Dalhousie Law Journal

Volume 26 | Issue 2 Article 9

10-1-2003

Union Certification on Offshore Production Installations

Gregory Anthony
Patterson Palmer

Gregory M. Anthony*

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The author describes the jurisdictional and legislative regimes governing labour relations in the Newfoundland and Labrador offshore. After providing an overview of the provincial certification process, he recounts the process of certification of the Hibernia platform and reviews some of the legal issues raised therefrom.

L'auteur décrit les régimes juridictionnel et législatif qui régissent les relations de travail dans la région extracôtière de Terre-Neuve-et-Labrador. Après avoir fait un survol du processus de certification de la province, il se tourne vers le processus de certification de la plate-forme Hibernia et examine certaines des questions d'ordre juridique soulevées par ce dernier.

* Gregory M. Anthony is a partner with the firm Patterson Palmer in St. John's. The author acknowledges the assistance of summer student Chris Hickey.

I. *Jurisdictional Issues and Legislative Regimes*

In Canada, the responsibility for regulating labour relations, employment and occupational health and safety matters is shared between the federal and provincial governments. Federal legislation applies to persons employed by the federal government and individuals employed in the following industries: radio and television broadcasting, chartered banks, postal service, airports and air transportation, shipping and navigation (including loading and unloading of vessels), interprovincial or international transportation by road, rail, ferry or pipeline, telecommunications and industries declared for the general advantage of Canada such as grain handling and uranium mining and processing. The primary federal legislation dealing with these areas and industries includes the *Public Service Staff Relations Act* [1] and the *Canada Labour Code*.[2] Provincial jurisdiction generally covers employees working in agriculture, manufacturing, mining (except uranium), fishing, forestry, petroleum, construction, service industries, local transportation, and provincial and local government employees.

1. R.S.C. 1985, c. P-35.
2. R.S.C. 1985, c. L-2.

1. *Legislative Regime – Newfoundland and Labrador*

The governments of Canada and Newfoundland and Labrador are signatories to an Atlantic Accord which governs joint management of petroleum resources off Newfoundland and Labrador. The legislative regime with respect to offshore Newfoundland and Labrador is governed by a combination of federal and provincial legislation which is encompassed in the *Canada-Newfoundland Atlantic Accord Implementation Act* [3] and its companion provincial legislation.[4]

Section 152(2) of the *Newfoundland Accord Act (Canada)* provides that Newfoundland and Labrador "social legislation," including the *Labour Standards Act*,[5] *Occupational Health and Safety Act* [6] and *Workplace Health, Safety, and Compensation Act*,[7] apply on any marine installation or structure that is within the offshore area in connection with the exploration or drilling for or the production, conservation or processing of petroleum. In section 152(1), a "marine installation or structure" is defined to include any ship, offshore drilling unit, production platform, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, and any other work or work within a class of work prescribed by the Governor General in Council. However, a marine installation or structure does not include any vessel that provides any supply or support services to a ship, installation or structure or work described. This would exclude standby vessels, supply vessels and trans-shipment vessels from the definition of "marine installation or structure."

In order for provincial social legislation to apply offshore, the marine installation or structure must be "within the offshore area." The "offshore area" is defined in section 2 of the *Newfoundland Accord Act (Canada)* as those sub-marine areas lying seaward of the low water mark of the province and extending, at any location, as far as any prescribed line or where no line is prescribed at that location, the outer

3. S.C. 1987, c. 3 [*Newfoundland Accord Act (Canada)*].
4. *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act*, R.S.N.L. 1990, c. C-2 [*Newfoundland Accord Act (Newfoundland)*].
5. R.S.N.L. 1990, c. L-2.
6. R.S.N.L. 1990, c. O-3.
7. R.S.N.L. 1990, c. W-11.

edge of the continental margin or a distance of 200 nautical miles from the base lines from which the breadth of the territorial sea of Canada is measured, whichever is greater.

In addition to the application of provincial social legislation, section 152(4) of the *Newfoundland Accord Act (Canada)* specifically provides that the occupational health and safety provisions of Part I of the *Canada Labour Code* and the labour standards provisions in Part III of the *Canada Labour Code* do not apply on any marine installation or structure that is within the offshore area in connection with the exploration or drilling for or the production, conservation, or processing of petroleum within the offshore area.

Further, the *Newfoundland Accord Act (Canada)* provides that Part I of the *Canada Labour Code* governing industrial relations does not apply and that the provincial *Labour Relations Act*[8] does apply in respect of any marine installation or structure that is within the offshore area for the purpose of becoming, or that is, permanently attached to, permanently anchored to, or permanently resting on the sea bed or subsoil of the sub-marine areas of the offshore during such time as the marine installation or structure is within the offshore area in connection with the exploration or drilling for or the production, conservation or processing of petroleum within the offshore area. In addition to the earlier requirements that the marine installation or structure be within the offshore area in connection with the exploration or drilling for or the production, conservation or processing of petroleum within the offshore area, the provision of the *Newfoundland Accord Act (Canada)* dealing with labour relations also requires that the marine installation or structure is within the offshore area for the purpose of becoming, or that is, permanently attached to, permanently anchored to or permanently resting on the sea bed or subsoil of the sub-marine areas of the offshore.

Section 152(5) of the federal legislation provides that the Governor in Council may exclude through prescribed regulations specific Newfoundland and Labrador social legislation which would otherwise apply. To date, there have been no regulations passed.

8. R.S.N.L. 1990, c. L-1 [*Labour Relations Act*].

2. *S.I.U. v. Rowan Canada Ltd.*[9]

In the case of *S.I.U. v. Rowan Canada Ltd.*,[10] the Canadian Labour Relations Board (the federal Board) dealt with an application for certification pursuant to the *Canada Labour Code* by the Seafarers International Union of Canada. The federal Board stated:

> The issue for the Board to decide was whether it had any jurisdiction to entertain and deal with the application in light of the provisions of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*.[11]

In reciting the background facts, the Board noted that the rig in question, the Rowan Gorilla, was a "jack up rig".

> The Gorilla left Halifax Harbour on November 22, 1991 and returned to the Panuke site where it set its' legs down on the sea floor and completed the drilling of the final production wells into the Panuke portion of the project reserves.[12]

The initial constitutional issue the Board considered was whether it was constitutionally valid to incorporate Nova Scotia social legislation by reference into federal legislation. The Board found:

> These authorities support the conclusion that the incorporation by reference of Nova Scotia social legislation in section 157 is constitutionally valid. Anticipatory incorporation, or incorporation by reference of provincial legislation as amended from time to time, has been upheld in *Coughlin*, *supra*, and *Dick*, *supra*. The requirement that the incorporated legislation be independently valid, as suggested in *Meherally*, *supra*, is met in this case. Nova Scotia social legislation, such as the *Trade Union Act*, is independently valid under section 92 of the Constitution, Property and Civil Rights within the Province.[13]

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9. This section was originally prepared by John C. MacPherson, Q.C. and Gregory Anthony for the Second Annual Atlantic Oil & Gas Conference, April 22, 2003 in Halifax, NS and presented in a paper entitled "Offshore Employment and Occupational Health and Safety Issues" [unpublished].
10. (1992), 92 C.L.L.C. 16066, 1992 CarswellNat 921 (CLRB), aff'd 93 C.L.L.C. 14057 (Fed. C.A.) [*Rowan*].
11. *Ibid.* at 2.
12. *Ibid.* at 3.
13. *Ibid.* at 10.

The Board next considered whether the delegation of legislative authority to a provincial cabinet Minister constituted delegation to the legislature in which the Minister sat. The Board reached the conclusion that the delegation of legislative authority to the provincial Minister in section 157(5) was also constitutionally valid.

The third issue raised by the application before the federal Board was as follows:

> The parties are in agreement that the Gorilla is a marine installation or structure within the meaning of the section 157. The parties disagree on the proper application of section 157(2) and 157(4). The parties also disagreed over whether, at the time of the application for certification, the Gorilla was in the offshore area for the purpose of becoming or was permanently attached to, permanently anchored to or permanently anchored on the seabed or subsoil or the submarine areas of the offshore area.[14]

In addressing this issue the Board undertook a detailed analysis of the wording and structure of section 157 of the *Nova Scotia Accord Act (Canada)*,[15] which is identical to the wording of section 152 of the *Newfoundland Accord Act (Canada)*.

In analyzing these provisions the Board stated:

> ... It is section 157(4)(b), however, that is most pertinent to these proceedings.
>
> Section 157(4)(b) refers to marine installations or structures within the meaning of section 157(2), but only those marine installations or structures that are in the offshore area for the purpose of becoming, or that are, permanently attached to, permanently anchored to or permanently resting on the seabed or subsection of the submarine areas of the offshore area. Out of the class of marine installations and structures created by section 157(2) it creates a subclass in which are included the marine installations and structures which satisfy the "permanency" criteria of section 157(4)(b).
>
> In respect of this subclass, section 157(4)(b) provides that Part V (now Part I) of the Code does not apply, and the Trade Union Act does not apply during such time as the marine installation or structure is within the offshore area in connection with a purpose referred to in that provision.[16]

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14. *Ibid.* at 14.
15. *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, R.S.C. 1988, c. 28 [*Nova Scotia Act (Canada)*].
16. *Ibid.* at 15.

The Board then addressed whether these two provisions were in conflict and concluded:

> The question raised by the parties was whether sections 157(2) and 157(4) are in conflict. In the Board's view, there is no conflict between these sections. Section 157(1), subject to modification by the Governor in Council pursuant to section 157(5)(a), defines what constitutes a marine installation or structure. It also defines what constitutes Nova Scotia social legislation. Section 157(2) creates a subclass of marine installations consisting of those that are in the offshore area in connection with the activities described therein. The Nova Scotia social statutes set out in section 157(1), plus or minus any statutes designated by the Governor in Council pursuant to section 157(5)(b), apply to the marine installations and structures in this subclass.
>
> A further subclass of marine installations and structures is carved out of this subclass by the operation of section 157(4)(b). The latter provision creates a subclass consisting of marine installations and structures set out in section 157(2) with the further qualification that they must satisfy the permanency requirement of section 157(4)(b). In respect of this class of marine installations and structure, Part V (now Part I) of the Code does not apply. In its place the Nova Scotia Trade Union Act does apply. In respect of these marine installations or structures, the Governor in Council has no statutory authority to remove the application of the Trade Union Act.
>
> At present, the Governor in Council has not, under section 157(5), removed the application of the Trade Union Act. Thus a marine installation or structure within the meaning of section 157(2) will be governed by that Act. A marine installation and structure which also meets the "permanency" requirements of section 157(4)(b) would be governed by the Trade Union Act, and excluded from the application of the Code, by virtue of both sections 157(2) and 157(4)(b).[17]

A final issue determined by the Board was whether the Gorilla, in this situation, was "permanently attached" to the seabed or subsoil of the marine offshore area. In that regard the Board stated:

> ...The purpose and general scheme of the Act, as well as the definition of

17. *Ibid.* at 15-16.

> marine installation and structure, all suggest that the phrases "permanently anchored", "permanently attached", and "permanently resting" should be interpreted as relating to the exploration, development and production of petroleum. Permanency, as argued by *Rowan*, should be interpreted as permanency relative to the phases of the petroleum production process. Thus if there is evidence that a marine installation or structure is in the offshore with the intention of completing the production phase of a project it would satisfy the permanency requirement of section 157(4)(b).[18]

The Board further concluded that permanency might relate to durations as short as one month or one year and applies as soon as a structure enters the offshore area.

The *Rowan* case settled that the legislative scheme in the *Nova Scotia Accord Act (Canada)* was constitutionally valid. It also settled that the governing labour relations legislation in the Nova Scotia offshore was that of the Province of Nova Scotia. Although there are no decisions specifically interpreting section 152 of the *Newfoundland Accord Act (Canada)*,[19] the language in section 157 of the *Nova Scotia Accord Act (Canada)*[20] is, in all material respects, identical to section 152 of the Newfoundland and Labrador legislation. As such, the reasoning and findings in the *Rowan* case would apply in Newfoundland and Labrador.

II. *An Overview of the Union Certification Process*

Pursuant to the *Labour Relations Act*[21] for the Province of Newfoundland and Labrador, a union may apply to become the exclusive bargaining representative of a group or class of workers. The certification process starts with an organizing drive during which the union and its representatives attempt to gather sufficient support to file an application for certification with the Labour Relations Board (the Newfoundland Board). During the organizing drive workers are asked to sign a union membership card acknowledging support for that particular union. Information concerning who has signed a union card is kept confidential and may only be released to the

18. *Ibid.* at 17.
19. R.S.N.L. 1990 c. C-2.
20. *Supra* note 15.
21. *Supra* note 8.

Labour Relations Board. When the union has obtained at least forty percent support of the proposed bargaining unit, they may file an Application for Certification. Once this application has been filed, there is a "statutory freeze" whereby the employer is prohibited from altering the terms of employment or pay rates for any of the employees involved.

When an application for certification is received by the Newfoundland Board pursuant to section 36 of the Act, the Board deals with the application in accordance with the procedures set out in the Act and its regulations. The procedures which are applied by the Newfoundland Board following the receipt of an Application for Certification[22] are generally as follows:

(a) Following receipt of the Application for Certification, the Board is required to give notice and send a copy of the Application to the Respondent Employer and to any other party named in the Application and to any party known by the Chief Executive Officer to be affected by the Application.
(b) The Employer is required to file a Reply to the Application for Certification within ten calendar days after receipt of a copy of the Application. The Reply will generally address each of the specific allegations set out in the Application for Certification.
(c) The Board will appoint an Investigating Officer to conduct an investigation and gather information on behalf of the Board. The Investigating Officer will generally contact the Employer to obtain a list of the employees in the proposed bargaining unit and to verify whether or not all of those individuals who have signed membership cards are employees of the Employer. The Investigating Officer will provide a report to the Board indicating whether the individuals who have signed membership cards correspond with the names of the employees who were employed by the Employer at the time of the Application for Certification. A copy of the Investigating Officer's report is provided to the parties, who are given an opportunity to respond to the content of the report in writing.
(d) Where an Application for Certification is supported by not less than forty percent of the employees in the proposed bargaining unit, the Board will hold a vote of the employees in the unit to determine whether or not they wish to be represented by the Union for purposes

22. *Ibid.* s. 36.

of collective bargaining. The Board will determine the time and place of the vote, which shall be taken no more than five days after receipt by the Board of the Application for Certification. The Investigating Officer is responsible for conducting the vote.

(e) The Board will meet to consider the Application for Certification and in particular whether any employees should be included or excluded from the proposed bargaining unit.

(f) Assuming that there are no other Applications (e.g., unfair labour practice complaint), and once the Board has determined the composition of the bargaining unit, the votes will be counted to determine whether or not a majority of employees support the certification of the union. Where a majority of the employees in the proposed bargaining unit vote in favour of the Union, or where at least seventy percent of the members of the bargaining unit have voted and a majority of those voting have voted in favour of the Union, the Board will issue a Certification Order, certifying the Union to represent the employees in the bargaining unit for purposes of collective bargaining.

(g) From the date of the receipt of the Application for Certification by the Board until the Board decides to either reject or accept the Application for Certification, the Employer is prohibited from altering the terms or conditions of employment of its employees in the proposed bargaining unit, unless it makes an application to the Board.

(h) Once the Union is certified to act on behalf of the bargaining unit employees, the Employer is prohibited from negotiating terms or conditions of employment with any of its employees who fall within the bargaining unit. In addition, once the Union gives notice to the Employer to begin collective bargaining, the Employer is once again prohibited from changing the terms or conditions of employment until either a collective agreement has been reached, or seven days have elapsed after the conciliation board's report has gone to the Minister of Environment and Labour, or the Minister has advised the employer that he has decided not to appoint a conciliation board.

(i) Once the Union gives notice to the Employer to begin collective bargaining, the Employer must meet within twenty days to start collective bargaining. This process may take anywhere from two weeks to more than a year to finalize a collective agreement between the parties.

(j) Should the parties be unable to agree on a collective agreement, either party may apply for conciliation through the Minister of Environment and Labour. Once the time period from the request of the Minister to appoint a Conciliation Board as set out in the legislation has expired, approximately fifteen days, the Union will be in a legal position to

strike and the Employer in a legal position to lock out.

(k) In first agreement situations, where the parties are unable to reach a collective agreement, either party may request the Labour Relations Board to conduct an investigation and settle the terms and conditions for the first collective agreement.

1. *Special Challenges for Offshore Production Installations*

The union certification process presents numerous challenges for the offshore oil industry. Oil platforms and production units are located offshore, making access difficult, and are often comprised of disparate groups of workers with distinct duties and separate employers. This gives rise to the possibility of a platform with multiple bargaining units, a situation which greatly increases the potential for labour unrest and complicates the bargaining process. Further, due to the sensitive nature of the industry, labour disruptions could have potentially devastating effects, adding a whole new level of considerations to the entire process. These unique challenges have led Newfoundland and Labrador to implement modified regulations for offshore oil installations.

2. *Newfoundland and Labrador Legislation*

On April 25, 1997, Morgan C. Cooper, (Cooper subsequently became Chair of the Newfoundland and Labrador Labour Relations Board from October of 1998 to February of 2003) submitted a report to the Honourable Kevin Aylward, then Minister of the Department of Environment and Labour entitled "Labour Relations Processes on Offshore Oil Production Platforms."[23] The purpose of the Cooper Report was to make recommendations on an employee/employer framework for offshore oil production platforms. Mr. Cooper received twenty-eight written submissions from interested parties and made twelve recommendations with respect to facilitating offshore productivity, stability and safety. Subsequent to receipt of the Cooper Report, the provincial government made a number of amendments to the provincial *Labour Relations Act* specifically dealing with labour relations in offshore Newfoundland and Labrador.

The amendments provide that the unit appropriate for collective bargaining on an offshore petroleum production platform is an all-inclusive unit comprising all employees employed on the platform except those

23. Morgan C. Cooper, "Labour Relations Processes on Offshore Oil Production Platforms" (April 1997) [unpublished][*Cooper Report*].

employed in construction and startup on the platform.[24] The purpose of this amendment is to avoid the creation of multiple bargaining units on the platform which would lead to fragmentation of the bargaining unit and increase the potential for labour unrest.

In addition, the Act provides that the licensed operator of the platform shall be considered to be the employer of all employees for purposes of consideration of an application for certification.[25] This is consistent with the provision mandating a platform-wide bargaining unit and although the licensed operator of the platform is considered to be the employer for purposes of the Board's consideration of the application for certification, where the Board certifies a trade union with respect to an offshore petroleum production platform, the licensed operator is required to immediately form an organization of all the employers of employees affected by the certification order. This organization has authority to engage in collective bargaining and enter into collective agreements on behalf of all employers on the platform. The legislation requires that all employers of employees affected by the application are required to become members of the employer's organization.[26]

Where a trade union has been certified to represent employees employed on an offshore petroleum production platform and the parties are unable to agree on the terms of a first Collective Agreement, either party can apply for arbitration of matters in dispute.[27] The Act requires that the arbitration shall begin within 30 days and an award or decision be delivered within 60 days of commencement of the arbitration proceedings. This period can be extended by up to 60 days.[28] The Act also requires that the Collective Agreement must be for a period of three years or longer.[29]

In order to address safety concerns on an offshore production facility, the Act provides that there shall be no strike or lockout until parties enter into an agreement setting out workforce requirements, and procedures

24. *Labour Relations Act, supra*, note 8, s. 38.1(1).
25. *Ibid.* s. 38.1(1).
26. *Ibid.* s. 56.1.
27. *Ibid.* s. 81.1.
28. *Ibid.* s. 81.2.
29. *Ibid.* s. 81.3.

necessary to ensure the orderly and safe shutdown and maintenance of the platform.[30] Where the parties are unable to agree upon the workforce requirements and procedures, either party may apply to the Board to settle the terms of this Agreement.[31]

3. *Union Access to Remote Sites*

A major obstacle to the certification of an offshore production facility which any trade union attempting to gain support must overcome is access to the site. Section 34 of the *Labour Relations Act*[32] for the Province of Newfoundland and Labrador and section 30 of the *Labour Relations Act Rules of Procedure*[33] give the Board discretion to issue orders granting an authorized representative of a trade union access to employees in an isolated location on premises owned or controlled by their employer. In his report submitted to the Honourable Kevin Aylward, then Minister of Environment and Labour, Morgan C. Cooper stated that:

> The remoteness of offshore work sites is a function of the isolated location of offshore oil platforms and the exclusive control which the licensed operators exert over air transportation including access to the onshore heliports.[34]

In discussing the issue of trade union access to remote locations, the Cooper Report stated:

> The necessity for effective and economical access to workers on offshore oil platforms is particularly compelling where the requisite level of support for collective action must be attained from members of a bargaining unit which comprised the entire platform. Although industry stakeholders have emphasized the availability of offshore workers in their off hours as well as the potential for access to offshore employees at the onshore heliport sites, such access is an imperfect substitute for opportunities to interact with employees in their offshore working environment during their non-working hours.[35]

30. *Ibid.* s. 100.2(1).
31. *Ibid.* s. 100.2(2).
32. *Ibid.* s. 34.
33. Nfld. Reg. 745/96, s. 30.
34. *Cooper Report, supra* note 22.
35. *Ibid.*

The issue of union access to offshore production facilities was raised before the Newfoundland and Labrador Labour Relations Board by the Communication, Energy and Paperworkers Union of Canada, Local 97, which made application to the Labour Relations Board on October 30, 1998 for access to the Hibernia Platform for the purpose of informing employees of their services, their interest in representing them in collective bargaining and soliciting union membership. The Union sought the following access to the Hibernia Platform: four visits with four representatives per visit; access to bulletin boards, meeting rooms and common areas; and private meetings with employees. In addition, the Union requested that the Hibernia Management Development Company Limited (HMDC), the licensed operator of the Hibernia Platform, provide transportation and accommodation to the trade union representatives while on the platform.

In their reply to the application, HMDC acknowledged that the platform was an "isolated location" insofar as it required access by helicopter or supply vessel, but it opposed access to the platform by the Union and argued that employees were not "living in an isolated location," that access was not impractical and that access was not reasonably required for the purpose of soliciting union membership. HMDC indicated that although persons working on board the Hibernia Platform live in an isolated location during their three-week work rotation, the vast majority of these workers live within the Province of Newfoundland and Labrador during their three-week offtime rotation. In addition, HMDC argued that all persons working on the Hibernia Platform embark and disembark through the heliport at Torbay International Airport in the Province of Newfoundland and Labrador. Therefore, it is possible for the Union to track workers departing to or returning from the Hibernia Platform as the workers enter and exit the Heliport in much the same way as a worker enters or leaves the entrance or exit of any shore-based industrial facility before and after their work periods. HMDC asserted that these circumstances provided adequate opportunity for the Union to approach the workers for the purpose of distributing leaflets or other written documentation.

HMDC argued that in order for the Board to grant access in accordance with the Act, it must determine that:

1. The workers for whom the Union seeks access are "living in an isolated location" which premises are owned or controlled by the employer;

2. Access to the workers would be impracticable unless permitted at the isolated location; and

3. Access is reasonably required for the purpose of soliciting union membership.

Although the Labour Relations Board conducted nine days of hearings into the Union's application, the application was withdrawn without a decision from the Board once applications for certification for the Hibernia Platform were filed by the Communication, Energy and Paperworkers Union (Local 97) and the FFAW. Although these initial applications for certification were unsuccessful, the Communication, Energy and Paperworkers Union, of Canada, Local 60N, was ultimately successful in obtaining a certification for employees working on the Hibernia Platform. (This certification is now the subject of judicial review). All three applications for certification were filed with the Board without an order for access, which would support the contention of HMDC that access was not reasonably required for soliciting union membership.

III. *Certification of the Hibernia Platform*

HMDC is the licensed operator of the Hibernia Production Platform, which is located at the Hibernia Oilfield situated on the Grand Banks over 300 kilometers southeast of St. John's, Newfoundland and Labrador. The Platform is engaged in drilling operations and in production of hydrocarbons. Crude oil is produced, processed and stored on the Platform and then loaded on tankers for shipment. Drilling pipe and other supplies and materials for the Platform are delivered mostly by supply boats. When the supply boats arrive, the supplies are unloaded and stored. Employees and other persons traveling to the Platform are transported by helicopter from St. John's and the standard working rotation is twenty-one days onshore followed by twenty-one days offshore.

On November 12, 1999, the Fish, Food and Allied Workers Union (FFAW) submitted an Application for Certification to represent workers employed on the Hibernia Platform. In its application, the FFAW claimed to represent 191 of 300 employees in the bargaining unit for support of 63.6 percent.

The Labour Relations Board received a second Application for Certification for employees working on the Hibernia Platform on November 18, 1999 from the Communication, Energy and Paperworkers Union, Local 97 (CEP). In its application the CEP claimed to represent 229 of 300 employees in the bargaining unit for support of 76.3 percent.

The Board received written submissions from the parties on the conduct of a representation vote, including the structure and wording of the ballot. The Board decided to hold two separate votes, with both votes being held concurrently. Each person voting was given two separate ballots with one ballot asking employees whether they wished to be represented by the FFAW and another ballot asking employees whether they wished to be represented by the CEP. Separate ballot boxes were maintained for the FFAW vote and the CEP vote. The vote was conducted on the Hibernia Offshore Production Platform on December 3-4, 1999 and at the Airport Plaza Hotel, St. John's on weekdays from December 6-23, 1999. Additional ballots were received by mail. The ballots were segregated where appropriate and the ballot boxes sealed pending further order of the Labour Relations Board. The Board, after reviewing a report of its investigating officer, decided to hold a hearing. The hearing was commenced on July 24, 2000 and following thirty-two days of hearings, concluded on February 16, 2001.

In the course of the Application for Certification the FFAW and CEP filed complaints with the Board alleging a violation of the section 45 statutory freeze provisions of the *Labour Relations Act* and naming HMDC and a number of contractors working on the Hibernia Platform. Section 45 of the *Labour Relations Act* provides that where an employer receives written notice of an application for certification from the Board, they shall not, without the consent of the Board, alter rates of wages or other term or condition of employment of the affected employees until the application has been granted, refused or withdrawn. This is commonly referred to as a statutory freeze.

The original complaint of the FFAW named three respondent employers: AOC Brown & Root Canada Ltd. (ABC), V.B. Offshore Management Accommodations Ltd. (V.B. Offshore), and Crosbie Salamis Ltd. (Crosbie Salamis). That complaint was subsequently amended, by Application received by the Board on April 6, 2000, to include HMDC. ABC, V.B. Offshore and Crosbie Salamis (collectively referred to as the "Contractors") all employed individuals working on the Hibernia Platform but none of them were served with the Applications for Certification. The Contractors argued that as they had not been served with the applications for certification, the section 45 statutory freeze provisions did not apply to them.

In considering whether the Contractors were subject to the section 45 statutory freeze provisions, the Board made reference to section 38.1 of the Act, an amendment specifically designed for offshore petroleum production platforms:

> 38.1(1) Where the Board received an application with respect to employees employed on an offshore petroleum production platform, the unit appropriate for collective bargaining is the unit comprising all of the employees employed on the platform except those employees the Board determined are employed in construction and startup on the platform.
>
> (2) Where the Board receives an application for certification with respect to employees employed on an offshore petroleum platform in relation to construction and startup on the platform, the Board shall deal with the application in accordance with section 38.
>
> (3) For purposes of an application for certification with respect to employees employed on an offshore petroleum production platform, the licensed operator of the platform shall be considered to be the employer for the purpose of the Board's consideration of the application.[36]

The Board noted that this amendment to the legislation was rooted in the Cooper Report and enacted after considerable discussion and consultations with interested parties. The Board, in its decision dated December 20, 2000, found:

> The result is the licensed operator of an offshore oil production platform is the employer for purposes of a certification application and in this case this is HMDC.[37]

The Board went on to state:

> The only employer named in either of the aforementioned certification applications is HMDC and indeed, is the only entity that could be. The question therefore arises is how would (the "Board") know about the defacto employer companies at the time of the application since only HMDC is named and only they are required to reply. Surely, the "employer" by legislation has the full mantle of an employer for purposes of (the "Act").
>
> The only logical conclusion is that section 38.1 of the legislation encompasses things that are necessarily ancillary to or naturally derived from the certification application. Section 45 is part and parcel of the application process. If the respondents are correct, then at the time of the application

36. *Labour Relations Act*, *supra* note 8, s. 38.1.

37. *Communications, Energy, and Paperworks Union of Canada, Local 97 et al. v. Hibernia Management and Development Company Ltd. et al.*, [2000] Nfld. L.R.B.D. No. 16 at para. 7 (NLLRB).

> the Board should have determined who the companies were that would be affected by the application and then given them notice in case a Section 45 Complaint should arise even though only the respondent i.e., the operator may file a reply to the certification application. We don't think this is an accurate interpretation of (the "Act") or the Rules. Neither Section 38.1 nor Section 45 contemplate more than one employer, they speak only of one employer and HMDC by legislation is it.
>
> HMDC has taken the responsibility of employer for applications for certification and matters implicit thereto and if there is an adverse ruling with regards to any of the layoffs then HMDC will have to square same with the immediate employers.[38]

As a result, the section 45 complaint against the Contractors was dismissed.

With respect to the applications for certification by the FFAW and CEP, the issues addressed by the Board in its Decision of March 30, 2001 were:

1. What is the meaning of being employed in "construction and startup" on a platform within the meaning of Section 38.1 and which of the disputed employees, if any, are excluded because they are employed in construction and start up?

2. What is the meaning of "employed on the platform" within the meaning of Section 38.1 and which of the disputed employees, if any, are excluded because they are not employed on the platform?

3. Which of the disputed employees, if any, are excluded because they are not "employees" as defined in Section 2(1)(m) of the Act for the reason that they exercise management functions or are employed in a confidential capacity in matters relating to labour relations?

4. How many of the employees in the bargaining unit have signed membership cards, and how many may be considered to support the application within the meaning of section 47 of the Act?

5. What is the procedure to follow in dealing with certification applications where two votes are taken and the proceedings are consolidated?

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38. *Ibid.* at para. 9-11.

6. What is the meaning and effect of the requirement of 40% support in Section 47(1) of the Act?

7. What is the appropriate order with respect to counting the ballots?

8. In the event that one or both applications are rejected, should the Board waive the six-month time bar for filing a subsequent certification application under section 18(1) of the Rules of Procedure of the Labour Relations Board?

9. Should there be any award of costs?[39]

1. *Meaning of "Construction and Startup"*

The *Labour Relations Act* for the Province of Newfoundland and Labrador specifically excludes from the bargaining unit any employees employed in "construction and startup" on the platform. There was disagreement among the parties regarding the meaning of this term.

The Board stated that:

> Section 38.1(1) of the Act provides for an all-inclusive bargaining unit of employees employed on the platform except for those employed in construction and startup. Without section 38.1(1), unions would be required to apply for certification of bargaining units of employees of each individual employer, and the description of the bargaining unit would be subject to review by the Labour Relations Board to determine whether the unit was appropriate for collective bargaining. Including contractors, there are 10 employers on the Hibernia Platform, with employees engaged in various distinct tasks on the Platform and the potential would exist without section 38.1 for multiple bargaining units on the platform. It is generally considered in the interests of labour peace to avoid fragmentation of bargaining units and it is preferable to have one or a small number of bargaining units rather than multiple bargaining units within an exercise. Having regard to the effect of section 38.1 on the application of other sections of the Act, it may be inferred that the intent of section 38.1(1) was to avoid multiple bargaining units on the platform. The intent of section 38.1 may also be determined by considering it within the context of all amendments to the *Labour Relations Act* set out in Stat-

39. *Fish, Food and Allied Workers Union et al. v. Hibernia Management Development and Company Limited*, [2001] Nfld. L.R.B.D. No. 3, 68 C.L.R.B.R. (2d) 161 at para. 12 (NLLRB).

utes of Newfoundland, 1997, c. 44 with respect to the offshore platform. The amendments also include a requirement in section 81.3 that the first collective agreement for the onshore platform be effective for a period of three years or longer and a requirement in section 100.2(1) that there be no strike or lockout until the parties to the collective agreement engage in procedures to ensure the orderly and safe shutdown and maintenance of the platform in the event of a strike or lockout. When these provisions are viewed in their entirety, there is an intent to reduce the possibility of disruption as a result of the labour dispute. In the Board's view, section 38.1(1) was intended to restrict the possibility that persons working on the platform could be members of a bargaining unit outside the platform-wide bargaining unit who would not subject to the provisions intended to avoid labour disruption such as sections 81.3 and 100.2 contained in Statutes of Newfoundland, 1997, c. 44. It is therefore appropriate to place an interpretation on section 38.1(1) that will avoid the possibility of multiple bargaining units on the platform. Although it is unnecessary to rely on the report to interpret the Act, the Board observes that its interpretation is consistent with the discussion of the appropriate bargaining unit in the report of Morgan Cooper, *Labour Relations Processes on Offshore Oil Production Platforms*, April 25, 1997.

The reference to construction on the platform may also be viewed in the context of the special project orders for the Bull Arm site and its extension to the offshore site. The existence of a special project order is consistent with an interpretation of construction that means the completion of the onshore construction project.

The meaning of construction may also be determined by reference to its placement in the phrase "construction and start up" in Section 38.1(1), 38.1(2) and 41.1(1) of the Act. The word "construction" is associated with the words "startup". There is no other reference in the Act to the "startup" and it would be appropriate to give those words their ordinary meaning within the industry. In this regard, the Board refers to the testimony of John Hanley with respect to the stages of the project which are design, construction, commissioning and startup. Those stages occur in that order with the construction stage normally completed prior to commissioning and startup. There is no suggestion that there were any persons employed in "startup". From the perspective of the stages of project development, the construction stage was completed upon completion of the ballasting and skirting work in 1997 following tow-out. The startup work was also completed prior to November, 1999 according to the testimony of John Hanley. Within the context of the words "construc-

> tion and startup", construction refers to the completion of the project to construct the platform, which was completed prior to November, 1999.[40]

The Board concluded that it would not be appropriate to interpret "construction and startup" in such a way as to create a situation where labour uncertainty and disruption would result from trying to distinguish groups of employees on the basis of which employees were employed in construction and which employees were not. The Board found that there were no persons employed in construction and startup on the platform in November 1999 within the meaning of section 38.1 of the Act and that none of the employees employed on the Hibernia Platform at the time of the application for certification would be excluded from the bargaining unit because they were employed in construction and startup on the platform.

2. *Meaning of "Employed on the Platform"*

The Board in its Decision dated March 30, 2001 considered what is meant by "employed on the platform" within the meaning of the Act. The Board considered the various classifications of employees working on the platform and their degree of attachment to the platform and interpreted "employees employed on the platform" to be those persons who are employed to work on the platform and have a significant attachment to the platform. The Board decided that it would review the number of days worked by each of the employees to determine which of those employees would have a significant attachment to the platform.

The Board found that employees working a regular three-week on, three-week off rotation were included within the bargaining unit. For those ad hoc employees who remained in dispute, the Board found it appropriate to review the record of the days worked on the platform within the period of ninety days prior to the date of the application for certification. The Board reasoned as follows:

> The Board has selected this time frame for the reason 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. An indication of significant attachment to the work force would be a number of days worked on the platform that would indicate more than one tour of duty within 90 days. Although the

40. *Ibid.* at para. 23-25.

> normal tour of duty is 21 days offshore, a review of the MAPS records indicates that several tours of duty have been 22 or 23 days on the platform, which is likely the result of weather or transportation problems. Within a period of 90 days, the maximum number of days that an employee could work offshore, given a 21-day rotation, would be 48 days. 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, and more than one tour of duty. One tour of duty within 90 days would not usually indicate a significant attachment. The Board has reviewed the records for each of the disputed ad hoc employees to determine whether they worked offshore for 24 or more days during the 90 days prior to the date of the application for certification.[41]

3. *Management Exclusions*

There were disputes between the parties with respect to several persons employed on the platform and whether or not they should be excluded from the bargaining unit as management. In considering the management exclusions, the Board made reference to the definition of "employee" as set out in section 2(1)(m) of the Act and several of its own decisions that have addressed the issue of management exclusions. The Board in approaching the issue of management exclusions stated as follows:

> Management functions are determined in part by examining an individual's duties and responsibilities to determine whether he or she exercises effective control and authority over the employee's supervised or whether he or she makes decisions or effective recommendations in areas that materially affect the economic lives of those employees. (See *Re Newfoundland (Treasury Board)* [1992] Nfld. L.R.B.D. No. 25, *Re Newfoundland Hospital and Nursing Home Association* [1992] Nfld. L.R.B.D. No. 18). The Board will also consider such factors as independence of decision-making in significant policy areas, management authority, and significant association with the management team. The Board will consider the organizational structure of the Employer and the proposed numbers of management and bargaining unit employees. The Board will also consider the extent to which the person does "hands on" work that would be considered bargaining unit work. With respect to decisions or effective recommendations in areas that materially affect the economic lives of employees, the Board will consider the following areas of responsibility: (1) Hiring, including participation in a selection committee and the extent of input into the decisions; (2) Discipline and discharge including the role

41. *Ibid.* at para. 33.

> played with respect to the various levels of disciplinary action including oral warning or counseling, written warning, suspension or discharge; (3) Evaluation of performance, including an examination of the consequences of the evaluation on salary increases, promotion, training opportunities and other advancement opportunities; (4) Leave requests, including the ability to authorize absence from work for sick leave, bereavement or family responsibility; (5) Promotion or transfer, including any involvement in a committee that recommends a decision; (6) Overtime authorization, including the authority to direct an employee to work outside the regular hours of work; (7) Directing the employees in the manner of performance of their duties; and (8) Assignment of job duties.
>
> The Board has considered these guiding principles with respect to the exercise of management functions and has also considered the extent to which any employee has been employed in a confidential capacity in matters relating to labour relations. A discussion of the various positions in dispute follows. HMDC proposes that all of these positions are included in the bargaining unit. The FFAW or the CEP or both propose the exclusion of these positions.[42]

Although beyond the specific scope of this paper, the Board went on to consider individual positions on the Hibernia Platform to determine whether they should be included or excluded from the proposed bargaining unit.

4. *The Decision*

The Board processed each application for certification as a separate application.

Section 47(1) of the Act deals with the taking of votes and ballots in the course of an application for certification and provides that:

> Where an application for certification is supported by not less than 40% of the employees in the unit to which the application relates, the Board shall take a vote of the employees in the unit to determine their wishes with respect to the certification of the applicant trade union as bargaining agent.[43]

The Board, in the course of considering the CEP and FFAW applica-

42. *Ibid.* at para. 42-43.
43. *Labour Relations Act*, *supra* note 8, s. 47(1).

tions for certification, was asked to determine the meaning and effect of the requirement of 40 percent support in Section 47(1) of the Act. After considering the legislation, the Board found that:

> It is therefore appropriate to find that the meaning of "40%" is in relation to support for the Union after the Board has determined the inclusions and exclusions from the unit in accordance with the Act. The Board does not have an opportunity to determine the inclusions and exclusions from the unit within the period of five days required to take the vote according to section 47(4) of the Act. Therefore, the procedure followed by the Board when having regard to section 47 as a whole, is to conduct the vote immediately and then to determine the inclusions and exclusions from the Act and to count the vote where the Union has demonstrated the support of 40% of employees in the unit as determined by the Board. The established practice by the Board is to determine if the applicant for certification has met the threshold requirement of 40% of the bargaining unit as determined by the Board. The unit, as determined by the Board, is the unit to which the application relates within the meaning of section 47(1). The practice followed by the Board is the practice the Board is required to follow by section 47. The Board will therefore examine the support for the FFAW in respect of the FFAW's application and process that application. The Board will follow the same process in respect of the CEP application.[44]

The Board examined the evidence of membership support for employees in the bargaining unit in respect of each application and processed the applications in the order in which they were received. By Order of the Board dated March 30, 2001, the Board found that following consideration of the Application, the representation of the interested parties and the evidence adduced at a hearing, it was determined that neither the CEP nor the FFAW had the support of more than 40 percent of the employees in the appropriate bargaining unit and therefore rejected both Applications for Certification.

On May 22, 2001, the Board received a third application for certification for employees working on the Hibernia Platform from Communications, Energy and Paperworkers Union of Canada, Local 60N (Local 60N). Following an investigation, consideration of the representations of the interested parties and a vote, the Board ordered on October 11, 2001 that Local 60N be certified to be the bargaining agent of all employees

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44. *Ibid.* at para. 74.

employed on the Hibernia Platform except those employees that the Board determines are employed in construction and start-up on the platform.

5. *Judicial Review*

HMDC has sought judicial review of the Board's decision in this case. The matter was heard by Chief Justice Greene (as he then was) of the Newfoundland and Labrador Supreme Court, Trial Division on November 18-19, 2001. At time of writing a decision had not been rendered.