CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. TASHA MCKNIGHT, Employee Respondent, PRINCE ALBERT PARKLAND HEALTH REGION, Respondent Employer and EXECUTIVE DIRECTOR, OCCUPATIONAL HEALTH AND SAFETY, Respondent Director

LRB File No. 038-16; July 12, 2016
Kenneth G. Love, Q.C., Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant:	Juliana Saxberg
For the Respondent Employee:	Not Appearing
For the Respondent Employer:	Robert Frost-Hinz
For the Respondent Director:	Lee Anne Schienbein

Appeal from Decision of an Adjudicator – Union seeks to review preliminary decision of an adjudicator following final decision being rendered – Board finds that appeal was not filed in timely fashion.

Appeal from Decision of an Adjudicator – Union argues that it should be treated as a "person directly affected" in respect of an appeal by one of its members under Part III of *The Saskatchewan Employment Act* – Board determines that determination by Adjudicator was reasonable – Board sustains Adjudicator's decision.

Standard of Review – Board considers standard of review of Adjudicator's Decision – Board determines that standard of review should be reasonableness where Adjudicator is interpreting her "home" statute.

REASONS FOR DECISION

Background Facts:

[1] Kenneth G. Love, Q.C., Chairperson: This is an appeal against a decision of an Adjudicator appointed pursuant to Part III of *The Saskatchewan Employment Act* (the *"SEA")*. The Canadian Union of Public Employees (the "Union") appeals against a preliminary decision and the final decision of an Adjudicator dated October 22, 2015 and February 18,

2016 respectively. In her preliminary decision, the Adjudicator ruled that the Union was not a "directly affected" party to the appeal and granted the Union only "watching brief" status for the final hearing. That status included being provided with "notice of the time and location of any hearing dates", and, "the opportunity to observe the hearing".

[2] At the hearing of the matter the Union did not appear to exercise its "watching brief" status and made no representations to the Adjudicator. The Adjudicator ruled that the alleged incident raised in the complaint arose out of the Respondent Employee's employment, the findings of the Respondent Employer that there was no harassment of the Respondent Employee as outlined in its investigation of the complaint and that it was reasonable.

[3] The Union filed a Notice of Appeal on March 4, 2016 and an amended Notice of Appeal on March 16, 2016. In its amended Notice of Appeal, the Union alleged that the preliminary decision by the Adjudicator to deny it status as being a person "directly affected" amounted to an error of law, an error which "resulted in a decision on the merits which is flawed and must be set aside".

Relevant statutory provision:

[4] The following statutory provisions are relevant to this appeal.

> ***Right to appeal adjudicator's decision to board***
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> *4 - 8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.*
>
> *(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.*
>
> *(3) A person who intends to appeal pursuant to this section shall:*
>
> > *(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and*
> > *(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.*
>
> *(4) The record of an appeal is to consist of the following:*
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> > *(a) in the case of an appeal or hearing pursuant to Part II, the wage*

assessment or the notice of hearing;
(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;
(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;
(d) any exhibits filed before the adjudicator;
(e) the written decision of the adjudicator;
(f) the notice of appeal to the board;
(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or
(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.

Union's arguments:

[5] The Union provided a written brief which we have reviewed and found helpful. In it, the Union argued that it should have been accorded status as a "person directly affected" by the decision. It argued that by virtue of section 6-3 of the *SEA*, that it was a person. It argued that it was directly affected by virtue of its certification by the Board as the bargaining agent for employees of the Respondent Employer, including the Respondent Employee. It argued that as the exclusive bargaining agent, it assumed the duty of fairly representing all employees for whom it was the exclusive bargaining agent.

[6] The Union also argued that it had been identified by the Board's Registrar as having a direct interest. It cited section 19 of the Board's regulations[1] which regulation requires the Board's Registrar to:

19 On the filing of an application mentioned in Part II, the Registrar shall:

[1] RRS c. S15.1, Reg 1

> *a) Make efforts that the registrar considers reasonable to determine the identity of any employer, other person, union, and labour organization that is referred to in the application or has a* ***direct interest*** *in the application* [emphasis added]

[7] Furthermore, the Union argued that, notwithstanding that it did not request intervenor status, the Adjudicator ought to have granted the Union intervenor status in accordance with Section 20 of the Board's regulations and/or following the Board's jurisprudence regarding granting of intervenor status as outlined in its decision in *C.E.P. v. J.V.D. Mill Services.*[2]

[8] The Union argued that in matters such as this, when employee's rights are impacted and when resolution is sought through negotiation, that the Union, as exclusive bargaining agent had the right and obligation to be party to those negotiations. That interest, it argued, showed that the Union's representational rights could be eroded and it was thereby "directly affected". This, it argued, is particularly true when the Adjudicator has a statutory obligation in section 4-5(2) of the *SEA* "to meet with the parties…with a view to encouraging settlement of the matter".

[9] The Union also argued that a decision by an adjudicator could have an impact upon a collective bargaining agreement negotiated by the Union and the Respondent Employer and that the Union should have the ability to insure that any such determination is in support of or in compliance with the terms of such collective bargaining agreement.

Respondent Employer's arguments:

[10] The Respondent Employer argued that the Union was not a person who was "directly affected" by the occupational health and safety officer whose decision was appealed to the Adjudicator. It pointed to the statutory definition of "person who is directly affected" in section 3-52(2) of the *SEA* to show that a trade union was not within the class of persons defined to have a "direct interest". It also noted that there was no class of prescribed persons who had been included in the definition by regulation.

[11] The Respondent Employer argued against the Union's submission that because it was a person it should be granted status, arguing that the whole of the definition

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[2] [2011] CanLII 2589 (SKLRB)

must be considered, that is a "person directly affected". Because the legislation defined particular types of persons to be directly affected, the Respondent Employer argued that no additions could be made to the classes of persons included by the legislature relying upon what was previously known as the maxim *Inclusio unius, est exclusion alterius*, but which has been modernized as explained by Ruth Sullivan in *Sullivan on the Construction of Statutes*[3] at paragraphs 4.33 to 4.35 and 4.46.

[12] The Respondent Employer also raised the decision of the Saskatchewan Court of Appeal in *S.G.E.U. v. Saskatchewan*[4] wherein a group of employees attempted to insert itself into court proceedings over pension entitlements. It also cited the Alberta Court of Appeal decision in *C.U.P.E..Local 30 v. WMI Waste Management of Canada Inc*[5].

Respondent Director's Arguments:

[13] The Respondent Director argued that the Union did not have standing to bring this appeal to the Board because they did not meet the definition of "person directly affected" by the decision of the Adjudicator. The Respondent Director also relied upon Ruth Sullivan in *Sullivan on the Construction of Statutes*[6].

[14] The Respondent Director also argued that the role of unions under occupational health and safety legislation was limited by that legislation to participation in activities such as occupational health and safety committees and occupational health and safety representatives. The Respondent Director argued that if the legislature wished to include unions within the definition of "persons directly affected", it would have done so.

[15] The Respondent Director also argued that the Notice of Appeal was untimely insofar as the substance of the appeal was dealt with in the preliminary decision, but the Union waited until after the decision on the merits was given before taking this appeal. In support, it relied upon *Canadian Broadcasting Corporation v. Canadian Media Guild*[7]. It argued that the time for launching an appeal was limited to "15 business days after the date of service of the decision of the adjudicator" as set out in section 4-8(3)(a) of the *SEA.* That

[3] 6th Edition, Markham: Lexis Nexis, 2014
[4] [1999] 172 Sask. R. 83 (CA)
[5] [1996] 178 AR 297 (CA)
[6] 6th Edition, Markham: Lexis Nexis, 2014
[7] [1998] CanLII 4247 (ABQB)

appeal period, it argued commenced upon service of the preliminary decision of the adjudicator, not the date of service of the final decision.

Analysis:

[16] This application, while perhaps not the strongest factual situation, raises some interesting points for consideration by the Board. In the broader context, it raises the conflict between various pieces of legislation wherein individual rights are protected and collective rights in respect of which an agent has been appointed as representative of employees in the exercise of those rights.

[17] There are numerous examples where these types of conflicts easily arise. They may arise in disciplinary proceedings between a professional organization and its member, in the area of human rights complaints, in proceedings for collection of wages due from an employer, in claims made to a workers compensation board, in employees seeking redress for unfair representation, and most often in occupational health and safety complaints.

[18] Occupational health and safety complaints often will involve multiple jurisdictions. In a case such as this, where harassment is alleged, the complaint might also attract a complaint to the Workers' Compensation Board if the associated trauma is such that it constitutes a workplace injury. Additionally, it might attract a complaint to the Human Rights Commission if there are allegations which trigger that Commission's jurisdiction. Additionally, since there are often anti-harassment policies enshrined in collective bargaining agreements which may spawn a grievance being filed. Furthermore, in circumstances where the harasser and the complainant are members of the same bargaining unit, an issue of fair representation may arise in respect of the representation duties incumbent upon the union in respect of both parties to the complaint.

[19] Overlaying all of these processes and adjudicative mechanisms is the provisions of the *SEA* insofar as complaints regarding occupational health and safety is concerned. However, in addition to being overlaying, the complaints are often overlapping as noted above. It is essential for Occupational Health and Safety officers, Adjudicators, and this Board to be cognizant of potential overlapping jurisdictions and to be alive to the possible conflicts in jurisdiction and the impact of their determination or adjudication in respect of the totality of the various complaints.

[20] Labour Boards, Workers' Compensation Boards, Human Rights Commissions, Arbitrators, Occupational Health and Safety officers, and Adjudicators each possess and maintain separate jurisdictions. However, conflicts can and do arise. A determination by an Occupational Health and Safety officer which provides that harassment is not found may impact on a claim by an employee for workers' compensation benefits arising from the alleged discrimination. Similarly, a report regarding harassment conducted by an employer and a union as a result of an anti-harassment policy enshrined in a collective bargaining agreement may impact upon a finding by an Occupational Health and Safety Officer or and Adjudicator.

[21] Both the Supreme Court of Canada[8] and the Saskatchewan Court of Appeal[9] have recognized this issue and have had to deal with it to insure consistency. The factual situation in *Figliola* was somewhat unique, but the Supreme Court confirmed that tribunals should not permit serial access to decision making bodies for the purpose of seeking a more favourable decision.[10] The Saskatchewan Court of Appeal adopted this rational in *Peng* wherein former Chief Justice Klebuc found that the Human Rights Commission had erred in failing to consider a report prepared by Andrew Robertson Q.C. under a harassment policy contained within the collective bargaining agreement.

[22] While none of the above has direct relevance to the issues in this case, it is presented as a background in respect of which participation in the process by persons who may, narrowly defined, have no interest in a matter, should be considered.

Standard of Review:

[23] This Board has the authority to review questions of law arising from an adjudicator's decision. In *Weiler v. Saskatoon Convalescent Home*[11] determined that it would adopt the following as the standard of review of Adjudicator's decisions.

1. Questions of Law will be reviewed on the correctness standard;

2. Questions of mixed law and fact will be reviewed on the reasonableness standard; and

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[8] See *British Columbia Workers' Compensation Board v. Figliola* [2011] SCC 52 (CanLII), 3 SCR 422
[9] See *University of Saskatchewan v. Peng* [2014] SKCA 98 (CanLII)
[10] See paragraphs 26 to 30 per Abella J.
[11] [2014] CanLII 76051 (SKLRB)

3. Questions of fact that are reviewable as questions of law will be reviewed on the reasonableness standard.

[24] However, where the issue, as here, involves the interpretation of the Adjudicator's home statute, there must be some deference given to the Adjudicator due to their specialized knowledge and familiarity with that statute. As such, the reasonableness standard is normally invoked in such cases. In *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professions*[12], the Supreme Court says:

> ***36 The standard of reasonableness, on the other hand, normally prevails where the tribunal's decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or relates to the interpretation of the tribunal's enabling (or "home statute") or "statutes closely connected to its function, with which it will have particular familiarity" (Dunsmuir, at paras. 51 and 53-54;Smith, at para. 26).***

[25] We will, therefore, apply the reasonableness standard to the question of statutory interpretation by the Adjudicator.

Issues to be determined:

[26] The issues to be determined by the Board are:

1. Was the notice of appeal filed in a timely manner?

2. Did the adjudicator err in her determination that the Union was not a "person directly affected" by the decision of the Occupational Health and Safety Officer.?

Was the Notice of Appeal filed in a timely fashion?

[27] Both the Respondent Employer and the Respondent Director take the view that the Union should not be entitled to appeal the preliminary decision affecting its right to participate in the final hearing following the issuance of the Adjudicator's final decision.

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[12] [2011] SCC 59 (CanLII), [2011] 3 SC.R. 616; See also *Hebron v. University of Saskatchewan* [2015] SKCA 91 (CanLII) and

Rather, they say that the proper time for appeal should flow from the time of the preliminary decision.

[28] In support of his position, the Respondent Director cited *Canadian Broadcasting Corporation v. Canadian Media Guild*[13] which decision was with respect to a limitation period in which an application for judicial review could be made under the Alberta Rules of Court. In that case there was no provision for extension or enlargement of the time in which the review was to be brought.

[29] As in the case before the Alberta Court of Appeal, this Board has no inherent authority to enlarge the time in which an application must, by statute, be filed. Section 27 of the Board's Regulations permits the Executive Officer of the Board to, on request, by order, "set a further time or other time than the time prescribed in these regulations…". That provision would not assist the Union in this case since the enlargement applies only to times prescribed in the regulations. While the form of application for review of an adjudicator's decision is provided for in section 4 of the Board's Regulations, the time limitation is prescribed by statute and may not be varied by the Board or its Executive Officer utilizing the authority given in section 27 of the Board's Regulations.

[30] However, as pointed out in the CBC case, the jurisprudence is not well settled in Alberta. Nevertheless, in that case, Mr. Justice Jones did conclude that the time for filing for judicial review was not reset by a subsequent decision. He ruled in that case that the review of the initial decision was barred, but a review of a subsequent decision could continue to be heard.

[31] One of the factors which seemed to influence the Courts in Alberta was whether or not the issue for which review was sought was impacted or factored into the subsequent decision. In the case before us, there is no or little impact of the decision to allow the Union to participate on a watching brief basis only. The final decision on the merits was not determined or affected by this determination.

[32] We concur with the Alberta Court's analysis of this issue. The preliminary decision was made by the Adjudicator on October 22, 2015. It was received by the Board on that same day and presumably (although we have no direct evidence) it was served on the

parties shortly thereafter. If we presume that it was served not later than November 1, 2015, the Union is well out of time to appeal that decision. However, the Respondent Employer and the Respondent Director take no issue that the appeal was timely in respect of the final decision dated February 18, 2016.

[33] It is troubling, as well, that even having been granted status to conduct a watching brief and to obtain copies of submissions, the Union did not act upon that status and did not appear at the hearing.

[34] For these reasons, I agree with the submissions of the Respondent Employer and the Respondent Director that the Union should have appealed the preliminary decision and not have waited until the final decision was rendered. Accordingly its appeal must be considered to have been filed outside the appeal period. As a result, we have no jurisdiction to hear the Union's appeal.

Is the Union "a person who is directly affected"?

[35] While it is not necessary for the Board to answer this question, in the event that our determination as to whether or not the appeal was filed in a timely fashion is determined to be incorrect, we will provide this analysis.

[36] In support of its arguments with respect to standing, the Union cited the decision of the Saskatchewan Court of Queen's Bench in *Andrea Dunkle v. Occupational Health and Safety Division (Ministry of Advanced Education, Employment and Labour)*[14]. This decision related directly to the then definition of "a person directly affected". In that case, an occupational health and safety officer, Andrea Dunkle, appealed a decision of an adjudicator to the Court of Queen's Bench. At that time the Court of Queen's Bench exercised the appellate jurisdiction that this Board now enjoys.

[37] In that case, former Chief Justice of the Court of Queen's Bench, Mr. Justice Laing supported Ms. Dunkle's application and agreed that she was a person directly affected and could therefore bring the appeal of the adjudicator's decision.

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[13] [1998] CanLII 4247 (ABQB)
[14] [2011] SKQB 59 (SKQB)

[38] However, in that case, there was no definition of "person directly affected" in the legislation. The current definition was added shortly after that decision was made and was continued into the *SEA*. The *Dunkle* case can be of no assistance to the Union in this appeal.

[39] The Union also raised questions regarding the Adjudicator's focus solely on the question of whether or not the Union was directly affected, arguing that this was only one of the category of standing which the Adjudicator could have awarded, the others, as noted by the Board in its decision in *C.E.P. v. J.V.D. Mill Services*[15] would have allowed them to participate in the hearing as either an exceptional intervenor or a public law intervenor.

[40] However, while it is true that the adjudicator did not specifically address these other category of intervenor, she did permit the Union to have status to conduct a watching brief, which could be considered similar to a public law intervenor status[16] with limited participation rights at the hearing itself.

[41] The question on which the adjudicator was focused was the interpretation of the statutory definition in the *SEA*. By her decision she recognized that even though a person might not be a "person directly affected", as defined in the statute, such person might yet be permitted to participate in the appeal.

[42] The Union also raised the fact that they were accorded notice from the Board's Registrar as having a direct interest in the application, relying upon section 19 of the Board's Regulations.

[43] Section 19 directs[17] the Board's Registrar, upon receipt of an application, including an application made under section 4 of the Regulations[18] in respect of an appeal under Parts II or III of the *SEA*. The Registrar is required by the provision, to insure, as best he can, that all parties who may have an interest, be provided the application filed.

[44] In making his determination, the Registrar is limited in his knowledge as to who might have a direct interest, particularly in appeals under Parts II or III of the *SEA* because he has information in the request from the Ministry of Labour Relations and Workplace Safety for the appointment of an adjudicator; information which is often incomplete or erroneous. In

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[15] [2011] CanLII 2589 (SKLRB)
[16] The term used by the Adjudicator was "public observational basis".
[17] Using the term "shall"
[18] Which is one of the sections in Part II of the Regulations

such circumstances, the Registrar cannot be faulted for casting a more inclusive rather than a less inclusive net and providing notice to more rather than fewer people.

[45] Additionally, it is not the Registrar of the Board who makes any determination as to whether or not that person has status at the appeal. He merely provides parties who may have an interest with notice to permit them to request status from the Adjudicator or the Board as may be the case. The fact that the Registrar may have provided notice to a party does not, in and of itself, provide any standing to an appellant. Accordingly, this argument will not assist the Union.

[46] With respect to the Union's argument that when employee's rights are impacted and when resolution is sought through negotiation, that the Union, as exclusive bargaining agent had the right and obligation to be party to those negotiations. This argument has some merit and may be applicable in some instances where parties are seeking to negotiate a settlement of a complaint which has an impact on terms and conditions of employment specified in the Collective Bargaining Agreement. In those circumstances, one would expect that the Union might be at the table to protect the interests of its member and its other members for whom it had negotiated those terms and conditions of employment. However, that was not the case here as there was no suggestion that settlement negotiations were under consideration and that the Adjudicator had failed to take such into consideration

[47] Similarly, the Union's argument that its participation would be necessary to insure that it was complying with its duty of fair representation of its members being, either the employee impacted, or, possibly the employee who may have been responsible for the complaint. The Union is required to walk a very fine line in such circumstances. In addition to its statutory duty of fair representation, the union faces a common law duty of fair representation as noted by the Supreme Court of Canada in *Canadian Merchant Guild v. Gagnon*[19]. However, there was no argument before the Adjudicator in respect to this argument either.

[48] In our opinion, the Adjudicator's determination that the Union was not directly affected by the application was reasonable. While it may have been open to the adjudicator to take a more liberal view of the legislation before her, her determination nevertheless fell within

[19] [1984] 1 SCR 509, CanLII 18 (SCC)

the range of possible outcomes and was in accordance with the modern rule of legislative interpretation as outlined by Ruth Sullivan in *Sullivan on the Construction of Statutes*[20].

[49] The Adjudicator's decision is accordingly affirmed.

DATED at Regina, Saskatchewan, this **12th** day of **July, 2016**.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson

[20] 6th Edition, Markham: Lexis Nexis, 2014