

**WRIGHT CONSTRUCTION WESTERN INC., Appellant v THE GOVERNMENT OF SASKATCHEWAN (DIRECTOR, OCCUPATIONAL HEALTH AND SAFETY DIVISION), Respondent**

LRB File Nos. 165-20 and 054-24; March 24, 2025

Vice-Chairperson, Carol L. Kraft (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

Citation: *Wright v Govt of Sask (OH&S)*, 2025 SKLRB 12

Counsel for the Appellant, Wright Construction Western Inc.: T. John Agioritis

Counsel for the Respondent, The Government of Saskatchewan  
(Director, Occupational Health and Safety Division): Alexa LaPlant and  
Chrisoph Meier

**Appeal from decision of Adjudicator – Section 4-8(1) of *The Saskatchewan Employment Act* – Whether OH&S Officer decision to issue Notice of Contravention based on reasonable, credible and documented evidence – Intent relevant – Matter remitted to Adjudicator**

**Sections 133(6) and (7) of *The Occupational Health and Safety Regulations* – Board reviews Adjudicator’s findings on requirement for Traffic Control Plan to be in writing and readily available**

**Absence of Recording – Board finds no procedural unfairness or prejudice to Appellant despite long delay between hearing and decision**

## **REASONS FOR DECISION**

### **Background:**

**[1] Carol L. Kraft, Vice-Chairperson:** This is an appeal by Wright Construction Western Inc. (“Wright”) of a decision of an Adjudicator (the “Adjudicator”) dated February 12, 2024 (the “Adjudicator’s Decision”) pursuant to Section 4-8 of *The Saskatchewan Employment Act* (the “Act”) in relation to LRB File No. 165-20.

**[2]** On July 21, 2020, Occupational Health and Safety Officer, Dylan Holzer (“Officer Holzer”) issued a Notice of Contravention (“NOC”) following an inspection of Wright’s construction site of a school at 600 5<sup>th</sup> Street NE, Weyburn (the “Worksite”). The NOC indicates that Wright contravened ss. 133(6) and (7) of *The Occupational Health and Safety Regulations, 1996* (the “Regulations”).

[3] On August 6, 2020, Wright appealed the NOC to the OHS Division Director ("Director") pursuant to s. 3-53 of the Act. In a decision dated October 6, 2020, the Director dismissed the appeal.

[4] On October 30, 2020, Wright appealed the Director's Decision.

[5] The Adjudicator held a virtual hearing on April 21 and 23, 2021 in which each party had the opportunity to present evidence (the "Hearing").

[6] On February 12, 2024, the Adjudicator rendered her Decision dismissing the appeal.

[7] On March 7, 2024, Wright filed its Notice of Appeal with the Board (LRB File No. 054-24).

[8] On April 24, 2024, the Adjudicator notified the Board via email that counsel for Wright, Mr. Agioritis, had requested production of the recording of the hearing in this matter but that she was unable to produce the recordings due to technical issues with a new laptop that she had purchased.

#### **Summary of Evidence:**

[9] On July 21, 2020, Officer Holzer and Officer Beth Getz ("Officer Getz"), (collectively with Officer Holzer, the "Officers") attended the Worksite to conduct an inspection. The Officers arrived at the Worksite at approximately 10:30 a.m. Officer Getz was present to inspect one of Wright's subcontractors, QSI Interiors Ltd. ("QSI").

[10] Les Schlosser, Wright's Senior Superintendent, met the Officers at the construction trailer and spoke with them briefly. While in the trailer, the Officers reviewed the Safety Board and Wright's safety documentation. No comment was made regarding any Traffic Control Plan at that point. After that, Mr. Schlosser and Officer Holzer went on a site tour to inspect the Worksite. Officer Getz left with QSI's foreman, Tyler Horseman, to inspect QSI's work areas.

[11] Mr. Schlosser took Officer Holzer around the Worksite following a pre-planned route Mr. Schlosser used for all site visitors. The tour began by going into the school, up to the second floor, before coming back down to the first floor and entering the recreation centre. Mr. Schlosser and Officer Holzer did not tour the exterior of the Worksite. Throughout the inspection, Officer Holzer repeatedly told Mr. Schlosser that he was looking for a contravention, while simultaneously telling him that it was an excellent site. Although it is unclear whether Officer Getz was with Officer

Holzer and Mr. Schlosser for the entirety of the tour of the Worksite, even she remarked that it was a "pretty clean site" during her direct examination.

**[12]** During the tour of the school, Officer Holzer saw two workers who were not wearing their safety glasses. These workers were employed by Integrated Interiors Inc. Mr. Schlosser sent them to put on their safety glasses, and they did so.

**[13]** As Officer Holzer and Mr. Schlosser were exiting the building through the gymnasium, Officer Holzer raised the issue of whether Wright had a Traffic Control Plan for the interior of the building, such as fixed lanes of traffic and traffic signs. Officer Holzer alleged to have observed scissor lifts in a large open space in the building, likely the school gymnasium. He testified that the equipment he observed that day was mostly stationary. Mr. Schlosser replied that he had never heard of something like that for the interior of an active construction site because the site changes every day.

**[14]** After this conversation, Officer Holzer and Mr. Schlosser returned to the construction trailer. The tour had taken approximately 45 minutes. Shawn Gollmer, the Junior Superintendent and Christian Nielsen, the Worksite Project Coordinator were both present in the trailer at this time. Officer Holzer and Mr. Schlosser continued discussing the two contraventions Officer Holzer alleged to have observed in relation to the safety glasses incident and the Traffic Control Plan. In relation to the Traffic Control Plan, Officer Holzer was referring to the need for a Traffic Control Plan in the interior of the building. Officer Holzer requested that Mr. Schlosser provide them with a copy of Wright's Traffic Control Plan. Mr. Schlosser gave Officer Holzer the Site Plan posted on the Safety Board, but Officer Holzer said that what he was looking for was for inside the building. Eventually, Mr. Schlosser left the trailer briefly.

**[15]** Mr. Schlosser then called Ryan Campaign, Wright's Safety Manager, to ask if he had ever heard of a site plan for traffic inside a building under construction. Mr. Campaign spoke with Mr. Roy about this issue and asked Mr. Roy to send a copy of the Site Plan to Mr. Schlosser.

**[16]** Mr. Roy testified that he sent the original Site Plan to Mr. Schlosser, Mr. Goller and Mr. Nielsen by email at 12:10 p.m. Afterwards, Mr. Roy updated the Site Plan to reflect the new location of the construction trailers after they had been moved that week. Mr. Roy sent the revised Site Plan to the Worksite at 12:21 p.m., just 11 minutes after his first email. The Officers were present at the Worksite while the Site Plans were made available to them.

[17] Officer Getz left the trailer shortly after Mr. Schlosser to complete her inspection report. She would have been absent from the trailer for at least 30 to 40 minutes.

[18] Mr. Goller asked Officer Holzer for more information about the issues with the Traffic Control Plan because he had never heard of a traffic control plan on the inside of an active construction site. Officer Holzer showed Mr. Goller the *Regulations*. After this, Officer Holzer asked Mr. Goller where Mr. Schlosser was because he "had a deal to make with [Mr. Schlosser]."

[19] At this time, Mr. Goller left the trailer and told Mr. Schlosser that Officer Holzer wanted to make a deal. Mr. Schlosser returned to the trailer. Mr. Nielsen was still in his office in the trailer. At that time, Officer Holzer offered to make a deal with Mr. Schlosser. He said that Mr. Schlosser could either take the contravention for the safety glasses or the contravention for the Traffic Control Plan. In response to Officer Holzer's offer, Mr. Schlosser stated that he wanted the safety glasses contravention because the workers they observed were not Wright employees. Officer Holzer had not realized that the workers were not Wright employees. As a result, he issued the NOC to Wright regarding the Traffic Control Plan and another NOC to Integrated for the safety glasses. Mr. Nielsen was present for this conversation and confirmed that Officer Holzer did offer Mr. Schlosser a deal.

[20] At approximately 12:30 p.m., Mr. Churchwell arrived at the Worksite. He was scheduled to be on site that day to attend the weekly subcontractor meeting and update the Site Plan. When he arrived, he spoke with Officer Holzer who indicated that Wright did not have a Traffic Control Plan. Mr. Churchwell showed Mr. Holzer the Site Map posted to the Safety Board. Officer Holzer stated that this was insufficient because Wright needed a plan for the interior of the building.

[21] Following his inspection, Officer Holzer issued the Contravention on the basis that Wright did not have a Traffic Control Plan as required by ss. 133(6) and (7) of the *Regulations*.

[22] Wright appealed the Contravention to the Director on the basis that Wright did in fact have a Traffic Control Plan in place that satisfied the requirements of ss. 133(6) and (7) the *Regulations*. Wright further submitted that Officer Holzer failed to base his decision on reasonable, credible or documented evidence due to his statements that he was there to issue a contravention and his offering Wright a deal.

[23] In his decision, the Director dismissed Wright's appeal and amended the NOC "by noting a contravention pursuant to subclause 133(7)(c)(vii) of the regulations".

[24] It is unclear whether the Director's decision amended the NOC by noting a contravention pursuant to s. 133(7)(c)(vii) of the *Regulations* instead of a contravention under ss. 133(6) and (7) generally.

**The Adjudicator's Decision:**

[25] The Adjudicator describes the procedural history of the appeal of the Director's Decision at the outset of the Adjudicator's Decision.

[26] The majority of the Adjudicator's Decision outlines the evidence, including witness testimony and the positions and final arguments of the parties.

[27] The Adjudicator's Decision outlined the issues as:

- (a) Should Officer Holzer's comments during the inspection regarding issuing a Notice of Contravention and proposing a deal have negated the issuance of the Notice of Contravention?
- (b) Did WCW have a traffic control plan as required by ss. 133(6) and (7) of the *Regulations* on July 21, 2020?

[28] On the first issue, the Adjudicator determined that compliance with the *Regulations* is mandatory, and that Officer Holzer's decision was based on reasonable, credible, and documented evidence. In this regard, the Adjudicator stated:

*66. I find that no matter what Officer Holzer's intention was, Regulation 133 is mandatory. There shall be a Traffic Control Plan. Even though there was testimony given by several of WCW's Employees that Officer Holzer had said he was going to issue a Notice of Contravention today, the issuing of a Notice of Contravention under this Regulation does not depend on intent. If WCW has not complied with the Regulation, the intent of the Officer is irrelevant. That being said, the Officer must form his opinion on credible, documented evidence.*

*67. There was no document labelled Traffic Control Plan produced by WCWs Managers. What was produced was Exhibits C2 and C3 that were the original Site Map and the revised edition neither of which did comply with Regulation 133 (6) and (7).*

*68. I therefore find that Officer Holzer's action in issuing the Notice of Contravention was based on reasonable, credible, and documented evidence.*

[29] In her analysis of the second issue, the Adjudicator found that Wright had a Traffic Control Plan in writing:

*In Regulation 133(7) (a) I find that words 'in writing' are not to be interpreted that it requires the traffic control plan to be in one document containing everything relating to the*

*Regulation. The documents that were described to Officer Holzer met the requirements of the Regulation in respect to a traffic control plan being in writing. Those documents included the Site Map, the Safety Manual, Safety Work Practices, Safe Job Procedures and Critical Tasks, the Safety Board, and the Minutes of various meetings (Tail gate and End Gate meetings and Foremen's meetings).*

*I therefore find that the requirement of a traffic control plan being in writing as required by Regulation 133 (7) (a).*

**[30]** However, the Adjudicator concluded that even though the "information necessary to satisfy a Traffic Control Plan was in the various documents that were produced", the written information pertaining to the traffic control plan was "not readily available for workers" contrary to s. 133(7) of the *Regulations*.

**[31]** As a result of finding non-compliance with s. 133(7)(b), the Adjudicator found that it was not necessary to review Wright's compliance with Regulation 133(7)(c).

**Argument on behalf of Wright Construction Western Inc:**

**[32]** Wright submits that the Adjudicator made various reviewable errors of law, including:

- a) Erroneously dismissing Wright's appeal on the basis that "the employer did not develop and implement a traffic control plan and protect the workers from hazards";
- b) Erroneously interpreting section 133(7)(b) of the *Regulations* and the meaning of a traffic control plan that was "readily available";
- c) Failing to properly and fully address Wright's due diligence defence under section 3-80 of the Act; and
- d) Erroneously concluding that the Notice of Contravention was based on reasonable, credible and documented evidence and failing to cancel the Notice of Contravention on the basis of the Officer Holzer's bias.

**[33]** At the appeal hearing before the Board, Wright also argued that the absence of the Recording of the hearing is procedurally unfair and prejudicial to Wright in its appeal.

**Argument on behalf The Government of Saskatchewan (Director of Occupational Health and Safety):**

**[34]** The Director submits that the Adjudicator made no reviewable error in her Decision. The Adjudicator determined that while the Traffic Control Plan was in writing as per s. 133(7)(a), it was not readily available for reference by workers at the place of employment. The Adjudicator

properly undertook a three-part analysis in determining whether Wright had a traffic control plan that met the requirements of s. 133(7).

**[35]** With respect to Wright’s argument that Officer Holzer was biased, the Director argues the Adjudicator correctly determined that the relevant question was whether the evidence established that Wright had a compliant traffic control plan. In its Brief, the Director argues:

- a. The Adjudicator did not find that the OHS Office was influenced by improper considerations. Rather, the Adjudicator concluded that the Officer’s issuance of the NOC was based on “reasonable, credible and documented evidence”.<sup>1</sup>
- b. Further, the OHS Officers’ alleged bias is entirely irrelevant, as the question before the Adjudicator was whether Wright had a traffic control plan in compliance with the *Regulations*. The Adjudicator determined, on hearing the evidence and assessing it *de novo*, that Wright did not have a compliant traffic control plan. The fact that the matter was heard *de novo* means that no deference was afforded to the findings of the OHS Officer, and as such, his alleged improper motives were not weighed into the Adjudicator’s analysis.<sup>2</sup>

**Issues:**

**[36]** The issues raised in this appeal are:

- (a) What is the appropriate Standard of Review?
- (b) Whether the Adjudicator erred in finding that Officer Holzer’s opinion was based on reasonable, credible and documented evidence;
- (c) Whether the Adjudicator erred in finding that Wrights Traffic Control Plan was not “readily available”;
- (d) Whether the Adjudicator erred in failing to determine whether Wright complied with section 133(7)(b)(c) of the *Regulations*;
- (e) Whether the Adjudicator erred in failing to address Wright’s due diligence defence;
- (f) Whether the record of appeal is incomplete pursuant to section 4-8(4) of the Act.

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<sup>1</sup> Director’s Brief of Law, para 59, p 17

<sup>2</sup> Director’s Brief of Law, para 60, p 17

**Relevant Statutory Provisions:**

**[37]** The following provisions of the *Act* are applicable in this matter:

**3-80** *In any proceedings for an offence pursuant to this Part or the regulations made pursuant to this Part respecting a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, the onus is on the accused to prove, as the case may be, that:*

...

(a) *It was not practicable or not reasonably practicable to do more than was actually done to satisfy the duty or requirement; or*

(b) *There was no better practicable means than was actually used to satisfy the duty or requirement.*

...

**4-8(2)** *A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III or Part V may appeal the decision to the board on a question of law.*

...

(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.*

**[38]** The following provisions of the *Regulations* are applicable in this matter:

**133(6)** *Where there is or may be a hazard to a worker from traffic at a place of employment other than a public highway, an employer or contractor shall develop and implement a traffic control plan to protect the work from traffic hazards;*

(7) *A traffic control plan required by subsection (6) must:*

...

(a) *be in writing;*

(b) *be made readily available for reference by workers at the place of employment; and*

(c) *set out, where appropriate:*

(i) *the maximum allowable speed or any vehicle or class of vehicles, including powered mobile equipment, in use at the place of employment;*

(ii) *the maximum operating grades;*

(iii) *the location and type of control signs;*

(iv) *the route to be taken by vehicles or powered mobile equipment;*

(v) *the priority to be established for classes of vehicle;*

(vi) *the location and type of barriers or restricted areas; and*

(vii) *the duties of workers and the employer or contractor.*



## Analysis and Decision:

### (a) What is the appropriate Standard of Review

[39] The Board's review jurisdiction pursuant to s. 4-8 of the Act is restricted to questions of law: *Tysdal v Cameron*, 2025 SKLRB 1 (CanLII); *Olympic Motors (SK) Corporation v Fowler*, 2024 CanLII 84633 (SK LRB); This interpretation is supported by the obiter comments of the Saskatchewan Court of Appeal in *Buchanan (Rural Municipality) v Veldman*, 2024 SKCA 111 (CanLII).

[40] The Board has previously determined that the standard of review to be applied on such appeals is correctness: *Saskatchewan v Martell*, 2021 CanLII 122408 (SK LRB), *Christine Ireland v Nu Line Auto Sales & Service Inc.*, 2021 CanLII 97414 (SK LRB).

[41] Findings of fact may be found to be questions of law only if they were based on no evidence, on irrelevant evidence, in disregard of relevant evidence or based on an irrational inference of fact: *Canadian Natural Resources Limited v Campbell*, 2016 SKCA 87 (CanLII), at para 12; *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007.

[42] For a question of mixed fact and law to rise to an error of law, the adjudicator must not just err in the weighing of the evidence or sufficiency of reasons but err in principle. This was discussed by the Court of Appeal in *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 (CanLII):

*[68] It follows that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence.1 To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R.114 at 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316—20; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244—43 and 431—36; and Hartwig v. Wright (Commissioner of Inquiry), 2007 SKCA 74). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact.*

### (c) Whether the Adjudicator erred in finding that Officer Holzer's opinion was based on reasonable, credible and documented evidence

[43] The Adjudicator states her findings on this issue in the Decision as follows:

63. According to the document issued by the Government of Saskatchewan to provide information to the public regarding the Notice of Contravention provisions:

*"Prior to issuing a notice of contravention, the officer must have formed the opinion that a workplace party has contravened The Saskatchewan Employment Act or the regulations and that the issuance of the notice of contravention is in accordance with Part III of the Act and the Division's policies. The opinion must be based on reasonable, credible and documented evidence."*  
[\[https://www.saskatchewan.ca/business/safety-in-the-workplace/enforcements-prosecutions-investigations/compliance-undertakings-and-notice-of-contraventions\]](https://www.saskatchewan.ca/business/safety-in-the-workplace/enforcements-prosecutions-investigations/compliance-undertakings-and-notice-of-contraventions).

As testified by Officer Holzer, he asked Schlosser for WCW's traffic control plan. Holzer related that Schlosser's response was "What's that?" Schlosser was shown Regulation 133, and he told Officer Holzer that WCW did not have that.

64. None of the documents that were presented to Officer Holzer were labelled Traffic Control Plan. None of the employees of WCW that were interviewed during the inspection could produce a document labelled Traffic Control Plan. Exhibit C2 was produced but was labelled Site Plan.

65. WCW's position as stated by Ryan Campaign (sic), Safety Manager, in WCW's Appeal to Director of the Notice of Contravention 1-000011438 addressed to The Director of Occupational Health & Safety Division dated October 6, 2020 was set out as follows:

*"From the onset of the inspection, the officer repeatedly told Wright's site superintendent Les Schlosser, that he would be issuing Wright a contravention. The Officer clearly demonstrated an intention of issuing a contravention from the moment he arrived at the Work Site and without regard for any evidence, let alone reasonable credible or document evidence. Because of this predetermination to issue a contravention, Wright respectfully submits that the Officer cannot reasonably have formed his opinion based on credible or documented evidence."*

66. I find that no matter what Officer Holzer's intention was, Regulation 133 is mandatory. There shall be a Traffic Control Plan. Even though there was testimony given by several of WCW's Employees that Officer Holzer had said he was going to issue a Notice of Contravention today, the issuing of a Notice of Contravention under this Regulation does not depend on intent. If WCW has not complied with the Regulation, the intent of the Officer is irrelevant. That being said, the Officer must form his opinion on credible, documented evidence.

67. There was no document labelled Traffic Control Plan produced by WCW's Managers. What was produced was Exhibits C2 and C3 that were the original Site Map and the revised edition neither of which did comply with Regulation 133 (6) and (7).

68. I therefore find that Officer Holzer's action in issuing the Notice of Contravention was based on reasonable, credible, and documented evidence.

**[44]** Wright submits that the Adjudicator's finding that Officer Holzer's Decision on the NOC was based on reasonable, credible and documented evidence is erroneous and fundamentally flawed for three reasons.

**[45]** First, Wright argues that the Adjudicator's conclusion contradicts her own finding that Wright had a written Traffic Control Plan in place. Wright points to the Adjudicator's findings at para 71 the Decision:

*In Regulation 133(7)(a) I find that words "in writing" are not to be interpreted that it requires the traffic control plan to be in one document containing everything relating to the Regulation. The documents that were described to Office Holzer met the requirements of the Regulation in respect to a traffic control plan being in writing. Those documents included the Site Map, the Safety Manual, Safety Work Practices, Safe Job Procedures and Critical Tasks, the Safety Board and the Minutes of various meetings (Tail gate and End Gate meetings and Foremen's meetings).*

**[46]** Second, despite recognizing all of the relevant documents comprising the Traffic Control Plan, the Adjudicator disregarded the fact that a fundamental element of Wright's Traffic Control Plan, being the Site Map, was actually provided to Officer Holzer (para 67). In reaching her conclusion, the Adjudicator fails to properly consider the testimony of Officer Holzer as reproduced in the Adjudicator's Decision:

- a. Officer Holzer testified that he did not take a picture of the document that he was provided during the inspection and that he does not remember what he was shown. He testified: "I do not remember what I was shown only that it did not meet the requirement of a Traffic Control Plan."
- b. When asked in cross examination if he asked them to provide a copy of the safety manual for his review, his response was: "No, I did not ask for any of the safety manuals, on the Traffic Control Plan". When asked if Schlosser said that they had never heard of an interior Traffic Control Plan because the interior is constantly changing, his responses was: "There was no Traffic Control Plan for the entire site within the Site Fence."
- c. Officer Holzer testified that he did not record any of the deficiencies of the document provided to him and only noted that it was not available. He stated that he stopped taking notes when he found the document to be insufficient.

**[47]** Third, the Adjudicator's comment that the intent of Officer Holzer did not matter fails entirely to appreciate the actual issue at hand, i.e. the reasonableness and credibility of Officer Holzer's decision in view of his biased approach to the inspection.

**[48]** The evidence before the Adjudicator was that Officer Holzer repeatedly told Mr. Schlosser that he was looking for a contravention, while simultaneously telling him that it was an excellent site. Officer Getz also commented during the Hearing that it was a "pretty clean site". There is also considerable evidence that Officer Holzer informed Mr. Schlosser that he could take the contravention on the safety glasses or the Traffic Control Plan. Mr. Schlosser testified that Officer Holzer offered him a "deal", however the Adjudicator made no comment on this in the context of Mr. Schlosser's testimony. After Officer Holzer learned that the workers not wearing safety glasses were not Wright employees, he decided to issue a NOC to Wright regarding the Traffic Control Plan and another NOC to Integrated for the safety glasses. When asked at the Hearing about his comments on making a deal, Officer Holzer said that "[h]e was just trying to work with the Employer. He could give them two Notices or just the Traffic Control Plan Contravention".

**[49]** The Adjudicator acknowledged that "there was testimony given by several of WCW's Employees that Officer Holzer had said he was going to issue a Notice of Contravention today".<sup>3</sup>

**[50]** Several Wright witnesses further testified that they prepared statements about the inspection following the inspection:

- Mr. Schlosser testified that he made a statement because he did not feel right about what had happened. Holzer kept saying that he had to give WCW a contravention today.
- Mr. Churchwell testified that he prepared a statement because this was an unusual situation. He said he had never heard of a traffic plan for construction inside the building. He said it did not sit right. He didn't see how it could be done.
- Mr. Nielsen confirmed that he had filed a Statement after the visit. He did so because he felt something was wrong. He did not like the content of the conversation that there could be a deal between two contraventions.
- Mr. Goller testified that he gave a statement after the meeting as he found it odd that Officer Holzer had proposed a deal and it was very unprofessional. Also, the conversation that he overheard was discussing a traffic control Plan for the interior which he had never heard of.

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<sup>3</sup> Adjudicator's Decision at para 66.

**[51]** Wright submits that the Adjudicator's framing of the issue around one of "intent" of the Officer misses the point entirely and constitutes an error of law. Officer Holzer's actions, along with his statements that he was looking for a contravention, demonstrate that Officer Holzer was determined to issue a contravention on the day of the inspection despite the circumstances. Also, he stopped taking notes and didn't verify or document what was provided to him by Wright. This biased approach was unreasonable and considerably discredits Officer Holzer's observations. Officer Holzer's actions and comments demonstrate unreasonableness and a lack of objectivity in connection with the issuance of the underlying NOC at issue. His actions were also contrary to OHS Policy. Thus, Wright submits, the Adjudicator's failure to recognize these issues and properly characterize the issue before her constituted an error of law.

**[52]** Wright further submits that the fact Officer Holzer was prepared to offer Wright a "deal" between the Traffic Control Plan contravention and the safety glasses contravention indicates that he was prepared to compromise his opinion of the Contravention. His willingness to compromise is evidence of the lack of an objective basis to ground the Contravention. Wright submits Officer Holzer's improper exercise of discretion and lack of objectivity is evidence of the Crown's inability to prove the contravention on a balance of probabilities.

**[53]** The Director argues that this is a challenge to the Adjudicator's handling of the evidence and findings of fact. The Director submits that factual questions rarely meet the test for a question of law and that a finding of fact may be grounded in an error of law only if it is based on no evidence, made on the basis of irrelevant evidence or in disregard of relevant evidence, or based on irrational inference of fact: *Simonson v Finning Canada and the Cat Rental Store*, 2020 CanLII 10392 (SK LRB) at para 11-12.

**[54]** The Director argues that the Adjudicator did not find that Officer Holzer was influenced by improper considerations. Rather, the Director says, the Adjudicator concluded that the Officer's issuance of the NOC was based on "reasonable, credible and documented evidence". The Board's concern, however, is that the Adjudicator did not put her mind to whether or not Officer Holzer was influenced by improper considerations.

**[55]** The Director further argues that the OHS Officers' alleged bias is entirely irrelevant, as the question before the Adjudicator was whether Wright had a traffic control plan in compliance with the *Regulations*. The Adjudicator determined, on hearing the evidence and assessing it *de novo*, that Wright did not have a compliant Traffic Control Plan. The fact that the matter was heard *de*

*novo* means that no deference was afforded to the findings of the OHS Officer, and as such, his alleged improper motives were not weighed into the Adjudicator's analysis.<sup>4</sup>

**[56]** The Board is in agreement with Wright's submissions and finds that the Adjudicator erred in law in her finding that Officer Holzer's opinion was based on reasonable, credible, and documented evidence.

**[57]** The fact that the hearing proceeded *de novo* requires that the person hearing the matter must hear it afresh and consider only evidence presented to her at that hearing: *Racic v Moose Jaw Family Services Inc.*, 2015 CanLII 60882 (SK LRB) at para 21. In the present case, the Adjudicator was still required to determine whether Officer Holzer's opinion was based on "reasonable, credible and documented evidence". If the officer's opinion was not based on "reasonable, credible and documented evidence", then any NOC ought not to have been issued.

**[58]** In this case, while there was considerable evidence regarding the behaviour of Officer Holzer, the Adjudicator found that Officer Holzer's intent was irrelevant. As a result, she did not consider his behaviour. She said: "I find that no matter what Officer Holzer's intention was, *Regulation 133 is mandatory*." She found that "there was no document labelled Traffic Control Plan produced by (Wright's) Managers". Therefore, she found that Officer Holzer's action in issuing the NOC was based on reasonable, credible and documented evidence.

**[59]** The Board finds that Officer Holzer's intention is relevant to determining whether his opinion was based on reasonable, credible and documented evidence. A predetermined decision is necessarily an unreasonable decision as it is based not on credible and documented evidence, but on one's one predisposition, belief or intent. Bias relates to both the adequacy of an investigation and reasonableness.

**[60]** Secondly, the Adjudicator's finding is contradictory. She finds that Officer Holzer's action in issuing the NOC was justified because Wright did not produce to him a document labelled "Traffic Control Plan". Yet, in her Decision, she finds that Wright did have a Traffic Control Plan and that it was comprised of several components, not just the Site Map, and that these were provided to Officer Holzer. The Adjudicator specifically stated:

*The documents that were described to Office Holzer met the requirements of the Regulation in respect to a traffic control plan being in writing. Those documents included the Site Map, the Safety Manual, Safety Work Practices, Safe Job Procedures and Critical*

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<sup>4</sup> Director's Brief of Law, para 60, p 17

*Tasks, the Safety Board and the Minutes of various meetings (Tail gate and End Gate meetings and Foremen's meetings).*

**[61]** Further, Officer Holzer testified at the Hearing that he does not remember what was shown to him, he did not take any photographs, and he stopped taking notes when he formed his opinion that the Site map did not satisfy the requirements of the Regulation. There is no evidence that he actually reviewed any of the documents that the Adjudicator found comprised the Traffic Control Plan. There is no mention of Officer Holzer reviewing any documentation in his scant notes.

**[62]** As part of the required analysis, the Adjudicator ought to have considered the documented evidence relied upon by Officer Holzer in issuing a NOC. The evidence in this case indicates that he relied solely on the site map to form his conclusion; that he does not recall what document was actually provided to him, that he took no photographs and made no notes regarding any documents provided to him.

**[63]** There is evidence to the effect that Officer Holzer was requesting a Traffic Control Plan for the interior. The evidence from the Wright employees indicates that they had never heard of a Traffic Control Plan for the interior because it changes. For example, the Adjudicator's Decision at para 27(e) notes:

(e) *Schlosser was asked if there was a Traffic Control Plan for the building. He replied that on the exterior it was the site map. He had never heard of a traffic control plan for the interior of the building. That would have to change daily. It was delegated to Shawn to supervise traffic in the building...*

...  
(g) *Schlosser confirmed that when he was talking about traffic control he was talking about the exterior . . .*

**[64]** Notably, the Adjudicator did find that Wright had a Traffic Control Plan comprised of several documents. In other words, it was not necessary to have a Traffic Control Plan in one document. The Adjudicator does not address how then Wright's failure to produce a document labelled "Traffic Control Plan" is "documented evidence" of non-compliance in light of her own finding that "The documents that were described to Office Holzer met the requirements of the Regulation in respect to a traffic control plan being in writing". The Adjudicator needs to provide reasons explaining this conclusion.

**[65]** In finding that Officer Holzer's intent was irrelevant, the Adjudicator disregarded the evidence of Officer Holzer's behaviour and failed to consider whether, given all of the evidence of his behaviour, his opinion was based on reasonable, credible and documented evidence. This

constitutes an error of law. Accordingly, the Board will remit this matter back to the Adjudicator for consideration in accordance with these directions.

(c) *Whether the Adjudicator erred in finding that Wright's Traffic Control Plan was not "readily available"*

[66] The Adjudicator found that the following documents met the requirements of a traffic control plan: "Site Map, the Safety Manual, Safety Work Practices, Safe Job Procedures and Critical Tasks, the Safety Board, and the Minutes of various meetings (Tail gate and End Gate meetings and Foremen's meetings)". The Adjudicator went on to find that these "documents were described to Officer Holzer" and "met the requirements of the Regulation in respect to a traffic control plan being in writing".

[67] However, the Adjudicator found that "the written information that pertained to the Traffic Control Plan was not *readily available for workers at the place of employment*". She stated: As there was access for workers to The Safety Manual and other relevant documents online a link to the relevant provisions of the Safety Manual relating to traffic control should have been on the Site Map." She concludes by saying: "I find that...compiling the information into one document is a better practicable means to have the information in the Traffic Control Plan available to the workers."

[68] Wright submits that the Adjudicator's conclusion that the "written information that pertained to the traffic control plan was not readily available for workers at the place of employment" is an error of law. In particular, Wright argues, the Adjudicator erred in her interpretation of s. 133(7)(b) of the *Regulations*, which provides that a traffic control plan be made "readily available".

[69] The term "readily available" is not defined in the *Regulations*. In this regard, Wright argues, the Adjudicator's Decision seemingly requires all employers to provide their traffic control plans in electronic format, particularly when such plans include reference to other written safety materials:

*As there was access for workers to The Safety Manual and other relevant documents online a link to the relevant provisions of the Safety Manual relating to traffic control should have been on the Site Map"*

[70] Wright argues that neither the Act nor the *Regulations* require electronic online access to safety materials. To do so in this factual context would require the Board to interpret the term "readily available" as meaning "instantaneously available". If the Legislature wished to incorporate



such a requirement on employers, it could have done so. However, the legislation does not use such language - it uses the phrase "readily available", which permits at least some reasonable scope of time for production of relevant materials.

**[71]** By requiring that the Site Map be produced in electronic format, complete with links to other safety documentation, Wright argues the Adjudicator erroneously elevated the legal standard applicable to employers in the context of traffic safety plans, and on Wright in connection with the Traffic Control Plan at issue in this appeal.

**[72]** The Adjudicator was required to find whether or not Wright's Traffic Control Plan was readily available. She found, based on her review of the evidence, which she outlined at pages 45, 46 and 47 of her Decision, that the Traffic Control Plan was not readily available. There are facts to support the Adjudicator's findings that the Traffic Control Plan was not readily available and those findings of fact are not subject to review by this Board. Accordingly, the Adjudicator's finding that the Traffic Control Plan was not readily available is upheld.

**[73]** With respect to Wright's argument that the Adjudicator's decision erroneously elevated the legal standard applicable to employers and required an electronic link on the site map, the Board notes the Adjudicator's finding is stated as follows:

*80. I find that although the Safety Manual was online workers would have to wade through all the documents listed to find answers to their questions. As there was access for workers to The Safety manual and other relevant documents online a link to the relevant provisions of The Safety Manual relating to traffic control should have been on the Site Map.*

**[74]** An adjudicator's authority in conducting appeals as set out in section 4-6(1) of the Act includes the power to dismiss the appeal, allow the appeal or vary the decision being appealed. The Board finds that to the extent the Adjudicator's decision orders Wright to specifically provide electronic access to the Safety Manual and other documents through a link on the Site Map, the Adjudicator exceeded her authority. Accordingly, the Board orders that Adjudicator's Decision be amended to omit any reference to specific directions for how Wright is ensure the Traffic Control Plan is made readily available.

*(d) Whether the Adjudicator erred in failing to determine whether Wright complied with Section 133(7)(b)(c) of the Regulations*

**[75]** The Adjudicator found that Wright had a Traffic Control Plan in writing but that it was not readily available. She stated that because she found that Wright did not meet the mandatory

requirement under Regulation 133(7)(b) (ie. “readily available”), it was not necessary to review Wright’s compliance with Regulation 133(7)(c).

**[76]** As the Adjudicator’s finding that the Traffic Control Plan was not “readily available” is not subject to review by this Board, the Board finds no basis for interfering with the Adjudicator’s decision not to address Wright’s compliance with Regulation 133(7)(c).

*(e) Whether the Adjudicator erred in failing to address Wright’s due diligence defence*

**[77]** Wright argues that the Adjudicator erred in law by failing to properly address Wright’s due diligence defence under section 3-80 of the Act. In particular, Wright argues that:

- a. The Adjudicator failed to consider all three types of due diligence defences available under section 3-80 of the Act:
  - i. It as not “practicable” to do more than was actually done;
  - ii. It was not “reasonably practicable” to do more than was actually done; and
  - iii. “There was no better practicable means than what was actually used”.

**[78]** The Director argues that s. 3-80 of the Act has no application to the NOC that was before the Adjudicator. As set out in s. 3-80 of the Act:

*3-80 In any **proceedings for an offence** pursuant to this Part or the regulations made pursuant to this Part respecting a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, the onus is on the accused to prove, as the case may be, that:*

*...*

- (f) It was not practicable or not reasonably practicable to do more than was actually done to satisfy the duty or requirement; or*
- (g) There was no better practicable means than was actually used to satisfy the duty or requirement.*

**[79]** The Director argues that offences under the Act are set out in s. 3-78. It says that NOC is not a prosecution for an offence under s. 3-78, but rather is a decision in an administrative proceeding issued pursuant to s. 3-38 of the Act. A NOC carries no punitive penalties, but rather simply requires the person who has contravened the legislation to comply with the Act: s. 3-38(b).

**[80]** The Director says that by way of contrast, penalties for offences are punitive in nature and can result in significant fines or imprisonment: s. 3-79 of the Act. No penalty was imposed on Wright and no charges were laid. As set out in *R v BLS Asphalt Inc.*, 2021 SKPC 25 at para 34,

offences are strict liability and must be proved beyond a reasonable doubt, at which point the burden shifts to the defence to establish due diligence on a balance of probabilities.

**[81]** The Adjudicator failed to consider this issue. She concluded that the position suggested to her by counsel for the Director, namely: compiling the information into one document is a better practicable means to have the information in the Traffic Control Plan available to workers<sup>5</sup>. The Adjudicator did not consider the evidence put forth by Wright at the hearing with respect to whether Wright's "multi-faceted approach" was "reasonably practicable" in the circumstances.

**[82]** Accordingly, the Board remits the matter back to the Adjudicator with instructions to determine whether the due diligence defence applies to the circumstances of this case, and if so, whether the evidence establishes that Wright's actions were reasonably practicable pursuant to s. 3-80 of the *Act*.

*(f) Whether the record of appeal is incomplete pursuant to section 4-8(4) of the Act given the absence of the recording of the hearing*

**[83]** Pursuant to section 4-8 of the *Act*, the record of an appeal is to consist of the written decision of the adjudicator and "any other material that the board may require to properly consider the appeal".

**[84]** Wright argues that the Board cannot properly consider the appeal without the Recording. It points to the fact that the hearing took place over two days and included the examination of several witnesses. Although the Adjudicator took notes during the hearing, Wright says there is no way to assess the accuracy of those notes with the Recording. Wright submits that the various inconsistencies throughout the Decision supports the conclusion that the notes contain numerous errors. It says that Adjudicator's mischaracterization of the evidence in this instance amounts to an error of law.

**[85]** Wright further argues that the fact that the Adjudicator issued her Decision 1,026 days after the Hearing is not only far beyond the time requirement contained in s. 4-7(1)(b)(ii)(B) of the *Act*, it is a significant amount of time for which the Adjudicator's recollection of the Hearing would fade and/or change.

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<sup>5</sup> Adjudicator's Decision at para 81, p 47

[86] Wright says that the Recording would have also provided the Board with further information on the exhibits that form the record of the Appeal. It says that the exhibits are integral to the issues on appeal and the Recording would have provided more context, especially since the exhibits contained in the record before the Board are not in colour.

[87] Wright argues the Board does not have an accurate representation of the evidence heard by the Adjudicator at the Hearing and there is no way for the Board to determine whether the summary of the evidence outlined in the Adjudicator's Decision is correct. To proceed with this appeal on the evidence portrayed in the Adjudicator's Decision would be procedurally unfair and prejudicial to Wright. Wright submits that the situation is analogous to that address in *Sharon May Strohan v Saskatchewan Labour Relations Board* (11 March 2022) Saskatoon, QBG 1019/2020 (Sask QB) in which the applicant argued that the transcript of the hearing was inaccurate.

[88] The Director argues that Wright did not state any specific allegation about evidence that had been left out of the Adjudicator's Decision, or point to any particular concern with the conduct of the hearing that was not reflected in the Decision. Further, the Director submits that to the extent that Wright raised the issue of Exhibits in the record being unclear, Wright has not specifically raised which Exhibits are unclear, or what information cannot be discerned from these Exhibits that should have been available to the Board. In addition, it says, clearer copies of the Exhibits were not requested from the Adjudicator, so it is unclear if alternative copies could have been provided prior to the hearing date.

[89] The recording of administrative proceedings and natural justice is discussed in *Canadian Union of Public Employees, Local 301 v Montreal (City)* 1997 CanLII 386 (SCC), [1997] 1 SCR 793. In that instance, the SCC was tasked with determining "whether the procedural requirements for a fair hearing...include the duty to make a recording of the proceedings" when a hearing before an Essential Services Council had failed to be recorded even though the adjudicator had indicated to the parties that it would indeed be "machine recorded" (i.e. audio recorded). The requirement that hearings be recorded in this manner was not statutorily prescribed but was the tribunal's typical practice. The SCC made the following comments which have since been the basis of further judicial comment:

*[75] In the absence of any express statutory requirements, the traditional common law requirements for a record of an administrative tribunal's proceedings include the document which initiated the proceedings and the document containing the tribunal's adjudication. Neither the reasons for the ruling, nor evidence presented at the hearing, have been considered necessary elements of the record to be presented to the superior tribunal upon*

appeal or review. Moreover, administrative bodies are normally under no obligation to make verbatim transcripts or recordings of their proceedings...

[76] Some deviation from this traditional approach has been evident in the jurisprudence of lower courts. Most notably, in *Tung v. Minister of Employment and Immigration* (1991), 124 N.R. 388, the Federal Court of Appeal found that as the lack of a transcript of a hearing before the Refugee Division of the Immigration and Refugee Board prejudiced the appellant in advancing an appeal of that decision, it constituted a denial of natural justice. The Federal Court of Appeal expressly disapproved of this decision in subsequent cases, however: *Kandiah v. Minister of Employment and Immigration* (1992), 141 N.R. 232... In *Kandiah*, the Federal Court of Appeal acknowledged the concern underlying the decision in *Tung*, that is, that an applicant may be deprived of his or her grounds of review or appeal given an absence of a transcript of what transpired at the impugned hearing. It held, however, that if the decision facing the court could be made on the basis of evidence established through other means, the principles of natural justice would not be infringed. The reviewing court should refrain from quashing the administrative order in such cases...

[77] Even in cases where the statute creates a right to a recording of the hearing, courts have found that the applicant must show a "serious possibility" of an error on the record or an error regarding which the lack of recording deprived the applicant of his or her grounds of review...

[78] The respondent has also relied upon jurisprudence of the Labour Court in Quebec where the absence of a complete verbatim transcript of the inquiry made by the administrative body appealed from was found to deny the appellant the rights to natural justice and a full and fair hearing: [Citations Omitted]. These cases all involved regimes with a broad statutory right of appeal to an appellate administrative tribunal on the merits of the initial decision, but no statutory right to a recording of the inquiry.

[79] In my view, the above jurisprudence of the Labour Court is not inconsistent with the principles enunciated in *Kandiah*, supra. In each case, as the Labour Court expressly acknowledged, the appeal turned on the appellate tribunal's review of the findings of fact and weighing of the evidence, which would be impossible without a complete record of the testimony at the initial inquiry. Such cases would likely fall within the exception mentioned in *Kandiah*, supra, as no other means of reproducing all of the evidence before the commission of inquiry would be readily available. This would substantially interfere with an appellate tribunal's ability to review the initial decision on its merits.

[80] In my view, the decisions in *Kandiah* and *Hayes*, supra, provide an excellent statement of the principles of natural justice as they apply to the record made of an administrative tribunal's hearing. In cases where the record is incomplete, the denial of justice allegedly arises from the inadequacy of the information upon which a reviewing court bases its decision. As a consequence, an appellant may be denied his or her grounds of appeal or review. The rules enunciated in these decisions prevent this unfortunate result. They also avoid the unnecessary encumbrance of administrative proceedings and needless repetition of a fact-finding inquiry long after the events in question have passed.

[81] In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious possibility" of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

[Emphasis Added]

**[90]** The fact that the Recording has been lost cannot be the cause of a cancellation of an Adjudicator's decision absent some demonstrated argument by Wright that:

- a. the lack of recording has resulted in the Board's inability to judge the merits of the appeal such that it forms part of the record pursuant to s. 4-8(1)(4)(g);
- b. without the Recording the Board's ability to review the Adjudicator's Decision on its merits is "substantially interfered with"; or
- c. "serious possibility" of error by the adjudicator is difficult or impossible to be found on appeal without the use of the Recording such that the appeal is hindered beyond repair.

**[91]** In this present case, Wright has referred to errors in the Adjudicator's Decision regarding the dates of the hearing: on the first page of the decision the adjudicator notes the date of the hearing being April 21 and 23, 2020. She subsequently indicates on page 5 that hearing was held on 21 and 23, 2022 and then ultimately indicates as well that it was scheduled to be held in 2021.

**[92]** The Board notes on page 47 of the Decision that the paragraph numbering is out of order: the paragraphs are numbered 80, 81, 82 and then under the heading "Conclusion and Remedy" and numbered 82, 71 and 72.

**[93]** The Board also notes a reference to Occupational Health and Safety Officer, "Dylan Holyk" at page 5 of the Adjudicator's Decision. Whether this was an error on the part of counsel in his opening statement, or whether it was the Adjudicator's error is unclear. There is, however, no indication in the Decision that this was any kind of error on the part of counsel.

**[94]** Aside from these errors, Wright has not provided any evidence that suggest any specific errors or omissions in the summaries of the evidence provided by the Adjudicator. While Wright's written submissions refers to a quote from Mr. Schlosser that was not included in the summary of the Adjudicator's testimony, other testimony, as well as the written statements, convey similar evidence.

**[95]** In the *Strohan*, case relied upon by Wright, the Applicant alleged that the transcript made of the recording was inaccurate. As an illustration of the problems, Strohan noted that the transcript refers to "hyperthyroidism" as opposed to "hypothyroidism". Strohan's spouse also suggested that he did not mispronounce a witness' name "Bihun" as "Leglume" which appeared

in the transcript. However, the most troubling assertions, according to the Bardai J. was that the transcript did not accurately record what happened during the hearing and there are things missing (*Strohan* at para 5).

**[96]** In the present case, Wright did not provide any specific allegations, supported by evidence, about evidence that had been left out, or erroneously included, or even mischaracterized. Wright does not point to any particular concern with the conduct of the hearing that was not reflected in the Decision. As pointed out by the Director, Wright's counsel was present at the hearing and would be able to do so if there were live concerns in this regard.

**[97]** The Board is concerned that the Adjudicator's Decision was not completed until almost three years after the hearing. The Board has also in these Reasons discussed the Adjudicator's finding that Officer Holzer's intent was irrelevant to her review and that there was consequently no discussion or analysis of the evidence surrounding his intent and behaviour in the Decision. There is also some apparent conflict in the testimony of the witnesses with respect to Officer Holzer offering a deal. The Decision contains no analysis of any conflict.

**[98]** Notwithstanding the passage of time, the little attention paid to the facts surrounding Officer Holzer's behaviour, and the fact that some errors are evident on the face of the Decision, the jurisprudence is clear that the mere assertion that the record has been lost without demonstrating how the appeal cannot now be decided without it, is insufficient to warrant a finding of procedural unfairness. Given the detailed notes taken by the Adjudicator and included in her Decision, and given the fact that the record includes the notes of Officer Holzer and the written statements from several Wright employees, the Board finds that Wright has not established a basis upon which the Board should determine that the Recording of the hearing is required to properly consider the appeal pursuant to s. 4-8(4)(g) of the *Act*.

### **Conclusion:**

**[99]** In conclusion, in accordance with 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.

**[100]** An appropriate order will be issued with these Reasons.

**[101]** The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered in making a determination in this matter.

**DATED** at Regina, Saskatchewan, this **24th** day of **March, 2025**.

**LABOUR RELATIONS BOARD**

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Carol L. Kraft  
Vice-Chairperson