Saskatchewan
Labour Relations Board

ARCH TRANSCO LTD., OPERATING AS REGINA CABS, Appellant v UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), Respondent

LRB File No. 290-19; December 17, 2020
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Appellant,
Arch Transco Ltd: Michael J. Phillips

Counsel for the Respondent, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers): Michael A. MacDonald

Section 4-8 of *The Saskatchewan Employment Act* – Appeal from Decision of an Adjudicator – Occupational Health and Safety – Harassment and Violence Policies – Appeal of Notice of Contravention – Interim Decision on Standing of Union – Standard of Review on Appeal – Jurisdiction to Hear Appeal of Interim Decision – Remit Matter back to the Adjudicator for Amendment of the Decision.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an Appeal filed by Arch Transco Ltd., operating as Regina Cabs [Company], against a decision of an Adjudicator appointed under Part III of the Act. The Respondent on the Appeal is United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers' International Union [Union]. The Union is the certified bargaining representative for a group of taxi drivers who are employed by the Company, pursuant to a certification order issued in LRB File No. 262-14. The Union and the Company are parties to a collective bargaining agreement.

[2] The bargaining unit is described in the following manner in the certification order:

> *…all taxi drivers employed by Regina Cabs, except those persons who own, control, or lease two or more taxi cabs, dispatchers, office personnel, supervisors and management above the rank of supervisors…*

[3] The decision under review is an interim decision in which the Adjudicator granted standing to the Union in the main proceedings [Interim Decision].

[4] The main appeal arises from a Notice of Contravention issued by an Occupational Health and Safety Officer, dated October 11, 2018 [Notice]. In the Notice, the OHS Officer observed that the Company had failed to cooperate with an officer in relation to a request for a list of the names of "Operator Cab Companies" (Taxi License Owners) and drivers that work jointly with the Company, and had therefore contravened section 3-8 of the Act; and, the Company had submitted a policy that did not encompass drivers for the Company and therefore contravened sections 36 and 37 of *The Occupational Health and Safety Regulations* [OHS Regulations]. The OHS Officer directed the Company to "create and implement a Harassment policy for all workers affiliated with Regina Cabs, inclusive of Taxi Licence Owners/Vehicle Operators and drivers for Regina Cabs (Arch Transco)", and although not correctly stated, to create a Violence policy.

[5] The Notice reads (at 1):

> *On June 27, 2018, Officers Ian Gardner and Lynn Selensky conducted an inspection at Regina Cabs (Arch Transco) at 3405 Saskatchewan Drive, in Regina Saskatchewan. Officers met with Sandra Archibald, owner of Regina Cabs regarding the violence policy for Regina Cabs.*
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> *In a prior Notice Of Contravention that was issued to Regina Cabs, report #16496, dated December 21, 2017, the Officer had requested a list of the names of "Operator Cab Companies" (Taxi License Owners) and drivers that work jointly with Regina Cabs as they will also be required to create a violence policy for their workplace.*
>
> *The request for this information was repeated in the inspection, and further correspondence was sent by email was sent* [sic] *on July 5, 2018. To date, this information has not been provided to our offices.*
>
> *As this information has not been provided, Regina Cabs (Arch Transco) is deemed to be the employer of the taxi drivers and must create and implement a Harassment policy and Violence policy for all workers affiliated with Regina Cabs, inclusive of Taxi Licence Owners/Vehicle Operators and drivers for Regina Cabs (Arch Transco).*

[6] The Company appealed the Notice on December 5, 2018, disputing the characterization of taxi drivers and taxi operators as "workers" pursuant to clause 3-1(1)(gg) of the Act. On May 7, 2019, the Adjudicator was selected to hear the appeal, pursuant to subsection 4-3(3) of the Act. The Interim Decision was issued on December 9, 2019. Unfortunately, there was a delay in hearing this matter that was attributed to Covid-19.

Interim Decision:

[7] The Interim Decision addresses only the issue of whether the Union has standing in the Company's appeal of the Notice.

[8] The following factual findings provide context for the involvement of the Union in these proceedings:

> *[18] According to the preamble in the Notice of Contravention, the ministry's engagement with Regina Cabs in relation to a violence policy goes back to at least December of 2017. The union introduced evidence that it wrote to the ministry on several occasions in 2018 on topics directly or indirectly related to the subject matter of the notice. An April 24 letter from the union stated it was "representing" an individual who had been asked to meet with ministry officials. The context suggested the individual was a worker at Regina Cabs and the letter referenced employment standards, workplace health and safety and occupational health and safety regulations. The letter asked the ministry to send any further correspondence on the matter to the union.*
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> *[19] An April 27 letter from the union referenced a conversation earlier in the week and provided the ministry with information on the company's structural relationship with its workers. The letter stated:*
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> > *The union continues to assert that for all practical purposes the employer-employee relationship exists and is routinely asserted by the employer.*
>
> *[20] The union followed up with a letter dated June 15 asking for information on the next steps to establishing a violence prevention policy at Regina Cabs.*
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> *[21] The union's September 10 letter to the ministry stated an intention to again follow up on the violence policy for Regina Cabs. It stated:*
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> > *I have tried to work with the employer to establish a Violence Prevention Policy be establish (sic), but have yet to see a written copy of the policy.*
> >
> > *I am writing you today to ask for your department to investigate and enforce the Saskatchewan Occupational Health and Safety Regulations.*
>
> *[22] By letter dated August 22, the union had written to the company requesting copies of the company's violence and harassment policies and indicating an interest in being consulted by the company in the development of a violence policy if they had not yet written one.*
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> *[23] The Notice of Contravention is dated October 11.*

[9] After the Notice was appealed, the director gave written notice to the Union.[1] After the Adjudicator was selected to hear the appeal, he began to receive correspondence from both the lawyer for the Union and the manager of the Company. The lawyer wrote to advise that the Union was represented. The manager advised that the Company was not represented, and that notice

[1] *Interim Decision* at para 4.

had been provided to the Union in error. The Adjudicator denied the Company's *ex parte* application to determine the Union's standing, and instead initiated proceedings with both the Company and the Union to determine that issue.

[10] In those proceedings, the Adjudicator identified two issues to be determined:

> 1) *Is the union a "person who is directly affected by a decision" within the meaning of s. 3-52(2) of the Act?*
>
> 2) *If the union is not a "person who is directly affected by a decision", is there another basis on which it should be recognized as a party?*

[11] In relation to the first question, the Adjudicator found that,

> *A plain reading of s. 3-52(2) leads to the clear conclusion that the union does not fall within the definition as the Legislature chose to very specifically and narrowly limit it. The Lieutenant Governor in Council could make regulations including unions generally or more narrowly within the scope of the definition, but has not chosen to do so.*[2]

[12] In relation to the second question, being whether there is another basis on which the Union should be recognized as a party, the Adjudicator summarized the parties' positions:

> *[48] The union asserts it has acted, and continues to act, in a representative capacity on behalf of the taxi drivers employed at Regina Cabs who are members of the union and in the bargaining unit recognized by the 2015 certification order.*
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> *[49] The company's position is that the union has no capacity to represent its worker members outside the scope of the certification order and the collective bargaining agreement between the parties. It further asserts that the absence of the union as a party does not affect the conduct or the result of the appeal because the director is the proper respondent and can be relied upon to defend the notice and thus effective advance the interests of the workers.*
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> *[50] In response to this assertion, the union argues that the director cannot be expected to appear as a party or to advance a case significantly similar to what the union would present on behalf of the workers.*

[13] The Adjudicator addressed the argument that the director was the "proper respondent", noting that while section 4-10 of the Act "gives the director the express right to appear and make representations on an appeal, he will not necessarily do so".[3] He then considered the role of the director on the appeal, including whether the statute suggests that the director would normally

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[2] At para 47.
[3] At para 53.

participate "in a manner that advances the interests of a worker or a group of workers".[4] Following this analysis, the Adjudicator decided to "assume for the purposes of the analysis that the director is not a party".[5] And, even if the director had communicated an intention to participate in the appeal, "the union's right to standing would still have to be considered".[6]

[14] The Adjudicator then moved on to consider whether the Union has a right to standing as a representative of the drivers in the bargaining unit, and began his analysis as follows:

> *[60] The union asserts its right to standing as a representative of the Regina Cabs taxi drivers who are within the bargaining unit created by the certification order in 2015. If this is valid, it depends first on a determination that the drivers have an interest in the appeal.*
>
> *[61] For the purposes of determining standing, I must assume the Notice of Contravention is valid. The policies the notice requires of the company are for the benefit of its workers. In this important sense, the notice directly affects the workers. While we might wonder what the Legislature meant when it additionally required that the decision be directed to those affected by it, I give this a broad meaning. To do otherwise would mean, in the case of Notices of Contravention, that a worker, although specifically mentioned, would never fall within the definition in s.3-52(2).*
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> *[62] Consequently, I find that the Regina Cabs drivers who are in the bargaining unit are persons directly affected by the Notice of Contravention. Having made this finding, I also find the company should, in the normal course, have set out the names of the workers in its notice of appeal, as required by s. 3-53(3)(a), and that the workers were entitled to notice of the appeal pursuant to s.3-53(5)(a) or 3-54(2), again in the normal course.*
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> *[63] However, I am mindful that the director and the registrar have apparently regarded the union as a representative of the workers. The union had extensive involvement encouraging the ministry in its investigation of the company, as noted in the correspondence referenced earlier. Once the Notice of Contravention was issued and then appealed, the director gave notice of the appeal to the union. …*
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> *[64] It is reasonable to infer from these circumstances that the workers were not given notice because the director and the registrar regarded the union as a representative of the workers and, consequently, a party to the proceedings…*
>
> *[65] It is important to note that the Act does not equate the status of "person who is directly affected by a decision" with a person who is a party. S. 4-4 deals with procedures on an appeal to an adjudicator. S.4-4(1) requires the registrar to consult with the "parties" in setting a time and place for the hearing. Once he has done that, he must give written notice of the time and place for the hearing to the director and to "all persons who are directly affected by the decision being appealed". The Legislature saw the possibility that the parties were not necessarily persons directly affected by the decision.*

[15] The Adjudicator considered three cases put forward by the Company in support of its position that the Union should not be a party: *SGEU v Saskatchewan*, 172 Sask R 83; 1998 CanLII

[4] At para 55.
[5] At para 59.
[6] *Ibid.*

12398 (SK CA) [*SGEU*]; *CUPE, Local 30 et al v WMI Waste Management of Canada Inc*., 1996 ABCA 6 [*CUPE*]; and *Canadian Union of Public Employees v McKnight*, 2016 CanLII 44867 (SK LRB) [*McKnight*].

[16] The *SGEU* case was an appeal against an order striking SGEU from an action brought by that union and a union member, against the Government of Saskatchewan. Then Chief Justice MacPherson, for the Court of Queen's Bench, had made an order striking the union from the pleadings, for having not asserted a cause of action on its behalf. He also declined the union's request to be granted public interest standing.

[17] In *SGEU*, Lane J.A. for the Saskatchewan Court of Appeal held:

> *[18] None of the cases cited by the appellant, SGEU, support the proposition that a union has the legal persona capable of enforcing interests of its members in its own name outside the scope of The Trade Union Act or outside any contractual rights. Section 3 of The Trade Union Act is, in my view, clear and unambiguous. The words "the right to organize and to form, join, or assist trade unions" simply gives the employees the right of collective action and assembly through a union. It does not purport to extend the meaning of the legal persona of a union as set out in s. 29 of the Act. It also does not purport to give the union the same or overlapping interests as its members.*
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> *[19] The central authority cited by the appellant, SGEU, i.e. International Longshoremen's Association, Local 273 et al. v. Maritime Employers' Association et al., supra, does not support the proposition that a trade union has a judicial personality beyond that granted by the appropriate trade union act. In that case, the union was participating in an illegal strike contrary to the collective bargaining agreement.*
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> *[20] In my view, the appellant's central argument that s. 29 of The Trade Union Act allows a union to be a party to an action alongside its members with respect to all employment-related matters, even when the claim does not disclose any cause of action by the union, is not supported by the case law and places an interpretation on s. 29 of The Trade Union Act not intended by the Legislature.*

[18] In concurring reasons, Cameron J.A. observed, at 12:

> *But this is a mere beginning, as Chief Justice MacPherson pointed out in granting the impugned order, for having the ability to sue and being in a position to do so are conceptually overlapping but legally distinct. The one has to do with capacity, the other with standing.*
>
> *Obviously, a person having a reasonable cause of action against another is in a position as of right to sue the other. And having done so, such person has the added right to appear before the court and to have the cause of action heard and determined. In some circumstances a person may also be in a position as of right to sue for and on behalf of others, as their representative, and thus acquire these added rights. Persons in either of these positions enjoy standing, in the sense of having the right to advance the cause of action before the court.*

> *In still other circumstances, persons may be placed by the court in a position to sue even though they, themselves, have no cause of action in the strict sense. They may be accorded standing by the court, as a matter of grace, if it be in the public interest. In addition, some persons, interested in another's cause of action but having none of their own, may be placed by the court in a position to be heard, as interveners, though not to maintain an action.*

[19] Cameron J.A. emphasized the distinction between capacity and standing, asserting that (at 15):

> *…Standing, especially as a matter of private right, has always to be addressed relative to the nature and scope of the cause of action at stake and the person or persons in whom it lies.*

[20] The Adjudicator distinguished from *SGEU* stating that "the union is asking for standing to do something objectively useful, which is to advance the interests of its members".[7]

[21] In *CUPE*, the Alberta Court of Appeal considered whether to overturn the decision of a Chambers judge refusing to quash a tribunal's decision to deny standing to certain persons, including a union, for failing to meet the criteria for "directly affected" or public interest status. The Chambers judge, in reviewing the tribunal decision, found that "the requirement of a direct affect was a condition precedent to the right to appeal".[8] The Alberta Court of Appeal found that the Chambers Judge was correct to give the term "directly affected" its common law meaning, and that it "is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter".[9] The Court also concluded that the Chambers judge did not err in refusing to "broadly interpret the term 'directly affected' so as to import expanding concepts of judicial discretion to grant public standing before an administrative tribunal".

[22] The Adjudicator distinguished from *CUPE*:

> *[68] The CUPE case draws an important distinction between reliance on a personal interest, which would mean an interest directly relevant to the union in the instant case, and a community interest, meaning an interest pertinent to the community as a whole. However, the union here is advancing neither. It has been clear from the outset that its purpose is to advance the interests of the Regina Cabs drivers who are its members.*

[23] *McKnight* was an appeal against both a preliminary decision and a final decision of an adjudicator pursuant to Part III of the Act. In that matter, a union - bargaining agent for the bargaining unit to which the employee belonged - had applied for watching brief status in an

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[7] At para 67.
[8] At para 14.
[9] At para 19.

appeal pursuant to Part III of the Act. In the preliminary decision (*TM v Prince Albert Parkland Health Region*, LRB File No. 095-15, October 22, 2015), the adjudicator had found that the union was not a directly affected party to the appeal; the union was provided only limited status for the purpose of conducting a watching brief:

> *18. In this case, I accept the submissions of PAPH that CUPE does not have standing on the basis that it is a party "directly affected" by the proceedings. CUPE does not fall within any of the enumerated persons in the definition of party "directly affected by a decision" in section 3-52(2) of the Act. CUPE's status as certified bargaining agent does not have any bearing on this issue. CUPE does have a duty of fair representation of an employee but that applies to the employee's rights pursuant to the collective agreement. While there may be provisions in the collective agreement protecting the employee's health and safety in the work environment the rights and obligations of the employee and employer that are relevant in this proceeding are those provided for in Part III, the Occupational Health and Safety provisions of The Saskatchewan Employment Act.*
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> *19. However, I do not see anything in The Saskatchewan Employment Act that would preclude CUPE from being able to conduct a watching brief on a public observance basis which would enable them to make an application to intervene should circumstances arise that might justify such an application to be made during the proceedings.*

[24] The Adjudicator noted, at paragraph 8 of the decision, that the application for status was not made on the employee's request, but nor did the employee object to CUPE's request for watching brief status.

[25] On the appeal, then Chairperson Love observed:

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

[26] In response to the union's reliance on the notice it received from the Board registrar, Chairperson Love observed:

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

[27] Chairperson Love addressed an argument with respect to the union's potential for standing in cases in which a resolution of employee's rights is sought through negotiation, and in which the union's compliance with its duty of fair representation is put in issue:

> *[46] With respect to the Union's argument that when employee's rights are impacted and when resolution is sought through negotiation, that the Union, as exclusive bargaining agent had the right and obligation to be party to those negotiations. This argument has some merit and may be applicable in some instances where parties are seeking to negotiate a settlement of a complaint which has an impact on terms and conditions of employment specified in the Collective Bargaining Agreement. In those circumstances, one would expect that the Union might be at the table to protect the interests of its member and its other members for whom it had negotiated those terms and conditions of employment. However, that was not the case here as there was no suggestion that settlement negotiations were under consideration and that the Adjudicator had failed to take such into consideration*
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> *[47] Similarly, the Union's argument that its participation would be necessary to insure that it was complying with its duty of fair representation of its members being, either the employee impacted, or, possibly the employee who may have been responsible for the complaint. The Union is required to walk a very fine line in such circumstances. In addition to its statutory duty of fair representation, the union faces a common law duty of fair representation as noted by the Supreme Court of Canada in Canadian Merchant Guild v. Gagnon19. However, there was no argument before the Adjudicator in respect to this argument either.*

[28] In this case, the Adjudicator commented on the effect of the Board registrar providing notice to the Union and the question of whether the Union could act in a representative capacity on behalf of its members:

> *[64] It is reasonable to infer from these circumstances that the workers were not given notice because the director and the registrar regarded the union as a representative of the workers and, consequently, a party to the proceedings. I acknowledge the comments of Chairperson Love in the McKnight appeal (although obiter dicta) to the effect that the registrar's inclusion of the union in the list of persons receiving notice does not determine the issue of standing. However, considered in the wider context, there is a reasonably clear indication here that the union has participated thus far in the process leading to this appeal and that the director and the registrar did not see the union as outside that process.*
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> *…*
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> *[69] I agree with the determination of the adjudicator in the McKnight case that the union there, as here, was not a person directly affected by the decision. However, I may disagree with her further statement that "CUPE's status as certified bargaining agent does not have any bearing…" on the issue of standing. If she simply meant the union's status as bargaining agent was not determinative of the issue of standing, I agree. If, however, the statement was intended to mean that, as a matter of law, a union certified as a bargaining agent can never be granted standing to represent the interests of members of the bargaining unit that aren't directly tied to the enforcement of rights set out in the collective bargaining agreement, I disagree.*
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> *[70] As noted above, the comments of Chairperson Love in the appeal of the adjudicator's decision to the board, albeit apparently obiter dicta, are thoughtful. However, they do not provide unequivocal support for the proposition that a union cannot act in a representative capacity on behalf of its members in circumstances such as these. I note that, in applying the reasonableness test he determined was appropriate to resolving the appeal, he stated that "it may have been open to the adjudicator to take a more liberal view of the legislation before her" but that her decision met the reasonableness standard.*

[29] The Adjudicator found that the Union's participation is not disruptive but rather helpful:

> *[72] … Since the workers have not been given notice and are not party to the appeal, having the union represent their interests will make the appeal process more complete and likely lead to a more fully considered decision.*

[30] He then concluded that, pursuant to section 4-4 of the Act, he has considerable discretion to permit or exclude the union's participation as a party, and:

> *[74] In exercising my discretion to determine the union will have standing, I am considering particularly that the workers did not receive notice of the appeal and were therefore unlikely to attempt to participate individually. The ministry appears to have regarded the union as the representative of the workers and the union has demonstrated an intention to represent them since its first correspondence with the ministry in April of 2018. Including the union as a representative of the workers does not take the appeal in a new direction or create a distraction from the main issues reasonably expected to frame the appeal. It simply ensures both sides, to the extent there are sides, will be represented and their interests advanced.*
>
> *[75] I have concluded, therefore, that the union has standing as a party in this appeal.*
>
> *…*
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> *[77] The appeal will proceed with the company as appellant and the union as respondent, with both parties exercising the usual rights and responsibilities associated with their standing.*

Argument of the Parties:

The Company:

[31] The Company says that the Board has jurisdiction to hear an appeal on a question of law, whether final or not. Here, the principle ground of appeal is procedural fairness on a question of law arising from the Adjudicator's determination that the Union was representative of a homogenous constituency of workers for the purposes of Part III of the Act. In suggesting that the Board is lacking jurisdiction, the Union relies on common law doctrines, and that reliance is misplaced because those doctrines apply only to the inherent jurisdiction of courts.

[32] The main appeal raises issues with the Notice of Contravention. First, the Notice mischaracterizes drivers as workers which include owners and operators and drivers. Second, the Notice assumes that the Company has control of the prevailing working conditions. But it does not own taxi licenses, nor own or control taxi vehicles. The vehicles are the worksite. Therefore, taxi drivers are not workers of the Company within the meaning of Part III of the Act; and license owners and operators have their own businesses. The certification order limits the Union's representational rights to taxi drivers who own, control, or lease fewer than two taxi cabs, thereby

recognizing that there is an inherent conflict of interest between owning a business and operating it.

[33] Although the Company filed a brief that outlined eight grounds of appeal, the Company's lawyer focused on three primary issues in his oral submissions. First, the Adjudicator waded into the merits of the main appeal when he found that the Union's representativeness was a basis for standing. Second, the Adjudicator prejudged the substantive issue arising on the main appeal. Third, the Adjudicator erred by relying on the director's decision to give notice to the Union and thereby fettered his discretion.

[34] On the first issue, the Adjudicator implied that there is a discrete group of workers within the meaning of Part III with uniform interests affected by the Notice. Despite what the Union alleges, there is a distinction between employees constituting the bargaining unit under Part VI of the Act and the workers defined by Part III. To act in a representative capacity, the Union must represent a common interest. However, whether there is a common interest, and with whom it is shared, is the question raised by the main appeal.

[35] The taxi drivers outlined in the certification order have interests that align with the Union and with the Company through their entrepreneurial activities. Owners and operators may have the same interests as taxi drivers on the appeal but they are not, and never have been represented by the Union under Part VI. In fact, these owners and operators are adverse in interest to the Union. The CBA, at Article 5, acknowledges that the taxi drivers do not have uniform working conditions. It is an open question whether there is any shared interest in working conditions in this workplace.

[36] On the second issue, the Adjudicator wrongly found that he must accept the Notice as being accurate in order to determine the question of standing. The Notice makes presumptions about workers and working conditions. The subject matter forming those presumptions consists of live issues. Further, the Adjudicator, by finding that the Union is representative of workers under Part III, effectively varied the Notice.

[37] The question of standing must be decided in relation to the issues raised on the Notice of Appeal, and not on the basis of the Union's representativeness in another context. If the Adjudicator thought it was necessary to decide the status of the drivers to decide the issue of standing, he erred by failing to put the parties on notice of his intention to do so, and to give them an opportunity to lead evidence on that issue.

[38] Third, the Adjudicator relied on the director's decision to serve notice on the Union and thereby fettered his discretion. Even if the Union was properly in receipt of notice on behalf of its members, it does not follow that the Union was sufficiently representative of the workers to participate on the appeal. The Union's capacity to receive notice on the part of its members and the Union's representativeness are two separate concepts.

[39] In addition to these three issues, the Board will address the statutory interpretation issues raised in the Company's brief, which are described as "Appeal Issue 1 – 'Parties'" and "Appeal Issue 2 – Jurisdiction". It should be noted that the Union filed a written reply and addressed these grounds in oral argument. In respect of these issues, the Company says that the Adjudicator erred by misinterpreting the word "parties", and incorrectly assumed that the Legislature had intended to broaden the meaning of "parties" to include a person beyond those specified in subsection 3-52(2). Subsection 3-52(2) delineates those persons who are directly affected by a decision, and it is those persons and no others, who may be parties to a related proceeding.

The Union:

[40] The Union states that the Interim Decision is not a "decision" as defined by section 4-6 of the Act, being that it is an "interlocutory", rather than final, decision. Therefore, the Board does not have jurisdiction to hear this Appeal. In the alternative, if the Board finds that it has jurisdiction, it should exercise its discretion to decline to hear the Appeal. In the second alternative, if the Board decides to hear the Appeal, then it must find that the decision contains no error.

[41] The Adjudicator had discretion to determine the question of standing to participate in the proceedings pursuant to subsection 4-4(2) of the Act. Contrary to the Company's arguments, sections 3-53(1) and 4-4 do not restrict the right to be a party or to be granted standing; these provisions confer rights to appeal and to receive notice, only. The Act contains no language that can be construed as restricting the right to be a party to such a proceeding.

[42] The Board must consider the unique nature of the main appeal. The Union is the only entity with standing in that appeal, besides the Company. When deciding whether the drivers in the bargaining unit were workers, the Adjudicator considered the definition of worker in the Act, assessed the facts, and then determined that the drivers were captured by that definition. The Union acknowledges, though, that it remains a live issue on the main appeal whether the Company's drivers are workers.

[43] As persons who are directly affected by a decision, the workers are entitled to notice of the appeal. Despite this, the Company failed to name any of the workers in the Notice of Appeal. Subsequently, the director did not send the Notice of Appeal to any workers, but instead, sent the Notice of Appeal to the Union.

[44] The Adjudicator found as a fact that the Union represents the workers of the Company. This finding is supported by the affidavit evidence. The Company led no evidence to contradict the assertion that the drivers are workers under the Act or the assertion that the Union was the representative of the workers in the main appeal. The Adjudicator could not have reached any other conclusion. It is inconsequential whether the Adjudicator took into account the director's belief that the Union was a representative of the drivers. The Adjudicator drew this conclusion independently, based on the affidavit evidence.

[45] Furthermore, it was open to the Adjudicator to exercise his discretion to extend party status to the Union as an advocate. In some circumstances, a union may have a duty to assist its members in occupational health and safety matters. Certainly, the CBA does not preclude the Union from assisting its members in such matters. It is entirely reasonable for the workers to have availed themselves of an advocate to assist in these proceedings.

[46] If the Board overturns the standing decision, the result will be to exclude the workers from the appeal proceedings. This is an untenable result. The workers have a right to receive notice of the appeal, to have an opportunity to make representations, and to participate in the main appeal.

Issues:

[47] The main issues, and the Board's decisions in relation to these issues are:

1) Does the Board have jurisdiction to hear this appeal?
    a. Yes.
2) If so, what is the applicable standard of review?
    a. Correctness.
3) Did the Adjudicator err in law by finding that the Union had standing as a party?
    a. Yes, the Adjudicator erred in law.

Applicable Statutory Provisions:

[48] The following provisions of *The Saskatchewan Employment Act* are applicable:

3-1*(1) In this Part and in Part IV:*

. . .

(gg) ***"worker"*** *means:*

(i) an individual, including a supervisor, who is engaged in the service of an employer; or

(ii) a member of a prescribed category of individuals;
..

. . .

3-8 *Every employer shall:*

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;
…

. . .

3-21*(1) An employer operating at a prescribed place of employment where violent situations have occurred or may reasonably be expected to occur shall develop and implement a written policy statement and prevention plan to deal with potentially violent situations after consultation with:*

(a) the occupational health committee;

(b) the occupational health and safety representative; or

(c) the workers, if there is no occupational health committee and no occupational health and safety representative.

(2) A policy statement and prevention plan required pursuant to subsection (1) must include any prescribed provisions.

. . .

3-52*(1) In this Division:*

(a) ***"adjudicator"*** *means an adjudicator appointed pursuant to Part IV;*

(b) ***"decision"*** *includes:*

(i) a decision to grant an exemption;
(ii) a decision to issue, affirm, amend or cancel a notice of contravention or to not issue a notice of contravention; and
(iii) any other determination or action of an occupational health officer that is authorized by this Part.

(2) In this Division and in Part IV, ***"person who is directly affected by a decision"*** *means any of the following persons to whom a decision of an occupational health officer is directed and who is directly affected by that decision:*

(a) a worker;
(b) an employer;
(c) a self-employed person;
(d) a contractor;
(e) a prime contractor;
(f) an owner;
(g) a supplier;
(h) any other prescribed person or member of a category of prescribed persons;

but does not include any prescribed person or category of prescribed persons.

3-53*(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.*

(2) An appeal pursuant to subsection (1) must be commenced by filing a written notice of appeal with the director of occupational health and safety within 15 business days after the date of service of the decision being appealed.

(3) The written notice of appeal must:

(a) set out the names of all persons who are directly affected by the decision that is being appealed;
(b) identify and state the decision being appealed;
(c) set out the grounds of the appeal; and
(d) set out the relief requested, including any request for the suspension of all or any portion of the decision being appealed.

(4) Subject to subsection (10) and section 3-54, an appeal pursuant to subsection (1) is to be conducted by the director of occupational health and safety.

(5) In conducting an appeal pursuant to subsection (1), the director of occupational health and safety shall:

(a) provide notice of the appeal to persons who are directly affected by the decision; and
(b) provide an opportunity to the persons who are directly affected by the decision to make written representations to the director as to whether the decision should be affirmed, amended or cancelled.

(6) The written representations by a person mentioned in clause (5)(b) must be made within:

(a) 30 days after notice of appeal is provided to that person; or
(b) any further period permitted by the director of occupational health and safety.

(7) The director of occupational health and safety is not required to give an oral hearing with respect to an appeal pursuant to subsection (1).

(8) After conducting an appeal in accordance with this section, the director of occupational health and safety shall:

(a) affirm, amend or cancel the decision being appealed; and
(b) provide written reasons for the decision made pursuant to clause (a).

(9) The director of occupational health and safety shall serve a copy of a decision made pursuant to subsection (8) on all persons who are directly affected by the decision.

(10) Instead of hearing an appeal pursuant to this section, the director of occupational health and safety may refer the appeal to an adjudicator by forwarding to the adjudicator:

(a) the notice of appeal;
(b) all information in the director's possession that is related to the appeal; and
(c) a list of all persons who are directly affected by the decision.

***3-54**(1) An appeal mentioned in subsection 3-53(1) with respect to any matter involving harassment or discriminatory action is to be heard by an adjudicator in accordance with Part IV.*

(2) The director of occupational health and safety shall provide notice of the appeal mentioned in subsection (1) to persons who are directly affected by the decision.

. . .

***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; and

(ii) in the case of an appeal or hearing pursuant to Part III:

(A) the director of occupational health and safety; and
(B) all persons who are directly affected by the decision being appealed.

(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.

(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.

(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.

(6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.

[…]

. . .

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.

[…]

[49] Finally, the following provisions of *The Legislation Act* are applicable:

2-10*(1) The words of an Act and regulations authorized pursuant to 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 the Legislature.*

(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

…

2-19*(1) In this section, "section heading" means a heading that appears in an enactment immediately above or beside a section or a provision of a section.*

(2) The following are part of an enactment:

(a) a preamble;
(b) headings other than section headings.

(3) The following are not part of an enactment and are to be considered to have been included editorially and for convenience of reference only:

(a) section headings;
(b) tables of contents;
(c) information notes providing legislative history;
(d) information notes providing text as an alternative for non-text content.

Preliminary Issues – Jurisdiction and Standard of Review:

Jurisdiction:

[50] The Union argues that the Board's jurisdiction to hear appeals is limited to appeals of final decisions of adjudicators made pursuant to Part III. The Union distinguishes from *McKnight* on the basis that it did not take into account the definition of "decision", an issue that is now before the Board.

[51] The Board does not agree that its jurisdiction is restricted to appeals of final decisions of adjudicators pursuant to Part III.

[52] The right to appeal a decision of an adjudicator on an appeal pursuant to Part III is set out at section 4-8 of the Act. Subsection 4-8(2) allows a person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III to appeal the decision to the Board on a question of law:

> ***4-8****(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.*

[53] In a number of places in its brief, the Union cites section 4-6 of the Act, stating that the adjudicator's decision "is not a 'decision' as defined by section 4-6 of the Act". The Union then relies on a combination of section 4-8 and clause 3-52(1)(b) to assert that the Board does not have jurisdiction.

[54] In interpreting the statute, the Board must adopt the modern approach to statutory interpretation and the doctrine of liberal construction as contained in section 2-10 of *The Legislation Act*:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to 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 the Legislature.*
>
> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

[55] Section 4-6 of the Act states:

> ***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.*

[56] The heading to section 4-6 states: "**Decision of Adjudicator**".

[57] Section 2-19 of *The Legislation Act* makes clear that a section heading is not part of an enactment:

> ***2-19****(1) In this section, "section heading" means a heading that appears in an enactment immediately above or beside a section or a provision of a section.*
>
> *(2) The following are part of an enactment:*
>
> *(a) a preamble;*
> *(b) headings other than section headings.*
>
> *(3) The following are not part of an enactment and are to be considered to have been included editorially and for convenience of reference only:*
>
> *(a) section headings;*
> *(b) tables of contents;*
> *(c) information notes providing legislative history;*
> *(d) information notes providing text as an alternative for non-text content.*

[58] Therefore, the heading to section 4-6 should not form part of the Board's interpretation of the section.

[59] Section 4-8, which provides the right to appeal to this Board, contains no limiting language in respect of the decision, other than that the decision be "of an adjudicator on an appeal pursuant to Part III."

[60] Section 4-6 sets out the actions that the adjudicator shall take. Clause 4-6(1)(b) states that the adjudicator shall provide written reasons for the decision to dismiss or allow the appeal, or to vary the decision being appealed. Section 4-7 states that an adjudicator shall provide the written reasons for a decision required pursuant to clause 4-6(1)(b) within specific periods.

[61] In setting out the timelines, section 4-7 explicitly applies to "the decision required pursuant to clause 4-6(1)(b)". By contrast, section 4-8, which is the source of the right to appeal, is not so restricted. This difference in language suggests that the rights of appeal extend to decisions other than those referred to in section 4-6.

[62] Pursuant to subsection 4-4(2), the adjudicator may determine the procedures by which the appeal or hearing is to be conducted. Latitude is extended to an adjudicator in determining those procedures, which may pertain to a broad range of issues. In determining these procedures, the adjudicator may issue a decision, and that decision may be in writing for purposes of the record of appeal. These powers are incidental to the exercise of power pursuant to subsection 4-4(2).

[63] In respect of clause 3-52(1)(b), the Union says that the Adjudicator's decision does not fall into any of the prescribed categories therein. Therefore, the decision in issue is not a decision that is properly before the Board on appeal.

[64] Clause 3-52(1)(b), which is found in Division 8 of Part III of the Act, provides a non-exhaustive list of decisions that can be made "[i]n this Division". Division 8 deals with an appeal of a decision of an occupational health officer's decision or an appeal of the director of occupational health and safety, not an appeal of a decision of an adjudicator from an occupational health officer's decision. The categories of decision in Division 8, Part III do not apply to appeals brought under Part IV of the Act, which is the Part that deals with appeals of decisions of adjudicators under Part III. To interpret clause 3-52(1)(b) in the manner urged by the Union would require the Board to ignore the plain language of the provisions and the "architecture"[10] of the Division and of the Act.

[65] The Union urges the Board to err on the side of efficiency and refuse jurisdiction, citing *Patel v Carson*, 2017 SKQB 377 [*Patel No. 1*], and *Patel v Saskatchewan (Practitioner Staff Appeals Tribunal)*, 2019 SKQB 291 [*Patel No. 2*]. The Union says that the Board's "statutory mandate is broad enough as it is", and that a finding that the Board's jurisdiction extends to non-final decisions opens the floodgates to abusive litigants taking advantage of interlocutory appeals and overtaxing the Board's resources.

[66] In *Patel No. 2*, the court reviewed the relevant legislation, which bears some similarities (and differences) to the legislation under consideration in this case. In respect of Dr. Patel's notice of appeal, Scherman J. found:

> *[9] After hearing submissions by counsel with respect to the application to strike Dr. Patel's Notice of Appeal, I struck the Notice of Appeal in an oral decision delivered October 10, 2019. My reasons, in summary, were that the right of appeal created by s. 15 of the Regulations is limited to appeals on questions of law or jurisdiction from PSAT decisions rendered after completion of a hearing. It was my opinion and decision that the Legislature intended the statutory right of appeal so created to be from final decisions of the tribunal and did not extend to interlocutory or interim decisions rendered during the course of hearings.*

[67] Paragraph 9 is the extent of the analysis on this point.

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[10] Language used in *United Steel v United Cabs*, 2019 CanLII 57383 (SK LRB) at para 71.

[68] This passage, in relation to different legislation, does not persuade the Board that it does not have jurisdiction over this appeal.

[69] Lastly, the Board will address the Union's judicial review argument. The Union asks the Board to pay heed to what it describes as the "presumption against review of interlocutory decisions", relying on *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 [*Whalen*]. However, the court in *Whalen* deals not with a tribunal's jurisdiction on an appeal but with "the presumption against judicial review of interlocutory decisions" [emphasis added].[11]

[70] The question here is not whether the Board has jurisdiction to hear a judicial review application, but rather, whether the Board has jurisdiction to hear an appeal from a decision that is not a final decision. A right of appeal is a creature of statute; there is no inherent, common law, right of appeal. In this case, the only limitation on the right of appeal is that it must relate to a decision of an adjudicator on an appeal pursuant to Part III. There is no applicable statutory definition of "decision". The right of appeal is broad, being on a question of law.

[71] Both of the *Patel* cases focus on judicial review. In *Patel No. 1*, the issue was whether Dr. Patel's originating application for judicial review should be allowed to proceed. The Court noted that Dr. Patel had "not asked the court to review any specific evidentiary ruling or interim procedural decision made by the [Senior Medical Officer]", the Board or the Discipline Committee.[12] Therefore, the question was whether there was an alternative manner in which Dr. Patel could take issue with a ruling of the RQRHR Board that was an appropriate alternative to subjecting that decision to judicial review.

[72] In *Patel No. 2*, the court found that Dr. Patel had adequate alternative remedies to contest the suspension of his privileges through "the process mandated by the Legislature in the Act and Regulations".[13] The appeal of the suspension was ongoing, and therefore that decision had not been finally decided. What remained was the decision whether to strike the application for judicial review.

[73] Within the realm of judicial review there is often an aspect of discretion in deciding whether to hear a judicial review of a matter in relation to which the final, substantive decision has not yet been issued. The reasons for this are many – prematurity is often at the core. The Court of Appeal

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[11] See, para 19.
[12] At para 31.
[13] At para 76.

in *Wal-Mart Canada Corp. v Saskatoon (City),* 2019 SKCA 3 quotes Gerald Heckman in "Developments in Remedial Discretion on Judicial Review: Prematurity and Adequate Alternative Remedies" (2017) 30 CJALP 1:

> *Encouraging early recourse to the courts may fragment the administrative proceedings, frustrate the statutory objectives of the administrative regime or tax judicial resources. Early judicial review may also deprive the court of the decision-maker's careful accumulation and analysis of an evidentiary record – an important consideration given the evidentiary limitations of judicial review proceedings...*

[74] The Board appreciates that there are compelling reasons to be reluctant to review non-final decisions of administrative tribunals.[14] One of these reasons is timeliness. In fact, the appeals provided for in the Act are subject to strict statutory timelines and adjudicators are granted procedural flexibility to permit their efficient adjudication. On the one hand, encouraging the adjudication of interim or interlocutory matters may have the effect of delaying this process. However, this is not universally true. In some cases, it may have the effect of expediting a final resolution.

[75] Although the aim of expediency should not be overlooked, the rights subject to the adjudicative regime are significant. It would not be appropriate to limit the scope of the right to appeal a decision of an adjudicator in the absence of explicit language to that effect. The plain language of the provision, the scheme and object of the Act, and the intention of the Legislature, support a broad interpretation of the right, that is, that there is a right to appeal non-final decisions.

[76] Finally, the Union submits that, even if the Board does have jurisdiction, it should decline to hear the appeal on the basis that it is premature and that the Company has an adequate alternative remedy. The Union, again, relies on *Patel No. 1 and Patel No. 2* and on a passage from Brown and Evans in their text, *Judicial Review of Administrative Action*.

[77] It is not appropriate for the Board to decline to hear the appeal in the manner suggested by the Union. This is not a matter of judicial review of administrative action. This is a statutory appeal from an adjudicator's decision pursuant to Part III. The Board has jurisdiction to hear the appeal and it will fulfill the statutory duties arising from that jurisdiction.

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[14] *Patel No. 2* at para 21.

Standard of Review:

[78] The Board has jurisdiction to hear an appeal on a question of law, pursuant to section 4-8 of the Act.

[79] The Notice of Appeal raises issues of procedural fairness and issues of mixed fact and law containing extricable questions of law. Both of these issues call for a review on a standard of correctness.

[80] In its brief, the Union argues that this matter is an internal administrative appeal calling for a reasonableness standard of review. As a creature of statute, the Board does not enjoy the inherent jurisdiction of the Court of Queen's Bench, and therefore, the Board is limited to reviewing adjudicators' decisions in accordance with its enabling statute.

[81] In its brief, the Company, who at the time stated that it was self-represented, relied on previous case law of this Board to argue that the standard of review is correctness. In oral submissions, counsel maintained that correctness is the appropriate standard of review on issues related to procedural fairness but suggested that the appellate standards of review in *Housen* do not apply to this matter. In the alternative, if the matter relates to the exercise of the Adjudicator's discretion, then it should be reviewed on a standard of reasonableness.

[82] Upon review of the briefs, and hearing the Company's new position with respect to the standard of review, the Board alerted the parties to the remarks of Barrington-Foote J.A. in *Lepage Contracting Ltd. v Saskatchewan (Employment Standards)*, 2020 SKCA 29 (CanLII), at paragraph 15, for further comment.

[83] In its oral argument, the Union modified its position on this issue, stating that the applicable standard of review is correctness.

[84] The Board in *Missick v Regina's Pet Depot*, 2020 CanLII 90749 (SK LRB) and *Lepage Contracting Ltd. v McCutcheon*, 2020 CanLII 10515 (SK LRB) has previously decided that the standard of review on an appeal of an adjudicator's decision is correctness.

[85] Under the previous legislation, the jurisdiction to hear an appeal rested with the Court of Queen's Bench. After the amendments granted jurisdiction to this Board, this Board had occasion to consider the applicable standard of review. Then Vice-Chairperson Mitchell in *Thiele v Hanwell*, 2016 CanLII 98644 (SK LRB) and *Gina Meacher (Gee's Family Restaurant) v Hunt*, 2017 CanLII 43925 (SK LRB), in particular, relied on the analysis in *Edmonton (City) v Edmonton East*

(Capilano) Shopping Centres Ltd., 2016 SCC 47 [*Edmonton East (Capilano)*]. In *Edmonton East (Capilano)*, the majority held that a statutory right of appeal does not qualify as a new category of matters subject to the correctness standard of review.

[86] The majority in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*] overturned this holding, finding that a statutory right of appeal is a category of matters subject to the correctness standard of review. It is argued that the *Vavilov* analysis applies to courts hearing statutory appeals; however, this Board has adopted the appellate standard of review for purposes of appeals of decisions of adjudicators pursuant to Part III, and has previously rejected the correctness standard of review because of the reasoning in *Edmonton East (Capilano)*. The appellate standard of review, where there is a statutory right of appeal, has been overturned.

[87] For the foregoing reasons, it is not necessary to decide whether the current appeal is appropriately characterized as an internal administrative appeal. However, it is worth noting that administrative tribunals adopt standards of review that are unique to the regime in question. Here, the legislative history and case law pertaining to the existing regime are relevant. This Board is a quasi-judicial tribunal that has adopted the appellate role of the Court in respect of these appeals, and has likewise adopted the appellate standard of review.

[88] For those reasons, the Board will review the Interim Decision on the applicable appellate standard of review. The decision involves a mix of fact and law, but the questions raised by the Company engage extricable questions of law. An extricable question of law calls for a correctness standard. As explained by Iacobucci and Major JJ in *Housen*,

> *33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:*
>
> > *A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).*
>
> *Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]*
>
> *…*

[89] Furthermore, to the extent that the Company raises issues pertaining to procedural fairness, by alleging a breach of the *audi alteram partum* principle, prejudgment, and fettering of discretion, a long line of case law continues to support the correctness standard.

[90] Therefore, correctness is the standard to be applied in relation to all questions of law.

Analysis and Decision:

Did the Adjudicator err in law by finding that the Union had standing as a party?

[91] Unlike a court, a tribunal finds its authority to determine the parties to a proceeding within the governing statute. This authority may be more or less circumscribed, depending on the language of the applicable provisions.

[92] In interpreting the Act, it is necessary to be guided by section 2-10 of *The Legislation Act.*

[93] Here, sections 3-53 and 3-54 confirm that a person who is directly affected by a decision has a right to notice of an appeal. Subsection 3-52(2) describes a person who is directly affected by a decision. There is no statutory discretion to expand upon that list. Therefore, the Adjudicator correctly concluded that the Union does not fall within the exhaustive definition in subsection 3-52(2), and, the Union is not a person who is directly affected by a decision.

[94] After determining that the Union did not meet the definition of a person directly affected by a decision, the Adjudicator asked whether there was another basis on which the Union “should” be recognized as a party.

[95] In its oral submissions, the Company does not specifically take issue with the Adjudicator’s reliance on section 4-4 as a source of authority to determine the procedures by which the appeal is to be conducted, and to therefore exercise discretion to grant standing to persons other than those who are directly affected. However, in its written submissions, the Company states that the Adjudicator erred by misinterpreting section 4-4, in particular by reading into the word “parties” a broader meaning than is intended, and erroneously relied on section 4-4 to conclude that parties are not necessarily persons directly affected by the legislation. In essence, the Adjudicator erred by interpreting the legislation to provide standing to any parties beyond those who are found to be directly affected by a decision.

[96] Relevant excerpts of the Interim Decision include:

> *[65] It is important to note that the Act does not equate the status of "person who is directly affected by a decision" with a person who is a party. S. 4-4 deals with procedures on an appeal to an adjudicator. S.4-4(1) requires the registrar to consult with the "parties" in setting a time and place for the hearing. Once he has done that, he must give written notice of the time and place for the hearing to the director and to "all persons who are directly affected by the decision being appealed". The Legislature saw the possibility that the parties were not necessarily persons directly affected by the decision.*
>
> *[…]*
>
> *[73] S. 4-4(2) gives the adjudicator the power to determine the procedures by which the appeal or hearing is to be conducted. That includes the responsibility to determine who are the parties to the proceedings. That determination must be made within the framework of the Act and regulations and any other relevant case law or legislation. In the instant case there is nothing I see to preclude the union's participation as a representative of the workers. However, I do believe I have considerable discretion in these circumstances to permit or exclude the union's participation as a party.*

[97] The Union argues that the Adjudicator has not interpreted the word "parties". The word "parties" does not appear in the relevant provisions of the legislation. The Act does not purport to constrain the Adjudicator's discretion to determine the parties.

[98] However, the Act does purport to set out who is directly affected by a decision. As mentioned, there is no discretion in the Act to expand upon this list. It is correct that an adjudicator, pursuant to section 4-4, may determine the procedures by which the appeal or hearing is to be conducted. However, section 4-4 must be read in its entire context, and in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature. It must be read in a manner that is consistent with the other provisions in the Act.

[99] It is correct that the use of the word "parties" in section 4-4 is not equivalent to persons who are directly affected, as defined in subsection 3-52(2). The intent of clause 4-4(1)(a) is to address the obligations of the Board registrar, not the adjudicator. The word "parties" in section 4-4 is a generic term used to refer to all of the persons who may participate in an appeal pursuant to Part II and Part III of the Act, including the directors under Part II and Part III. Those persons who may participate pursuant to Part II are not referred to as persons directly affected. This is consistent with the use of the word "party" in subsection 4-5(1).

[100] Similar to this, subsection 4-5(2) states,

> *(2) With respect to an appeal pursuant to section 3-54 respecting a matter involving harassment or a discriminatory action, the adjudicator:*

> *(a) shall make every effort that the adjudicator considers reasonable to meet with the parties affected by the decision of the occupational health officer that is being appealed with a view to encouraging a settlement of the matter that is the subject of the occupational health officer's decision; and*
>
> *(b) with the agreement of the parties, may use mediation or other procedures to encourage a settlement of the matter mentioned in clause (a) at any time before or during a hearing pursuant to this section.*

[101] The use of the phrase "parties affected by the decision" simply contemplates the possibility that the director may be affected, if not directly affected, by the decision.

[102] Therefore, the use of the word "parties" alone should not be taken to suggest that a Part III adjudicator has discretion to add parties other than those persons who are directly affected and other than the director.

[103] However, it is also necessary to consider the adjudicator's authority, pursuant to section 4-4, from a broader perspective.

[104] First, there are clear limitations on the persons who have a right to appeal matters arising in Part III. Subsection 3-53(1) states that a "person who is directly affected by a decision of an occupational health officer may appeal the decision". This right is not extended to any other person. Similarly, section 3-56 states that a person who is directly affected by a decision of the director may appeal the decision to an adjudicator. This right is not extended to any other person.

[105] Section 4-8 states that a person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to this Board. For this purpose, a person who is directly affected by a decision means any of the persons, as described by subsection 3-52(2). Other than the director, and those persons who are directly affected, no other person has the right to appeal the decision of the adjudicator.

[106] Second, the express rights to notice and to have an opportunity to make written representations are revealing. According to subsections 3-53(5) and (6), the director shall provide notice of the appeal to persons who are directly affected by the decision and provide an opportunity to those persons to make written representations to the director within the express timeline. Pursuant to subsection 3-53(10), the director may refer the appeal to an adjudicator. In referring said appeal to an adjudicator, the director forwards a list of all persons who are directly affected by the decision.

[107] Section 3-54 states that an appeal mentioned in subsection 3-53(1) with respect to any matter involving harassment is to be heard by an adjudicator, and the director shall provide the notice of the appeal to persons who are directly affected by the decision. The opportunity to make written representations is not repeated in relation to the appeals to an adjudicator, including the appeal of a wage assessment pursuant to Part II. This is explained by the adjudicator's authority, pursuant to section 4-4, to determine the procedures by which the appeal is to be conducted. An appeal may be conducted, for example, by both oral and written submissions, with timelines to be determined by the adjudicator.

[108] In summary, the following factors suggest that there are limits on the adjudicator's authority to determine standing: the specific language outlining the exhaustive list of persons who are directly affected by a decision; the limited right of persons to an opportunity to make representations on an appeal to a director; the express right of persons to notice of an appeal to an adjudicator; and the limited categories of persons with rights of appeal. In respect of the latter, it is revealing that no person, other than one who is directly affected or is a director, has an express right to appeal a decision of an adjudicator to this Board.

[109] The Board will now turn to each of the Company's remaining substantive arguments, in turn, and will then address the implications of these limits for this case.

[110] First, the Company argues that the Adjudicator erred by wading into the merits of the main appeal. More specifically, the Adjudicator erred by presuming that the Notice was valid instead of considering the extent of the Union's interest in the issues raised by the Notice of Appeal, and then finding that the Union's representativeness was a basis for standing.

[111] The Notice deems that the Company is the employer of the taxi drivers and that all workers consist of "Taxi Licence Owners/Vehicle Operators and drivers for Regina Cabs". This is a central issue on the appeal. The Notice of Appeal reads, at 3:

> *Neither taxi drivers nor taxi operators are "workers" for Regina Cabs, pursuant to the definition of that term at section 3-1(gg) of the Saskatchewan Employment Act. The worksite where a taxi driver works would best be described as the taxi vehicle. Regina Cabs does not own nor control the taxi vehicles.*

[112] The Union acknowledges that the foregoing remains a live issue on the substantive appeal.

[113] After presuming the Notice was valid, the Adjudicator inquired whether the Union represented persons who were directly affected by the decision, and who therefore had a right to notice of the appeal. The Adjudicator concluded that the Union was representative of the workers and therefore should have standing.

[114] In the Board's view, it was an error to presume that the Notice was valid and to ground standing on the Union's representativeness, apart from any consideration of the Union's interest in the issues. The reasons for this are as follows.

[115] In the absence of specific statutory direction with respect to a person's participatory rights, the law of standing must be informed by the common law right to be heard. It is for this reason that, generally speaking, a court will grant participatory rights to persons who have a personal or direct interest in the issues raised by the proceedings and who therefore have a right to be heard in relation to those issues. In *SGEU*, Cameron J.A. explained (at 15):

> *Standing, especially as a matter of private right, has always to be addressed relative to the nature and scope of the cause of action at stake and the person or persons in whom it lies.*

[116] In some circumstances a person may "be placed by the court in a position to sue even though they, themselves, have no cause of action in the strict sense" if it is found to be in the public interest.[15] In this case, a court will apply the test for public interest standing articulated by the Supreme Court in *Canada v Downtown Eastside*, 2012 SCC 45 (CanLII), [2012] 2 SCR 524 [*Downtown Eastside*]. Alternatively, a person who is interested in another person's cause of action may be granted status as an intervenor: *SGEU*, at 12.

[117] Here, standing was not grounded in the public interest nor found to be in the nature of an intervention. As explained at paragraph 68:

> *[68] The CUPE case draws an important distinction between reliance on a personal interest, which would mean an interest directly relevant to the union in the instant case, and a community interest, meaning an interest pertinent to the community as a whole. However, the union here is advancing neither. It has been clear from the outset that its purpose is to advance the interests of the Regina Cabs drivers who are its members.*

[118] In other circumstances, a "person may also be in a position as of right to sue for and on behalf of others, as their representative".[16] An example of this is a legal guardian who is legally entitled to bring an action on behalf of another, on the basis of that other person's right or interest.

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[15] At 12.
[16] *Ibid.*

Another example arises from a union's right to collective bargaining pursuant to Part VI of the Act. In matters arising under Part VI, a union's standing is grounded in its legal rights arising from its status as the exclusive bargaining agent on behalf of the members of a bargaining unit. In this respect, a union's representativeness may ground a claim of standing.

[119] But a union does not have a right to be a party "to an action alongside its members with respect to all employment-related matters": *SGEU*, at paragraph 20. As Cameron J.A. in *SGEU* confirms, capacity and standing are separate concepts. While the Adjudicator did not rely on section 6-3, it is worth noting that this provision, which deals with a union's capacity as a legal person, is not determinative of whether a union should be found to have standing in an employment matter.

[120] To be sure, this is not to say that there will never be any circumstance in which a union could have an interest, arising from its status as the exclusive bargaining agent for members of a bargaining unit, in the issues raised in a proceeding outside of Part VI. *McKnight* includes some thoughtful discussion on this very issue. However, as is discussed more in the following section, the Adjudicator did not outline the Union's interest in the issues.

[121] The Adjudicator distinguished from *SGEU*, *CUPE*, and *McKnight*, cases that provide helpful commentary about the difference between the capacity and the ability to sue and the different effect of rights conferred by separate parts of the statutory regime. He distinguished from *SGEU* on the basis that the Union is seeking to do something objectively useful and from *CUPE* on the basis that the Union is seeking to rely neither on a personal interest, nor a community interest, but to advance the interests of the Regina Cabs drivers who are its members. Finally, he noted that *McKnight* does not provide unequivocal support for "the proposition that a union cannot act in a representative capacity on behalf of its members in circumstances such as these". But while the Adjudicator distinguished from these cases, he did not find support therein for grounding the Union's standing in its representativeness, apart from a consideration of its interest in the issues.

[122] Subject to the constraints of the statute, the correct approach would have been to inquire about and determine the issues that were raised by the Notice, and then determine whether the Union had an interest in those issues. Instead, by presuming that the Notice was valid, the Adjudicator did not fully consider the issues that are raised on the appeal of that Notice.

[123] Of note is the finding that the Union had standing, not to represent its own interests, but to represent others who are directly affected by the decision, others who did not receive notice of the appeal and, presumably, did not have a reasonable opportunity to make representations about the issues raised in the interim hearing.

[124] Second, the Company argues that the Adjudicator prejudged the substantive issue arising on the main appeal.

[125] After presuming the Notice was valid, the Adjudicator found that the "policies the notice requires of the company are for the benefit of its workers", and therefore the Notice directly affects the workers. He concluded that the "Regina Cabs drivers who are in the bargaining unit are persons directly affected by the Notice of Contravention". The Notice directly affects the workers, and there is a link between this finding and the Regina Cabs drivers in the bargaining unit. In essence, the Adjudicator found that the employees pursuant to Part VI are workers pursuant to Part III, prior to hearing the substantive appeal.

[126] In many cases it will be clear who is a worker, as that term is understood in subsection 3-52(2) of the Act. Here, the question of who is a worker is a live issue. The Company has raised this issue from the outset of these proceedings. The Union confirms that it is a live issue.

[127] The fact that this is a live issue may have complicated the matter of providing notice to workers. Still, whether or not the Notice is valid, it raises an issue about policies, and does so in a manner that directly affects one or more prescribed categories of persons. The question about whether a person is either a worker or an employer, or both a worker and an employer, should not prevent that person from receiving notice of a proceeding that is intended to decide those questions.

[128] If the substantive issues are, or are characterized as being, inextricably intertwined with the question of who is directly affected, then it may be appropriate to cast a wide net, to allow persons to participate, and to defer the issues of who is either a worker or an employer, to be decided concurrent with the remaining substantive issues. This is consistent with what the Adjudicator described as a broad approach to whether a decision has been "directed" to a person for the purpose of determining whether that person is directly affected by a decision.

[129] To be sure, in casting a wide net, one must take into account the impact on the rights of others who are directly affected. Still, in the right circumstances, this approach may ensure that

the persons who are entitled to make representations have a reasonable opportunity to be heard in relation to the issues.

[130] Here, the Adjudicator did not clarify that the drivers were directly affected for purposes of standing only; nor did he find that the drivers were directly affected for purposes of allowing them to participate in the appeal. He found that the drivers were directly affected for purposes of allowing the Union to participate in the appeal on their behalf, as their representative. In doing so, he seems to have equated the definition of "employee" under Part VI with the definition of "worker" under Part III. This reasoning is in error.

[131] Third, the Company argues that the Adjudicator erred by relying on the director's decision to give notice to the Union and thereby fettered his discretion. In short, the Board agrees that the Adjudicator erred in relying on the decision to give notice to the Union.

[132] In finding that the Union has standing, the Adjudicator found that the drivers who are in the bargaining unit are persons directly affected by the Notice, that the company should have set out their names in its Notice of Appeal, and that those workers were entitled to notice of the appeal.

[133] The Adjudicator acknowledged that the workers were not provided with notice. After having found that the workers were not provided notice, the Adjudicator granted standing to the Union. He concluded that standing was justified because of the Union's representational character and because of the notice to the Union. In concluding that the Union has standing, the Adjudicator considered "particularly that the workers did not receive notice of the appeal and were therefore unlikely to attempt to participate individually."[17]

[134] *McKnight* asserts that "[t]he fact that the Registrar may have provided notice to a party does not, in and of itself, provide any standing to an appellant."[18] A related observation was recently made in an analogous context: *CLR v Plumbers and Pipefitters*, 2020 CanLII 44354 (SK LRB), at paragraph 51.

[135] Similarly, the fact that the director may have provided notice to a person does not, in and of itself, ground standing in the proceedings. The director is in a unique position relative to others who may be participating in or have rights to participate in the appeal of the director's decision.

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[17] At para 74.
[18] At para 45.

The Adjudicator acknowledges this unique relationship: “The director’s responsibility to consider and decide appeals seems inconsistent with a general responsibility to actively participate as the respondent on appeals where an adjudicator hears the appeal”.[19]

[136] The director does not, by giving notice to persons who are not directly affected by a decision, grant participatory rights to those persons on an appeal of that decision. To be sure, a person who is directly affected by a decision must also be a person to whom a decision is directed, and an argument could be made that notice would assist in determining to whom a decision is directed. However, there is no similar argument before the Board, nor any dispute about whether the Union is directly affected by the decision.

[137] The Board agrees that the Adjudicator erred in relying on the director’s decision to give notice to the Union. The notice to the Union cannot be relied upon as evidence of the Union’s representativeness. Given the remaining concerns with the Interim Decision, the fact that the Adjudicator may have relied on other evidence of representativeness is not curative. Furthermore, the result of the Interim Decision is that the Union replaces the workers who are found to be directly affected by a decision – workers who, if they are directly affected, have a right to notice.

[138] The Company argues that the failure to provide notice is a technicality and that the Adjudicator still has discretion to determine the proper parties in the context of these proceedings. In essence, the Adjudicator has discretion to remedy the failure to provide notice to the proper parties by adding those persons as parties. This is true. Subsection 4-4(6) underscores the importance of providing notice to persons who are directly affected *by the appeal*:

> *(6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.*

Conclusion:

[139] In summary, the statute does not specifically define a “party” to the appeal proceedings. But nor does it authorize an adjudicator to ground standing on the basis of a person’s representativeness. To the extent that the statute is silent, a person’s participatory rights are informed by the right to be heard. The right to be heard is defined by the issues that are raised on the appeal. Arising from the right to be heard, there are three commonly recognized bases for

[19] At para 55.

standing: direct interest, public interest, and intervenor. The ability to conduct a watching brief on a public observer basis is a fourth, more restricted means by which a person might participate.

[140] Here, the statute restricts the first basis by clearly defining and limiting the categories of persons who are directly affected. The second basis, the public interest category, is generally used for initiating an action. Besides, the statutorily limited appeal rights militate against its availability. The third category, intervenor status, is by necessity subordinate to the direct interest category and is subject to the limits that are appropriate for a stranger to the litigation. For these reasons, whether a person may be granted standing as an intervenor should generally be determined after the main parties have been identified. Only the third and fourth categories are potentially available to the Union in this case.

[141] For the foregoing reasons, the Interim Decision cannot be affirmed. Accordingly, pursuant to clause 4-8(6)(b) of the Act, the matter is remitted to the Adjudicator for amendment of the decision in accordance with the direction provided in these Reasons.

[142] The Board is grateful for the comprehensive oral and written arguments provided by the parties, all of which the Board has reviewed and found helpful. The Board is particularly grateful for the respectful manner with which both counsel presented their arguments.

DATED at Regina, Saskatchewan, this **17th** day of **December, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson