LRB File No. 262-18

In the matter of an appeal to an adjudicator pursuant to s. 3-53 of *The Saskatchewan Employment Act*

BETWEEN

Regina Cabs ("Regina Cabs" or "the company")

-and-

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("the union")

DECISION ON INTERIM APPLICATION REGARDING STANDING

Counsel for the company: Robert J. Frost-Hinz
Counsel for the union: Heather M. Jensen

INTRODUCTION

[1] Arch Transco Ltd. operates a taxi service as Regina Cabs. On October 11, 2018, an occupational health officer issued a Notice of Contravention directed to Regina Cabs requiring it to comply with provisions of *The Saskatchewan Employment Act* ("the Act") and regulations under that Act pertaining to violence and harassment policies.

[2] The company appealed that decision by letter dated December 5, 2018.

[3] This is an application to determine whether the union will have standing in the company's appeal under Part III of the Act. The parties argued this matter before me in a hearing by conference call on November 18, 2019.

[4] When the Executive Director of Occupational Health and Safety ("the director") informed the Registrar ("the registrar") of the Labour Relations Board ("the board") that the appeal had been submitted, he gave written notice of the appeal to the union. In March of 2015 the union had been certified by the board to represent a bargaining unit at Regina Cabs comprised of "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".

[5] Pursuant to s. 4-3(3) of the Act, I was selected by the registrar as the adjudicator with respect to that appeal on May 7, 2019.

[6] Counsel for the union advised me by email dated May 27, 2019, that it represented the union on the appeal and discussed the need for a scheduling call with the parties to set a hearing date.

[7] By email dated June 3, 2019, and an attached letter, the manager for Regina Cabs advised me the company was not represented by counsel and set out the company's position that the union had been notified of the appeal in error and it should not have standing in the appeal. She asked that I not include the union in a scheduling call.

[8] I subsequently considered what was in effect an *ex parte* application by the company to exclude the union from participation in a further application that would determine whether the union would have standing in the main appeal. The company, which was still not represented by counsel at this point, provided several submissions by email for my consideration.

[9] By written decision dated August 13, 2019, I denied the company's *ex parte* application and ruled that the union would be allowed to participate in the proceedings to determine whether it will have standing in the main appeal. These are those proceedings.

[10] In arguing this application, the parties were not in agreement on the question of who bore the onus on the application. The union takes the position it presently has standing and the company is applying to have the union removed. The company's position is the union presently has no standing and is applying for it. We agreed it might be unnecessary to resolve this provided we could agree on the order of going in the hearing of the application. The parties agreed the union would present first. The parties therefore agreed it would be unnecessary for me to determine whether the application was the union's or the company's unless the issue of onus became a live issue, which the reasons below reveal it has not.

[11] The Notice of Contravention being appealed from contains three separate but related items. The three are preceded in the notice by a sort of preamble in the following terms:

> 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.
>
> 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).

[12] Each of the items contains an observation, a reference to the legislation applicable to that item and a specific compliance required. In each case the compliance is required by December 3, 2018.

[13] The observation in the first item repeats portions of the preamble related to the company's failure to provide the information requested by the ministry. It goes on to state:

> The employer has failed to cooperate with an officer exercising a duty imposed by *The Saskatchewan Employment Act and Regulations*.

[14] The specific provision in the Act said to be contravened is s. 3-8(e):

> Every employer shall: ...
>
> > (e) cooperate with any other person exercising a duty imposed by this Part or the regulations made pursuant to this Part....

[15] The second item in the notice relates to the company's harassment policy. The observation states:

> After review of the policy submitted, I have determined that it does not encompass the drivers for Regina Cabs. Regina Cabs (Arch Transco) must 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).

[16] The legislative provision said to be contravened is s. 36 of *The Occupational Health and Safety Regulations, 1996*, which requires employers to develop a harassment policy and sets out the content requirements for those policies.

[17] The final item pertains to the company's violence policy. The observation repeats the observation related to the second item, apparently in error. However, the legislative provision identified in the operative part of the notice is s. 37 of *The Occupational Health and Safety Regulations, 1996*, which prescribes places of employment that provide certain stated services for the purposes of s. 14(1) of *The Occupational Health and Safety Act, 1993*, now apparently replaced by s. 3-21 of the Act. S. 3-21 requires employers operating prescribed places of employment to "develop and implement a written policy statement and prevention plan to deal with potentially violent situations". Places of employment that provide "taxi services" are included in the list of prescribed places of employment.

[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.

[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:

> 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.

[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:

> 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.

[23] The Notice of Contravention is dated October 11.

ISSUES

[24] This application requires me to consider two central questions:

> Is the union a "person who is directly affected by a decision" within the meaning of s. 3-52(2) of the Act?
>
> 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?

LEGISLATIVE FRAMEWORK

[25] This appeal was commenced by the company pursuant to s. 3-53 in Part III of the Act:

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

[26] Subs. (4) of this section provides that the director is to "conduct" appeals (in the sense of considering and determining them), but subject to two exceptions – one discretionary and one mandatory. Under subs. (10), the director can choose to forward an appeal to an adjudicator, and s. 3-54 requires that an "appeal…with respect to any matter involving harassment or discriminatory action" must be heard by an adjudicator.

[27] If the director conducts the appeal, there is no requirement for an oral hearing: subs. (7). Persons who are directly affected by the decision have an opportunity to make written representations to the director.

[28] The term "person who is directly affected by a decision" is a defined term used in several provisions in Parts III and IV. It is defined in s. 3-52(2):

> (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.

[29] If an adjudicator is to conduct the appeal, the director must forward to the adjudicator, among other things, a list of all persons who are directly affected by the decision (again, as defined in s. 3-52(2)). This obligation arises through the combined application of s. 3-53(5)(a) and (10)(c), s. 3-54(2) and s. 3-55(c). The registrar has the responsibility to select an adjudicator once the director advises the registrar that there is an appeal to be heard by an adjudicator: s. 4-3(3).

[30] S. 4-4 sets out the procedures on appeals to an adjudicator. It provides, in part:

> 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:
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> (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: …
>
> (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.

[31] The director can choose to be a party to any appeal being heard by an adjudicator by virtue of s. 4-10, which is discussed in greater detail below.

CASE LAW

[32] The company referred me to the following written decisions having a bearing on this application.

[33] The first is the 1993 decision of our Court of Appeal in *SGEU v Saskatchewan*, 172 Sask. R. 83 ("*SGEU*"). There the union applied to join a civil lawsuit brought by one of its members in a representative capacity on behalf of other current and former members of the union seeking the same remedy. On the motion of the defendant government, the union was removed as a plaintiff for disclosing no reasonable cause of action against the defendant. Lane J.A., with Gerwing J.A. concurring with his reasons and Cameron J.A. concurring in the result, dismissed the appeal, citing s. 29 of *The Trade Union Act*, which was then the governing statute:

> 29. For the purposes of this Act, every trade union is deemed to be a person, and may sue or be sued and prosecute or be prosecuted under its own name.

[34] His decision goes on to state (at para. 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.

[35] The company also referred to the Alberta Court of Appeal decision in *CUPE Local 30 et al v. WMI Waste Management of Canada Inc.*, 1996 ABCA 6 ("*CUPE*"). CUPE was one of six appellants, including two individuals, two organizations that appear to have been environmental groups and the Alberta Federation of Labour. The case does not turn on CUPE's status as a union.

[36] The Edmonton Local Board of Health had made a decision approving the development of a waste management facility by the respondent. CUPE and the other appellants filed notices of appeal with the Public Health Advisory and Appeal Board. The right to appeal was limited by the relevant statute to a person who was "directly affected by a decision of a local board". The appeal board denied the appellants' standing to appeal. A Chambers Judge found no reviewable error. The appellants appealed to the Court of Appeal.

[37] The Court of Appeal dismissed the appeal, agreeing that none of the appellants were "directly affected by the decision" and stating (at para. 19):

> In our view, the inclusion of the word "directly" signals a legislative intent to further circumscribe a right of appeal. When considered in the context of the regulatory scheme, it is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter.

[38] The issue of whether a union can have standing in an appeal under Part III of the Act was considered by Adjudicator Wingerak in 2015 in *TM v Prince Albert Parkland Health Region*, LRB File No. 095-15. TM filed a harassment complaint against her manager. She appealed the decision on that complaint and the matter came before Adjudicator Wingerak. CUPE Local 4777 was the bargaining agent for the bargaining unit including TM. It applied for watching brief status on the appeal, seeking to be provided with notice of the time and location of any hearing dates, the opportunity to observe the hearing, copies of any submissions made by the parties, notice of any decisions made and copies of any reasons. However, it also indicated an intention to intervene when and if necessary.

[39] Although the union's application for status in the hearing was not made at TM's request, she didn't object to the application.

[40] The union based its application on its assertion that it was a "person who is directly affected by a decision" within the meaning of s. 3-52(2) of the Act (quoted above).

[41] The adjudicator determined that the union was not a "person who is directly affected by a decision" but could conduct a limited watching brief (at paras. 18 to 20):

> 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*.
>
> 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.
>
> Accordingly, while I am not prepared to accede that CUPE has status as a party to this proceeding, I am prepared to allow CUPE limited watching brief status. CUPE shall be provided with notice of the time and location of any hearing dates and the opportunity to observe the hearing. I will not be providing CUPE with notice of any pre-hearing case conferences or mediation or other meetings being held or facilitated by me with a view to encouraging a settlement of the matter as contemplated in section 4-5(2) of The Saskatchewan Employment Act. In regards to any written submissions made by the parties during the formal hearing process CUPE may request copies of such submissions directly from the parties and it will be up to the

parties to extend the courtesy of providing a copy to CUPE or not, but I do not see that as my role.

[42] The adjudicator subsequently denied the appeal in the main hearing and the union appealed both the decision on standing and the main decision to the board. The union's notice of appeal alleged that the preliminary decision by the adjudicator to deny it status as being a person "directly affected" amounted to an error of law, an error which "resulted in a decision on the merits which is flawed and must be set aside". The board provided its decision in *CUPE v McKnight et al*, 2016 CanLII 44867 ("*McKnight*").

[43] Before considering the merits of the appeal, Chairperson Love addressed the appropriate standard of review, concluding that the standard of reasonableness applied.

[44] He then considered the first issue, which was whether the union's notice of appeal had been filed in a timely manner. He ruled that the 15-day period for the filing of an appeal related to the decision concerning standing ran from the time of the decision on that issue rather than from the conclusion of the main appeal. Consequently, he ruled that the appeal had not been filed in time and the board was without jurisdiction to hear it.

[45] The second issue on the appeal was whether the union was "a person who is directly affected". Although acknowledging that it was not necessary for the board to answer this question given it was without jurisdiction, he went on to offer his analysis on this point. While this analysis is technically *obiter dicta*, it is thoughtful and I include a substantial portion of it (paras. 39 to 48). The various references to "the SEA" are to *The Saskatchewan Employment Act*:

> The Union also raised questions regarding the Adjudicator's focus solely on the question of whether or not the Union was directly affected, arguing that this was only one of the category of standing which the Adjudicator could have awarded, the others, as noted by the Board in its decision in C.E.P. v. J.V.D. Mill Services[15] would have allowed them to participate in the hearing as either an exceptional intervenor or a public law intervenor.
>
> However, while it is true that the adjudicator did not specifically address these other category *(sic)* of intervenor, she did permit the Union to have status to conduct a watching brief, which could be considered similar to a public law intervenor status with limited participation rights at the hearing itself.
>
> 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.
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> The Union also raised the fact that they were accorded notice from the Board's Registrar as having a direct interest in the application, relying upon section 19 of the Board's Regulations.
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> Section 19 directs the Board's Registrar, upon receipt of an application, including an application made under section 4 of the Regulations in respect of an appeal under Parts II or III of the SEA. The Registrar is required by the provision, to insure, as best he can, that all parties who may have an interest, be provided the application filed.

In making his determination, the Registrar is limited in his knowledge as to who might have a direct interest, particularly in appeals under Parts II or III of the SEA because he has information in the request from the Ministry of Labour Relations and Workplace Safety for the appointment of an adjudicator; information which is often incomplete or erroneous. In such circumstances, the Registrar cannot be faulted for casting a more inclusive rather than a less inclusive net and providing notice to more rather than fewer people.

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.

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

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. Gagnon. However, there was no argument before the Adjudicator in respect to this argument either.

In our opinion, the Adjudicator's determination that the Union was not directly affected by the application was reasonable. While it may have been open to the adjudicator to take a more liberal view of the legislation before her, her determination nevertheless fell within the range of possible outcomes and was in accordance with the modern rule of legislative interpretation as outlined by Ruth Sullivan in Sullivan on the Construction of Statutes.

ANALYSIS AND REASONS

Is the union a "person who is directly affected by a decision" within the meaning of s. 3-52(2) of the Act?

[46] The company's position is that the union is not a person who is directly affected by the Notice of Contravention from which the appeal is taken. The union did not advance the argument that the union itself was directly affected by the decision. It argued instead that the workers employed by Regina Cabs who are union members were directly affected, and that the union should have standing as their representative.

[47] I don't find it necessary to rely on the case law referenced earlier to reach a conclusion on this point. 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.

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?

[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.

[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 effectively advance the interests of the workers.

[50] In response to this assertion, the union argues that the director cannot not 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.

[51] The director has the right to participate in appeals to an adjudicator pursuant to s. 4-10 of the Act:

> 4-10 The director of employment standards and the director of occupational health and safety have the right:
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> (a) to appear and make representations on:
>
> (i) any appeal or hearing heard by an adjudicator; and
> (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
>
> (b) to appeal any decision of an adjudicator or the board.

[52] However, can it be expected that the director will appear? At the close of argument in this hearing I asked the parties whether I could ask the director if he intended to participate pursuant to s. 4-10. The union said yes. The company said no. I ultimately concluded it was not necessary to pursue this further for the reasons that follow.

[53] While s. 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. Both counsel for the parties and I related some of our personal experience during argument on this point. Counsel for the company indicated his understanding that the director was often directly involved in appeals. Counsel for

the union expressed a contrary understanding. I indicated that in the few matters I had been engaged in or was currently engaged in the director had not participated.

[54] Adjudicator decisions are reported on the Labour Relations Board website. While I did not do an exhaustive analysis, a review of the nine decisions reported during 2018 and 2019, including consent orders, reveals that none involved participation by the director as a party.

[55] Furthermore, the provisions in the Act setting out the various responsibilities of the director suggest that the director would not normally participate in a manner that advances the interests of a worker or group of workers. S. 3-53 of the Act gives the director what might be considered the primary responsibility for hearing appeals. It is only where the director chooses to direct an appeal to an adjudicator under s. 3-53(10) or an appeal is required to be heard by an adjudicator under s. 3-54 that the director is not the decision-maker on the appeal. 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.

[56] This observation is not inconsistent with the director's right to participate pursuant to s. 4-10. The director also has duties as a ministry official to support the responsibilities of the minister responsible for the Act. One of those responsibilities could be to weigh in periodically when important issues of jurisdiction or the interpretation of the Act are under consideration by an adjudicator, the board or the Court of Appeal. S. 4-10 explicitly extends the director's authority to commencing appeals to the board or the Court of Appeal.

[57] This is not to say the director could never exercise his authority to support a decision in favour of or against the interests of a worker or an employer. However, my cursory review of the reported decisions indicates that is not normally the case.

[58] The company points to the fact the director is often named as a respondent in the style of cause given to appeal documents. While the Act does not require this, it does appear to be a practice, but an examination of the reported cases from 2018 and 2019 shows it isn't universally so. In fact, in the instant case, the registrar's "Selection of Adjudicator", which is the formal appointment of the adjudicator to hear the appeal, styles the matter with the company as appellant and the union as respondent.

[59] Consequently, I will assume for the purposes of the analysis that the director is not a party. I would also add that, even if the director were to indicate an intention to participate, the union's right to standing would still have to be considered.

[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).

[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.

[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. When the director forwarded the information to the adjudicator required by s. 3-55 of the Act, he included the union in his list of persons who had been provided notice of the appeal. The registrar included the union as a named party when he formally selected an adjudicator.

[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.

[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.

[66] The company argues that the *SGEU*, *CUPE* and *McKnight* cases militate against the union's participation as a party here. I find those cases to be helpful but not determinative.

[67] The decision in *SGEU* is distinguishable. In the instant appeal, the union is not advancing its own interests. The principal concern of the court in *SGEU* was that the union was not seeking a remedy in the lawsuit. Here the union is asking for standing to do something objectively useful, which is to advance the interests of its members.

[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.

[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.

[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.

[71] One additional matter should be addressed. The union points to several provisions in the collective bargaining agreement between the company and the union that it says support the notion of the union representing workers in proceedings of this kind. The company relies on what it considers the absence of any provisions in the agreement that suggest the union would have such a role. I see nothing in the agreement that is particularly persuasive either way. However, the fact the agreement fails to address this issue does not settle the matter. In considering whether the union can, in the limited circumstances of this appeal, appear as a party to represent the interests of the workers who are affected by the notice, I don't need to find a specific foundation in the collective agreement.

[72] Finally, it is important to note that the participation of the union is not disruptive to the appeal and is, instead, helpful in the process. I accept the union's representations that the Part IV appeal provisions contemplate an adversarial process, although modified to some degree, much in the same way arbitral processes are modified. In this instance the appeal will potentially pit the rights of the workers affected by the policies against the rights of the company to either have no policies or to have policies not dictated by the legislation. 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.

[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.

[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.

[76] This is not to say that unions are entitled, as a matter of law, to participate in all appeals to adjudicators where one or more union members are affected by the decision being appealed. Equally, it cannot be said that unions are excluded, as a matter of law, from status as a party to represent members affected by decisions being appealed. Each fact situation must be considered on its merits. I acknowledge this may create ambiguity in many instances and lead to additional litigation. However, this is not an issue that lends itself to resolution by hard and fast rules.

ORDER

[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.

"G. Tegart" December 9, 2019
Gerald Tegart, Adjudicator