Saskatchewan
Labour Relations Board

The Labour Relations Board
Saskatchewan

DARCY THIELE, DEL REIMER, DEBRA FAUL and GORDON LYNN ABRAHAMSON, as directors of BRI ENERGY SOLUTIONS LTD., Appellants v. DIRECTOR OF EMPLOYMENT STANDARDS, THOMAS HANWELL, and DWIGHT SIMAN, Respondents

DARCY THIELE, GORDON LYNN ABRAHAMSON AND ANDREW DENNIS as directors of BRI ENERGY SOLUTIONS LTD., Appellants v. DIRECTOR OF EMPLOYMENT STANDARDS, and DAVID IRELAND, Respondents

LRB File Nos. 052-16, 053-16, 054-16, 055-16 & 056-16; December 13, 2016
Graeme G. Mitchell, Q.C., Vice-Chairperson (sitting alone pursuant to Section 9-95(3) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1)

For the Appellants:	Anders Bruun
For the Respondent, Director:	Lee Anne Schienbein
For the Respondent Employees:	No-one Appearing

Appeal from Decision of a Wage Assessment Adjudicator – Section 4-8(1) of *The Saskatchewan Employment Act* – Board determines that reasonableness is standard of review for statutory appeals.

Appeal from Decision of a Wage Assessment Adjudicator – Board identifies relevant principles of statutory interpretation – Corporate Directors dispute Adjudicator's finding that they are joint and severally liable for unpaid wages and holiday pay owing to employees – Adjudicator's ruling upholding their liability is reasonable.

Appeal from Decision of Wage Assessment Adjudicator – Adjudicator's ruling that an employee who is also a corporate director may claim for unpaid wages and holiday pay is reasonable.

Appeal from Decision of Wage Assessment Adjudicator – Adjudicator's ruling that she is unable to add to a wage assessment a corporate director whom the Director of Employment Standards omitted is unreasonable – Board orders this corporate director be added to the wage assessment pursuant to section 4-8(6)(a) of *The Saskatchewan Employment Act*.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** Mr. Darcy Thiele, Mr. Del Reimer, Ms. Debra Faul, Mr. Gordon Lynn Abrahamson and Mr. Andrew Dennis, all directors of BRI Energy Solutions Ltd. [the "Appellants"] appeal pursuant to subsection 4-8(1) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 [the "*SEA*"] against a decision of an Adjudicator appointed under Part II of the *SEA*.

[2] Three wage assessments were initially issued against various combinations of the Appellants respecting the three (3) Respondent employees. Collectively, these assessments totaled $52,753.83. The Appellants appealed against these wage assessments pursuant to subsection 2-75(1)(a) of the *SEA*. On May 28, 2015 this Board appointed Jodi Vaughan to adjudicate these appeals.

[3] Adjudicator Vaughan heard these appeals together over two (2) days in November 2015.

[4] On February 2, 2016, in a thorough and closely reasoned Decision, Adjudicator Vaughan allowed the Appellants' appeals in part. She directed reductions to two (2) of the three (3) impugned wage assessments for various reasons. Her Order lowered the Appellants' global financial liability to $43,138.45.

[5] On March 24, 2016, the Appellants appealed to this Board. Each of the five (5) Notices of Appeal set out three (3) identical grounds of appeal, even though not all appellants were named in all of the impugned wage assessments. The relevant portions of those grounds are reproduced below:

> 1. *The Adjudicator erred in law by concluding that the phrase "joint and several" when used in the [SEA] in reference to the liability of corporate directors necessarily means that each and every director is liable for the whole of the obligation and that "when it comes to unpaid wages there is no defence." In law, the phrase "joint and several" has several meanings and can be interpreted and applied in law to produce vastly different results.*

> *In this matter, the Adjudicator applied the interpretation which, for the Appellant, produced a result which is patently unjust and absurd rather than the interpretation which would result in a just, reasonable and sensible result.*
> . . . . . .
>
> 2. *Further the Adjudicator erred in concluding that Claimants had not been paid in the manner specified in section 2.35 of the [SEA}. Claimants were in fact and law paid within the meaning of the [SEA]. Claimants were in fact and law paid within the meaning of the [SEA] thereby discharging such liability as Appellant may have.*
>
> 3. *The Adjudicator also erred in upholding, in part, the claim asserted by Dwight Siman as it was initiated while he was a director of the employer and therefore not entitled to advance a claim as an employee. In the alternative Dwight Siman in his capacity as director was liable for the wage claim advanced by David Ireland for wages claimed for the period when Dwight Siman served as director and the Adjudicator should have so ruled.*

[6] These appeals were heard together on June 7, 2016. These Reasons for Decision explain why this Board has concluded that these appeals must be allowed in part.

FACTS

[7] Mr. Barry Ireland incorporated BRI Energy Solutions Ltd. operating as Vbine Energy ["BRI Energy"] in Saskatchewan on December 11, 2015. Its' business objective was to develop vertical axis wind turbines as a viable alternative source for the production of electricity. It was anticipated BRI Energy would secure patents for concepts and ideas acquired by Mr. Ireland and, ultimately, produce affordable wind turbines to be sold globally.

[8] Mr. Ireland was the mastermind behind this enterprise. As a consequence, BRI Energy was structured so that Mr. Ireland held more than 50% of the voting shares. This ensured he had complete control over all of BRI Energy's operations.

[9] BRI Energy's business plan did not unfold as hoped. The wind turbines which the company developed, manufactured and had installed throughout the world possessed significant design flaws. By April 2012, the directors decided to shut down production in an attempt to rectify these flaws and, presumably salvage BRI Energy's business. At the time this matter came before Adjudicator Vaughan in November 2015, it appeared BRI Energy had not resolved these design problems and was on the verge of collapse. Indeed, BRI Energy has been inactive since November 5, 2012.

[10] The three (3) wage assessment notices at issue here relate to three (3) employees owed wages and other emoluments for different time periods in 2012. They may be summarized as follows:

- **Wage Assessment No. 7106 – Thomas Hanwell – $5,676.92**

  Mr. Hanwell began his employment with BRI Energy in June 2011. His claim included unpaid wages of $600 per week from March 4, 2012 to April 28, 2012, holiday pay and one (1) week pay for termination without notice for persons employed for less than one (1) year.

- **Wage Assessment No. 7096 – Dwight Siman – $18,992.30**

  Mr. Siman began his employment with BRI Energy sometime in 2009. His claim included unpaid wages of $1,000 per week from March 4, 2012 to April 28, 2012, an unpaid commission, holiday pay for both salary and commissions as well as four (4) weeks in lieu of notice for persons employed for more than three (3) years but less than five (5) years.

- **Wage Assessment No. 7108 – David Ireland – $28,383.61**

  Mr. Ireland, the son of Barry Ireland, began his employment with BRI Energy sometime in 2010. His claim included unpaid wages of $1,500 per week from July 22, 2012 to November 9, 2012, annual holiday pay and pay in lieu of notice.

[11] The Appellants, Darcy Thiele, Del Reimer, Gordon Lynn Abrahamson and Andrew Dennis, were directors of BRI Energy throughout the relevant time frames. The Appellant, Debra Faul resigned her position as a corporate director on April 25, 2012, at which time her legal liability as a director for unpaid wages ceased. See: *SEA*, ss. 2-68(1).

[12] In addition to being employed by BRI Energy, Mr. Dwight Siman also served as a corporate director from July 7, 2012 to March 29, 2013. The Appellants contended that because of this service, he should also have been named as a director in Mr. David Ireland's claim.

[13] The Appellants principal complaint was that because they were spread out over the three (3) Prairie provinces, they were removed from the day-to-day operations of BRI Energy. The board meetings were conducted primarily by way of telephone conference calls and the directors were overly reliant on the information provided to them at such meetings by Mr. Barry Ireland. Simply put, the Appellants characterized themselves as "outside" directors. As such, they maintained they should not be held liable for any of the unpaid wages as assessed against them by the Director.

THE ADJUDICATOR'S DECISION

[14] The Appellants appealed these wage assessments. They maintained that because they were remote from the daily workings of BRI Energy, it would be unfair and unjust to hold them liable for any of the unpaid wages. They acknowledged that subsection 2-68(1) of the *SEA* imposed jointly and several liability on all corporate directors unpaid wages to employees during their tenure as directors. However, they contended that 'joint and several' could mean that one director should be liable for the full amount of these unpaid wages. In light of how the company had been mismanaged, it was only fair and just that Mr. Barry Ireland should be the director solely liable under these wage assessments.

[15] In her decision released on February 2, 2016, Adjudicator Vaughn carefully recounted BRI Energy's difficult history and the travails experienced by the Appellants and other directors in attempting to get a better understanding of how fiscally viable BRI Energy actually was. She reviewed the various wage assessments including the Employment Standards Officer's worksheets to reconcile them and assess their accuracy.

[16] Adjudicator Vaughn began by noting at page 2 of her Decision that although the impugned wage assessments had been issued under the *SEA*, the relevant "rules in place during the time period relevant to these proceedings were contained in [*The Labour Standards Act*, R.S.S. 1978, c.L-1, as amended]." This clarification is welcome; however, as the rules contained in the *SEA* are substantially the same as those it superseded in *The Labour Standards Act*, there is no substantive difference between these statutes in the application of the relevant rules.

[17] She then identified the relevant issues at page 4 as follows:

> *There are two issues before me:*
> 1. *Are the Respondents owed wages in relation to their employment with BRI?*
> 2. *Are the Appellants responsible for outstanding wages?*

[18] Respecting the first issue, she determined, after carefully reviewing the documents as well as the testimony given at the appeal hearing, that the wage assessments relating to Thomas Hanwell and Dwight Siman should be revised. Specifically, she reduced the

unpaid wage entitlement for these two (2) former employees from eight (8) weeks to six (6) weeks. Contrastingly, she determined that the wage assessment relating to David Ireland was accurate.

[19] Respecting the second issue, namely the Appellants' collective liability for the unpaid wages, Adjudicator Vaughan determined that the various directors named in the wage assessments were equally responsible for their share of amounts owing to the three (3) employees. In particular she rejected the principal submission of Mr. Bruun who represented the Appellants at the hearing before her, to the effect that Barry Ireland should be held solely responsible for making good on those assessments. At page 22 of her Decision, Adjudicator Vaughan stated:

> *As I explained to Mr. Bruun at the beginning of the hearing, the unfairness of holding the Appellants responsible for outstanding wages given Barry Ireland's actions cannot factor into my decision. My authority comes for the Act. Both The Saskatchewan Employment Act and its predecessor provide that directors of a corporation are jointly and severally liable to an employee for all debts due for services performed, not exceeding six months' wages, while they were directors (section 2-68 [the SEA] and section 63 [The Labour Standards Act]). The Acts also provide that "wages" includes (sic) vacation pay and pay in lieu of notice.*
>
> *I respectfully disagree with the Appellants' position that I have the authority to rule that liability should rest solely with Barry Ireland. I do not control who is or is not named in a Wage Assessment. The Director of Employment Standards makes that decision. With respect to director's liability, the legislation is clear. I am bound by the legislation. Lack of involvement in the corporation is not a defence. Due diligence is not a defence. The misappropriation of funds by one of the directors or secret agreements between and employee(s) is not a defence. When it comes to unpaid wages, there is no defence.*

[20] She did take into account the fact that the Appellant, Debra Faul had ceased to be a director of BRI Energy on April 25, 2012. As a result, her liability for any unpaid wages terminated on the date. Adjudicator Vaughan, accordingly, relieved the Appellant, Faul from any liability in relation to David Ireland's wage assessment and from one (1) week of liability in relation to the wage assessments for Thomas Hanwell and Dwight Siman.

[21] Finally, Adjudicator Vaughan found as a fact that Dwight Siman had been a director of BRI Energy from July 7, 2012 to March 29, 2013, the period during which David Ireland's claim for unpaid wages accrued. She acknowledged at page 22 of her Decision that "fairness dictates he should have been named as a director in David Ireland's claim". Yet,

despite the fact that she found his omission curious, she indicated at page 23 that it did not "invalidate any of the claims because liability of directors is joint and several".

[22] As a result, she varied the impugned wage assessments as follows:

- **Wage Assessment 7106 for Employee Thomas Hanwell**
  Outstanding Wages: $4,407.69
- **Wage Assessment 7096 for Employee Dwight Siman**
  Outstanding Wages: $10,346.15
- **Wage Assessment 7108 for Employee David Ireland**
  Outstanding Wages: $28,384.61

ISSUES

[23] The issues to be decided on this appeal may be summarized as follows:

- Did the Adjudicator err in her interpretation of the phrase "jointly and severally liable" in subsection 2-68(1) of the *SEA*?
- Did the Adjudicator err when she concluded that the Employees had not been paid in accordance with section 2-35 of the *SEA*?
- Did the Adjudicator err when she concluded that the Employee, Dwight Siman was entitled to claim wages as he also was a corporate director of the Employer?
- Did the Adjudicator err when she concluded that she lacked the authority on an appeal to add a corporate director to a wage assessment?

RELEVANT STATUTORY PROVISIONS

[24] The provisions of the *SEA* authorizing this appeal and setting out this Board's powers on appeal read as follows:

> ***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.*
>
> . . . . . .
>
> *(4) The record of an appeal is to consist of the following:*
> *(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment of the notice of hearing;*
>
> . . . . . .
>
> *(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.

. . . . . .

(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.

[25] The provisions of the *SEA* most relevant to the issues raised by the Appellants read as follows:

2-35 (1) *An employer shall pay all wages to an employee:*
(a) in Canadian currency;
(b) by cheque drawn on a bank, credit union or trust corporation;
(c) by deposit to the employee's account in a bank, credit union or trust corporation; or
(d) by a prescribed means.

(2) Subject to subsection (3), all wages of an employee must, at the employer's discretion, be:
(a) paid to the employee during the employee's working hours;
(b) delivered to the employee's place of residence;
(c) sent to the employee by mail in a envelope addressed to the employee's place of residence; or
(d) deposited into a bank, credit union or trust corporation account of the employee's choice.

(3) If an employee is at the time fixed for payment of the employee's wages absent from the place where the wages are payable, the employer shall immediately send the employee's pay by registered mail to the employee's last address known to the employer.

(4) Any agreement between an employer and employee that allows for payment of wages in any other manner than that set out in subsection (1) is void.

(5) No employer shall issue a cheque in payment of wages that is not honoured.

. . . . . .

2-68*(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.*
(2) The maximum amount of a corporate director's liability pursuant to subsection (1) to an employee is six months' wages of the employee.

. . . . .

2-74*(2) Subject to subsection (4), the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this [Part II], the director may issue a wage assessment against either or both of the following:*
(a) the employer;
(b) subject to subsection (3), a corporate director.
(3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has

> *reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with section 2-68.*
>
> . . . .
>
> *(8) The director of employment standards may, at any time, amend or revoke a wage assessment.*

STANDARD OF REVIEW

1. The Applicable Standard of Review

[26] As already noted, appeals brought pursuant to subsection 4-8(1) of the *SEA*, are limited to questions of law. This section replaced section 62.3(1) of the now repealed *Labour Standards Act*, R.S.S. 1978, c.L-1 which governed wage assessment matters prior to the *SEA*'s enactment. Section 62.3(1) of the repealed statute authorized an appeal from a wage assessment adjudicator "on a question of law or of jurisdiction to a judge of the Court of Queen's Bench within twenty-one (21) days after the decision". The *SEA* removed the reference to jurisdictional questions. It also removed appellate jurisdiction for such matters from the Queen's Bench and reposed it in this Board.

[27] In *Weiler v Saskatoon Convalescent Home,* 2014 CanLII 76051 (SK LRB), the first case to come to the Board following this legislative change, Chairperson Love considered the scope of the Board's review powers under subsection 4-8(1) and concluded that three (3) types of issues may arise under this provision. In *Matt's Furniture Ltd v Hoffert*, 2016 CanLII 31172 (SK LRB) at paragraph 11, he most recently summarized his conclusions in *Weiler* on the question of scope of review as follows:

> *The Board has outlined the standard of review for questions of law, questions of mixed law and facts, and factual questions which may be reviewable as errors of law in Wieler v. Saskatoon Convalescent Home. That decision established the following standards of review:*
>
> > ***1.*** *Errors of Law will be reviewed on the "correctness" standard.*
> > ***2.*** *Errors of Mixed Law and Fact will be reviewed on the "reasonableness" standard.*
> > ***3.*** *Errors of Fact which may be reviewable as questions of law will be reviewed on the "reasonableness" standard.*

[28] Subsection 4-8(1) is a generic statutory appeal provision with language that is similar, if not identical, to language found in many federal and provincial statutes across Canada.

Very recently the Supreme Court of Canada settled on "reasonableness" as the applicable standard of review in statutory appeals.

[29] In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 ["*Edmonton East (Capilano)*"], the Court was called upon to determine the appropriate standard of review for appeals under section 470 of Alberta's *Municipal Government Act* ["*MGA*"]. This provision authorized appeals from decisions of a local assessment review board to the Alberta Court of Queen's Bench on "a question of law or jurisdiction of sufficient importance to merit an appeal". Both Alberta's Court of Queen's Bench and Court of Appeal determined that the appropriate standard of review for such matters was correctness.

[30] The Supreme Court (5:4) disagreed. Writing for the majority, Karakatsanis J. stated at paragraphs 21 - 24:

> *[21] The [Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190] framework balances two important competing principles: legislative supremacy, which requires the courts to respect the choice of Parliament or a legislature to assign responsibility for a given decision to an administrative body; and the rule of law, which requires that the courts have the last word on whether an administrative body has acted within the scope of its lawful authority (paras. 27-31).*
>
> *(1) Presumption of Reasonableness*
>
> *[22] Unless the jurisprudence has already settled the applicable standard of review (Dunsmuir, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so the standard of review is presumed to be reasonableness (Movement laïque Québécois v Saguenay (City), 2015 SCC 16; [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.*
>
> *[23] The Dunsmuir framework provides a clear answer in this case. The substantive issue – whether the Board had the power to increase the assessment – turns on the interpretation of s. 467(1) of the MGA, the Board's home statute. The standard of review is presumed to be reasonableness.*
>
> *(2) Categories That Rebut the Presumption of Reasonableness*
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> *[24] The four categories of issues identified in Dunsmuir which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or vires",*

> *and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (Canadian Artists' Representation v National Gallery of Canada, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; McLean v British Columbia (Securities Commission), 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22). [Emphasis added.]*

[31] The majority went to consider whether a statutory right of appeal or a right to appeal with leave against an administrative tribunal's decision qualifies as a new category of matters subject to a standard of review of correctness. The Alberta Court of Appeal in this case concluded it did. However, Karakatsansis J. disagreed stating at paragraph 28 that such a result ran counter to "strong jurisprudence from this Court". She elaborated at paragraph 29 as follows:

> *[29] At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (McLean; Smith v. Alliance Pipeline Ltd., 2011 SCC 7, [2011] 1 S.C.R. 160; Bell Canada v. Bell Aliant Regional Communications, 2009 SCC 40, [2009] 2 S.C.R. 764; Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, [2014] 2 S.C.R. 633; Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, [2015] 3 S.C.R. 147; ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2015 SCC 45, [2015] 3 S.C.R. 219).*

[32] The majority acknowledged at paragraph 32 that the "presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness". However, after reviewing the language, and statutory context, of section 407 of the *MGA,* Karakatsanis J. determined the Alberta Legislature did not intend appeals brought pursuant to that legislative provision be subject to a correctness standard.

[33] Applying the *Edmonton East (Capilano)* analysis here, I find the presumption of reasonableness operates. The adjudicator had to interpret particular provisions of the *SEA.* For the purposes of appeals under Parts II and IV, the *SEA* qualifies as the "home statute". Moreover, none of the four (4) *Dunsmuir* categories that would rebut this presumption is relevant here. Nor following the Court's direction in *Edmonton East (Capilano)*, is there any need to embark upon a contextual analysis.

[34] Accordingly, for all of these reasons this appeal must be decided on a reasonableness standard.

2. What is the Reasonableness Standard?

[35] The now classic formulation of the revised reasonableness standard is found in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9. There Bastarache and LeBel JJ. explained it as follows at paragraphs 46 – 47:

> *[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?*
>
> *[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [Emphasis added.]*

3. Conclusion on Standard of Review

[36] For these reasons, the relevant standard of review is reasonableness, see: *Edmonton East (Capilano)*, *supra*. Accordingly, the decision of Adjudicator Vaughan will be assessed to determine whether it "falls within a range of possible, acceptable outcomes" and is justified, transparent and intelligible, see: *Dunsmuir*, *supra*.

ANALYSIS AND DECISION

1. Did the Adjudicator err in her interpretation of the phrase "jointly and severally liable" in subsection 2-68(1) of the *SEA*?

[37] The first issue on this appeal raises a pure question of statutory interpretation, namely what is meant by the term "jointly and severally liable" as it is found in subsection 2-68(1) of the *SEA*. Prior to analyzing this issue, however, it is important to review two (2) statutory interpretative principles that should inform this analysis.

[38] The first principle is the modern rule of statutory interpretation which applies to all question of statutory interpretation. The Supreme Court *per* Brown J. very recently summarized this rule in *Krayzel Corporation v Equitable Trust Co.*, 2016 SCC 18. He stated at paragraph 15:

> *[15] Statutory interpretation entails discerning Parliament's intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's schemes and objects: Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21. Throughout, it must be borne in mind that every statute is deemed remedial and is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": Interpretation Act, R.S.C. 1985, c. I-21, s. 12.*

[39] In this passage, Brown J. references the federal *Interpretation Act*. It should be noted, however, that *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, s.10 is to the same effect. See also: *Holtby-York v Saskatchewan Government Insurance*, 2016 SKCA 95, at para. 6.

[40] The second principle relevant here emphasizes the remedial nature of Part II of the *SEA.* The Supreme Court identified this principle when it interpreted provisions of *Ontario's Employment Standards Act* ["*ESA*"], a statute similar in effect to Part II of the *SEA*. For example, in *Machtinger v HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, Iacobucci J. for the Court stated at page 1003:

> *Section 10 of the Interpretation Act, R.S.O. 1980, c. 219, provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." The objective of the [ESA] is to protect the interests of employees by requiring employers to comply with certain minimum periods of notice of termination. To quote, Conant Co. Ct. J. in [Pickup v Litton Business Equipment Ltd. (1983), 3 C.C.E.L. 266], at p. 274, "the general intention of this legislation [i.e. the [ESA]] is the protection of employees, and to that end it institutes reasonable, fair and uniform minimum standards." The harm which the [ESA] seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to employers.*
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> . . . . .
>
> *Accordingly, an interpretation of the [ESA] which encourages employers to comply with the minimum requirements of the [ESA], and so extends its protections to as many employees as possible, is to be favoured over one that does not.*

[41] Similarly, in *Rizzo & Rizzo Shoes Ltd*, *supra*, Iacobucci J. again writing for the Court reiterated the interpretative approach to the *ESA* which he had advocated in *Machtinger*, *supra*. At page 47, he stated:

> *Finally with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see e.g., Abrahams v Attorney General of Canada, [1983] 1 S.C.R. 2, at p. 10; Hills v Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 537).*

[42] Shortly thereafter, the Saskatchewan Court of Appeal adopted this interpretative approach in respect of *The Labour Standards Act*, R.S.S. 1978, c.L-1, the precursor to the *SEA* in *Kolodziejski v Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525, 1999 CanLII 12264 (SKCA). As a result, it should apply with equal force to the *SEA*.

[43] With these governing interpretive principles identified, I turn to consider the substance of the Appellants' first ground of appeal, namely Adjudicator Vaughan's interpretation of the phrase "jointly and severally liable". This is the passage found at pages 21 and 22 of her Decision with which the Appellants take issue:

> *As I explained to Mr. Bruun at the beginning of the hearing, the unfairness of holding the Appellants responsible for outstanding wages give Barry Ireland's actions cannot factor into my decision. My authority comes from the Act. Both The Saskatchewan Employment Act and its predecessor provide that directors of a corporation are jointly and severally liable to an employee for all debts due for services performed, not exceeding six months' wages, while they were directors (section 2-68 [of the SEA] and section 63 of the old Act). The Acts also provide that "wages" includes vacation pay and pay in lieu of notice.*
>
> *I respectfully disagree with the Appellant's position that I have the authority to rule that liability should rest solely with Barry Ireland. I do not control who is or is not named in a Wage Assessment. The Director of Employment Standards makes that decision. With respect to director's liability the legislation is clear. I am bound by the legislation. Lack of involvement in the corporation is not a defence. Due diligence is not a defence. The misappropriation of funds by one of the directors or secret agreements between him and employee(s) is not a defence. When comes to unpaid wages, there is no defence.*

[44] At the hearing of this appeal, counsel for the Appellants submitted that Adjudicator Vaughan's conclusion on this issue is unfair because it re-victimizes them for the alleged fraud of a fellow director, Mr. Barry Ireland. Counsel for the Appellants elaborated on his argument at pages 4 and 5 of his Memorandum of Law as follows:

> *It is clear from the uncontradicted evidence of Robert Fisher that the [sic] Barry Ireland misappropriated at least $500,000.00 from the employer, BRI. Much of this value came from the purchase of shares in BRI by Appellants.*

> *Now the Appellants having been victimized once stand to be victimized a second time by Order of the Province of Saskatchewan. It is submitted on the facts of this case, that it is unreasonable and unjust to interpret the Saskatchewan Employment Act as having the effect of imposing liability on Appellants.*
>
> *The phrase "joint and several" has many meanings. In this matter the Adjudicator accepted and applied an interpretation which did not include director Dwight Siman. In this the Adjudicator approved the assessments of the Director, though the fact of Dwight Simans [sic] directorship was known to the office of the director.*
>
> *It is submitted on the facts of this matter than an interpretation of "joint and several" which excludes appellants from liability serves the purposes of the Saskatchewan Employment [Act].*

[45] Counsel for the Appellants relied on three (3) authorities to support this line of argument: *Verdun v Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *New Brunswick v Estabrooks Buick Ltd.* (1982), 44 N.B.R. (2d) 201, 1982 CanLII 3042 (NBCA), and *R. v De Haven*, [1977] 6 W.W.R. 141 (SKCA). He asserts these authorities stand for the proposition that statutory language should be interpreted so as to avoid an unjust result.

[46] Counsel for the Director disagreed. She asserts firstly that the phrase "jointly and severally liable" is a legal term of art with an accepted understanding at law. She cited the decision of Lee J. in *Royal Bank of Canada v Riverbanks Gourmet Café & Market Inc. and Sherry Fleming*, 2002 ABQB 50 as exemplifying the generally accepted meaning of joint and several liability. In particular, Lee J. at paragraph 26 of his reasons for judgment stated:

> *[26] Blacks Law Dictionary defines 'joint and several' liability as follows: "A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at this option ... The creditor may select one or more as the object of his suit" [West Publishing Company, 1979, 5th Edition].*

[47] She argues secondly that even if fraud was demonstrated, which it was not, it would not displace the operation of joint and several liability. Again she cited *Riverbanks Gourmet Café & Market Inc.* where Lee J. concluded at paragraph 30 that allegations of fraud advanced in that matter "are not properly before the Court at this time, and do not give rise to a defence in favour of the Defendant, Sherry Fleming in her personal capacity".

[48] I agree with counsel for the Director that Adjudicator Vaughan's reasons satisfy the reasonableness standard for three (3) reasons.

[49] First, the Adjudicator did not err in applying the generally accepted meaning of the phrase "jointly and severally liable" as it is found in subsection 2-68(1). Contrary to the position of the Appellants, this is a term which is neither ambiguous nor amenable to a variety of interpretations. As a consequence, the Adjudicator adhered to the modern rule of statutory interpretation in her decision. The interpretive approach reflected in the Supreme Court's decision in *Verdun* referred to by the Appellants has evolved and matured, and is now reflected in more recent jurisprudence, most notably *Rizzo & Rizzo Shoes Ltd.*, *supra* and its progeny.

[50] Second, Adjudicator Vaughan took into account the remedial nature of Part II of the *SEA* when adjudicating this matter as the Supreme Court directed in *Machtinger*, *supra*, for example. As noted in *Machtinger*, statutory provisions like subsection 2-68 and, Part II, more generally, are to receive an interpretation "which encourages employers to comply with the minimum requirements" of the legislation in order to "extend" its protections to as many employees as possible: *Machtinger*, *supra*, at p. 1003.

[51] This fact renders *R v DeHaven*, *supra*, wholly inapplicable to this case. *DeHaven* involved a criminal prosecution and different interpretive principles apply in such a context, most notably the central tenet that any ambiguity in the law is to be decided in favour of the accused. Here any ambiguity (of which there is none) must be resolved in favour of employees. See especially: *Rizzo & Rizzo Shoes Ltd.*, *supra*, at page 47.

[52] Third, the Appellants' reliance on the now dated decision of the New Brunswick Court of Appeal in *New Brunswick v Estabrooks Buick Ltd.*, *supra*, is misplaced. The statutory interpretation issue in that appeal required the Court to resolve an apparent inconsistency between the French and English versions of a provision of New Brunswick's *Social Services and Education Tax Act*. It should be recalled that in New Brunswick by virtue of section 16(2) of the *Canadian Charter of Rights and Freedoms*, French and English versions of a provincial law are equally authoritative.

[53] In the New Brunswick Court of Appeal each of the three (3) judges issued separate reasons for judgment. As a consequence, there is no majority opinion for the Court. However, the judges agreed that the French text of the provision in question was to be preferred. In the words of Hughes, CJNB this was because of "its clarity and because it avoids results which the Legislature probably did not anticipate or intend": *Estabrooks Buick*, *supra*, at para. 4.

[54] As explained above, subsection 2-68(1) is neither ambiguous nor amenable to an interpretation that the Legislature did not anticipate or intend. It is not necessary, therefore, to resort to the kind of interpretive analysis undertaken by the New Brunswick appeals court in *Estabrooks Buick.*

[55] Accordingly, for these reasons, Adjudicator Vaughan's interpretation of subsection 2-68(1) of the *Act* satisfies the reasonableness standard of review. As a consequence, the Appellants' first ground of appeal must fail.

2. Did the Adjudicator err when she concluded that the Employees had not been paid in accordance with section 2-35 of the *SEA*?

[56] As counsel for the Director observes at paragraph 16 of her Brief of Law, this issue is advanced by the Appellants in their Notices of Appeal but not addressed in their Memorandum of Facts and Law. Nevertheless, she submits that Adjudicator Vaughan "made a reasonable determination that the Employees were not paid pursuant to s. 2-35 of [the *SEA*] with respect to the cheques that the Employees were told to hold by their Employer."

[57] Adjudicator Vaughan explicitly references section 2-35 in the following passage found at page 20 of her Decision:

> *With respect to Dwight Siman and David Ireland's claims, the Appellants argue that a BRI share was issued to each of them on October 10, 2012 (ER12), that they did no pay for these shares, and that the value of each share was $10,000. Accordingly any claim for wages must be discounted by this amount.*
>
> *Even if shares were issued in exchange for unpaid wages, I cannot take the value of the shares into account as payment for wages. Both Acts say that an employer must pay all wages to an employee in Canadian currency by cheques or deposit to the employee's account and that any agreement allowing for payment of wages in any other manner is void (section 2-35 of new Act and section 49 of old Act). The issuance of BRI shares has no bearing on these appeals.*

[58] Elsewhere in her Decision, Adjudicator Vaughan reviewed the unusual history surrounding cheques proffered to employees and those same employees being told not to cash them because BRI Energy lacked the funds to cover those cheques. It is apparent from her analysis that she clearly understood the requirements of the *SEA* respecting how wages are lawfully to be paid in Saskatchewan and applied those requirements to the facts as she found them. As a result, her analysis of, and conclusions on, this issue satisfies the reasonableness standard.

[59] Accordingly, for these reasons the Appellants' second ground of appeal must fail.

3. Did the Adjudicator err when she concluded that the Employee, Dwight Siman was entitled to claim wages even if he was a corporate director of the Employer?

4. Did the Adjudicator err when she concluded that she lacked the authority on an appeal to add a corporate director to a wage assessment?

[60] As the Appellants' last two (2) grounds of appeal relate to the same individual, Dwight Siman, they conveniently may be dealt with together.

[61] The third ground of appeal may be disposed of quickly. There is no dispute that although Mr. Siman was employed by BRI Energy throughout the period of time relevant to the wage assessments under consideration, he also served as one of its corporate directors from July 7, 2012 until March 29, 2013.

[62] The definition of "employee" found in subsection 2-1(f) is broad. It does not exclude an individual satisfying this definition who may also be a director of his or her corporate employer. As already discussed, section 2-68 speaks to the liability of corporate directors of the employer for the unpaid wages of its employees. It is important to recognize that this provision also does not exclude an employee who is also a corporate director from seeking payment of unpaid wages and holiday pay. It only precludes such an individual from taking advantage of the benefit accorded to other employees in his or her situation by virtue of section 15.1 of *The Enforcement of Maintenance Orders Act, 1997*, S.S. 1997, c.E-9.21.

[63] As a result, Adjudicator Vaughan's conclusion that Mr. Siman was an employee able to seek payment for unpaid wages and holiday pay even though he was also a corporate director of BRI Energy satisfies the reasonableness standard.

[64] The Appellants' fourth and final ground of appeal is more difficult. This ground asserts that Adjudicator Vaughan erred when she did not add Mr. Siman as a corporate director subject to liability under Wage Assessment No. 7108 in relation to Mr. David Ireland. On this point, she stated at page 22:

> *The Appellants also argue Dwight Siman and/or David Ireland's claims are flawed because Dwight Siman is not names as a director on David Ireland's Wage Assessment when he was clearly a director at that time (ER4 and ER10). The Respondents argue the claims are not flawed due to joint and several liability. As long as one director is liable, the claims are valid.*

> *The evidence establishes Dwight Siman was a director from July 7, 2012 to March 29, 2013. I accept the Appellants' argument that fairness dictates he should have been named as a director in David Ireland's claim. For some reason, Employment Standards chose not to name him. While I agree he should have been named, the fact he was not named, does not invalidate any of the claims because liability of directors is joint and several.*

[65] Earlier in her decision, Adjudicator Vaughan stated:

> *I do not control who is or is not named in a Wage Assessment. The Director of Employment Standards makes that decision. With respect to director's liability, the legislation is clear. I am bound by the legislation.*

[66] In summary, Adjudicator Vaughan found the evidence demonstrated that Mr. Siman should have been named as a corporate director for purposes of Wage Assessment No. 7108. However, because the Director did not include him among the corporate directors identified in that wage assessment, and in spite of the unfairness visited upon the named corporate directors from this omission, she lacked the ability to correct it.

[67] In order to assess the reasonableness of her conclusion on this issue, it is necessary to unpack her reasoning. This necessitates a careful review of the relevant statutory provisions.

[68] To begin, subsections 2-74(2) and (3) of the *SEA* authorize the Director to issue wage assessments in certain circumstances. These provisions read as follows:

> ***2-74****(2) Subject to subsection (4), if the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this part, the director may issue a wage assessment against either or both of the following:*
>
> *(a) the employer;*
>
> *(b) subject to subsection (3), a corporate director.*
>
> *(3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with subsection 2-68. [Emphasis added.]*

[69] Section 2-68, which is referenced in subsection 2-74(3) and reproduced above, creates joint and several liability upon "the corporate directors of an employer" for unpaid wages and holiday pay of employees.

[70] Subsection 2-75(1)(a) authorizes an appeal of a wage assessment from either "an employer or corporate director who disputes liability or the amount set out in the wage assessment". Once an appeal has been filed and an adjudicator has been appointed by the Board's registrar pursuant to subsection 4-3(3) of the *SEA* [as recently amended by *The Extension of Compassionate Care, 2016*, SS 2016, c17, s5], an adjudicator will convene a hearing. The powers of an adjudicator are enumerated in subsections 4-6(1) and (2) as follows:

> ***4-6****(1) Subject to subsections (2) to (5), the adjudicator shall:*
> *(a) do one of the following:*
> *(i) dismiss the appeal;*
> *(ii) allow the appeal;*
> *(iii) vary the decision being appealed; and*
> *(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal. [Emphasis added.]*

[71] Adjudicator Vaughan concluded that because the *SEA* did expressly authorize her to add a corporate director she lacked the authority to add Mr. Siman as a corporate director to the wage assessment, even though it was undisputed, he had served as a corporate director at all relevant times and his omission was unfair to the other named corporate directors.

[72] Counsel for the Director supports the Adjudicator's reasoning arguing that the right of a corporate director under subsection 2-75(1) "does not extend to assessing the liability of others with the intention to have others added to the wage assessment". See Director's Brief of Law, at paragraph 22.

[73] I acknowledge that the *SEA* does not expressly authorize a wage assessment adjudicator to add a corporate director to a wage assessment issued by the Director. However, I conclude that it is too narrow a reading of this legislation to hold that because it is not explicitly allowed, an adjudicator is without jurisdiction to amend or vary a wage assessment by adding a corporate director whom the Director failed to include. Three (3) factors persuade me that in the circumstances of this appeal, Adjudicator Vaughan's conclusion on this point fails to meet the reasonableness standard.

[74] First, it has insufficient regard for the modern rule of statutory interpretation encouraging a generous and liberal interpretation for all legislation. A corporate director is authorized to appeal either liability or the amount which the wage assessment directs them to pay. Here, the name of a corporate defendant has been omitted for no legitimate reason. Indeed,

at the hearing, the representative of the Director did not take issue with the fact that Mr. Siman should have identified as a corporate director in Wage Assessment No. 7108. A reading of subsection 2-75 of the *SEA* that is consistent with this modern rule of statutory interpretation would permit a corporate director to challenge the failure of the Director to include a fellow corporate director on a wage assessment as this omission not only touches on that director's liability but could also affect the amount set out in the wage assessment for which he or she is liable.

[75] As well, the remedial powers of a wage assessment adjudicator include the power "vary the decision being appealed". A generous reading of this broad remedial language would not limit an adjudicator to ordering a reduction in the amount identified in the wage assessment as owing to the employees, or determining the liability of the employer or corporate directors named in the wage assessment. It would also permit the adjudicator to correct any deficiency in the wage assessment in circumstances where the evidence is clear and undisputed that it contains an error or omission, such as not including a corporate director who properly should have been identified in the document.

[76] Second, the remedial nature of Part II of the *SEA* further supports such an interpretation. Part II seeks to remedy inequities not only for employees but also to employers and corporate directors. This would include ensuring that all employers or corporate directors responsible for unpaid wages are correctly identified and named in the wage assessment.

[77] Third, a generous interpretation of these provisions ensures that the Director's powers under section 2-74(2) and (3) of the *SEA* are subject to some form of administrative law oversight. The approach adopted by Adjudicator Vaughan in this appeal and endorsed on this appeal by counsel for the Director effectively renders a determination by the Director pursuant to these legislative provisions final and immune from any form of independent third party review.

[78] This appeal is a case in point. At the time he issued Wage Assessment 7108, the Director may not have known that Mr. Siman was also a corporate director. It is clear from the record, however, that he knew of this fact by the time the hearing took place before Adjudicator Vaughan. Yet, at no point did the Director exercise his authority under subsection 2-74(8) of the *SEA* which permits him to "at any time, amend, or revoke a wage assessment".

[79] It would be inconsistent with the principles of statutory interpretation identified earlier to perpetuate this glaring omission when the relevant statutory language bears an interpretation that would rectify it.

[80] Accordingly, for all of these reasons, Adjudicator Vaughan's decision not to vary Wage Assessment 7108 and include Dwight Siman as a corporate director liable under that wage assessment fails to meet the reasonableness standard. In the circumstances of this appeal her conclusion respecting this issue cannot be said to "fall within a range of possible, acceptable outcomes" as contemplated in *Dunsmuir*, *supra*.

[81] As a consequence, pursuant to subsection 4-8(6)(a) of the *SEA*, I direct that Wage Assessment 7108 should be amended to identify Mr. Siman as a corporate director responsible for the unpaid wages and holiday pay owing to Mr. David Ireland.

5. Amendments to Wage Assessments for Ms. Debra Faul

[82] A final issue remains. Subsection 2-68(1) stipulates that a corporate director is only jointly and severally liable for unpaid wages "while they are corporate directors". Only the Appellant, Debra Faul ceased being a corporate director for part of the time relevant here. Adjudicator Vaughan acknowledged this fact and took it into account in the following passage found at page 22 of her Decision:

> *The only way a director is not liable for wages is if he or she was not a director when the wages were earned. The evidence establishes all named directors were directors during the relevant time period. The only director with reduced liability is Debra Faul. According to the evidence, she resigned as director on April 25, 2012 (ER5). Therefore, she is not responsible for any portion of David Ireland's wages or for the portion of Thomas Hanwell and Dwight Siman's wages covering April 25 to April 30, 2012…In the end, liability is joint and several but Debra Faul's liability is reduced by 1 weeks' pay for Thomas Hanwell and Dwight Siman.*

[83] Counsel for the Director at paragraphs 25 and 26 of her very helpful Brief of Law quantified those reductions as follows:

> *25. The Director of Employment Standards submits that Wage Assessment 7106 for Employee Hanwell should be reduced to $4,026.92 for Appellant Faul only ($4,407.69 - $380.77 = $4,026.92). This is based on the following calculation for three working days, Thursday, April 26, Friday, April 27 and Monday, April 30 and Hanwell earning $600 per week:*

> *$600/5 days x 3 days = $360.00 plus vacation pay on the $360.00 of $20.77 ($360.00 x 3/52) for a total reduction of $380.77*
>
> *26. The Director of Employment Standards submits that Wage Assessment 7096 for Employee Siman should be reduced to $9, 711.54 for Appellant Faul only ($10, 346.15 - $634.61 = $9, 711.54). This based on the following calculation for three working days, Thursday, April 26, Friday, April 27 and Monday, April 30 and Siman earning $1,000 per week:*
>
> > *$1,000/5 days x 3 days = $600.00 plus vacation pay on the $600.00 of $34.61 ($600.00 x 3/52) for a total reduction of $643.61.*

[84] The Board accepts these adjustments to Ms. Faul's liability under these two (2) wage assessments as accurate, and directs that Wage Assessments 7106 and 7906 be amended accordingly.

CONCLUSION

[85] This case is a cautionary tale. Like Adjudicator Vaughan, I, too, have sympathy for the Appellants. As she stated they "seem like good, business-savvy people who took their role on BRI's board seriously." Unfortunately, they failed to scrutinize rigorously the information provided to them by management and effectively left the day-to-day workings of BRI Energy's operations solely to Mr. Barry Ireland, much to their detriment.

[86] Accordingly, for all of these reasons the Appellants' appeals are allowed in part as follows:

- Wage Assessment 7106 is amended to reflect Appellant Faul's liability as $4,026.92.
- Wage Assessment 7108 is amended to include the name of Dwight Siman in the list of Directors of BRI Energy jointly and severally liable for the unpaid wages and holiday pay due and owing to David Ireland.
- Wage Assessment 7906 is amended to reflect Appellant Faul's liability as $9,711.54.

[87] All other aspects of the Appellants' appeals are dismissed.

DATED at Regina, Saskatchewan, this **13th** day of **December, 2016**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson