KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 160**

Date: **2024 09 09**
File No.: KBG-RG-01429-2023
Judicial Centre: Regina

BETWEEN:

SASKENERGY INCORPORATED

PLAINTIFF

- and -

UNIFOR LOCAL 649

DEFENDANT

Counsel:

Jana M. Linner, K.C. and Jianna Rieder	for the plaintiff
Gary L. Bainbridge, K.C.	for the defendant

DECISION LAYH J.
SEPTEMBER 9, 2024

BACKGROUND AND DISALLOWANCE OF AFFIDAVITS

[1] In this judicial review initiated by SaskEnergy Incorporated [SaskEnergy], I previously released a decision, (*SaskEnergy Incorporated v Unifor Local 649*, 2024 SKKB 96 [*SaskEnergy Decision*]) disallowing, as part of the record, affidavits sworn by SaskEnergy employees who attended the arbitration hearing before Arbitrator Dennis P. Ball, K.C. [Arbitrator]. These affiants attempted to augment testimony before the Arbitrator that they believed the Arbitrator either did not consider or misapprehended in his decision of December 12, 2022, 2022 CanLII 126109 (Sask LA) [*Decision*].

[2] After my *SaskEnergy Decision* disallowing the impugned affidavits, I allowed SaskEnergy time to reflect whether it wished to continue its application for judicial review. SaskEnergy has since stated its intention to proceed based on the record before the court as provided by the Arbitrator. Accordingly, the record before me includes the *Decision*, the exhibits before the Arbitrator and the written argument at the arbitration.

THE NATURE OF THE GRIEVANCES

[3] In his *Decision*, the Arbitrator found that SaskEnergy breached its unilaterally imposed Drug and Alcohol Policy [Policy] when, after an incident on July 17, 2019, it sent four employees for drug and alcohol testing and after a second incident on March 4, 2020, it sent a single employee for testing, all members of UNIFOR Local 649 [Union]. Each of the employees grieved the way SaskEnergy demanded drug and alcohol testing.

[4] What was not in issue at the grievance were the terms and conditions of the Policy, which was authored and unilaterally imposed by SaskEnergy, or whether the incidents that led to the drug and alcohol testing were "significant work-related incidents" as defined in the Policy. They were. What was in issue was the grievors' allegation that SaskEnergy had improperly applied the Policy.

[5] The Policy contemplates two circumstances in which SaskEnergy might impose testing. The first circumstance, which was not applicable in the grievance, arises when reasonable grounds suggest that the employees' action, appearance or conduct while on duty indicates use of alcohol or drugs. The second circumstance, which both the Union and SaskEnergy agree apply to the grievances, contemplate alcohol and drug tests when an employee is involved in a "significant work-related incident" or "high potential incident" and, as part of the complete investigation, requiring a test is "a reasonable line of inquiry for the investigation" and/or there are reasonable grounds to

believe that drug or alcohol use "may have been a contributing factor." The relevant "post-incident/accident" provisions of the Policy read as follows (page 12):

> **3. Post-Incident/Accident Testing for Employees in Safety-Sensitive Positions**
>
> a) As part of a complete investigation, testing for Unauthorized and/or Unlawful Substances will be required for Employees involved in a "significant work-related incident" or "high potential incident" (as defined below) where requiring a test is a reasonable line of enquiry for the investigation. In addition, management may, at its discretion, require a post-incident test after any other work-related incident or near miss as part of an investigation where there are reasonable grounds to believe that Unauthorized and/or Unlawful Substance use may have been a contributing factor.
>
> b) The following procedures will apply to all post-incident testing:
>
> (i) a "significant work-related incident" or "high potential incident" will include all incidents which resulted, or could have resulted in:
>
> …
>
> • any event that would be considered a "dangerous occurrence" under *The Occupational Health and Safety Regulations, 1996* or its successor legislation;
>
> …
>
> c) The reasons for a decision to conduct a test or not to conduct a test should be documented as part of the preliminary investigation as soon as reasonably practical after the incident;
>
> …
>
> g) Employees referred for a test will only be those who had a reasonable possibility of being involved in relation to the incident; …

[6] In the first incident, on July 17, 2019, four employees were assigned to connect a new natural gas pipeline to a house on an acreage near Baildon, Saskatchewan southeast of Moose Jaw, Saskatchewan. The assignment required excavation of a trench from the house to the existing buried gas line. The work crew consisted of Doug Lansdell, the crew lead on-site supervisor who began employment with SaskEnergy in 2001; Tyler Thauberger, the welder who began employment with SaskEnergy in 2013; Ryan Manz, the operator of the hydrovac machine who began employment with

SaskEnergy in 2014; and Tyler Malinowski, the operator of the trencher machine who began employment with SaskEnergy in 2016.

[7] The employees were to install a natural gas pipe approximately 170 metres in length. Manz operated the hydrovac unit, which excavates ("daylights") any underground lines by using a high-pressure water spray around the areas of buried lines to soften the soil and then, using a vacuum device, to remove the resultant slurry.

[8] Malinowski operated a chain trencher machine, a tractor unit with a boom to dig a trench (six inches in width) approximately five to six feet deep for laying the new natural gas pipe from the gas tie-in area to the house. Thauberger was assigned to weld together the pipe once it was laid. Lansdell was assigned as the crew lead. He directed the work.

[9] Six days before the crew began its work, SaskEnergy sent two other employees, Jarret Fisher and Andre Desmarais to the site to mark the location of the existing buried gas line to which the newly installed gas line would be connected. When Fisher and Desmarais arrived, they found yellow SaskEnergy pin flag markers already placed at the location approximately 170 metres from the house. Additionally, they placed stakes to show where the trench for the new line would be dug from the house to the tie-in point with the buried, existing line.

[10] As well, a SaskEnergy "expediter" had visited the site in advance to prepare a plan drawing showing the gas line locations. The expediter, using white paint, marked the tie-in point for the gas line in the same location as the yellow SaskEnergy pin flag markers.

[11] SaskEnergy retained a third-party contractor, Shermco, to locate buried telephone and electrical lines. Shermco employees attended the site in advance and, using orange pin flags and paint, marked the location of a buried SaskTel line.

Shermco's locate markers for this line were placed close to, or along the same line as, SaskEnergy's markers for the buried gas line – an unusual situation that raised doubts about whether the staking of the SaskTel line and/or the SaskEnergy gas line was reliable.

[12] For that reason, a day or two before the work was scheduled to begin, Lansdell used a SaskEnergy program called "1st Call" to contact yet another SaskEnergy employee, Gary Mehls, to travel to the site and confirm the location of the buried SaskEnergy line. Mehls told Lansdell that he would do so.

[13] Even though SaskEnergy employees had already attended the site three times to locate the buried gas line, the proximity of the orange SaskTel flag markers left Lansdell concerned about the reliability of the SaskEnergy line locates. He called Shermco and was assured that their markers were correct.

[14] On the date of the incident, following a tailgate meeting, Malinowski began trenching along the staked line, beginning at the house, and moving towards the natural gas tie-in. Manz was hydrovacing and exposing the underground lines. While Manz was able to daylight the telephone cable, the natural gas line, apparently located close to the telephone line, could not be found. He advised Lansdell that he could not find the natural gas line.

[15] Lansdell went to the neighbouring property where he connected a transmitter to the natural gas service line. Connecting a transmitter allows the employee to use a locating tool to search for the signal. Lansdell connected the transmitter and returned to where Manz was hydrovacing. Lansdell began to sweep the area with his locator, looking for a signal from the connected line from next door.

[16] By then, Malinowski had trenched approximately 130 to 140 metres away from the house towards the anticipated natural gas tie-in, about 35 metres short of the expected run length. He smelled natural gas. Lansdell told him to stop working.

[17] The line that Malinowski had trenched was approximately 35 metres away from where the locates conducted by all the previous SaskEnergy employees said it was supposed to be. Lansdell immediately contacted Armand Claude, the Superintendent of Construction South. Claude, along with Messrs. Kotylak, Stoudt and Davies, called back via speakerphone. Lansdell explained what had happened, and that the line was well outside of where everyone marked the line to be. While Lansdell had planned to pinch off the line and repair it, he was told to stop working. Claude testified that in his opinion Lansdell "was very agreeable and good about it and told me the truth."

[18] Claude, Stoudt, Davies and Kotytlak testified at the hearing. After speaking to Lansdell and hearing his description of what had happened, none of them had reason to suspect he and any of the crew might have been under the influence of alcohol or drugs. They did not ask if any of the crew had been acting abnormally. Nor did they speak to any of the other crew members, even though all of them were readily available to the phone.

[19] Lansdell was told that he, Thauberger, Malinowski and Manz were to take a drug and alcohol test and to wait at the site for a manager to arrive to take them for drug testing. When Lansdell asked why, he was told that he "should have known better" than to trench without proper daylighting. The employees were instructed not to do any further work. Lansdell was told a new crew was being assigned to repair the line.

[20] At the hearing, Claude, Stoudt, Davies and Kotylak all testified that the decision to require testing was made because the four employees "were part of the crew" and because they had enough knowledge, especially to know trenching should not have started before the gas line was exposed. They also accepted that the tests had been

ordered to eliminate drugs or alcohol as a possible factor in the accident. However, in a typewritten memo based on notes made by Claude and Stoudt, the managers' summary did not contain any reference to requiring testing to eliminate drugs or alcohol as a possible factor in the accident.

[21] A manager, Craig Noble, picked up the four men and took them to Moose Jaw for testing. A fifth employee who was present and working with the crew, Brent Labrash, was not required to take a test, even though he was working on the crew when the line was hit. The managers decided that he was too new and inexperienced to have known better.

[22] Thauberger was some distance away from the site of the gas line hit and only arrived minutes before the gas line was hit. Knowing that under the Policy they faced discipline up to and including dismissal if they refused to submit to the testing, the four employees complied. All four employees tested negative. None was disciplined because of the accident.

[23] After the testing was completed, Noble transported the men back to the jobsite. They arrived in the late afternoon. Lansdell asked Claude if they should finish the job. Claude said they should. They worked until 8:30 p.m. or 9:00 p.m. to complete the gas service tie-ins.

[24] The Union filed grievances on behalf of Lansdell, Manz, Malinowski, Thauberger and Cortney Mead. Lansdell's grievance read as follows:

> On July 17 2019, the grievor was sent for a drug and alcohol test without a thorough investigation. Management made the decision to send the grievor for a test after 3 phone calls with the crew lead (grievor). How can an investigation be thoroughly done over the phone? Unifor 649 believes that SaskEnergy violated their own policy and the right of the grievor by failing to thoroughly investigate the situation, with this failure, employees were subjected to drug and alcohol testing without just cause. Resolve is to compensate

> employees, and to ensure that SaskEnergy is in compliance with the drug and alcohol policy in the future.
>
> (Affidavit of Bree Kozakewich sworn November 9, 2023 [Kozakewich affidavit], Exhibit D)

[25] The second incident – unrelated to the first – occurred on March 4, 2020. Mead was part of a construction crew and was assigned a job on the Whitebear First Nation. Dan Pelly was crew lead. Mead, Nathan Bitz and Levi Milani were machine operators. Thauberger was the welder. As in the first incident, the crew was installing a residential natural gas service by tying into an existing line and laying a pipe. This job necessitated using a backhoe to create a "bell hole," an excavation beside and under the pipeline to permit access to and inspection of the pipeline for the new installation. Pelly directed Mead to use the backhoe to enlarge the hole to expose more of the natural gas main so Thauberger had more room to weld.

[26] Unknown to Mead, the pipeline he was excavating was no longer straight as the previous five to eight feet of exposed line were. Instead, it had moved 18 inches to the east, and approximately 18 inches closer to the surface. The tracer wire used to locate the line was straight, the plastic natural gas pipe was not, and the wire became separated from the pipe. Consequently, Mead struck the gas line with his backhoe. Gas began to escape until the workers pinched off the line.

[27] The hit was immediately reported to Pelly. He took pictures and sent them to Richard Davies, the Superintendent of Construction South. Davies asked if soil conditions or weather had been a factor in the hit. Pelly told him that "operator error" caused the hit.

[28] Davies told Pelly to stop working and that he would call back. When Davies called back, he told him that Mead would be taken for drug testing. No other crew member was taken for testing. Pelly waited with Mead until Davies arrived. Mead was taken to a neighbouring town for a drug (urinalysis) and alcohol (breathalyzer) test.

The results were negative. Mead returned to the site at 6:45 p.m. and resumed work. He received no disciple as the result of the line hit.

[29] Based on these events, the Union filed a grievance, which read as follows:

> On Wed. Mar. 4/20, the grievor was sent for a drug + alcohol screen after contacting an SEI gas line while operating a backhoe. The gas line that was contacted deviated approx. 450 mm off to the side, and 500 mm up from the 3m of straight pipe that was exposed already. After management investigated they determined that the operator was solely responsibility because he used mechanical means to excavate within 150 mm of a gas line. Unifor 649 belives that there was nothing reasonable that the grievor could have done to prevent the line hit, and should not have been sent for drug and alcohol testing. Unifor 649 believes this is a violation of the SEI Drug and Alcohol policy and is an unnecessary invasion of the employees privacy. Unifor 649 asks for the employee to receive compensation in line with existing case law, to be made whole.
>
> (Kozakewich affidavit, Exhibit F)

[30] Both grievances proceeded to arbitration.

SUMMARY OF THE ARBITRATOR'S *DECISION*

[31] In reaching his decision, the Arbitrator, at para. 9 of the *Decision*, laid out the analytical process he would follow. After summarizing the facts, he reviewed the relevant provisions of the Policy to decide whether SaskEnergy's demands complied with the Policy and then referred to "relevant arbitral jurisprudence" to decide whether the tests reasonably balanced safety concerns with the grievors' individual privacy interests.

[32] The Arbitrator, in paras. 73 to 83 of the *Decision* set out, in detail, the relevant provisions of the Policy; *The SaskEnergy Regulations*, RRS c S-35.1 Reg 1; relevant provisions of *The Occupational Health and Safety Regulations, 2020*, RRS c S-15.1 Reg 10; and SaskEnergy Construction, Operations and Maintenance Practices. The Arbitrator accepted that the two incidents were (as the Union and SaskEnergy had

accepted) "significant work-related incidents" or "high potential incidents" and that the five grievors were employed in "Safety-Sensitive Positions." The Arbitrator noted that the parties agreed that the "Post Incident/Accident Testing" provisions of the Policy applied to the grievors but the parties disagreed how those provisions should be interpreted and applied. The resolution of that question was the issue before the Arbitrator.

[33] In his analysis of this issue, the Arbitrator first turned, at para. 84 of the *Decision*, to the "arbitral jurisprudence" that has taken a "balancing of interests" approach to drug and alcohol testing. He described the two competing interests – that of the employer and that of the employee subjected to testing – as follows:

> 84. …On the one hand, management may require employees to submit to drug and alcohol testing to protect the legitimate safety concerns of everyone in the workplace. On the other, individual workers have a right to privacy and personal integrity. Those two interests must be balanced in a reasonable manner having regard to the facts of each case. The principle is easy to state but difficult to apply. One reason is that the test is not whether the employer's demand for testing was right, but whether it was reasonable. In any given set of circumstances, reasonable people may well disagree on what was reasonable.

[34] The Arbitrator then evaluated the reasonableness of SaskEnergy's demand for drug testing as permitted by the terms of the Policy in light of the Collective Agreement and with the law of arbitral jurisprudence.

[35] He first stated the Union's position: that SaskEnergy could not require any employee to submit to drug or alcohol testing without first inquiring into whether such tests might reasonably be necessary to rule out impairment as a potential cause of the accident.

[36] He then stated SaskEnergy's position: the grievors failed to comply with its safety policies and, in light of the grievors' experience and training, their aberrant

decision not to follow those rules made the drug and alcohol testing a reasonable line of inquiry and justified its decision to test.

[37] The Arbitrator then canvassed arbitral jurisprudence. He found that respecting post serious incidents, arbitration decisions have consistently held that there must be some form of investigation or "line of inquiry" to determine whether testing might reasonably be required to rule out impairment by drugs or alcohol as a contributing factor. He then referred to *Weyerhaeuser Co. v C.E.P., Local 447,* 2006 CarswellAlta 1859 (WL) (Alta Arb) [*Weyerhaeuser*], a decision cited by both parties, which the Arbitrator quoted extensively at para. 90 of the *Decision*. The Arbitrator looked to this decision to appreciate the elements that justified an employer's decision to conduct drug and alcohol testing: 1) the threshold level of the incident; 2) the degree of inquiry necessary before the decision to test is made; and 3) the necessary link between the incident and the employee's situation to justify testing.

[38] The Arbitrator then looked to *Weyerhaeuser Co. and CEP, Local 447 (Kelly), Re,* 2012 CarswellAlta 2068 (Alta Arb), a decision that stated a "balancing of interests" requires an employer to consider the impact of mandatory testing on an employee's right to privacy.

[39] With this jurisprudential backdrop, the Arbitrator addressed the first grievance. He quoted and disagreed with SaskEnergy's assessment of the grievors' behaviour as "inexcusable", "unreasonable", "abnormal", "illogical", "reckless", "inexplicable." (para. 98) The Arbitrator did not accept, as the arbitral jurisprudence required, "that any of the Grievors behaved in such an abnormal manner that it could have (or did) raised doubts about whether they might have been under the influence of alcohol or drugs." (para. 99) The Arbitrator then extensively reviewed the facts, as he found them, and concluded at para. 109:

> [109] I find that the evidence did not disclose any sort of behaviour on the part of any of the Grievors that might have raised reasonable concerns about their condition. Nor did any of the managers suggest they had any cause for such concern. Their investigation was confined to discussions with Lansdell. None of them spoke to, or asked to speak to, any of the other Grievors. Lansdell said nothing that might have given the managers any reason to believe alcohol or drugs might have been consumed by any of the four Grievors. None of them asked him if any of the Grievors had exhibited any unusual behaviour. None of them made an inquiry into the possibility of drug or alcohol consumption.

[40] The Arbitrator also noted that SaskEnergy did not consider the line strike to have been sufficiently egregious to warrant any discipline and its report to Occupational Health and Safety indicated that it had received a satisfactory explanation for why the accident had occurred. Respecting this first incident, the Arbitrator found five failings by SaskEnergy to abide by the Policy. He wrote:

> [111] I conclude that the Employer:
>
> - had no discernible reason to inquire into whether any of Lansdell, Manz, Malinowski, and Thauberger had consumed alcohol or drugs to fully understand why the accident had occurred;
>
> - did not have reasonable grounds to believe any of the Grievors had demonstrated such abnormal conduct or erratic behaviour that requiring them to submit to drug and alcohol tests was justified;
>
> - did not inquire into whether any of the Grievors had consumed alcohol or drugs;
>
> - did not in fact suspect that impairment by alcohol or drugs on the part of any of the Grievors might have been a factor in the gas line strike; and
>
> - did not give any consideration to whether, in the circumstances, transporting the four Grievors to another location for the purposes of submitting them to drug and alcohol tests would be a justified intrusion into their right to privacy and personal dignity.

[41] The Arbitrator found that SaskEnergy's management, without any suspicion that the employees might have consumed alcohol or drugs, ordered the test "as a deterrent to ensure they would be more cognizant of safety rules in the future." (para. 112) He noted, particularly, that all employees at the site were required to complete the test, regardless of their responsibility for the incident – another indication that the purpose of the test was to "prompt them to be more careful in the future." (para. 113)

[42] Respecting the second incident, again, management, Davies, did not speak to Mead, who was readily available to the phone, only to Pelly. And no questions were asked of Pelly, including whether Mead might possibly have consumed alcohol or drugs. Davies had no discernible reason to suspect Mead might have consumed alcohol. The Arbitrator noted that, contrary to the specific terms of the Policy, SaskEnergy did not produce a document explaining the reason for the decision to require Mead's test.

[43] The drug and alcohol test confirmed that Mead had no alcohol or drugs in his system. Nor did SaskEnergy impose any discipline arising out of the incident. SaskEneryg's report to Occupational Health and Safety stated that the gas line deviation that led to the strike was "sudden," and did not suggest that the accident was foreseeable.

[44] The Arbitrator reached essentially the same conclusions respecting SaskEnergy's shortcomings and failures that he reached respecting the first incident.

[45] The Arbitrator allowed the grievances and granted the following relief:

> • A Declaration that the Employer improperly required each Grievor to submit to drug and alcohol tests in circumstances that constituted an abuse of its Alcohol and Drug Policy and infringed upon each Grievor's right to privacy and personal dignity; and
>
> • A sum of damages payable to each Grievor, in the sum of $1,500.00 to Lansdell, Manz, Malinowsky and Thauberger, and $2,000.00 to Mead.

(Union's Brief of Law, para. 13(oo))

SASKENERGY'S GROUNDS FOR JUDICIAL REVIEW

[46] Frankly, I am less than certain of the specific grounds upon which SaskEnergy challenges the Arbitrator's *Decision*. In its originating application, SaskEnergy states its grounds for review in three and one-half pages, divided into three broad categories and sometimes subcategorized, as follows:

> **Grounds for Judicial Review**
>
> 17. The Applicant states that the Arbitration Decision contains several reviewable errors and brings this judicial review application on the following grounds:
>
> (a) In finding that SaskEnergy had breach the Drug and Alcohol Policy:
>
> (i) The Arbitrator erred in law and/or reached an unreasonable and untenable conclusion by failing to give effect to the express terms of the Drug and Alcohol Policy and in implementing an overly broad and unreasonable interpretation of the Drug and Alcohol Policy that is inconsistent with established arbitral jurisprudence and, in particular, established arbitral jurisprudence on the test for post-incident testing;
>
> (ii) the Arbitrator erred in mixed fact and law and/or reached an unreasonable and untenable conclusion by misdirecting himself to the central issue in question by erroneously focusing his analysis on justifying the conduct of the Grievors instead of determining whether the drug and alcohol tests were a reasonable line of inquiry in the circumstances. In particular, the Arbitrator failed to consider all relevant evidence, ignored relevant evidence, failed to provide reasons and/or provided inadequate and unreasonable reasons his reliance on the evidence of the Grievors' in comparison to the evidence of the Employer's witnesses and the information the Employer's witnesses gathered and relied on in their investigation in order to make their decision to send the Grievors' for drug and alcohol tests;
>
> (iii) The Arbitrator erred in law and exceeded his jurisdiction by failing to consider the evidence, ignoring relevant evidence, and/or failing to give reasonable deference and

effect to SaskEnergy's determination of its operational requirements and safety procedures, policies and workplace, which included the equipment that if there is any doubt as to the location of a buried gas line, the buried gas line must be daylighted before excavation begins, and the requirement that buried gas lines must be daylighted before soil is disturbed within 0.60 metres of the buried gas line;

(iv) the Arbitrator erred in mixed fact and law and/or reached an unreasonable and untenable conclusion by determining the Grievors' actions were reasonable and that their actions did not raise a reasonable concern about their condition in light of the evidence led by the parties at the arbitration hearing. In particular, in finding that the Grievors' actions were reasonable and did not raise a reasonable concern about their condition, the Arbitrator failed to consider all relevant evidence, ignored relevant evidence, fundamentally misapprehended evidence and/or made erroneous findings of fact on the basis of no evidence, failed to meaningfully consider central arguments raised by SaskEnergy, and failed to provide reasons and/or provided inadequate and unreasonable reasons explaining his conclusion and his reliance on the argument of the Union in comparison to the evidence of the Grievors, SaskEnergy's witnesses, and the arguments of SaskEnergy:

A. SaskEnergy provided evidence that Mr. Kotylak had been part of the telephone conversation with Mr. Davies and Mr. Pelly. The Union did not provide any evidence to the contrary, nor did the Union provide any argument to the contrary. The content and process of this telephone conversation was central to SaskEnergy's argument that it had properly investigated the incident leading to the Mead Grievance. The Arbitrator failed to provide reasons and/or provided inadequate and unreasonable reasons as to why he determined Mr. Kotylak had not been part of that telephone conversation and determined that Mr. Kotylak had not spoken to Mr. Pelly;

B. Each Grievor provided evidence that then were aware of and trained on the relevant workplace policies and safety rules, and that they knew they were breaching the relevant workplace policies and safety rules. The evidence of SaskEnergy's witnesses was that they found the Grievors' actions in breaching the relevant workplace policies and safety rules, in light of the

respective Grievors' knowledge and experience, to be unusual and raise concerns;

C. SaskEnergy provided evidence that the Crew Lead is an on-site supervisor whose job duties expressly include assisting in investigations. This was confirmed by the evidence of the Grievors. The evidence of the Union's witnesses and SaskEnergy's witnesses was that in both incidents, the Crow Leads spoke to the individuals involved in the incident, including the respective Grievors, and communicated the information to SaskEnergy;

D. The importance of the workplace policies and safety rules, and the role of the Crew Lead in supervising and assisting in investigations, was central to SaskEnergy's argument before the Arbitrator and formed the foundation upon which the decision to order the drug and alcohol tests were ultimately made;

E. The Arbitrator failed to provide reasons and/or provided inadequate and unreasonable reasons as to why he relied on the argument of the Union in determining that actions of the Grievors were reasonable and that their actions did not raise a reasonable concern about their condition, in light of the evidence of the Grievors, which was consistent with the evidence of SaskEnergy, particularly in that the Grievors knowingly breached workplace policies and safety procedures without a reasonable explanation.

(b) The errors of law, mixed fact and law, and unreasonable and untenable conclusions in the Arbitrator's decision affect not only the specific facts of the Grievances, but also the ability of SaskEnergy to interpret and apply the Drug and Alcohol Policy in future situations. The Applicant submits that the Arbitrator's interpretation of the Drug and Alcohol Policy, particularly in light of the Arbitrator's erroneous findings of fact, fundamental misapprehensions of evidence, and failure to meaningfully consider SaskEnergy's arguments results in an unreasonable application of the terms of the post-incident testing provisions of the Drug and Alcohol Policy in the present circumstances and creates doubt as to the application of these provisions in future cases involving significant-work-related incidents or hight potential incidents; and

(c) The Arbitrator erred in awarding damages, as well as damages in the manner that he did. To the contrary of the Arbitrator's award, the damages awarded as not reasonable and outside the

> range of reasonable damages awarded in the arbitral jurisprudence.

[47] These wide-ranging, ill-defined grounds of appeal do little to assist the court to conduct a focused judicial review.

[48] Furthermore, and as a preliminary concern, many of these wide-ranging grounds of appeal alleged by SaskEnergy suggest that the Arbitrator did not properly consider the entirety of the evidence that came before him. For example, SaskEnergy, in its "Grounds for Judicial Review," alleges that the Arbitrator:

> a) "failed to consider all relevant evidence, ignored relevant evidence" (para. 17(a)(ii));
>
> b) "exceeded his jurisdiction by failing to consider the evidence, ignoring relevant evidence" (para. 17(a)(iii));
>
> c) "failed to consider all relevant evidence, ignored relevant evidence, fundamentally misapprehended evidence and/or made erroneous findings of fact on the basis of no evidence" (para. 17(a)(iv));

[49] These grounds of review repeatedly suggest that the Arbitrator did not consider the evidence before him and that he mischaracterized the evidence he did consider. This criticism forms the basis of many of SaskEnergy's arguments. In its Brief of Law, SaskEnergy repeatedly looks to and specifically cites the Kozakewich affidavit to illustrate that the Arbitrator failed to consider or ignored relevant testimony. SaskEnergy repeatedly and specifically pinpoints paragraphs of, or exhibits to, the Kozakewich affidavit, the entirety of which I have disallowed as part of the record. Such pinpoints are found at footnotes 2, 6, 7, 8, 9, 10, 11, 13, 14, 17, 28, 19, 20, 28, 33, 35, 36, 27, 28, 29, 40, 47, 58, 51, 54, 55, 58, 69, 70, 71, 72, 80, 82, 83, 87, 90 and 104.

[50] Obviously, having disallowed the Kozakewich affidavit, SaskEnergy's reliance on these footnotes and the related statements in the Kozakewich affidavit are of no consequence. SaskEnergy's argument based on these footnotes is emasculated. Regrettably, though the court is left with the task of sorting out which arguments must necessarily fail (and which continue) because the evidentiary augmentation in the Kozakewich affidavit has been disallowed.

[51] Essentially, though, I agree with how the Union's counsel has framed the issue before me. In his Brief of Law, he succinctly states at para. 14:

> The issue before this Honourable Court is whether the learned Arbitrator's Award and/or reasons within the Award are unreasonable.

THE ISSUE

[52] Because both parties agree that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*] sets the standard of review as "reasonableness," the sole question is whether the Arbitrator's *Decision* withstands the court's scrutiny under the rules the Supreme Court of Canada set out in *Vavilov*'s test of reasonableness.

ANALYSIS

Vavilov and Resultant Principles to Apply to the Arbitrator's Decision

[53] *Vavilov* offers signposts of what constitutes a "reasonable" decision in administrative law, many dependent upon several exigencies that a reviewing court must consider. Both the Union and SaskEnergy have summarized several of these signposts, and, of these, I find that both the Union and SaskEnergy have similarly cited the most applicable ones. First, as stated, SaskEnergy at para. 25 of its Brief of Law, a decision will be unreasonable if, when read holistically:

> (i) it fails to reveal a rational chain of analysis;

> (ii) reveals an irrational chain of analysis; or
>
> (iii) when read in conjunction with the record, does not make it possible to understand the decision maker's reasoning on a critical point: *Vavilov* at para 103.

[54] The Union, citing the same paragraph from *Vavilov*, states the reviewing court's task as follows:

> Path of analysis (*Vavilov*, paragraphs 102-104): The reasons must show a connection or "path of analysis" between the evidence and the decision made, as opposed to immediately arriving at a conclusion after setting out the parties' submissions.
>
> (Union Brief of Law, para. 42(2))

[55] The parties agree on the court's task but disagree on the result the court should reach after applying this task.

[56] In reading *Vavilov*, I find particularly instructive the Supreme Court's sensitivity to the context of the administrative decision under scrutiny. Administrative decisions range widely, often wildly. Administrative decisions that affect, for example, the immigration rights of Canadians, that create a precedent widely affecting those who follow, that require statutory interpretation, that apply across the country – these decisions will require the reviewing court to adapt and sensitively apply the principles of reasonableness as set out in *Vavilov.* Here is what the Supreme Court said:

> [88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

> [89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context"…
>
> [90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.
>
> [case citations omitted] [Emphasis added]

[57] Accepting that reasonableness is the test, I inquire, as directed in *Vavilov*, "What is the 'legal and factual context' of the decision under review?" In this judicial review, the legal context does not involve interpreting a legislative provision. The Arbitrator was interpreting a unique drug and alcohol policy authored and implemented by a single Saskatchewan employee, SaskEnergy. The *Decision* identifies pitfalls that SaskEnergy must avoid when, in the future, it implements the Policy respecting its employees. The *Decision* will have some, but limited, precedential value to other drug and alcohol testing policies implemented by other employers.

[58] In the range of "complexity" of the decision – a consideration that *Vavilov* again requires addressing – measuring the way that an employer must oblige employees to produce a urine and breath sample is not a particularly difficult or complex analysis. Essentially, such a task requires a balancing of the privacy rights against the legitimate need for employers to ensure that employees are not working under the influence of drugs or alcohol.

[59] In the consideration of the "importance" of the decision under judicial review, one might, for example, consider the consequences of the Arbitrator's *Decision*. SaskEnergy faced two consequences arising from the *Decision*. First, it must adjust the procedure it undertakes before demanding a drug and alcohol test. Second, the *Decision* awarded damages.

[60] Respecting the first consequence, nothing in the *Decision* suggests that SaskEnergy's Policy is inherently flawed or needs modification. What the *Decision* requires is an internal administrative adjustment to accommodate the privacy rights of its employees. All SaskEnergy need do because of the *Decision* is to read para. 111 of the *Decision* (as previously quoted). There, what the Arbitrator found SaskEnergy did in error, is what SaskEnergy must do to rectify how it demands a drug and alcohol test. SaskEnergy was not disallowed drug and alcohol testing; it was told how to do drug and alcohol testing. Nothing in those directions should be particularly troubling to SaskEnergy. Phrased as direction, rather than error, before demanding a drug and alcohol test, SaskEnergy should: 1) have a "discernible reason to inquire" if an employee has consumed drugs or alcohol; 2) have reasonable grounds to believe that employees "had demonstrated such abnormal conduct or erratic behaviour that requiring them to submit to drug and alcohol tests was justified"; 3) "inquire into whether [the employees] had consumed alcohol or drugs"; 4) suspect that "impairment by alcohol or drugs…might have been a factor [in the incident]"; and 5) give some "consideration to whether, in the circumstances, transporting [an employee] to another location … to drug and alcohol tests would be a justified intrusion into their right to privacy and personal dignity." I fail to see how SaskEnergy can suggest that the *Decision* is important or significant (in a deleterious way) to its overall operations or, more particularly, to its ability to continue to conduct drug and alcohol testing. Indeed, the "importance" of the *Decision* might be seen to benefit SaskEnergy because it animates and enlivens the Policy with instruction and guidance.

[61] Respecting the importance of the second consequence of the *Decision* – the quantum of damages – compared to many other decisions that often come under judicial review, the quantum of damages the Arbitrator awarded is relatively minimal – unlike, for example, certain professional discipline decisions that commonly seek costs incidental to the hearing, such as the damages that Dr. Huerto challenged in *Huerto v College of Physicians and Surgeons of Saskatchewan*, 2005 SKQB 94, 263 Sask R 214 where he, an individual and not a large corporation, sought judicial review when he was ordered to pay $52,000.00 in costs incidental to the hearing. Little merit lies with SaskEnergy's argument on this point.

[62] Nor is anything in the Arbitrator's *Decision* "life-altering" (as described in *Vavilov*). In the range from "routine to life-altering," the *Decision* leans heavily to the routine. As described above, the *Decision* gives direction in the routine operation of an employer's administration of drug and alcohol testing. All the *Decision* requires is that SaskEnergy will have to fine-tune the implementation of its Policy. In the realm of administrative decisions, this *Decision* is not of profound consequence to SaskEnergy.

[63] *Vavilov* also requires the measure of reasonableness to be sensitive to the nature of the administrative decision maker. As stated in *Vavilov*, decision makers range from "specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers and more." (para. 88) The Arbitrator was assigned his role under the Collective Bargaining Agreement [CBA] between SaskEnergy and the Union. The CBA, in clause 32.06, sets out sequential steps in the event of a dispute, moving from taking up the dispute with the employee's immediate supervisor, then, if not resolved, to Human Resources to hold a hearing and render a written decision, then, if not resolved, to a hearing with the Vice-President and the Union and, finally, if not resolved, ultimately to arbitration.

[64] Among the terms of arbitration in clause 32.07 of the CBA one finds the following:

> **32.07 Arbitration**
>
> 1. The parties will meet within ten (10) working days from the date the notice to proceed to arbitration was received, to select an arbitrator.
> …
>
> 2. When the arbitrator has been selected, a meeting shall be arranged, to hear the evidence of both parties as soon as possible.
> …
> 6. The decision of the arbitrator shall be final and binding on all parties.
>
> 7. Each party shall be responsible for the cost of its witness(es).

[65] An arbitrator under a CBA holds a unique position in the realm of judicial review. Consider, for example, that the Arbitrator was not a statutorily created tribunal but by an arbitrator who the parties jointly chose; that the CBA states that the arbitrator's decision is "final and binding on all parties"; and that ss. 6-49(2) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 states that "The finding of an arbitrator…is final and conclusive…is binding on the parties…and is enforceable in the same manner as a board order made pursuant to this Part." Clearly, unlike other administrative decisions that are subject to judicial review because a statute specifically contemplates the possibility of appeal or judicial review, this situation is diametrically opposite: the parties affected (under the CBA) and the Saskatchewan Legislature have both stated an intention that in labour disputes an arbitrator's decision is final.

[66] Now, while I appreciate that both the CBA and *The Saskatchewan Employment Act* attempt to draw finality to an arbitrator's decision, judicial review is protected by s. 96 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK): legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 31, [2008] 1 SCR 190 [*Dunsmuir*]. However, such clear attempts to deprive courts from review are not without effect. As the Supreme

Court stated in *Vavilov* at para 24: “Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.”

[67] Jointly choosing your decision-maker under a collective bargaining agreement augurs against an exhaustive parsing of the arbitrator’s decision as SaskEnergy has done in its three and one-half page Grounds for Judicial Review and its extensive Brief of Law. Justice Jackson in *Art Hauser Centre Board Inc. v Canadian Union of Public Employees Local No. 882*, 2008 SKCA 121, 311 Sask R 272 [*Art Hauser Centre*] recognized the unique position and judicial deference owed to a consensually chosen arbitrator’s decision. She wrote:

> [23] … The decision to be reviewed is that of a labour arbitrator, chosen by the parties pursuant to a process established in a collective agreement. There is a long list of cases that could be cited in support of the proposition that consensual labour arbitrators are to be accorded a high degree of deference.

[68] In addition to having jointly chosen its decision maker, SaskEnergy faces a general judicial inclination to allow broad discretion to decisions of a labour arbitrator. Again, Justice Jackson in *Art Hauser Centre* identified and endorsed this inclination, first offering her understanding of this principle and then citing, with emphasis, a decision of the Supreme Court of Canada. She wrote:

> [23] …… In addition to the authorities cited earlier in these reasons, in the section pertaining to the standard of review, I need only quote the words of LeBel J. in *Toronto (City) v. C.U.P.E., Local 79* [2003 SCC 63, [2003] 3 S.C.R. 77]:
>
> > [68] This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and

> volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding"… [Emphasis added.]

[69] Here is yet another general principle of judicial review that applies to this situation. As found at para. 93 of *Vavilov*, a reviewing court should be sensitive to the expertise of the decision maker. At para. 93 the court stated that "judges should be attentive to…decision makers of specialized knowledge." The court expanded: even in the face of an outcome "that might be puzzling or counterintuitive on its face" this specialized knowledge may accord "with the purposes and practical realities of the relevant administrative regime." In this light, I accept, as the Union states, that the Arbitrator is a highly experienced and well-respected labour arbitrator and former judge in Saskatchewan. As stated at para. 93 of *Vavilov,* "This demonstrated experience and expertise may also explain why a given issue is treated in less detail." However, I have found that the *Decision* lacks no detail in its analysis.

[70] Finally, as *Vavilov* states, quoting *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, at para 54, [2013] 2 SCR 458, reasonableness review is not a "line-by-line treasure hunt for error." Instead, my task as a reviewing court, is "to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic…" (*Vavilov* at para 102). I find that SaskEnergy's argument rests on a line-by-line hunt for error and fails to focus on the Arbitrator's step-by-step analysis and how he focused on the ultimate issue: the appropriate implementation of the Policy.

[71] For example, in paras. 33 to 51 of its Brief of Law, SaskEnergy argues (often relying upon the disallowed Kozakewich affidavit) that the Arbitrator did not understand how egregiously the employees failed to follow SaskEnergy's established training and safety procedures. I see little consequence in this belaboured multi-page criticism. The Arbitrator accepted (as did SaskEnergy and the Union) that the two

incidents were, as defined in the Policy, "significant work- related incident[s]" or "high potential incident[s]". No party disputed that a significant and potentially dangerous incident had occurred. In my view, the take-away of the entire *Decision* was how SaskEnergy should have proceeded after the incident and in light of the circumstances of the incident.

[72] In this vein, if SaskEnergy believed that the employees' conduct was so "inexcusable," "unreasonable," and "reckless," but not explained by drug or alcohol impairment, no evidence suggests that the employees received any type of employment sanctions.

[73] In conclusion, these general principles gleaned from the above-cited case law, particularly *Vavilov*, make SaskEnergy's task of seeking judicial review – a burden that lies exclusively upon it – challenging for several reasons:

a) SaskEnergy's implementation of its drug and alcohol policy does not raise a highly complex issue (many employers have such policies and the Arbitrator specifically identified SaskEnergy's shortcomings in implementing its Policy).

b) The *Decision* is of primary importance to two parties – the Union and SaskEnergy – and of limited application or importance beyond the specific provisions of SaskEnergy's unique Policy. Using the terms of *Vavilov*, the *Decision* leans to "routine" and not "life-altering."

c) The "tribunal" was jointly chosen by the parties to the underlying dispute and subsequent hearing.

d) SaskEnergy agreed, as *The Saskatchewan Employment Act* directs, that the Arbitrator's *Decision* would be final.

e) The *Decision* should not be mined for error in a line-by-line critique; it should (and did) address the issue before it: did SaskEnergy implement the Policy with due regard to its employees' privacy rights?

[74] With these general principles in mind, I return to SaskEnergy's "Grounds for Judicial Review" and the arguments it has made in its Brief of Law.

SaskEnergy's Specific Grounds for Judicial Review

[75] Again, as previously stated, I face a difficult task in evaluating SaskEnergy's arguments when I have disallowed the Kozakewich affidavit upon which several of these arguments rely. Even though I disallowed the Kozakewich affidavit, SaskEnergy did not refine its originally filed Brief of Law (paras. 28-94), which, in 29 pages of "Reviewable Errors of the Arbitrator," it describes the Arbitrator's errors. In outline form, SaskEnergy states the errors as follows:

> i) The Arbitrator erred in mixed fact and law and/or reached an unreasonable and untenable conclusion by misdirecting himself to the central issue in question
>
> a. The Arbitrator erred by failing to consider the actual requirements for daylighting by SaskEnergy
>
> b. The Arbitrator erred by failing to consider whether the drug and alcohol tests were a reasonable line of inquiry in the circumstances and instead focused on whether there was a "discernible" reason for the tests
>
> c. The Arbitrator erred by failing to consider the role of the Crew Lead
>
> d. The Arbitrator's fundamental misapprehension of the evidence casts doubt on reasonableness of the entire Decision
>
> ii) The Arbitrator erred by failing to give effect to the express terms of the Drug and Alcohol Policy and in implementing an

overly broad interpretation that is inconsistent with established arbitral jurisprudence

a. Inconsistency with established arbitral jurisprudence, without justification, can render a decision unreasonable

b. The Decision is not consistent with established arbitral jurisprudence

iii) The Arbitrator erred in awarding damages that were not reasonable and were outside the range of reasonable damages in the arbitral jurisprudence

Did the Arbitrator Misdirect Himself to the Central Issue in Question?

[76] I will deal with SaskEnergy's arguments raised in (i) (a) – (d) above in a few general statements. First, in making these arguments, SaskEnergy frequently and squarely relies on the Kozakewich affidavit to prove how the Arbitrator misunderstood or did not consider the evidence, particularly how seriously the employees failed to observe SaskEnergy's safety policies. Evidence contrary to or supplementing evidence found in the *Decision* or the exhibits is not before this Court.

[77] Second, I agree with the Union when it states (at para. 67 of its Brief of Law) that the Arbitrator "asked exactly the appropriate question." The Union then offers its response to SaskEnergy's allegation that the Arbitrator misdirected himself to the central issue in question (at para. 68):

> 68. The Applicant [SaskEnergy] spends a great deal of time reviewing its Policy and the merits thereof, the circumstances of each incident, and how the Grievors did not follow proper "daylighting" procedure, as well as the implications of a gas line hit. But all of this misses the point. The question is not whether a gas line hit is a "significant incident" (it is, as the Respondent conceded at the arbitration hearing), nor whether its implications are serious (they are, which again was never disputed), nor whether the Applicant's Policy is meritorious (this was never disputed) nor even whether the Grievors, individually or collectively, had made an error (the Arbitrator did find that Lansdell and Manz, at least, had had a lapse in judgment). Workers make mistakes – sometimes serious ones – without impairment becoming a reasonable line of inquiry, and that was the finding of the Arbitrator.

> Whatever mistakes had been made, there was no reasonable suggestion on these facts that impairment was a cause, or potential cause, of them.

[78] This paragraph, in my view, is an accurate characterization of SaskEnergy's misdirected argument. Accepting the seriousness of the employees' error, the Arbitrator found that, under the factual circumstances of the incident, SaskEnergy had no discernible reason to inquire whether drugs or alcohol was involved, did not inquire whether any of the employees had consumed drugs or alcohol and did not suspect impairment by drugs or alcohol as part of the gas line strike. That was the issue and not the number of safety policies that the employees should have known about and failed to follow. In my view, it is not the Arbitrator who misdirected himself to the central issue in question; it is SaskEnergy which has misidentified the central issue – how, following a serious incident, SaskEnergy should have determined if drug and alcohol testing was a reasonable inquiry and, if so, how to proceed with due consideration of its employees' privacy rights.

Was the Decision Inconsistent With Established Arbitral Jurisprudence?

[79] This portion of SaskEnergy's Brief of Law begins by quoting paras. 155, 156 and 161 of *Weyerhaeuser*, drawing attention to the distinction between "reasonable cause testing" and "post-incident testing." In the *Decision*, the Arbitrator also quoted *Weyerhaeuser*, from paras. 155 to 162, inclusive, and for the same purpose. The Arbitrator emphasized in bold from *Weyerhaeuser* the distinction between the two types of incidents that might lead to drug and alcohol testing. I fail to see why SaskEnergy suggests the Arbitrator failed to inform himself of this distinction. SaskEnergy cites and quotes several arbitral decisions (*Teck Highland Valley Copper Partnership (THVCP) v United Steel Workers, Local 7619*, 2022 CanLII 87852 (BC Arb); *Vancouver Shipyards Co. Ltd. v CMAW, Local 506 Marine and Shipbuilders*, 2020 CanLII 75894 (BC Arb); *International Union of Operating Engineers, Local 793 v Mammoet Canada Eastern Ltd.*, [2019] OLRD No 3641 (QL) (Ont Arb)) to suggest that the Arbitrator

conflated the requirements for post-incident testing with reasonable cause testing. SaskEnergy argues that the Arbitrator only permitted testing if it had a reasonable basis to suspect the employees were impaired.

[80] At para. 85 of its Brief of Law, SaskEnergy cites several passages from the *Decision* to show that the Arbitrator erred by requiring SaskEnergy to have established reasons to believe that the employees were impaired by drugs or alcohol before testing could be ordered. SaskEnergy suggests that these quotations show that the Arbitrator's sole focus was whether there was "evidence of impairment" or a "reasonable basis to suspect the employee was impaired."

[81] SaskEnergy has oversimplified the Arbitrator's reasoning. Clearly, in a post-incident situation, if evidence of impairment is obvious, testing is easily justified. But absent any evidence of impairment, <u>together with</u> no other attempts to make reasonable inquiry, pushed SaskEnergy's testing beyond what arbitral decisions permit. Again, I agree with the Union's characterization of SaskEnergy's basic and underlying premise, as stated at para. 105 of the Union's Brief of Law:

> 105. Again, the gist of the Applicant's argument remains: "There was a significant incident, so we had the right to test." Everything else within its Brief is secondary to this underlying position.

[82] The Arbitrator was looking for evidence that SaskEnergy engaged in a "reasonable line of inquiry." The Arbitrator did not say that as a precondition for testing, SaskEnergy must have had evidence of employee impairment. Instead, at paras. 93 and 94, he posed two issues he had to address – the nature of the employees' link to the incident and the nature of the "reasonable line of inquiry" that an employer must undertake after a significant incident before demanding a test.

[83] Respecting the nature of the employee's link to the incident, he quoted Arbitrator Sims in *Weyerhaeuser* who wrote:

> 189. In my view, absent some statutory obligation to report on a broader basis, the investigation must lead to the conclusion not just that someone might have been impaired, but that the particular employee's role in the event might have been due to impairment. The "reasonable line of inquiry" conclusion thus needs to be employee specific.

[84] On this point, the Arbitrator found that SaskEnergy's demand for testing was not employee specific. Instead, all employees in the location of the first incident were sent for testing without appropriate inquiry as to their involvement or any consideration if the incident might have been due to impairment.

[85] Then the Arbitrator, seeking arbitral jurisprudence respecting the nature of the "reasonable line of inquiry" necessary before an employer demands a drug and alcohol test, again quoted Arbitrator Sims, who wrote:

> 206. In my view the policy should also say directly that, unless circumstances make it impossible, the investigation that precedes the decision and thus the conclusion that "testing represents a reasonable line of inquiry" should include obtaining the individual's account of the event. To exclude the individual without good reason seriously undermines the *bona fides* of the inquiry and the resulting decision. Even if that is not essential for a reasonable policy then, in my view, it is nonetheless essential for a reasonable application of that policy.
>
> 207. In each case here, the responsible managers concluded quite reasonably in the circumstances, that there was no real suspicion of impairment. In each case, the cause of the injury or damage was relatively obvious or would have been if the individuals involved had been spoken to had been asked what happened. In each case they would have been reminded that the safety committee had previously made a recommendation which, had it been acted upon, would have reduced the likelihood of the event happening.

[86] The Arbitrator did not misapply arbitral jurisprudence. As directed by the jurisprudence, he implemented its direction. His *Decision* shows that determining a reasonable line of inquiry is a multi-facet inquiry, dependent upon the circumstances of the incident. The Arbitrator found several reasons why SaskEnergy's line of inquiry fell short of the arbitral jurisprudence.

CONCLUSION

[87] I have closely read the *Decision* and find that it, read as a whole, is reasonable (as paraphrased in paras. 31 to 44 above). I find that the *Decision* bears the hallmarks of reasonableness – justification, transparency and intelligibility — and squarely sits within the relevant factual and legal constraints that came before the Arbitrator.

[88] I find that SaskEnergy's essential assertion is that the employees, having made a mistake they should have known better to avoid, were rightfully sent for drug and alcohol testing. Such is not the law. The Arbitrator's reasons for disallowing this position are well reasoned and easily meet the hallmarks of reasonableness as required by *Dunsmuir* and re-stated in *Vavilov*. The Arbitrator appropriately offered a cogent and logical explanation why he did not accept that after a significant incident caused by the experienced employees SaskEnergy could send them for testing to eliminate drugs and alcohol as a possible factor in the incident.

[89] Finally, respecting an award of damages, I referred to the case law provided by both the Union and SaskEnergy and the discretion that an arbitrator should be permitted in assessing damages. I find the damage award reasonable.

[90] Costs are awarded to the Union in the usual manner.

J.
D.H. LAYH