THE DIRECTOR OF EMPLOYMENT STANDARDS, Appellant v. MAXIE'S EXCAVATING[1], Respondent and SEAN ANDREW BRIDGETTE, Respondent

LRB File No. 194-17; February 8, 2018

Kenneth G. Love, Q.C., Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant: Director Employment Standards:	Lee Anne Schienbein and Laura Barath
For the Respondent, Maxie's Excavating:	Vincent Dziadyk, Janice Harasymchuk & Rob Harasymchuk
For the Respondent Sean Andrew Bridgette:	Sean Bridgette and Sarah Bridgette

Appeal of Adjudicator's Decision – Director of Employment Standards appeals against a decision of an Adjudicator in respect of a Wage Assessment made by the Director. Board reviews statutory scheme related to appeals by Director of Employment Standards and Director of Occupational Health and Safety.

Time limits for filing of Appeal – Employer argues that Director's appeal was filed outside of the 15 business day period for appeals under section 4-8 of *The Saskatchewan Employment Act*. Board reviews provisions and its prior decision in ***Black Gold Boilers Ltd. Re:***[2] Board determines that *Black Gold Boilers* should not be followed.

Time limits for filing Appeal – Board reviews the scheme of the *Act* and determines that Director is bound by the time limitation imposed upon other appellants to the Board. Board finds that Director is a "person" under section 4-8 of *The Saskatchewan Employment Act*. Board also finds that an unlimited right of appeal as suggested by the Director leads to an absurdity and would render any adjudicator's decision uncertain as it could not be final with an unlimited right of appeal.

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[1] See paragraph [2] below for the full name of the Respondent.
[2] [2016] CanLII 98643 (SKLRB)

Time limits for filing Appeal – Board reviews statutory provisions for filing of appeals to the Board – Board finds that service upon the Director in this case was improper which makes the date for commencement of the appeal period uncertain. Board also finds that notwithstanding the improper service, the Director formulated the intention to appeal within the prescribed appeal period, notwithstanding that the actual notice of appeal was mailed and delivered to the Board outside the appeal period.

Standard of Review – Board reviews the standard of review as enunciated by the Supreme Court in ***Edmonton City v. Edmonton East (Capilano) Shopping Centres Ltd.***[3] and determines that the standard of review of a decision of an Adjudicator should be reasonableness.

Decision of Adjudicator – Board reviews Adjudicator's decision on reasonableness standard. Board determines that the Adjudicator erred and that his decision was unreasonable – Decision remitted to Adjudicator to be reconsidered.

Employee Representation – Board reviews complaint by Employee that he was not allowed to be represented by his spouse at the hearing. Board determines that employees may be represented by the Director or by another person.

Notice of Appeal and Filing of Appeal with Director – Board reviews requirements for provision of notice of appeal to the Adjudicator and appropriate proof of payment of filing fees to accompany appeal. Board finds that notice of appeal not provided to Adjudicator, who proceeded on the assurance of Employment Standards Officer that appeal had been properly lodged. Board directs Director to provide documentation related to filing requirements and the Notice of Appeal.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** This is an appeal against a decision of an Adjudicator appointed pursuant to Section 4-3 of *The Saskatchewan Employment Act* (the *"SEA")*. The Director of Employment Standards (the "Director") appeals against the decision of an Adjudicator dated August 28th, 2017[4], which decision amended the determination of the Director that the Respondent, Sean Andrew Bridgette ("Bridgette"), had not received sufficient notice of lay off as prescribed by *The Saskatchewan Employment Act*. (the "*SEA*")

[3] 2016 SCC 47
[4] LRB File No. 088-17

[2] Maxie’s Excavating (“Maxie’s”) is a business name and has been used as the shortened name for the actual Respondents in this case who are properly described as follows:

> *NORTH PARK ENTERPRISES INC., o/a Marie's Excavating; VINCENT DZIADYK, being a director of North Park Enterprises Inc., o/a Marie's Excavating; BRYM ENTERPRISES LIMITED., o/a Maxie's Excavating; MYRNA BRAATEN, being a director of Brym Enterprises Ltd., o/a Maxie's Excavating; DINGO ROAD & RAIL HOLDINGS LIMITED, o/a Maxie's Excavating; ROBERT HARASYMCHUK, being a director of Dingo Road & Rail Holdings Ltd., o/a Maxie's Excavating; JANUK HOLDINGS LIMITED, o/a Marie's Excavating; JANICE HARASYMCHUK, being a director of Januk Holdings Ltd., o/a Maxie's Excavating; GKB HOLDING LIMITED, o/a Maxie's Excavating; GERALD BRAATEN, being a director of GKB Holding Ltd., o/a Maxie's Excavating.*

Facts:

[3] Bridgette had worked for Maxie’s for over (8) eight years. Based upon his length of service, the *SEA* entitled him to six (6) weeks’ notice of layoff, or pay in lieu thereof.

[4] Over the course of 2016, Bridgette was provided written documents by Maxie’s with his pay stub indicating that he may be laid off sometime in the future. Those documents were dated February 29, 2016 and August 17, 2016. In both cases, the document read as follows:

> *Consider this written notice that, due to shortage of work, Layoff notices may be forthcoming at any time after receipt of this letter.*

[5] After receipt of those first two documents, no layoffs occurred. A third notice was given, identical to the first two, on October 13, 2016. At that time, Bridgette was on short term disability and he did not receive a pay stub or the enclosed notice. The third written notice was posted at Maxie’s business offices. The Adjudicator determined that even though he was absent from work, Bridgette was aware of the October 13, 2016 correspondence. However, the Adjudicator also found that Bridgette had received similar notices approximately once a year in the past and had never been laid off principally as a result of his employment as a safety officer.

[6] The Adjudicator held, in his decision dated August 28, 2017, that the written correspondence was effective notice even though it did not contain a specific layoff date. The Adjudicator reduced the amount payable pursuant to the Wage Assessment to $184.04 from the original amount assessed by the Director which was $6,478.97.

[7] The Director appealed the Adjudicator's decision pursuant to section 4-10 of the *SEA*, by a Notice of Appeal dated September 19, 2017, sent by registered mail and received by the Board on September 26, 2017. At the hearing of this matter, Bridgette also made submissions regarding the Adjudicator's decision, which we have also considered.

[8] At the hearing of this matter on December 5, 2017, Maxie's raised an issue as to the jurisdiction of the Director to file an appeal outside of the 15 days provided for appeal in section 4-8 of the *SEA.* Counsel for the Director sought leave to file a supplemental Brief in respect to this question, which leave was granted. No party, other than the Director, provided any additional submissions with respect to this jurisdictional question.

Relevant statutory provision:

[9] Relevant statutory provisions are as follows:

> ***Notice required***
> ***2-60****(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:*
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> ***Table***

Employee's Period of Employment	***Minimum Period of Written Notice***
more than 13 consecutive weeks but one year or less	*one week*
more than one year but three years or less	*two weeks*
more than three years but five years or less	*four weeks*
more than five years but 10 years or less	*six weeks*
more than 10 years	*eight weeks*

> *(2) In subsection (1),* ***"period of employment"*** *means any period of employment that is not interrupted by more than 14 consecutive days.*
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> *(3) For the purposes of subsection (2), being on vacation, an employment leave or a leave granted by an employer is not considered an interruption in employment.*
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> *(4) After giving notice of layoff or termination to an employee of the length required pursuant to subsection (1), the employer shall not require an employee to take vacation leave as part of the notice period required pursuant to subsection (1).*
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> . . .

Right to appeal adjudicator's decision to board

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:*

(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.*

. . .

Right of director to appeal
4-10 *The director of employment standards and the director of occupational health and safety have the right:*

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.

Director's arguments:

[10] The Director filed a written argument which we have reviewed and found helpful in support of his appeal. The Director also filed a supplemental Brief regarding the jurisdictional question referenced above.

Arguments regarding the Issues on Appeal:

[11] The Director argued that the Adjudicator erred in his analysis of the requirements of section 2-60 of the *SEA*. The Director argued that the notice of layoff provided to the employee was not sufficiently specific, unequivocal and clearly communicated to the employee. In support of its position, the Director cited *Kerfoot v. Weyerhaeuser Co.*[5] *and Stearns-Roger Canada Ltd. v. The Queen*[6].

[12] The Director argued that the provisions of the *SEA* should be interpreted in accordance with s. 10 of *The Interpretation Act*[7] to give those provisions a "fair, large and liberal construction and interpretation that best ensures the attainment of its objects". In support, the Director cited this Board's decision in *Bri Energy Solutions Ltd*.[8]

[13] The Director also argued that the onus of proving that proper notice had been given to Bridgette was on Maxie's and that they had failed to meet that onus.

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[5] 2013 BCCA 330
[6] Per Hughes, District Court Judge, decision dated July 30, 1969
[7] *The Saskatchewan Interpretation Act , 1995* S.S. 1995 c. I-11.2
[8] [2016] CanLII 98644 (SKLRB)

Arguments concerning the Director's ability to file an appeal outside the 15 business day period provided for other appellants

[14] The Director argued that his right of appeal arises under a separate and distinct section of the *SEA*, being section 4-10. He argued that this provision exists to provide the Director with a broad right of appeal and that s. 4-10(b) provides the authority for the Director to appeal "any decision". He further argues that the right of appeal provided by s. 4-10 is unrestricted, in contrast to the right of appeal provided in s. 4-8 which is restricted to "questions of law" and provides temporal limits on the filing of appeals within 15 business days. No such restrictions are found in s. 4-10, the Director argues.

[15] The Director argues that the provisions of s. 4-8 should not override s. 4-10 because to do so would render s. 4-10(b) meaningless.

[16] The Director also argued that the word "person", as found in section 4-8, does not include the Director. In support of this argument, the Director cites s. 4-9 which specifically includes the Director within the meaning of the word "person".

[17] The Director argues that he acts not in his own personal interest, but has a broad public policy role which is supported by s. 2-87(1)(b) of the *SEA*. This role allows him to raise issues that are of general importance to the rights and responsibilities of employers and employees.

[18] The Director also argues that the legislative history of this provision supports the interpretation for which it argues.

[19] In support of its position, the Director cited this Board's decision in *Black Gold Boilers Ltd. Re:*[9]

Maxie's arguments:

[20] Maxie's provided oral argument at the hearing of this matter. Maxie's supported the Adjudicator's decision. Maxie's argued that they had just cause to provide the layoff notice in the form that they did due to uncertainty in the excavating market and ups and downs in the

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[9] [2016] CanLII 98643 (SKLRB)

business available to them. They argued that the Adjudicator made the correct decision and applied the correct test and that they fell within the exception outlined by the Adjudicator.

[21] Maxie's argued that they had complied with the provisions of the *SEA* as was found by the Adjudicator in his decision.

[22] Maxie's also argued that the Director should be required to file his Notice of Appeal within the same timelines as are provided for other appellants to the Board.

Bridgette's arguments:

[23] Bridgette raised several points in his argument related to the hearing and the processing of the appeal. In addition, Bridgette supported the Director's appeal against the Adjudicator's decision.

[24] Bridgette raised an issue regarding the Adjudicator not allowing his wife, Sarah Bridgette, to attend the hearing and make presentations on his behalf. He also argued that the Employment Standards Officer who appeared at the hearing failed to properly represent him on the appeal and failed to file certain exhibits or to introduce evidence which he thought should have been introduced.

[25] Bridgette also raised an issue regarding the notice of appeal by Maxie's and the payment of the appeal fee required by the *SEA*.

Analysis:

<u>The Director's Right of Appeal:</u>

[26] In *Black Gold Boilers Ltd. Re:,* the Board initially considered a preliminary objection to the Board's jurisdiction to hear an appeal filed by the Director approximately 2-and-one-half (2 ½) months following the decision of the Adjudicator. In that decision, the Board made a preliminary decision and confirmed that decision in the final written decision. At paragraphs [30] – [33] Vice-Chairperson Mitchell provided the following reasons for the preliminary decision:

> ***[30]*** *At the outset of the hearing, the Respondent Anderson took exception to what he described as the late filing by the Director of his appeal. This objection was disposed of at that time; however it is useful to set out my reasoning for rejecting it.*

> ***[31]*** *As noted above, the Director appealed pursuant to subsection 4-10(b) of the SEA. This section differs in two (2) significant ways, from the other appeal provision found in Part IV, i.e. subsection 4-8(1). The first difference is that subsection 4-10 is not limited to appeals on questions of law. It authorizes the Director to appeal "any decision of an adjudicator or the board".*
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> ***[32]*** *The second difference, and the one most pertinent to this discussion, is that section 4-10 does not impose a statutory time limit within which the Director must initiate an appeal. It is open-ended. By contrast, subsection 4-8(1) of the SEA requires an employer, employee or corporate director to file his or her appeal "within 15 business days after the date of the decision by the adjudicator".*
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> ***[33]*** *Here, Adjudicator Wheatley issued his decision on January 1, 2016. Yet, the Director did not file his formal appeal with the Board until March 18, 2016, approximately two-and-a-half (2 ½) months later. However, as subsection 4-10(b) of the SEA is the relevant provision and does not impose a statutory limitation period for appeals to the Board from an adjudicator[1], it is clear that the Director's appeal is not statute barred.*

[27] In spite of these comments, Vice-Chairperson Mitchell determined that notwithstanding the lateness of the appeal, the appeal would be dismissed on the grounds that the decision met the test of reasonableness. Vice-Chairperson Mitchell's comments in *Black Gold Boilers Ltd. Re:* are simply *obiter dicta*, which does not bind subsequent Boards.

[28] The Director argues that section 4-10 provides him with the ability to appeal any decision of an adjudicator at any time and is not restricted by the 15 business day time limitation provided for in section 4-8 in relation to other party's appeals. With respect, for the reasons which follow, I cannot agree with these submissions.

<u>Appeals by the Director:</u>

[29] In this case, the Director argues that section 4-10 does not impose a time limit on his right of appeal. He notes that section 4-8 provides for a right of appeal to a person "who is directly affected by a decision of an adjudicator". In such cases, that appeal must, by virtue of section 4-8(3)(a) be filed within 15 business days of the Adjudicator's decision. No similar provision is found in section 4-10.

[30] When the Board is interpreting the provisions of its home statute, the Board is directed by the Supreme Court of Canada to utilize the modern rule as enunciated by Elmer

Drieger in *Construction of Statutes (2nd ed., 1983)* where he outlines the process to be followed as:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[31] The scheme set out in the *SEA* for a dispute to come forward to an Adjudicator is set out in Parts II, III and IV of the *SEA*. The process is that a person having a claim under either Part II or Part III may file an application with the Director of Employment Standards or the Director of Occupational Health and Safety in respect of the dispute. Under Part II, the Director will investigate the claim, and if found to be justified, the Director will issue a wage assessment under section 2-74. In the case of Part III, a similar process occurs upon a claim being filed under section 3-36.

[32] Appeals to an adjudicator are provided for in section 2-75 for Part II and Division 8 for Part III. Under section 2-87, the Director of Employment Standards is granted standing to represent employees in respect of claims under Part II. However, subsection 2-87(2) makes the Director's representation optional. Additionally, subsection 2-87(3) provides that in representing employees, the Director "shall act in a reasonable manner".

[33] The Director of Employment Standards has no right to appeal to an Adjudicator. Appeals are limited to those persons against whom a wage assessment may be made, or the employee affected. This lack of a right of appeal granted to the Director is appropriate, since the decision being appealed against is his decision.

[34] Under Division 8 of Part III of the *SEA,* appeals are limited to being filed by a "person who is directly affected by a decision of an occupational health officer". A definition of who such persons are was introduced into the former *Occupational Health and Safety Act* as a response to a decision by then Chief Justice Laing in *Dunkle v. Saskatchewan (Advanced Education, Employment and Labour, Occupational Health and Safety Division)*[10], which provisions were carried forward into the *SEA*. In that case, Chief Justice Laing considered whether or not an appeal filed by an employee of the Director was included within the then definition of "person who is directly affected by a decision of an occupational health officer".

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[10] 2011 SKQB 59 (CanLII)

[35] The definition of "person who is directly affected by a decision" contained within section 3-52(2) does not include the Director of Occupational Health and Safety. Again, this is not unusual as it is his decision being appealed.

[36] Under the appeal scheme put in place by the *SEA,* as noted above*,* neither Director has a right of appeal to the Adjudicator. The Director of Employment Standards is not a party to the proceedings before the Adjudicator, but, as noted above, may represent employees before the Adjudicator. Similarly, the Director of Occupational Health and Safety is not, by definition, a "person who is directly affected by a decision".

[37] Given their lack of standing before the Adjudicator, either Director requires some authority to provide them standing to appeal either to this Board, or the Court of Appeal. This is the purpose for sections 4-9 and 4-10. Absent these provisions, they would have no right to appeal or to make representations to the Board or to the Court of Appeal with leave of that Court.

[38] While it is consistent with the scheme of the *SEA* to allow standing to the Director of Employment Standards and the Director of Occupational Health and Safety, it is another thing entirely to suggest that the proper interpretation of that provision provides the Director with an unlimited time in which to file an appeal.

[39] The scheme of the *Act* also provides that, notwithstanding he is not a party to the appeal, the Director is provided the written reasons for the adjudicator's decision at the same time as those reasons are provided to the parties and this Board.[11] This places him, time wise, in the same position as the parties to the process before the Adjudicator to (a) review the decision, and (b) formulate the intention to appeal.

[40] It is clear that the legislature intended that there should not be an undue delay in the processing of claims made to the Director of Employment Standards and their final adjudication. Tight time lines are provided for appealing to an adjudicator[12], for the issuance of a decision by an adjudicator[13] and for appeals to this Board[14]. Given that time limits are provided in each case, it would, the Board submits, be unusual that no time limit was prescribed for appeals by the Director pursuant to section 4-10.

[11] See section 4-6 (1)(b)
[12] 15 business days by virtue of section 2-75(2)
[13] 60 days by virtue of section 4-7(1)(a)
[14] 15 business days by virtue of section 4-8(3)(a)

[41] The Director argues that he is not a "person" as that term is used in section 4-8(3)(a) and is therefore, not captured by the timeline set out therein. Again, we cannot agree with this submission. The Director is a public officer exercising authority under the *SEA. The Interpretation Act, 1995*[15] defines a "public officer" as "includes a **person** in the public service of Saskatchewan: [emphasis added]. By this definition, it appears that the Director is, indeed, a person.

[42] Furthermore, by virtue of section 1-3 of the *SEA*, the Crown is bound by the *Act*. This inclusion, we submit, shows an intention that the same standards apply to the Crown as to the subjects of the Crown. Therefore, if different rules for the Director from those imposed upon the Crown's subjects were intended, those different rules would have been clearly spelled out. This was done in the case of service of documents in section 9-9 of the *SEA*. That section establishes a different scheme with respect to service of documents upon the Directors.

[43] Finally, having no time limit for appeals by the Director leads to an absurd result and promotes uncertainty. Does the Director have unlimited time restraint to file an appeal? If that is the case, then a decision of an adjudicator could never be final. It is trite to say that the law abhors a vacuum. That would be the effect of an unlimited time limitation. No decision would ever be final as the Director may, at any time following a decision of an Adjudicator, file an appeal. That clearly is not the intention of the legislature in establishing tight timelines for the processing of appeals.

[44] For these reasons, we must conclude that the obiter comments by Vice-Chairperson Mitchell in *Black Gold Boilers Ltd. Re:* should not be followed. The legislation intends that the Director have the same time lines for filing an appeal as any other person, being 15 business days from the date of service of the decision. The only difference would be in the calculation of the date of service in accordance with section 9-9(3).

[45] Section 43 of *The Employment Standards Regulations*[16] provides the following with respect to service upon the Director:

> *43(1) For the purposes of subsection 9-9(3) of the Act, a document or notice may be served on the director of employment standards:*

[15] S.S. 1995 c. I-11.2, section 2
[16] RRS c. S-15.1 Reg 5

> *(a) by personal service during normal business hours at the business address of the director of employment standards;*
> *(b) by prepaid registered or certified mail addressed to the director of employment standards at the business address of the director; or*
> *(c) by telephone transmission to a number provided by the director of employment standards of a facsimile of the document or notice together with a cover page that indicates:*
> *(i) the title of the person being served;*
> *(ii) the name, address and telephone number of the sender;*
> *(iii) the date and time of the transmission;*
> *(iv) the number of pages transmitted, including the cover page;*
> *(v) the telephone number from which the document is transmitted; and*
> *(vi) the name and telephone number of a person to contact if there are transmission problems.*
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> *(2) If a document or notice is served pursuant to clause (1)(b), service is deemed to have been effected:*
> *(a) on the delivery date shown on the signed post office receipt card; or*
> *(b) if the delivery date is not shown, on the day on which the signed post office receipt card is returned to the sender.*

[46] The statute is somewhat ambiguous as to what date should be chosen for the commencement date for the appeal period. Pursuant to subsection 4-6(1)(b), the Adjudicator is required to provide copies of his written reasons to "the board, the director of employment standards…and any other party to the appeal". Additionally, section 4-7(4) requires the Board to "serve the decision on all persons mentioned in clause 4-4(1)(b)", which includes the Director. Subsection 4-8(3) then links the appeal period to 15 business days "after the date of service of the decision of the adjudicator".

[47] It is clear, however, that date for appeal is determined from section 4-7(4) since, in that provision, the Board is required to "serve" the document on the parties, including the Director[17]. Therefore, that date must be the date on which the time limit commences. The Board's records show that the Adjudicator's decision was received on August 30, 2017 and sent via email, on that date, to the parties, including Kelly Harris of the Ministry of Labour Relations and Workplace Safety on behalf of the Director. 15 business days from August 30, 2015 would be September 21, 2017. The Board's records also show that the Notice of Appeal was dated September 19, 2017, but not mailed by registered mail until September 22, 2017, which would be outside of the 15 business day appeal period. Additionally, the appeal, sent by registered mail,

took an additional (4) four days to be delivered which would also take the Notice of Appeal outside of the time limited for appeal.

[48] The Saskatchewan Court of Appeal has dealt with the issue of substantial compliance with timelines related to filing of Notices of Appeal on several occasions.[18] In *Wascana Energy v. R.M. of Gull Lake No. 139*, a Notice of Appeal was sent by Wascana Energy to the R.M of Gull Lake on the day prior to the date on which the statutory notice period expired. It was received by the R.M. of Gull Lake the day following the expiry of the statutory notice period.

[49] The Court of Appeal relied upon its earlier decision in *Newell Smelski* that held that, where there are no statutory provisions regarding what the effect of imperfect compliance or noncompliance with the statutory requirement, less than full compliance did not necessarily mean the appeal was a nullity. At paragraphs 32-34 of *Wascana Energy*, the Court says:

> *[32] Even if it were otherwise, even if the company had failed to exercise the right of appeal in full compliance with all of the terms of the subsection, the effect would not necessarily have been fatal, as noted in Regina (City) v. Newell Smelski Ltd.:*
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> *To have had that effect--an ultimate effect--such imperfect compliance would have to have had the effect, first, of nullifying the act of service or the notice of intention to appeal or both, and hence of extinguishing the company's right of appeal.*
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> *But not every failure to observe statutory requirements of a procedural nature [as they were there characterized by the statute] carries with it such effects. If the legislature does not expressly provide for the effect of imperfect compliance or noncompliance with a requirement of this nature, the matter becomes one of implication, having regard for the subject matter of the enactment; the purposes of the requirement; the prejudice caused by the failure; the potential consequences of a finding of nullity; and so on.[p. 51].*
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> *In support of this proposition we referred to Secretary of State for Trade and Industry v. Langridge; [1991] 3 All E.R. 591 (C.A.) and Cote: The Interpretation of Legislation in Canada (2nd. Ed.) at pp.202 to 207. (One might also refer to Board of Education of Dysart School District et al v. Board of Education of Cupar School Division No 28 (1996), 1996 CanLII 5042 (SK CA), 148 Sask R. 41 (Sask.C.A.) and Howard v. Secretary of State for the Environment, [1974] 1 All E.R. 644 (C.A.), per Lord Denning M. R. in particular).*
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> *[33] Since the legislature said nothing of the possible effects of timely posting but untimely receipt of a subsection 303(1) notice of appeal given by*

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[17] It is interesting to note that the word "person" is used here to include the Director.

[18] See *Regina (City) v. Newell Smelski Ltd. 1996 CanLII 5084 (Sk CA); Wascana Energy v. R.M. of Gull Lake No. 139* 1998 CanLII 12344 (SK CA). ; *Marose Investments Ltd. v. Regina (City)* 2009 SKCA 20 (CanLII)

> *means of registered mail, the matter is one of implication, having regard for the considerations mentioned in Newell Smelski. In the light of what has already been said of the subject-matter and purpose of the subsection, together with the objectives of its provisions and the scheme of which it forms part, it is difficult to think the legislature intended that the effect should be fatal when the notice of appeal is posted within the prescribed time and arrives within sufficient time to allow for the hearing and determination of the appeal in keeping with the scheme of the enactment.*
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> *[34] At worst, this amounts to substantial compliance of a near perfect sort, as was the case here, where notice was mailed on the day before the period expired, was being delivered on the day of expiry, and was delivered the day after. As might have been expected, nothing turned on the fact the notice did not arrive a day or two earlier, for the administrator and the board were still able to act upon it in accordance with the requirements of the statute. This was especially so in the circumstances, for the assessment had not only been completed well in advance of May 31st but had been published several days beforehand, leaving ample time for the performance of these duties. Nor did any other form of prejudice arise.*

[50] There are no provisions in the *SEA* to deal with imperfect or noncompliance with the established timelines. In this case, as was the case in the *Wascana Energy* decision, there has been substantial compliance with the statutory timelines insofar as the signing of the Notice of Appeal was within the time statutory appeal period.

[51] Additionally, service upon the Director of Employment Standards by email is not one of the prescribed methods of service upon him. The Board should have served the decision upon the Director by fax, which is one of the prescribed service methods. Had that been done, the Director could have had his right of appeal expunged. The service of the decision by the Board by email was ineffective service. Accordingly, the time for appeal would only commence once Kelly Harris had either personally delivered the decision to the Director, or provided it to him by registered mail or fax that the appeal period would commence. Since he filed an appeal, we can conclude that he did get notice of or service of the decision, but cannot conclude that such service was effective so as to deprive him of his right of appeal under section 4-8 and 4-10.

[52] However, as noted by the Court of Appeal in *Marose Investments*, a failure to strictly comply with the service provisions of, in that case, *The Cities Act*, has the effect of reducing the time limited for the filing of an appeal[19] and cannot be relied upon to vacate a right of appeal.

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[19] *Supra* note 16 at para 12.

[53] For these reasons, the application by Maxie's to have the Director's appeal dismissed as being late filed is denied.

The Director's Appeal

[54] In his appeal, the Director raises (3) three issues:

(a) That the Adjudicator erred by applying an incorrect test;

(b) That the Adjudicator erred by concluding that the employer had satisfied the requirements of section 2-60 of the *SEA*; and

(c) That the Adjudicator mischaracterized relevant evidence and made inferences on the facts resulting in findings of fact that are reviewable as questions of law.

[55] In his written brief, the Director concentrated on points (a) and (b) above. The Director's argument was that the Adjudicator erred in adopting the wrong test from *Gibb v. Novacorp International Consulting Inc.*[20]. The Director, in support of its position cited *Kerfoot and Harshenin v. Weyerhaeuser Company Limited*[21] and *R. Stearns-Roger Canada Ltd.*[22]. This error, the Director argued caused the Adjudicator to find that proper notice pursuant to section 2-60 of the *SEA* had been given to Bridgette.

[56] Section 2-60 of the *SEA* provides as follows:

> ***Notice required***
> ***2-60****(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:*
>
> ***Table***

[20] [1990] BCJ No. 1705 (BCCA)
[21] 2013 BCCA 330 (CanLII)
[22] July 30, 1968 decision of the District Court of Saskatchewan (unreported)

Employee's Period of Employment	***Minimum Period of Written Notice***
more than 13 consecutive weeks but one year or less	*one week*
more than one year but three years or less	*two weeks*
more than three years but five years or less	*four weeks*
more than five years but 10 years or less	*six weeks*
more than 10 years	*eight weeks*

(2) In subsection (1), ***"period of employment"*** *means any period of employment that is not interrupted by more than 14 consecutive days.*

(3) For the purposes of subsection (2), being on vacation, an employment leave or a leave granted by an employer is not considered an interruption in employment.

(4) After giving notice of layoff or termination to an employee of the length required pursuant to subsection (1), the employer shall not require an employee to take vacation leave as part of the notice period required pursuant to subsection (1).

[57] The section provides for notice to an employee in respect of lay off or termination. However, the content for such notice is not specified. This is the crux of this appeal.

Standard of Review:

[58] In this Board's decision in *Bri Energy Re:*[23], the Board revised its standard of review based upon the decision of the Supreme Court of Canada in *Edmonton City v. Edmonton East (Capilano) Shopping Centres Ltd.*[24]. In that decision, the Supreme Court allowed an appeal from the determination by both the Alberta Court of Queen's Bench and the Alberta Court of Appeal which had determined the standard of review "on a question of law or jurisdiction of sufficient importance to merit an appeal" to be correctness. Madam Justice Karakatsanis, writing for the majority adopted the standard of reasonableness. At paragraphs 21-24 she said:

> *[21] The [Dunsmuir v New Brunswick, 2008 SCC 9 (CanLII), [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).*

[23] 2016 CanLII 98644 (SKLRB)
[24] 2016 SCC 47

> *(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 (CanLII); [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*
>
> *[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 (CanLII), [2014] 2 S.C.R. 197, at para. 13; McLean v British Columbia (Securities Commission), 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at para. 22). [Emphasis added.]*

[59] Madam Justice Karakatsanis then went on at paragraph [29] to confirm that the standard of review should be no different whether a statutory right of appeal with leave against an administrative tribunals decision qualified as a new category of matters to which the correctness standard should be applied. She said:

> *[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 (CanLII), [2011] 1 S.C.R. 160; Bell Canada v. Bell Aliant Regional Communications,2009 SCC 40 (CanLII), [2009] 2 S.C.R. 764; Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633; Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44 (CanLII), [2015] 3 S.C.R. 147; ATCO Gas and*

Pipelines Ltd. v. Alberta (Utilities Commission), 2015 SCC 45 (CanLII), [2015] 3 S.C.R. 219).

[60] She then concluded that the appropriate standard of review was reasonableness. Following the analysis suggested in *Edmonton East (Capilano)* to the statutory provisions in the *SEA*, Vice-Chairperson Mitchell concluded that the reasonableness standard should be applied to appeals of Adjudicator's decisions under Parts II and III of the *SEA.*

[61] The decision of the Adjudicator in this case does not fall within one of the "exception" categories outlined by Madam Justice Karakatsanis in *East (Capilano)*. We will, therefore, review the Adjudicator's decision on the reasonableness standard.

Was the Adjudicator's Decision Unreasonable?

[62] The reasonableness standard was described by Bastarache and LeBell JJ. In *Dunsmuir v. New Brunswick*[25] in the following terms at paragraphs [46] and [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.]*

[63] At paragraph 17 of his decision, the Adjudicator identifies the common law test for what will suffice as notice from the text *Wrongful Dismissal and Employment Law* at section 6.2.1 as follows:

[25] [2008] 1 S.C.R. 190, 2008 SCC 9 (CanLII)

> *It is well established in Canadian jurisprudence that notice of termination of employment must be* ***specific, unequivocal, and clearly communicated to the employee****, Whether a purported notice is specific and unequivocal is a question of fact to be determined on an objective basis in all the circumstances of each case.* [emphasis mine]

[64] After review of the facts found by him and a review of the British Columbia Court of Appeal decision in *Gibb v. Novacorp International Consulting Inc.*[26], the Adjudicator concludes at paragraphs 25-27 as follows:

> *25. The notice as given did not contain a specific date of layoff. Wood J.A. In Novacorp International Consulting Inc. …said:*
>
>> *The fact that no effective date of termination is to be found in the letter is a circumstance that might support an inference that the requirements of a specific notice has not been met, but again, it depends on all of the circumstances. If no date were given, and much time passed, it might well lead a court to conclude that no proper notice was given.*
>
> *26. It is clear that it is in an employer's interest to provide a specific date of termination. Employers who do not do so may find their purported notice to be ineffective. However, it is also clear that there is no absolute rule that a specific date of termination must be given for notice to be effective.*
>
> *27. The facts in this case indicate that this employee received written notice. He knew that the economic downturn meant layoffs would occur. He also knew that the work the business carried out was weather dependent, which meant the precise date of termination was not feasible to predict at the time notice was given. In these circumstances, I conclude that the notice given to the employee was specific and unequivocal.*

[65] It is this rationale that Maxie's supports. Bridgette concurs with the position of the Director which is that the Adjudicator erred in this conclusion and as such the conclusion and rationale for the decision was unreasonable.

[66] In support of his position, the Director cites the British Columbia Court of Appeal decision in *Kerfoot v. Weyerhaeuser Company Limited*[27]. In that decision, the BC Court of Appeal noted at para. [21] that the decision relied upon by the Adjudicator was distinguishable and had not been applied by the lower court in its determination.

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[26] [990] BCJ No. 1705 (BCCA)
[27] Supra note 18

[67] The Director also referenced an older District Court decision in *R. v. Stearns-Roger Canada Ltd*[28]. That case dealt with provisions of the then *Minimum Wage Act* in respect of the requirement of notice for termination or layoff.

[68] In that case, the notice given was similar to the notice provision provided by Maxie's in this case. In part it read; "[D]ue to shortage of work your services may be terminated without further notice after October 25, 1968". The Court found in that case, that the notice was insufficient compliance with the statutory provision for notice of layoff or termination.[29]

[69] Here, the Adjudicator initially, in paragraph 17, identified the correct test for provision of notice, as supported by all of the jurisprudence mentioned herein. He also noted at paragraph 25 that the notice did not contain a specific date of termination as is required by the test he adopted and the jurisprudence referenced in his decision and as now cited by the Director. He then reaches an unreasonable conclusion in paragraph 26 when he then concludes that: "[H]owever it is also clear that there is no absolute rule that a specific date of termination must be given for notice to be effective". That was not the case as was confirmed as early as 1968 in the *Stearns-Rogers* decision of the District Court of Saskatchewan. Nor can it be sufficient compliance with the requirement for specific notice identified by him within the proper test.

[70] The rationale given in paragraph 27 of the decision to excuse the lack of specificity of the notice does not, in my opinion excuse the lack of specific notice. Woods J.A. is quoted by the Adjudicator to provide support to this exception for specificity in paragraph 25, but even this passage suggests that "[I]f no date were given, and much time passed, it might well lead a court to conclude that no proper notice was given. It does not, in my opinion, act as an exception to the established test.

[71] The evidence in this case established that notices were regularly and routinely given and not acted upon[30]. They were all the same, that is, they did not provide any specific date on which lay off would occur. Such notice, as was the case in *Stearns-Rogers,* cannot constitute specific or proper notice of lay off.

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28 *Supra* note 19
29 See, in particular the third full paragraph of that decision on page 3.
30 See paragraph 12 of the Adjudicator's decision.

[72] The Adjudicator also correctly placed the onus on the employer to show that notice was specific[31]. However, he failed, in his decision, to test whether or not that onus had been met. To not do so was, I believe, unreasonable.

[73] The Adjudicator's decision does not meet the test of reasonableness. Accordingly, it must be remitted to him to be reconsidered by him in accordance herewith.

Issues Raised by Bridgette at the Appeal:

[74] As noted above, Bridgette raised an issue regarding the Adjudicator not allowing his wife, Sarah Bridgette, to attend the hearing and make presentations on his behalf. He also argued that the Employment Standards Officer who appeared at the hearing failed to properly represent him on the appeal and failed to file certain exhibits or to introduce evidence which he thought should have been introduced.

[75] Bridgette also raised an issue regarding the notice of appeal by Maxie's and the payment of the appeal fee required by the *SEA*.

[76] Section 4-4 of the *SEA* provides broad authority to the Adjudicator to take control of the hearing process and to "determine the procedures by which the appeal or hearing is to be conducted". However, any such rules or procedures would have to be in accord with the principles of natural justice. One of these rights is the right to be represented by counsel at hearings where there were serious consequences for the person seeking counsel.

[77] In Exhibit EE-1 filed by the Employment Standards Officer at the hearing, the Introduction reads as follows:

> ***Introduction and Issues***
>
> *Kelly Harris, represents the Director of Employment Standards in the application and enforcement of The Saskatchewan Employment Act (2014).* ***I do not represent the employee.*** *[emphasis added]*

[78] Section 2-87 of the SEA is clear that the Director (or his designate) has standing at the hearing "to represent any or all employees of an employer"[32]. When so doing, the Director, or his designate, "shall act in a reasonable manner".[33]

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[31] See paragraph 22 of the Adjudicator's decision.

[79] When the Director, or his designate, does not represent the employee as was purportedly the case here, he would have no standing to appear at the hearing and could only be in attendance at the hearing as a witness on behalf of the Employee or the Employer.

[80] In his decision, the Adjudicator notes the Respondent in the proceedings not as Bridgette, but rather names the Director as the Respondent. This is consistent with Bridgette's complaint that he was not permitted to cross examine witnesses or to have his wife present to assist him in the processing of the appeal. It would appear that the Adjudicator presumed the Director was representing Bridgette, when, according to his filed material, the Director was clearly not representing Bridgette.

[81] It is important for Adjudicators to have a clear understanding of who has the conduct of the appeal process. Pursuant to section 2-75(9), a Wage Assessment issued by the Director and forwarded to the Adjudicator, "is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing…". In light of that provision, the onus of proof is shifted to the Appellant to satisfy the Adjudicator that the amount shown on the wage assessment should be varied.

[82] In most instances, with the Wage Assessment as a starting point, no evidence should be required from the employee or the Director to establish either the *bona fides* of the Wage Assessment, or the amounts due to the employee.

[83] In this case, there was clearly a misunderstanding by the Adjudicator of the role of the Director and Bridgette. Given that the Director was not, by his own submission, representing Bridgette, the Adjudicator should have, in my opinion, recognized Bridgette as the Respondent in the appeal and permitted him to have a representative of his choice at the hearing of the appeal.

[84] However, nothing particularly turns on this determination, and as the matter is being remitted to the Adjudicator in any event, we would simply ask that he direct his mind to the points raised above in his revisiting of the appeal.

[85] Bridgette also made complaint regarding the notice of appeal to the Adjudicator and the payment of the necessary filing fee for the processing of the appeal.

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[32] See Section 2-87(1)(a)
[33] See Section 2-87(3)

[86] In respect of his issue, the Board was unable to find a copy of the Notice of Appeal by Maxie's in the record of the Adjudicator, notwithstanding that it is to form a part of the record pursuant to section 4-8(4)(c). That is also strange in that the Notice of Appeal is to be forwarded to the Adjudicator by the Director pursuant to section 2-75(8)(b) of the *SEA.*

[87] At paragraph 3 and 4 of the Adjudicator's decision, the Adjudicator references both the Wage Assessment and the Notice of Appeal. He says:

> *3. The Director confirmed that the Wage Assessment was served on the appellants on May 1, 2017 and that the Director received the appellant's Notice of Appeal and required deposit on May 9, 2017. The appeal was therefore started within the 15 day time period provided by The Saskatchewan Employment Act (the 'Act').*
>
> *4. The Appellants' Notice of Appeal is a letter dated May 1, 2017…*

[88] There is no copy of the referenced Notice of Appeal within the record provided to the Board. Absent that document, and some evidence of the payment of the deposit, I find it difficult to understand how the Adjudicator came to his conclusion. The Wage Assessment, which forms part of the record, is dated April 10, 2017. If forwarded to Maxie's by registered or certified mail, it would, by section 9-9, be deemed to have been delivered "on the fifth business day following the day of its mailing", not May 1, 2017 as noted in the Adjudicator's decision.

[89] As this matter is already being remitted to the Adjudicator for his attention, we will include a direction, pursuant to section 4-8(6)(b) that the Adjudicator take the steps necessary to ensure that the appeal was filed in a timely manner. The Director shall be ordered by him to provide the Adjudicator and Bridgette with information and documents necessary to show when the Wage Assessment was issued, how and when it was served on Maxie's, the date and manner of payment of the filing fee, along with a copy of the Notice of Appeal as well as their method and time of service upon him.

[90] An appropriate Order will accompany this decision.

DATED at Regina, Saskatchewan, this **8th** day of **February, 2018.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.
Chairperson