Court of Appeal for Saskatchewan
Docket: CACV4138

Citation: ***Prairie Pride Natural Foods Ltd. v United Food and Commercial Workers, Local 1400*****, 2024 SKCA 84**

Date: 2024-09-06

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Between:

Prairie Pride Natural Foods Ltd.

Appellant
(Applicant and Respondent)

And

United Food and Commercial Workers, Local 1400

Respondent
(Applicant and Respondent)

Before:	Schwann, McCreary and Drennan JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Madam Justice Schwann
In concurrence:	The Honourable Madam Justice McCreary The Honourable Madam Justice Drennan
On appeal from:	2022 SKKB 274, Saskatoon
Appeal heard:	May 31, 2023
Counsel:	Brent Matkowski for the Appellant Heath Smith for the Respondent

Schwann J.A.

I. INTRODUCTION

[1] This appeal arises from an employer's decision to dismiss one of its employees. The union representing the employee successfully grieved the termination before a three-member arbitration board [Board], which concluded "the Employer's decision to terminate the Grievor was unreasonable and unwarranted" (*Prairie Pride Natural Foods Ltd. v UFCW, Local 1400 and Senyotkham* (6 July 2020) Saskatoon, Grievance #228 18/19 (Sask Board of Arbitration) at para 51 [*Award*]). The majority of the Board also determined that "reinstatement would not be appropriate and that damages in lieu of reinstatement should be awarded" (at para 57).

[2] Prairie Pride Natural Foods Ltd. [Employer] applied to the Court of Queen's Bench (as it then was) for judicial review of the *Award*. In an effort to have the employee reinstated, the United Food and Commercial Workers, Local 1400 [Union] also sought judicial review of the remedy portion of the *Award*.

[3] The reviewing judge found that the *Award* was sufficiently transparent, justified and intelligible, both in terms of the employee's termination and the remedy imposed, and, accordingly, dismissed both applications: *United Food and Commercial Workers, Local 1400 v Prairie Pride Natural Foods Ltd.*, 2022 SKKB 274 [*Review Decision*].

[4] The Employer appeals from the *Review Decision*. It asserts that the reviewing judge erred in his reasonableness analysis and failed to conclude that it was denied procedural fairness as a result of the Board's decision to use an uncertified, allegedly incompetent interpreter in the arbitration proceedings. Although the Union's judicial review application did not meet with success, in the absence of an appeal or cross-appeal to this Court from the *Review Decision*, it nonetheless seeks the following relief: "That this Honourable Court of Appeal substitute its own Remedy for that of the Chambers Judge, and the Arbitration Board, restoring the Grievor to his employment, as of the effective date of his termination".

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[5] I conclude the Employer's appeal must be dismissed. Further, I would not give effect to the Union's argument on reinstatement, as that issue is not properly before this Court. My reasons follow.

II. BACKGROUND

[6] The Employer operates a poultry processing plant in Saskatoon, Saskatchewan, and the Union is the certified bargaining agent for the employees who work at that plant. Their employment arrangement is governed by the terms of a collective bargaining agreement [CBA] between the Employer and the Union, which was in place at the operative time.

[7] The incident that gave rise to the Grievor's termination concerns two brothers, Nopphon Senyotkham and Noppadone Senyotkham, and their respective wives, all of whom worked for the Employer at the relevant time. Nopphon is married to Pornthip and Noppadone is married to Anitshara. For ease of reference, I will refer to them by their first names, or, in the case of Nopphon, I will also refer to him as the Grievor.

[8] By all accounts, the two couples had an acrimonious relationship, which often spilled over to their workplace. On Friday, November 15, 2018, a conflict arose between Pornthip and Anitshara on the processing floor. The Employer issued a warning to both, instructing them to avoid each other. After work, while Anitshara was driving home, she observed being followed by Pornthip and her husband, Nopphon. Out of concern for her safety, Anitshara turned into a random parking lot, parked and locked the doors to her vehicle. When Pornthip, too, pulled into the same parking lot, Anitshara became frightened and attempted to call her husband but was unable to immediately reach him. She then called Alex Ordonez, who was the work supervisor for all four of these individuals and a close family friend to Anitshara and Noppadone.

[9] It is unclear how Noppadone became aware of the rapidly heightening events, but both he and Alex arrived at the parking lot soon thereafter. While the evidence led at the arbitration hearing was conflicting in some respects, what seems to be clear is that tensions soon escalated amongst the parties after these individuals appeared on the scene.

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[10] Upon arriving at the parking lot, Noppadone got out of his vehicle and approached Nopphon and Pornthip, who had remained in their vehicle. A loud and heated discussion ensued. Worried about the threatening nature of their conversation, Alex retrieved a baseball bat from his vehicle, and he, too, approached Nopphon and Pornthip's vehicle.

[11] It appears to be accepted as fact that Alex struck the exterior mirror of Nopphon and Pornthip's vehicle with his bat. At this point, Anitshara and Pornthip both exited their respective vehicles and began documenting the events with their mobile phones.

[12] When Noppadone exited his vehicle, he had a hatchet in hand. No one testified to having seen him with the weapon until he struck Pornthip in the back of the head with it. Upon witnessing his wife being assaulted in this way, Nopphon grabbed his own hatchet from the back seat and exited his vehicle. The parties differ on whether evidence was led at the arbitration hearing as to whether Nopphon began chasing Anitshara with the hatchet or if he rushed over to assist his wife. There was no transcript of the hearing, and the mobile phone data was unhelpful.

[13] After striking Pornthip and dropping her, Noppadone and Anitshara fled the scene, as did Alex. Nopphon was left to care for his bleeding and unconscious wife. Pornthip was hospitalized and, because of her injuries, was unable to return to work for nine months.

[14] The incident was reported to the Saskatoon police. Following an investigation, Noppadone was charged with assault. He pleaded guilty to that charge and received a three-year sentence. No charges were brought against Alex or the Grievor.

[15] On the following Monday, Nopphon requested time off from work to care for his injured wife. The plant manager, Gates Duret, learning for the first time of the incident involving multiple employees and a supervisor, asked the company's human resources administrator to speak with Anitshara. He undertook to speak to Alex. No efforts were made by the Employer to interview the Grievor or to obtain any of the statements that were made by various individuals to the police. Mr. Duret then presented his findings to the chief executive officer for a final determination regarding the Grievor's continued employment, who Mr. Duret had identified as the aggressor. As the Board noted in its decision, "Mr. Duret confirms that he relied upon the evidence and statement of Alex Ordonez and the statement of Anitshara when he met with the Chief Executive Officer, Ron Patterson, to review the incident" (*Award* at para 27).

[16] The Employer terminated Nopphon's employment on December 6, 2018. The termination letter read, in part, as follows: "your employment with Prairie Pride has been terminated based on your actions which occurred on November 15, 2018 towards another employee employed with Prairie Pride. Prairie Pride has an obligation to ensure the health and safety of their employees under their control which is detailed at section 3-8 of *The Saskatchewan Employment Act*" (emphasis omitted).

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III. THE *AWARD* AND THE BOARD'S REASONS

[17] The Union grieved Nopphon's dismissal, and a board of arbitration was convened to hear and determine the merits of that grievance. Although, as noted, the arbitration hearing was *not* transcribed, the parties appear to agree on the following core facts that were material to the Employer's judicial review application.

[18] On the first day of the Board hearing, the Union put forth Sirithorn Janzen as a Thai–English interpreter for Nopphon and his wife. Ms. Janzen had been recommended to the Union by the Open Door Society. Even though she had no formal training as an interpreter, the Union assured the Board that Ms. Janzen could translate between English and Thai. The Employer objected to Ms. Janzen serving in that capacity for two reasons: first, she was not qualified to offer interpretation or translation services, and second, she (allegedly) was in a conflict of interest because she had a close relationship with the Grievor and other key witnesses.

[19] The Board adjourned proceedings until the next day for the Union to secure another interpreter. When the proceedings resumed, the Union informed the Board that it was unable to locate an alternate interpreter. The Board accepted Ms. Janzen as an interpreter over the Employer's continued objections.

[20] In the context of its written reasons on the grievance arbitration, the Board began by briefly recounting the evidence and then noting that, as this was a case of employee discharge, the Employer bore the onus of establishing that the disciplinary action it took was appropriate and that termination was warranted. Broadly speaking, the Board framed the central issues as being whether (a) the Grievor's conduct provided just and reasonable cause for discipline, and (b) the Employer's decision to terminate the Grievor was a reasonable response to the circumstances at hand.

[21] The Board next grappled with the question of whether the incident that gave rise to Nopphon's termination occurred within the purview of a workplace incident, concluding that, because it was so closely related to an incident which began in the workplace, it should be treated as a "continuation of a workplace incident" (*Award* at para 32).

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[22] In connection with the question of whether discipline was justified, the Employer had posited that it had just cause to dismiss the Grievor given his (alleged) intimidation, harassment and attempted assault of Anitshara with a deadly weapon, i.e., a hatchet. In considering that argument, the Board directed itself to address the following two questions:

(a) first, "what information did the Employer have before it when it made the decision to terminate"; and

(b) second, "what credible conclusions can be drawn when all the evidence from all the witnesses is properly assessed" (at para 34).

It was accepted as fact that the Employer did not interview the Grievor prior to his termination. While acknowledging that the Employer's failure to interview the Grievor was not fatal to its decision to terminate him, the Board reframed the inquiry before it as this: "Although the Employer may not be technically required to interview the Grievor, it is required to fully investigate and have the facts before it to make a fair and reasonable decision in regard to termination" (at para 34). After considering the evidence related to that point, the Board found that a full and proper investigation had not been conducted and that its absence amounted to a breach of Article 8.01 of the CBA.

[23] The Board's findings are captured in the following paragraphs of its decision:

> 35. It is this Board's belief that failure to interview the Grievor and provide him with an opportunity to tell his side of the story not only breaches Article 8.01 of the CBA, but is a clear indication that the Employer had not done a thorough or, in fact, any form of investigation to arrive at a finding or conclusion that would justify disciplining the Grievor.
>
> 36. In other words, although the failure to interview the Grievor may not have been fatal, the failure to conduct a proper investigation does put its decision to discipline the Grievor in jeopardy.

[24] The Board went on to observe that the information the Employer relied on had come from Alex, who, it said, "was a very close friend of Anitshara and Noppadone" (at para 37). It also remarked on how the Employer had ample opportunity to gather information from sources other than Alex to confirm what had transpired in the parking lot and to obtain copies of the police statements or to interview Noppadone, the Grievor or Pornthip. Although Anitshara had provided a written statement to the Employer, the Board noted that, in it, she made "no reference to any incidents of wielding an axe by anybody in that parking lot" and that "her written statement of November 26, 2018 makes no reference to the hatchets" (at paras 37 and 39). That being so, and given the Employer's position that the Grievor had exhibited an intent to harm, the Board found it curious that the Employer had failed "to get further information from Anitshara to see whether there was any intent to harm" (at para 38).

[25] Finally, the Board addressed the Employer's argument that, even if the investigation was deficient, there was enough information for it to have disciplined Nopphon. The Board declined to follow the decision in *Windpak Ltd. v CEP, Local 830* (2010), 194 LAC (4th) 154, which the Employer had relied on, finding it distinguishable because the arbitrator in that case had made a finding of fact that the company had enough information before it to impose discipline (i.e., credible, uncontested documents). In contrast to the matter at hand, the Board said, "the Employer had only the evidence of [Alex], who was one of the protagonists in the dispute in the parking lot, as by his own admission, he was wielding a bat and in some fashion hit the Grievor's vehicle with that bat" (at para 45).

[26] Having made those findings, the Board's bottom-line determination is captured in the following paragraphs from its decision:

> 46. Combined with the fact that the Grievor was not charged with any criminal offences, when in fact one of the other protagonists was charged, should have alerted the Employer to question whether the Grievor's involvement warranted any form of discipline. The issue of whether the Grievor was being attacked and acting in self-defence or whether he was an aggressor should certainly have been investigated further. The Employer took no steps to meaningfully investigate the incident before making its decision to terminate the Grievor. As adjudicator Robinson says in the *Windpak* case:
>
> > [44] Employers proceed at their own peril when they discipline employees without reviewing allegations with them in advance or without otherwise conducting reasonably vigilant investigations.
>
> 47. It is clear to this Board that the Employer did not conduct "reasonably vigilant investigations".

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> …
>
> 49. … this Board has concluded the CBA before us, in fact, provided that the Employer does have some onus as set out in Article 8.01 to involve the union and the Grievor in "mutual problem-solving" and "respect for the individual".
>
> 50. A review of the evidence brings this Board to the conclusion that had the Employer done a thorough investigation of the incident, it may very well have concluded, as this Board has, that it was more likely than not that the Grievor was acting in self-defence to protect his wife and himself after he observed her being struck a number of times in the head with a hatchet. *There is no evidence before this Board that the Grievor got out of the vehicle he was in with the hatchet until after he observed his wife being struck*.
>
> (Emphasis added)

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[27] The Board was split on the question of remedy. The majority held that reinstatement would not be appropriate and ordered pay in lieu. The dissenting member of the Board would have reinstated Nopphon: *Prairie Pride Natural Foods Ltd. v UFCW, Local 1400 and Senyotkham* (7 August 2020) Saskatoon, Grievance #228 18/19 (Sask Board of Arbitration).

IV. THE JUDICIAL REVIEW DECISION

[28] In a comprehensive, carefully reasoned decision, the reviewing judge dismissed the parties' respective applications for judicial review. Before turning to the merits, he addressed the Employer's procedural fairness argument in connection with the Union's choice of interpreter and the translation of the evidence.

[29] As mentioned, proceedings before the Board were not transcribed. For that reason, the Employer applied to adduce extrinsic evidence for purposes of its procedural fairness argument. While noting the general rule that evidence on a judicial review application should be restricted to the tribunal record and that extraneous evidence is typically not received, the reviewing judge accepted the affidavit evidence on the translation issue in order to "bring possible procedural defects to the attention of the reviewing court, which defects are not otherwise found in the record" (*Review Decision* at para 39). He ruled that affidavit evidence from the parties would be admissible, albeit limited it to (a) "the discussion that led the Board to permit Ms. Janzen to interpret testimony", and (b) "whether Ms. Janzen struggled in the translation exercise" (at para 40). However, as the reviewing judge made abundantly clear, he would disregard those portions of the parties' affidavits that attempted to "revisit the merits of each party's case" (at para 41).

[30] According to an affidavit filed by Mr. Duret, on the first day of the arbitration hearing, the Employer's legal counsel had objected to having Ms. Janzen serve as the translator. This caused the Board to adjourn the proceedings until the following day, and it directed the Union to obtain a qualified interpreter who was not associated with the Grievor. When the parties reconvened the next day, the Union informed the Board that it had been unable to locate an alternate interpreter and proposed to have the arbitration proceed using the services of Ms. Janzen. When the Employer's legal counsel renewed its objection, she was permitted to question Ms. Janzen under oath. According to Mr. Duret, Ms. Janzen testified to the following:

(a) she was not a member of the Association of Translators and Interpreters of Saskatchewan (ATIS);

(b) she was not bound by a code of conduct;

(c) she had no certification or formal training in Thai-to-English translation or translation in general;

(d) she was a close family friend of the Grievor and Pornthip; and

(e) her only translating experience was on one other occasion for one hour.

[31] Despite the Employer's objection, the Board ordered the parties to proceed with Ms. Janzen as the interpreter, instructing "the parties to speak slowly to allow for the translation" (*Review Decision* at para 45).

[32] Marilynne MacFarlane, a service representative for the Union who had attended the arbitration hearing, also filed an affidavit. I will turn to the contents of her affidavit later on in these reasons.

[33] With the aid of this extrinsic evidence, the reviewing judge expressed no difficulty with understanding the testimony of the witnesses. In concluding that the duty of procedural fairness applied to grievance arbitration proceedings, generally, he said the nature and content of that duty was informed by the factors outlined in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

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[34] In that regard, he found the first three *Baker* factors supported "a consistent and evenly applied form of procedural protection" (*Review Decision* at para 68) but took a nuanced approach with the other two factors. On the importance of the decision to the individuals, he wrote, "While there can be little doubt that all parties before a tribunal will have an interest in the outcome of its decision, there may be qualitative differences in those interests", most notably in "immigration, professional discipline and employment related proceedings" (at para 71). Those differences, he said, can often be informed by who carries the burden of proof and the potential for grave and permanent consequences: see *Baker* at para 25, quoting *Kane v University of British Columbia*, [1980] 1 SCR 1105 (WL) at para 31. As to the choice of procedure, the reviewing judge noted that, while a tribunal must observe a procedure that is "mindful of the potential impact on an individual", including "the necessary procedural protections for that individual", it "must also be mindful of the onus of proof, and whether, in all the circumstances, the party bearing that onus will be unduly prejudiced by the procedure observed" (*Review Decision* at para 74).

[35] The Employer argued that the Board's failure to insist on a formally qualified interpreter meant that it (the Employer) was not afforded a meaningful opportunity to meet the Grievor's position at the arbitration hearing because it was denied (a) a proper understanding of the testimony given by the witnesses, who had not testified in English, and (b) the right to meaningfully cross-examine the Grievor and Pornthip about the incident in question.

[36] The reviewing judge observed that, as a matter of procedural fairness, it was the *Grievor*, who was of Thai descent, who had the right to an interpreter. While he accepted that the Employer was entitled to understand the testimony given by the witnesses and to be able to conduct a meaningful cross-examination, he nevertheless found its argument "somewhat mischievous, if not outright disingenuous" (at para 86). This was so, he said, because the Employer was the author of much of its complaint owing to its failure to carry out a fair and balanced investigation, including by interviewing the Grievor. Had the Employer done so, he said, it would have learned of the Grievor's version of the events and of its need for an interpreter.

[37] Setting those misgivings aside, the reviewing judge was not persuaded that Ms. Janzen lacked the necessary competence to serve as an interpreter. He wrote as follows:

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> [88] Finally, while there is no dispute that she lacked formal translation credentials, *the extrinsic evidence does not persuade me that Ms. Janzen lacked competence to serve as an interpreter.* It is apparent from the award that the Board felt comfortable making its findings of fact from the evidence it received through her translation. Moreover, the *affidavit evidence received is conflicting and does not establish obvious inadequacy in Ms. Janzen's efforts.* As a final observation on the point, I think one should be mindful of the reality, noted by Lamer C.J.C. at para. 62 in *Tran*, that "… Interpretation is an inherently human endeavour which often takes place in less than ideal circumstances". There is little doubt that the circumstances here, particularly given the lack of advance preparation by the parties, were less than ideal – but not necessarily inadequate.
>
> (Emphasis added)

[38] All things considered, the reviewing judge concluded the Employer had not been denied procedural fairness due to the Board's failure to insist on a formally qualified, Thai–English interpreter.

[39] Turning next to the question of the reasonableness of the *Award*, the reviewing judge identified *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], as the governing authority. He then considered, but rejected, the Employer's three lines of argument that the *Award* did not meet the hallmarks of reasonableness.

[40] The Employer firstly pointed to the insufficiency of the Board's reasons, notably its failure to reconcile the contradictory evidence of Anitshara and the Grievor. However, the reviewing judge rejected that argument for two reasons. He found that the allegation of "conflict in the evidence" was embedded in Mr. Duret's affidavit and in the cross-examination of Ms. Janzen. However, as he reiterated, the extrinsic evidence had been admitted solely for purposes of the procedural fairness argument and would not be considered on the merits. As this part of the extrinsic evidence did not fall within the *Saskatchewan (Workers' Compensation Board) v Gjerde*, 2016 SKCA 30, 395 DLR (4th) 331 [*Gjerde*], exceptions, the reviewing judge refused to consider it for purposes of resolving the alleged conflict.

[41] Further, as the reviewing judge observed, even if he did consider the "unaddressed contradictory testimony" (*Review Decision* at para 100), he was not persuaded that the Board had failed to identify a conflict in the evidence about violence or threatened violence against Anitshara. That body of evidence, he said, arose from the evidence of the Grievor and Alex, but the Board had rejected Alex's evidence on that point. Finally, even if there was a conflict in the evidence,

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the reviewing judge rejected the Employer’s submission that *College of Physicians and Surgeons of Saskatchewan v Shamsuzzaman*, 2011 SKCA 41, [2011] 8 WWR 1, stood for the proposition that the unexplained rejection of a witness’s conflicting testimony meets “the high threshold of unreasonableness” (*Review Decision* at para 103). *Shamsuzzaman*, as he correctly observed, was decided on other grounds.

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[42] Second, the reviewing judge also rejected the Employer’s argument that the Board had unreasonably ignored the full panoply of the Grievor’s alleged conduct prior to Pornthip being struck with the hatchet. As the reviewing judge noted, not only did the Employer fail to explain how the Board’s disregard of those (alleged) facts met the indicia of reasonableness, but he also found the Employer’s just cause argument missed the mark completely because its claim was confined to the events in the parking lot. On this point he wrote, “The Board had no responsibility to make disciplinary findings on conduct that did not form the essential basis of the Employer claim of just cause” (*Review Decision* at para 107).

[43] In the Employer’s third argument, it submitted that the Board had misinterpreted Article 8.01 of the CBA which requires parties to keep an open dialogue. The reviewing judge accepted that the wording of Article 8.01 may give rise to different interpretations, including the one suggested by the Employer. However, he wrote that “it is not unreasonable to conclude that the attitude reflected in Article 8.01 could also apply to the investigation of potentially disciplinable conduct” (at para 111). In the alternative, even if the Board had misinterpreted Article 8.01, the reviewing judge found that it would not have altered the outcome.

[44] Finally, on the issue of remedy, the reviewing judge described the Union’s submission as little more than a “bald assertion of unreasonableness” (at para 114). He remarked that, even if reinstatement would have been the *correct* thing to do in the circumstances, correctness was not the standard by which he was to assess the decision.

[45] In the end result, the reviewing judge dismissed both judicial review applications.

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V. STANDARD OF REVIEW AND THE GOVERNING FRAMEWORK

[46] The role of an appellate court sitting on appeal from a judicial review decision is to determine whether the reviewing judge selected the correct standard of review and correctly applied it to the decision under review: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559; *Dr. Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43, [2003] 1 SCR 226; and *Unifor Locals 1-S & 2-S v Saskatchewan Telecommunications*, 2023 SKCA 68 at para 33, 21 Admin LR (7th) 84. In practical terms, "this means that once the appellate court has identified the correct standard of review, it 'steps into the shoes' of the lower court, and applies that standard to the decision of the administrative tribunal" (*Akpan v The University of Saskatchewan Council*, 2021 SKCA 129 at para 16, 10 Admin LR (7th) 61 [*Akpan*]): see also *Sran v University of Saskatchewan (Academic Misconduct Appeal Board)*, 2024 SKCA 32 at para 26.

[47] When issues of procedural fairness are raised, correctness is often identified as the applicable standard of review, which, in this context, is understood to mean whether the procedure was fair or not. This approach was discussed in *Sran* as follows:

> [57] This Court has identified correctness as the applicable standard of review to issues of procedural fairness (*Akpan*; see also *Toutsaint v Investigation Committee of The Saskatchewan Registered Nurses' Association*, 2023 SKCA 11, 477 DLR (4th) 213; *Eagle's Nest Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20, 395 DLR (4th) 24; *Mission Institution v Khela*, 2014 SCC 24 at paras 79 and 89, [2014] 1 SCR 502). Accordingly, "[i]n substance, that means an appeal court must determine whether the procedure at issue was fair in the circumstances" (*Akpan* at para 20, citing *Kupsar* [2020 SKCA 142] at para 37). This characterization appears to make the question a binary one – whether the procedure was fair or not – which is "best reflected in the correctness standard", but "strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; see also *Constantinescu v Canada (Correctional Service)*, 2021 FC 229 at para 71). This squares with the content of the duty of procedural fairness as described by Barrington-Foote J.A. in *Akpan*, with reference to the *Baker* factors (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]): [paragraph 21 of *Akpan* omitted].

[48] Where a reviewing judge acts as a first instance decision-maker, the appellate standards of review are those set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]. This means that determinations of law are reviewed for correctness, while findings of fact and mixed fact and law, absent an extricable question of law, are subject to review on the palpable and overriding error standard: *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at

para 11 and 12, 462 DLR (4th) 585 [*Horrocks*], and *Gordillo v Canada (Attorney General)*, 2022 FCA 23 at para 59, 466 DLR (4th) 350.

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VI. ISSUES

[49] The Employer advances several grounds of appeal. In addition, although the Union did not appeal from the *Review Decision* or file a cross-appeal in the within matter, it nonetheless seeks to have the remedy set aside and for Nopphon to be reinstated to his prior position.

[50] In my view, this appeal is resolved by answering the following questions:

(a) Did the reviewing judge err in finding there was no breach of procedural fairness?

(b) Did the reviewing judge err by failing to conclude the *Award* was unreasonable within the meaning of *Vavilov*?

(c) Is the Union's request to set aside the remedy properly before this Court?

VII. ANALYSIS

A. The procedural fairness issue

1. The Employer's position on appeal

[51] The Employer asserts that the Board erred by allowing an unqualified, uncertified and untrained translator, who it also claimed was partial to the Grievor, to interpret the questions and answers given by key witnesses, including those of the Grievor. It points to many instances throughout the hearing where Ms. Janzen is said to have incorrectly translated testimony from English to Thai or was unable to provide a translation at all. Mr. Duret deposed that Anitshara stopped to correct Ms. Janzen's translation of her (Anitshara's) testimony on several occasions, which, as alleged by the Employer, resulted in Anitshara effectively translating a significant portion of her own testimony and written statement. The alleged poor quality of Ms. Janzen's translation, it says, put it at a disadvantage and prejudiced its cross-examination of the Grievor, which collectively resulted in a breach of procedural fairness. It asks this Court to set aside the *Review Decision* and direct a rehearing of the grievance arbitration.

2. The law

[52] Historically speaking, a request for interpreter assistance was not granted on the mere invocation of a witness. It was a matter left to the discretion of the decision-maker, with the primary consideration being whether the *witness* possesses sufficient knowledge of the language used at the proceeding so as to understand and answer the questions put to them: see, for instance, *Ponomoroff v Ponomoroff*, [1925] 3 WWR 673 (Sask CA).

[53] However, the common law evolved over time with due regard to an accused's rights, particularly in criminal proceedings, and by the express statutory recognition under the *Canadian Bill of Rights*, SC 1960, c 44, for proceedings before federal administrative agencies. That right was eventually transformed into a constitutional guarantee with the coming into force of s. 14 of the *Charter*. It provides as follows:

> **Interpreter**
> **14** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

[54] *R v Tran*, [1994] 2 SCR 951 (WL) [*Tran*], was the first occasion on which the Supreme Court heard an appeal where the right to interpreter assistance under s. 14 was put in issue. That right, the Supreme Court said, serves several purposes, including "that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it … [W]hich is intimately related to our basic notions of justice, including the appearance of fairness" (at para 39). Consequently, this right, the Supreme Court said, "touches on the very integrity of the administration of *criminal justice* in this country" (emphasis added, at para 39).

[55] The elements or content of the standard for interpretation services established in *Tran* were helpfully summarized in the administrative law context in *Mohammadian v Canada (Citizenship and Immigration)*, [2000] 3 FC 371, 4 Imm LR (3d) 131, aff'd 2001 FCA 191, leave to appeal to SCC refused, [2002] 1 SCR viii [*Mohammadian*], as follows:

> [7] The elements of the constitutionally guaranteed standard are briefly described below:
>
> - in general terms, the standard of interpretation is high but not so high as perfection.
> - continuous: without breaks or interruptions, i.e., interpretation must be provided throughout the proceedings without any periods where interpretation is not available.

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- precise: the interpretation should reflect the evidence given without any improvement of form, grammar or any other embellishment.
- impartial: the interpreter should have no connection to parties or interest in the outcome.
- competent: the quality of the interpretation must be high enough to ensure that justice is done and seen to be done.
- contemporaneous: the interpretation must be available as the evidence is given, though not necessarily simultaneously.

[56] Succinctly put, this means that the content of the s. 14 right in proceedings, where the *Charter* applies, requires the interpretation to be continuous, precise, competent, impartial and contemporaneous: *Tran* at para 44.

[57] In advancing its proposition, I understand the Employer to argue that the analysis and reasoning developed by the Supreme Court in *Tran* in connection with the application of s. 14 of the *Charter* extends to grievance arbitrations between private entities: in this case, a private employer and a union. While *Tran* applied the s. 14 right in the context of criminal proceedings, I recognize that there are cases that have extrapolated that right to administrative proceedings. For example, in the context of an immigration proceeding before the Convention Refugee Determination Division of the Immigration and Refugee Board in *Mohammadian*, Pelletier J. (as he then was) wrote, "since the arbitration board was bound to apply principles of natural justice, section 14 applied" (at para 10). In reaching that conclusion, Pelletier J. relied on *Wyllie v Wyllie* (1987), 37 DLR (4th) 376 (BCSC), and *Roy v Hackett* (1987), 45 DLR (4th) 415 (WL) (Ont CA) [*Roy*], concluding, "The question as to whether section 14 applies to these proceedings is not controversial" (*Mohammadian* at para 10).

[58] Similar sentiments can be found in *Xhelilaj v Canada (Citizenship and Immigration)* (1997), 39 Imm LR (2d) 47 (WL) (FC); *Thambiah v Canada (Citizenship and Immigration)*, 2004 FC 15, 11 Admin LR (4th) 203 [*Thambiah*]; and *Francis v Canada (Citizenship and Immigration)*, 2012 FC 636, 412 FTR 99 [*Francis*]. Notably, however, all of those decisions involve a tribunal convened pursuant to federal legislation that also includes an express right to an interpreter: see also Donald J.M. Brown, et al., *Judicial Review of Administrative Action in Canada*, loose-leaf (Rel 2024-02) (Toronto: Thomson Reuters, 2023) at § 10:36 [*Judicial Review*]). It is also of consequence that, in the immigration context, there is a significant risk of jeopardy to the immigrant or refugee who is a party to the proceeding, indicating that, given the factors outlined in *Baker*, a high level of procedural fairness is required in such proceedings.

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[59] The *Roy* decision mentioned in *Mohammadian* is of particular interest for several reasons. This was an arbitration from the dismissal of an employee from the Royal Canadian Mint under a collective agreement and the *Canada Labour Code*, RSC 1970, c L-1. Although the arbitration board was French-speaking, the employer called English-speaking witnesses: to which, the union demanded simultaneous translation. The employer did not object but was allowed to cross-examine the credibility of the grievor's statement that she was not comfortable speaking in English. In the end, the arbitration board dismissed the employee's grievance.

[60] On appeal, the Ontario Divisional Court quashed the arbitration award for violating s. 14 of the *Charter*. On further appeal by the employer, the Ontario Court of Appeal reinstated the arbitrator's decision, holding that s. 14 applied to the employer and the arbitration process and that it must be interpreted broadly. One of the employer's arguments, which has resonance in these proceedings, was that, pursuant to s. 32 of the *Charter*, a witness in a labour arbitration, undertaken pursuant to a collective agreement, does not enjoy *Charter* protection. Section 32 of the *Charter* provides as follows:

> **Application of *Charter***
> **32**(1) This *Charter* applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[61] Of significance, the Court of Appeal in *Roy* agreed with the general proposition that the *Charter* does not apply to a private dispute between two non-government parties. However, as the employer in that case was an agent of the federal Crown, the Court reasoned that its actions were subject to *Charter* scrutiny.

[62] Setting aside the question of the applicability of the *Charter*, the Court of Appeal in *Roy* went on to note that, as an arbitration board is quasi-judicial in nature, it is subject to the rules of natural justice. After reviewing a number of authorities, the Court reasoned that, since the arbitration board must abide by the rules of natural justice, "it follows that s. 14 of the *Charter* applies to its proceedings" (at para 23). In my respectful view, this statement must be read with caution in light of the fact that the employer was the federal government to which the *Charter* applied and not a private entity as is the case before us.

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[63] The decision in *Mohammadian* was also informed by *Wyllie*. Although that decision concerned the question of reimbursement for interpretation services, the British Columbia Supreme Court took the position that under s. 14 of the *Charter* a litigant in a civil proceeding has the right to the assistance of an interpreter.

[64] In the matter at hand, the Employer relies on *Tran*, *Thambiah* and *Suri v Vahra*, 2019 BCSC 675, 58 Admin LR (6th) 274 [*Suri*], for the proposition that procedural fairness mandates that the full range of the *Tran* standard be applied, meaning that the interpretive services must be continuous, precise, competent and contemporaneous and that the interpreter be impartial and unbiased.

[65] I am not persuaded that *Thambiah* and *Suri* offer much support for the Employer's position. Not only are these decisions distinguishable on their facts, but I also do not find them persuasive nor are they binding on this Court. *Thambiah*, which relied exclusively on *Mohammadian*, held that s. 14 of the *Charter* applied to refugee proceedings before a federal board and tribunal. *Thambiah* simply followed the decision in *Mohammadian* (which had relied on *Roy*) without conducting any independent analysis. While the British Columbia Supreme Court's decision in *Suri* was more firmly rooted in a procedural fairness analysis and the *Baker* factors, Rule 6.7 of *Residential Tenancy Branch Rules of Procedure* expressly provided that a party may be assisted by an interpreter. The Court in *Suri* fleshed out the statutory right by holding it was incumbent on the arbitrator to ensure that the interpretation it relied on was accurate and "free from bias" (*Suri* at para 59). *Suri* did not mention *Tran* nor did it speak to s. 14 of the *Charter*.

[66] Here, the reviewing judge was alert to the distinction between the type of proceedings that were engaged in *Thambiah* and *Mohammadian* versus a consensual grievance arbitration process: see paragraphs 76–78 of the *Review Decision*. While noting that some arbitration decisions have gone so far as to extend the s. 14 *Charter* right (at least as far as payment for the cost of translation services is concerned), most have dealt with it as part of a grievor's right to procedural fairness. The point to be made here is that, in its judicial review application, the Employer failed to identify any case authority squarely on point for the proposition that the right under s. 14 of the *Charter* applies to private grievance arbitration proceedings. Neither has it done so on appeal. While it is fair to say that s. 14 has been employed in many administrative proceedings involving government entities to which the duty of fairness applies, it does not necessarily follow that the full extent of the *Tran* standard operates in the present context. This point was made by the authors in *Judicial Review*:

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§ 10:39. Generally

> …
> While it is clear that section 14 applies to many administrative proceedings to which the duty of fairness applies, it does not necessarily follow that each and every element of the right in criminal proceedings also applies in administrative proceedings. Thus, while a tribunal's decision may be set aside without the need for the applicant to demonstrate prejudice, a decision will be allowed to stand if the applicant failed to object at the hearing to the quality of the interpretation when it was reasonable to expect an objection to be made. As well, intervention will almost certainly be denied where the error was not material or where the applicant cannot point to evidence of interpretation problems.
>
> (Footnotes omitted)

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[67] I note as well that there is an open question as to whether the *Charter* applies to a voluntary, collective agreement process because of the wording of s. 32. This issue was not addressed by the Employer at the time of the review hearing nor explored on appeal. In that regard, I find the comments in *Roy* noteworthy insofar as the Ontario Court of Appeal seemed to accept the general proposition that s. 32 precluded *Charter* scrutiny in the case of "a private dispute between two non-government parties" (at para 13). However, given the lack of argument on this point, and the fact that the Employer's procedural fairness argument can be resolved on an alternate basis, this issue is best left for another day.

[68] Framed in the context of procedural fairness, there appears to be judicial acceptance that the right to interpretation services (where there is a demonstrated need) applies to grievance arbitration proceedings. As noted, the debate is on the content of that duty.

[69] There is also an unresolved issue about whether there exits a difference between a grievor's right to interpretation services and that of an employer. Before the reviewing judge, the Union had argued that the right to an interpreter in a labour arbitration context is generally thought of from the grievor's perspective. In contrast, it says, this case is about an employer's assertion that *its* right to a qualified interpreter – as an essential component of the Board's duty of procedural fairness – was breached and that the *Tran* standards spell out the full scope of that duty. In challenging the underlying premise of the Employer's argument, the Union points to the qualitative difference between the interests of the parties in the outcome of this labour arbitration and how Ms. Janzen's presence was to ensure that the *Grievor* was able to understand the proceedings and for the Board to understand his evidence. This meant, the Union argued, that the duty of procedural fairness owed to an employee is qualitatively different from that owed to an employer; accordingly, it says that, here, the Employer's use of the Grievor's right as a springboard to challenge the *Award* was disingenuous and must be rejected.

[70] The reviewing judge did not resolve whether the Union's asymmetrical right's argument had merit. He framed the matter as a question about the content of procedural fairness owed to the Employer as informed by a *Baker* analysis. Taking that approach, he concluded that the Employer was entitled to understand the testimony given by the witnesses and was "also entitled to a meaningful cross-examination" (*Review Decision* at para 85).

[71] Setting aside those issues, the question remains as to the content of the employer's right. With respect to the questions surrounding the abilities and competence of an interpreter in administrative proceedings, I find the commentary in *Judicial Review* helpful:

> **§ 10:39. Generally**
>
> …
>
> In addition, the interpreter must be competent. That is, she or he must be able to understand and be comprehensible to the person being assisted, as well as to the tribunal, and must provide a full and accurate translation of what is said by witnesses and other participants at the hearing. In sum, translation must be continuous, precise, competent, impartial, and contemporaneous, but it does not need to be perfect. As well, an interpreter must normally be independent and certified, although it has been held that it was not a breach of the duty of procedural fairness for a visa officer to use a member of the embassy staff as an interpreter, at least in the absence of a timely objection by the applicant, who bears the onus of asking for an interpreter, or of evidence of incompetence. In that regard, when a "spot audit" of the interpretation is ordered, the applicant must be given an opportunity to make submissions as to its conclusions.
>
> (Footnotes omitted)

[72] In terms of the basic attributes of a qualified interpreter, the decision in *Suri* is also helpful. The British Columbia Supreme Court observed as follows about a qualified interpreter:

> [42] A qualified interpreter is one who has a level of proficiency in both languages such that the Arbitrator is satisfied that the person providing the interpretation is able to accurately convey the testimony of the witness into English. A qualified interpreter for the purposes of [a Residential Tenancy Branch] hearing does not have to be someone that is a certified interpreter.

Perfection is not the standard: "It is not enough to show that there were errors: there will always be errors. A translation mistake will translate into a procedural fairness error where an incorrect translation results in a decision or determinative finding that might have been different had the words been correctly translated" (*Francis* at para 6). Also see *Khatun v Canada (Citizenship & Immigration*), 2012 FC 159 at para 51, and *Yakoubi v Canada* 2019 FC 776 at para 14.

[73] Finally, the decision in *Suri* is also instructive for its description of the impartiality requirement:

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> [41] … An impartial interpreter is one that can provide interpretation free from bias, and without favouring either party. This does not mean that a relative or friend of a party is automatically excluded. There may be instances where the Arbitrator is able to satisfy him/herself that the person, despite not being at arm's length, will be able to provide interpretation free from bias.

3. Application of the law

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[74] The Employer's allegation of procedural unfairness hinged on the dual assertion that Ms. Janzen was not impartial and did not competently interpret the testimony of the witnesses at the arbitration hearing. The reviewing judge was not satisfied from the extrinsic evidence that Ms. Janzen had failed to meet the basic standards of proficiency and impartiality and, accordingly, found no breach of procedural fairness by the Board. As I will discuss, I see no error in the reviewing judge's bottom-line conclusion

[75] I begin my analysis with two broad observations.

[76] First, the obvious difficulty with the Employer's argument, which also confronted the reviewing judge, was that the evidence before the Board was not transcribed. The lack of a hearing transcript does not, on its own, constitute a breach of procedural fairness: "the absence of a transcript will not violate the rules of natural justice" (*Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 at para 81). Given that one aim of labour arbitration is to proceed to have a matter adjudicated by experts in the field in a manner that is expeditious, informal and cost-effective, such proceedings are very commonly not transcribed, and this statement should not be taken as a criticism of that practice: see *United Steel Workers, Local 7656 v Mosaic Potash Colonsay ULC*, 2015 CanLII 77883 (Sask LA) at para 28.

[77] That said, it stands to reason that the lack of a transcript self-evidently hindered the Employer from being able to establish a foundation for an argument, which largely hinged on the testimony of the witnesses.

[78] Second, the Board's silence on the Employer's translation concerns is also noteworthy. One would expect that if Ms. Janzen's alleged lack of proficiency was an issue before the Board (as suggested by the Employer), at a minimum, it would have addressed that issue in its reasons or have commented on any difficulties *it* had experienced, if indeed that was an issue at the hearing. This point was not lost on the reviewing judge, who surmised that the Board "felt comfortable

making its findings of fact from the evidence it received through her translation" (*Review Decision* at para 88). One possible inference that can be drawn from the Board's silence is that *it* had no difficulty understanding the translated evidence.

[79] As I noted above, in the absence of a transcript or commentary from the Board, the reviewing judge agreed to receive several affidavits from Mr. Duret, on behalf of the Employer, and an affidavit from Ms. MacFarlane and Ms. Janzen, on behalf of the Union. That was the *only* evidentiary foundation he had to assess the merits of the Employer's procedural fairness argument.

[80] The reviewing judge recognized that Ms. Janzen lacked formal translation credentials, but he was not satisfied by the material before him that she lacked the *competence* to serve as an interpreter. He gave two reasons for this conclusion. First, as noted above, "the Board felt comfortable making its findings of fact from the evidence it received through [Ms. Janzen's] translation" (at para 88). Second, he found the extrinsic evidence unhelpful because it was conflicting and, in any event, "does not establish obvious inadequacy in Ms. Janzen's efforts" (at para 88).

[81] Having reviewed the affidavits, I see no error in the reviewing judge's assessment of that evidence, and, therefore, there is no basis for appellate intervention.

[82] On the issue of competence, the reviewing judge identified how the evidence of Ms. MacFarlane's and Mr. Duret's differed:

(a) Mr. Duret had deposed that, in his opinion, "Ms. Janzen appeared to have trouble translating between English and Thai", especially when Anitshara testified (at para 46);

(b) "Ms. MacFarlane denied Mr. Duret's description of the difficulty Ms. Janzen had in translation, particularly in regard to Anitshara" (at para 49);

(c) Ms. McFarlane offered evidence that Ms. Janzen had previously "provided interpretation services for the [Saskatoon Police Service] and the Provincial Court of Saskatchewan" (at para 48), notably at Noppadone's plea hearing;

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(d) Ms. McFarlane "agreed that the Board was told that Ms. Janzen was familiar with the Grievor and Pornthip", but she deposed that "there was no suggestion that they were close friends" (at para 47);

(e) "Ms. MacFarlane said she had worked with interpreters in the past and that Ms. Janzen's service in this regard was 'unremarkable' in comparison to what she had previously observed" (at para 49); and

(f) Ms. Janzen's affidavit (which touched on her previous experience) "was not inconsistent with Ms. MacFarlane's" (at para 50).

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[83] As to the Employer's argument that Ms. Janzen was biased, I agree that the reviewing judge did not explore this proposition beyond stating, as noted above, "although [Ms. MacFarlane] agreed that the Board was told that Ms. Janzen was familiar with the Grievor and Pornthip, she said there was no suggestion that they were close friends" (at para 47). Under the Employer's cross-examination of Ms. Janzen on her affidavit, it pressed her about that relationship. As demonstrated from the following passages of that cross-examination, Ms. Janzen was consistent in her responses:

> Q. And the Saskatoon Thai-speaking community includes Noppadone, Nopphon, Pornthip, and Anitshara, correct?
> A. Correct.
>
> Q. And Alex Ordonez, correct?
> A. I don't really know him. I just heard from the hearing that he's there. But I think he's not even Thai.
>
> Q. Okay.
> A. And Nopphon, that's -- the first time is when I went to the hearing, that's the first time I ever met him. But I met Pornthip, Noppadone -- oh, sorry, Pornthip, Noppadone, and Anitshara before.
>
> Q. Okay. So when did you first meet Pornthip?
> A. I'm not sure. We always -- like, before the COVID hit, we always have Thai New Year in April, and we always, like , have a -- a party, Thai party going on. And I believe that's when I met her.
>
> …
>
> Q. Would it be fair to say that you knew Pornthip for at least a few years before the Arbitration Hearing took place?
> A. I know who she is, but I don't personally know-know her.
>
> …
>
> Q. And how many times would you see Pornthip in a year, approximately?
> A. One time.

Q. One time a year at the Thai New Years?
A. Thai New Years, probably say hi and not really -- like, I don't really talk to her. That's a tradition -- Thai thing. Like, you just greet.

…

Q. And you said that you had never met Nopphon prior to the arbitration?
A. Yes.

…

Q. So the first time you met Nopphon was in the actual hearing --
A. Yeah

…

Q. You were aware of Nopphon, as a member of the Thai-speaking Saskatoon community, though, correct?
A. I never met him before. Maybe he went to, like, the Thai New Year and stuff, but I never actually, like, pay attention and see him or talk to him before until of here -- the hearing.

…

Q. Okay. Do you remember saying, during the hearing, that you were a close family friend of Nopphon and Pornthip?
A. No. I don't recall that. I didn't say that.

Q. You had a friendly relationship with these individuals, though, correct?
A. No. I'm not, like , close friend with Nopphon or his wife.

Q. So you're not a close friend, but you had a friendly relationship, correct?
A. I can't really say a friendly relationship because our Thai community is so small, and it's just, like, I know who Pornthip is, but not -- not a friend. If I -- like, I know who she is.

…

Q. And during the hearing, you described yourself as a close family friend of Nopphon and Pornthip, correct?
A. No.

[84] I do not take the Employer to argue that the reviewing judge erred in finding points of conflict in the evidence. Rather, its position seems to be that the reviewing judge erred by not preferring Mr. Duret's affidavit over those filed by the Union, how he weighed the evidence, and how he interpreted Ms. Janzen's testimony. In short, this is a disagreement with the reviewing judge's findings of fact as opposed to a review of the findings made by an administrative decision-maker. In practical terms, it means that the Employer's procedural fairness arguments can only have traction if this Court were to review the affidavits afresh in the hope we would assess that body of evidence differently.

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[85] This argument invites consideration of the standard of review. As expressed above, the role of an appellate court, sitting in appeal from a judicial review decision, is to determine whether the reviewing judge selected the proper standard of review and correctly applied that standard to the matter at hand. However, for the reviewing judge to address the procedural fairness argument, he had to make findings of fact from the extrinsic evidence that he admitted. In so doing, he acted as a first instance fact-finder and decision-maker. This unique circumstance invokes a different standard of review. Where questions of fact are raised in the context of a first-instance decision made by a reviewing judge, the standards expressed in *Housen* apply: see *Horrocks* at para 12 and *Syncrude Canada Ltd. v Canada (Attorney General)*, 2016 FCA 160 at para 29, 398 DLR (4th) 91. This approach is also canvassed by Donald J.M. Brown, *Civil Appeals*, loose-leaf (Rel 2024-02) (Toronto: Thomson Reuters Canada, 2023), as follows:

> **§ 14:46. Exception: Reviewing Court Acting as a Court of First Instance**
> Where a reviewing court is acting as a court of first instance, as, for example, where it fashions a remedy, where there is an allegation of procedural unfairness and evidence beyond the record is required in order to determine what actually occurred, where the review is to be conducted *de novo*, where it addresses a question of the timeliness of the application for judicial review, or the application of discretionary considerations, and makes its own findings of fact, or other determination, as opposed to reviewing the findings of an administrative decision-maker, then the usual standards of appellate review apply, unless the reviewing court did not address the issue.
>
> (Footnotes omitted)

4. Conclusion on procedural fairness

[86] I am satisfied that, in applying the *Baker* factors, the reviewing judge properly addressed the content of procedural fairness in connection with the standards required for interpretation services. Further, having reviewed the admissible extrinsic evidence and the reviewing judge’s reasoning for his findings in that regard, I am also satisfied that those findings are not vitiated by palpable and overriding error. Consequently, the Employer’s argument cannot succeed.

B. Reasonableness of the *Award*

[87] Under this ground of appeal, the Employer asserts the reviewing judge’s reasonableness assessment was flawed in the following ways:

(a) the Board failed to address the contradictory testimony of the witnesses;

(b) the Board concluded there was no basis for discipline; and

(c) the Board erroneously interpreted Article 8.01 of the CBA.

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[88] The parties agree that the reviewing judge identified the proper standard of review. They disagree, however, on whether he correctly applied it in relation to those issues. As such, this Court must step into the shoes of the reviewing judge and conduct its own reasonableness review.

[89] In very summary form, a reasonableness review focuses on the decision-maker's reasoning process and the outcome of the decision (*P&H Milling Group v United Food and Commercial Workers Local 1400*, 2023 SKCA 14, 478 DLR (4th) 604):

> [8] At a high level, a reasonableness review … [D]etermines whether the decision in question is based on an internally coherent and rational chain of analysis that is defensible in relation to the relevant facts and the law. Conceptually, there are two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the decision-maker's reasoning process. The second is when the decision is untenable in some respect, given the relevant factual and legal constraints that bear on it. See, generally: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*].

[90] The Employer's arguments before the reviewing judge focussed on allegations of discrete factual errors committed by the Board and its failure to consider some of the pertinent evidence. In addressing those arguments, the reviewing judge quoted the following paragraph from *Vavilov* for guidance in assessing the Employer's submissions, which bears repeating here:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, [2018 SCC 31] at para. 55; see also *Khosa*, [2009 SCC 12] at para. 64; *Dr. Q*, at paras. 41–42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15–18; *Dr. Q*, at para. 38; *Dunsmuir*, [2008 SCC 9] at para. 53.

[91] Where a factual error is alleged, much like the reviewing judge, I find the following two paragraphs from *Premier Horticulture Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184*, 2020 SKQB 77, 54 CLRBR (3d) 1, provide a concise statement of the principles governing such matters:

> [49] The Employer advanced numerous distinct "errors" in support of its position and that the Board's decision was unreasonable. Unreasonableness is not a conclusion arrived at by my minute focus on details and parsing individual words or phrases of the language used. The reasonableness assessment is, to modify an old cliché, about the health of the forest, not the individual trees within the forest.

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> [50] In the words of the Supreme Court of Canada … [a] reasonableness review is not a "line-by-line treasure hunt for error" [*Vavilov*]. While the reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic, it is the overarching logic that the reviewer must focus on. Reasonableness reviews start with judicial restraint and respect for the distinct role the legislature has assigned to the labour relations boards. While in various respects there is a measure of logic and reason to the Employer's individual criticisms of the Board's decision, it is the overall reasonableness of the Board's decision that is the test, not whether there is some reason to the criticisms made.

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1. Conflicting evidence

[92] The Employer says that, in reaching its conclusion, the Board failed to resolve the contradictory evidence as to whether Nopphon had chased Anitshara with a hatchet in the context of the following chain of events:

(a) Nopphon and Pornthip had followed Anitshara in a vehicle after work to the point where Anitshara felt threatened;

(b) after Anitshara pulled into a parking lot, Nopphon's vehicle followed, presumably with the intent to initiate a confrontation;

(c) there was a hatchet in Nopphon and Pornthip's vehicle, and, at some point, he wielded it and exited his vehicle;

(d) Alex observed Nopphon "chasing Anitshara with another hatchet" (*Award* at para 15); and

(e) in the Board's view, Anitshara "provided no details about any incident with hatchets" (*Review Decision* at para 19).

[93] The Employer asserts that the Board's decision was unreasonable because the Board failed to resolve the contradictory evidence between the Grievor and that given by Alex and Anitshara. This is demonstrated, it says, from the Board's conclusion at paragraph 50 of its decision where it said as follows, repeated here for ease of reference (*Award*):

> 50. A review of the evidence brings this Board to the conclusion that had the Employer done a thorough investigation of the incident, it may very well have concluded, as this Board has, that it was more likely than not that the Grievor was acting in self-defence to protect his wife and himself after he observed her being struck a number of times in the head with a hatchet. *There is no evidence before this Board that the Grievor got out of the vehicle he was in with the hatchet until after he observed his wife being struck.*
>
> (Emphasis added)

[94] The Grievor testified that he had remained in his vehicle until he saw his wife being struck with a hatchet, which in turn prompted him to run to his wife's aid, albeit with a hatchet in hand. The *Award* does not specifically refer to testimony from the Grievor about him chasing Anitshara with a hatchet. In contrast, as the Board noted, in his statement, Alex had indicated that, as Noppadone was striking Pornthip in the head, the Grievor began chasing Anitshara with another hatchet.

[95] With respect, I see no failure to resolve any conflict between the version of events provided by the Grievor and that of Alex. While the Board did not expressly state that it rejected Alex's testimony, I am satisfied from reading the reasons as a whole that it found him not credible: "It must be remembered that [Alex] was a very close friend of Anitshara and Noppadone, a fact that appeared to be known by all witnesses testifying at the hearing. This friendship was described as being 'almost like family'" (*Award* at para 37). The Board also alluded to the fact that Alex had skin in the game as revealed by its observation that Alex "was one of the protagonists in the dispute in the parking lot, as by his own admission, he was wielding a bat and in some fashion hit the Grievor's vehicle with that bat" (at para 45).

[96] Credibility is a finding of fact. As *Vavilov* instructs, a reviewing court may assess and evaluate the evidence before it; however, "absent exceptional circumstances, a reviewing court will not interfere with [a decision-maker's] factual findings" (at para 125). The reviewing judge interpreted the Board's reasons, in relation to its credibility findings, in the same way by saying this (*Review Decision*):

> [102] The circumstances here are notably different from those in *Shamsuzzaman*. First, in the present case, the Board expressly noted only one conflict in the testimony about any violence or threatened violence against Anitshara. That conflict was between the testimonies of the Grievor and [Alex]. Unlike the situation in *Shamsuzzaman*, the Board clearly stated its reasons for rejecting [Alex's] evidence on this point. Because it did not find any conflict between Anitshara's testimony and that of the Griever, it did not have to address its reasons for rejecting one testimony over the other.

[97] I am satisfied that the Board provided cogent reasons for rejecting Alex's testimony and that the reviewing judge correctly interpreted the Board's conclusion in that regard. In any event, the Board's findings must be approached with deference, and the Employer's invitation for this Court to re-weigh and reassess them must be approached with caution.

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[98] That brings me to the Employer's allegation of an unresolved conflict between the evidence of Anitshara and the Grievor. Turning to her evidence at the arbitration hearing, the Board commented that "she makes no reference to the Grievor being out of the vehicle prior to Pornthip being struck with the hatchet", and, in connection with her November 26, 2018, written statement, it said, "Anitshara provided no details in regard to any incident with the hatchets" (*Award* at para 19). The Board went on to make the interesting observation that "the Employer made no effort to interview Anitshara even after her written statement appeared to make no reference to any physical altercation by anyone in the parking lot" (at para 38). Distilled to its essence, I take the Board to have signalled that the Employer's version of events was undermined by the inadequacy of its investigation.

[99] Moreover, as the reviewing judge noted, the Employer's submission that Anitshara had given conflicting evidence to that of the Grievor was premised on parts of Mr. Duret's affidavit and portions of the cross-examination of Ms. Janzen, which he had ruled was not part of the record. That body of evidence, he said, is found in "the extrinsic affidavit evidence given by [Alex] and, to a lesser extent, on the cross-examination of Ms. Janzen on her affidavit" (*Review Decision* at para 99). As the reviewing judge was not satisfied that such evidence fell within the exceptions recognized in *Gjerde*, he declined to admit it, concluding as follows: "the Employer largely relies on evidence that is not part of the record. … I am satisfied that such evidence does not fall within any of the exceptions recognized" (at para 99). As I discuss below, I see no error in his admissibility ruling.

[100] *Vavilov* provides that the outcome is a crucial consideration in the reasoning process and that perfection in the reasons is not required. There was no evidence that the Board failed to consider any of the controverted evidence; it simply did not agree with the Employer's preferred version of events. Given the Board's factual findings – which *Vavilov* instructs should not be interfered with lightly – and how the *Review Decision* dealt with the Employer's allegation of conflicting evidence, I am satisfied that the reviewing judge did not err in determining that the Board's decision met the *Vavilov* hallmarks of justification, transparency and intelligibility.

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2. No basis for discipline

[101] The Employer submits the Board's determination that the Grievor was not culpable and was simply acting in self-defence was unreasonable in the following ways:

(a) the Board's conclusion was tainted by a breach of procedural fairness;

(b) the Board failed to resolve conflicting testimony; and

(c) the Board entirely ignored the sequence of events that provoked the attack on Pornthip.

These arguments must be rejected.

[102] First, as I discussed above, there was no breach of procedural fairness.

[103] Second, the Board found the Employer's investigation was deficient and (implicitly at least) that it could not make any findings about what had transpired up to the events that occurred in the parking lot. This distinction was important because, as the reviewing judge noted, "[a]lthough evidence of the earlier events provided narrative, there is nothing in the record to suggest that they formed part of the Employer's claim" (*Review Decision* at para 107). Based on this logic, he reasoned, "the Board had no responsibility to make disciplinary findings on conduct that did not form the essential basis of the Employer claim of just cause" (at para 107). Not only is the Employer asking this Court to examine the full panoply of events afresh, but it has failed to make a meaningful argument about how the Board's decision on this point was unreasonable.

[104] Third, contrary to the Employer's assertion, the Board did *not* find that Nopphon had acted in self-defence. It only noted that it was "quite *conceivable* that the Grievor was acting in self-defence *of his wife* who was being struck on the head with a hatchet" (emphasis added, *Award* at para 48). Moreover, the Board did not accept the facts as alleged by the Employer, which it says led up to the assault on Pornthip, chalking it up to the Employer's failure to conduct "reasonably vigilant investigations" (at para 47).

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3. Article 8.01 of the CBA

[105] The Board also found the Employer's failure to interview the Grievor was at odds with Article 8.01 of the CBA, which it construed as imposing an obligation on the Employer to involve the Union in "mutual problem-solving". The Employer says this interpretation of Article 8.01 was flawed because the language of that provision, together with its placement within the structure of the CBA, simply instructs the parties to keep an open dialogue on labour management issues generally but does not impose an obligation to mutually problem solve matters of discipline. It says the Board's interpretation was therefore unreasonable.

[106] Article 8.01, as quoted in the *Award*, reads as follows:

> 34. … Article 8.01 of the CBA states:
>
> > The Employer and the Union are committed to establishing and maintaining a workplace for Employees based on co-operation, mutual problem-solving, and respect for the individual.
>
> (Emphasis omitted)

[107] Applying *Vavilov* to the issue of contract interpretation, the reviewing judge found the phrases and words employed by Article 8.01 were broad and open-ended and, thus, merited a liberal interpretation. He acknowledged that Article 8.01 was susceptible to multiple interpretations, including both the one ascribed to it by the Board and the one proposed by the Employer. Given the looseness and ambiguity in the language, he found the Board's interpretation was not unreasonable. In any event, as he went on to note, if the Board's interpretation of Article 8.01 was unreasonable, it "would not alter the outcome" (*Review Decision* at para 112).

[108] I agree with and adopt the reasoning of the reviewing judge in relation to Article 8.01. The Board's decision can stand without the finding of a breach of Article 8.01.

4. The admissibility ruling

[109] As mentioned, the reviewing judge accepted extrinsic evidence from both sides for purposes of addressing the procedural fairness issue pertaining to "(1) the discussion that led the Board to permit Ms. Janzen to interpret testimony; and (2) whether Ms. Janzen struggled in the translation exercise" (*Review Decision* at para 40). However, he ruled that, with respect to "the extrinsic affidavit evidence [that] purports to revisit the merits of each party's case, either to question *or to enhance the factual findings made by the Board*, I am satisfied that such evidence

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cannot displace the testimony described in the record. … it must be disregarded" (emphasis added, at para 41).

[110] In its factum on appeal, the Employer cites the following case authorities for purposes of demonstrating legal error in the admissibility ruling: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 FTR 297; *Gjerde*; *Hartwig v Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 DLR (4th) 268; and *SELI Canada Inc. v Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, 336 DLR (4th) 577.

[111] In terms of admissibility, the reviewing judge correctly identified the general principle that, subject to limited exceptions, the evidentiary record on judicial review is restricted to that contained in the board or tribunal record. As he noted, pursuant to *Gjerde*, there are exceptions to that rule, of which one – procedural defects "not otherwise found in the record" (*Review Decision* at para 39) – was found to apply to the matter at hand. Accordingly, as I discussed above, he admitted the evidence for the limited purposes of addressing the following:

(a) the discussion that led to the Board permitting Ms. Janzen to interpret testimony; and

(b) whether she struggled in her capacity as a translator.

[112] The admissibility of an affidavit is a question of law, reviewable on the standard of correctness: see *Canada (Attorney General) v Iris Technologies Inc.*, 2021 FCA 223 at para 20, [2022] 4 CTC 147, and *Collins v Canada*, 2015 FCA 281 at paras 49 and 57, 480 NR 274. However, factual findings related to a determination of admissibility are entitled to deference.

[113] The Employer does not assert that the reviewing judge incorrectly identified the applicable test. Rather, it argues that the reviewing judge erred in the application of the *Gjerde* framework. With respect, I see no basis for appellate intervention.

[114] Paragraphs 14 to 18 of Mr. Duret's April 7, 2021, affidavit go directly to the evidence (as interpreted by him) and the merits of the matter before the Board. These paragraphs do not, in my view, fall within any recognized exception. As I read the affidavit, its intended purpose was to fill in blanks created by the absence of a transcript. Indeed, Mr. Duret himself acknowledges that it provides commentary on *some*, but not all of *the evidence*.

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[115] Moreover, as the Employer details in its factum, the purpose of those paragraphs was to inform the reviewing judge about what some of the witnesses had testified to at the hearing with a view to filling in the evidentiary blanks concerning why the Grievor's termination was justified (i.e., because he had chased Anitshara with a hatchet) and thus provide the necessary context and background. The reviewing judge saw it for what it was: an obvious, impermissible attempt by the Employer to backfill its position on judicial review by colouring and highlighting selective testimony. I too find it hard to see it in any other light.

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[116] The factual findings made by the reviewing judge related to his conclusion that the impugned evidence did not fall within one of the *Gjerde* exceptions are entitled to deference. As I see it, those findings disclose no palpable and overriding error. It follows that the reviewing judge did not make a reviewable error in disregarding portions of Mr. Duret's affidavit.

C. The Board remedy

[117] By way of remedy, the Board majority determined that "reinstatement would not be appropriate and that damages in lieu of reinstatement should be awarded" (*Award* at para 57). The dissenting member of the Board would have ordered that Nopphon be reinstated to his position. The Union's application for judicial review of the majority decision was dismissed by the reviewing judge.

[118] As canvassed above, while the Employer appealed from the reviewing judge's decision to dismiss its application, the Union did *not* bring an appeal nor did it cross-appeal on the remedy part of the decision. Nevertheless, as expressed in its factum, the Union seeks the following relief from this Court: "That this Honourable Court of Appeal substitute its own Remedy for that of the Chambers Judge, and the Arbitration Board, restoring the Grievor to his employment, as of the effective date of his termination".

[119] I am of the view that, because no appeal or cross-appeal was filed by the Union from the *Review Decision*, its argument in this regard is not properly before this Court. I therefore decline to consider it for that reason: see, generally, *Cypress (Regional Health Authority) v Service Employees' International Union-West*, 2016 SKCA 161, 294 CLRBR (2d) 1, leave to appeal to SCC refused, 2017 CanLII 32938. Neither do I accept the Union's argument that its claim for

appellate relief could somehow be piggybacked onto the Employer's notice of appeal. The notice of appeal does not contemplate or take issue with the Board or the reviewing judge's decision respecting remedy. The Employer's grounds of appeal are limited to issues of procedural fairness, the determination that the Grievor was acting in self-defence or that his actions did not warrant discipline (or both), and whether Article 8.01 of the CBA was breached. As such, I need not decide the question of whether this Court could address the Union's request for reinstatement of employment had the Employer raised that issue on appeal.

[120] Moreover, even if this issue had been properly before this Court, for the reasons expressed by the reviewing judge, I am not persuaded that the remedy was unreasonable.

VIII. CONCLUSION

[121] The appeal is dismissed with costs to the Union fixed at $3,000.

"Schwann J.A."
Schwann J.A.

I concur. "McCreary J.A."
McCreary J.A.

I concur. "Drennan J.A."
Drennan J.A.

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