NOVA SCOTIA COURT OF APPEAL
Citation: ***Egg Films Inc. v. Nova Scotia (Labour Board)***, 2014 NSCA 33

Date: 20140403
Docket: CA 416865
Registry: Halifax

Between:

Egg Films Incorporated

Appellant

v.

The Labour Board and the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories, and Canada, Local 849

Respondents

Judges:	Saunders, Fichaud and Bryson, JJ.A.
Appeal Heard:	December 9, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $3,000, per reasons for judgment of Fichaud, J.A., Saunders, J.A. concurring; Bryson, J.A., dissenting.
Counsel:	Jack Graham, Q.C. and Michael Murphy, for the appellant Ronald A. Pink, Q.C. and Andrew R. Nielsen, for the respondent IATSE, Local 849 Edward A. Gores, Q.C. for the respondent, Nova Scotia Labour Board

Reasons for Judgment of Fichaud, J.A. (Saunders, J.A. concurring):

[1] Egg Films produces television commercials and promotional films for corporate clients. It hires a crew of technicians for each project. The shoot usually takes a day. The Labour Board certified Local 849 as the bargaining agent for these technicians. The Board concluded that, despite their brief work span, the technicians were Egg Films' "employees" for the duration of their project under Part I of the *Trade Union Act* and a bargaining unit of the technicians' classifications was appropriate for collective bargaining. Egg Films sought judicial review in the Supreme Court of Nova Scotia. The judge held that the Board's decision was reasonable and dismissed the application. Egg Films appeals.

[2] The issues are whether the Board's conclusions - that these project specific technicians were "employees" and that a unit composed entirely by their classifications was appropriate for collective bargaining - are reasonable under the standard of review. The Court heard spirited argument about the application of the reasonableness standard.

1. Background

[3] The Labour Board conducted hearings over six days, with extensive testimony. On April 14, 2011, before the hearings, the Board wrote to the parties stating that the proceeding would not be recorded unless recording was requested by a party and, if requested, that party would be responsible for the transcript. As it turned out, there was no transcript. My recitation of facts draws from the Board's findings (Reasons for initial Interim Decision - 2012 NSLB 120, and Reasons for Decision II - 2012 NSLB 180), and the written exhibits. Unless I cite the Board's Decision II, my references are to the Board's initial Interim Decision.

[4] Egg Films creates commercial and corporate media productions. Its brochure summarizes its "Concept" and "Services":

> We approach the creative process differently than other production houses: We engage. Our experienced production team and international roster of award-winning directors tackle each project as a unique challenge.
>
> Another competitive advantage: We're a one-stop shop, covering everything from start to finish. We make it all happen, and we make sure it's all done right.
>
> …

> Egg is our production company, and at Egg, we produce original content destined for TV, Radio, and the Web (among other media), usually – but not only – for advertising.
>
> Our passionate and dedicated team handles every aspect of production from casting on through to "It's a wrap." Being a one-stop production house affords us the quality control we need in order to deliver uncompromised work, while affording our clients optimal cost-effectiveness.

[5] The Labour Board described Egg Films' operations in more detail:

> 4. The Respondent Egg Films styles itself as "Atlantic Canada's premier commercial and corporate production company". It's operations were described by Michael Hachey who is its CEO and Co-Executive Producer. The company was formed in the summer of 2003 and operates out of Halifax with a satellite office in Moncton. Egg Films produces television, radio and web advertising as well as corporate and web video. Egg Films has a sister company, with the same ownership and direction, called Hatch Post. Hatch Post was described as a "full-service post-production facility" which finalizes many Egg productions with film and video editing, 2-D and 3-D animation and sound design (including voice, music and effects). Hatch Post boasts that it is home to some of the best technical people in the country, and uses top-notch equipment which enables it to work with local and national clients through ftp file transfer and "digitally access talent from across North America and around the world". Egg's promotional brochure, under the heading "Casting and Talent", makes reference to an "in-house database of union and non-union talent", "talent payment services, union and non-union", and "access to ACTRA and UDA signatory services". Egg Productions, with Hatch Post appear to be on the cutting-edge in what they do, running head-to-head against competition from Toronto, and doing very well.
>
> 5. Although Mr. Hachey is familiar with the feature film industry, Egg Films does not engage in such productions. Nonetheless, it hires people for technical services who overlap with those in such movie productions. Movie or television feature filming involves projects which may run for weeks or months and employ large numbers of people. Egg Films / Hatch Post does projects where" the filming may last only a day. The Egg / Hatch operation has about 14 full time employees and hires others as required for particular projects. Egg Films may only do 10 to 15 shooting days per year, mostly to produce commercial advertising. Some of these projects may involve small crews of 3 to 5 people who are "multi-tasking", while others may need a dozen or so specialist technicians. …

[6] This application for certification emanated from Egg Films' shoot on March 5, 2011 of a commercial for the Atlantic Lottery Corporation. The Board (para 5)

said the project "involved the hiring of approximately 25 people, a significant number of whom were members of the Applicant Union".

[7] The Board described Egg Films' hiring process for the Atlantic Lottery project, starting with the staff who were outside Local 849's proposed bargaining unit:

> 6. … Once the contract for production was awarded to Egg, Mr. Hachey sought out a Line Producer (in this case a Mr. Mike Masters from Ontario) and a Director of Photography (Eric Yealland – who regularly works with Mr. Masters) to make the production a reality from a technical and artistic perspective. Mr. Hachey along with his business partner and co-producer, Sara Thomas (in consultation with the agency and the client), maintain the "vision of the production", while the contracted Line Producer and Director manage bringing the project to fruition on the set. The Line Producer normally hires a Production Manager, although in this instance a Mr. Craig Cameron was chosen, who regularly works with Hatch Post. The Production Co-ordinator, formally working under or with Mr. Masters, was nevertheless a regular full-time employee of Egg Films, Mr. Colin Davis. Similarly, the Assistant Director, presumably working in this instance under Mr. Yealland for the duration of the project, was Mr. Evan Kelly who is a full-time Egg Films employee and sometime photographic director in his own right. At any rate, Mr. Hachey and Ms. Thomas, along with Messrs. Masters, Yealland, Cameron, Davis and Kelly, (subject to possible further argument) might be seen as the managers, supervisors or foremen on this project for which the "shoot" began and ended on March 5, 2011.
>
> 7. In addition to the producer / director group described above, there were others on the "Crew Call" document for the March 5 shoot who do not fall within the group described in the Applicant Union's proposed bargaining unit. It was the job of Andrew Sheridan to scout out the location ahead of time, and make the arrangements with proprietor to allow the shoot to go ahead. While apparently present on the day to ensure things went smoothly as "Location Manager", he appears to have had no technical role in the shoot. The Art Director, Michael Pierson, supervises the "look" of the set and props, according to Mr. Hachey, which is a role which falls outside the technical bargaining unit group sought. There were three individuals connected to the "cameras" (all digital, no "film" required despite the Respondent's name): Patrick Doyle was the Camera Operator, while John Cochrane and Christina Milligan were assistant camera men who multi-tasked when required. It was the evidence of Mr. Dan Mahoney (about whom more below), that camera crews are normally in their own bargaining unit represented by a separate I.A.T.S.E. Local headquartered in Toronto. At any rate, these camera positions do not fall within the bargaining unit of technicians sought by the Applicant Union. Finally there were four

> "Production Assistants" or "P.A.'s": two formally assigned to the Art Department who helped make props (Melanie Wood and Maria DeRozari) and two, Mike Hall and Greg Richardson, who gave general, multi-tasking assistance. These four individuals were Nova Scotia Community College students, on set to learn the practical side of the industry, who were paid considerably lesser wages than the established technicians in the proposed bargaining unit. These four all billed the Respondent on an Egg Films invoice form.

[8] The Board turned to Egg Films' hiring of the technicians who occupied Local 849's proposed unit:

> 8. The remaining technical crew were people hired to do jobs with the somewhat whimsical names which one sees on film credits at the end of a movie in a cinema. On the electrical side, Ken LeBlanc, the "Gaffer", was in technical charge of the lighting. He did two half days of preparation in addition to working the day of the shoot. He submitted an invoice on the standard form prepared by Egg Films, and did not charge Harmonized Sales Tax or "HST". Mr. LeBlanc was assisted by Jess MacGillivray, the "Best Boy Electric". He too used the Egg Films invoice with no HST but in addition to his daily rate, billed a modest amount for the rental of his truck for the day. The electrical equipment which they used appears to have been largely rented or provided by Egg Films. Ross Sangster was engaged as the "Key Grip", in charge of setting up the light scaffolding, physically placing cameras and moving props and items around the set. He was assisted by Keith Adams, the "Best Boy Grip". Mr. Sangster was paid by the day (including a day's preparation) and brought some of his own tools and equipment or "kit". For this he billed on the standard Egg invoice and charged HST. Mr. Adams, who also used the Egg invoice, and charged for a day, did not charge for any "kit", nor did he charge HST. John Gallagher was hired as a "Swing". This meant he assisted both the Gaffer and the Key Grip. He too used the Egg invoice but did not charge HST.
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> 9. Mr. Gary Mitchell, who has been a member of I.A.T.S.E. for years and is in his first year as President of Local 849, the Applicant Union, gave evidence [at] the hearing. He was at the shoot on March 5, 2011 as the operator of the generator truck parked outside the hotel which provided power to the filming activity inside. In the language of the trade, he was referred to as the "Genny Op". Mr. Mitchell says he was called for the job by Mr. Cameron the Production Manager with whom Mr. Mitchell confirmed his daily rate of pay. His first task on the day of the shoot was to go to the premises of a local equipment rental company to pick up the Generator Truck, with electrical and other gear (including lights) on board, which had been rented by Egg Films. When he arrived at the hotel, the truck was unloaded by the Gaffer, Key Grip and their assistants, along with help from Mr. Mitchell. The latter

then "grounded" the truck, ran the cables in to the set location, and got the electrical system going. He also assisted the Gaffer with setting up exterior lights which apparently shone through a window to the pool or "spa" area. While Mr. Mitchell might go into the set area from time to time and assist with odd matters there, his primary role was to monitor the effective and safe operation of the generator truck outside. Mr. Mitchell used the Egg Film invoice to bill for his work, and claimed no "kit" charges or HST.

10. Mr. Zane Knisely was in charge of making or procuring props, under the supervision of the Art Director, and presumably with the assistance of the student Art Department Production assistants, mentioned above, Melanie Wood and Maria DeRozari. Mr. Knisely, as "Props Master", invoiced Egg on its standard form for a significant "flat fee" with an "extra" item, but charged no HST. The audio recording and mixing was handled by Zan Rosborough. Mr. Rosborough brought his own equipment, including a mixing board. Unlike others mentioned so far, Mr. Rosborough invoiced Egg Productions on his own "Zander Productions" letterhead, charging a flat rate for the one [day] of recording plus a flat rate for the rental of his audio gear. He also charged HST. The visual (i.e. camera) and the audio recordings, are of course, all made in digital electronic formats. Mr. Cam Erais was on set as the "DMT / VTR" technician. His job, in the words of Mr. Hachey, was to "manipulate the digital stuff" and provide "playbacks" in order to ensure that the shoot was going properly, capturing appropriate digital "footage". Mr. Erais used the Egg invoice to charge for half a day of preparation plus the day of the shoot at flat rates, without HST.

11. Also on site the day of the shoot was Ms. Martha Curry who was listed as "wardrobe" on the Crew Call sheet, and described by Mr. Hachey as their "Wardrobe Stylist". She was given a budget by Egg to shop for wardrobe or costume elements, though she might ask actors to use some of their own clothes or actually make some items herself. Mr. Hachey says "she has her own equipment – tailoring stuff". Ms. Curry used a standard Egg invoice to bill for "2 days prep / wrap" and "1 ½ days shooting" under the name of "Village Road Productions". She charged HST. Also at the shoot, not surprisingly, was an "H/M/U" person; in other words Ms. Cathy O'Connell was there as the "hair and make-up" artist. She billed a flat daily rate plus an amount for "kit rental" on the Egg Films invoice, but charged no HST. Last, but by no means least, was Jenny Reeves, who provided "craft". This is the somewhat idiosyncratic label given in the film industry to what one might otherwise describe as "snacks". However, it appears that regular breaks and enticing "craft" are thought critical, by all involved, to the maintenance of harmonious morale on set. Ms. Reeves billed her "craft service day rate" for one day of preparation plus the day of the shoot with the addition of "kit rental" (platters, etc.). This was done on her "Two Black Sheep Catering" stationery, where she also added an amount for HST. To provide context, it may be helpful to note that "craft" does not necessarily seem to include full

> meals. In this instance, meals were provided by the hotel and paid for by Egg Films directly. As a final matter, in relation to all of the above technicians, it was Mr. Hachey's view that Egg Films, in order to get the best people, generally "pays above union rates".

[9] The Respondent Local 849 is the Atlantic Canadian Local of The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada ("IATSE"). IATSE represents technical workers in the entertainment industry, including film, television, commercials and live entertainment.

[10] The Board summarized IATSE's background and the nature of collective bargaining in this industry:

> 12. … However, evidence was heard from Mr. Dan Mahoney about the structure and operation of I.A.T.S.E. which was relevant to the issue of the kind of people normally represented by the union and thus the rationale, from the Applicant Union's perspective, of the appropriateness of the bargaining unit for which it has applied. His evidence was also relevant on the "nature of the industry". Mr. Mahoney is an International Representative and Assistant Division Director of the Motion Picture and Television Production Division of I.A.T.S.E. at its headquarters office in New York City. Mr. Mahoney stated that his role, working along side local business agents of I.A.T.S.E., is to supervise negotiations and administration of collective agreements throughout the United States and Canada. Mr. Mahoney stated that he has worked for 36 years in the "film, television and commercial industry" broadly speaking (starting as a Grip and then the Key Grip), including 15 years with the union N.A.B.E.T., (presumably in the television sector) and for the last 16 years with I.A.T.S.E. Mr. Mahoney stated that I.A.T.S.E. has a North American membership of 115,000 people in some 400 different locals. While Mr. Mahoney stated he has worked in "the industry" around the world, he admitted in cross-examination that he has only worked "in-the-trade" (as a production assistant) in Canada on one occasion – that was with an American production in British Columbia. He said he has never worked "in-the-trade" in Ontario or the Atlantic Provinces; however, he stated that he has advised Canadian I.A.T.S.E. locals as an "International Representative" for the union.
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> 13. It was the evidence of Mr. Mahoney, reinforced in some instances by labour board jurisprudence from various Canadian jurisdictions, that I.A.T.S.E. has traditionally established different locals throughout North America primarily for two types of settings: live performance, on the one hand, and film, on the other. Thus, in Nova Scotia, Local 849 of I.A.T.S.E., the present Applicant, has frequently obtained voluntary recognition agreements in a relatively standard form (though with a schedule of local variances) from production

companies doing feature films and television series here. This information was confirmed by Mr. Mitchell. In addition, I.A.T.S.E. Local 680 operates in Nova Scotia for live performance stage technicians at both permanent and temporary locations: see the certification decision from this Board in I.A.T.S.E. Local 680 and *Power Promotional Events Inc. (Power Promotional)* 2011 NSLRB 47 (LRB No. 6371) (S. Ashley, Vice-Chair). However, Mr. Mahoney also testified that, in the United States since 1996, I.A.T.S.E. Locals have been negotiating special agreements with producers of commercial advertising, either on an individual basis or through a sector agreement negotiated with the "Association of Independent Commercial Producers" (A.I.C.P.), on behalf of its members. Mr. Mahoney provided a draft copy of the "2007 Commercial Production Agreement and Northeast Corridor Appendix – I.A.T.S.E. – A.I.C.P." for the Board's edification. While its details are not necessarily pertinent to this proceeding, it does indicate that I.A.T.S.E. purports to represent film technicians involved in producing commercial advertizing over wide geographical areas in much of the United States. I.A.T.S.E., to date, appears to have signed no such commercial production agreements in Canada.

14. Mr. Mahoney testified, after having sat through the evidence of Mr. Hachey, that the kind of "commercial shoot" which the latter described is virtually identical to the commercial shoots in the United States which are covered by the "Commercial Production Agreement" there. However, it was Mr. Mahoney's evidence that the technician classifications and work done by I.A.T.S.E. members on commercial shoots is the same as that done in feature films for the cinema, or documentaries and features for television, etc. This point was also made by Mr. Mitchell who provided a recently signed collective agreement between I.A.T.S.E. Local 849 and "Furniture Productions Limited" which related to the production in Nova Scotia of a film then titled "The Guys Who Made Furniture". A quick perusal of this agreement in comparison with the 2007 Commercial Production Agreement reveals lists of technical job classifications which have much in common. Costume designer, craft service, key grip, gaffer, hair stylist, make-up artist, property master, sound mixer, VTR-Video or playback operator, etc. all appear in both agreements. There are also differences, however. For instance the American Commercial Production agreement contains reference to "director of photography" and "camera operators" who are not found in the Local 849 agreement, perhaps because such persons, in Canada, have their own special local operating out of Toronto, but covering much of the country, including the Atlantic Provinces.

[11] Typically, in Egg Films' projects, many or most of its technicians belong to Local 849. These workers perform the same job functions for Egg Films as they would for a project with another employer, though a feature film or television program would involve a longer work span. Their work for other employers is

governed by collective agreements. But, at Egg Films, these technical workers' functions were not subject to collective bargaining.

[12] Local 849 decided to challenge this pattern.

[13] On March 5, 2011, coincident with Egg Films' Atlantic Lottery shoot, Local 849 applied for certification for a unit of:

> All Motion Picture Technicians in the employ of Egg Films, Inc., including Best Boy Grips, Costume Designers, Lighting Technicians, Props Assistants, Gaffers, Best Boys Lighting, Generator Operators, Key Make-ups, Props Masters, and Key Grips, in the Province of Nova Scotia, except Producers and those above the rank of Producer, Foremen and those above the rank of Foremen, and those excluded by Section 1(2) of the *Trade Union Act*.

[14] Local 849 applied for certification under s. 23 in Part I of the *Trade Union Act*, R.S.N.S. 1989, c. 475, as amended, originally enacted as S.N.S. 1972, c. 19. Later, while discussing the history of the legislation, I will refer to this statute as the "*1972 Act*" (below, paras 59 ff.).

[15] The Board received the application, served it on Egg Films, and set March 16, 2011 as the voting day. The vote was taken on March 16, and the ballot box was sealed until the Board heard the evidence and submissions on whether the technicians were "employees" and the proposed unit was appropriate.

[16] The Board held its initial hearing on July 5, 6 and 7, 2011. Presiding was the Board's Vice-Chair, Bruce Archibald, with two Members, George Fox and Larry Wark. Michael Hachey, Egg Films' CEO, testified for Egg Films. Gary Mitchell, Local 849's President, and Dan Mahoney, an International Representative of IATSE, testified for Local 849. On October 6, 2011, the Board issued an Interim Order (2011 NSLB 98) stating:

> 1. That Motion Picture Technicians engaged by Egg Films Inc. on March 5, 2011 are employees for purposes of Section 2(1)(k) of the *Trade Union Act* ("Act") given their non-self-dependent status as workers;
> 2. That the bargaining unit applied for by the Union is a unit appropriate for collective bargaining pursuant to Section 25(14) of the *Act*;

The Order retained jurisdiction to resolve any dispute about the "ins and outs" of particular employees in the unit.

[17] On April 3, 2012, the Board issued its written reasons (2012 NSLB 120) for its Interim Order of October 6, 2011. The judicial review focuses primarily on these reasons.

[18] Egg Films and Local 849 couldn't agree on the unit's "ins and outs". So, on July 3, 4 and 6, 2012, the Board conducted a further hearing on that matter. Mr. Hachey and Ms. Sara Thomas, Egg Films' President, testified for Egg Films. David Rumley, Business Representative of IATSE, Local 667 and Tim Storey, Business Agent of the Directors' Guild of Canada, testified for Local 849. On September 20, 2012, the Board issued its Decision II (2012 NSLB 180), followed by its Final Order of October 1, 2012.

[19] The Board excluded from the unit (i) management and supervisory employees, as directed by s. 2(2)(a) of the *Trade Union Act*, (ii) full or regular part-time employees, so the unit would comprise only project specific or occasional employees, and (iii) employees who better suited existing bargaining units – *i.e.* "creative and production" workers, as the Board described them, represented by the Directors' Guild of Canada; actors or "talent" represented by ACTRA; and camera operators, who had their own cinematographers' unit represented by IATSE, Local 667 [Interim Decision II, paras 41-45]. This left for Local 849 a unit of classifications, to be filled by individuals who would be employed for a project, then laid off. The Board's Decision II identified these individuals and their occupations:

> [46] This leaves from the "crew list" the following people: Ken LeBlanc, Gaffer; Jess MacGillivray, Best Boy Electric; Ross Sangster, Key Grip; Keith Adams, Best Boy Grip; John Gallagher, Swing; Gary Mitchell, Genny Op; Zane Knisely, Props; Zan Rosborough, Sound; Jenny Reeves, Craft; Martha Curry, Wardrobe; and Cathy O'Connell, Hair and Make Up. These people were all correctly categorized by Ms. Thomas as falling within the IATSE Local 849 category. These eleven technicians were in the unit sought by the Applicant Union and properly constitute the Bargaining Unit for the purpose of the vote.

The Board's Final Order defined the unit by classifications:

> Effective September 27, 2012 the Labour Board certifies … Local 849 as the Bargaining Agent for a bargaining unit consisting of:
>
> All Motion Picture Technicians employed on a casual basis (not full-time nor regular part-time) by Egg Films Inc., including Best Boy Grips, Costume Designers, Lighting Technicians, Props Assistants, Gaffers, Best Boys Lighting,

> Generator Operators, Key Make-ups, Props Masters, and Key Grips, in the Province of Nova Scotia, except Producers and those above the rank of Producer, Foremen and those above the rank of Foremen, and those excluded by Section 2(2) of the *Trade Union Act*.

[20] Egg Films applied for judicial review on May 11, 2012, and amended its Notice on October 22, 2012. Justice Pickup heard the application on March 6, 2013, and issued a decision on April 17, 2013 (2013 NSSC 123). The judge concluded that the Board's decision satisfied the reasonableness standard of review, and dismissed Egg Films' application.

[21] Egg Films appealed to the Court of Appeal.

2. Issues

[22] Egg Films' factum to the Court of Appeal submits that the judge erred because the Board unreasonably concluded that (1) the technical workers were "employees" under s. 2(1)(k) of the *Trade Union Act*, and (2) the bargaining unit composed by their classifications was "appropriate" for collective bargaining under ss. 25(4) and (14) of the *Act*.

3. Standard of Review – Reasonableness

[23] The parties agree that the standard is reasonableness.

[24] The Court first determines whether the jurisprudence has established a standard: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para 62. This Court has said that reasonableness governs judicial review of the Labour Board's exercise of its core functions under the *Trade Union Act*, such as determining who is an "employee" for a certification application and whether a unit is appropriate for collective bargaining: *International Union of Operating Engineers, Local 721 v. Granite Environmental Inc.*, 2005 NSCA 141, para 22; *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Ltd.*, 2009 NSCA 60, para 21; *Casino Nova Scotia/Casino Nouvelle Ecosse v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, paras 24-28; *Cape Breton Island Building & Construction Trades Council v. Nova Scotia Power Inc.*, 2012 NSCA 111, para 36. That conclusion derives from an analysis of all *Dunsmuir*'s factors, not the least of which is the strong privative intent expressed in s. 19(1) of the *Trade Union Act*:

> 19(1) If in any proceeding before the Board a question arises under this Act as to whether
>
> (a) a person is an employer or employee;
>
> …
>
> (g) a group of employees is a unit appropriate for collective bargaining;
>
> (h) an employee belongs to a craft or group exercising technical skills;
>
> …
>
> the Board shall decide the question and the decision or order of the Board is final and conclusive and not open to question, or review, but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act.

[25] I will apply reasonableness to the issues in this appeal.

[26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11-17. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, paras 20, 31-41. *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, para 46.

[27] At the appeal hearing, counsel articulated forceful submissions on the mechanics of reasonableness. Egg Films' factum summarized its position:

> 16. … while courts tend to show deference to the decisions reached by Labour Boards, it's important to note that the reasonableness standard does not allow for the application of more than one degree of deference. … The deference owed to the Labour Board is the same as the deference owed to any other adjudicator who attracts the reasonableness standard of review. That being said, courts have found

> that the nature of the question under review may indicate whether the range of possible outcomes is wide or narrow.
>
> …
>
> 19. … While it's indisputable that a reasonableness review does not contemplate a "line-by-line treasure hunt for error", reviewing courts are not restricted from "zooming in" where necessary, nor should the reasonableness review be reduced to a simple "tracking" exercise meant to ensure that an adjudicator's reasons are internally consistent with their conclusions. Such a tautological approach amounts to reasoning in a vacuum, with no attention given to the overarching context in which a decision is made.
>
> 20. … The Appellant respectfully submits that if the Board's decision, however well-written, reaches a conclusion that is not "legally possible" or "legally permissible", it does not matter that the outcome can be said to "flow logically" from the reasons, or that the Board's reasons can be "tracked". …

[28] I'll comment on three of these points.

(a) No Spectrum of Standards

[29] As to degrees of deference - since *Dunsmuir* there is only one deferential standard. In *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para 59, Justice Binnie for the majority said "[r]easonableness is a single standard that takes its colour from the context". "Colour from the context" in my view means that, when statutory authority is in issue, the application of this single standard involves analysis of each statute's unique text, context, scheme and objectives that may widen or narrow the range of reasonable outcomes.

(b) Attention to Board's Reasons

[30] Next, the judge's "treasure hunting", "zooming in", or "tracking" of the Board's reasons. Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan, supra*, at paras 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras 11-17.

[31] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, Justice Abella for the majority reiterated:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. …

(c) Statutory Interpretation

[32] Last is what Egg Films' factum terms the "tautological … vacuum" of introspective review. Nobody suggests that the reviewing judge should just ponder the internal circuitry of the tribunal's reasons, and disregard the statutory environment. To determine whether the tribunal unreasonably exercised its statutory authority, the reviewing judge tests the connection between the tribunal's conclusion and the statute's plain wording or ordinary meaning, context or scheme, and objectives, channelled under the accepted principles of legislative interpretation. While doing this, however, the judge doesn't drift into correctness review – *i.e.* the judge remains attentive to the range of reasonable interpretations, instead of focussing on the judge's preference among them. The following authorities explain.

[33] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, Justices LeBel and Cromwell for the Court, analyzed the context and purpose of the pertinent legislation, then affirmed the quashing of a Human Rights Tribunal's costs award because:

> [64] … Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretive process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. …

[34] Similarly, in *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, the Court overturned as unreasonable the federal Minister of Public Works and Government Services' approved valuation of the Halifax Citadel Historic Site. The valuation was for the calculation of federal payments to the City of Halifax in lieu of municipal taxes, under the *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13. The Minister had approved a nominal valuation of $10 for 42 acres in downtown Halifax. Justice Cromwell said:

> [47] It is unreasonable, first, because the manner in which the Minister formulated his opinion was inconsistent with his obligation to form an opinion about the value that would be established by an assessment authority. Not only did the Minister not adopt the approach which the relevant assessment authority actually *would* apply to value the property, but he also had evidence before him, apparently not contradicted, that *other Canadian assessment authorities would not value the property* in the way he did. And there was *no evidence that any assessment authority would do so*. On that record, the Minister's opinion is in my view unreasonable. The Minister's opinion is also unreasonable on a second ground: by adopting the view that a national historic site is valueless because it cannot be used for commercial activities, the Minister defeated Parliament's purpose in including national historic sites within the PILT [payments in lieu of taxes] scheme. … [Justice Cromwell's italics]

On the second ground, Justice Cromwell elaborated:

> [51] As discussed in more detail earlier, the stated purpose of the Act is "to provide for the fair and equitable administration of payments in lieu of taxes": s. 2.1. …
>
> [52] The Minister's conclusion is fundamentally at odds with this scheme. At the core of his reasoning, it may be inferred, is the proposition that land which, by virtue of its historic site designation, has no development value has only nominal value for PILT purposes. ... [quoting the Federal Government's appraiser to this effect]
>
> [53] This reasoning, in my respectful view, is inconsistent with the Act's inclusion of national historic sites within the types of federal property eligible for PILTs under the Act, and with the overall purpose of the Act to deal equitably and fairly with Canadian municipalities in relation to payments in lieu of property taxation.

[35] Recently, in *McLean v. British Columbia*, *supra*, the Court offered a framework of how that exercise of statutory interpretation folds into the deference mandated by reasonableness review. The provincial Securities Commission held that the limitation period for proceedings on a settlement agreement began from the settlement agreement, not from the earlier underlying misconduct that had generated the settlement agreement. The Supreme Court upheld the Commission's interpretation as reasonable. Justice Moldaver for the majority (paras 42-70) reviewed the ordinary meaning, drafting history, context and purpose of the legislation in question. Earlier, he said:

> [20] Before turning to my analysis, I pause to note that the standard of review debate is one that generates strong opinions on all sides, especially in the recent jurisprudence of this Court. However, the analysis that follows is based on this

Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.

…

[31] … The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work" [citations omitted].

[32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations (*Dunsmuir*, at para 47; see also *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405). Indeed, that is the case here, as I will explain in a moment. The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*

[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. This 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".

…

[37] For the reasons that follow, I conclude that both interpretations are reasonable. Here, the statutory language is less than crystal clear. Or, as Professor Willis once put it, "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" [citations omitted]

[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 will necessarily be unreasonable – no degree of deference can justify its acceptance; see *e.g.*, *Dunsmuir*, at para 75; *Mowat* [*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471], at para 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para 4) will necessarily be limited to a single reasonable interpretation – and the administrative decision maker must adopt it.

[39] But, as I say, this is not one of those clear cases. As between the two possible interpretations put forward with respect to the meaning of s. 159 as it applies to s. 161(6)(d), both find some support in the text, context, and purpose of the statute. In a word, both interpretations are *reasonable*. The litmus test, of

> course, is that if the Commission had adopted the other interpretation – that is, if the Commission had agreed with the appellant – I am hard-pressed to conclude that we would have rejected its decision as unreasonable.
>
> [40] The bottom line here, then, is that the Commission holds the interpretive upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim* [*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557], at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.
>
> [41] Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review – even in the face of a competing reasonable interpretation.
>
> [Justice Moldaver's italics]

(d) Summary

[36] I don't read either party's submissions as taking issue with these principles. Here the crucible is the breadth or narrowness of the range of outcomes that are reasonably permitted by the plain meaning of the *Trade Union Act*'s words, its context or scheme, and its legislative objectives.

4. First Issue – Are the Technicians "Employees"?

[37] On March 5, 2011, Egg Films' technical crew worked on the Atlantic Lottery shoot. The next day, they moved on to projects for other producers or to unemployment. Likely they would return to Egg Films for some future project. If not them, then other technicians with like skills would crew Egg Films' next shoot. Everyone knew this. But, as of March 6, there was no ongoing contract that obligated Egg Films to rehire any individual technician. Are such project specific workers "employees" under the *Trade Union Act*?

[38] I'll follow the Board's analysis through the plain meaning, context or scheme and drafting history, and objectives of the *Act*.

(a) Plain Meaning

[39] Section 2(1)(k) defines "employee":

> 2(1) In this Act,
>
> …
>
> (k) "employee" means *a person employed to do skilled or unskilled manual, clerical or technical work* and includes
>
> > (i) police constables or officers employed by a city, town, municipality or village commission, or by a board, commission or agency of, or a corporation controlled by, a city, town, municipality or village commission,
> >
> > (ii) a person employed or engaged on fishing vessels of all types or in the operation of these vessels on water, if he is paid wages or salary or accepts or agrees to accept a percentage or other part of the proceeds of the adventure or of the catch in lieu of or in addition to wage;
>
> [Italics added]

[40] The Board said, of s. 2(1)(k):

> 50. … Defining "employee" in significant part by saying it means "a person employed …" is notoriously circular and unhelpful. Nor does one receive great assistance in sorting out employees from independent contractors by reading section 2(1)(l) of the Act, which says "employer" means "any person who employs more than one employee".

[41] Literally, s. 2(1)(k), coupled with s. 19(1)(a) [quoted above, para 24], gives the Board wide, almost question-begging, discretion to define "employee" in a manner that conforms to the *Trade Union Act*'s context, scheme and legislative objectives. Egg Films' factum acknowledges this, then moves to the *Act*'s context and scheme:

> 43. The Appellant submits that when the definition of "employee" in s. 2(1)(k) is read on its own, and divorced from its statutory scheme/context, the wording is likely wide enough to include just about anyone who provides a service to another. However, when this definition is considered against the backdrop of the entire Act, it becomes clear that no reasonable interpretation could find that people hired to work for a single day can be "employees".

(b) Context/Scheme and Objectives – The Board's Approach

[42] The Board's reasons joined the *Trade Union Act*'s context or scheme and legislative objectives in a fluid analysis.

[43] Starting with the constitutional context, the Board (para 42) quoted from the Supreme Court's decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, para 19:

> … We conclude that s. 2(*d*) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(*d*) of the *Charter*: …

In *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, paras 45-47, the Chief Justice and Justice LeBel for the majority reiterated these points, but disagreed with the Ontario Court of Appeal's view that s. 2(d) guaranteed a *Wagner Act* model of collective bargaining.

[44] The Board then cited *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395. In *Doré*, Justice Abella for the Court said:

> [24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values [citations omitted]. …

[45] The Board (para 42) interpreted the Supreme Court's rulings:

> … The Board can only infer that the Supreme Court of Canada was strongly reinforcing the notion that labour relations tribunals must be careful to ensure that in interpreting their constitutive statutes, they engage in a purposive interpretational approach which is consonant with the *Charter* values of freedom of association in *Charter* section 2(d) and upholds at least the minimal core of collective bargaining rights deemed to be protected by the reasoning in *B.C. Health*. … This is clearly a delicate exercise which requires due care and attention to upholding key principles of the right to collective bargaining, while not over-shooting the mark as the Ontario Court of Appeal was seen to have done in the *Fraser* case.

[46] For guidance on legislative purpose, the Board cited the *Trade Union Act*'s Preamble, added by S.N.S. 2010, c. 37, s. 136:

> WHEREAS the Government of Nova Scotia is committed to the development and maintenance of *labour legislation and policy designed for* the promotion of common well-being through *the encouragement of free collective bargaining* and the constructive settlement of disputes;
>
> AND WHEREAS Nova Scotia employees, labour organizations and employers recognize and support freedom of association and free collective bargaining as the bases of effective labour relations for the determination of good working conditions and sound labour-management relations in the public and private sectors of Nova Scotia;
>
> AND WHEREAS the Government of Nova Scotia desires to continue, and extend, its support to labour and management in their co-operative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good labour relations to be in the best interests of Nova Scotia:
>
> [Italics added]

[47] The Board (para 43) noted the Preamble's first recital that the *Act* is "designed for the promotion of common well-being through the encouragement of free collective bargaining …". The Board returned to this later.

[48] The Board considered the legal test of "employment" from many perspectives. The Board (para 18) cited a list of points that addressed the Ontario Labour Relations Board's principles in *L.I.U.N.A., Local 183 v. York Condominium Corporation*, [1977] O.L.R.B. Rep. 645 "which has often been cited by this Board in sorting out conflicting claims on the question of 'employees v. independent contractors' ". The Board (para 50) turned to the definition of employee in the common law of master and servant from *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161 (P.C.), page 169 and Lord Wright's fourfold test of control, ownership of the tools, chance of profit and risk of loss. The Board (para 50) cited scholarly authority that these four factors "boil down to two questions: (1) whether the worker is controlled by the employer/client: and (2) whether the worker is economically independent". The Board (para 51) then quoted *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, where the Supreme Court spoke of "subordination" and "integration into the business" stemming from a list of non-exhaustive factors. As I will discuss, for its ultimate ruling the Board addressed a mixture of these various criteria.

[49] The Board found (para 52) that the " 'new economy' of flexible work forms and variable employment arrangements", is "far more complex" than the traditional "dichotomy between 'employees' and 'independent contractors' ". The Board said "the reality on the ground" is that employment arrangements now comprise a "continuum of legal arrangements" that reflects varying degrees of sporadic or enduring connections between workers and the workplace. This meant that the "employment" status of workers on the continuum turns on a textured analysis instead of a bright line rule:

> 54. … as with much precarious employment in the so-called "new economy", workers with particular skills may be unable to gain full-time or even regular part-time work with a single employer needing her or his particular skills in a given industrial context. In some industries, serial, or even concurrent employment with a number of employers may be the norm. Thus, while these workers are not really "self employed" or "independent contractors", they are not "self-dependent" either; rather, they are *dependent* [Board's italics] on a number of employers in an industry. This may be a *wide-spread* [Board's italics] phenomenon in the "new", or at least "current", economy, but it is not a new phenomenon. It has been the case for generations in the construction industry. While some craft persons or trade workers in construction may be fortunate enough to have long-term and perhaps full-time, or at least regular part-time, employment, many move from project to project not with the same, but rather a series of different employers. These people can be "obvious" employees, or may be dependent or not self-dependent workers whose status requires analysis going beyond mere appearances in order to determine whether they are employees for the purposes of the *Act*. Despite "sporadic" employment, when they are working for a given employer, they may, according to the particular circumstances of the case, be seen as employees of that employer for the purposes of the *Act*. Thus, "non-self-dependent" personal workers can be "employees" where the facts of a particular case so warrant. …

[50] The Board found that Egg Films' technicians were "non-self-dependent" occupants of this continuum:

> 55. This brings us to one of the Respondent's important arguments. Egg Films says that Mr. Mitchell, or any of the other technicians employed on March 5, 2011, gains only a small portion of their income from Egg Films, and may or may not have a continuing association with Egg Films in the future. It is indeed clear that Mr. Mitchell gains far more of his income as a Genny Op [operator of the generator truck that powers the filming operations] from firms other than Egg Films. However, it is also clear that he is dependent on firms in the film and/or commercial production industry for his livelihood.

> He is not self-dependent, but is rather dependent on an industry, of which Egg Films is a part, which regularly hire "Genny Ops". He is hired to do his work in the industry because of his personal skills and ability, but he is not dependent solely on Egg Films. This, of course, is exactly the same situation as skilled trades persons in the construction industry. The recognized union representing a particular trade in the construction industry can obtain certification for the relevant employees working for an employer in the construction industry if it represents the majority of the employees working on site in that trade on the day when it applies. This is the case under current Part II of the *Act* regulating construction, and was so under the previous *Act* which lacked such specific rules for construction or other such occupational categories. The point is that such workers who perform technical skills personally are and were deemed employees for the purposes of certification even if they were not expected to necessarily have a long-term "dependency" on the relevant employer. This is because it is assumed that the employer will wish in the relatively near future to hire or re-hire the same or similar persons with technical skills that the union represents. This is not new or radical. It is a situation which existed for decades before the current *Act*.
>
> …
>
> 59. … While the technicians are far from entirely dependent on Egg Films for all their employment income, they are part of a workforce in the local film industry which is generally available for personal hire by production companies like the Respondent. The film technicians are not self-dependent, but dependent on the industry of which both they and Egg Films are a part. In accordance with the short hand phrase often used by labour boards when describing a purposive approach to the interpretation of the *Act*, it makes "good labour relations sense" to characterize those film technicians as employees in the Nova Scotia film industry.
>
> …
>
> 68. … While an "occasional" bargaining unit group may seem more inchoate "between projects" than a full-time and regular part-time unit, all bargaining units fluctuate in terms of membership. People come, people go, and positions sometimes remain unfilled for some time. The point is that collective bargaining relates to positions or classifications and not just to individuals. The parties know what various classifications of film technicians do and who will be required for projects of varying size. One need merely adopt a construction industry cast of mind, and abandon the false imprisonment of the purely "industrial" conception of Part I of the Act, to succeed in this exercise. Collective bargain[ing] can proceed with no more than its normal level of difficulties.

[51] The Board made findings on "control", and on other criteria stated by the Supreme Court in *Pointe-Claire*, the Privy Council in *Montreal Locomotive* and

Board jurisprudence sourced in *L.I.U.N.A.*. But the Board applied those criteria only to the single day of these technicians' employment - March 5, 2011:

> 51. The "control" test of yore has proved difficult to apply for decades. The definition of employer [*sic* "employee"] in section 2(1)(k) of the Act undermines the simple application by referring to the fact that an employee may be employed to do ["] *skilled* or unskilled manual labour, clerical or *technical* work." [Board's emphasis] Certifications in the health and university sector provide ample and eloqu[e]nt examples of persons deemed "employees", and unionized as a result, but whose skills and technical abilities are beyond the capacity of managers to "control" or even understand in any narrow or literal sense. Indeed, people in these sectors are employed, often paid by salary rather than hourly wages, precisely because the[y] have skills and can do technical things which the person who engages them cannot do and trusts them to carry out on their own. However, their particular skill, technical abilities or professional knowledge is necessary to the organization. Thus, it is not surprising that in *The City of Pointe Claire* [*Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015], supra, at paragraph 48, the Supreme Court of Canada refers to "legal subordination" and "integration into the business" as relevant criteria for determining who is the "real employer" of an employee, while still referring to the question of who "exercises the greatest control over all aspects of their work". In regard to the latter concept, the Court refers to a non-exhaustive list of factors: "the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business".
>
> …
>
> 58. To leave the issue of "independence" and return to the question of "control" or "subordination", the Board wished to briefly outline its findings in relation to the evidence. The Board finds that the Respondent's [Egg Films'] contentions that the technicians working on March 5 were self-directing, independent contractors exercising the skills autonomously does not comport with the evidence. Mr. Hachey, in consultation with the client, set out the vision for the project and hired the Line Producer and Director of Photography to see that this vision was made a reality in artistic terms. The technicians, while using their various skills to run their particular equipment, did so under the close direction of the Line Producer and Director of Photography, who brought the project to creative fruition. The Respondent's staff negotiated rates of pay with each of the technical workers, … In this arrangement, there was no "profit or loss" calculation by the technicians, in that none made particularly onerous outlays for equipment and supplies in relation to this particular shoot. The Respondent paid many of the technicians for a previous shoot date which had been cancelled. This was a simple compensation for the loss of wages for the shoot for which day they had been hired which was cancelled. The employees did not bear that risk of

> loss. Egg Films rented the generator truck, for example, and gave the wardrobe designer a budget for costumes. The sound person did bring his own board, but was this [*sic*] not something which he apparently brought for this project and which appeared to have impacted on the wage he negotiated. The technicians on this shoot were paid for their time in the exercise of their skills in their work performance or for their opportunity costs in that regard. They were not making a profit or loss on an investment in a commercial sense. Mr. Hachey agreed that he could, and would, dismiss or send home technicians who were not performing satisfactorily. None of the people on the shoot, with the possible exception of the Line Producer in relation to the Director of Photography, hired other technicians to do the work for them in a business sense. All were hired for their own personal skills and performed them. As to the question of an "intention" to create an employer/employee relationship, the views of the parties are certainly relevant, but not determinative. Clearly, Mr. Hachey believed he was hiring independent contractors, while Mr. Mitchell viewed himself as a temporary or casual employee of Egg Films in the film industry. …

[52] Based on all these criteria, the Board determined that the technicians were Egg Films' "employees" on March 5, 2011:

> 59. On the foregoing assessment of the evidence, the Board concludes that the Applicant Union is correct that the "motion picture technicians" employed by Egg Films on March 5, 2011 were employees within the meaning of the *Act* and were not independent contractors. On March 5 the technicians had agreed to become [an] integral part of the shoot directed and produced by the Respondent, and agreed to perform their work for the day under the supervision of Egg Films. While it was not a long term period of "subordination" to the Respondent's project needs, they were fully integrated into the shoot activities and integrated into the vision of the project which was not in their hands or of their making.

(c) Context and Scheme - Analysis

[53] Egg Films challenges the Board's adoption of the "construction industry cast of mind" (Board Decision, para 68).

[54] The *Trade Union Act*'s Part I, under which the Board certified Local 849, is titled "Industrial Relations Generally". Part I is employer centric – *i.e.* a union bargains with one employer for employees of that employer. Part II is titled "Construction Industry Labour Relations", and includes s. 92(e)'s definition of "employee" as "a person employed in the construction industry". Part II permits sectoral bargaining between an accredited employers' organization, representing

construction employers generally, and a union or council of unions, representing the traditional trades in the construction industry. Construction workers, similar to Egg Films' technicians, typically move among employers and projects.

[55] Egg Films agrees that film technicians move among projects and employers similarly to construction workers. Egg Films says the logical consequence is that, as with construction workers, these peripatetic film technicians better suit sectoral bargaining than employer-centric bargaining. But the *Trade Union Act* prescribes sectoral bargaining only for the construction industry under Part II. Egg Films deduces that, according to the context and scheme of the *Trade Union Act*, these project specific film technicians legally cannot be "employees" under Part I (because Part I doesn't prescribe sectoral bargaining) or Part II (because Part II applies only to construction workers). Egg Films asserts that, unless the Legislature amends the *Act* to permit sectoral bargaining in the film industry, these "one-day" technicians are not permitted to bargain collectively.

[56] Egg Films' factum summarizes its take on the Board's reasoning:

> 45. The Appellant submits that if these one-day workers were "forgotten", it was only because the Act was never engineered to "remember" them in the first place. While the Board claims that these workers were only excluded due to a Board oversight, the "oversight" was clearly the result of the clear limitations of the Act.
> …

[57] In my view, the Board reasonably interpreted the *Trade Union Act*'s scheme, context, and legislative antecedence. I respectfully disagree with Egg Films' interpretation.

[58] Project specific work often is termed occasional employment. As Egg Films points out, the *Trade Union Act* assigns construction labour relations, which usually involves project specific employment, to Part II's sectoral bargaining. Egg Films correctly notes that sectoral bargaining is confined to Part II, while Part I involves employer centric bargaining. Where I part with the submission is this – apart from the construction industry, the *Trade Union Act* does not oust project specific or occasional employment from employer centric bargaining in Part I. This is clear from the history of the legislation.

[59] The current "Part II - Construction Industry Labour Relations" was enacted by the *Trade Union Act*, S.N.S. 1972, c. 19 ("*1972 Act*"). Before then, labour relations in Nova Scotia was governed by the *Trade Union Act*, S.N.S. 1947, c. 3,

with its later revisions (R.S.N.S. 1954, c. 295 and R.S.N.S. 1967, c. 311) and amendments ("*1947 Act*"). The *1947 Act*, in the *Wagner Act* model, permitted the Labour Relations Board to certify a union as the exclusive bargaining agent for employees of an employer. The current Part I, enacted by the *1972 Act*, is titled "Industrial Relations Generally" and, with modern refinements, replicates the *1947 Act*'s approach.

[60] The *1947 Act*, s. 2(1)(i) defined "employee":

> 2(1)(i) "employee" means a person employed to do skilled or unskilled manual, clerical or technical work…

The same wording exists today in s. 2(1)(k), which defined "employee" for Local 849's application to certify Egg Films. This statutory wording – "a person employed to do skilled or unskilled manual, clerical or technical work" – has defined "employee" continuously since 1947.

[61] Before the *1972 Act*, labour relations in the construction industry was governed by the *1947 Act*. Construction workers, performing project specific work of varying duration, moving job to job, were "employees" under the former s. 2(1)(i). Some construction unions were voluntarily recognized and others were certified under the *1947 Act*. The application of the *1947 Act* to construction workers is apparent from S.N.S. 1968, c. 59, s. 3, which amended the *1947 Act* (at that time revised as R.S.N.S. 1967, c. 311), by enacting s. 7A. This amendment included s. 7A(2) that added an accelerated method to certify a unit of "employees" in the "construction industry", as an alternative to the existing certification procedure that had earlier governed construction employees. "Employee", at that time, was defined by the former s. 2(1)(i) whose essential wording matches the current s. 2(1)(k).

[62] Problems with labour relations in the construction industry in the 1960s led first to the enactment of amendments that targeted the construction industry (S.N.S. 1968, c. 59, s.3, mentioned above, and S.N.S. 1970-71, c. 5) and later culminated in a separate "Part II Construction Industry Labour Relations" in the new *1972 Act*. In *Municipal Contracting Ltd. v. International Union of Operating Engineers, Local 721 and KYDD* (1989), 91 N.S.R. (2d) 16 (C.A.), Chief Justice Clarke described the circumstances that precipitated the special treatment of the construction industry:

> **[5]** During the mid-1960's the province became engulfed in a series of disputes in the construction industry which threatened the economic stability of various areas of the province in particular and to some extent, the province in general. In 1967 Mr. I.M. MacKeigan, Q.C. (later Chief Justice of Nova Scotia) was commissioned to inquire into these problems with special emphasis upon the difficulties which were delaying and disrupting the construction of the Deuterium Heavy Water Plant at Glace Bay. He recommended, among others, that separate statutory recognition be given to the construction industry in Nova Scotia and, vital to the issues that prompt this appeal, that a process of "speedy arbitration" to resolve disputes be imposed upon unions and employers. As a result the Legislature enacted a separate certification procedure for the construction industry. Hence the beginning of Part II designed to apply only to the construction industry. The recommendation for "speedy arbitration" was not implemented at that time.
>
> **[6]** The problems that made for disputes among the construction trades continued, including jurisdictional disputes over work and rights, employment of nonunion labour and related matters. Wildcats, strikes and lockouts were frequent and regular occurrences. This led to the appointment of the late Professor H.D. Woods of McGill to investigate the deteriorating situation. He concluded, as had Commissioner MacKeigan, that the traditional (Part I) method of resolving disputes was inadequate to serve the special circumstances that had developed in the construction industry in Nova Scotia.
>
> **[7]** Professor Woods recommended, at pages 101-102 of his report, that the construction industry in Nova Scotia required a separate and special system for the resolution of its grievance disputes ...
>
> **[8]** It was in response to these recommendations that the **Trade Union Act** was amended by S.N.S. 1970-71, c. 5, to provide for an accelerated arbitration procedure in the construction industry. The **Act** was further amended and consolidated in 1972 by c. 19. It is from this brief historical backdrop that Part II entitled **Construction Industry Labour Relations** achieved its legislative birth and statutory existence.

[63] Egg Films interprets the *1972 Act*'s introduction of Part II as a prospective exclusion from Part I of project specific or occasional workers in *any* occupation, including the film industry. With respect, that interpretation is mistaken.

[64] The *1972 Act*'s relocation of the construction industry into Part II, with its sectoral bargaining, responded to problems peculiar to Nova Scotia's construction industry, as discussed by Chief Justice Clarke in *Municipal Contracting*. The *1972 Act*'s enactment of Part II had no connection to the film industry.

[65] The definition of "employee" for workers outside the construction industry did not change with the *1972 Act*. Before 1972, that definition of "employee" in s. 2(1)(i) included project specific or occasional workers with a brief job-span, construction workers being an example. As the Board, in *Egg Films*, said:

> 55. … The recognized union representing a particular trade in the construction industry can obtain certification for the relevant employees working for an employer in the construction industry if it represents the majority of the employees working on site in that trade on the day when it applies. This is the case under current Part II of the *Act* regulating construction, *and was so under the previous Act* which lacked such specific rules for construction or other such occupational categories.
>
> [Italics added]

The *1972 Act* altered that approach only for construction workers. Outside the construction industry, since 1972 the same definition of "employee" in Part I, s. 2(1)(k), continues with the same meaning as before – *i.e.* it still applies to project specific or occasional workers.

[66] As the Board said (para 55), its view "is not new or radical", but "is a situation which existed for decades before the current *Act*". The Board noted (para 47), those project specific or occasional employees, outside the construction industry, may have been "forgotten" in the post-1972 certification practice before the Board. But they were not legally banished by the definition of "employee" in s. 2(1)(k).

[67] The Board's statement (para 68) "[o]ne need merely adopt a construction industry cast of mind" does not, as Egg Films suggests, mean that the Board wrongly extended the *current Part II* to a Part I certification. Rather, the Board reiterated that *Part I's current* definition of "employee", for film technicians, remains as it was in the pre-1972 legislation, when that definition included project specific workers, such as those in either the construction or film industries.

[68] Justice Bryson questions the Board's assumptions about the construction industry under the *1947 Act*. He says there were "relatively few certifications in Nova Scotia as of the early 1960s", though he quotes the 1970 *Woods Report* that "lately there has been an increase in certification applications to the Labour Relations Board". My colleague says that the construction projects "would often last more than a day" and construction workers "received 100 percent of their

income from employer associations". My colleague concludes "[t]he Board's reliance on the analogy of the construction industry is not apt".

[69] Under the reasonableness standard, the question is - Was the Board's view among the reasonable interpretations of the *Act*? The Board's point was that, before 1972, the same definition of "employee" in the *1947 Act* included workers in project specific (*e.g.* construction) jobs whose duration varied with the project. Nobody doubts that, between 1947 and 1972, construction workers had project specific jobs of varying duration, that construction workers were "employees" under s. 2(1)(i) of the *1947 Act*, and that the former s. 2(1)(i) is materially the same as the current s. 2(1)(k). So, to me at least, the clear answer is - Yes. With respect, it doesn't matter whether there were relatively few construction certifications in the early 1960s, increasing later in that decade, or that the projects often would outlast one day, or who wrote some or all construction workers' paycheques at a given moment.

[70] And so it is, as well, for Part I's application to occasional employees in today's entertainment industry.

[71] Project specific work for various classifications of workers in the entertainment industry generates collective bargaining. Egg Films' promotional material touts its access to union talent (Board Decision, para 4, quoted above, para 5). Egg Films deals with bargaining units for other occasional workers: (i) actors, represented by ACTRA, (ii) directors and employees who perform "creative and production" work, as the Board described it, represented by the Directors' Guild of Canada, and (iii) camera operators, represented by IATSE, Local 667 [Board's Decision II, paras 28-29, 42-45]. Egg Films not only acknowledges this fact, but cites it as a reason for a global unit of occasional workers to lessen the disruption of fractionalized bargaining (below, para 115). These other units comprise workers employed for the duration of Egg Films' projects, as are the technicians.

[72] If the technicians' project specific work means they are not "employees", then it is puzzling how these other bargaining units, also covering project specific employees for the same projects, could have status.

[73] Egg Films' counsel notes that most collective bargaining in the industry derives from voluntary recognition. That doesn't solve the puzzle. Collective bargaining by voluntary recognition is subject to Part I of the *Trade Union Act*. Sections 30(1) and (2) of the *Act* sanction voluntary recognition when a union purports to represent "employees" of the employer, and apply the provisions of the

Act as if the union was certified. Section 30 is in Part I, which defines "employee" according to s. 2(1)(k). The same s. 2(1)(k) also governed Local 849's application to certify Egg Films' technicians.

[74] In many shoots, the majority of Egg Films' technicians belong to Local 849. These project specific technicians are subject to collective bargaining when they work for producers other than Egg Films. The Board found (para 57 – quoted below, para 96) that, according to Mr. Hachey's testimony, Egg Films competes for quality technicians with Toronto firms who pay union rates. The Board found that IATSE "frequently obtained voluntary recognition agreements" from production companies for feature films and television work (Board Decision, para 13, quoted above, para 10).

[75] Though voluntary recognition prevails, certification is not unknown for project specific workers in the entertainment industry. The Board (para 13) cited *I.A.T.S.E. Local 680 and Power Promotional Events Inc. (Power Promotional)*, 2011 NSLRB 47 (LRB No. 6371), where the Nova Scotia Board certified a unit for live performance stage technicians at both permanent and temporary locations. The Board in *Power Promotional* described the work:

> The Union provided employees to work on the site of Power Promotional's large outdoor concert in Halifax in August 2010. … There are currently 73 workers in this local, which represents mainland Nova Scotia and New Brunswick. The members provide a wide range of skills and services in the entertainment industry, such as sound and lighting technicians, props and wardrobe, riggers, flymen, general skills such as truck loaders, stage hands, spotlight operators, deck crew, camera operators, and scenic painters. Sources of work include corporate events and trade shows, indoor and outdoor concerts, theatrical shows, and ice shows. … The members obtain work on a hiring hall basis. When a promoter decides to stage an event, he or his representative contacts the Union and sends a breakdown of the personnel needed on a daily basis, indicating what skills are needed and when. … The duration of the work can vary from a one day concert, to events like the Nova Scotia Tattoo which can provide work for as long as five weeks.

These technicians, who were engaged on a hiring hall basis to work on entertainment projects such as a one day concert, were certified under Part I. So they were "employees" under s. 2(1)(k). The Board in *Egg Films* chose to follow its precedent of *Power Promotional* (para 70, quoted below para 104).

[76] Egg Films moves in a world of employer centric collective bargaining for project specific work by occasional employees. Nothing in the *Trade Union Act* shelters Egg Films in a private sanctuary.

[77] For those reasons, I disagree with Egg Films that the scheme and context of the *Trade Union Act* manifest a legislative intent to exclude project specific workers in the film industry from Part I's definition of "employee" in s. 2(1)(k). Whether sectoral bargaining for film technicians, in the pattern of Part II, might be a suitable policy choice is for the Legislature, not for the court on judicial review. The Board's interpretation of the *Act*'s context and scheme is legally permissible and reasonable.

(d) Legislative Objectives - Analysis

[78] The Board found that, if the technicians were not "employees", they would have no access to collective bargaining for their work at Egg Films. The Board (para 43) quoted the legislative objective – "the encouragement of free collective bargaining" - from the *Trade Union Act*'s Preamble (above para 46). The Board continued:

> 43. … Moreover, the Preamble does indicate that the *Trade Union Act* is "… designed for the promotion of common well-being through the encouragement of free collective bargaining …" Counsel for the Applicant Union notes that, in commenting on a very similar preamble to the *Canada Labour Code*, Graham J. Clarke, in *Clarke's Canada Industrial Relations Board*, Canada Law Book, Toronto 2010 (looseleaf) Vol. 1) p. 12-1, says:
>
> > "The Board has often used the Preamble, and its clear preference for collective bargaining, when interpreting the provisions of the Code. For example, the Board will strive to encourage access to collective bargaining by interpret[ing] liberally the definition of employee. It will also certify bargaining units which, while perhaps not the most appropriate, represent the only possibility for a group of employees to obtain access to the rights provided by the code."

[79] Later (paras 55, 63), the Board cited the "purposive interpretation of the Act, in accordance with the Preamble" to support its ultimate conclusion.

[80] The Board's interpretation of the explicit legislative objective to encourage collective bargaining was reasonable.

(e) Continuity – The "One Day" Employee in an Enduring Unit

[81] Egg Films' main argument is that a "one day" worker is not an employee. That fleeting attachment, says Egg Films, just can't muster the stuffing for employment under any test. Justice Bryson agrees. The continuity factor is pivotal to this case.

[82] The Board did not qualify employment with the bright line of a minimum term of service. The Board didn't say that, to be Egg Films' "employee", the technician's project must last at least a month, a week or a day. Rather, based on "control" and the other familiar criteria, the Board considered whether they were "employees" functionally *during Egg Films' project*, whatever the project's duration. As to continuity, the Board said that, while individuals may be transient, a certification governs *the unit's classifications* which at Egg Films were durable:

> 68. …The Respondent argued that it would not know who was in the bargaining unit and in relation to whom it was required to bargain. This is not a convincing argument. While an "occasional" bargaining unit group may seem more inchoate "between projects" than a full-time and regular part-time unit, all bargaining units fluctuate in terms of membership. *People come, people go, and positions sometimes remain unfilled for some time. The point is that collective bargaining relates to positions or classifications and not just to individuals. The parties know what various classifications of film technicians do and who will be required for projects of varying size*. …
>
> [Italics added]

Similarly, when discussing the application of the *1947 Act* to project specific workers in the construction industry, the Board said:

> 55. … The point is that such workers who perform technical skills personally are and were deemed employees for the purposes of certification even if they were not expected to necessarily have a long-term "dependency" on the relevant employer. This is because it is assumed that *the employer will wish in the relatively near future to hire or re-hire the same or similar persons* with technical skills that the union represents. This is not new or radical. It is a situation which existed for decades before the current *Act*.
>
> [Italics added]

[83] The exclusive bargaining status of a certified union and a resulting collective agreement bind any employee who enters the unit during the agreement's term. It

doesn't matter that the worker had not arrived on the scene when the union was certified or the collective agreement was signed, or that he leaves before the agreement expires. The unit, not the individual, is the enduring feature, and its definition is the cement of collective labour relations.

[84] And the unit is a creature of collective labour relations legislation. It is alien to the individual master-servant relationship. The traditional common law had treated a group, or unit of workers bargaining collectively as an illicit conspiracy in restraint of trade: The Honourable George W. Adams, *Canadian Labour Law*, 2nd ed, vol 1, loose-leaf (Toronto: Canada Law Book, 2013), § 1.20 – 1.150. Judges developed the classic servant/independent contractor distinction in a climate entirely different than a certification dispute, mainly to decide whether the alleged master was vicariously liable in tort to a third party.

[85] It is not enough for Egg Films to say – This isn't how judges did it at common law. A statutory labour tribunal is expected to tailor a master-servant concept to suit the scheme and objectives of its collective bargaining statute. In *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, Justice Fish for the Court, said:

> [5] Labour arbitrators are not legally bound to apply equitable and common law principles – including estoppel – in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.
>
> [6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.

See also paras 44-53. Though *Nor-Man* involved labour arbitration, in my view, Justice Fish's comment applies also to the Labour Board's interpretation of the *Trade Union Act*. Peter Barnacle, Michael Lynk & Roderick Wood, *Employment Law in Canada*, 4th ed, vol 1, loose-leaf (Markham, Ont: LexisNexis Canada, 2005), state:

> **§2.2** Surprisingly, given the importance of the determination, the statutes tend to define "employee" and "employer … in terms of striking circumlocution", commonly stating that an employee is a "person employed by an employer" who in turn is defined as a "person who employs people", or words to that effect. … The point cannot be over-emphasized that, even more obviously than at common

> law, the purpose of the particular statute should and generally does determine whether or not a given relationship falls within its scope. It follows that precedents arising under the common law or under a particular statute can legitimately be rejected or modified when the question of "employee" status is asked for a different purpose.

In *Pointe-Claire*, paras 48 and 58, Chief Justice Lamer for the majority referred to the collective bargaining statute's objective as support for upholding the Labour Court's ruling that a temporary worker was employed in the City's bargaining unit.

[86] The Board in *Egg Films* cited the ongoing stability of the working classifications that defined Egg Films' unit. These individuals finished the Atlantic Lottery project after one day. But Egg Films soon would rehire them or others just like them for the next shoot, time and again, as long as Egg Films carried on its business. Egg Films' business model engages technicians repetitively for successive projects. Each time, the technicians occupy the enduring classifications that define this unit. This was the durable temporal connection, or continuity that suited a purposive application of the *Trade Union Act* to these employees' flexible work arrangements in the "new economy".

[87] The Board considered the rapport between the common law test of "employment" and the application of labour relations policy. Then the Board tailored the common law principle to suit the frame of collective bargaining in the circumstances of this case. In my view, the Board's approach is governed by *McLean*, para 33 (quoted above, para 35). Justice Moldaver said "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" (Justice Moldaver's italics).

(f) The Board's Comments on the Traditional Criteria

[88] The Board (Decision para 51, quoted above para 51) quoted the Supreme Court of Canada's criteria for employment from *Pointe-Claire*, including "control".

[89] The Board found that Egg Films "controlled" its technicians during their work on the Atlantic Lottery shoot. The Board (para 58, quoted above, para 51) found that Egg Films' "contentions that the technicians working on March 5 were self-directing, independent contractors exercising the skills autonomously does not

comport with the evidence". The Board's passage elaborated on the technicians' "close direction" by superiors.

[90] The Board (para 58) made findings on other criteria mentioned in *Pointe-Claire*, and on chance of profit, risk of loss and ownership of equipment - criteria from the Privy Council's earlier decision in *Montreal Locomotive*. The Board's passage also addressed aspects of traditional Labour Board criteria that were sourced from the OLRB's Decision in *L.I.U.N.A.*.

[91] Then the Board concluded:

> 59. On the foregoing assessment of the evidence, the Board concludes that the Applicant Union is correct that the "motion picture technicians" employed by Egg Films on March 5, 2011 were employees within the meaning of the *Act* and were not independent contractors. …

[92] I respectfully disagree with Justice Bryson that the Board "eschews" and "virtually ignores" the traditional test for employment. The Board applied the common law criteria. The distinctive feature of the Board's reasoning is that, to accommodate the scheme and objectives of the *Trade Union Act*, the Board applied these criteria only to the day of the technicians' work project, March 5, 2011. I have discussed that continuity issue already.

[93] The Board's factual findings, applying these criteria to March 5, are inferred from a shades of gray blend of what *Pointe-Claire* described as non-exhaustive factors. The record, with no transcript of testimony, discloses no basis to overturn the Board's testimonial assessment or blending exercise. The Board's findings occupy the range of reasonable outcomes.

(g) Effect on Egg Films

[94] Egg Films says that collective bargaining would unduly constrain the efficiency of its unique business model. It submits that business efficacy is a countervailing policy or legislative objective, and that "encouragement of free collective bargaining" doesn't monopolize the field of objectives.

[95] Similarly, Justice Bryson's reasons say that "[c]ertification effectively holds Egg hostage to the union" because, if negotiations fail, a strike would place Egg Films "under obvious financial pressure" while the technicians "can withhold their services indefinitely with financial impunity".

[96] The Board considered the evidence of Egg Films' circumstances. The Board found (para 56) that Egg Films' "claim to be in a unique, *sui generis* commercial production industry, unrelated to the film or television feature documentary industry, is not tenable", despite the brevity of Egg Films' project shoots. The Board responded to Egg Films' submissions by finding (para 57) that collective bargaining would not unduly hamper Egg Films' efficiencies by "imposing" draconian union security provisions, or restricting its freedom to choose the best technicians available, or otherwise inflict "ruinous consequences" on Egg Films' operations. On wages, the Board noted:

> 57. … Mr. Hachey's evidence was that he is competing on the basis of quality with firms in Toronto. To get the best people he said he generally pays above union rates. This, then is unlikely to be problematic if the Applicant Union adheres to its practice of seeing wages in the collective agreement as being a minimum floor, and allowing the employer and individual technicians to bargain for rates above them. …

[97] Factual findings are subject to reasonableness review. But when, as here, there is no transcript, a reviewing court is hard pressed to fasten on an evidential basis for overturning the findings that the Board says are drawn from the testimony. I see no such basis.

[98] Egg Films already has collective bargaining relationships with ACTRA, the Directors' Guild and IATSE, Local 667, for actors, creative and production employees and camera operators, respectively. Like the technicians' proposed unit, those units cover occasional workers for project specific work. Nothing in the record indicates that these relationships have distressed Egg Films. To all appearances, Egg Films has thrived. Witnesses from the Directors' Guild and Local 667, testified, as did Egg Films' principals. Without a transcript, this Court can't know what they said. But the Board heard their evidence, and the Board's extensive findings offer no suggestion of collective opportunism from these three bargaining agents.

[99] If hostage taking follows perforce from collective bargaining for a unit of occasional employees, then – How could this be?

[100] One can't deny the possibility that the certified technicians union might extract significant concessions from Egg Films. But that isn't the only prospect. Another is that level headed negotiating would incorporate, with practical adjustments for Egg Films' situation, standard provisions and rates from master

collective agreements that govern the industry generally. The exhibits (July 5, 2011 hearing - Exhibits 15 and 16) include such a "Standard Agreement" with the Directors' Guild of Canada and a Rate Sheet for the Standard Agreement. The Board (para 57) indicated that IATSE has a similar practice, with standard minimum rates but "allowing the employer and individual technicians" to bargain for improvements. Mr. Hachey said that he competes with Toronto and, in the past, has had to pay higher than union rates "[t]o get the best people" (above, para 96). If IATSE Local 849 adheres to its practice, as the Board anticipated, Egg Films will continue, as before, to negotiate effective financials with individual technicians.

[101] The Court can't predict one scenario or the other. It isn't for the reviewing judge, blind to the testimony at the Board, to overturn the Board's certification based on the judge's speculation about the outcome of future collective bargaining.

(h) Voting Eligibility Rule

[102] Egg Films challenged the Board's use of a "snap shot" rule, instead of a "double date" rule on voting eligibility.

[103] The Board's usual policy under Part I had been that only someone who was employed on both the date of the certification application and the date of the vote may vote. This is the "double date" rule. It was not enacted by statute or subordinate legislation. It was born of Board jurisprudence primarily to prevent manipulation of the constituency, for instance, by an employer's hiring of anti-union workers after the application for certification is delivered.

[104] The use of the double date rule in this case would have meant that there would be no "employee" who could have voted on March 16, 2011. The technicians left Egg Films' employ on March 6 after the Atlantic Lottery project ended. The Board altered its policy so that Egg Films' technicians who were "employed" only on the date of Local 849's application for certification (March 5), but not on voting day, could vote. This is the "snap shot" rule. The Board explained:

> 69. As is no doubt clear from the Board's approach to the previous issues, our conclusion in relation to the standard "double date" employment rule under Part I is that it must yield in the film/commercial production industry to a "bright line" date of application rule in the light of a purposive interpretation of the Act. The purpose of the "double date" rule in relation to industrial

> bargain[ing] units with relatively stable workforces is parallel to the discussion above on whether "casual" employees should be in or out of bargaining units with full and regular part-time employees. If the rule of having to be employed on the date of application and the date of the vote were not the subject of an exception for employees in the commercial advertizing production segment of the film industry, large numbers of employees would potentially be denied their capacity to exercise their constitutional freedom to join a union and participate in collective bargaining. Moreover, such an approach would be inconsistent with the purpose of the Act as set out in the Preamble, and consistently reinforced in the Board's jurisprudence over more than 20 years. The purpose of the *Trade Union Act* is to promote properly regulated collective bargaining and thus help to establish good working conditions and sound labour-management relations. This is one of the pillars upon which effective economic development or "common well-being" is the [*sic*] based, according to the Act's Preamble. Imposing the "double date" of employment rule for eligibility to vote in certification applications in the film industry runs counter to these basic purposes.
>
> 70. In this respect, the Ontario cases cited earlier (*Crocodile, City of Brantford etc.*) [*I.A.T.S.E., Local 58 v. Crocodile Labour Services Inc.*, [1997] O.L.R.B. Rep. 832 and *I.A.T.S.E., Local 129 and City of Brantford*, [2003] CanLII 47543 (Ont. L.R.B.), and other cases cited in the Decision of the Nova Scotia Board, para 38] have it right. In the stage and theatre business, the "construction industry" approach is best: those at work in the industry on the date of application *only* are entitled to vote in the certification ballot established by the Board. The Ontario stage and theatre cases cannot be meaningfully distinguished in this regard. This Board's decision in *Power Promotions* recognizes the correct principle [above para 72]. There is no reason not to adopt this approach in the film/commercial advertizing industry in the Province, where parallel labour relations conditions prevail. While the "double date" rule of Part I has a useful function in many standard industry certifications, preventing unfair manipulation of voting constituencies and ensuring that those with a continuing interest in the workplace have a franchise to exercise, its non-purposive application in the film/commercial industry would have the opposite effect. It would disfranchise those with a continuing interest in the workforce of an industry of which both the Applicant Union and the Respondent are a part.

[105] Similarly, the Board's Decision II said:

> [25] … The Board does not purport to include Egg Films' regular full-time or part-time employees in the bargaining unit. As such, the snap-shot approach, of having a vote among casual technicians on-site at a shoot on the date of application only (as in the construction industry historically), is *not* inappropriate.

> [Board's italics] This is particularly the case as this procedural sauce applies to both the pro-union geese and the anti-union ganders who may be fluttering in the wings: that is, in an "open season", an application for revocation could be received from casual employees in the bargaining unit, hired for a particular shoot, and/or working for the employer, on a single day who might successfully seek decertification (subject, of course, to the union security provision of any relevant collective agreement).
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> . . .
>
> [41] The Board must reject the Respondent Employer's constant efforts to resurrect the "significant long-term connection to the employer" argument to undermine the Board's ruling in the Interim Order that only those Motion Picture Technicians employed on the date of the shoot as "casuals" are eligible to be in the unit and to vote. The Board is aware that the Respondent Employer opposes what it calls the "single snap shot" approach to bargaining unit membership. However, in relation to a bargaining unit of purely casual or occasional workers, in an industry where the labour market is structured as it is in the film industry, this is the appropriate approach, as explained in our Reasons for the Interim Order. …

[106] I don't read the Board's reference (para 69) to "constitutional freedom to … participate in collective bargaining" as an assertion that s. 2(d) of the *Charter* guarantees a particular model of bargaining, such as a *Wagner Act* format. That would offend *Fraser*. Rather, the Board adopted the purposive analysis, endorsed in *Doré* (quoted above, para 44), to act consistently with the *Charter* values. Those values include the nature of access to collective bargaining on fundamental workplace issues, that was described in *Health Services*, and reiterated in *Fraser*, (see above para 43). In my view, the Board's conclusion that the *Trade Union Act*'s constitutional context and Preamble point to purposive analysis is legally permissible and within the range of reasonable interpretations.

[107] Neither the "double date" nor the "snap shot" approach is legislated by statute or subordinate legislation. Either was a legally permissible choice of policy and practice to effectuate the *Trade Union Act*'s scheme and objectives. The Board composes and fine tunes its practice on these matters in its body of decisions. The snap shot approach has prevailed in Ontario Board practice for the film/entertainment industry, is the Nova Scotia practice for project specific work in the construction industry, and was consistent with an earlier decision (*Power Promotions*) of the Nova Scotia Board respecting project specific employment in the entertainment industry. The Board determined that, where project specific work is the norm, as in the film industry, the snap shot approach is preferable. The

double date rule, according to the Board, could stifle the employees' access to collective bargaining.

[108] The Board concluded that the Preamble's objective to encourage collective bargaining outweighed the employer's design of unadulterated business efficacy. To satisfy the Preamble's objective, the Board altered its double date rule to a snap shot rule. These conclusions are governed by *McLean*, para 33. The choice between countervailing objectives or policy considerations, each stemming from the tribunal's home statute, is for the tribunal. The reviewing court should resist the temptation to stray into correctness analysis.

(i) Conclusion – First Issue

[109] The definition of "employee" is the *Act*'s portal to collective bargaining. It is a natural harbour for the Board's interpretation of labour relations policy. Literally, s. 2(1)(k) is open-ended and, coupled with s. 19(1)(a)'s privative signal, invites the Board to infuse its view of the *Act*'s objectives. The Board chose among outcomes permitted by the *Act*'s wording, context and scheme. The Board was guided by deduction from the purposive directive to encourage collective bargaining expressed in the *Act*'s Preamble.

[110] The Board's conclusion that the technicians were "employees" under s. 2(1)(k) is reasonable. The reviewing judge made no error in this respect. I would dismiss this ground of appeal.

5. Second Issue – Is the Technicians' Unit "Appropriate"?

[111] Sections 25(4) and (14) of the *Trade Union Act* say:

> 25 (4) The Board shall determine whether the unit applied for is appropriate for collective bargaining and the Board may, before certification, if it deems it appropriate to do so, include additional employees in or exclude employees from the unit.
>
> . . .
>
> (14) The Board in determining the appropriate unit shall have regard to the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration.

[112] The Board concluded:

> 60. … Nova Scotia Board jurisprudence is clear, and the parties do not dispute, that the task of the Board in these circumstances is to delineate "*an* appropriate bargaining unit" and not necessarily "the *most* appropriate unit" [Board's italics]. Moreover, the standard Nova Scotia jurisprudence holds that Section 25(14) does not establish an exclusive list of factors and that others are relevant. [citations omitted] …
>
> 61. On the question of membership, the Applicant Union has advanced a non-exclusive list of "motion picture technicians". The Respondent has suggested that the list is arbitrary and amounts to allowing the union to pick and choose who is "in" and "out". … The evidence of Mr. Hachey, Mr. Mitchell and Mr. Mahoney, as well as the documents which they adduced (brochures, crew lists, and collective agreements) indicates, however, that there is actually a clear sense among all concerned as to who motion picture technicians are and what they do. … They include the list of technicians found in the Union's Application at the very least. … The Board is thus content on the evidence to find that the bargaining unit applied for by the Union is an appropriate unit for collective bargaining in the circumstances, in so far as its membership is concerned. …

[113] As set out earlier (paras 13, 16 and 19), the Board included the technicians' classifications requested in Local 849's application for certification. The Board excluded (1) management and supervisory employees, (2) full or regular part-time employees, and (3) classifications in existing bargaining units represented by other unions (ACTRA for actors, the Directors' Guild of Canada for creative and production employees, and IATSE, Local 667 for camera operators).

[114] Egg Films says that the Board's ruling was unreasonable in two respects.

(a) Fragmented Bargaining

[115] Egg Films submits that the Board should have approved a wall-to-wall unit of all its project specific employees that would reduce the inefficiency of piecemeal bargaining. Egg Films' factum explains:

> 62. … the purpose and intent of the Act is to balance the interests of employers and their employees. … In other words, "an appropriate unit" is a unit that is appropriate not only for the union's purposes, but also for the employer's. … With respect, the Board failed to offer any reasonable justification for refusing to certify what it referred to as a "best or better unit" that included all "occasional workers" working at the ALC Shoot, including camera operators, DMT/VTR people, directors, production assistants, as well as any animators involved with the shoot.

…

> 68. … An all-inclusive unit would also allow this small company to avoid the possibility of bargaining with five separate bargaining units simultaneously (i.e. in the film industry, ACTRA represents actors; IATSE, Local 667 represents camera operators; the Directors Guild of Canada represents directors; IATSE, Local 849 represents technicians and craft services people; and a fifth union could potentially be certified to represent Egg Films' full-time and part-time workers).

[116] Under s. 25(14), the Board's prime directive is to consider "community of interest". The Board found, on the evidence, that the technicians had community of interest *inter se*. Others, such as actors, directors and production employees on the "creative" side, who do not perform technical functions, would inject heterogeneity. Similarly, full-time or regular part-time employees have different interests than do project or occasional employees. In this respect, the Board said:

> 62. … The Board's traditional policy of excluding casual employees from bargaining units under Part I of the Act has almost invariably been in the context of "industrial" employment at a particular location where bargaining units are composed of full-time and regular part-time employees who are doing similar work as any casuals who are sought to be included. Under such circumstances, it has been thought problematic to require unions to organize people who are infrequently at the workplace. It has also been thought inappropriate to allow such casuals to have an undue influence on collective bargaining when they are irregularly in attendance, are under no obligation to attend, and may not be governed by, or even experience, the working conditions which affect regular part-time and full-time employees on a daily basis. In other words, it is in *comparative* [Board's italics] terms that casuals and regular part-time or full-time employees may have conflicting interests. …
>
> 63. The point, however, is that in the present case, the Applicant Union is not seeking to unionize "casual employees" whose interests compete with or are antithetical to full-time or regular part-time employees. The bargaining unit applied for might be thought of as "occasional workers" whose work and skills differ from the full-time employees of Egg Films. The film technicians here are similar to many construction workers. They are hired for the duration of the project, or in this case the "shoot". The Respondent does not need Gaffers, Grips, Props people, Make Up Artists, Genny ops and the like for much of the year. When they are hired, they do not threaten the jobs of full-time or regular part-time employees. The motion picture technicians are part of a separate workforce, called upon by the Respondent as required, and they have their own community of interest in terms of multiple work locations, hours of work, working conditions and methods of remuneration

> which will only overlap sporadically with those of full-time and regular part-time employees of Egg Films. …

[117] Once employees have access to collective bargaining, Labour Boards are reluctant to complicate the employer's operations by fractionalizing the units. But this isn't a severance case where an existing unit would be split into two. To the contrary, the Board's reasons for finding that these technicians were "employees" emphasized that, otherwise, they would be denied access to collective bargaining for their work at Egg Films. That rationale didn't apply to members of Egg Films' existing bargaining units.

[118] Camera operators are represented by IATSE, Local 667 in an existing bargaining unit. The Board's Decision II noted (para 42) that "a uniquely configured 'commercial productions bargaining unit' … jointly proposed for voluntary recognition by IATSE locals 667 and 849" had been "rejected in negotiations by the Respondent Employer in this case".

[119] Egg Films now suggests that the Board erred by not splicing the technicians into the existing units with an accretion order, or siphoning the other units' employees into Local 849's unit, or consolidating the existing and proposed units. The other bargaining agents were not joined as parties to this proceeding. It was not unreasonable for the Board to avert the procedural and jurisdictional disarray that would follow such a sudden impact on other bargaining units. If an employer seeks to alter the composition of its bargaining units, its course is to apply to the Board, joining the appropriate parties, under the Board's procedures for an amendment, accretion or consolidation. I should not be taken as expressing a view on the outcome of such an application.

[120] Fashioning an appropriate bargaining unit isn't a linear exercise. Adams, *Canadian Labour Law*, § 7.60, discusses the delicate balance:

> **3. CRITERIA FOR UNIT DETERMINATIONS**
>
> Save for specific and usually public sector workplaces, the complex and often conflicting considerations involved in the determination of an appropriate bargaining unit has discouraged most legislatures from enacting specific standards which labour boards would be required to utilize in determining bargaining unit contours. Indeed, the Nova Scotia Court of Appeal has noted that labour boards have polycentric decision-making authority in choosing criteria which "involves a number of competing interests and considerations, and calls for solutions that balance benefits and costs among various constituencies" [citing *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)* 2005 NSCA 141, at

> para 25, which followed *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, at para 28]. …

After mentioning "[t]he multiplicity of factors, which seldom point in one specific direction", *Adams* continues:

> In applying these considerations, a labour board's objective is to fulfill its obligation to maximize an employee's freedom to join a trade union of his or her choice while at the same time promoting harmonious labour relations through effective and efficient collective bargaining procedures. Each case requires a labour board to balance the aforementioned factors by assigning weight as deemed appropriate by the board in light of its experience and wisdom in such matters. …

[121] The Board, in this case, focussed on its statutory directive of "community of interest", and weighed permissible criteria. It isn't the reviewing court's role to recalibrate the scale by assigning different weights to the criteria. The Board's conclusion is within the range of reasonable outcomes.

(b) Craft Units

[122] Egg Films submits that the Board's approved unit offended the provisions in the *Trade Union Act* and its Regulations that govern craft units.

[123] Section 2(1)(x) of the *Act*, in Part I, defines "unit":

> 2(1)(x) "unit" means a group of two or more employees and "appropriate for collective bargaining" with reference to a unit, means a unit that is appropriate for such purposes whether it be an employer unit, craft unit, technical unit, plant unit or any other unit and whether or not the employees therein are employed by one or more employers;

[124] Section 24 deals with craft units:

> **Group with technical skills**
>
> 24(1) Where a group of employees of an employer belong to a craft or group exercising technical skills by reason of which they are distinguishable from the employees as a whole and the majority of the group are members of one trade union pertaining to that craft or other skills, the trade union may apply to the Board and, subject to Section 23, may be certified as the bargaining agent of the employees in the group, if the group is otherwise appropriate as a unit for collective bargaining.

> (2) The Board is not required to apply this Section where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.
>
> (3) Where the employees of an employer are certified in accordance with this Section, the employer pursuant to subsection (5) of Section 98 is not bound by any accreditation order made pursuant to this Act.

Section 23 is the general provision that authorizes an application for certification under Part I. Section 98(5), in Part II, applies to an accredited employers' association in the construction industry.

[125] Also pertinent are the *Craft Units and Votes of Employees Regulations*, under the *Trade Union Act*, enacted in 1973 as N.S. Reg 54/73, as amended in 1977 by N.S. Reg. 46/77 ("*Craft Units Regulations*"):

> **1 (1)** In considering any application herebefore or hereafter made to the said Board under Section 24 (1) of the said Act for certification of a trade union as bargaining agent of the employees in a group belonging to a craft or exercising technical skills, and in determining whether the proposed group is otherwise appropriate as a unit for collective bargaining and whether the union should otherwise be certified, the Board *shall require to be satisfied*:
>
> (a) that no material community of interest exists between the proposed group and other employees of the employer;
>
> (b) that the industry in which the employer is engaged belongs to a class of industry which traditionally or normally is organized by craft unions pertaining to such respective crafts or other skills;
>
> (c) that the continued normal operation of the employer's production process is not dependent upon the performance of the assigned functions of the employees in the proposed unit;
>
> (d) that the proposed group is more appropriate for collective bargaining than an employer, plant or sub-plant unit which included the employees in the group.
>
> **(2)** This Section shall not apply to the construction industry, to any non-commercial institution, or to any other industry that does not produce or deal in goods or services on a commercial basis.
>
> [Emphasis added]

[126] Egg Films submits that s. 24 and the *Craft Units Regulations* prefer a wall-to-wall unit over several craft units, to minimize the disruption from fragmented

bargaining. Egg Films asserts that: (1) the technicians' unit approved by the Board was a craft unit contemplated by s. 24(1); (2) Regulation 1(1)'s words "the Board shall require to be satisfied" mean that conditions (a) through (d) of Regulation 1(1) are mandatory; (3) the conditions were not satisfied; and, therefore (4) the Board erred by sanctioning this non-compliant craft unit.

[127] The Board rejected Egg Films' submission on two alternative bases:

> 65. … the Nova Scotia rules arose in the context of the construction industry and the turmoil of the 1960's and 1970's related to the operation of construction craft unions. As noted earlier, Part II of the Act covering the Construction Industry was enacted to counter the chaotic economic problems of "whip sawing" and "leap-frogging" in the construction industry where small numbers of employees in individual trades, each represented by different unions were able to bring the construction industry to a standstill. In like measure, section 24(1) of the Act is addressed to situations where craft or technical employees "…are distinguished from the employees as a whole", and sub-section 1(1)(b) of the craft units regulations requires, before certification of such a craft or technical unit, that "… the continued *normal* [Board's italics] operation of the employer's production process is not dependent upon the performance of the assigned functions of the employees in the proposed unit". In other words, the regulations are aimed at preventing a small number of employees in a single craft from striking and holding to ransom an employer whose "employees as a whole" produce goods or provide services on a commercial basis" (Regulation 1(2)) and who "as a whole" might not be in a position to strike, or desire to do so if they were. In other words, section 24 and its corollary regulations are about preventing the carving out of small craft units that can throw a spanner, as it were, into the larger industrial works of a firm and its "employees as a whole".
>
> 66. … Thus, section 24 has as its purpose the limitation of certifications of small, single craft units associated with the construction trade, as is confirmed by section 24(3) which exempts any craft units so certified under Part I from the effect of accreditation orders under Part II of the Act. The Board's conclusion is that section 24 and the Craft Unit Regulations, were never intended to apply to occupational units such as film technicians[,] movie projectionists, stage hands or musicians, voluntarily recognized or certified under Part I of the Act, and have never been applied in such circumstances in this Province. The Board so finds.
>
> 67. If, however, we are wrong in the foregoing analysis, we find that were the Craft Units Regulations to apply to the motion picture technicians in the Applicant Union's proposed bargaining unit, the Board is satisfied that the four conditions found in the Regulation are met. This is so based on the evidence described above: (a) while the technicians worked with some of

> Egg Films' full-time staff on March 5, 2011, there is no material community of interest between the full-time staff and the occasional extras pulled in by the Respondent on the few commercial shoots it does per year; (b) there is no doubt that the film industry, of which commercial advertizing production is a part in this Province, is a class of industry which can be said to be organized by craft unions, if IATSE can be so described; (c) the continued "normal production" of Egg Films' activities in doing radio commercials, web-content and creating other advertizing products can continue without film technicians, and, in so far as they are required for commercial shoots, they can be seen as a dominant employee group rather than a potentially obstructive minority; and (d) as explained above, the proposed film technicians unit of occasional employees is more appropriately seen as having its own community of interest rather than common interests with a bargaining unit which might include the Respondent's other full-time or regular part-time employees. Thus, were it necessary, the Applicant Union can be seen to meet the requirements of the craft units regulations, and we so find.

[128] The Board's first basis (paras 65-66) turns on a legal interpretation of s. 24. The Board interpreted these provisions as stemming from a situation in the construction industry where "small numbers of employees in *individual* trades, *each* represented by different unions" brought the industry to a standstill. The Board said the Regulations "are aimed at preventing a small number of employees in a *single* craft" from holding the employer's operations to ransom. Again, the Board said that s. 24's purpose is "the limitation of certifications of small, *single craft* units". [Emphasis added].

[129] Section 24(1) says it applies to "*a group* of employees" who "belong to *a craft or group*" with distinguishable skills, and the majority of "*the group* are members of *one trade union* pertaining to *that* craft or other skills" [Emphasis added]. Section 24(1) speaks in a singular voice. The Board's view that s. 24(1), and therefore Regulation 1(1), apply to the certification of "single craft" units is a reasonable interpretation.

[130] The unit approved for Egg Films is not a "single craft" unit. It includes numerous classifications with varied specialties – key grips, costume designers, gaffers, lighting technicians, generator operators, sound specialists, props specialists, wardrobe specialists, hair and make-up artists, and "craft" people. At Egg Films, a "craft" person meant someone who brings "snacks" (see Board's Decision, para 11 quoted above, para 8). The Board's description of these classifications and their skill-sets is quoted above (paras 8 and 19). Local 849's unit wasn't branded by association with a single craft or group with a

distinguishable skill, such as electricians in the International Brotherhood of Electrical Workers or carpenters in the International Brotherhood of Carpenters and Joiners. Rather the common denominators, as the Board fashioned Egg Films' unit, were that the employees (1) worked for a period that was project specific, instead of being full-time or regular part-time and (2) were not more appropriate for an existing bargaining unit (units represented by the Directors' Guild, ACTRA and IATSE Local 667) and (3) were not supervisory or management. The classifications with all three criteria were assigned to Local 849's unit. This produced a unit comprising numerous skills, occupations or crafts.

[131] Egg Films misapprehends a collection of classifications as "a craft" within s. 24(1). The Board routinely defines a Part I unit to include a list of classifications. That each classification may involve a skill does not convert a multi-occupational unit into "a craft unit" under s. 24(1). In my view, the Board's interpretation of s. 24(1), as applying to a "single craft", is permissible, and the Board's conclusion that this was not such a craft unit was reasonable.

[132] The Board's alternative basis (para 67) was that, in any case, the four conditions of Regulation 1(1) are satisfied. These are mostly factual findings, based on the Board's assessment of the evidence. This un-transcribed record shows no basis to overturn the Board's findings.

[133] The Board's determination that the bargaining unit was appropriate occupied the range of reasonable outcomes. The reviewing judge made no error. I would dismiss this ground of appeal.

6. Conclusion

[134] Justice Pickup ordered costs of $1,500. The effort in this Court was more substantial. I would dismiss the appeal, with costs of $3,000 all-inclusive payable by Egg Films to Local 849 for the appeal.

Fichaud, J.A.

Concurred: Saunders, J.A.

Dissenting Reasons of Bryson, J.A.:

[135] I concur with my colleagues about the standard of review and the high degree of deference that should be accorded to the Board when deciding whether to grant certification in this case. The standard for reviewing the Board's decision is that of "reasonableness".

[136] I am unable to agree that the Board's decision was reasonable in finding that the technicians providing services to Egg were "employees" for the purposes of certification under the *Trade Union Act*. The Board's conclusion was unreasonable because the material facts it finds are unsupported by the evidence it cites and the reasoning path employed does not logically sustain the conclusion the Board reaches.

[137] The Board found that one day of work which may never be repeated constituted "employment" for certification purposes under the *Trade Union Act*. Eschewing traditional "employer-employee" analyses, and undeterred by an absence of statutory or jurisprudential support, the Board decided that the technicians providing services to Egg in this case were "dependent workers", although they were not dependent on Egg, but on an industry "of which Egg was a part". With respect, neither the choice of that test, nor its application, was reasonable.

Wagner Act Model:

[138] The Board recognized that this was a "hard" case requiring a beginning with first principles. After reciting the constitutional and legislative policy support for collective bargaining, the Board reviewed the history of North American labour relations generally, and its dependence on the American *Wagner Act* model, in particular. The Board remarked:

> 47. ***There is a problematic legacy to this historical evolution of the legal regulation of labour relations in Nova Scotia, which is particularly important for this case. Occupational unions, outside of the construction industry, have largely been ignored*** as the Board has, for forty years, concentrated its efforts on refining its jurisprudence and policy in relation to its two primary constituencies: the general industrial sector and the construction industry. This binary understanding of the *Act* has not been without its challenges. . . . ***Forgotten, in this apparent "industrial/construction" dichotomous vision of the Act, have been***

> ***occupational unions***, such as the Applicant Union or those like the American Federation of Musicians who have lived on the margins of Part I, primarily through the mechanism of voluntary recognition but sometimes through certification. A pertinent example from relatively recent Nova Scotia Board jurisprudence is cinema "film projectionists": see *I.A.T.S.E., Local 848 v. Empire Theatres Limited Aberdeen Cinemas*, L.R.B. No. 4402, October 23, 1996.
>
> [Emphasis added]

[139] An article authored some years ago by the Board's chair in this case, goes further:

> … An important issue for labour relations, and for the teaching of labour and employment law, is that ***the Wagner Act model no longer fits the reality of many workplaces in the new economy***. In the world of fluid, serial employment, organizing a single employer to become the certified bargaining agent at one industrial site does not seem to work for large categories of vulnerable workers.
>
> [Emphasis added]
>
> Bruce P. Archibald: *Teaching Canadian Labour and Employment Law in the Globalized New Economy: Ruminations of an Ageing Neophyte*, 14 C.L.O.L. 139 at p. 148

[140] The question in this case is whether the *Trade Union Act* really can accommodate the attenuated understanding of "employee" which grounded the Board's certification order in this instance. For reasons that follow, I say not.

Legislative Policy:

[141] While the Board spent some time addressing the constitutional support for collective bargaining and quoted from the Preamble of the *Act* to emphasize the legislative policy in favour of collective bargaining, the Board did not explicitly address the objects of legislation based on the *Wagner Act* model. What are those objects? The Supreme Court of Canada provides the answer in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27:

> 57 K. E. Klare has identified the following main objects of the *Wagner Act*:
>
> 1. *Industrial Peace*: By encouraging collective bargaining, the Act aimed to subdue "strikes and other forms of industrial strife or unrest," because industrial warfare interfered with interstate commerce; that is, it

> was unhealthy in a business economy. Moreover, although this thought was not embodied in the text, industrial warfare clearly promoted other undesirable conditions, such as political turmoil, violence, and general uncertainty.
>
> 2. *Collective Bargaining*: The *Act* sought to enhance collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict.
>
> 3. *Bargaining Power*: The *Act* aimed to promote "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and employees.
>
> 4. *Free Choice*: The *Act* was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.
>
> 5. *Underconsumption*: The *Act* was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers.
>
> 6. *Industrial Democracy*: This is the most elusive aspect of the legislative purpose, although most commentators indicate that a concept of industrial democracy is embedded in the statutory scheme, or at the least was one of the articulated goals of the sponsors of the Act. Senator Wagner frequently sounded the industrial democracy theme in ringing notes, and scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy, . . . the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."
>
> ("Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978), 62 *Minn. L. Rev*. 265, at pp. 281-84)

[142] Equalizing bargaining power is one of the key objects of the *Wagner Act* model legislation, which assumes that employees are at a disadvantage and lack bargaining power when negotiating with employers. The Legislature seeks to correct that imbalance by providing a more even playing field where "liberty of contract" is restored. Many of the other objects of the *Wagner Act* model legislation would be accomplished or enhanced by restoring such a balance. In his seminal article: H. W. Arthurs, "The Dependant Contractor: A Study of the Legal Problems of Countervailing Power" (1965) XVI: 1, Professor Arthurs describes some of the pernicious effects of inequality of bargaining power and the consequent insidious position of employees he describes as "dependent contractors":

> Unequal power between private persons, no less than between citizen and state, is an unhappy fact of modern society. In one area—employment relations—public policy has clearly adopted collective bargaining as a technique for redressing this imbalance of power. In another area—commercial competition—collective action is generally suspect as the vehicle by which a powerful group may overwhelm weak individuals. This study concerns the paradoxical plight of groups of competitors who may find survival difficult without collective action. They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as "independent contractors" rather than "employees" they lack the legal status which is a prerequisite of the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or sell or otherwise stabilize conditions, because of the combines legislation. They are prisoners of the régime of competition.

[143] But there is nothing in the evidence cited by the Board in this case which suggests that there was any inequality of bargaining power—or a lack of freedom of contract—that required restoration by certification. The technicians that work very occasionally for Egg are free to decline or accept work as they wish. They are not under any financial or other duress to accept an offer of work from Egg. Moreover, they are free to ask for—and are frequently able to secure—higher compensation than they usually obtain from others who retain their services. Far from requiring redress of unequal bargaining power, the technicians who provided services to Egg already enjoyed freedom of contract.

Dependent Contractors:

[144] In its reasons the Board decided that the technicians here represented a special and growing class of "dependent workers" which increasingly appear in the "new economy". By dependant workers the Board means workers who do not work consistently for one employer and are not dependent on one employer, but in a broader sense are dependent or vulnerable because they are not self-employed.

[145] Many jurisdictions have addressed the vulnerability of dependent contractors, usually by enacting specific legislation. But all require significant dependence on *one employer*. None have done what the Board did here—grounded "dependence" on an *industry*. In Wesley B. Raynor, *Canadian Collective Bargaining Law*, 2d ed (Markham, Ontario: LexisNexis Canada Inc., 2007) the author describes how this category of worker has been recognized elsewhere:

> Most jurisdictions have now included dependent contractors as employees in order to permit persons so classified to bargain collectively. The wording of the Ontario *Labour Relations Act* (thereinafter "Ontario act") perhaps best exemplifies the attempt of the legislature to move those groups in the middle of the spectrum to the "employee" category. Section 1(1) of the Ontario act defines dependent contractor as:
>
> > … a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing … who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.
>
> The section, in its opening words, clearly instructs the labour board to disregard the form of the relationship, hence, by implication, directing the Board's mind to the substance of the relationship. It also removes "ownership of tools", one of the four factors in the *Montreal Locomotive* case, as a consideration. ***Rather, it establishes a two-fold test:***
>
> ***1. Is there economic independence, and***
>
> ***2. Are the duties performed in a relationship more like that of employer-employee rather than that of independent contractor.***
>
> Most of the cases have dealt with the second leg of the test, ***but economic dependence must be established before the question of the nature of the relationship arises***.
>
> Economic dependence must exist between the "employer" and the dependent contractor, not between the contractor and an industry. Thus, owner-operators of trucks dependent on the construction industry for 80 per cent of their income could not claim the status of employees of one particular company in the industry when that company was only one of several for whom the operators provided service.
>
> [Emphasis added]

[146] While the foregoing quotation plainly describes a particular statutory regime, the discussion is generally relevant to the principle of "dependent contractor". Economic vulnerability alone is an inadequate description of the status of the dependant contractor—after all, many businesses are economically vulnerable. Rather, it is vulnerability expressed as dependence upon a particular employer. Importantly, that dependence must first be established before considering the nature of the alleged employer-employee relationship.

[147] The degree of dependence on a particular employer has varied, depending on jurisdiction. For some it is as much as 80 percent, in others as little as a third—see Brian A. Langille and Guy Davidov, "Beyond Employees and Independent Contractors: A View From Canada" (1999) 21 Comp. Lab. L. & Policy J. 7, and in particular footnote 64.

[148] But as we shall see in this case, the Board emancipates dependency from a relationship with any one particular employer.

[149] In employing a "dependent worker" analysis, the Board virtually ignores the classic tests for defining employee status: *City of Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.); *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. These tests ultimately require the Board to examine the relationship between employer and employee. This the Board failed to do. Rather, the Board borrowed a two-fold test from the foregoing Langille-Davidov article:

> However, it has been correctly observed that these four factors boil down to two questions: (1) whether the worker is controlled by the employer/client; and (2) whether the worker is economically independent (calculating profit and loss, and owing expensive tools to carry out a commercial contract, being the indicia) …

No court has ever cited this article.

[150] The Board approaches the analysis of the "dependent worker" as employee in the following manner:

> 53. … However, there is a serious issue as to whether, pursuant to a purposive interpretation of the *Act*, … dependent personal workers who provide services as "dependent" contractors, or even "non-self dependent workers", should be treated as employees.

[151] Many dependent workers are not—as in this case with Egg—dependent on one employer. Clearly the technicians seeking certification here are not financially dependent on Egg. One might have thought that disposed of the question because that lack of dependence on Egg means there is no inequality of bargaining power that needs to be redressed by certification. In situations where legislatures have adopted a "dependent worker" category, a lack of dependence on an employer would be fatal (¶ 145 and 146 above). But the Board anticipates this argument when it says:

> 55. This brings us to one of the Respondent's important arguments. Egg Films says that Mr. Mitchell, or any of the other technicians employed on March 5, 2011, gains only a small portion of their income from Egg Films, and may or may not have a continuing association with Egg Films in the future. ***It is indeed clear that Mr. Mitchell gains far more of his income as a Genny Op from firms other than Egg Films. However, it is also clear that he is dependent on firms in the film and/or commercial production industry for his livelihood. He is not self-dependent, but is rather dependent on an industry, of which Egg Films is a part,*** which regularly hired "Genny Ops". He is hired to do his work in the industry because of his personal skills and ability, but he is not dependent solely on Egg Films. This, of course, is exactly the same situation as skilled trades persons in the construction industry. … The point is that such workers who perform technical skills personally are and were deemed employees for the purposes of certification even if they were not expected to necessarily have a long-term "dependency" on the relevant employer. This is because it is assumed that the employer will wish in the relatively near future to hire or re-hire the same or similar persons with technical skills that the union represents. This is not new or radical. It is a situation which existed for decades before the current *Act*.
>
> [Emphasis added]

[152] A principal argument of Egg Films is that the technicians in this case cannot be compared to the construction industry which has its own special "Part II" certification process which emerged out of the industrial turmoil of the 1960s. The Board meets this argument by claiming that skilled tradespersons in the construction industry were "employees" for certification purposes under the *Trade Union Act* before the advent of the Part II amendments:

> 54. … The problem with much of the foregoing analysis of "dependent contractors" is that it assumes an *on-going* employment relationship of "dependency" on *one* employer (vide: *Fownes Construction* and *Mackie Moving Systems, Corp supra*). However, as with much precarious employment in the so-called "new economy", workers with particular skills may be unable to gain full-time or even regular part-time work with a single employer needing her or his particular skills in a given industrial context. In some industries, serial, or even concurrent employment with a number of employers may be the norm. ***Thus, while these workers are not really "self employed" or "independent contractors", they are not "self-dependent" either; rather, they are dependent on a number of employers in an industry. This may be a wide-spread phenomenon in the "new", or at least "current", economy, but it is not a new phenomenon. It has been the case for generations in the construction***

> ***industry.*** While some craft persons or trade workers in construction may be fortunate enough to have long-term and perhaps full-time, or at least regular part-time, employment, many move from project to project not with the same, but rather a series, of different employers. These people can be "obvious" employees, or may be dependent or non-self-dependent workers whose status requires analysis going beyond mere appearance in order to determine whether they are employees for the purpose of the *Act*. Despite "sporadic" employment, when they are working for a given employer, they may, according to the particular circumstances of the case, be seen as employees of that employer for the purposes of the *Act*. Thus, "non-self-dependent" personal workers can be "employees" where the facts of a particular case so warrant.
>
> [Italics - Board's emphasis. Bold emphasis added]

[153] We shall see.

Construction Industry in Nova Scotia:

[154] The Board relies exclusively on the history of the construction industry in Nova Scotia as a useful analogy supporting certification of the technicians here. It will therefore be instructive to examine briefly that history and in particular, why the *Trade Union Act* was amended to accommodate that industry.

[155] As a result of labour strife in the Province, largely exemplified by illegal work stoppages, particularly in the construction industry in Cape Breton, the government commissioned a report of inquiry into industrial relations which was authored and delivered by H. D. Woods (Commissioner), "Report of the Commission of Enquiry into Industrial Relations in the Nova Scotia Construction Industry" (Nova Scotia, 1970). For similar reasons, the government commissioned and received a report from I. M. McKeigan, Q.C. respecting deuterium construction projects in Glace Bay, Nova Scotia in 1967.

[156] The Woods and McKeigan reports are well-known antecedents to the *Trade Union Act* amendments in the 1960s and early 70s: *Municipal Contracting Ltd. v. I.U.O.D.E., Local 721 and Kydd*, 91 N.S.R. (2d) 16, (N.S.C.A.). *Municipal Contracting Ltd.* is extensively quoted in *U.A. Local 682 v. U.S.W.A. Local 1064*, 103 N.S.R. (2d) 203, cited by the appellant. Likewise, *Municipal Contracting Ltd.* is referred to by this Court in the appeal of *U.S.W.A.*, 110 N.S.R. (2d) 123 (N.S.C.A.), cited by the respondent. In this latter case, *Municipal Contracting Ltd.* is referred to by this Court under the hearing "The Purpose of the [Part II] Legislature – the Reason for its Existence". It is clear that the *Act* was amended in

reliance on the McKeigan and Woods reports, (*Municipal Contracting Ltd.*, ¶ 5 to 8).

[157] According to H. Carl Goldenberg & John H. G. Crispo, *Construction Labour Relations*, (Canadian Construction Association, 1968), there were relatively few certifications in Nova Scotia as of the early 1960s. At page 430, the authors report:

> Again, as of 1963, the Nova Scotia Board was reported to have received few applications for certification from the construction industry, and recognition of the unions has been voluntary. Herman reports that the Nova Scotia Board had at that time granted certification orders only to the construction operating engineers and usually on an area-wide or province-wide basis.
>
> > The Board's practice has been to approve province-wide bargaining units only where the employer has two projects widely separated from each other. Possible mobility of labour between two projects could probably explain this. In effect, province-wide certification in Nova Scotia means joint certification in only two areas—the Halifax and the Sydney regions—where most of the construction activity is concentrated.
>
> Table 10-11 indicates that in the period 1967-1968, out of the 10 agreements in the nine building trades surveyed, nine were metropolitan in coverage (the city of Halifax and the city of Dartmouth), and the ironworkers' structural agreement was provincial. The agreement of the operating engineers with certification on a province-wide basis undoubtedly continues to exist, although it was not included in the survey.

[158] The *Woods Report*, *supra* supports the foregoing comment about the low level of certification because many of the union-employer relationships came about voluntarily:

> Many of the established relationships between unions and employers in Nova Scotia came about without the assistance of certification which compels an employer to recognize the certified union as possessing the sole right to negotiate for the employees in the unit appropriate for collective bargaining. Indeed until fairly recently voluntary recognition was the usual situation in the construction trades, although lately there has been an increase in certification applications to the Labour Relations Board.

[159] It was recognized in the 1960s that the former *Trade Union Act* did not readily suit the construction industry. As Commissioner Woods observed in his Report at p. 13:

> ***The first point to be made in trying to evaluate the situation in Nova Scotia is that the Trade Union Act is ill-conceived for the construction industry.*** In this Nova Scotia is by no means alone. Public policy regarding construction industry labour relations has been anything but satisfactory from the time of the passage of labour legislation after the second world war. While some attention was paid to the interest of construction unions, it appears that the framers of the *Federal Industrial Relations and Dispute Investigation Act* passed in 1948 and the provincial acts of that period had their attention directed to the growth of industrial unionism following the emergence of the Congress of Industrial Organizations in the United States and its Canadian counterpart, the Canadian Congress of Labour. This placed the emphasis on the factory and the mine rather than the construction site. It also encouraged vertically integrated units of employees on the industrial as distinct from the craft principle. Yet by specifically including the word "craft" among the list of appropriate types of unit it encouraged a continued independent recognition of craft unions in industries employing a variety of workers of quite different skills. The construction industry is perhaps the best example. In it the craft unions have managed to maintain themselves partly, although by no means wholly, because of the assistance of the law.
>
> The important point to note is that, aside from this special "craft privilege", the *Trade Union Act* along with its counterparts in many Canadian jurisdictions, has established the same policy and framework of administrative law for the construction industry as for all other industries. In doing so it has failed to take into account sufficiently certain differences between the construction industry and most other industries. These differences will bear examination. ***In anticipation it may be noted that this effort to apply a law reasonably suitable to most industries other than construction is the source of much of the difficulty experienced by the latter in Nova Scotia as elsewhere.***
>
> [Emphasis added]

[160] Relying on the *Woods Report*, the Legislature amended the *Trade Union Act* in 1971 and 1972, (*Municipal Contracting Ltd., supra* at ¶ 156). It created a special regime for the construction industry under a new "Part II" of the *Act*. Key changes favoured quicker certification based on geographic areas as well as sectoral bargaining with accredited employer associations. This latter change was important for the purpose of equal bargaining.

[161] In *Construction Labour Relations* at p. 415, the authors remark on employer vulnerability in the national context, prior to legislative reform:

> The position of individual contractors in the construction industry is so vulnerable that many seek the security of concerted action in their relations with organized labour. The associations that contractors have so far established have met with

> limited success. ***To maintain a reasonably equitable balance of power between unions and management in many sectors of the industry requires new departures in either public or private law-making, to strengthen the position of contractor associations.***
>
> [Emphasis added]

[162] One of the issues which statutory amendments to the *Trade Union Act* addressed was contractor vulnerability. Woods describes the feeling of vulnerability of some contractors prior to these amendments:

> Taking these factors together the employers express a kind of helplessness in negotiation, especially when the unions increase their strength by encouraging those they represent to accept work during a strike in other localities or provinces. This removes economic pressure from the strikers and weakens the employers' bargaining position to the point where capitulation to union demands is usually, they believe, the only path open to them.

[163] The foregoing makes clear that in the construction industry in the 1960s labour difficulties included the vulnerability of contractors—especially smaller contractors—to collective bargaining with unions. Amendments to the *Trade Union Act* which permitted accreditation of employers' organizations for the purpose of collective bargaining with unions helped correct this disparity in bargaining power. Labour Board decisions recognize this. For example in *360 Cayer Ltee (Re)*, [2000] N.S.L.R.B.D. No. 2 (QL) :

> 36 32. To explain the model of accreditation actually reflected in Sections 94 – 99 both inclusive of the 1972 *Act*, we start with a definition. Accreditation is the unionization of construction industry employers working in a sector as defined then, in Section 89(h) of the 1972 *Act* [now Section 92(h)]. It is the mirror image of the unionization of employees and, paradoxically, has the same purpose. Workers organized, traditionally, as a means of countering the superior legal "power" and economic might of employers by banding together (in unity there is strength) and using the threat, or the reality, of a strike to achieve some semblance of equivalent "clout" economically speaking and, because of statutory protection of the right to organize, legally speaking too. ***In an illustration of the "worm turning", it became obvious to all—participants and legislators alike—that, in the construction industry, the strength gained by the trade unions, through the threat and use of the strike weapon and through the ability to use the tactics of "whipsawing" and "leap-frogging", had created an unhealthy imbalance of power***. This dysfunction was continent-wide rather than restricted to Cape Breton Island or Nova Scotia generally either in the nature or breadth or seriousness of the problems. ***Accreditation, which was an "Ontario" concept in Canada, was seen as one solution because it would create a rough equivalence in power***

> ***between employers, on the one hand, and construction industry trade unions, on the other.***
>
> [Emphasis added]

[164] With respect, the Board's analogy to the construction industry for its "dependent worker" analysis, is inappropriate. As a general comment, the technicians in this case bear no resemblance to construction workers who enjoy a special statutory regime not extended by the Legislature to other workers who do not obtain regular employment from a single employer. Extending an "industry dependent" analysis to the technicians here is a policy step which the Legislature itself did not take (by contrast to the jurisdictions referred to in ¶ 145 above).

[165] Moreover, some of the assumptions grounding the Board's analogous reliance on the history of the construction industry are unsound. First, it is clear that certification based on individual projects was relatively rare. If the Board is suggesting otherwise, it is mistaken.

[166] Second, even where workers were certified on a project basis and would not have a long-term dependency on the relevant employer, those projects would often last more than a day. Bargaining units frequently disappeared in the 1960s when the project ended. One of the reasons for the 1968 amendments to the *Trade Union Act* was to remedy the delays of certification under Part I of the *Act*, i.e. s. 25(3) of the *Act*. Accordingly, it is wrong to imply, as the Board seems to do, that the technicians here can be certified when a project lasts for a single day because that routinely happened in the construction industry in the 1960s.

[167] Most importantly, construction workers were and are not usually dependent on a particular employer, but rather on an association of employers in a specific area of the Province. Unlike the technicians here, construction workers were reliant upon and received 100 percent of their income from employer associations. In this case the only evidence cited by the Board was the example of Mr. Mitchell, who received $2,000 of his annual $60,000 income from Egg (i.e. three percent).

[168] The Board's reliance on the analogy of the construction industry is not apt. Equality of bargaining power is a goal of the *Wagner Act* model legislation. That goal was also one of the reasons for the Part II amendments to the *Trade Union Act*. The Board's decision does not promote equality of bargaining power. It does the opposite. That is not a purpose of certification.

Are Technicians "Dependent Contractors"?

[169] As we have seen, a principal purpose of certification under the *Trade Union* Act is to redress an inequality of bargaining power which is a consequence of worker dependence, usually on one employer. In this case, there is no dependence on Egg by the class of technicians included in the certified bargaining unit. There was a relative equality of bargaining power as the Board itself recognized when it observed that to get the "best people" Egg generally had to pay "above union rates". This makes sense. While it is obvious that the technicians are necessary to Egg's capacity to produce a product for its clientele, there are very few "shoot days" in the year and employment with Egg is brief and sporadic. This places the technicians in a relatively strong bargaining position. Egg needs their services but they clearly do not need Egg.

[170] Beyond the day or two that the technicians are "on set", there is no relationship between the technicians and Egg, and no expectation of one. In this connection Egg cites a Board decision which describes a situation strikingly similar to this one:

> 12. …We add that, generally speaking, a casual is not obligated to accept the offer from the "employer" nor is the employer obliged to offer work. The question then becomes simple: should a casual "employee" be regarded as an employee of the employer given that neither is obligated to the other except when the casual is actually at work? Our answer is no. If one argues to the contrary, it would be a strange kind of employment relationship under which neither party owed anything at all to the other! Consequently, we reject the notion that a casual "employee" is an "employee" within the meaning of s. 2(1)(k) of the *Act* or of the other sections we have cited and replicated in this decision. Consequently, we apply our general approach in dealing with ss. 23(1), 25(1) and 25(7). This means that to have membership in a union and a vote counted, a casual employee must be actually at work on both dates.
>
> [Original emphasis per *Nova Scotia Government & General Employees Union v. Parkland at the Lakes Ltd.*, 2011 NSLB 37.]

[171] Of course, these words occur in the context of deciding whether casual employees can vote on an application for certification. But it is a good general description of what an employer—employee relationship *does not* look like.

The Effect of Certification on Egg:

[172] Certification effectively holds Egg hostage to the union rather than redressing an imbalance of power between Egg and the technicians whose services Egg retains. Far from correcting an inequality of bargaining power, certification places Egg at a great disadvantage. In the event of an impasse between Egg and the union, financial pressure can be exerted on Egg by the withdrawal of services. Egg needs to do some live shoots to service its clients. It requires the technicians for that purpose and is under obvious financial pressure if those services are unavailable. For their part, the technicians can withhold their services indefinitely with financial impunity.

[173] Why did the Board do this? Because it said that the employees are "dependent" on the film industry and that Egg is part of the "film industry". Of course, unlike the bargaining regime under Part II of the *Trade Union Act*, where employers may be represented by an employers' association—thus restoring any potential imbalance between individual contractors and a union—no such regime applies in this case. Certification in these circumstances gives the benefit of "collective bargaining" to workers, but denies the balancing benefit to Egg of industry-wide employer bargaining.

[174] Justice Fichaud objects (¶101) that it is not for the reviewing judge, "blind to the testimony at the Board, to overturn the Board's certification based on the judge's speculation about the outcome of future collective bargaining", implying that I am speculating on the results of certification. With respect, that is not my point. The question is not whether as a matter of fact an inappropriate certification might be rescued by good faith bargaining or frustrated by the opposite. The question is whether certification is warranted in the first place. In this case, certification does not level the playing field, but biases it in favour of the certified union. Whether the union abuses that advantage is irrelevant. The point is that certification should not confer such an advantage. Whether Egg is exploited as a result is not speculation of what might happen but an illustration of the structural problem certification creates.

Is Egg Part of Film Industry?:

[175] It is essential to the Board's reasoning that Egg be part of an industry, so as to justify worker dependence on that industry (there is no dependence on Egg as an employer).

[176] This is how the Board analyzed Egg's inclusion in the "film industry".

> 56. The foregoing approach, of course, assumes that there are persons working in a recognized occupation (in this case motion picture technicians) in a relevant industry. On this score, the Respondent's claim to be in a unique, *sui generis* commercial production industry, unrelated to the film or television feature documentary industry, is not tenable. In order to make films, commercials or television documentaries, it is often necessary to capture moving images, and/or accompanying sounds, of people, objects and their environs in order to simulate reality for presentation in some sort of narrative form which entertains, informs or persuades. Mr. Hachey, Mr. Mitchell and Mr. Mahoney all agreed that the same motion picture technicians are typically employed in all three contexts to assist in this work. Celluloid film is no longer used for these purposes, rather digital photographic technology is used. ***Mr. Mahoney and Mr. Mitchell were clear that I.A.T.S.E. motion picture technicians do virtually identical work on film shoots and on commercial shoots, even if Mr. Hachey is right that smaller commercial shoot crews multi-task and work more co-operatively than on typical film productions which are much larger and last longer***. The Board thus concludes that for purposes of the *Act*, the commercial and corporate advertising industry is a part of the film industry for purposes of the *Act*, even if it may not be so for other commercial purposes. Such an approach helps to structure the exercise of the employees' s. 13 rights of freedom of association as union members in this industry, in a manner which accords with constitutional values and the purposes of the *Act*.
>
> [Emphasis added]

[177] The problem with the foregoing analysis is that it defines Egg's place in the "film industry" on the basis of the work performed by the people it hires. This is an illogical reasoning path. The nature of an employer's business or "industry" cannot be defined simply by the services which some of its workers provide. For example, an apartment owner is not part of the "construction industry" because he employs carpenters to repair his roof. What is required is an analysis of commonality of business done by Egg Films *vis-a-vis* the film industry. That analysis is lacking. Moreover, the inclusion of Egg in the "film industry" is contrary to the evidence cited in the Board's own decision.

[178] The Board made findings of fact that are inconsistent with Egg's inclusion in the film industry. The Board noted at various points in its decision: "Egg Films may only do 10 to 15 shooting days per year, mostly to produce commercial advertising," Egg Films "styles itself as 'Atlantic Canada's premiere commercial

and corporate production company'" and "Egg Films produces television, radio and web advertising as well as corporate and web video". Egg does not engage in the "feature film industry".

[179] The Board recited—and did not reject—the evidence of Mr. Hachey referred to in ¶4 of its decision. He explained that Egg's competition is in Toronto, (not the local film industry). Egg works for both local and national clients. Egg has been able to accomplish that from Halifax with a satellite office in Moncton. One of the hallmarks of being in the same business or industry is having competitors in common. For example in the construction industry—the analogy on which the Board so heavily relies for is "dependent worker" analysis—contractors compete with one another for the same projects and customers. There is no evidence in this case that Egg competes for the same work or customers as the "film industry". There is no suggestion in the Board's factual findings or reasoning that Egg competes with any of the other businesses that employ the technicians who sought certification in this case. Put another way, the fact that Egg may occasionally compete with the film industry for the services of these technicians does not mean that Egg competes for the same work or customers as the film industry. The Board's conclusion that Egg is part of the film industry is neither supported by the facts nor the Board's reasoning path.

[180] By way of contrast, where the Legislature has grounded worker dependency on an industry, careful drafting has defined how "industry" is understood as a basis for certification. Under Part II of the *Act*, labour boards will only certify a union if an employer is engaged in the construction industry. "Construction industry" is a defined term, (92(c) of the *Act*). Moreover, the industry is further subdivided into four sectors; industrial and commercial, house building, sewers, tunnels and water mains, road building or any other sectors by the Board, (92(h) of the *Act*). Regulations passed under the *Act* give guidance on the composition of a "sector" considering six factors, (s. 36 of the *Act's* Regulations). The foregoing demonstrates that the Legislature gave careful consideration to both inclusion in an industry and inclusion in each specific sector of an industry. Such structure is utterly absent from the Board's analysis of Egg's claimed inclusion in the film industry.

[181] In this case the Board has chosen a novel "dependent worker" analysis to support its certification decision and order. I agree with Egg's submission that:

> … By requiring mere dependence on an industry, the Board dramatically altered the standard methodology for determining employment status, which leads to the

> unreasonable result that non-employees can now certify entire industries based upon one day of work. (original emphasis)

[182] In *Sagaz* the Supreme Court directed that in determining employee status, "What must always occur is a search for the total relationship of the parties". The Board failed to do that by focusing on industry dependence. One is not "employed" by an industry. One is employed by an employer. It is that relationship which the Board has failed to analyze except in its passing concession that the technicians are not dependent on Egg. The Board has not considered the total relationship ***of the parties.*** Instead, it has substituted "industry" for "employer". In doing so, it has not applied a reasonable "employee-employer" test.

[183] Although the Board found that Egg exercised "control" over the technicians during their brief shoot, that finding alone cannot sustain the Board's decision because the dependency and control test adopted by the Board considers these factors conjunctively, (¶ 149 above). Moreover, an isolated finding of control is of no value in the absence of a proper *Sagaz* analysis.

[184] Justice Fichaud disagrees that the Board is applying a novel test in this case. With respect, my colleague is too generous to the Board. To recapitulate: the Board has applied a test of impermissible novelty because:

1. The Board's worker dependence analysis ignores the legislative purpose of correcting bargaining inequalities;
2. In the absence of legislative sanction, the Board has grounded worker dependence on "industry" as opposed to an employer;
3. Where legislative support permits such an analysis, there must be *substantial* dependence on *one* employer, (¶ 145 and 146 above);
4. In the case of Nova Scotia, the Legislature has sanctioned an "industry dependent" analysis in Part II of the *Act* for the construction industry. Part II was enacted for historical reasons already described, following careful study. The Board's decision in this case lacks any such legislative or policy antecedents;
5. The definition of construction industry in Part II of the *Act* reflects careful policy choices with extensive criteria for Board consideration when deciding on certification, (¶ 180 above). The Board's "industry analysis" neither enjoys the benefit of such legislative policy support, nor supplies equivalent detailed criteria for such analysis. The

> Board's decision in this case crosses the line from interpretation to legislation.

[185] Certification of contractors who are not dependent on a single employer creates an imbalance of bargaining power in this case and potentially others if a similar logic is applied. Extending worker dependence to an "industry", however defined, to create employee status and justify certification, transcends both binding jurisprudence and statutory mandate. It represents a problematic policy decision, best left to the Legislature.

[186] The Board's decision is analytically flawed and factually unsupported. It was unreasonable and the Chambers judge erred in failing to say so. I would allow the appeal, set aside the order of the Chambers judge and I would quash the certification order granted the Board.

Bryson, J.A.