respect to the determination of which employees should be in the bargaining unit and hence which employers were required to be members of HPEO. Unifor advanced this argument on two bases:

- (i) The issue had already been settled by the Board's *Preliminary Ruling* when it had ruled that "*all* subsequent employers would automatically become members of the HPEO" ;

- (ii) The *Act* defined the bargaining unit as "*all* the employees employed on the platform except..." construction and start-up employees and therefore on a plain reading of the language of s. 38.1 the bargaining regime and the resulting collective agreement applied to all employees who were not construction and start up personnel, and hence, to their employers.

2. The Board's decision was unreasonable and should be set aside because:

- (i) The test applied by the Board ignored the plain language of the statute and disregarded the purpose and intent of the legislature;

- (ii) The Board unreasonably applied a community of interest test that had no application to a statutorily-defined bargaining unit;
- (iii) There was no justification for using a 90-day evidence-gathering period because its use undermined the entire legislative scheme;
- (iv) The 24/90 test for determining attachment to the platform as developed in the *Certification Decision* in the context of a certification application has no relevance or application to the issue of which employers are required to be a member of HPEO;
- (v) The decision was not responsive to Unifor's arguments.

The applications judge rejected all of Unifor's arguments and denied the application for judicial review.

The Appeal

(a) Focus of the Appeal

[36] Unifor advances on this appeal essentially the same arguments presented to the judge, although they have been packaged in a different way. Underlying most of the arguments is the submission that the interpretation placed on s. 38.1 of the *Act* by the Board – and accepted by the judge – is unreasonable because it cannot be justified by any reasonable construction of the legislation once proper principles of interpretation are applied.

[37] Although the standard of judicial review to be applied by the judge to the tribunal decision under review is generally a standard of reasonableness – a position also accepted by the parties to this appeal – the standard of appellate review of the judicial review judge's decision is different. This Court will review the judge's decision against a standard of correctness. Thus, if this Court disagrees with the judge's conclusions as to whether the tribunal's decision is reasonable (applying, of course, the proper test for determining reasonableness), it may substitute its own conclusion on that matter (*Agrairav. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-46; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, per Deschamps J. at para 247; *Burke v. NLAPPE* 2010 NLCA 12, 294 Nfld. & P.E.I.R. 230 at paras 49-50). I note in passing that this approach has recently been the subject of some criticism: Ashley Bowron,

“Reviewing the Reviewer: The Role of Appellate Courts in Judicial Review” (2019) 50:1 Advocates Quarterly 18.

[38] In the current case, Unifor submits that this is not simply a case of whether the Board, in interpreting its home statute, gave it an interpretation it could reasonably bear. Rather, it is argued, where the tribunal ascribes meaning to a legislative provision that cannot be supported under applicable principles of statutory interpretation, that interpretation is necessarily unreasonable. Unifor submits that the judge erred in law by applying wrong interpretive principles and in concluding that the Board’s decision was reasonable; accordingly, Unifor argues, the judge’s decision must therefore be set aside. In taking this position, Unifor relies on decisions of the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 and *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770.

[39] Unifor cites *Wilson* for the propositions that the reasonableness of a decision must be assessed by reference to the legislation being considered and that a decision can be unreasonable if it ascribes meaning to a legislative provision that cannot be supported under proper principles of statutory interpretation.

[40] In *McLean*, the Court held that the principle of deference to a tribunal decision cannot justify upholding an unreasonable statutory interpretation:

[38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision-maker adopts a different interpretation, its interpretation is necessarily unreasonable – no degree of deference can justify its acceptance. ... In those cases, the “range of reasonable outcomes” ... will necessarily be limited to a single reasonable interpretation – and the administrative decision maker must adopt it.

[41] This surely follows from the application of the rule of law. If there is no room for reasonable debate as to what a statutory provision means, then the administrative decision maker, bound, as all state institutions are, to observe the rule of law, must comply with the law and apply the statute accordingly. It is only when multiple decisions can be made within a zone of more than one reasonable interpretation that it is justifiable to defer to the expertise and front-line policy familiarity and practical knowledge of the tribunal.

[42] However, the principles of statutory interpretation do not always lead inexorably to a single clear answer. They will often be susceptible to multiple

reasonable interpretations that involve judgment on the part of the interpreter as to what will advance, or at least not hinder, the perceived overall statutory objective of the legislative provision and also comport with the interpreter's perception of fairness in the context of the provision's application. In such cases, deference is due to the administrative decision maker's decision. The burden is on the person seeking judicial review to show not only that his or her alternative interpretation is reasonable but also that the tribunal's interpretation is unreasonable and there is no other reasonable interpretation.

[43] If this cannot be shown, then when it comes to interpreting its home statute, the tribunal's decision should be shown deference if it is one of a range of decisions that is "defensible in respect of the facts and the law" (per Bastarache and LeBel JJ. in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 47; *Alberta (Information and Privacy Commissioner v. Alberta Teachers Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, per Rothstein J. at paras. 30-39; *Locke's Electrical Ltd. v Newfoundland and Labrador (Labour Relations Board)*, 2011 NLCA 40 at para 12). As noted in *McLean*:

[33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. Indeed, the exercise of that interpretive discretion is part of an administrative decision maker's expertise.

[44] In this case, the question under consideration is whether the judge erred in her conclusion that there were reasonable competing interpretations of the legislation. If so, and this Court concludes that there was only one reasonable interpretation available (and that that interpretation is the one advanced by Unifor), this Court can and should overturn the judge's decision and set aside the Board's decision to the extent that it is not based on that proper interpretation.

[45] To determine that in the context of this case, it is necessary to examine whether the judge identified and applied proper principles in interpreting the *Act* and, if not, whether, applying proper principles, Unifor's proposed interpretation is the only reasonable one available.

[46] If both interpretations find support in the text, context and purpose of the statute, both interpretations will be considered to be reasonable.

(b) Interpretation of Section 38.1

[47] In *Wilson*, a majority of the Supreme Court reiterated that a standard of reasonableness applies when a court is reviewing decisions of labour adjudicators acting under and interpreting the *Canada Labour Code*, R.S.C. 1985, c. L-2 within their areas of expertise. The majority concluded that the *Code*, properly interpreted, justified, on a reasonableness standard, the original adjudicator's conclusion that the *Code* permitted the adjudicator to determine whether a dismissal was unjust even though at common law an employer was entitled to dismiss without cause on payment of reasonable compensation. In arriving at that conclusion, Abella J., for the majority on this point, noted that the reasonableness of the decision being reviewed must be assessed in the specific context under review and by reference to the specific legislation being considered. The interpreter must apply proper principles of statutory interpretation and the fact that there may be two or more previous conflicting lines of authority in the jurisprudence does not necessarily lead to the conclusion that both approaches are reasonable.

[48] The judge in the current case summarized the interpretation issue that faced the Board as follows:

[36] The Board then addressed the arguments of the parties on the appropriate interpretation of the phrase "employees employed on the platform". In the course of this exercise the Board acknowledged Unifor's suggestion that the language of section 38.1 was virtually identical to the recommendation made by the Cooper Report and meant the same thing. [Unifor's] interpretation (it asserted) permitted the Board very little discretion to exclude employers [sic] from the bargaining unit. It maintained that the exclusion must be limited to employers and employees involved only in startup and/or construction.

[37] The Board disagreed with Unifor's position on the limited discretion to exclude employers and it approved the interpretation given to the phrase "employees employed on the platform" in [the *Certification Decision*]. This interpretation, it concluded, met the statutory intention and objective of avoiding the possibility of multiple bargaining units on the platform.

[49] In addressing whether the Board's rejection of the Unifor interpretive position led to an unreasonable result, the judge noted that the Board acknowledged what she called the "basic rule of interpretation" as being that "legislation should be read in its entire context, in its grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of Parliament", as well as the presumption against tautology (paragraph 39). In engaging in her own interpretation of the applicable legislative provisions later

in her reasons, the judge referred to decisions of this Court in *Lynch v. St. John's (City)*, 2016 NLCA 35 and *Archaen Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43 as setting out the correct approach to interpretation of statutes in this province. She noted that the intention of the legislature is to be discerned “by reference to all relevant sources of meaning, including the words used, the statutory context, the Court’s knowledge of the pre-existing law, social context, the perceived mischief that caused the government (or private member) to act by introducing the bill into the legislature and the legislative history” (*Lynch*, paragraph 75).

[50] In concluding that the Board majority “chose an interpretation of s. 38.1 that the words of the section could bear”, the judge determined that:

[119] In interpreting the legislation discerning the intention of the legislature, I conclude that the majority of the Board considered all relevant sources of meaning for s. 38.1, including the words used, the statutory context, the Cooper Report, Hansard, the offshore oil production context, the perceived mischief sought to be avoided by the section, and the guidance from the [*Certification Decision*].

[120] In the analysis that followed, it is apparent that the Board did not ignore the language of the legislation and was live to the fact that the bargaining unit was defined by statute.

[51] Unifor, however, submits that the approach of the judge to assessing the Board’s interpretation of the *Act* was flawed and that the application of proper interpretive principles leads inexorably to the conclusion that the judge’s agreement with the Board’s approach was in error and could not be a reasonable interpretation of section 38.1.

[52] Unifor says that the judge, in reality, wrongly adopted an approach to interpretation based on the jurisprudence relating to collective agreement interpretation rather than statutory interpretation. This argument is based on the judge’s reference to the decision of this Court in *Layman v. Layman Estate*, 2016 NLCA 13. That case involved judicial review of the decision of a consensual arbitrator. The decision discussed the applicable standard of judicial review and also addressed the approach by the arbitrator to interpretation of the underlying contract.

[53] The judge cited and relied on *Layman* for its discussion of the applicable standard of review (reasonableness) and concluded that the question before her was “whether the interpretation of ss. 38.1 and 56 of the *Act* adopted by the majority of the Board was reasonable in light of the facts and the law”

(paragraph 107). There is nothing objectionable to her use of *Layman* for that purpose. She did not, however, purport to rely on *Layman* for the purpose of extrapolating and applying appropriate principles of interpretation. This is a different, and subsequent, question. She relied on *Lynch* and *Archean* for that exercise. Having determined that the standard of review was reasonableness, she then had to test the interpretation of the statute adopted by the Board against a proper application of principles of statutory interpretation to determine whether the Board's interpretation was one that the statute could reasonably bear. This is what she did. She in effect concluded that the interpretation adopted by the Board was not reached in a manner inconsistent with basic statutory interpretation principles and therefore met the applicable standard of reasonableness. The judge therefore did not err in respect of the approach to interpretation that she adopted.

[54] Unifor goes further, however, and says that, even if the judge's approach to interpretation could not be faulted, the decision reached by the Board could not, applying proper principles, be justified as a reasonable decision in any event. There is in effect, submitted Unifor, only one justifiable interpretation of the language in section 38.1 which leads to the conclusion that all employers who employ employees who work on the platform, other than original construction and start-up personnel, no matter how sporadically or in what circumstances, are required to be members of HPEO and are bound by the platform collective agreement.

[55] It is necessary, therefore, to address the interpretation of section 38.1 and to consider whether there is only one reasonable interpretation of that provision and whether that interpretation is the one advanced by Unifor.

(i) Language

[56] Unifor relies, firstly, on what it says are the plain words of section 38.1(1). The subsection only purports to exclude construction and start-up personnel. By implication, it says, all other employees are included in the bargaining unit. This is buttressed, it says, by the definition of "employee" in section 2(m) of the Act:

"employee" means a person employed to do skilled or unskilled manual, clerical or technical work and includes a professional employee and a dependent contractor but does not include a manager or superintendent or other person who, in the opinion of the board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations.

[57] On its face, it was argued, the term “employee” in section 38.1 should include all workers who do not fall within the management and confidential exceptions mentioned in the definition. When combined with the limited exclusionary reference in s. 38.1 to construction and start up personnel and the absence of any reference to “significant attachment” or minimum amount of time spent on the platform, it followed, so it was said, that all other employees were encompassed by the statutorily-defined bargaining unit. Unifor’s position is summed up in the following submission: “Once an employer employs a single person on the platform for a single day, it falls within the statutory definition of the bargaining unit” (Appellant’s Factum, paragraph 80).

[58] However, the issue for the Board in the decision under review, as it was in the *Certification Decision*, was not so much the meaning to be ascribed to the word “employee” in the abstract but to the phrase “employees employed on the platform”, with the emphasis on “*employed on*”. The judge agreed with and relied on this distinction. In response to Unifor’s argument that unless “employee” was to be given its natural comprehensive meaning to ensure that all workers on the platform were covered by the collective bargaining regime the decision would be unreasonable, the judge responded:

[69] Unifor asserts that this result is clearly unreasonable.

[70] In this regard, Unifor’s position places the focus on the word “employee” whereas the Board determined the issue required interpretation of the phrase “employed on.”

[71] I disagree with Unifor’s position on the question that the Board was required to address.

[72] The enquiry required was for “employees employed on the platform” whose employers were required to join the HPEO pursuant to s. 38.1 and 56.1 of the *Act*. The predominant challenge was not (for example) whether employees were to be characterized as skilled workers or instead employed in a confidential capacity in relation to labour relations. *The dispute centered on whether the employees had a sufficient attachment to the platform to be considered “employees employed on” the platform.*

(Emphasis added.)

[59] Viewed from this perspective, the notion of being an employee “*employed on*” the platform introduced a potentially limiting dimension. It raised the question of what employment “on” the platform meant. Did it mean that any physical presence on the platform, involving the performance of any work, no

matter how transitory or peripheral, was a sufficient connection with or attachment to the platform to engage the collective bargaining regime? Would, for example, an employee of the Canada-Newfoundland & Labrador Offshore Petroleum Board who happened to visit the platform for a day to perform inspection duties or to meet with management be considered to be *employed on* the platform? Or must there be some other more substantial connection? Unifor conceded that some employees who set foot on the platform, such as those who were there “not in connection with the operation of the platform”, e.g. a journalist visiting the platform to cover a news story (Appellant’s Factum, paragraph 23) would not be caught by section 38.1. However, it maintained that “a worker who attended the platform for only one day would be part of the bargaining unit if the worker was on the platform *in connection with the operations of the platform*” (emphasis added).

[60] It was this question of what the legislature meant when referring to being “employed on” the platform which led the Board to conclude that a “significant attachment” test could and should operate to give meaning to that notion. The judge quoted the Board’s analysis at paragraph 103 of her decision:

[201] ... If asked where he worked, would the employee be able to say, “I work on Hibernia”? Does the employee earn her living on Hibernia, or does she earn her living on Hibernia as one of numerous other installations? Put another way, is Hibernia their place of work, or is it a place they happen to be working this week or whenever they get a call to go there and can fit it in their schedule? These are some of the considerations to think about when determining whether they are “employed on the platform.” The only way to determine whether someone is “employed on the platform” is to consider that individual employee and whether his or her position has a significant attachment to the platform.

[61] In its majority reasons, the Board also made the following observations:

[202] ... this is not a “boots on the platform” bargaining unit. Not every single person who steps on Hibernia to do a day’s work there is a member of the bargaining unit. The question to consider is whether that person is employed there. CEP [the predecessor of Unifor at the time of the Board application] has agreed that individuals who attend the platform to perform inspections from time to time, such as members of the regulator (CNLOPB), and other government inspectors of the installation, do not become members of the platform-wide bargaining unit the minute they set foot on the platform. The HPEO and HRDC and intervenors recognize that it is easy to determine that a regular-rotation employee is a member of the bargaining unit unless that employee is management. *The question comes with respect to those in the middle.*

(Underlining in original; italics added.)

[62] This recognized that there was room for debate as to just what scope was to be given to the phrase “employees employed on the platform” even if one were to focus only on the language of the legislation without considering other sources of meaning that are also resorted to in the interpretive exercise.

[63] Later in her reasons the judge declared that she was “satisfied” with the Board’s analysis as described in paragraph 201 of the Board’s reasons (Judgment, paragraph 121). I, also, am satisfied that this was a reasonable way to interpret and breathe practical life into the phrase “employees employed on the platform” within section 38.1. It cannot be said that the Board’s focus on the phrase “employees employed on” in section 38.1, as opposed to focusing on the defined literal meaning of the word “employee” was unreasonable in the circumstances. Nor can it be said that the use of a notion of significant attachment, as flowing from the words of being employed “on” the platform was an unreasonable use of the language, given the fact that the phrase “employed on” itself contemplated some sort of demarcation between those whom the legislature intended to include within the statutorily-defined bargaining unit and those who were not to be so included even though they could be described as persons whose “boots” touched the platform.

[64] This analysis also provides the answer to Unifor’s further submission that the significant attachment test had no role in determining the issue faced by the Board because it was adopted from the Board’s previous *Certification Decision* where the issues were different. Both the Board and the judge recognized that the contexts of the two decisions were not the same (Board Decision, paragraph 209; Judgment, paragraph 74-76); nevertheless, quite apart from its relevance to the issues in the *Certification Decision*, it is clear that it also has relevance in giving practical meaning to the notion of being “employed on” the platform for other purposes, such as determining when employers of such employees would have to be members of HPEO.

[65] Furthermore, there is a certain logic in having the same test for determining who is in the statutory bargaining unit when determining the issue of who has the right to vote with respect to certification and who is in the unit from time to time thereafter for the purpose of determining who could claim benefits and who was subject to the obligations of the collective bargaining relationship resulting from that certification. Indeed, it would be odd if the tests were not the same. The Board alluded to this when the majority stated:

[209] The Union appears to be arguing that the criteria used to determine membership in the bargaining unit for the purpose of voting for membership in that bargaining unit

ought not to be the same as the criteria used to determine membership in the bargaining unit now. There was no legal argument put forward to articulate the difference. What makes an employee a member of a bargaining unit for the purposes of certification ought to be the same criteria used to determine whether another employee is a member of the bargaining [unit] in a subsequent analysis of what constitutes membership in that bargaining unit. There was no jurisprudence presented to the Board to show that it ought to use a different test.

[66] The language of section 38.1, therefore, does not support Unifor's argument that the statutorily-defined bargaining unit necessarily encompasses every person except those involved in construction and start-up.

(ii) Previous Statements as to the Scope of s. 38.1

[67] In asserting an "all-encompassing" scope of the bargaining unit defined in section 38.1, Unifor also relied on the language in the *Cooper Report* and in other previous decisions of the Board which, it submitted, accepted that the bargaining unit included more than what would be permitted by a significant attachment test.

[68] Although such statements are not binding on this Court or the judge, it is worth considering them in the context of the submission by Unifor that the Board's decision is inconsistent with previous interpretative approaches and is therefore unreasonable.

[69] It will be recalled that, in dealing with the issues before him, Cooper used language that, taken out of context, talked of "all" employees (except start-up and construction personnel) being included in the bargaining unit. Since the *Labour Relations Act* amendments were based on the *Cooper Report*, it followed, so Unifor argued, that "employees employed on the platform" should reflect that all-encompassing approach. I do not accept this submission. First, the language used by Cooper must be read and considered in the context of what he was addressing. He was dealing primarily with whether there was a distinction between operations personnel and those in construction and start-up (the latter groups to be excluded) and between professional and other personnel (both groups to be included). He did not expressly deal with the question of whether there should be some defining characteristic that would otherwise determine whether a particular worker was to be considered within or without the bargaining unit for other ongoing purposes. To read Cooper's words more comprehensively is to give too great a controlling weight to his report with respect to interpretation of section 38.1 generally.

[70] Secondly and more importantly, however, the fact that there was a difference in the critical language chosen by the legislature in section 38.1, as opposed to the language in the *Cooper Report* is telling. Even if Cooper's language in his recommendation ("all employees on...") could be read as meaning that every person whose boots touched the platform in relation to platform operations was to be included in the bargaining unit, the fact that the legislature chose different language ("all employees *employed* on...") suggests that the legislature was departing from a physical presence test and, instead, was tying unit membership to a relationship based on a type of employment, which required an investigation as to what the nature and extent of that relationship was in a given case. Accordingly, reliance on the *Cooper Report* is not helpful to Unifor's case on this point.

[71] Unifor also relied on statements by the Board in the *Preliminary Ruling* to the effect that it was never intended that membership in HPEO would be static or that there would be two categories of employers on the platform (i.e. some bound by the collective agreement and some not) as indicating that the Board itself regarded the bargaining unit as all-encompassing. This was buttressed further, it was submitted, by the conclusion reached in the *Preliminary Ruling* that the purpose of HPEO was "to act as bargaining agent for all employers" on the platform. Like reliance on the *Cooper Report*, this reads too much into the language without reference to context and the issue under consideration. The *Preliminary Ruling* responded to HMDC's argument that HPEO membership only encompassed employers who employed workers at the time of the certification application. The Board rejected that interpretation and concluded that HPEO membership encompassed employers who subsequently employed workers on the platform. It did not address the question at that time of what would encompass "employees employed on the platform" as a means of identifying those employers of such employees for the purpose of determining membership in HPEO. That is evident from the Board's statement that "employers who employ employees on that site are bound to become members of HPEO." Which specific employers, and how they were to be identified, was not addressed. That was the very issue that was left to the decision that ultimately was subjected to judicial review and is the subject of this appeal. As the Board stated in its decision that is now under challenge, "nowhere in [the *Preliminary Ruling*] did the Board or HPEO state that every individual worker on the Hibernia platform was to be considered a member of the bargaining unit" (paragraph 169). I agree with this conclusion. The matter remained open.

[72] Unifor further relied on statements and conclusions of the Board in the case under appeal as indicating that the Board’s adoption of a substantial attachment gloss on section 38.1 was inconsistent with the Board’s own supporting analysis. For example, the Board accepted that the legislature based its amendments on the “desirability of establishing a single bargaining unit on the offshore production platform” based on a “unique community of interest” with a view to preventing a fragmented workforce on the platform. Such general language, employed when discussing the overall purpose of the legislation, cannot be extrapolated as if it were itself a legislative provision that should be rigidly applied in all circumstances without consideration of context. It does not follow that a physical “boots on the platform” test was necessarily intended to apply without exception when considering the actual language chosen which, as indicated above, suggests a more nuanced test for determining just who was to be included within the notion of “employees *employed on*” the platform. It is *those* employees (and, by implication, not others who still might be *on* the platform) that were intended to be part of an un-fragmented workforce. The language used by the Board in its analysis is not inconsistent with the conclusions it reached.

[73] Even though the Board adopted the significant attachment principle for the purposes of the *Certification Decision*, Unifor argued that applying the significant attachment principle in the context of the issues in the current case was unreasonable because doing so “contradicted all material conclusions of law made by the Board” in the *Certification Decision* (Appellant’s Factum, paragraph 75). In particular, Unifor relied on the Board’s observations in the *Certification Decision* to the effect that “there is no issue before the Board with respect to determination of the appropriate bargaining unit” because it was statutorily defined, thereby eliminating the need to engage in a “community of interest” analysis to determine the scope of the unit. This indicated, it was argued, that the Board recognized that the determination of the scope of the bargaining unit was pre-determined in favour of including everybody except those specifically excluded by the legislation.

[74] As well, Unifor referred to the statement by the Board (accepted by the judge as the “essence” of the *Certification Decision*) that given the intent of section 38.1 to “avoid multiple bargaining units”,

... [e]mployees with a significant attachment to the platform, who return to work for more than one tour of duty on the platform and who perform work similar to the steady state workforce, should not be placed in a position where they would be excluded from the bargaining unit.

[75] From this, it was argued, the Board accepted that the legislation should not operate to exclude workers who return to the platform and perform the same type of work and tasks as unionized employees, but for different employers regardless of the amount of time they spend there (Appellant's Factum, paragraphs 74-75), leading to the conclusion that the bargaining unit was intended to be all-encompassing.

[76] Neither of these submissions based on the reasoning in the *Certification Decision* assists Unifor's position. The fact that the legislature has defined the bargaining unit rather than leaving it to the Board to decide, as would usually be the case, does not eliminate the necessity of the Board and the judge to interpret what s. 38.1 means with respect to the scope of the bargaining unit that the legislature intended to create. It is the phrase "employees employed on the platform" that determines who is in the unit and who is not. That is a question that is still open to interpretation by the Board. The *Certification Decision* and the judge recognized this.

[77] Further, the notion that employees who perform similar types of work should be included in the bargaining unit regardless of their employer, so as to avoid multiple bargaining units, was enunciated by the Board as the basis for a single bargaining unit *once the significant attachment principle* had been applied. In other words, having determined who were "employees employed on the platform" by application of the significant attachment principle, the Board was then simply acknowledging the importance of the policy of non-fragmentation. This is clear from the words quoted above that "employees *with a significant attachment to the platform ... should not be ... excluded...*" (emphasis added). Unifor's overly-expansive interpretation of the Board's comments cannot be accepted.

[78] There is no manifest inconsistency between the statements made in the *Cooper Report* and other Board decisions, and the interpretation of s. 38.1 employing the significant attachment gloss, as applied by the Board and accepted by the judge.

(iii) Purpose and Legislative History

[79] Unifor further submitted that an interpretation of section 38.1 that does not include all employees on the platform, excepting construction and start-up personnel, is unreasonable because such an interpretation does not comport with the underlying purpose of the legislation.

[80] Against the backdrop of the general purpose of the *Labour Relations Act* as being the facilitation of the rights of workers to associate and bargain collectively and the promotion of labour peace and stability, Unifor submitted that the purpose of sections 38.1 and 56.1 was to establish a single bargaining unit on an offshore production platform and that this purpose should inform the interpretation of the language of section 38.1. In support of this submitted purpose, Unifor relied in part on the analysis in the *Cooper Report*, as earlier discussed, which had been generally accepted by the government, noting that the Minister introducing the amendments in the legislature stated that “we have incorporated the heart of the Morgan Cooper report” in the legislation (Newfoundland and Labrador House of Assembly, *Hansard*, 43rd General Assembly, 2nd Session, No. 52 December 16, 1997).

[81] In further support of its submission, Unifor relied on statements in the Board’s decision in *Re Communications, Energy and Paperworkers Union of Canada, Local 60N and Petro Canada*, [2006] N.L.L.R.B. No. 2 relating to the Terra Nova oil field on an application for certification dealing with whether certain employees were exempted from the bargaining unit because they were construction or start up employees. The Board there laid stress on the *Cooper Report’s* reference to “the desirability of establishing a single bargaining unit on the offshore production platform, regardless of the number of employers operating on the platform” and the fact that, as previously noted, statements were made in the House of Assembly at the time of the debate on adoption of the amendments that they “incorporated the heart of the Morgan Cooper report.”

[82] These generalized statements also do not advance Unifor’s case. There are limits to how far reliance on the *Cooper Report* can be carried in this context to achieve a result that leads to only one interpretive conclusion within the scope of the *McLean* principle. While reflecting the fundamental philosophy of the *Cooper Report*, the amendments, as noted earlier, did not accept the *Cooper* recommendations in total, as reflected in the addition of an additional word used in the critical language in s. 38.1. The language chosen by the legislature indicates that it was leaving it to the Board to determine, in a given case, whether the type, nature, frequency and duration of work on the platform could be said to amount to being “*employed on the platform.*” As recognized by the Board and the judge, that requires something more than application of an arbitrary and rote physical presence test, no matter how transient and no matter what the circumstances surrounding the presence may be. It required, as concluded by the Board, addressing the following considerations:

[201] ... If asked where he worked, would the employee be able to say : “I work on Hibernia”? Does the employee earn her living *on* Hibernia, or does she earn her living on Hibernia as one of numerous other installations? Put another way, is Hibernia their place of work, or is it the place they have to be working this week or whenever they get a call to go there and can fit it into their schedule? These are some of the considerations to think about when determining whether someone is “employed on the platform.” The *only* way to determine whether someone is “employed on the platform” is to *consider that individual employee and whether his or her position has a significant attachment to the platform.*

(Italics added.)

[83] While one can divine a general underlying purpose of the amending legislation (the promotion of an unfragmented bargaining regime so as to achieve uniform regulation of working conditions on the platform), it is much more difficult to conclude that that general purpose must lead to a single meaning with respect to a particular legislative provision like s. 38.1. It is only if a particular construction is inconsistent with and counterproductive to the underlying purpose that one can have confidence that the meaning indicated by the language alone is not the correct one. While an interpretation which allows for some workers on the periphery of the core workforce to remain outside the bargaining unit (with, correspondingly, their employers not being members of HPEO), those are the ones who, by definition, have a marginal work connection to the platform (i.e. no significant attachment). The policy against exclusion of workers from a single bargaining unit does not necessarily apply to such workers because their lack of significant attachment means their work circumstances will not be the same as those of the core workforce in any event.

[84] I am not satisfied that the interpretation placed on s. 38.1 by the Board and the judge is inconsistent with the general purpose of the legislation.

(iv) The Mischief to be Addressed

[85] The approach to statutory interpretation enunciated in this Court’s decisions in *Lynch* and *Archean* contemplates identifying, if possible, the “mischief” that caused the legislators to act by introducing the bill into the legislature. That can often be done by reference to any studies, white papers or reports that were previously submitted to government, as well as by statements of government ministers sponsoring the bill, statements of purpose in the bill or by the structure of the legislation itself. Identification of the perceived mischief can then be used to draw an inference as to the purpose or objective of the new provision. In this case, the *Cooper Report* is relevant.

[86] Although the judge did not specifically advert to the perceived mischief to which s. 38.1 was directed, it is apparent from the overall tenor of her reasons that she accepted that the mischief that was intended to be avoided by introducing a special labour relations regime on offshore oil production platforms was the potential for disruption of labour peace by fragmented bargaining resulting in differing treatment of employees even though their working environment was essentially the same. This was to be achieved by, amongst other things, creating a single bargaining unit for “all employees employed on the platform” and by deeming one body to be the employer for those workers regardless of who actually employed them. Section 38.1 should therefore be interpreted and applied in a manner that would work toward, rather than be counterproductive to, the overall objective of addressing that mischief. It must be remembered that the objective of preventing fragmented bargaining was expressed to be relevant to the group of people denominated as employees employed on the platform. As previously discussed, the objective will not be frustrated by excluding those not falling within the category of “employees employed on the platform.” The objective is focused on those within that category because of the similarity of their work circumstances.

[87] The identification of the “mischief” to be addressed in this case supports the conclusions as to overall legislative purpose referred to above.

[88] I would also observe in passing that Unifor made submissions that the result of the interpretation of the Board would be the *creation* of “mischief” in the operation of the new legislative regime. This use of the term is not what is meant with respect to the identification of pre-legislative mischief for the purpose of determining legislative purpose. In reality, employing the term in the way Unifor has done amounts instead to an argument that the interpretation and application of s. 38.1 adopted by the Board is unreasonable because it leads to some negative results in particular cases. That sort of analysis is not part of the formal interpretive exercise. Obviously, if an interpretation leads to an absurd or illogical result that the legislature could not be expected to have intended, the court should be loathe to adopt it but short of that, if the application of proper interpretive principles leads to a particular result, even if it is not regarded by the court as the optimum or even a good one, the court must give effect to the legislative direction.

(v) Conclusion as to Interpretation of Section 38.1

[89] Blending the foregoing analyses of the use of the statutory language in legislative context, the manner in which the language has been treated and

applied in the past, the legislative history of the provisions in issue, and the perceived objective and purpose of the legislation, I am satisfied that the legislature contemplated the operation of a single bargaining unit for all those employees who could be identified as the core operational workforce on the platform (“employees employed on the platform”) because of the importance of maintaining labour peace and efficient contract administration with respect to those workers whose work environments were generally the same and in respect of whom it could be said their place of work was *on* the platform. It did not contemplate inclusion of every worker who was physically present on the platform no matter how peripherally or transiently related to operations unless it could be said that their work, for some reason or another, involved being employed *on* the platform. The notion of being “employed on” the platform contemplates having a stake in or a legitimate say regarding the employment environment such as participation in strike votes, involvement in labour management committees and votes on acceptance of a collective agreement. Casual or peripherally-connected workers, would not necessarily have such a stake. It was reasonable for the Board to recognize this distinction. I agree with the Board when it described this as the “crux of the matter” when addressing whether employees of the Fourth to Thirteenth respondents could be considered to be employed on the platform:

[195] Do the employees of the intervenors have a longer term interest in the terms and conditions of employment on Hibernia like the members of the bargaining unit do?

[90] The legislature left the determination of whether, in a given case, a worker was an employee “employed on” the platform to be decided by the Board. To do that, it was incumbent on the Board to develop and apply a principle that would differentiate between those who were employed on the platform and those who were not, even though they may have been physically present from time to time and peripherally engaged in what could broadly be described as platform operations. In this case, the Board chose to apply a “significant attachment” principle. It was within its jurisdiction to do so. There is nothing unreasonable in its choice and definition of that principle, considering the language of s. 38.1 and the statutory purpose. The adoption of a significant attachment principle does not amount to a modification or alteration of the applicable legislation, as contended by Unifor; rather, it amounts to a practical focusing of the legislation in its specific application.

[91] I accordingly agree with the interpretation placed on s. 38.1 by the Board. It follows that the *McLean* principle does not apply. Unifor has not established that the interpretation of s. 38.1 was unreasonable nor that Unifor’s alternative

interpretation is the only reasonable one. In these circumstances, the judge was correct in deferring to the Board's interpretation of its home statute. Although she expressed her conclusion somewhat differently (paragraph 117: "the majority [of the Board] chose an interpretation of s. 38.1 that the words of the section could bear"), the result is the same. There was no basis for disturbing the Board's conclusions on the basis of an unreasonable interpretation.

(c) The 24/90 Test

[92] As it did before the judicial review judge, Unifor took strong exception to the use by the Board of the 24/90 test for determining whether significant attachment existed in a given case. The argument in this respect is not about interpretation of the legislation; rather it is about whether the Board acted reasonably, in its application of the legislation.

[93] Essentially, Unifor argues that the adoption of the 24/90 test, though perhaps having some justification in the context of a certification application, is irrelevant to the issues presented in this case. Furthermore, it is arbitrary and effectively destroys the integrity of the bargaining unit.

[94] The arbitrariness, says Unifor, is found in the fact that by choosing a particular 90-day period in which to examine which employees satisfied the significant attachment test, the Board effectively excluded consideration of whether other employees who satisfied the test may have worked outside of the selected period, thereby resulting in under-inclusiveness that would not be in accord with the intent of the legislation, even if the significant attachment principle were operative. Employers of such employees would then escape the obligation to be members of HPEO "simply because the Board chose not to look at those dates [outside of the chosen 90-day period]" (Appellant's Factum, paragraph 92). There is also the potential – evident in respect of the current choice of the 90-day period – that the examination period will be dated by the time the determination is made by the Board, thereby again excluding relevant employees and their employers from consideration.

[95] Unifor further argues that the integrity of the bargaining unit will be effectively destroyed by the Board's chosen investigative methodology because "employers commencing the employment of employees after the 90 [day] window selected by the Board will also be able to breach the *Act* and the collective agreement with impunity, unless the Appellant applies to the Board for a fresh determination every 90 days" (Appellant's factum, paragraph 94), a situation that the legislature could not have intended. Such a situation would not

foster the legislative goal of promoting labour peace. It further would have the effect of reversing the burden of proof in applications of this type, since it would put the onus on the union to prove who ought to be included in the unit, whereas the Board has already determined that the party seeking exclusion bears the onus of proof (Board Decision, para. 186).

[96] The arguments put forward by Unifor effectively mirrored the reasoning of the dissenting member, William Parsons, at the Board level. He drew a distinction between use of such a screening device during a certification hearing and its use for current purposes. Unlike the present situation, the use of a sampling period immediately before the application for certification was filed was contemplated by the Board's rules of procedure and was tied to the shelf-life of the membership cards that are submitted as proof of support for the union's certification application. Member Parsons had taken the position that a 24/90 test for determining significant attachment was unnecessary because that language did not exist in s. 38.1 and was unreliable and unnecessarily restrictive because it only took a "snapshot" in time.

[97] As noted earlier, the majority of the Board, on the other hand, concluded that the criteria that make an employee a member of a bargaining unit for the purpose of certification ought to be the same as the criteria used to determine later on whether another employee is a member of the unit and, by extension, whether his or her employer should be a member of the statutorily-mandated employers' organization (Board Decision, paragraph 209). That said, the majority acknowledged the limits of the 24/90 test and made it clear that it was not their intention to apply the test rigidly to the exclusion of other considerations. To repeat a portion of their ruling quoted earlier:

[17] In using a sample of time, the Board is aware that it may not have captured every employer of employees on the platform and may not have obtained a list of exactly every individual or position who has been on Hibernia since 2010. However, the purpose of the order was to try to ascertain who and what positions were being affected by the Union's application in this matter and what employees were employed on the platform.

[98] Further, in relying on and adopting the 24/90 criteria used in the *Certification Decision*, the majority was accepting that analysis as to how the test should be applied. The *Certification Decision* made it clear that the 24/90 test was not carved in stone. As quoted earlier from that decision:

The above criteria applied by the Board to establish significant attachment are not absolute. In the event the Board finds there are factors to justify including or excluding

a particular employee on the basis of significant attachment to the platform then the Board will take those factors into account.

(Emphasis added.)

[99] The judge certainly regarded the Board's adoption of the 24/90 test as only a flexible first step in the examination of the evidence to determine whether significant attachment existed in individual cases:

[102] ... the Board did not restrict itself to the random 90 day sampling period if it had better evidence. For example, cleaners of the Fifth respondent spending 20 days a year on the platform and the remainder of their time on multiple other job sites were excluded due to lack of significant attachment ...

[100] As well, the *Certification Decision* recognized that the opposite situation (inclusion within the bargaining unit on the basis of significant attachment even if the 24/90 test was not met and otherwise pointed to exclusion) could also occur. The reference to inclusion of well services workers within the bargaining unit, discussed earlier (*supra*, paragraph 22) is an example.

[101] I agree with the judge's conclusions in this regard. It is true, as Unifor argues, that the union may face some practical difficulties in obtaining information about other employers employing employees on the platform outside of the selected 90 day period in order to argue significant attachment, unless it made continuous or frequent applications for information as to employment status on the platform (or the Board could be persuaded to make an order for automatic periodic disclosure to facilitate efficient operation of the bargaining unit to ensure the inclusion of all appropriate employers within HPEO as contemplated by the legislation), those problems are not insurmountable (indeed, Unifor in the current case was able to obtain information that led it to make its application to the Board). The difficulties in this regard would not amount to a frustration or subversion of the operation of the legislative regime.

[102] In the end, the judge did not choose which of the majority and dissenting reasons was the correct one. She dealt with it this way:

[105] I conclude that both the majority reasons and the dissent of Member Parsons are equally transparent and intelligible and their conclusions on the applicability of [the *Certification Decision*'s] interpretation of s. 38.1 are justifiable.

[103] That being so, it could not be said that the majority's decision was unreasonable. That was sufficient for the purposes of her decision. I, however, would go further.

[104] In my view, the majority decision is the correct approach. It is a reasonable response to a very practical evidentiary problem – how to obtain information to make determinations relative to the exact composition of a bargaining unit (and corresponding obligations of employers to be members of HPEO) in a complex labour relations environment involving many different employers and many different job types. I would agree that if the 24/90 test were applied rigidly as the only determinant of whether an employee had a significant attachment to the platform, the application of the test in that way could be regarded as arbitrary, unnecessarily restrictive and therefore unreasonable. However, the Board's recognition that the test was not absolute saves the situation. If other considerations demonstrate that, notwithstanding the failure to meet the 24/90 threshold, there are other reasons for concluding that the nature of the connection to the platform and the nature, type and duration of employment that brings a worker to the platform, whether within or without the chosen 90 day period, is sufficiently close to the work and community of interest of the core workforce that they are best served by being part of the same bargaining unit, they can be so included. This saves the decision of the majority from being considered unreasonable.

[105] There is no basis for concluding that the judge erred by not deciding that the Board's decision adopting and applying the 24/90 test in the way it did (recognizing that it was not absolute) was unreasonable.

(d) Position of the Intervenors

[106] In most cases involving the other respondents (the individual employers affected by Unifor's application) the Board decided that the nature and frequency of the work of their employees demonstrated that they did not have a significant attachment to the platform. Those respondents-employers who appeared supported the position of HMDC and HPEO in opposition to Unifor's appeal. Their submissions raised no new substantive arguments.

[107] Inasmuch as the result of this appeal is that the judge's decision should be upheld, thereby not disturbing the Board's original decision, the arguments of the respondents-employers need not be dealt with in detail.

Summary and Disposition

[108] The judicial review judge made no errors justifying the setting aside of her decision. Accordingly, the decision of the Labour Relations Board which was the subject of the judicial review must stand. I would, therefore, dismiss the appeal.

[109] As to costs, the Second and Third Respondents, Hibernia Management and Development Company Limited and Hibernia Platform Employers' Organization, should have their costs on the appeal for two counsel according to Column 3 of the scale of party and party costs. Inasmuch as the same counsel appeared for both respondents and filed one factum on behalf of both, only one set of costs should be allowed.

[110] The First respondent, the Newfoundland and Labrador Labour Relations Board, did not file a factum but appeared by counsel on the hearing of the appeal. It took no position on any of the substantive issues. Accordingly, the Board should not be subject to or entitled to any costs on the appeal.

[111] As to the costs of Halliburton Canada ULC, Import Tool Corporation Ltd. and Vallourec Canada Inc., they should have one set of costs on the basis of one counsel according to Column 3, as they were represented by the same counsel and their factums were identical with respect to the main issues on appeal.

[112] As to Wood Group PSN Canada Inc. and Tam International Oil Services Ltd. , they should severally have their costs on the basis of one counsel for each party according to Column 3.

[113] The other parties, Baker Hughes Canada Company, Belfor Property Restoration, Crosbie Salamis Ltd., Newfoundland and Labrador Association of Quality Personnel and Spectrol Energy Services Inc., did not participate in the appeal and therefore should not be entitled to costs.

I Concur:_____

C.W. White J.A.

I Concur:_____

F.P. O'Brien J.A.