THE DIRECTOR OF EMPLOYMENT STANDARDS, Appellant v STREAMLINE OILFIELD SERVICES LTD., KELLY BRADY, ROGER HARDY, JASON PETERSON and KIM PETERSON, Respondents and TIM McDONALD, Respondent

LRB File No. 273-16; October 29, 2019

Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant:	Francis Poulin
For the Respondents Streamline Oilfield Services Ltd., Kelly Brady, Roger Hardy, Jason Peterson and Kim Peterson:	Calen Nixon
For the Respondent, Tim McDonald:	No one appearing

Appeal from decision of Wage Assessment Adjudicator – Preliminary issue – Board determines that Director's right of appeal granted by section 4-10 of *The Saskatchewan Employment Act* is to be exercised in accordance with the rules set out in section 4-8 of the Act – Board determines that 15 business day time limit for appeal applies to Director – Board determines that, since decision was served on Director by email, it was never properly served and appeal is not out of time.

Appeal from decision of Wage Assessment Adjudicator – Standard of review – Reasonableness is standard of review for appeals from Adjudicators' decisions.

Appeal from decision of Wage Assessment Adjudicator – Adjudicator's decision, that employee was not entitled to overtime pay, based on her assessment of evidence and credibility of witnesses, is reasonable – Director's appeal is dismissed.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On April 20, 2016 the Director of Employment Standards[1] ["Director"] issued a Wage Assessment against Streamline Oilfield Services Ltd. and four of its directors, Kelly Brady, Roger Hardy, Jason Peterson and Kim Peterson [these five respondents will collectively be referred to in these Reasons as "Streamline"]. The Wage

[1] The Director will be referred to as "he" in these Reasons, since the Director was Greg Tuer when this Appeal commenced.

Assessment alleged that Streamline owed its employee Tim McDonald $14,809.25. Streamline appealed the Wage Assessment. The appeal was heard by an Adjudicator who issued a decision on October 31, 2016 reducing the amount owing by Streamline to McDonald to $1,909.04. That decision was sent by the Board Registrar to the Director, Streamline and McDonald by email on October 31, 2016. On December 7, 2016, the Director filed a Notice of Appeal of that decision with the Board.

[2] The hearing of the Appeal took place on April 6 and May 31, 2017, before then Vice-chairperson Graeme Mitchell. Vice-chairperson Mitchell was appointed as a Judge of the Court of Queen's Bench on September 21, 2018. The parties agreed that the Appeal could be concluded by the Chairperson or Vice-chairperson listening to the recording of the hearing and then issuing this decision. The parties also requested that it be brought to the Board's attention that the Court of Appeal had granted leave to the Director to appeal the Board's decision in LRB File No. 194-17[2]. The grounds of appeal in that case included a challenge to the Board's interpretation of provisions of *The Saskatchewan Employment Act* ["Act"] pertaining to the timeliness of an appeal by the Director. Following the release of the Court of Appeal decision[3] in that case ["*Maxie's*"] on July 30, 2019, the parties agreed that the Board can now proceed to determine this Appeal.

[3] In *Maxie's,* with respect to the issue of the applicability of the 15 business day time limit to the Director, the Court held:

> *[38] Unlike the above two errors, this breach of procedural fairness did not result in any directions being provided to the Adjudicator. It did not result in any prejudice in this matter, given that the appeal before the Board was permitted to proceed. However, the Board has determined the Director is subject to the timelines of s. 4-8(3) of the Act. While I am not determining this substantive issue of the timelines applicable to the Director, I am of the opinion that the portions of the Board's decision regarding the application of s. 4-8(3) to the Director must be excised from the Board Decision and are of no force and effect because of the breach of the duty of procedural fairness in dealing with this issue.*
> *. . .*
>
> *[49] With regard to the s. 4-8(3) versus s. 4-10(b) 15-day deadline issue, this is not an issue relevant to the adjudication and no direction was required or given to the Adjudicator regarding this issue. Normally, this would require the Court to refer the matter back to the Board for a redetermination of this issue. However, it is now moot. The Director's appeal to the Board was allowed to proceed for other reasons and the Director was generally successful on the appeal. There is no utility in referring this issue back to the Board. The determination of the merits of this issue will have to wait for another matter and another day.*

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[2] *Employment Standards v Maxie's Excavating (North Park Enterprises Inc.)*, 2018 SKCA 31 (CanLII).
[3] *Saskatchewan (Employment Standards) v North Park Enterprises Inc*., 2019 SKCA 69 (CanLII).

[4] With its Brief of Law and Appeal Record, the Director submitted an Affidavit of an Employment Standards Officer. At the hearing the Director withdrew the request that it be considered. Therefore, the Board will not consider the issue of whether it was admissible.

Relevant Legislative Provisions:

[5] The following provisions of the Act were considered in this Appeal:

> ***Interpretation of Part***
> *2-1 In this Part and in Part IV:*
> *. . .*
> *(f)* ***"employee"*** *includes:*
> *(i) a person receiving or entitled to wages;*
> *(ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;*
> *(iii) a person being trained by an employer for the employer's business;*
> *(iv) a person on an employment leave from employment with an employer; and*
> *(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);*
> *but does not include a person engaged in a prescribed activity;*
> *(g)* ***"employer"*** *means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:*
> *(i) has control or direction of one or more employees; or*
> *(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;*
>
> ***Director has standing as representative of employees***
> *2-87(1) The director of employment standards:*
> *(a) has standing to make a representation on behalf of the Government of Saskatchewan or to represent any or all employees of an employer:*
> *(i) in proceedings respecting an appeal of a wage assessment or a hearing mentioned in sections 2-75 and 2-76 before an adjudicator, the board or a court;*
> *(ii) in proceedings pursuant to any other Act or any Act of the Parliament of Canada with respect to claims for unpaid wages; and*
> *(b) may apply to a court to intervene in proceedings involving claims by or against employees, if in the opinion of the director the proceedings raise an issue of general importance to the rights and responsibilities of employers or employees.*
> *(2) Subsection (1) does not require the director of employment standards to represent employees in any proceedings.*
> *(3) In exercising the power set out in subsection (1), the director of employment standards shall act in a reasonable manner.*

Procedures on appeals
4-4(1) After selecting an adjudicator pursuant to section 4-3 and in accordance with any regulations made pursuant to this Part, the registrar shall:

(a) in consultation with the adjudicator and the parties, set a time, day and place for the hearing of the appeal or the hearing; and

(b) give written notice of the time, day and place for the appeal or the hearing to:

(i) in the case of an appeal or hearing pursuant to Part II:

(A) the director of employment standards;

(B) the employer;

(C) each employee listed in the wage assessment or hearing notice; and

(D) if a claim is made against any corporate directors, those corporate directors;

. . .

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.

Decision of adjudicator
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.

Written decisions
4-7(4) As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

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.

Appeal to Court of Appeal
4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards or the director of occupational health and safety, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

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.

Proceedings not invalidated by irregularities
6-112(1) A technical irregularity does not invalidate a proceeding before or by the board.

(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.

(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made

for the purpose of determining the real question or issue raised by or depending on the proceedings.

(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:

(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;

(b) by striking out the name of a person improperly made a party to the proceedings;

(c) by substituting the name of a person that in the opinion of the board ought to be a party to the proceedings for the name of a person improperly made a party to the proceedings; or

(d) by correcting the name of a person that is incorrectly set out in the proceedings.

Service
*9-9(1) In this section, **"director"** means the director of employment standards appointed pursuant to Part II, the director of occupational health and safety appointed pursuant to Part III or the director of labour relations appointed pursuant to Part VI.*

(2) Unless otherwise provided in this Act, any document or notice required by this Act or the regulations to be served on any person other than the director may be served:

(a) by personal service on the person by delivery of a copy of the document or notice;

(b) by sending a copy of the document or notice by registered or certified mail to the last known address of the person or to the address of the person as shown in the records of the ministry;

(c) by personal service at a place of employment on the person's manager, agent, representative, officer, director or supervisor;

(d) by any method set out in The Queen's Bench Rules for the service of documents; or

(e) by delivering a copy to the person's lawyer if the lawyer accepts service by endorsing his or her name on a true copy of the document or notice indicating that he or she is the lawyer for that person.

(3) A document or notice to be given to or served on the director must be given or served in the prescribed manner.

[6] Subsection 3(4) of *The Employment Standards Regulations* ["Regulations"] was the provision at issue in the Adjudicator's decision:

Exemptions from Part II of the Act
3(4) Except for sections 2-15 and 2-16, Subdivisions 2 and 3 of Division 2 of Part II of the Act do not apply to an employee who performs services that are entirely of a managerial character.

[7] Section 43 of those Regulations was also relied on by the Director:

> ***Service on director of employment standards***
> *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:*
>
> *(a) by personal service during normal business hours at the business address of the director of employment standards;*
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> *(b) by prepaid registered or certified mail addressed to the director of employment standards at the business address of the director; or*
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> *(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:*
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> *(i) the title of the person being served;*
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> *(ii) the name, address and telephone number of the sender;*
>
> *(iii) the date and time of the transmission;*
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> *(iv) the number of pages transmitted, including the cover page;*
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> *(v) the telephone number from which the document is transmitted; and*
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> *(vi) the name and telephone number of a person to contact if there are transmission problems.*

Preliminary Issue:

[8] Streamline raised a preliminary issue that the Board was without jurisdiction to hear the Appeal because the Appeal had been filed beyond the 15 business day time limitation in section 4-8 of the Act for appealing an Adjudicator's decision.

Argument by Director

[9] The Director argues that section 4-8 is inapplicable to the Director. None of its provisions apply to the Director. The Director's right of appeal is set out in section 4-10, and is unlimited. The 15 business day time limit does not apply and the appeal is not limited to errors on questions of law.

[10] The Director relies on *Saskatchewan (Employment Standards) v Black Gold Boilers Ltd.*[4] ["*Black Gold Boilers*"], in which the Board made the following finding:

> *[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.*
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> *[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".*

[4] 2016 CanLII 98643 (SK LRB).

> *[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, it is clear that the Director's appeal is not statute barred.*

[11] After referring to several authorities respecting the appropriate approach to the interpretation of ambiguous legislation, the Director argues that none of them apply. There is no ambiguity; the context and ordinary meaning of section 4-10 reveal a clear legislative intent to create a distinct right of appeal for the Director. The Legislature chose not to restrict the right of appeal in section 4-10 as it did in section 4-8.

[12] The Director relies on the following admonition in *R v McIntosh*[5]:

> *26 Second, the contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. I would agree with Pierre-André Côté's observation in his book The Interpretation of Legislation in Canada (2nd ed. 1991), at p. 231, that:*
>
> > *Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say. . .*
>
> *The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. The contextual approach provides no basis for the courts to engage in legislative amendment. (emphasis in original)*

[13] The Legislature is presumed to know all that is necessary to produce rational and effective legislation. The Legislature is presumed to draft and enact laws in an orderly and economical way. The sequencing of words, phrases and clauses is presumed to reflect a rational plan.[6]

[14] The Director described the legislative history of the Director's right of appeal. He indicated that under *The Labour Standards Act* (repealed and replaced by Part II of the Act), the Director

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[5] [1995] 1 SCR 686, 1995 CanLII 124 (SCC).
[6] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014 at 205 and 210.

only had a right of appeal "on behalf of employees"[7]. When the Act was passed, section 4-10 was added, with this requirement removed.

[15] Streamline argues that, without reference to section 4-8, section 4-10 is not clear as to whom the Director is to make its clause 4-10(b) appeal. The Director's answer with respect to the issue of whether there is ambiguity in where the Director is to appeal a decision of an Adjudicator is that the answer is implicit, as there is only one possible answer. The Director then argues that it is clear from the structure of the Act and the legislative changes that the only place to appeal a decision of the Board under clause 4-10(b) is to the Court of Appeal, and that this interpretation is supported by subsection 4-9(2). At the hearing, however, the Director indicated that he had changed his opinion, and was then of the view that clause 4-10(b) gives the Director a right of appeal to the Court of Appeal; he does not need leave, and the 15 business day time limit in subsection 4-9(2) does not apply. The Director's right of appeal would be exercised under *The Court of Appeal Act, 2000*.

[16] Next the Director turned to the following comment in *Valley Beef Producers Co-operative Ltd. v Farm Credit Corp.*,[8] interpreting *The Court of Appeal Act, 2000*:

> *Section 8, to which subsection 7(2) is subject, requires leave to appeal in relation to interlocutory decisions of the Court of Queen's Bench, a matter of no concern to this appeal, except as it demonstrates that the legislature has chosen on policy grounds to constrain the right of appeal in relation to such decisions. Subsection 7(3) demonstrates the same thing. On occasion the legislature has chosen to completely preclude appeal, as it did in The Trade Union Act. On other occasions it chose to partially preclude appeal, as it did in The Water Appeal Board Act, which provides for appeal only to the Court of Queen's Bench. And on still other occasions it chose to limit the right of appeal to a question of law alone, as it did in section 43 of The Small Claims Act. These are but examples of enactments to which subsection 7(2) is subject by reason of subsection 7(3), examples that reflect legislative policy choices of one kind or another, either denying appeal or limiting the right of appeal in some way. As we must respect these policy choices, so too must we respect the policy choice to confer an unlimited right of appeal.*

[17] The Director then argues:

> *The Director's unique role and the public policy behind Director appeals is highlighted in clause 2-87(1)(b) where it states that the Director is to deal with matters that "raise an issue of general importance to the rights and responsibilities of employers or employees". If this policy applies to the Director's ability to intervene, it should also apply the Director's right of appeal in light of its unique role under Part II.*[9] *(emphasis in original)*

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[7] Section 62.3.
[8] 2002 SKCA 100 (CanLII) at para 48.
[9] Supplemental Brief on Jurisdiction on Behalf of the Appellant, the Director of Employment Standards, at para 29.

In other words, he is asking the Board to read into section 4-10 words that do not appear there, and that are applicable in an entirely different context.

[18] With respect to the time limit for initiating an appeal, the Director argues that it would be improper and premature for the Director to be bound by the same 15 business days' time limitation as the parties, as this could interfere with or prejudice the parties' rights under section 4-8. He did not, however, explain how a Director's appeal could have that effect.

[19] Finally, the Director argues that, even if he is bound by the 15 business days' time limit, the time has not yet commenced to run because he has never been properly served. Subsection 9-9(3) of the Act states that a document to be served on the Director "must" be served in the prescribed manner, and service by email is not one of the manners prescribed in section 43 of the Regulations.

Argument on behalf of Streamline

[20] Streamline argues that clause 4-10(b) is ambiguous and capable of multiple reasonable interpretations. It submits that the most plausible, reasonable and appropriate interpretation is that the Director's right of appeal is limited by and to be exercised in accordance with sections 4-8 and 4-9. It argues that a purposive interpretation of legislation, as part of the modern approach, often requires restrictive interpretation as opposed to expansive interpretation:

> *When the ordinary meaning of legislation is too broad, the effect of purposive analysis is to narrow its scope by excluding applications that are not rationally related to the purpose.*[10]

[21] Streamline argues that the Director's right of appeal only makes sense if clause 4-10(b) is read conjunctively with section 4-8. Clause 4-10(b) merely says that the Director may appeal, but not to whom or how. The purpose of section 4-10 is to ensure the Director has a voice. This applies even if it did not participate in the hearing before the Adjudicator or the Board.

[22] Streamline argues that the Board should not consider itself bound by *Black Gold Boilers*, and should come to a different conclusion respecting the proper interpretation of sections 4-8 and 4-10. It notes that, in that case, the Board did not undertake a full review of the interaction among sections 4-8 to 4-10 in making its decision. At the hearing of this Appeal, both parties acknowledged that, as is often the case in these appeals, the respondents in *Black Gold Boilers*

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[10] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014 at 292.

were not represented by legal counsel, meaning the Board did not hear full argument on this issue.

[23] Streamline points out that under subsection 4-9(1), the right of appeal to the Court of Appeal is from a decision of the Board made pursuant to section 4-8. It also pointed out that, in *Black Gold Boilers*, the Board stated:

> *It should be noted that by virtue of section (sic) subsection 4-9(2) of the SEA, if the Director wishes to appeal a decision of the Board to the Court of Appeal, he, like other prospective appellants, must file a notice of appeal "within 15 business days after the date of service of the decision of the board". It is also unnecessary to determine if there may be common law limitations on the Director's ability to appeal despite the lack of a statutory limitation period.*[11]

This comment, it argues, is a further indication that the interaction among sections 4-8 to 4-10 was not fully considered in that case.

[24] Streamline submits that the use of the words "any decision" in clause 4-10(b) needs to be construed in light of sections 4-6 and 4-7, which make it clear that the decision at issue is the Adjudicator's Decision, and not the reasons for that decision or any findings that the Adjudicator made in reaching that Decision. This interpretation, it submits, is consistent with the following description of the law:

> *It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgment or order, as issued and entered in the court appealed from, and not against the reasons expressed by the court for granting the judgment or order.*[12]

[25] Streamline referred the Board to *Saskatoon (Chief of Police) v Saskatoon Board of Police Commissioners*[13] ["*Saskatoon Chief of Police*"]. The Court of Appeal considered an ambiguity in *The Police Act, 1990* in the context of the scheme of that Act as a whole:

> *[35] Notwithstanding s. 67, which, by making s. 60 inapplicable to probationary members, appears to remove the power of the Chief of Police to dismiss a probationary member for unsuitability, the Chief nevertheless retains sole responsibility for discipline under s. 35 subject only to "the general direction of the board and to this Act." The power to dismiss for unsuitability is not given by the Act to anyone else. It is inconceivable that the Legislature intended that no one have the power to dismiss a probationary member for unsuitability, particularly in the context of the rest of the Act which, among other things, empowers the Chief to dismiss all other members for unsuitability. The appellant and the Board of Police Commissioners argued that, in the absence of any specific provision in the Act for dismissal of unsuitable probationary members, the Chief would resume his common law power to dismiss for such reasons, subject to the requirements of procedural fairness as exemplified*

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[11] At footnote 1.
[12] Hon. John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal*, 2d ed. (Markham: Butterworths) 2000 at 6.
[13] 2004 SKCA 3 (CanLII).

> *in Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police. In our view, resort to the common law is unnecessary. The power of the Chief of Police to dismiss a probationary constable for unsuitability must be inferred from s. 35, for the conferral of the responsibility for discipline by the Legislature necessarily implies the power to carry out that responsibility. Indeed, that is the effect of the 2001 reenactment of s. 67, the object of which was to make explicit what was until then implicit, namely, that the power of the Chief of Police to discipline under s. 35 was not affected by s. 67.*

It must be noted, however, that the Court of Appeal appeared to rely, in part, for this decision on the 2001 legislative amendment to *The Police Act, 1990* that confirmed this intent.

[26] Next Streamline argues that the Board should rely on *Prince Albert (City) v Riocan Holdings Inc*. ["*Riocan*"]. The dilemma in that case was described as follows:

> *The issue is whether a taxpayer who wishes to appeal his tax assessment to a board of revision has the right to appeal a decision of the secretary of the Board to not put the taxpayer's appeal on the list for hearing by the Board, which decision the secretary is empowered to make by s. 253(2) of The Urban Municipality Act, 1984, S.S., 1983-84, c. U-11, and amendments thereto. The effect of the decision was to deny the taxpayer any hearing of his appeal to the Board. If the decision of the secretary was a decision of the Board within the meaning of s. 260 of the Act, the taxpayer had a right to appeal the decision to the Committee. If it was not, there was no right of appeal. The Committee found that it was a decision of the Board.* [14]

[27] The Court of Appeal held:

> *[16] The main difficulty with the interpretation put on the Act in the Queen's Bench judgments, that is, that the secretary of the board holds a statutory office separate from that of the board with powers separate from those of the board, is the anomalous result. A secretary of a board of revision is empowered to refuse to put an appeal on the list for hearing on the ground of a deficient notice of appeal. The result is that the appeal cannot be heard, which amounts to a functional dismissal of the appeal, and there is no appeal from the secretary's decision. On the other hand, if the board itself dismisses an appeal on the ground of a deficient notice, its decision is subject to an appeal to the Committee. This anomaly is exacerbated by the fact that the secretary of the board may be the assessor whose decision is under appeal, and thus an appellant might face the possibility of being deprived of the right to appeal to the board of revision by the very person from whose decision he is appealing without any further right of appeal. The right to apply for judicial review is hardly a substitute for a full right of appeal, since the scope of judicial review is much narrower.*
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> *[17] The other possible interpretation of the above mentioned sections of the Act is that the position of secretary is not a statutory office separate from that of the board, and that the powers given to the secretary by the Act, when exercised, are acts of the board. This is logical, as everything the secretary is empowered to do is done on behalf of the board. This interpretation is consistent with the words of the relevant sections and makes the impugned decision subject to appeal, just as if it were a decision made by a panel of the board. The anomalies mentioned above disappear. For these reasons, we conclude that the second interpretation, that given to the sections in question by the committee, is the most harmonious with the scheme of the Act and the intention of the legislature.*

[14] 2004 SKCA 73 (CanLII) at para 1.

[28] The Court of Appeal reviewed the practical difficulties that arose from the interpretation advanced by the applicant and chose instead an interpretation that was more logical and harmonious with the scheme of the legislation. Streamline argues that applying that approach in this Appeal leads to a conclusion that its interpretation should be accepted by the Board.

[29] With respect to the issue of whether the Director was properly served with the Adjudicator's Decision, Streamline relies on *Bueckart v Geransky Brothers Construction Ltd.*[15] where the Board used its power under section 6-112 to waive improper service on the employer on the basis that the employer acknowledged receiving a copy of the Notice of Appeal from the Board Registrar. The Director acknowledged receiving the Adjudicator's Decision and should not be allowed to rely on a technical irregularity to avoid the application of the time limit.

Analysis and Decision

[30] The Board agrees with the Director that the following statements describe rules to be applied in the interpretation of legislation:

> *2.1 … Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament[16].*
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> *2.2 The chief virtue of the modern principle is its insistence on the complex multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account the purpose of the provision and all relevant context. It must do so regardless of whether the legislation is considered ambiguous.[17]*
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> *. . .*
>
> *2.9 At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.[18]*

[31] The Act creates three levels of appeal of a Wage Assessment. The first level is to appeal a Wage Assessment from the Director to an Adjudicator pursuant to section 2-75. The right of

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[15] 2015 CanLII 43768 (SK LRB).
[16] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014 at 7.
[17] *Supra*, at 7/8.
[18] *Supra* at 10.

appeal is limited to employees, employers and corporate directors. The Director does not have a right of appeal because it is the Director's decision that is being appealed.

[32] The second level is an appeal from an Adjudicator's decision to the Board. The Director proposes that the path to appeal is through section 4-8 if initiated by an employer, employee or corporate director and through section 4-10 if initiated by the Director.

[33] The third level is an appeal from the Board to the Court of Appeal. Here the Director says that appeals by an employer, employee or corporate director are under subsection 4-9(1) and by the Director is under subsection 4-9(2). During the oral hearing, the Director backtracked from this argument and argued that the Director's appeal to the Court of Appeal is under section 4-10 and *The Court of Appeal Act, 2000*. This change of heart reflects the ambiguity that exists in these provisions that the Board must address. The Board also notes that in *Maxie's*, which counsel jointly requested the Board take into consideration, the Director applied for leave to appeal to the Court of Appeal pursuant to subsection 4-9(1). The Board notes that subsection 4-9(1) provides:

> *4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law. (emphasis added)*

[34] Subsection 4-9(2) reinforces the applicability of section 4-8 to the Director by its explicit reference to the Director:

> *(2) A person, including the director of employment standards or the director of occupational health and safety, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.*

[35] Subsection 4-9(2) also reflects the drafting style evident in sections 4-8 and 4-10, of establishing the right of appeal in one subsection and the time limitation for exercising that right in a separate subsection.

[36] Section 4-9 confirms the appropriate interpretation of sections 4-8 and 4-10. While the sections could have spelled out the intent more clearly, the Board finds that the only reasonable interpretation of these provisions is that clause 4-10(b) provides the right of appeal, but does not spell out how the Director exercises that right. That is when he must turn to section 4-8. The Legislature could have repeated the rules in section 4-8 in section 4-10, but given their close proximity, that would have been redundant.

[37] Rules of statutory interpretation require the Board to apply an interpretation consistent with the purpose of Part II, which is to protect employees. However, in this case, the Director has emphasized that he did not bring his appeal on behalf of the employee who is the subject of the Wage Assessment. Further, while in this case, a successful appeal by the Director would benefit the employee, the Director is asking the Board to make a finding that could help or harm an employee, depending on the subject matter of the appeal.[19] Accordingly, the benefits-conferring nature of Part II has no bearing on this decision.

[38] The Board is not bound by its previous decisions and, in this Appeal, the Board is not prepared to follow the findings in *Black Gold Boilers*, which were made without full argument.

[39] The Board has no hesitation in finding that section 4-10 is ambiguous. It is reasonably capable of bearing at least two different interpretations. The Board must adopt the interpretation that is most plausible, efficacious, reasonable and appropriate. Section 4-10 must be read in conjunction with sections 4-8 and 4-9.

[40] A careful review of section 4-9 results in the conclusion that there is only one plausible interpretation of section 4-10. Section 4-8 sets out the rules that apply to appeals from Adjudicators' decisions. Section 4-10 provides the Director with a right of appeal that can be exercised in accordance with the rules set out in section 4-8.

[41] In *Riocan* and in *Saskatoon Chief of Police*, the Court of Appeal confirmed that it is appropriate for the Board to consider the practical consequences of each proposed interpretation of ambiguous legislation in determining which is appropriate to adopt. In this Appeal, that review clearly leads to the interpretation suggested by Streamline. It is unreasonable to suggest that the Legislature would have considered it appropriate to grant a bare right of appeal to the Director that has no time limit on when the Director can bring an appeal; no restriction to a question of law; no requirement to serve anyone with a notice of appeal; no rules about what constitutes the record; no direction respecting the status of the Adjudicator's Decision during the appeal or ability for the Board to stay its effect; and no direction to the Board on what orders it can make after considering the appeal. To adopt the Director's interpretation would lead to an anomalous result. The interpretation proposed by Streamline is more logical and more harmonious with the scheme of the Act and the intention of the Legislature.

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[19] See, for example, *Weisgerber v Rural Municipality of Maple Creek #111 and Government of Saskatchewan, Director, Employment Standards*, LRB File No. 024-18, June 15, 2018, where the Director supported the employer in the employee's appeal from the Adjudicator's decision.

[42] There is one more factor that confirms the appropriate interpretation of section 4-10. The Board does not have inherent jurisdiction; it only has the jurisdiction conferred on it by the Legislature. The Board only has jurisdiction to hear appeals by the Director by virtue of section 4-8. If the Board was to adopt the Director's interpretation, it would have no jurisdiction to hear the Director's appeal.

[43] Having found that the 15 business day time limitation in section 4-8 of the Act applies to the Director, the next question is whether the Director's Appeal was filed outside that time limitation. The 15 business days begin to run from the date of service of the Adjudicator's Decision. Section 9-9 of the Act sets out rules for service of documents. Subsection 9-9(2) sets out, for service on persons other than the Director, methods by which those persons "may be served". Subsection 9-9(3), on the other hand, states that the Director "must" be served in the prescribed manner. The prescribed manner for service on the Director, in section 43 of the Regulations, does not include email. Therefore, the Director was never properly served with the Decision. That means that the Board cannot conclude that the Appeal was served out of time. Non-service is not a technical irregularity; therefore, section 6-112 of the Act does not give the Board the authority to waive it[20].

[44] Streamline's preliminary objection to the Appeal is, therefore, dismissed.

Appeal by the Director:

[45] The Notice of Appeal filed by the Director sets out two grounds for appeal:

(a) The Adjudicator failed to correctly interpret subsection 3(4) of *The Employment Standards Regulations*;
(b) The Adjudicator's incorrect statutory interpretation led to an error of mixed fact and law.

Argument on behalf of the Director

[46] The decision made by the Adjudicator, with which the Director takes issue, is that McDonald was not entitled to overtime pay while he was a dispatcher. If he was "an employee who performs services that are entirely of a managerial character", he is not entitled to overtime pay. The Director found that he was entitled to overtime pay; the Adjudicator overturned that decision. The Director was very critical of all aspects of the Adjudicator's decision but, at its core,

[20] *Brady v Jacobs Industrial Services Ltd.*, 2016 CanLII 49900 (SK LA).

the main finding objected to by the Director was that the Adjudicator preferred the evidence of Streamline's witnesses.

[47] The Director argues that the Board should apply a correctness standard to the Adjudicator's decision. He cited *Wieler v Saskatoon Convalescent Home*[21] ["*Wieler*"] as setting out the standard of review that applies in this Appeal:

> *The first question for the Board to consider is what the applicable standard of review in this matter is. For the reasons which follow, we find the applicable standard of review of questions of law is correctness, for questions of mixed fact and law, reasonableness, and for questions of fact which may be considered errors of law, reasonableness.*

[48] He noted, however, that the Board's decision in *Wieler* was under review by the Court of Appeal. The Court of Appeal's decision was released on October 20, 2017[22]. It made the following comment respecting the standard of review to be applied:

> *[23] The parties both argued that where a right of appeal is one restricted to a question of law, the standard of review is correctness. In support of their arguments, they referred the Court to DJB Transportation (at paragraph 36), saying that, as in that decision, which involved the Labour Standards Act, RSS 1978, c L-1, repealed (a precursor to the Saskatchewan Employment Act), the standard of review should be correctness. Having not been presented with any arguments to the contrary on this point, I have proceeded to a review of the question of law in this case on the basis of a correctness standard of review. I must add, however, that the issue of the correct standard of review in appeals such as this remains an open matter: see Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd., [2016] 2 SCR 293, 2016 SCC 47.*

[49] The Director rejects the Board's finding in *Black Gold Boilers* that the presumption of reasonableness applies to the Adjudicator's decision. In his view, Adjudicators are not experts, but *ad hoc* appointments, and therefore the presumption of deference does not apply. He disagrees with the finding by the Board to the contrary in *Judy's Korner Tavern v Samoleski* [23] ["*Judy's Korner Tavern*"].

[50] The Director argues that subsection 3(4) of the Regulations should be narrowly interpreted, more narrowly than the Adjudicator interpreted it. He argues that since the definition of "employer" in clause 2-1(g) of the Act includes the term "manager", that means that a person can only be considered to perform services of a managerial character if he or she has control or direction of one or more employees or is responsible, directly or indirectly, in whole or in part, for

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[21] 2014 CanLII 76051 (SK LRB) at para 12.
[22] *Wieler v Saskatoon Convalescent Home*, 2017 SKCA 90 (CanLII).
[23] 2014 CanLII 76055 at para 40.

the payment of wages to, or the receipt of wages by, one or more employees[24]. He argues that a manager is by definition an employer.

[51] The Director then referred the Board to two cases that, he says, lead to a conclusion that subsection 3(4) of the Regulations must be interpreted in a manner that extends protection to as many employees as possible[25].

[52] In *Hill v Begg*,[26] the Court of Queen's Bench considered the meaning of the word "entirely" in the predecessor to subsection 3(4)[27]. The Director argues that "entirely" should be interpreted to mean continuously. Isolated incidents of employees contributing to managerial type duties are not sufficient. The Adjudicator erred by relying on exceptional or isolated activities to conclude that the indicia of management were satisfied and by relying on theoretical authority to do certain management tasks when there was little or no evidence that McDonald did or was authorized by Streamline to do them on a regular basis. He admits, however, that the evidence was contradictory on key issues that were critical to the determination of whether McDonald performed services that were entirely of a managerial character.

[53] In *Westfair Foods Ltd. v Director of Labour Standards (Sask)*[28] ["*Westfair Foods*"] the Court set out nine indicia of management. While acknowledging that the Adjudicator considered them, the Director argues that there are other relevant indicators that the Adjudicator should have also considered.

[54] The Director referred to *Balzer v Federated Co-operatives Limited*[29] as a case in which the Court adopted what the Director considered to be an appropriately restrictive interpretation of the exemption. He cited several cases in which an employee was found to be entitled to overtime pay and invited the Board to draw the conclusion that, in comparison to those cases, the Adjudicator applied a more liberal interpretation to subsection 3(4) of the Regulations than she should have.

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[24] Words that appear in clause 2-1(g) of the Act.
[25] *Elcan Forage Inc. v Weiler* (1992), 102 Sask R 197 (SK QB), 1992 CanLII 7979; *Machtinger v HOJ Industries Limited*, [1992] 1 SCR 986.
[26] [1987] SJ No. 824 (QL) (SKQB).
[27] *The Labour Standards Act*, subsection 4(2), which read: "Part I of this Act does not apply to an employee who performs services that are entirely of a managerial character".
[28] 1995 CanLII 6185, (1995), 136 Sask R 187 (SK QB).
[29] 2014 SKQB 32 (CanLII).

[55] The Director suggested that the Adjudicator should have made her decision on the basis of what duties a dispatcher usually carries out[30], rather than what duties the dispatchers employed by Streamline carried out.

Argument on behalf of Streamline

[56] Streamline argues that the standard of review is reasonableness, relying on *Black Gold Boilers* and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*.[31] ["*Edmonton East*"]. *Thiele v Hanwel*[32] ["*Thiele*"] also confirmed that Adjudicators' decisions are entitled to deference:

> *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.*

None of the four categories that would call for a correctness standard apply in this case. Streamline also referred to the Board's finding in *Judy's Korner Tavern* that adjudicators are entitled to deference by the Board and the courts.

[57] A standard of review of reasonableness, Streamline argues, requires the Board to determine whether the Adjudicator's decision falls within a range of reasonable possible outcomes, and is transparent and intelligible. The Adjudicator's decision meets all of those requirements. She identified the duties that are of a managerial character, and found that the legal threshold was met. The Director is asking the Board to re-evaluate the evidence, something it cannot do.

[58] In Streamline's view, the Adjudicator found that McDonald's duties as dispatcher met most[33] of the indicia of performing duties entirely of a managerial character that were identified in *Westfair Foods*. In Streamline's view, the Adjudicator properly applied the factors identified in *Westfair Foods* in coming to her conclusion that McDonald was exempt from the entitlement to overtime pay.

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[30] As part of his Brief of Law the Director filed excerpts from what appears to be a website with the heading Government of Canada, National Occupational Classification. The Board makes no finding as to whether they are admissible in this manner, as they are irrelevant.
[31] [2016] 2 SCR 293, 2016 SCC 47 (CanLII).
[32] 2016 CanLII 98644 (SK LRB) at para 33.
[33] Streamline is non-unionized and the owners carry out the budgeting duties.

[59] In response to the Director's submission that the Adjudicator applied the wrong law, Streamline says that a careful review of her decision shows that she had the correct law in mind when she undertook her review of the evidence. What the Director is unwilling to accept is that the lack of credibility of his witnesses tainted the whole case.

Analysis and Decision

[60] The first issue for the Board to determine is the standard of review. In *Black Gold Boilers*, the Board acknowledged the standard of review applied in *Weiler* and *Matt's Furniture Ltd v Hoffert*[34] ["*Matt's Furniture*"], but then went on to find:

> *[25] ... Very recent jurisprudence from the Supreme Court of Canada identifies "reasonableness" as the appropriate standard of review for the type of issue raised on this appeal.*
>
> *[26] In Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47, ["Edmonton East (Capilano)"] the Supreme Court had to determine the appropriate standard of review for appeals under section 470 of Alberta's Municipal Government Act ["MGA"] that limited appeals 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.*
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> *[27] The Supreme Court (5:4) disagreed. Writing for the majority, Karakatsanis J. stated at paragraphs 21 – 24:*
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> > *[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 (para. 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 (Mouvement laique Quebecois 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.*

[34] 2016 CanLII 31172 (SK LRB).

> *[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, [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).*
>
> *[28] Applying this analysis here, the presumption of reasonableness operates. The adjudicator was asked to interpret provisions of the SEA which for present purposes qualifies as the "home statute". None of the four (4) Dunsmuir categories that would rebut this presumption is relevant to this matter. Accordingly, this appeal must be adjudicated on a reasonableness standard.*

[61] In *Thiele*, the Board again reviewed its previous findings respecting applicable standard of review on an appeal under Part IV of the Act, in *Weiler* and *Matt's Furniture*. It then reviewed the Supreme Court of Canada decision in *Edmonton East* and reached the following conclusion:

> *[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.*

[62] The Board then confirmed that what it described as the "now classic formulation of the revised reasonableness standard" in *Dunsmuir v New Brunswick*,[35] applied to its review of the Adjudicator's decision:

> *[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*

[35] [2008] 1 SCR 190, 2008 SCC 9 at para 35.

> *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 in Thiele.]*

[63] The Director relied on *DJB Transportation Services Inc. v Bolen*,[36] to argue that the Adjudicator should not receive deference for specialized knowledge:

> *In my view the only factor which points to a reasonableness standard would be the expertise of Adjudicators but, as the respondent argued, and I agree, the Adjudicators under the LSA are appointed on an ad hoc basis and there is not the institutional expertise which exists under the Trade Union Act.*

[64] Recent decisions of the Board no longer accept that description of Adjudicators:

> *Adjudicators appointed pursuant to the former Acts and now under the SEA are appointed for their expertise in the area of their adjudication, be it employment standards, occupational health and safety matters, or harassment complaints made to a special adjudicator. As such, the decisions made by these adjudicators are entitled to deference by this Board and the courts.*[37]

[65] The Adjudicator provided a detailed, thoughtful decision. She clearly spelled out the Director's view of the evidence and Streamline's view of the evidence. She then referred to the case law that she considered in making her decision. She reviewed in detail the evidence before her that applied to each of the nine indicia of management identified in *Westfair Foods*. She concluded by referring to how the case law applied to the facts before her. The Adjudicator was faced with inconsistent evidence by the witnesses, and she was required to make findings of credibility. She was uniquely placed to make this assessment. At paragraph 52, she stated:

> *Where discrepancies exist between the employer's and the employee's evidence, I preferred the evidence of the employer's witnesses because I believe they refrained from exaggerating Tim's role while the employee's witnesses down-played his role. After considering all of the evidence, I find Tim performed services of an entirely managerial*

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[36] 2010 SKCA 50 (CanLII) at para 40.
[37] *Judy's Korner Tavern* at para 40.

> *character while employed as a Dispatcher at Streamline and consequently is not entitled to overtime pay for hours worked up to May 11, 2015.*

[66] The Board is not a hearing *de novo* to reassess the Adjudicator's findings of fact. It is not for the Board to make findings of fact or to review findings made by the Adjudicator, apart from reviewing those findings for reasonableness. It is not the Board's role to second-guess the Adjudicator's findings of credibility.

[67] The Director suggested that the Adjudicator should have made her decision on the basis of what duties a dispatcher usually carries out, rather than what duties the dispatchers employed by Streamline carried out. In the Board's view, that would have been an unreasonable decision. The Adjudicator is required to make her decision on the basis of the evidence before her, as she did. Was McDonald, while a dispatcher, "an employee who performs services that are entirely of a managerial character"? The Adjudicator found that he was. The Board finds that this is a reasonable conclusion for her to have drawn.

[68] In *Westfair Foods*, the Court of Queen's Bench provided the following interpretation of the test to be applied by the Adjudicator:

> *What constitutes "of a managerial character" for the purposes of s. 4(2) of the Act will vary according to the facts of each case. Hence, an all-encompassing definition for the phrase is impractical. However, a reference to those characteristics and functions indicative of, or at least associated with management positions, as indicia for determining whether an employee's services are of a managerial character are, in my view, appropriate. The indicium making up such criteria can readily be extracted from case authorities, dictionary definitions, reports of arbitration awards and legal writings on employment law. The fundamental ones in my opinion are:*
>
> *(1) the supervision and direction of other workers;*
> *(2) the discipline of subordinates, individually or as part of a management team;*
> *(3) evaluating the performance of subordinates;*
> *(4) hiring and promoting of subordinate staff;*
> *(5) some independence and discretion in performing assigned duties;*
> *(6) supervision of a collective agreement, where the work place is unionized;*
> *(7) negotiating remuneration individually rather than collectively;*
> *(8) level of remuneration, vis-à-vis, non-managerial staff;*
> *(9) participation in carrying out the employer's budgets and performance requirements.*
>
> *This list is not intended to be all inclusive; nor must each criterion be found to exist before an employee's position can take on a managerial character; nor is each criterion entitled to equal weight. To the contrary, in my opinion only the functions of supervision and right to discipline are of fundamental importance and therefore of greater significance.*
>
> *The word "performs" in s. 4(2), contemplates not only the services of a managerial character an employee performed but also those which reasonably flow from or which are associated with the position occupied by the employee. Hence, an employee cannot evade compliance with the minimum standards prescribed by the Act by giving the employee the*

> *title of "manager" or supervisor, nor can the employee bring herself or himself within the provisions of the Act by failing to perform functions that are reasonably required by the position occupied.*[38]

[69] The fact that McDonald did not have final word on certain management decisions does not automatically lead to a conclusion that his duties did not meet the test to be exempt from an entitlement to overtime pay. The Adjudicator recognized this, when she referred to the following finding in *McCracken v Canadian National Railway Company*[39]:

> *The Court also said, "the degree of autonomy and decision-making authority needs to be significant, but it need not be absolute or unfettered, and a manager may have to report to and be supervised by more senior managers and officials in the organization".*

[70] The Director attempted to argue that the Adjudicator applied the wrong legal test because on occasion in her Decision she used the shorthand "manager" rather than "an employee who performs services that are entirely of a managerial character". Nothing in the Decision indicates that by using this shorthand she was doing anything other than making the Decision more readable. She clearly understood and applied the proper legal test.

[71] The Director also argues that the Adjudicator applied the wrong legal test by ignoring clause 2-1(g) of the Act. While the Adjudicator did not expressly refer to clause 2-1(g), applying it does not change the analysis. Streamline would be required to prove that McDonald had control or direction of one or more employees. It is clear from the Adjudicator's decision that this test was met.

[72] Adjudicators are not required to set out in their Decisions every single piece of evidence heard at a hearing and their view respecting its relevance to the issue at hand. A summary is enough. To find otherwise would be unworkable. It is clear that the Director's real argument is not that the Adjudicator did not consider all of the evidence, but that she should not have preferred the evidence of Streamline's witnesses. The Adjudicator had the great advantage of seeing the witnesses and hearing their evidence first hand. Nothing in the Adjudicator's Decision or the Director's argument convinces the Board that the Adjudicator's findings of fact or credibility are unreasonable.

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[38] At p. 8-9.
[39] 2010 ONSC 4520 (CanLII).

[73] In *Koskie v Child Find Sask Inc.*[40], the Board held:

> *[63] The Board has dealt with a similar argument in Racic v. Moose Jaw Family Services Inc. In that case, the Board noted that in the application of the reasonableness standard of review, the Board must consider the Adjudicator's decision in the context of the evidence, the parties submissions, and the process to assess whether it is reasonable. In Newfoundland Nurses, the Supreme Court said:*
>
> > *[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that* ***the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision****". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:*
> >
> > > *"Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Underlining added by Abella J.]*
> > > *(David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., The Province of Administrative Law (1997), 279, at p. 304)*
> >
> > *…*
> > *[17]* ***The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.***
> >
> > *[18] Evans J.A. in Canada Post Corp. v. Public Service Alliance of Canada, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572) that Dunsmuir seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "****perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision****" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:*
> >
> > > ***When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process.*** *Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]*
> >
> > *(Bold emphasis added by Board in Child Find, underline emphasis in original)*

[40] 2015 CanLII 90523 (SK LRB).

[74] The Director does not agree with the Adjudicator's view of the facts. That is not a ground on which the Board can overturn her findings of fact. The Board finds that the Adjudicator's findings of fact are reasonable. The Adjudicator's reasons support the conclusion she reached. Even if the Board was to accept the Director's submission that the reasons are deficient (which it does not), her Decision falls within a range of reasonable possible outcomes. Her Decision demonstrates justification, transparency and intelligibility.

[75] Accordingly, pursuant to clause 4-8(6)(a) of *The Saskatchewan Employment Act*, the Decision of the Adjudicator is affirmed and the Director's Appeal is dismissed.

[76] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful. Although not all of the numerous arguments and authorities raised have been addressed in these Reasons, all were considered in making this decision.

DATED at Regina, Saskatchewan, this **29th** day of **October, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson