

KING'S BENCH FOR SASKATCHEWAN

Citation: 2025 SKKB 53

Date: 2025 04 01
File No.: KBG-RG-00764-2023
Judicial Centre: Regina

BETWEEN:

SASKATCHEWAN GOVERNMENT AND GENERAL
EMPLOYEES' UNION

APPLICANT

- and -

DAVID BRIAN LAPCHUK and
SASKATCHEWAN LABOUR RELATIONS BOARD and
GOVERNMENT OF SASKATCHEWAN

RESPONDENTS

Counsel:

Heather Robertson and Samuel Schonhoffer	for the applicant
Bob Hrycan	for the respondent, David Lapchuk
Rylan Bridge, Rachel Haack	for the respondent, Government of Saskatchewan
No one appearing	for the respondent, Saskatchewan Labour Relations Board

JUDGMENT
April 1, 2025

MEGAW J.

INTRODUCTION

[1] The applicant, Saskatchewan Government and General Employees' Union [SGEU], has filed an originating application for judicial review pursuant to Rule 3-49 of *The King's Bench Rules* seeking to set aside the following decisions of the

Saskatchewan Labour Relations Board in LRB File No. 263-16: *David B. Lapchuk v Saskatchewan Government and General Employees' Union*, 2022 CanLII 21656, and *Lapchuk v Saskatchewan Government and General Employees' Union*, 2023 CanLII 10988, as well as the Order of the Board dated February 17, 2023.

[2] The respondent, David Brian Lapchuk [Lapchuk], opposes the application in its entirety and requests that the application be summarily dismissed. However, his materials seek to have certain aspects of the damages awarded by the Saskatchewan Labour Relations Board [SLRB] revisited and increased in his favour.

[3] The respondent, Government of Saskatchewan [Government], opposes SGEU's application in its entirety and seeks to have it dismissed.

[4] The decisions of the SLRB are referred to as the *Liability Decision* (2022 CanLII 21656) and the *Remedy Decision* (2023 CanLII 10988). These decisions relate to events which had their genesis in a work incident involving Lapchuk on October 17, 2012, and continued ultimately through a grievance arbitration pursuant to the provisions of the collective agreement between SGEU and the Government and then to breach of the duty of the fair representation applications brought by Lapchuk against SGEU before the SLRB. The incident of October 17, 2012, led to the Government, employer, taking certain disciplinary action against Lapchuk. Ultimately the events of that date resulted in the Government terminating Lapchuk's employment.

[5] Lapchuk had originally requested that SGEU file grievances with respect to the following matters:

- (1) The Government's failure to remove a reprimand letter from his employment file; and
- (2) The Government's termination of his employment.

[6] The grievance with respect to the termination of Lapchuk's employment involved the filing of additional, inter-connected, grievances. These included the grievances with respect to improper discipline preceding the actual termination of his employment, and the failure to allow Lapchuk union representation at a discipline meeting. In addition, Lapchuk sought to grieve the failure by the Government to locate and return certain articles acquired by him to allow him to complete his work [accommodation grievance].

[7] SGEU declined to pursue a grievance with respect to the issue of the employer's failure to remove a reprimand letter from Lapchuk's file. This matter arose from a dated incident involving Lapchuk and is completely unconnected to the matters arising from the incident of October 17, 2012, or the ultimate termination of Lapchuk's employment.

[8] The improper discipline grievance and the failure to allow representation grievance were effectively subsumed in the termination of employment matter which the union agreed to pursue. It appears the accommodation grievance was lumped into the termination arbitration and proceeded along with the latter.

[9] The grievance filed with respect to the employment termination matters proceeded to the arbitration hearing before a single arbitrator in September and November 2015 and occupied a total of five days of hearing. The parties provided oral submissions to the arbitrator on January 22, 2016. Shortly thereafter SGEU applied to submit further medical evidence. That application was dismissed by the arbitrator. By decision dated August 31, 2016, the arbitrator dismissed the termination of employment grievance in its entirety. The record appears to disclose that the accommodation grievance was never dealt with in any substantive way through the grievance or during the arbitration hearing. The result of all of this was that Lapchuk's employment with the Government was finished and he was not entitled to any damages as a result of his

employer's actions and nothing resulted with respect to the accommodation grievance.

[10] Following the arbitration hearing and the dismissal of the grievances with respect to these matters, Lapchuk filed two applications before the SLRB seeking orders that the Union had failed in its duty to fairly represent him. The “reprimand letter” issue was identified by the SLRB as LRB 353-13. The “employment termination matter” with the subsumed parts was identified by the SLRB as LRB 263-16.

[11] Lapchuk’s application with respect to LRB 353-13 was summarily dismissed by the SLRB. This dismissal is found at paras. 146-149 of the *Liability Decision*. That issue is not part of the present judicial review application.

[12] The proceedings against SGEU with respect to the employment termination matter were commenced on November 25, 2016. Lapchuk alleged a failure by SGEU to complete its duty of fair representation with respect to the above issues. This matter proceeded to a hearing before the SLRB which consumed some 44 hearing days from the time it commenced on June 26, 2018, through to its conclusion on November 3, 2021. The SLRB rendered its decision on February 23, 2022, finding SGEU liable for breaches of its duty of fair representation on several grounds.

[13] The SLRB found SGEU had acted arbitrarily to Lapchuk by committing gross negligence in the conduct of the arbitration (paras. 155-156, 158 and 162-163 of the *Liability Decision*). The SLRB found SGEU had acted arbitrarily and in a discriminatory manner with respect to its pursuit of the accommodations grievance (paras. 151-154 of the *Liability Decision*). The SLRB found SGEU acted arbitrarily in not continuing to pursue an arbitration before a panel rather than a single arbitrator (para. 157). The SLRB found SGEU acted in an arbitrary manner and in bad faith in view of the length of time taken to have the arbitration move forward (paras. 165-168).

[14] Due to the lack of evidence tendered with respect to an appropriate

remedy in light of the liability findings, the matter then returned to the SLRB for a continuation of the hearing. This second hearing before the SLRB occurred over a further seven days in August, September, and October, 2022. A decision was then rendered by the SLRB on February 17, 2023 determining that the Union was required to pay damages to Lapchuk in the total amount of \$294,755.

[15] This entire process involving Lapchuk and the Union has now taken well in excess of a decade to work through some of the various legal proceedings which arose from the initiating incident back in October 2012. I use the phrase “some of the various legal proceedings” because there has been a relative plethora of matters commenced in the Court of King’s Bench, before the Human Rights Commission, before the Workers’ Compensation Board [WCB], and before the SLRB, in addition to the identified grievance procedure and the duty of fair representation issues with which this judgment is concerned. In the particular matter here under review there has been litigation between the parties for a period of time in excess of 8 years, culminating in a hearing that spanned a rather incredible total of 44 days.

[16] SGEU argues that the SLRB decision is fatally flawed in its entirety on two broad fronts. It says firstly that the *Liability Decision* is flawed because the SLRB, impermissibly, attempted to micro-analyze the work done, or not done, by SGEU in pursuit of the termination grievance. SGEU asserts that the decision provided by the SLRB in this regard is not reasonable on a number of fronts and must therefore be set aside in its entirety.

[17] SGEU then says that the SLRB fell into error in the *Remedy Decision* by failing to determine the fundamental question of causation of any damages which flowed from the finding(s) of liability. It seeks to have the entirety of the *Remedy Decision* set aside as a result of this error.

[18] The application for judicial review filed by SGEU sets forth the grounds

to challenge the two decisions of the SLRB. It cites almost 70 paragraphs in support of the grounds for attacking the SLRB's decisions. Issue is taken virtually with every aspect of the two decisions which have been rendered by the SLRB.

[19] This file has been a challenging file for Lapchuk, SGEU, and the individual members of SGEU who were assigned to work on the grievance file. The extent of these challenges was recognized and specifically commented upon by both the arbitrator and the SLRB. While the Court recognizes those challenges and difficulties, they do not alter the fundamental responsibilities of SGEU in its duty to provide fair representation. Neither do they alter the legal basis upon which damages may be determined following a finding of a failure to provide such fair representation.

[20] The SLRB's reasons with respect to liability actually include several distinct and separate decisions to ground responsibility with SGEU. Because each of these decisions may have some impact on the actual remedy to be provided, this judgment will determine the reasonableness of each individual decision on the issue of liability.

[21] In the result, I have determined the application for judicial review with respect to that portion of the *Liability Decision* which determined SGEU failed in its duty of fair representation by acting in an arbitrary way with respect to the presentation of the arbitration (the termination aspect) and the pursuit of the accommodation grievance must be dismissed. I determine the SLRB's decision in these regards were reasonable.

[22] I have then determined that the SLRB's decisions finding SGEU acted in an arbitrary manner, with respect to proceeding before a single arbitrator or an arbitrary and a bad faith manner with respect to the length of time it took to complete the arbitration proceedings must be set aside as these decisions are not reasonable.

[23] I have then further determined the decision with respect to remedy is not reasonable and must be set aside. While I have considered whether this Court or the SLRB should then make a remedy decision, I have reluctantly determined that aspect of the matter must be returned to the SLRB for their review and consideration, and ultimate decision. I say reluctantly because I recognize the length of time this litigation has been ongoing and that a return to the SLRB will necessarily involve further delay. However, these matters are to be determined by the SLRB and the Court should not usurp that function.

[24] The *Remedy Decision* includes reference by the SLRB to SGEU's discriminatory and bad faith actions. I do not comment upon those references in this judgment because the entirety of the remedy is being set aside. In addition, the finding with respect of SGEU's liability on the various fronts are to be found in the *Liability Decision*.

[25] Finally, I have determined that the SLRB decision dismissing the pursuit of the claim by SGEU against the Government is reasonable. As a result, the application of SGEU seeking review of this specific decision is dismissed.

[26] Lapchuk has been primarily successful in upholding the *Liability Decision* which grounded responsibility for what occurred with SGEU through the arbitration. However, SGEU has been successful in its challenge of certain aspects of the *Liability Decision* and the entirety of the remedy provided. While the upholding of the main liability finding is significant, so is the setting aside of the other aspects with respect to liability and the complete remedy. I am unable to determine that one is more important or significant than the other and view the parties' success as being mixed. As a result, I decline to exercise my discretion to order costs payable to either of the parties, SGEU or Lapchuk. The Government is not seeking an order for costs in this matter.

[27] My reasons follow.

BACKGROUND

[28] At the time of the initiating incidents giving rise to these proceedings, Lapchuk was employed by the Government, specifically with the Ministry of Highways and Infrastructure [MHI]. Prior to his employment with that department, he had been employed with the Government through the Apprenticeship and Trade Certification Commission. While at this earlier position, a letter of reprimand dated March 24, 2004 with respect to an incident involving Lapchuk had been placed on his employment file. At that time, a grievance was filed on that matter by SGEU. This resulted in the employer agreeing to remove the letter from Lapchuk's personnel file. In fact, the Government did not physically remove the letter from the file, and it remained on the file until April 1, 2011. Lapchuk requested SGEU initiate a grievance regarding the failure to remove the letter. SGEU declined to proceed further with this matter on the basis that the letter was ultimately removed and further that the Government's failure was merely an oversight from which no harm had ensued. Lapchuk disagreed that there had been no harm. This background forms the basis for Lapchuk's application to the SLRB in LRB 353-13.

[29] The more significant issue in these proceedings arises from events which occurred on October 17, 2012. On that day, Lapchuk was engaged in his employment duties travelling from Yorkton to Regina, Saskatchewan. He and his co-workers determined to stop in Fort Qu'Appelle, Saskatchewan for lunch. The vehicle in which Lapchuk was riding, an MVIS (Motor Vehicle Inspection Station), parked in a lot in the vicinity of the restaurant that the co-workers were going to attend. Once they were parked, a third party drove up to them in a car and demanded that they immediately move their vehicle. The third party indicated that the Government vehicle was impermissibly parked on land belonging to a First Nation.

[30] It is not in dispute that the confrontation between this individual and

Lapchuk deteriorated resulting in the two of them engaging in a heated verbal argument, and ultimately a physical altercation. Following that incident, Lapchuk was off work as a result of his assertion of having suffered physical injuries in the confrontation. He was away from work completely until May 2013, when he returned to partial duties. He resumed his full time responsibilities in July 2013, just shy of a year following the incident.

[31] When he returned to work, he discovered that certain office items which he required to allow him to perform his job duties were not in his office. Back in 2001, as a result of certain injuries he had suffered in a motor vehicle accident (or several motor vehicle accidents), he required ergonomic appliances in his office to permit him to complete his employment duties. These were purchased through Lapchuk and were therefore his personal property. Some of these items were apparently misplaced. The Government indicated that it was unable to find the file with respect to the ergonomic assessment and the accommodations which were to be made. It would appear some or all of these appliances were never recovered. This background forms the basis for the accommodations issue grievance and is part of the application in LRB 263-16.

[32] Prior to October 4, 2013, Lapchuk had received certain warnings regarding his use of email. The employer requested a meeting with him for October 4, 2013 to discuss this issue. Lapchuk indicated he did not have union representation for that meeting. Despite that, the meeting was held and Lapchuk was given a three-day suspension without pay for his violation of the email policy. This is also part of LRB 263-16.

[33] As well, at that October 4, 2013 meeting with the employer, Lapchuk was placed on a paid administrative leave pending completion of an investigation being conducted as a result of the activities which had taken place at Fort Qu'Appelle the previous year. The Government had some time earlier commissioned this investigation

of that incident, and Lapchuk's participation in it.

[34] The report of the investigation was received shortly after Lapchuk's suspension of October 4, 2013. Following review of the investigation report, on October 28, 2013, the Government advised Lapchuk by letter that it was dismissing him from his employment for cause effective immediately. That letter was in evidence before the SLRB where the following was stated:

[28] At the October 4, 2013 meeting, Lapchuk was also given a letter from MHI management indicating "Given the serious nature of your recent behaviour, you are being placed on Paid Administrative Leave pending an investigation" [Exhibit A22]. On October 28, 2013 he received a letter from the Government dismissing him for cause effective immediately ["Termination Letter"]. The Termination Letter indicated that a third party investigation report had concluded that Lapchuk was familiar with the expectations of him in a situation like that encountered during the Fort Qu'Appelle incident, however he did not comply with policy or use verbal techniques to de-escalate and manage the conflict situation with the standard of behaviour expected of a Highway Traffic Officer. It concluded:

The violations of professional standards and employer policies and procedures in the on-duty altercation which occurred on October 17, 2012, your reluctance to accept responsibility for your actions and tendency to deflect blame on others as well as, the disrespectful behaviour has harmed and compromised your credibility as a peace officer which also has had a detrimental impact on other Highway Traffic Officers working with you [Exhibit A23].

[Liability Decision at para 28]
[Footnotes omitted]
[Emphasis in original]

This, together with the earlier identified matters, form the basis for the SLRB file styled as LRB 263-16.

[35] As a member of the union, Lapchuk sought the assistance of SGEU in

grieving his dismissal from his employment. He also sought the assistance of SGEU in grieving the failure to remove the reprimand letter; the failure to permit a union representative to be present; the failure to provide the accommodation devices; and the imposition of the three day suspension with respect to email usage.

[36] Following an inability to resolve the employment issues informally as between SGEU and the Government (the initial steps of the collective agreement process), as per the usual procedure, SGEU considered whether to proceed with a formal arbitration with respect to any of the subject matters raised. The standard review process engaged in by SGEU involves an internal consideration of the matters in issue by a grievance committee within SGEU. For each of Lapchuk's grievances in LRB 263-16, SGEU determined to proceed with an arbitration and the committee specifically recommended that "a full panel arbitration may be advantageous for this case" (Exhibits U29 – 31). SGEU's decision to approve having the grievances proceed to arbitration was made in early 2015. As indicated, the Union declined to proceed with a grievance of the matter set out in LRB 353-13.

[37] SGEU advised the Government of its intention to move these matters to an arbitration. It was confirmed that the matter would be proceeding to hearing but that it would take place before a single arbitrator, rather than a full panel as per the grievance committee's recommendation. The parties agreed that single arbitrator would be Sheila Denysiuk, Q.C. The arbitration was then scheduled to proceed from September 14 to 18, 2015. There was apparently no further consideration given to moving the matters to a full panel arbitration and neither was there any explanation provided concerning the decision to proceed in this fashion and contrary to the committee's recommendation.

[38] The initial involvement between SGEU and Lapchuk concerning these various matters involved a union representative, Mr. Buchinski. It appears Lapchuk did not get along with Mr. Buchinski and SGEU determined to assign different

representatives to handle and manage Lapchuk's matters.

[39] SGEU assigned two Labour Relations Officers [LROs] to complete the arbitration on behalf of Lapchuk. Together, and in consultation with Lapchuk, they determined the issues upon which evidence would be presented at the arbitration and upon which they would ask the arbitrator to determine. A decision was made that this arbitration should proceed on the basis of the following theories: (1) whether Lapchuk was properly trained for the position in light of the confrontation which occurred on October 17, 2012; and (2) whether Lapchuk's medical condition (post-traumatic stress disorder [PTSD]) was the cause of his reaction to the situation which developed that day. It appears the development of these issues and approach occurred early in the arbitration process and did not change through to the end of those proceedings. The entire arbitration itself was conducted on the basis of these theories being advanced, and in particular the medical aspect with respect to the PTSD condition.

[40] The arbitration presented its own difficulties as a result of Lapchuk's behaviour. There were angry outbursts and inappropriate conduct by him. These behaviours were commented upon by the arbitrator. Nevertheless, it appears that Lapchuk was fully participating with the LROs in the lead up to the arbitration.

[41] The arbitration was not concluded in September 2015 because SGEU was not in a position to present its medical evidence with respect to Lapchuk's health condition at that time nor the effect of such health condition on his reaction to those day's events (the PTSD issue). This necessarily meant that the arbitration had to be adjourned and a continuation date of November 12, 2015, was set by agreement between SGEU, the Government, and the arbitrator.

[42] At the initial arbitration hearing, the Government declined to consent to Lapchuk's medical evidence being submitted by way of reports. The Government declined to concede that Lapchuk suffered from PTSD at the time of the Fort

Qu'Appelle incident. It further declined to concede that the witnesses proposed by SGEU on this issue were entitled to proffer an expert opinion regarding any diagnosis of PTSD. As a result, there was no evidence presented, or then available, on this central arbitration theory which was agreed to be advanced by SGEU.

[43] The arbitrator, in her written decision dated August 31, 2016 (*SGEU v Saskatchewan Government*, 2016 CanLII 94947 (Sask LA) [*Denysiuk Decision*]), addressed the matter of the medical evidence issues:

11. It is often the case that parties agree on the existence of the disability and focus evidence on linking the illness or condition to the misconduct. Failing agreement, expert evidence is required to address the issues. In this case, the parties didn't agree on the existence of the disability in the first instance or its impact on the events in question, therefore medical evidence is critical.

12. The Union filed numerous reports from Lapchuk's family physician, physiotherapists and psychologists. The reports date back to 2001 when Lapchuk was employed at the Saskatchewan Apprenticeship and Trade Certification Commission ("the Commission"). Lapchuk was injured in several motor vehicle accidents and required workplace accommodations as a result. The accommodations followed Lapchuk when he moved to Highways in 2007. The more recent medical reports relate to treatment Lapchuk received for injuries sustained in the Fort Qu'Appelle incident. The reports include some information about psychological issues – symptoms of PTSD, depression and anxiety – but they don't squarely address the issues raised in this hearing, namely whether Lapchuk suffered from PTSD when the alleged misconduct occurred and, if so, the connection between the disability and the alleged misconduct. The Employer didn't accept the reports as proving either the disability or the casual link.

13. At the outset, the Union indicated that in addition to calling Lapchuk, it intended to call Greg Petroski, a psychologist who had been treating Lapchuk, and possibly one other psychologist. However, the Union didn't have a current report from Mr. Petroski or the other witness. From this, it was evident that the Union wasn't in a position to call expert testimony on the

September dates which necessitated setting additional dates in November.

14. Two days were scheduled for the Union's medical evidence. Ordinarily, a party intending to call expert evidence provides the other side with the expert's *curriculum vitae* and a report or at least a summary of the proposed testimony. In this case, although the Union indicated it intended to call Mr. Petroski and Lapchuk's family physician, the Union didn't have their reports yet. The Employer was reluctant to proceed on the scheduled dates without reports and raised a further concern as to whether Mr. Petroski and/or Dr. Cheshenchuk were qualified to testify as experts in any event. A conference call was convened on November 4, 2015 to hear submissions on the issue.

15. The basis of the Employer's concern regarding Mr. Petroski was that he had previously advised Highways that he had limited his practice to counselling and treatment and wasn't willing to do a formal psychological assessment. The Employer questioned whether Mr. Petroski was the right expert and suggested adjourning the hearing for the Union to find a different expert or possibly agreeing on an independent medical expert.

[Emphasis added]

[44] As the November resumption dates for the arbitration approached, the issue of what medical evidence to call to advance the issue which had been identified by SGEU was discussed between the LROs and Lapchuk. Some days prior to the resumption of the hearing, SGEU had not provided notification of any further medical information to the Government. As a result, as indicated in the passage quoted above, the Government proposed that the matter be adjourned further to allow this evidence to be gathered and to consider the retention of a joint medical expert.

[45] The LROs discussed the option of an adjournment with Lapchuk. At the outset of the discussion, he was quite strongly opposed to an adjournment occurring. It appears he was of the view that there was evidence to allow for the necessary conclusions, and he indicated that he sought to have this matter concluded. The LROs did not ultimately pursue an adjournment. A conference call was convened with the

arbitrator where the issue of necessary medical evidence was discussed. She summarized that call and her views as follows:

16. I note here that Lapchuk attended the conference call. He complained about delaying the case and said he had already given the Employer “everything they need”. That simply isn’t correct. In fact, the Employer made repeated request [*sic*] for medical information starting in August 2013 when Lapchuk raise PTSD at a meeting with the Employer to discuss the email issue. It wasn’t entirely clear whether Lapchuk was asking for future accommodations because of the PTSD or raising it for some other reason. The Union representative attending the meeting didn’t know about PTSD until that point either.

17. In my view, the Employer appropriately requested medical information to support the claim. As indicated, Lapchuk provided some information, but most of it related to injuries and accommodations required when he worked at the Commission or to treatment following the Fort Qu’Appelle incident. Although there were references to mental health issues, including PTSD, in the reports, the Employer’s position at the time, and at the hearing, was that the information provided wasn’t sufficient.

18. I advised the parties that I shared the Employer’s concern regarding Mr. Petroski’s testimony given that he hadn’t done a psychological assessment. There was a brief discussion about other psychologists and psychiatrists involved in Lapchuk’s care who might be in a better position to provide expert testimony. The conference call was reconvened on November 6 after the reports from Dr. Chechenchuk and Mr. Petroski were received. The Employer had the same concerns about the proposed testimony and indicated that it would raise objections when the hearing resumed.

[*Denysiuk Decision*]
[Emphasis added]

[46] As between Lapchuk and the LROs, the medical involvement and potential evidence of a Dr. Clarke, a Dr. Asmundson, and a Dr. Natarajan, had been discussed. All of these individuals had been involved with Lapchuk with respect to the issue of PTSD. Lapchuk advised his view that Dr. Clarke was in a “conflict of interest”.

It is unclear what he meant by this and there does not appear to be any suggestion that the LROs made any further or detailed inquiries in this regard. He advised that he was uncertain if Dr. Natarajan's report could be used as this was obtained for the LTD, long-term disability, determination. Again, there is no indication the LROs completed any inquiries or investigations in this regard. The work of Dr. Asmundson and his clinical psychology doctoral student, Holly Parkerson, was not considered by the LROs and no further inquiries appear to have been made in that regard.

[47] On the issue of the adjournment identified by the arbitrator, there was available evidence which indicated that Lapchuk had ultimately advised the LROs that he was not opposed to an adjournment, and they should provide him with the dates when the hearing would be reconvened. In this regard, Exhibits U53 and U54 were referred to at the argument of this matter.

[48] When the arbitration reconvened, SGEU determined to tender the testimony and report of Mr. Petroski, the registered psychologist, together with the report only of Dr. Chenshenchuk, a family physician. Dr. Chenshenchuk was not produced by SGEU as a witness at this hearing as she was not available, apparently as a result of SGEU's delay in contacting her.

[49] With respect to the testimony of Mr. Petroski, the arbitrator stated:

154. Mr. Petroski indicated he has relied exclusively on information received from Lapchuk regarding these events. In particular, he has had no communication with Highways to get an unbiased account of Lapchuk's behaviour in the workplace or in the Fort Qu'Appelle incident. Mr. Petroski understands that Lapchuk has been seen by other psychologists and that Lapchuk obtained a PTSD diagnosis from a psychologist at CBI, but he hasn't seen the reports. Mr. Petroski testified that he was comfortable providing treatment to Lapchuk, notwithstanding that he hadn't done a psychological assessment and hadn't seen other reports to that effect.

155. Following testimony on qualifications and experience, the

Employer took the position that Mr. Petroski shouldn't be allowed to provide an opinion as to a diagnosis given that he hasn't done a psychological assessment, this notwithstanding that he has treated Lapchuk for symptoms of PTSD from the outset.

156. After considering the submissions, I conclude that Mr. Petroski should not be allowed to provide opinion evidence on a diagnosis in the circumstances. However, I concluded that he has expertise in the treatment of PTSD and could provide opinion evidence in that regard, as well as testify about the specific treatment provided to Lapchuk. I advised the parties that the burden remains on the Union to prove not only a disability, but also a link between the disability and the misconduct. I also expressed my continuing concern that Mr. Petroski was not in a position to provide the best evidence on these issues.

157. Mr. Petroski's evidence with respect to PTSD can be summarized as follows:

- PTSD is a condition that results from exposition to significant events that the individual isn't able to properly process.
- Individuals with PTSD are in a chronic state of hyper-vigilance and arousal which results from the presence of high levels of hormones. The hormones change an individual's brain function and when that happens, the individual has extreme difficulty standing down.
- PTSD is highlighted by an inability to respond during a stressful situation because the individual is more likely to freeze rather than react.
- PTSD symptoms include recurrent and intrusive memories, flashbacks, nightmares, depression and severe anxiety.
- Treatment involves talk therapy whereby the individual faces what is frightening so they can learn to cope with it. Treatment also involves relaxation techniques. The goal is to have the individual be less

reactive when those events happen in the future.

[*Denysiuk Decision*]
[Emphasis added]

[50] With respect to the report of Dr. Chenshenchuk, the arbitrator stated:

145. The Employer argues that Dr. Chechenchuk's report should be disregarded in its entirety for a number of reasons. To start, the Union didn't provide a CV outlining Dr. Cheshenchuk's credentials. Without that, there is no evidence she has a focus on mental health or, more particularly, PTSD. Importantly, the report doesn't outline Dr. Cheshenchuk's diagnostic procedures or provide any basis for her opinion. Finally, Dr. Cheshenchuk didn't attend the arbitration and wasn't available for cross-examination.

146. The employer also submits that Dr. Cheshenchuk's report doesn't support the Union's argument that Lapchuk's conduct was caused by PTSD. The Employer notes that one of the characteristics referred to in the report, that Lapchuk has a delayed response to danger or an inability to react in stressful situations, isn't what occurred in the [*sic*] Fort Qu'Appelle where Lapchuk's conduct is more properly characterized as an immediate and exaggerated overreaction versus a delayed response.

147. The Employer's concerns regarding Dr. Cheshenchuk's report are well-founded. There is no indication that Dr. Cheshenchuk has the necessary expertise to diagnose PTSD and she wasn't produced as a witness in any event. Accordingly, although I allowed the Union to file the report, I did so for the limited purpose of outlining Dr. Cheshenchuk's role in Lapchuk's care and treatment. The report otherwise has limited value and doesn't assist in establishing PTSD in the first instance or its connection to the misconduct.

...

233. The Union proposed to call evidence from two sources – Dr. Cheshenchuk and Mr. Petroski. I allowed the Union to file Dr. Cheshenchuk's report, but only for the limited purpose of outlining her role in Lapchuk's care and treatment. Beyond that, it would be inappropriate to give any weight to Dr. Cheshenchuk's report given that the Union didn't produce her as a witness which meant that the Employer didn't have an

opportunity to examine her qualifications or ask questions about the basis for her opinion. In the end, Mr. Petroski was the only witness to testify at the hearing on the disability issue.

[*Denysiuk Decision*]
[Emphasis added]

[51] While Ms. Amor indicated at the SLRB hearing that the report of Dr. Asmundson had been filed at the arbitration, there is no mention of that report either in the arbitrator's detailed decision or in the list of exhibits filed at that proceeding. There is nothing in the material to indicate that either of the LROs spoke to Dr. Asmundson or any other individual from that individual's team in preparation for the arbitration hearing. As a result, it appears there was no material gathered from either Dr. Asmundson or his PTSD program.

[52] On this state of the evidence, the arbitration hearing was closed. However, on January 26, 2016, Lapchuk's then personal lawyer, David Barth, sent a copy of a report from Dr. Natarajan to SGEU. How this came to be in the possession of this lawyer is a bit of a mystery and how it came to be forwarded to SGEU in the manner it was is not entirely clear from the material. SGEU, through Ms. Hardy, provided a copy of this report to the Government and the arbitrator and attempted to re-open the hearing to allow the report to be filed as part of the evidence on the arbitration. The arbitrator declined to allow such filing, determining that the hearing had been formally closed.

[53] As indicated, the arbitrator then rendered her decision on August 31, 2016, dismissing Lapchuk's grievances in their entirety. Apparently the issue of the accommodation grievance was caught up in this dismissal. This decision brought the grievance proceedings to a complete conclusion.

[54] Lapchuk then filed an application with the SLRB alleging that SGEU had failed in its duty of fair representation with respect to the various grievances which had

been filed. With respect to the breach of the duty of fair representation concerning the accommodation grievance, he asserted SGEU had done nothing. With respect to the failure to remove the letter, he asserted he had been harmed and that the grievance should have been acted upon by SGEU. With respect to the termination grievance, he asserted that SGEU had been grossly or seriously negligent in its conduct of the arbitration through its failure to both marshal and present some medical evidence concerning the diagnosis of PTSD and the effect that condition would have had on Lapchuk as at October 17, 2012, the date of the termination incident.

[55] The SLRB dismissed the complaint concerning the failure to grieve the removal of the letter, essentially indicating that Lapchuk had not suffered any harm. The SLRB, however, found SGEU liable on the termination grievance for its failure in its duty of fair representation on several enumerated grounds. It also appears the SLRB found that SGEU had breached its duty of fair representation with respect to the accommodation grievance.

[56] Receipt of evidence with respect to the issue of the appropriate remedy was the subject of a further hearing before the SLRB held over seven days in August, September, and October, 2022. Following receipt of this further evidence, the SLRB determined that SGEU was required to pay Lapchuk a total of \$294,755 broken down as follows:

[173] In summary, the Union shall pay to Lapchuk:

Damages for breach of duty of fair representation	\$206,849
Legal expenses	\$25,000
Out-of-pocket expenses	\$12,761
Moral damages	\$25,000

Pre-judgment interest from date of termination	<u>\$25,145</u>
TOTAL	\$294,755

[*Remedy Decision* at para 173]
[Emphasis in original]

ISSUES

[57] On the basis of the foregoing background, the following issues are to be determined on this application for judicial review:

- (a) What is the standard of review on this application with respect to the SLRB's *Liability Decision* and *Remedy Decision – Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]?
- (b) What is the duty of fair representation expected of a union to its members?
- (c) Did the SLRB act reasonably in determining the claim advanced by SGEU against the Government should be dismissed?
- (d) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to the accommodation grievance?
- (e) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision concerning the use of a single arbitrator?
- (f) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision concerning the length of time it took the proceedings to conclude?

- (g) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision that the claim was not barred by *The Workers' Compensation Act, 2013*, SS 2013, c W-17.11
- (h) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision concerning the application of *Browne v Dunn* (1893), 6 R 67 (HL)?
- (i) Did the SLRB act reasonably in determining that SGEU breached its duty of fair representation with respect to the termination grievance?
- (j) Did the SLRB act reasonably in the *Remedy Decision* by failing to consider and determine the issue of causation of damages as a result of the finding of a failure of the duty of fair representation?

DECISION

General Comments

[58] Prior to addressing the issues identified, it is necessary to address generally certain of the procedural issues which arose during the argument of this matter. These issues concern the written arguments presented, the addition of issues beyond the written argument, the failure to include materials on issues identified in the application, and the necessity of commencing judicial review proceedings to allow for a variation of the decision. These general comments are made to highlight what the Court has considered in arriving at the decision on this judicial review application.

[59] Following commencement of the judicial review application, SGEU applied to this Court, pursuant to the provisions of *The King's Bench Rules*, seeking to

have the number of pages of its Brief increased from 40 to 80 pages. By way of interlocutory decision, Wildeman J. determined that the page limit should only be increased to 45 pages given the lengthy record in this case but affirmed the requirement that within that expanded page range, the written argument to be advanced should still be focused and concise.

[60] In the Brief ultimately filed by SGEU dated July 19, 2024 for this judicial review, the following statement is made:

6. SGEU relies on its briefs of law filed with the SLRB in LRB File No. 263-16 at the Liability and Remedy stages and SGEU's oral arguments contained in the Liability and Remedy Transcripts, that further explores these issues, as SGEU is constrained in addressing all of the legal and factual issues engaged by the Decisions [*Liability Decision* and *Remedy Decision*] in the page limit in the present case.

[61] At the hearing of this matter the Court inquired whether this statement meant that SGEU sought to have the Court review and consider not just the written argument and reply filed on this application, but also the other arguments written and oral which had been advanced at the SLRB hearings. Initially, it was indicated that the reference to the SLRB materials was done as part of the record in this matter and to illustrate that these arguments were well-before the SLRB to allow it to make decisions other than the ones which it ultimately made. However, throughout the oral argument, considerable reference was made to that which was presented to the SLRB and which appear in the record of this matter, including specific reference to a number of paragraphs of that written material.

[62] As a result, it appeared that SGEU sought to have this Court consider its written Brief filed on this judicial review application together with the other materials filed before the SLRB together with its oral submissions before the SLRB. I decline to do so for the reasons set out below.

[63] *The King's Bench Rules* with respect to the length of Briefs of law provides as follows:

13-38.1(1) Except where otherwise provided by these rules, or with leave of the Court, a brief of law filed in Court, including a pre-trial brief filed pursuant to rule 4-13:

(a) must not exceed 40 pages in length, excluding the List of Authorities and any appended materials; ...

[64] This provision is specific and direct. As indicated the rationale for the Rule is to ensure the arguments advanced are focused and concise. This allows the Court to review that which is directly in issue and obligates the parties to ensure their focus remains squarely on the issues raised.

[65] The Court had given clear procedural direction and accordingly the inclusion of other materials was not permitted pursuant to the order given. The respondents in this matter, Lapchuk and the Government, constrained themselves to Briefs in compliance with Rule 13-38.1 as expanded by Wildeman J.

[66] By attempting to have the Court consider literally everything, the parties opposite do not know what specifically is being advanced or considered and are therefore prejudiced in their ability to respond. Having adhered to the page limit, they are hamstrung, potentially, to being exposed to alternative theories of the applicant to which they have not responded, and to which they have no idea if the Court has or will consider. Furthermore proceeding in this manner defeats the goal of having arguments focused and concise.

[67] In addition, during argument on this matter, the applicant attempted to introduce matters which were not set forth in its Brief and/or not identified in its originating notice for judicial review. Two examples of this will identify this issue. Despite there being no real issue raised on the facts of this matter an argument was introduced then placing certain factual findings in issue. Secondly, a legal issue was

introduced regarding the Workers' Compensation Board and whether these proceedings ought to have been included in the earlier WCB ruling involving Lapchuk's claims against the Government and therefore precluded from decision by the SLRB. Neither of these matters were identified in the originating notice and neither were addressed in the Brief filed by SGEU.

[68] A party is obligated to identify its arguments in the written Brief for the consideration of the Court. That is not to say a party will be forestalled from presenting an argument not identified, but it is to say that this practice should be the exception to the rule. The whole purpose of the pleadings and then the Brief is to put the parties, and the Court, on notice of the matters in issue and to permit the parties, and the Court, to properly prepare for the oral submissions on the various arguments raised in the materials, and, finally, to focus their arguments and considerations on that which is in issue between the parties. This, of course, permits the Court to actively engage with the parties to debate and develop the arguments which are being advanced.

[69] Indeed, the very purpose of oral argument is to provide a ripe opportunity for a party to support and defend the arguments advanced. To ambush this procedure by then introducing new arguments is to defeat the purpose and scope of the argument. This should be discouraged by the Court, particularly in cases such as this where the record is rather unwieldy and there may be any number of perceived issues lurking in the weeds of that record unbeknownst to the others who are also important players in the presentation of this entire matter to the Court.

[70] Here, I am able to consider these new arguments advanced and decide upon them. I do that to ensure that all matters are dealt with at this stage to inform the parties with as complete a decision as possible. But, this is not done to in any way encourage this type of approach to oral argument in general.

[71] With respect to the issue of the necessity of commencing judicial

proceedings to allow for a variation of the decision under review, I am referring to Lapchuk's submission that certain damages assessed by the SLRB ought to be increased. Essentially this requested increase is sought to be supported by the observation that SGEU applied to set aside the SLRB decision and accordingly this respondent can ride on that application to change certain findings made by that tribunal. Lapchuk, in every other respect, asserts that the decisions rendered by the SLRB are reasonable and therefore the application of SGEU cannot succeed, and must be dismissed in its entirety.

[72] In light of his support of the reasonableness of the decision, in my respectful view, Lapchuk cannot then also seek to attack the *Remedy Decision* to obtain higher damages or a different result. Either there is a finding the decision is reasonable or not. To successfully attack the measure of damages, and seek an increase, the respondent must commence proceedings seeking that relief.

[73] Furthermore, as with the add-ons sought by SGEU, proceeding in the manner sought by Lapchuk on this issue does not provide notice to the parties of that which is in issue. It also does not provide notice to the Court, through appropriate pleadings, of that which is sought to be advanced.

[74] I now proceed with the issues that were identified through the Originating Application.

- (a) **What is the standard of review on this application with respect to the SLRB's *Liability Decision* and *Remedy Decision* – *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [Vavilov]?**

[75] The parties are agreed that the applicable standard of review is one of reasonableness in accordance with the direction set forth in *Vavilov*. It is necessary to cite rather extensively from that decision to inform and to set the basis upon which that standard has been considered in this matter. The submissions advanced were quite

wide-ranging. Accordingly, many of the comments on reasonableness in *Vavilov* factor in the decision being made here on this application.

[76] The decision of Wagner C.J. in *Vavilov* describes clearly and concisely both the nature of a reasonableness review and its difference from a consideration of correctness of the decision under consideration:

[12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature’s choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir’s* [*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190] promise to protect “the legality, the reasonableness and the fairness of the administrative process and its outcomes”, reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

[13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a “rubber-stamping” process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be “justified to citizens in terms of rationality and fairness”: the Rt. Hon. B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, “Proportionality and Justification” (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

[77] That majority decision in *Vavilov* confirms that a reviewing Court is to consider only the reasonableness of the decision made by the administrative tribunal. The Court's role is not to identify whether there were other possible outcomes to the decision which was made. Rather, the analysis begins with a respect for the decision-making role the administration tribunal occupies and to consider therefore only whether that decision made, and the basis for making the decision, were reasonable in the circumstances before that tribunal:

B. Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes

[82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190], at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain

the “range” of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, “as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did”: para. 28; see also *Ryan [Law Society of New Brunswick v Ryan]*, 2003 SCC 20, [2003] 1 SCR 247], at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[*Vavilov* at paras 82-83]
[Emphasis in original]

[78] Where the tribunal provides written reasons for its decision, the Court is to review those to understand how the decision-maker came to the conclusions under attack and to determine the reasonableness of those conclusions. The reviewing Court is to conduct this examination by determining if the decision is coherent and based on an analysis that is supported by the facts and the law applicable to the situation under consideration:

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with “respectful attention” and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir [Dunsmuir v New Brunswick]*, 2008 SCC 9, [2008] 1 SCR 190], at para. 48, quoting D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis

and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker’s reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with “the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes”: para. 47. Reasonableness, according to *Dunsmuir*, “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”, as well as “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[Emphasis in original]

[79] There may be a range of possible outcomes for the decision maker. However, provided the reasons given are justified on the evidence and the law, are transparent and are intelligible, it is not subject to attack on a judicial review application.

[80] In *Andritz Hydro Canada Ltd. v The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69 [Andritz], Kalmakoff J.A. quoted with approval the opinion of Barrington-Foote J.A. in *Service Employees International Union – West v Saskatchewan Health Authority*, 2020 SKCA 113, 454 DLR (4th) 363 expanding on the explanation of the criteria necessary to ground reasonableness in a decision:

[46] In *Service Employees International Union – West v*

Saskatchewan Health Authority, 2020 SKCA 113, 454 DLR (4th) 363, Barrington-Foote J.A., dissenting but not on this point, summarized the principles from *Vavilov* that establish the framework for a reasonableness review:

[102] ... [In *Vavilov*], the majority confirmed the reasonableness standard requires the reviewing court to answer two questions; that is, “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; [*Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [20120 1 SCR 5] at para. 13” (at para 99). For analytical purposes, the Court described two kinds of fundamental flaws as a convenient way to discuss the issues that may show a decision to be unreasonable (at para 101). First, is there “a failure of rationality internal to the reasoning process”? Second, is the decision “in some respect untenable in light of the relevant factual and legal constraints that bear on it”? (at para 101). The Court emphasized that in order to justify setting aside a decision, the flaws must be “sufficiently central or significant”, not superficial or peripheral (at para 100).

[103] The first category of flaws reflects the principle that a reasonable decision must be based on internally coherent reasoning; that is, reasoning that is both rational and logical. As the majority put the matter, “the reviewing court must be able to trace the decision-maker’s reasoning without encountering any fatal flaws in its overarching logic” (*Vavilov* at para 102). A decision will be unreasonable if it fails to reveal a rational chain of analysis or exhibits an irrational chain of analysis. While administrative decision makers must not be held “to the formalistic constraints and standards of academic logicians”, a decision may be unreasonable if it exhibits “clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise” (*Vavilov* at para 104).

[104] As to the second category, “a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision ... Elements of the legal and factual contexts of

a decision operate as constraints on the decision maker in the exercise of its delegated powers” (*Vavilov* at para 105). The relevant constraints depend on the facts. In *Vavilov*, the majority discussed what they characterized as “a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies” (at para 106). The Court cautioned that these elements are not a checklist and vary in significance depending on the context.

[105] I would finally note that reasonableness is a deferential standard and must be sensitive and respectful of the role of the delegated decision maker. It is not a “line-by-line treasure hunt for error” (*Vavilov* at para 102). The court’s function is to “ensure the legality, the reasonableness and the fairness of the administrative process” (*Dunsmuir v New Brunswick*, 2008 SCC 90 at para 28, [2008] 1 SCR 190). However, reasonableness review must also be robust. ...

See also: *Amalgamated Transit Union, Local 615 v Saskatoon (City)*, 2021 SKCA 93 at para 93, 86 CLRBR (3d) 1; and *AlumaSafway [AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119]*, 2022 SKCA 99] at para 35.

[*Andritz* at para 46]

[81] It is important to accept that a measure of perfection is not expected from the reasons of the decision maker. The reasons as a whole must be viewed with a consideration of both the history and the nature of those proceedings:

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have

preferred” is not on its own a basis to set the decision aside: *Newfoundland Nurses [Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)]*, 2011 SCC 62, [2011] 3 SCR 708], at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[*Vavilov* at para 91]

[82] Those reasons do not have to address at length the arguments advanced or completely develop all of that which was presented. Rather, the Court is to conduct its review from the perspective of whether they comply with the requirements outlined and whether they exhibit a pathway towards the decision or decisions ultimately rendered. See also *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 61.

[83] If those reasons reveal a fundamental error or a method of analysis which illustrates an unreasonable analysis, the Court is not then entitled to apply its own reasoning to justify the end result. To do so would be to stray from a reasonableness analysis to one that is focused on outcome or final result:

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines [Delta Air Lines Inc. v. Lukács]*, 2018 SCC 2, [2018] 1 SCR 6], at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale

for that decision. To the extent that cases such as *Newfoundland Nurses* [*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708] and *Alberta Teachers* [*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654] have been taken as suggesting otherwise, such a view is mistaken.

[*Vavilov* at para 96]

[84] In the final analysis, the Court must determine whether the decisions under review are justified, transparent, and intelligible, in light of the factual background and the legal basis upon which the decision is to be based:

[99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190], at paras. 47 and 74; *Catalyst* [*Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5], at para. 13.

[*Vavilov* at para 99]

[85] The party seeking to challenge the decision under attack bears the burden of establishing unreasonableness. It is not minor errors which justify interference. Rather, any issues identified must be of such significance as to warrant overturning the decision:

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply

because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is, however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

[*Vavilov* at paras 100-101]

[86] The reviewing Court is to review the analysis completed by the tribunal in its decision and ask whether the decisions made flow from the method of analysis completed by the tribunal:

[103] While, as we indicated earlier (at paras. 89- 96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam [Canada (Director of Investigation and Research) v Southam Inc.]*, [1997] 1 SCR 748, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney*

General), 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[*Vavilov* at para 103]
[Emphasis added]

[87] All of the above discussion has been recently summarized by Leurer J.A. (as he then was) in *Danychuk v University of Regina*, 2022 SKCA 146, 476 DLR (4th) 368:

[32] As described in *Vavilov*, at its core, “a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (at para 85). *Vavilov* tells us that, where reasons are required – and, in this case, the parties agree that they were both required and given – “it is not enough for the outcome of a decision to be *justifiable* ... the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies” (at para 86, emphasis in original).

[33] Finally, I would emphasize *Vavilov*’s direction that a “reviewing court must develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable”. *Vavilov* instructs that, to make this determination, “the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (at para 99, citing to *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 74, [2008] 1 SCR 190, and *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 13, [2012] 1 SCR 5).

[88] I again note that the nature of the reasons do not require length or excessive detail. Rather, they must “bear the hallmarks of reasonableness: justification, transparency, and intelligibility.” The comments in *Lessard v University of Saskatchewan (College of Medicine)*, 2024 SKCA 109 are instructive in this regard:

[81] Based on the legal and factual constraints before it, the Board was justified in concluding that the College’s decision denying Ms. Lessard’s deferral request and her discontinuance were reasonable. The Board’s analysis on this point may have

been brief, but it was clear and transparent: no medical documentation, no deferral. I see no logical fallacies or gaps in the Board's line of reasoning. As such, I am not satisfied that there are sufficiently serious shortcomings in the *Board Decision* [*Lessard v University of Saskatchewan (Academic Appeal Committee)* (9 November 2021) Saskatoon, University Appeal Board] or that it lacks the requisite degree of justification, intelligibility and transparency. Accordingly, I find that the *Board Decision* meets the reasonableness threshold. It follows that the reviewing judge did not err in reaching the same conclusion.

[89] The above discussion was also set forth in *AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119*, 2022 SKCA 99, [2023] 6 WWR 74.

[90] This lengthy discussion of reasonableness and the primary necessity to review the tribunal's reasons for the "hallmarks" of such reasonableness will be applied in reviewing the various aspects of the SLRB's decisions in this case.

[91] Finally in this regard, the reviewing Court is required to respect the tribunal's findings of fact. The Court is entitled to weigh in on such findings only in the event there is palpable or overriding error (*Vavilov*):

(d) *Evidence Before the Decision Maker*

[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 [Canada (Canadian Human Rights Commission) v Canada (Attorney General)]*, 2018 SCC 31, [2018] 2 SCR 230, at para. 55; see also *Khosa [Canada (Citizenship and Immigration) v Khosa]*, 2009 SCC 12, [2009] 1 SCR 339, at para. 64; *Dr. Q [Dr. Q v College of Physicians and Surgeons of British Columbia]*, 2003 SCC 19, [2003] 1 SCR 226, 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* [*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190], at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam* [*Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748], at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker* [*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817], for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

[Emphasis in original]

[92] On this application, despite its length, the record is not significantly in issue. But for one specific incident, which will be discussed *infra*, the factual background to this matter is not being attacked on this application for judicial review. Rather, the nature of the reasons given by the SLRB is challenged.

[93] There is similarly no attack advanced respecting a misapprehension or an error in reviewing the evidence. There is no suggestion the SLRB was not aware of the applicable law with respect to the duty of fair representation. Rather, the argument is that the SLRB completely misapplied the law to the facts as disclosed by the evidence. Again, the single evidentiary issue will be discussed further in these reasons.

[94] SGEU attacks the reasons of the SLRB and argues that the decisions lack

justification, transparency, and intelligibility, on each of the ultimate conclusions reached by the tribunal. As a result, the lengthy record in this matter plays a minor role in this judicial review. Instead, the reasons of the SLRB are to be considered on each of the decision points to determine their reasonableness within the constraints outlined by the foregoing discussion.

[95] In summary there are several points to keep in the forefront of the analysis which follows:

- (a) This Court is not to conduct its review with a consideration of whether the tribunal decision is correct, or is the decision which the Court would have arrived at if hearing this matter at first instance.
- (b) The review of the tribunal's reasons is not done with an expectation of perfection. Rather, the review is with an eye on whether the reasons are justified, transparent, and intelligible.
- (c) This Court is not re-hearing the matter nor is it sitting in appeal.
- (d) Reasonableness of the reasons is not determined by length but rather by substance with a clear understanding of that which is in issue.
- (e) The decision is not to be parsed because it does not include "all the arguments, statutory provisions, jurisprudence, or other details".
- (f) The tribunal is entitled to make its own findings of fact based on the evidence absent palpable or overriding error.

[96] I have earlier referred to the fact that the SLRB actually made a number

of specific decisions each concluding there had been a failure in the duty of fair representation. It can fairly be observed that this situation is somewhat unusual given the multiple grounds of failure being advanced and found against SGEU. This reality required the Court to examine each of the conclusions reached by the SLRB in the *Liability Decision*.

[97] It is noted that in the *Remedy Decision*, the SLRB lists findings it says were made in the *Liability Decision* regarding various breaches of the duty of fair representations. Here, I am referring to that *Remedy Decision* at paras 3, 44, 80, 133 and 153. The comments of the SLRB at these paragraphs are not in accordance with the actual findings made in the *Liability Decision*. Because the whole of the remedy is being set aside I do not comment any further on these incorrect references in those paragraphs and they have not, therefore, factored into the decision on this judicial review.

(b) What is the duty of fair representation expected of a union to its members?

[98] To put the decisions made by the SLRB in context, it is necessary to review the nature of the union's duty of fair representation. With this area too, there is no dispute on the law to be applied nor that was applied by the SLRB. *The Saskatchewan Employment Act*, SS 2013, c S-15.1 sets forth the requirement of a union's duty of fair representation together with the manner in which that duty is to be carried out:

6-59(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.

(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.

[99] In *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union*. Local 955, 2017 CanLII 20060 (Sask LRB) [*Hartmier*] Mitchell, Vice-Chairperson (as he then was) provided a helpful historical review of the duty of fair representation:

1. Brief Historical Review of Duty of Fair Representation

[138] Section 6-59 of the *SEA* [*The Saskatchewan Employment Act*] is the successor to section 25.1 of the *TUA* [*The Trade Union Act*, RSS 1978, c T-17 (rep)], the provision interpreted and applied in much of the Board's large body of jurisprudence respecting the duty of fair representation. Section 25.1 obliged a trade union to represent its members "in grievance or rights arbitration proceedings...in a manner which is not arbitrary, discriminatory, or in bad faith". In *Gilbert Radke v Canadian Paperworkers Union*, [1993] 2nd Quarter, Sask. Labour Rep. 57, LRB File No. 262-92, for example, the Board explained the rationale for imposing such a duty on a union in respect of employees for whom they enjoy bargaining rights. The Board stated at page 61:

The notion that a union owes a duty to those it represents to represent them fairly arose relatively early in the history of the interpretation of collective bargaining legislation in North America. As the legislation conferred the exclusive right to represent all employees in a group delineated as an appropriate bargaining unit, once a majority of those employees had selected a trade union, it was considered logical to impose on that trade union an obligation to be even-handed in its representation of all employees in the bargaining unit, including those who had opposed the selection of that union, had not become members of the union, or who were, for some reason in a minority within the bargaining unit. The union acquired exclusive status as a legal representative of all employees in a bargaining unit; in recognition of the degree of influence this gave the union over interests important to all employees, labour relations boards and courts imposed on it a duty to represent all employees fairly and without discrimination.

[Emphasis in original]

[100] As indicated in the above quote, these historical origins actually begin almost 100 years ago in the United States of America. Morgana Kellythorne in her article “Toward a Theory of the Duty of Fair Representation” (2003) 9 Appeal: Review of Current Law and Law Reform 32, 2003 CanLIIDocs 59 at 33 sets out further detail which assists in understanding the nature of the union’s duty in this regard:

Historical Origins of the DFR [duty of fair representation]

The DFR originated in the 1940s in the American case, *Steele v. Louisville & Nashville Railroad* [323 US 192 (1944) [*Steele*]]. The U.S. Supreme Court stated that the DFR is an obligation inherent in the statutory grant of exclusive representation status to a trade union, because "the exercise of a granted power to act on behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." [*Steele* at 202] The trade union in question excluded black members of the bargaining unit and denied them seniority rights. The Supreme Court was faced with a dilemma, as it sought to combat this blatant racism without the assistance of anti-discrimination legislation, which did not yet exist.' Thus, the identification of an inherent statutory DFR was outcome-driven in the face of a concrete legal problem, and drew on elements of trust law.

In the U.S., the DFR then expanded beyond providing protection from racial discrimination in negotiation of collective agreements, and was applied to unions' processing of grievances and application of terms of existing collective agreements. By 1962, the National Labor Relations Board decided that a violation of the duty constituted an unfair labour practice. Finally, in 1967, the U.S. Supreme Court expressed the duty in a positive test in *Vaca v. Sipes* [386 US 171 (1967)]: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory, or in bad faith* [emphasis added]." The *Vaca v. Sipes* test remained a cornerstone of the DFR after its importation to Canada.

[Footnotes omitted]
[Emphasis in original]

[101] This rich history then led to the development of the principles of the duty of fair representation as set forth by the Supreme Court of Canada in the oft-cited

decision of *Canadian Merchant Service Guild v Gagnon*, [1984] 1 SCR 509 at 527 [Gagnon]:

The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of, the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[102] The duty of fair representation does not compel a detailed evaluation of the actions of the union nor does it envision necessarily a second guessing of the decisions of the union. As well, that duty does not elevate the Union's actions to a requirement of achieving perfection or even of acting without negligence. As a result, the SLRB is not to merely sit in appeal of any decisions taken by SGEU. In *Haley v C.A.L.E.A. (No. 1)*, 1981 CarswellNat 602 (WL) (Can LRB), this principle was put as follows:

30 It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess

its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.

31 But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence — it is a total failure to represent (e.g. *Forestell and Hall* [41 di 179, [1980] 3 Can LRBR 491], *supra*. Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake.

[103] In *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (Sask LRB), a summary of the guiding principles for determining a fair representation case was provided, thereby developing the application of the principles set forth in the preceding citation and providing specific examples of limitations of the union's duty in this regard:

[40] The Applicant in this case complains that the Union failed to represent him fairly in the prosecution of his promotional grievance. Many, if not most, duty of fair representation claims allege that a member's union failed to prosecute his or her grievance appropriately. It is not surprising, then, that a large body of jurisprudence has evolved about what principles should guide a labour relations board when assessing the merits of such claims. A helpful summary of these principles is found in *Mwemera v United Brotherhood of Carpenters and Joiners of America, Local Union No. 2010* [2016 CanLII 8866 (AB LRB), *aff'd* 2017 ABQB 286]. There the Alberta Board stated as follows at para. 20:

This Board's decision in Reid v United Steelworkers of America Local Union No. 7226, [2000] Alta. L.R.B.R. LD-064 (at para. 3) summarizes some of the key principles underlying the duty of fair representation:

- *The Union need not take every grievance to arbitration. It need not take a grievance to arbitration just because the grievor asks the Union to do so. The Union is entitled to assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration.*
- *The Board focuses its examination on the Union's conduct and considerations while the Union represented the employee and in making its decision, rather than on the merits of the grievance, which is the question an arbitrator would answer.*
- *The Union is entitled to make a wrong decision, as long as it fairly and reasonably investigates the grievance and comes to an informed decision.*
- *The Union must give the employee a fair opportunity to present the employee's own case to the Union and to provide input on the result of the Union's investigation.*
- *The Union should communicate fairly with the employee about all aspects of its representation. Communication with the employee can play a significant role in representation, but the union need not take direction from the employee or answer all questions to the employee's satisfaction nor must it act within the employee's time limits.*
- *A Union does not breach its duty of fair representation just because it reaches a conclusion with which the employee does not agree.*

[41] It is important to recall, as well, that the function of this Board in such matters is not to “second guess” or “sit on appeal” of a union’s handling of a member’s grievance. As Chairperson Love reminded us in *Owl v Saskatchewan Government and General Employees’ Union* [:

It is clear that a Union has carriage of grievances or, as has sometimes been stated, owns the grievance. It is also clear that the Board will not sit “on appeal” of a Union’s decisions in how it conducts a grievance. At paragraph [24] of [Taylor v Saskatchewan Government and General Employees’ Union 2011 CanLII 27606 (SK LRB)] the Board said:

With respect to the Applicant’s complaint that the Union should have called more or different witnesses, this Board has previously stated that we will not, with the benefit of hindsight, sit “on appeal” of a trade union’s decision on how it conducts its arbitrations, including which witnesses should have been called, and/or what evidence should have been tendered and/or what arguments should have been advanced or abandoned, as the case may be. [Citations omitted.]

[Emphasis in original]

[104] In *Hartmier*, Mitchell, Vice-Chairperson, cites the following comments in *Hargrave v Canadian Union of Public Employees, Local 3833*, 2003 CanLII 62883 (Sask LRB) describing what is meant by the use of the word “arbitrary” with respect to the duty of fair representation:

[28] ...

The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:

It could be said that this description of the duty requires the exclusive bargaining agent to "put

its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.

This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.

[Footnotes omitted]
[Emphasis in original]

[105] SGEU argued forcefully on this application that to permit, or confirm, a finding that there was a breach of the duty of fair representation in this case under any of its various heads would cast a pall over the entire union grievance procedure. The submissions went on to instruct the Court on how a limitation to the duty of fair representation is crucially important to SGEU's involvement in this grievance process. It was stated that if any part of the *Liability Decision* of the SLRB was permitted to stand, unions would simply not pursue grievances due to their fear of being found to have breached their duty of fair representation. It is difficult to understand how such an approach would insulate a union from a duty of fair representation claim in light of the foregoing recitation of this area of the law. Regardless, it was determined necessary to inform the Court of the nature of the duty of fair representation and the need to ensure SGEU remains in control of both the process and the decisions to engage in the process. It was further argued that the SLRB decision here was "unprecedented." How that is so was not developed by SGEU.

[106] Respectfully, the standard of review applicable in this matter does not permit the Court to engage in the debate concerning the impact such a decision might have on the trade union movement. Rather, as indicated, the standard of review requires

the Court to determine whether the SLRB's particular decisions were reasonable applying those considerations set forth above. The issue of correctness, appropriateness, or even opening of the floodgates against grievance arbitration, are not issues that are before the Court on this application and are therefore not properly considered in my deliberations.

[107] Against this background of the law, in the *Liability Decision*, the SLRB instructed itself as follows on the application of the doctrine of the duty of fair representation:

[133] The task for the Board in this matter is to determine whether the Union breached the duty of fair representation that it owed to Lapchuk. Did they act in a manner that was arbitrary, discriminatory and/or in bad faith?

[134] The Board has considered and described the duty of fair representation in numerous decisions, many of which were referred to in this matter. There is no dispute as to the test that the Board is to apply to the facts of this matter. There is no dispute that the onus of proof is on Lapchuk. The issues are whether the Union's conduct crossed the threshold from negligence to gross negligence or was otherwise arbitrary, whether they discriminated against him on the basis of his disabilities or otherwise and whether they acted in bad faith.

[108] The SLRB then referred to a series of the decisions including *Gagnon* to properly instruct itself on the parameters of the duty of fair representation. See paras. 135-141, *Liability Decision*.

[109] The SLRB then specifically instructed itself as follows:

[137] It is not the function of the Board to determine if the Union was correct in its assessment of the merits of the grievances or to second guess every action taken by the Union. In *Chabot v Canadian Union of Public Employees, Local 4777* [2007 CanLII 68749 (SK LRB)], the Board stated:

...

[138] In *Lucyshyn* [*Lucyshyn v Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB)], the Board held that the Board is to apply an objective standard to assessing the Union's processing of grievances:

...

[141] In many decisions the Board has relied on the following explanation of the concepts, arbitrary, discriminatory and bad faith as reported in *Toronto Transit Commission* [[1997] OLRD No 3148]:

. . . a complainant must demonstrate that the union's actions are:

(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent [citation omitted];

(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or

(3) "in BAD FAITH" – that is, motivated by ill-will, malice, hostility or dishonesty.

. . . The behaviour under review must fit into one of these three categories. It must be "arbitrary", "discriminatory", or undertaken "in bad faith". Mistakes or misjudgements are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".

...

[145] The Board does not minutely examine each and every action by the Union but looks at the whole course of conduct to determine whether the Union failed in its duty of fair representation. It is not the duty of the Board to assess the performance of the Union in each meeting or email undertaken in the course of Lapchuk's representation. The Board must look at the Union's representation of Lapchuk in its entirety and

determine if the Union breached its duty of fair representation.

[*Liability Decision* at paras 137-138, 141 and 145]

[Footnotes omitted]

[Emphasis in original]

[110] I have referred at length to those instructing passages in the *Liability Decision* to allow for the conclusion that the SLRB correctly and completely identified the principles with respect to the duty of fair representation. Furthermore, based on the authorities identified, the SLRB correctly identified the tests to be applied to the evidence tendered to determine whether there had been a breach of that duty of fair representation.

[111] I now turn to the specific arguments advanced by SGEU here said to identify the lack of reasonableness in the SLRB decisions. The *Liability Decision* of the SLRB makes distinct decisions regarding failures of SGEU in its duty of fair representation. As indicated, it is necessary to consider each separate ultimate conclusion in this reasonableness analysis. These separate conclusions determine the basis upon which SGEU was found to be liable. The appropriate remedy ultimately to be determined will be based on the findings of failure in the duty of fair representation.

(c) Did the SLRB act reasonably in determining the claim advanced by SGEU against the Government should be dismissed?

[112] If SGEU is found to be responsible for the payment of sums to Lapchuk, SGEU submits the Government should have to contribute to the payment of any such award. It appears this argument is advanced on the basis that it is really the Government's fault for Lapchuk's difficulties: if Lapchuk is entitled to recover damages as a result of the termination of his employment, the Government originally caused that loss and should be required to pay its share of those damages. SGEU submits the SLRB decision on this issue to the contrary is unreasonable.

[113] SGEU argues that the sum total of the SLRB's reasons for the dismissal

of the claim advanced against the Government is to be found in the brief comments in the reasons set forth in the *Remedy Decision* at para 121:

Liability of Employer:

[121] The Board rejects entirely the Union's arguments that the Employer should be held responsible for any damages ordered in this matter. No claim was made against the Employer in this matter. No finding of fault was made against the Employer in this matter. Therefore, no damages are payable by the Employer.

[*Remedy Decision* at para 121]
[Emphasis in original]

[114] As a starting point, pointing to this single paragraph is not an accurate representation of the entirety of the SLRB's consideration of this particular issue. First the SLRB identifies the argument advanced by SGEU:

[109] Next the Union argues that, if the Board orders that compensation is payable to Lapchuk, the Employer should be ordered to pay a portion of that compensation. This, it argues, is because if the Union failed to get Lapchuk's job back, when it ought to have, that is only because he was wrongfully terminated. If he was wrongfully terminated, that is the Employer's wrongful act.

[110] The Union argues that if the Board does not make a finding that the Employer discriminated against and wrongfully terminated Lapchuk, then it cannot make a finding that he ought to have been reinstated or that the Union owes him the full extent of damages now being claimed. The Union argues that it did not cause Lapchuk's losses. If he was wrongfully terminated by the Employer, the losses flowing from that termination are the responsibility of the Employer.

[*Remedy Decision* at paras 109-110]

[115] Next the SLRB identifies the response of the Government to the position advanced by SGEU:

Argument on behalf of Employer:

[112] First, the Employer argues that the Board has no jurisdiction to order that Lapchuk be reinstated. Under section 6-49 of the Act, the decision of the Arbitrator on that issue is final and binding.

[113] Second, the Employer argues that there is no basis in law or evidence for the Union to suggest that the Board should apportion responsibility for damages between the Union and the Employer. The concept of apportionment arises from cases in which Labour Boards have ordered unions to proceed with grievances to arbitration, after being found to have breached the duty of fair representation. That is not what happened in this case. Labour Boards introduced the concept of apportionment to protect employers from increased damages that result from the conduct of unions. Apportionment is a shield for an employer, not a sword for a union.

[114] Under section 6-104 of the Act, since there has been no finding of fault on the part of the Employer, the Board has no authority to apportion any liability to the Employer. The Employer is not responsible for damages that are the fault of the Union.

[*Remedy Decision* at paras 112-114]

[Footnotes omitted]

[116] Having identified the arguments advanced and the issue for consideration, the SLRB then renders its decision dismissing any liability on behalf of the Government by referring to the applicable statutory provisions and the application of the law:

Relevant Statutory Provisions:

[115] The following provisions of the Act are applicable in determining an appropriate remedy in this matter:

6-49(2) The finding of an arbitrator or arbitration board:

(a) is final and conclusive;

(b) is binding on the parties with respect to all

matters within the legislative jurisdiction of Saskatchewan; and

(c) is enforceable in the same manner as a board order made pursuant to this Part.

6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate.

Reinstatement:

[116] Reinstatement is not an available remedy in this matter because the Arbitrator has already determined that Lapchuk will not be reinstated. The Board has no jurisdiction to overturn the Arbitrator's decision. The Employer referred the Board to Labour Relations Board Remedies in Canada [Release 11, November 2018 (Toronto: Canada Law Book, 2013), at para 15:2300] which, in reference to *Gendron v Municipalité de la Baie-James* [[1986] 1 SCR 401], noted:

The Supreme Court of Canada has ruled that a statutory provision making an arbitral award final and binding puts it beyond the jurisdiction of a labour board to set aside an award and order arbitration after an award has been issued on the merits of a grievance.

Section 6-49 of the Act contains that provision. It states that the Arbitrator's decision that Lapchuk is not to be reinstated, is final and binding.

...

Liability of Employer:

[121] The Board rejects entirely the Union's arguments that the Employer should be held responsible for any damages ordered in this matter. No claim was made against the Employer in this

matter. No finding of fault was made against the Employer in this matter. Therefore, no damages are payable by the Employer.

[*Remedy Decision* at paras 115, 116 and 121]
[Emphasis in original]

[117] The SLRB considered in its reasons that the claim against the Government was completely dismissed by the arbitrator. The SLRB therefore determined this brought the Government's exposure to Lapchuk pursuant to the grievances filed to an end. The SLRB specifically referred to the applicable statutory provisions and rendered a decision accordingly.

[118] SGEU does not state that the SLRB missed reviewing any specific legal precedent or statutory provision that ought to ground liability in the Government for SGEU's breach of its duty of fair representation. It similarly does not argue that the SLRB misunderstood, as evidenced by its reasons, the basis upon which contribution from the Government was being sought. At its core, SGEU argues quite simply that the conclusion on this issue in its view is just wrong.

[119] In accordance with the direction given in *Vavilov*, this Court is not to review the reasons with a view to looking for perfection, length, or a reference to every argument that was advanced before it. Rather, the review is to determine whether the reasons provide intelligible and traceable reasoning in support of the decision made by the tribunal. Here, with respect to this issue on the basis of the foregoing discussion, I determine they do.

[120] The SLRB identified the arguments advanced and then in discussing those arguments determined that a basis for ongoing liability of the Government was absent. I determine the decision in this regard was reasonable. The reasons provided, while brief, are justifiable pursuant to the legislation cited, are transparent in that they clearly set forth the SLRB's decision, and are intelligible in arriving at the conclusion. There is, accordingly, no basis upon which this decision could be set aside on this

review.

(d) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to the accommodation grievance?

[121] This part of the grievance procedure appears to have been in fact subsumed by the more substantive issue of the termination of Lapchuk's employment. Nevertheless, it did form part of the grievances that were to proceed on behalf of Lapchuk through SGEU's representation and which SGEU had undertaken to advance through the grievance process. On this part of the grievance, the SLRB determined that SGEU had acted in an arbitrary and discriminatory manner towards Lapchuk:

[151] The arbitrary, discriminatory conduct in this matter started with the accommodations issue. At the meeting on September 30, 2013 that was attended by Lapchuk, Buchinski and Moore, Buchinski's responsibility was to act as an advocate for Lapchuk. Based on all of the evidence received, the Board has determined that he did not fulfill that role.

[152] Buchinski admitted he did nothing to assist Lapchuk with the accommodations issue. Even though the Union had been involved in assisting Lapchuk in originally obtaining the accommodations, and Buchinski admitted that meant the Union would have a file, he did not look for it. McCorrison said Buchinski could have asked for Lapchuk's previous file to be retrieved when PSC said they could not find their file and that he should have looked for the file. McCorrison later suggested that under the Union's file retention policy, seven years after an issue is resolved, the file would be shredded. Lapchuk's previous file at the Union may no longer have existed – but no one made the effort to assist Lapchuk by even looking for it.

[153] Lapchuk told McCorrison that Buchinski was "dismissive" and "condescending" toward him at the meeting. McCorrison did not engage with Lapchuk to investigate the cause for the breakdown of the meeting and of his relationship with Buchinski. He treated Lapchuk in an arbitrary, discriminatory manner by not investigating what happened or taking into account Lapchuk's concerns or Lapchuk's illness.

[154] The Union's conduct respecting Lapchuk's request for assistance with his accommodations issues reflected a complete

disregard for the consequences to Lapchuk.

[*Liability Decision* at paras 151-154]
[Footnote omitted]

[122] Because of its potential impact on the appropriate remedy that might be available to Lapchuk, it is necessary to review what the SLRB did in coming to its separate conclusions on this issue that SGEU's behaviour was both arbitrary and discriminatory. I determine the SLRB's determination of arbitrariness is reasonable. I am not able to conclude the determination that same behaviour was discriminatory was similarly reasonable.

[123] The SLRB determined that, based on the evidence presented, SGEU did nothing to assist Lapchuk with respect to the accommodation issue. The SLRB referred to the evidence of both Mr. Buchinski and Mr. McCorriston in this regard. Both in its written and oral submissions, SGEU does not take issue with the SLRB's findings of fact in this regard in view of the existence of this evidence given the testimony of the witnesses tendered at the hearing before the SLRB. Thus, it may be accepted that there was an evidentiary basis for the SLRB to make the findings which it did and no palpable or overriding error has been made in this regard.

[124] I note SGEU does argue that the Union did take some steps to find alternative union representation. But, it does not assert the SLRB made a palpable or overriding error in its review of the evidence on this particular issue.

[125] In light of these findings, the SLRB then determined that the SLRB acted arbitrarily and with a complete disregard for the consequences to Lapchuk as a result of the actions of SGEU. There was clear and unequivocal evidence provided by the SGEU witnesses from which it was concluded that nothing had been done on this particular grievance.

[126] Again, in the absence of palpable or overriding error, this Court is not

entitled to merely substitute findings of fact. This function is reserved to the SLRB and the reasons given are intelligible and justified by the complete record. Neither is the Court entitled to simply substitute its own opinion for that of the tribunal.

[127] SGEU then appears to argue that, in the final analysis, the failures of SGEU with respect to the accommodation grievance are of no moment in light of the fact that Lapchuk's employment was terminated. While that may be so, I determine that is an issue which factors into whether any damages flow, the remedy portion of the action, from SGEU's failure of its duty of fair representation on this particular grievance.

[128] Based on the evidence as found by the SLRB, I determine the SLRB's decision that SGEU acted arbitrarily to be reasonable. The SLRB traced the factual background to this matter. Its decision is justified based on these factual findings. It is apparent how the decision was arrived at and it is intelligible in providing the result.

[129] However, in determining SGEU's actions were discriminatory, I am unable to determine this part of the decision is reasonable. As paras. 109, 150, 153 and 170 of the *Liability Decision*, the SLRB simply states the actions of SGEU were discriminatory. However the SLRB provides no analysis as to how it arrived at that particular conclusion.

[130] The SLRB appropriately identifies the test for determining whether there was discriminatory conduct by SGEU as set forth in *Pham v Amalgamated Transit Union, Local 113*, [1997] OLRD No 3148 (QL) (Ont LRB) (at para. 109 *Liability Decision*). But, following that there is no discussion or development of the manner in which SGEU made any such "invidious distinction" with respect to Lapchuk.

[131] As a result, I am unable to conclude the SLRB's conclusion in this specific regard is reasonable. It is not justified by a review of the facts and the law. It

may fairly be stated that the complete absence of review on the issue of discrimination also results in this aspect of the reasons lacking intelligibility.

(e) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision concerning the use of a single arbitrator?

[132] SGEU argues that the SLRB's decision was not reasonable when it expressed concern over the fact that the grievance proceeded before a single arbitrator rather than the three party arbitration panel as recommended by SGEU when the processing of the grievance was approved. SGEU further argues that the manner in which this arbitration proceeded is usual in labour arbitration cases. While that latter assertion may be so, the analysis on this review is solely focused on whether this aspect of the decision was reasonable, not whether it frequently happens.

[133] In this regard, the sum total of the SLRB's reference to this issue in the *Liability Decision* is found in the following passage:

[157] The grievance committee recommended that the grievances be heard by an arbitration panel. The grievances were heard by a single Arbitrator. The Board is not satisfied that the Union met its duty to make a thoughtful decision about this choice because the Union provided no evidence that a thoughtful process was followed in making the decision. None of the Union's witnesses could explain how or why that decision was made or even who made the decision. We will never know if this choice would have affected the outcome of the arbitration. What we do know is that the grievance arbitration provisions of the collective agreement assume a panel will be used, and that the grievance committee believed it "may be advantageous for this case". According to the evidence before the Board, the Union did not make a rational, reasoned decision on this issue.

[Footnote omitted]

[134] It is unclear from this paragraph why this issue was even being considered by the SLRB. Specifically, it is unclear from these reasons that the SLRB had determined that the decision taken by SGEU to proceed with a single arbitrator

amounted to a breach of the duty of fair representation. It may be that was the SLRB's intention given the final sentence of para. 156: "[h]ere the Union acted with complete disregard for or indifference to the consequences of their decisions." But, there is no clear determination by the SLRB in this regard. For the sake of completeness of these reasons, I will comment on this aspect of the reasons on the assumption that they did play a role in the SLRB's determination that SGEU had failed in its duty of fair representation.

[135] Respectfully, on this particular issue, I am unable to determine that the reasons given intelligently assist in determining the connection of the decision to proceed with a single arbitrator to a failure in the duty to provide fair representation to Lapchuk. While the decision was different from that given by the panel who reviewed proceeding with the grievance, I am unable to discover anything in the evidence to indicate that the decision could be considered factually to be grossly negligent or otherwise arbitrary, nor that it was carried out with complete disregard to the interests of the grievor. Indeed, there is nothing in the evidence to allow for any conclusion that proceeding in this fashion even mattered or was anything more than a decision available to SGEU in its general conduct of the arbitration process. The SLRB identifies no such evidence in its brief consideration of this issue.

[136] As previously discussed, the purpose of considering the duty of fair representation is not either to tell SGEU how to conduct a grievance nor is it to micro-manage SGEU's actions in that regard. Simply identifying that which happened does not then lead necessarily to a finding of a breach of SGEU's duty in this regard. It appears that is what the SLRB did with respect to this particular finding of liability.

[137] The SLRB determined a three person panel was not used. It then determined none of SGEU's witnesses called could explain why this had occurred. From this it jumped to the conclusion that, as a result, SGEU did not make a rational,

reasoned decision in this regard.

[138] What the SLRB did not do is provide any indication on how SGEU's decision was arbitrary, discriminatory or made in bad faith. The absence of such explanation denies the parties an understanding of how the decision was arrived at. It lacks transparency and it is not justifiable based on either the applicable law or the available evidence. According to the law with respect to the duty of fair representation outlined, the sole finding of what happened does not then provide justification for a finding of a failure of duty of fair representation.

[139] For these reasons, I must determine the decision of the SLRB on this issue was not reasonable and must be set aside.

(f) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision concerning the length of time it took the proceedings to conclude?

[140] The SLRB then determined that SGEU acted in an arbitrary manner and in bad faith as a result of the length of time it took to have the matter ultimately proceed to an arbitration. The comments of the SLRB in its reasons are:

[165] Another issue that leads the Board to determine that the Union acted in an arbitrary manner and in bad faith was the length of time it took the Union to move the arbitration forward. The collective agreement that applied to Lapchuk contains provisions that indicate that the parties believe time is of the essence in the hearing of an arbitration of a termination grievance:

22.1 F) Termination arbitrations will be heard, and decisions rendered, within one hundred and twenty (120) calendar days, unless otherwise agreed to by the parties.

22.2 A) ...The Arbitration Board shall meet not later than seven (7) calendar days after it has been constituted, unless by consent of both parties the date is set back.

22.2 I) *The proceedings of an Arbitration Board shall be completed within one (1) year of the appointment of the Chair.*

22.3 D) *The award of the Arbitration Board shall be rendered in writing within ninety (90) calendar days of the close of the hearing, unless otherwise agreed by the parties.... [emphasis added]*

[166] Lapchuk was terminated on October 28, 2013. The Union did not approve moving forward to arbitration until February 19, 2015, almost 16 months after his termination. The hearing did not commence until September 14, 2015, almost 23 months after his termination. Despite this excessive delay, they did not come to the arbitration prepared with the necessary evidence to prove Lapchuk's defence.

[167] The Arbitrator was appointed on March 24, 2015. Her Decision was rendered on August 31, 2016, 17 months after her appointment and 9 months after the close of the hearing.

[168] The Union provided no explanation of why it did not ensure that these provisions of the collective agreement were complied with. None of the Union witnesses could explain the reason for the delays. There was no evidence that a reasoned, rational decision was made to proceed in this manner.

[*Liability Decision* at paras 165-168]

[Footnote omitted]

[Emphasis in original]

[141] The SLRB recognizes that there was no explanation provided for the delay. What the SLRB then did, through its reasons, was recognize the fact of the delay, and from that fact alone conclude that there had been arbitrary and bad faith action by SGEU. In my respectful view this is identical to that which was done with respect to the issue of the panel for the arbitration.

[142] Based on a review of the reasons provided, I am compelled to determine that the decision in this regard was not reasonable. There is no evidence reviewed to support that anything happened other than that the matter was delayed. Delay, in and of itself, does not equate to *mala fides* or arbitrary action by SGEU simply because it is

one of the parties responsible for advancing the arbitration to a hearing. Here, there is no evidence that SGEU was doing anything untoward, or failing to do anything appropriate, to advance the arbitration. There was then no development by the SLRB of how delay, in and of itself, would constitute a breach of the duty of fair representation.

[143] Indeed, the SLRB's comments in the *Remedy Decision* appear to be directly contrary to the comments it made as cited above:

[157] Lapchuk invited the Board to take into account not only the delay in the hearing of this matter, but the delay in the hearing of the grievance arbitration, in determining an appropriate amount of compensation for delay. The Board declines to do so. The delay in the arbitration hearing was instead factored into the determination that the Union breached its duty of fair representation.

[158] With respect to the issue of delay in the hearing of this matter, *Abrametz [Law Society of Saskatchewan v Abrametz, 2022 SCC 29, [2022] 2 SCR 220]* confirmed that the first question for the Board is whether the delay was inordinate. This requires a consideration of contextual factors including the nature and purpose of the proceedings, the length and causes of the delay and the complexity of the facts and issues. The approach adopted by both Lapchuk and the Union in this matter led to a complexity of facts and issues. The hearing in this matter was delayed by the COVID-19 pandemic and by Lapchuk's mental health issues. Setting aside those factors, which are not attributable to either party, the Board finds that the parties share responsibility for the length of time the hearing lasted. While the delay definitely caused Lapchuk significant prejudice, the Board is unable to find that the delay was inordinate, given the complexity of the facts and issues in this matter and the shared responsibility for the length of the hearing. Accordingly, the Board declines to order additional compensation for delay.

[144] I find the SLRB's decision in this regard unreasonable as a result. There was no analysis completed as to how the issue of delay could be considered arbitrary, or perhaps grossly negligent. There was similarly no analysis completed to show that the delay in proceeding was motivated by: "ill-will, malice, hostility or dishonesty" by

SGEU. I am referred to those decisions which require an analysis of whether there were intentional actions by SGEU in causing this lengthy delay: *Karmazyn v Saskatchewan Polytechnic Faculty Association*, 2021 CanLII 52074 (Sask LRB), and *Hartmier*. In this regard there was simply no analysis completed by the Board.

[145] This aspect of the SLRB's decision is accordingly set aside on the basis that there was no justification provided for the decision and it is not intelligible according to the available law and evidence.

(g) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision that the claim was not barred by *The Workers' Compensation Act, 2013*, SS 2013, c W-17.11?

[146] During oral argument, it appeared that SGEU was raising a further ground of error by the SLRB with respect to its refusal to find that the claim now being advanced by Lapchuk was barred by virtue of the provisions of *The Workers' Compensation Act, 2013*. While this issue was argued before the SLRB, it was not identified as a ground for judicial review in the originating application filed and neither was it identified as an issue in the Brief filed by SGEU. When it was raised these shortcomings were identified. Regardless, in the interests of completeness, I address this issue here.

[147] The SLRB identified the issue with respect to the ability to proceed with a claim in light of the provisions of *The Workers' Compensation Act, 2013: Remedy Decision* at paras 117-120. Following a discussion of the statutory provisions and the WCB decision in this regard, SGEU's argument was dismissed and the SLRB determined that it had jurisdiction to proceed with the assessment of a remedy:

[117] The Union argued that Lapchuk's claim for damages in this matter is barred by the following provisions of *The Workers' Compensation Act, 2013*:

2(1) In this Act:

...

(h) “compensation” means compensation payable pursuant to this Act with respect to an injury;

...

(r) “injury” means all or any of the following arising out of and in the course of employment:

(i) the results of a wilful and intentional act, not being the act of the worker;

(ii) the results of a chance event occasioned by a physical or natural cause;

(iii) a disabling or potentially disabling condition caused by an occupational disease;

(iv) any disablement.

43 No employer and no worker or worker’s dependant has a right of action against an employer or a worker with respect to an injury to a worker arising out of and in the course of the worker’s employment.

167(1) No action or proceeding lies or shall be commenced for the recovery of compensation.

(2) All claims for compensation must be heard and determined by the board.

168 This Act and the regulations apply instead of all rights and causes of action, statutory or otherwise, to which a worker or the worker’s dependants are or might become entitled against the employer of the worker by reason of any injury to the worker arising out of and in the course of employment of the employer.

[118] The Board agrees that in *The Workers’ Compensation Act, 2013* the Legislature has committed exclusively to the WCB the question of when the statutory bar applies:

169(1) Any party to an action may apply to the board for

adjudication and determination of the question of:

(a) the plaintiff's right to compensation pursuant to this Act; or

(b) whether the action is barred by this Act.

(2) The board's adjudication and determination pursuant to this section is final and conclusive.

[119] With respect to one of the Statements of Claim filed by Lapchuk in the Court of Queen's Bench in response to his termination, the Employer made an application to the WCB for a determination whether the action was barred by *The Workers' Compensation Act, 2013* ["WCB 2015 Decision"]. The Union says that since the WCB 2015 Decision finds that the Union is an employer, any action against it related to Lapchuk's work injuries and/or the relapses of those work injuries and the associated claimed costs is barred by *The Workers' Compensation Act, 2013*. However, what the Union neglected to mention is that the WCB 2015 Decision also states:

However, with regard to Mr. Lapchuk's grievances in relation to his suspension and termination from employment, this has no relationship to his work injuries and has no bearing on whether or not his work injury claim was accepted or denied. WCB does not have any jurisdiction to reinstate Mr. Lapchuk's employment or rule on whether or not he should have been suspended or terminated from employment. This ruling lies completely outside of WCB's jurisdiction. (page 12)

...

However, the Board finds that WCB has no jurisdiction with regard to the SGEU suspension and termination grievances as this part of the action has no relationship to the WCB work injury claim. As such, the Board finds that this portion of the action is not barred by the Act. (page 13)

[120] In other words, the WCB has already determined that the damages suffered by Lapchuk arising out of the Union's conduct did not arise out of or in the course of his employment. Therefore, *The Workers' Compensation Act, 2013* is not a bar to an award of damages in this matter. The jurisdiction to review

and provide a remedy for the actions of the Union belongs to the Board, not the WCB.

[Footnote omitted]
[Emphasis in original]

[148] Based on the foregoing, I determine that the SLRB's reasons on this issue are intelligible, transparent, and are justified, by the reference to the decision of the WCB together with the applicable statutory references. Therefore the reasons are reasonable with regard to the decision that is made. Once again brevity or lack of reference to every argument advanced does not evidence unreasonableness in the decision that has been rendered. It appears SGEU is doing little more than attempting to relitigate this issue. The SLRB has explained the basis for its decision on the applicable legislation and the prior WCB decision. The pathway to decision is clear and justified on that which was cited.

[149] In fact, the SLRB decision on this issue is contained in the *Remedy Decision*. As indicated the whole of the remedy has been determined to be unreasonable. Regardless, again this discussion on the WCB issue is included for completeness.

(h) Did the SLRB act reasonably in determining SGEU had breached its duty of fair representation with respect to its decision concerning the application of *Browne v Dunn* (1893), 6 R 67 (HL)?

[150] The Board referred to the issue of the calling of evidence through Lapchuk which was not referred to the other Government witnesses. The issue is stated as follows in the *Liability Decision*:

[169] Hardy and Amor testified that, in addition to the medical defence, the other theory of the case was that the Government failed to recognize that putting Lapchuk into the field without sufficient training caused risk, because he was in full uniform, in a law-enforcement-looking vehicle. Lapchuk also believed that the Fort Qu'Appelle incident was a setup by his co-workers. The Arbitrator noted [at paras 194 and 195] there were "many

instances” where Lapchuk gave evidence that was potentially relevant to this defence, that was not put to the Government’s witnesses. Hardy and Amor did not follow the proper approach to having it admitted. Therefore, the Arbitrator had no choice but to disregard this evidence. We can never know whether that evidence would have changed the outcome of the arbitration. It weighed heavily enough on the Arbitrator’s mind that she referred to it in her Decision. What we do know is that Hardy and Amor were not trained and/or experienced enough to be able to submit it in an admissible manner. Again, it was gross negligence for the Union to not ensure their LROs are educated on basic rules of evidence.

[Footnote omitted]

This issue was identified by SGEU as a “*Brown v Dunn*” situation. For purposes of this decision, the more germane attack is to the SLRB determination regarding the failings of the LROs and their lack of expertise.

[151] Respectfully, the comments of the SLRB in this regard are difficult to follow. It appears the SLRB is commenting on the propriety of not putting certain evidence to the Government witnesses but yet having Lapchuk testify to these matters. It is unclear whether this is indeed intended to refer to a *Browne v Dunn* situation, or just a general commentary on a failing of SGEU to properly conduct the litigation aspect of the matter. At the end of this discussion, the SLRB concludes that this was gross negligence due to the failure to have the LROs educated on the basic rules of evidence.

[152] Earlier in these reasons, it was identified that the law in this area establishes litigation expertise by the LROs is not a requirement of the duty of fair representation. There is no stipulation that the LROs must be trained with particular emphasis on the rules of evidence. They are not lawyers. There is recognition in the law that there may even be simple negligence in the presentation of the arbitration grievance. The SLRB’s reasons do not conduct any sort of an analysis in this regard given these accepted parameters to the duty of fair representation jurisprudence.

[153] Rather, what the SLRB's reasons do is they cite the situation and conclude from its occurrence that this was an aspect of the failure of the duty of fair representation. There is no critical analysis as to how that is so or what particular aspect led to the resulting failure of the duty of fair representation. On this aspect of the decision I am unable to conclude that the SLRB's decision is either transparent or justifiable. There is a complete lack of analysis to allow for a consideration of the route taken by the SLRB for its decision.

[154] For all of these reasons, I determine the SLRB's decision of this issue is not reasonable and must be set aside.

(i) Did the SLRB act reasonably in determining that SGEU breached its duty of fair representation with respect to the termination grievance?

[155] SGEU submits that despite the SLRB properly instructing itself on the law with respect to the duty of fair representation, and the requirement that it not second guess the steps taken by SGEU in a grievance arbitration, that this is exactly what was done on this issue. SGEU argues that the SLRB engaged in a microscopic examination of the steps taken by SGEU to advance the grievance. They submit this is precisely what they are prohibited from doing according to the jurisprudence concerning the duty of fair representation.

[156] In this regard, the SLRB instructed itself as follows:

[155] The Board turns next to the preparation for and conduct of the arbitration. It is not for the Board to determine whether the Union was correct in deciding how to conduct the arbitration, and which witnesses to call. The Board will not microscopically review the Union's conduct during the arbitration proceedings or minutely assess and second guess its actions. However, what the Board expects and needs to see in the Union's evidence is that it arrived at its decisions in a fair and reasonable manner, without gross negligence, taking into account all reasonably available information and relevant considerations.

[156] It is not the role of the Board to second-guess the Union's decisions in how it ran the arbitration. But the Union's inability to explain the rationale for its decisions adds to the evidence that it was acting in an arbitrary manner. In some cases, it could not even advise the Board who had made important decisions. The Union was required to put its mind to the merits of the grievances and engage in a process of rational, reasoned decision making, based on all reasonably available information and relevant considerations. Here the Union acted with complete disregard for or indifference to the consequences of their decisions.

[*Liability Decision* at paras 155-156]

[157] The SLRB then examined the actions of SGEU concerning the issue of the medical evidence to be called. It determined that SGEU had been grossly negligent in its determinations regarding that issue by its action at the time of the conclusion of the first hearing and the introduction of evidence at the second hearing. It recognized that the critical issue, as had been determined by SGEU at the time of embarking on the grievance, was to establish both a diagnosis of PTSD and a connection of that condition to the behaviours exhibited by Lapchuk at the time of the incident in October 2012. The LROs had advised Lapchuk that this was the strategy to be employed. The September hearing was specifically adjourned because SGEU did not have this evidence lined up and was not in a position to react once the Government advised that they were opposing any attempt to simply introduce the medical reports which SGEU had at hand.

[158] In this regard, SGEU refers the Court to the comments of the SLRB in *Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (Sask LRB) [*Owl*], where the applicant there asserted a number of detailed arguments setting forth the failings of the union on an arbitration (*Owl* at paras 9-11).

[159] With respect to the allegations of failure set forth by the applicant in this case, the SLRB reviewed the evidence in detail at paras. 64-66 of the *Liability Decision*:

[64] That afternoon Hardy wrote to Lapchuk recommending that

Dr. Clarke be used as the expert witness to attest to Lapchuk's PTSD diagnosis and indicating that she and Amor would be meeting with Dr. Clarke. In response Lapchuk sent a three-page email indicating his opinion that Dr. Clarke could not be a witness as she would be in a conflict of interest. He then went on to provide further opinions about how the Union should proceed and asked 16 questions about the Government's suggestion that the arbitration be adjourned to allow time for additional medical evidence to be obtained. Hardy's only response was that, if Lapchuk wanted to proceed with just Dr. Cheshenchuk and Petroski, he should line them up to testify at the hearing the following week.

[65] A series of emails was entered as Exhibit A3449. The final email in the string, from Lapchuk to Hardy, dated November 7, 2015, 12:30 am, is critical to understanding the positions of the parties as to the failure of the Union to file medical evidence that the Arbitrator was prepared to accept as establishing their medical defence. Accordingly, it is set out in full, as follows:

It is something that the union has I am told agreed to with the employer and is to have in place not my choice. I am advising you she [Dr. Clarke] is probably in a conflict of interest for the already stated reasons. The union will have to determine that for themselves, as for her credentials she only has PHD. And WCB has determined the PTSD valid claim Nov 2013.

As I told Marie and I am telling you that these were the only 2013 medical providers and were EFAP PTSD counselor Greg Petroski provided as expert for my treatment, and the medical doctor Dr Chesenchuk. The union has agreed to find another expert per your discussions with the employer just recently. And there is a list of questions I have asked. Answers would be appreciated from the employer and I have asked the union to put forward or answer if they can.

Union has full carriage of the grievance as I have agreed to in prior email but to find the new expert as far as I know that well is dry for 2013 treatments and my health at that time. It's the unions responsibility so I ask that this be done in weeks rather than months as it is a thirteenth hour request.

I will not sign any release of the union, so stop with the

nonsense as you are proceeding as union has already agreed to this with employer. I am simply advising you of the reality of whom I saw at the time of Wrongful of wrongful Dismissal. The union can line up whomever hasn't got a conflict of interest, if union determines it is Clarke its out of my control and I will attend immediately any expert that the union chooses, I just have no additional plausible alternative medical leads.

As for lining up Dr Petroski and Dr Chesenchuk that was for union to have done, and continues to be your responsibilities. It's enough that Dr Chesenchuk report was done days ago but SGEU neither returned their call or paid for the report so I did at 8:30 today. I have the receipt this in order to have the reports required for Thursday, Friday morning. Technically both done Thursday.

It's the unions case to proceed with and new delay seems to be open ended with no return date as I know of no other PHD or higher I attended for PTSD treatment. This for something never asked for at Sept 2015 adjournment. Additionally it is foolish of me to suggest those witness's that are barred by the consent forms I signed to never be witnesses for me such as LTD psychiatrist. It would seem SGEU might access that psychiatric expert easily with SGEU LTD 's permission. He is definitely qualified and you can work his issues out internally with SGEU to access his professional opinion. Other than that please outline how union proposes to find some other expert and timeline its only up to the union.

All other avenues that have been adjourned by employer for the arbitration I will be pressing to move forward on as this new medical expert is the employers new request cannot be used as an excuse to adjourn those actions further. Employer has stalled this process as the union has agreed to find a new medical expert for some date in the future.

Union has carriage of the grievance if they have agreed to adjournment it's the unions business.

Let me know when this is adjourned to and who you setup for this whatever expert I will attend.

[66] Lapchuk's interpretation of this message is that he was resigned to the fact that the November 2015 dates for continuation of the arbitration hearing were going to be adjourned so that further medical information could be gathered. He suggested there may be challenges in obtaining reports or testimony from Dr. Clarke or the SGEU LTD psychiatrist, Dr. Natarajan, but leaves it to the Union to work out those issues. While an earlier email in this chain from Hardy to Lapchuk suggests that Lapchuk should arrange for Petroski and Dr. Cheshenchuk to provide evidence, he also indicates that it is the Union's responsibility to make those arrangements. The Union's response to this message was to proceed with the arbitration hearing on November 12, 2015 with only Petroski as a witness, filing reports from Petroski, Dr. Clarke and Dr. Cheshenchuk, and not making any inquiries about obtaining reports or evidence from Dr. Asmundson or Dr. Natarajan. Further emails confirm that Lapchuk's interpretation of the message was clearly communicated to the Union. Lapchuk's view that the Union was not listening to him is borne out by the documentary evidence filed by both parties.

[Footnote omitted]
[Emphasis in original]

[160] SGEU argues that the above is a prime example of the SLRB microscopically examining the actions of the SGEU throughout the arbitration. I do not agree. The above-cited passage illustrates the SLRB's detailed review of the evidence in support of its eventual decision. This is what is required of a tribunal to ensure its ultimate decision is transparent and justified. It informs the reasons for decision to allow them to be intelligible for the parties.

[161] In reviewing the facts, the SLRB was doing that which was necessary to allow for its ultimate determination in this regard. The SLRB here determined that SGEU had acted with gross negligence. That term has been repeatedly defined, by the classic expression in *McCulloch v Murray*, 1942 SCR 141 at 145 [*McCulloch*] per Chief Justice Duff:

I am, myself, unable to agree with the view that you may not have a case in which the jury could properly find the defendant

guilty of gross negligence while refusing to find him guilty of wilful or wanton misconduct. All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, I think it is entirely a question of fact for the jury whether conduct falls within the category of gross negligence, or wilful misconduct, or wanton misconduct. These words, after all, are very plain English words, not difficult of application by a jury whose minds are not, confused by too much verbal analysis.

In this case the jury found gross negligence and stated that the gross negligence consisted in reckless driving. I have no doubt that the jury were entitled on the evidence to find that the appellant's driving was reckless, and, that having been found, there was, I think, a sufficient basis for their finding that this reckless driving constituted gross negligence.

[162] The SLRB reviewed what transpired with respect to the consideration of available medical evidence and determined SGEU had been grossly negligent in its handling of this issue. In support of the finding of gross negligence, the SLRB referred to the fact that there was no investigation of either Dr. Natarajan or Dr. Asmundson, and therefore no attempt to get their information before the arbitrator. There was similarly no investigation of Dr. Clarke, including the basis for Lapchuk's assertion that this healthcare professional was somehow in a conflict of interest position.

[163] Finally, there was no argument to simply adjourn the hearing to further investigate and determine the availability of any such evidence. The availability of an adjournment was specifically presented by the Government and in the discussion had with the arbitrator. As indicated, the SLRB determined that Lapchuk had, in the end, provided his lack of opposition to the matter being adjourned in light of the issues concerning the lack of medical evidence.

[164] In this regard, SGEU seeks to attack or impugn the SLRB's acceptance of the evidence that Lapchuk had provided his consent to the continuation of the hearing

being adjourned and seeks to essentially blame Lapchuk for what occurred in the days leading up to the reconvening of the arbitration and in the failure to obtain an adjournment. In the SGEU Brief filed July 19, 2024, SGEU characterizes Lapchuk’s emails on this issue as “a kind of ‘poison pill’” and goes further to express concern “that the SLRB fell into this trap...” (paragraph 72). During argument, counsel then referred the Court to those areas in the transcript which were argued to provide contrary evidence to that as found by the SLRB.

[165] I am able to determine that there was evidence before the SLRB in the form of the email correspondence, together with the *viva voce* testimony of Lapchuk, to allow the SLRB to form the conclusions which it did regarding Lapchuk’s position on both an adjournment of the hearing and the presentation of medical evidence. Because the SLRB did not accept other evidence as per the assertions advanced by SGEU, does not then make the SLRB’s findings or decision unreasonable. It is the master of its hearing and it may determine the evidence to accept, the evidence to reject, and the findings of fact to be made. There is no basis to determine those findings were patently unreasonable. I am not entitled to insert my own determinations of fact in light of the clear findings made by the SLRB. There is no palpable or overriding error with respect to the evidentiary findings made in this regard.

[166] Respectfully, as earlier stated SGEU’s arguments here amount to little more than an attempt to re-argue the case in the hopes of obtaining an ultimate result which they view as more favourable. The references to the other evidence is a less than veiled effort to criticize the original tribunal for gullibly accepting evidence which was obviously, in SGEU’s view, merely a trap set to catch the unwary and the less sophisticated.

[167] The reality of the matter is that the SLRB determined that the LROs did little, if anything, to investigate, discover, or properly consider, the availability of

medical evidence necessary to establish the critical causal connection between the incident of October 2012 and Lapchuk's PTSD status. They were not prepared to present any such evidence at the initial hearing in September 2015 and were similarly unprepared to present any such evidence, or to have even reviewed the availability of any such evidence by the time of the resumption of the hearing in November 2015. Even with the advantage of a direct discussion with the arbitrator, who was the decision maker, the SLRB determined there were no sufficient steps taken to protect the grievance and attempt to obtain, or at least consider, the additional evidence required. This evidence was squarely before the tribunal. While SGEU disputes the correctness of the acceptance of this evidence, it does not argue as to its availability.

[168] It is these activities which form the basis for the SLRB's determination there had been gross negligence committed by SGEU. This determination is based on findings of fact. There is evidence to support such findings. I am unable to determine these findings were not therefore reasonable and were not reasonably identified in the *Liability Decision* rendered by the SLRB.

[169] Reference to the SLRB's identification of the applicable law defining the duty of fair representation has been made earlier in these reasons. In finding SGEU had acted arbitrarily or with gross negligence, the SLRB instructed itself on the appropriate test to be applied:

[145] The Board does not minutely examine each and every action by the Union but looks at the whole course of conduct to determine whether the Union failed in its duty of fair representation. It is not the duty of the Board to assess the performance of the Union in each meeting or email undertaken in the course of Lapchuk's representation. The Board must look at the Union's representation of Lapchuk in its entirety and determine if the Union breached its duty of fair representation.

[*Liability Decision* at para 145]

[170] It then reviewed the available evidence at paras. 158-161. Finally it

expressed the conclusion that SGEU had acted arbitrarily in committing gross negligence with respect to the failure to properly deal with the issue of the medical evidence: paras. 162-164 of the *Liability Decision*.

[171] The SLRB's reasons in this regard are intelligible and justified based on the facts and law as determined by the SLRB. I am unable to conclude that the SLRB inappropriately micro-analysed the activities of SGEU. The route taken by the SLRB to arrive at its decision on this issue is clear and transparent. Again, the correctness of that decision is not a matter that is either before me, or which I am entitled to consider on this reasonableness review. I therefore find this aspect of the decision to be reasonable.

(j) Did the SLRB act reasonably in the *Remedy Decision* by failing to consider and determine the issue of causation of damages as a result of the finding of a failure of the duty of fair representation?

[172] This then leads to a discussion with respect to the *Remedy Decision*. As indicated, I have determined that it is necessary to return the issue of the appropriate remedy to the SLRB as a result of finding that the decision given by the SLRB with respect to the determination of the appropriate remedy were not reasonable in these circumstances, coupled with the setting aside of certain aspects of the *Liability Decision*, which will inform the appropriate remedy to be granted.

[173] SGEU argues that having determined the issue of liability, the SLRB was required at law to then engage in an analysis of whether such liability caused the damages claimed or any damages to Lapchuk. This can be termed as recognizing there was an analytical requirement in determining whether there was a causal connection between the wrongful actions of SGEU with respect to its duty of fair representation and any damages suffered by the grievor, Lapchuk.

[174] In this regard, the SLRB stated in the *Remedy Decision*:

Lapchuk's burden of proof in the Remedy Hearing:

[122] The Union argued that a central part of the Remedy Hearing was whether the Union caused Lapchuk a loss in its failure to call certain medical evidence or witnesses. This is totally wrong. The Board has already found the Union is liable. The Union repeatedly suggested that Lapchuk should have called the evidence at the Remedy Hearing that they neglected to call at the arbitration, and went so far as to suggest that the Board should draw an adverse inference against Lapchuk for failing to do so. The Board does not agree. The Remedy Hearing is not a do-over of the arbitration. The only issue before the Board is quantification of damages. The Remedy Hearing is not an opportunity to re-run the arbitration and decide if it would have been successful if Lapchuk had been in charge of deciding what evidence to tender. The Remedy Hearing is not a vehicle (nor is it a goal of the Remedy Hearing) to determine whether the result in the arbitration was correct.

[123] The Board has already found that the Union is at fault for Lapchuk's current situation. They were charged with responsibility for protecting Lapchuk's interests and in the many ways outlined in the Liability Decision, they failed. The task for the Board now is to calculate the damages that they caused through their wrongful acts.

[Footnote omitted]
[Emphasis in original]

[175] In *Howell v International Association of Heat and Frost Insulators and Allied Workers, Local 110, Re*, 2021 CarswellAlta 2408 (WL) (Alta LRB), the following is stated:

[70] This means that determining what is a fair and reasonable monetary settlement offer in a DFR complaint is not as simple as other cases. The damages from a breach of the duty will most often be the loss of a chance, and valuing that loss of a chance is not easy. It means that, even if the Board assesses the settlement offer on the premise that the complainant's allegations in the DFR complaint would be proven, that assessment must also account for the risk that the underlying grievance may not have been successful. As stated above in *Martin [Martin v Allied Food and Commercial Workers Union Local 397, Alta LRBD 85-048]*, "[i]t would be a serious error for the Board to assume

that any grievance, frustrated by a breach of the duty of fair representation, would have succeeded if it had been arbitrated". Considering the likelihood of success of a grievance in this context also allows the Board to consider the cost to labour relations parties of ordering a union to advance a hopeless grievance to arbitration simply because of defects in representation. Reaching a reasonable settlement under this section can avoid that circumstance.

[Emphasis added]

[176] The SLRB commented on this causation requirement by apparently mistaking it for the adage that difficulty in determining damages does not preclude the assessment of any damages. The SLRB states as follows:

[132] Relying on an excerpt from an unreported decision referenced in *Bridges v UNITE Here, Local 47* [2011 CanLII 62464 (Alta LRB)] [*"Bridges"*], the Union asks the Board to deny Lapchuk damages on the basis of the following comment made in that decision: "It would be a serious error for the Board to assume that any grievance, frustrated by a breach of the duty of fair representation, would have succeeded if it had been arbitrated". However, *Bridges* goes on to reject that approach:

[29] The Ontario Labour Relations Board addressed the apparent arbitrariness of this approach to assessing damages in Radio Shack, [1979] OLRB Rep. Dec. 1220 (jud. rev. denied, in Re Tandy Electronics Ltd., and United Steelworkers of America et al. (1980), 30 O.R. (2d) 29, 80 CLLC 14,017 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused March 10, 1980, 29 O.R. (2d) 29 n):

101. It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature - a result that would appear to contravene the first tenet discussed. The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See

Mayne and McGregor on Damages 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example: Withers v. General Theatre Corporation, [1933] 2 K.B. 536; Roach v. Yates, [1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

[30] *After reviewing several such cases, the Board concluded:*

111. If the courts have not shied away from attempting to provide effective monetary relief for the violation of private rights, should the Ontario Labour Relations Board be any less sensitive when confronted with the intentional defiance of statutory policy? The answer must surely be in the negative unless this approach conflicts fundamentally with more important principles and we do not think this is the case.

[133] The purpose of the compensation ordered by the Board is to counteract as much as possible the consequences of the Union's arbitrary, discriminatory and bad faith conduct. The Board agrees with the finding referred to in *Bridges* that "one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing." The Board will not burden Lapchuk with an unattainable standard of accuracy in the assessment of damages. The Board will not shy away from attempting to provide effective monetary relief for the Union's deliberate and egregious breaches of their duty of fair representation, even if it is not precisely or easily quantifiable.

[*Remedy Decision* at paras 132-133]

[Footnotes omitted]

[Emphasis in original]

[177] The SLRB found that SGEU failed in its duty of fair representation by acting arbitrarily or with gross negligence. The finding of such negligence does not then, at law, equate automatically to a finding that the party subjected to the gross negligence, necessarily then suffered damages. This fundamental proposition has, respectfully, not been addressed in any respect in the reasons of the SLRB.

[178] The Court was specifically referred to *Romard v Canadian Union of Public Employees*, 2000 CanLII 3423 (NS SC), a decision with respect to the duty of fair representation and the damages which may flow from a breach of that duty. There, the Court stated:

[69] There are some difficulties associated with this assumption. The onus is on the plaintiff to prove its case and to establish that the grievance would have succeeded had it gone to arbitration. The onus is on the plaintiff to establish damages. The only evidence before the Court on this point is the testimony of Kelly Murray who gave his opinion that dismissal grievances are the easiest ones to handle because the success rate is high. I am unable to conclude on the evidence or lack of evidence before this Court that the plaintiff's grievance would have succeeded. I am asked to draw the inference that because the Employment Insurance Board of Referees could not conclude that the plaintiff was dismissed because of misconduct that this would have automatically been the finding of the arbitrator. There is a great difference between the evidence that was presented to the Board of Referees and that which may have been presented at an arbitration.

[Emphasis added]

[179] Here, it is apparent that the SLRB did not conduct any form of analysis as to whether the liability of SGEU, or the arbitrary actions/gross negligence of SGEU, ultimately caused any damages to Lapchuk. *Vavilov* requires the decision maker to explain its conclusions. This is done by identifying the issues advanced and the analysis concluded with respect to those issues by the parties. I determine this did not happen here. *Vavilov* puts this proposition as follows:

(e) *Submissions of the Parties*

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker* [*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817], at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[128] Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” (*Newfoundland Nurses [Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)]*, 2011 SCC 62, [2011] 3 SCR 708], at para. 25), or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion” (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[Emphasis in original]

[180] At the hearing with respect to the issue of the appropriate remedy, Lapchuk tendered two witnesses. Neither of those witnesses opined on the PTSD issue which had caused the original problem during the arbitration proceedings. It is clear from the record that SGEU specifically raised the causation concern and the need to consider whether Lapchuk would have been able to find success in the arbitration had SGEU complied with its duty to fair representation.

[181] The critical issues identified by the SLRB in the *Liability Decision*, the existence of a PTSD diagnosis at the time of the 2012 incident and the connection between that diagnosis and the actions of Lapchuk at that time remained issues at the remedy hearing. SGEU argued there was no evidence provided by Lapchuk with respect to these critical issues.

[182] The SLRB responded to these arguments as follows:

[125] The Union argues that there is no evidence before the Board that Lapchuk had a diagnosis of PTSD before the Fort Qu'Appelle incident. That is not true. The WCB 2018 Decision states:

A further complicating factor is the fact that Mr. Lapchuk suffered from PTSD before the injury. Although he had been symptom free for about 2 years before October 17, 2012, he retained a pre-existing vulnerability that was prone to be triggered. (page 2)

At page 16 the WCB 2018 Decision also noted that he had first been diagnosed with PTSD at some point between 2002 and 2005.

[126] Alternatively, the Union argued that the purpose of the Remedy Hearing was not to re-run the arbitration, but the onus was on Lapchuk to demonstrate the outcome of the arbitration would have been different had the Union called the evidence outlined in the *Liability Decision*, and the evidence fails to establish this. The Union argued that the whole purpose of the Remedy Hearing was for Lapchuk to prove that the Union mismanaged his disability defence and that it would have been possible or easy or likely that there would have been a different outcome if they had not breached their duty of fair representation. The onus, they say, is on Lapchuk to prove what difference this would have made. The Union's position is that it is clear that, no matter what they did, it is unlikely the Arbitrator would have come to a different decision.

[127] The Board disagrees with all of those arguments. The Union at several points bases these arguments on findings of the Arbitrator. What the Union fails to acknowledge, though, is that the Arbitrator made those findings because of and based on the

case they put before her. The Arbitrator's decision outlines all of the shortcomings in the Union's evidence; those shortcomings are attributable to the Union's conduct of the case. The reason the Board is considering this issue is because of the Union's conduct.

[128] The Board does not have to find that the Arbitrator was wrong before it has authority to award damages. As noted above, this Board has no jurisdiction to make a determination that she was wrong. That does not lead to a conclusion that the Board cannot award damages to Lapchuk for the Union's wrongful conduct and the damage it caused him.

[*Remedy Decision* at paras 125-128]
[Emphasis in original]

[183] I note the statement regarding the WCB finding of fact is from a 2018 decision. This would have appeared well after the arbitration hearing was concluded and was therefore not available at the time of that proceeding. The SLRB then concludes the decision of the arbitrator was based on the case put before her by SGEU. However, there is no evidence in the record before the SLRB which in any way establishes that the case could have been different or that there was evidence available which would have established that difference. Simply put, there is no evidence in the record to establish the critical questions or to raise a reasonable ability to establish those.

[184] Respectfully, I am unable to conclude this part of the SLRB's decision is reasonable based on the evidence that was before the SLRB and the applicable law as set forth above. The conclusions reached in the result must be considered to be not intelligible or justifiable on this central issue of the need to find causation, or better said, Lapchuk's loss of a chance to be successful in establishing damages flowed from SGEU's arbitrary conduct. The pathway followed by the SLRB to make the decision cannot be discerned in light of that applicable law and evidence.

[185] The authorities cited establish the need to have that causal connection

through the evidence. The SLRB did not consider this causal link and appears to have misunderstood the fault of SGEU does not the equate SGEU having caused any damages. The lack of justification for the decision rendered with respect to the appropriate remedy is made out by such lack of reference. Contrary to the decision of the SLRB, this is not a case of finding the arbitrator was wrong in order to then award damages. The SLRB had already determined SGEU had been grossly negligent in failing to take the steps necessary to secure or determine the availability of the medical evidence. However, it was due to the absence of that evidence that the arbitration failed, not due to the failure of SGEU in its actions. The SLRB mistakenly determined that it was SGEU's failure in its duty in this regard which caused the damages. The SLRB then fails to distinguish between the dismissal of the arbitration and whether, assuming SGEU had done its duty, the outcome would or could have been different. Again, as stated in the authorities cited, the inquiry is whether the claimant lost a chance to succeed at the arbitration and to value that chance by way of damages.

[186] In the result, due to the foregoing analysis, I determine that the SLRB's decision with respect to the assessment of damages is not reasonable. The reasons given do not provide a method by which any appropriate analysis was conducted and are therefore neither intelligible nor justified based on that which was before the SLRB. As a result, I find that the SLRB's decision with respect to damages must be set aside.

CONCLUSION

[187] On the basis of the foregoing, I determine that the application to set aside the *Liability Decision* with respect to a finding of a failure to provide a duty of fair representation as a result of the arbitrary actions or gross negligence of SGEU with respect to the arbitration must be dismissed. The SLRB's decision on this aspect is reasonable and therefore not open to review by this Court. I determine that the SLRB's decision with respect to the remedy is, however, not reasonable and must be set aside.

[188] In light of the particular evidence to be called with respect to the issue of the appropriate remedy, I direct that this aspect be returned to the SLRB for a further hearing on this aspect. I have considered whether the appropriate remedy could be considered by this Court on this review application. I have determined it cannot. The parties will have the ability, before the SLRB, to call such evidence as they determine appropriate and available to deal with arguments concerning the appropriate remedy.

[189] The decision on the complete remedy appears to have been based on the entirety of the conclusions of the SLRB of the various failures of SGEU with respect of the duty of fair representation. Certain of those failures have been set aside on the grounds those specific decisions reached were not reasonable. That necessarily means that the whole of the issue of damages must be reconsidered in light of the actual duty of fair representation conclusions arrived at by the SLRB.

COSTS

[190] SGEU has not been successful in setting aside the entire decision of the SLRB. Lapchuk has been successful in upholding the SLRB's ultimate decision that there was a breach of the duty of fair representation by SGEU. SGEU has been successful in setting aside the entirety of the *Remedy Decision*. As a result of what I determine is divided success I decline to exercise my discretion to award costs in this matter.

[191] The matter is to be remitted back to the SLRB for a determination of the appropriate remedy to be provided to Lapchuk in view of SGEU's breach of its duty to fair representation towards him.

J.
M.T. MEGAW