
Court of Appeal for Saskatchewan
Docket: CACV4435

Citation: *SaskEnergy Incorporated v*
***Unifor Local 649*, 2026 SKCA 94**

Date: 2026-08-26

Between:

SaskEnergy Incorporated

Appellant
(Applicant)

And

Unifor Local 649

Respondent
(Respondent)

Before: Caldwell, Bardai and Kilback JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Keith D. Kilback
In concurrence: The Honourable Justice Neal W. Caldwell
The Honourable Justice Naheed Bardai

On appeal from: 2024 SKKB 96 and 2024 SKKB 160, Regina
Appeal heard: June 4, 2026

Counsel: Jana Linner, K.C., and Jianna Rieder for the Appellant
Gary L. Bainbridge, K.C., for the Respondent

Kilback J.A.

I. INTRODUCTION

[1] Following two unrelated workplace incidents, five members of Unifor Local 649 employed by SaskEnergy Incorporated grieved management decisions requiring them to undergo drug and alcohol testing. An arbitrator upheld the grievances. He issued a declaration that SaskEnergy improperly required the employees to submit to testing and awarded them compensation (*UNIFOR, Local 649 v SaskEnergy Incorporated*, 2022 CanLII 126109 (SKLA) [*Award*]).

[2] SaskEnergy applied to the Court of King's Bench for judicial review of the *Award*. A preliminary issue arose concerning the material to be considered on the application.

[3] The arbitration hearing was not recorded, so there was no transcript of the evidence available. In support of its application for judicial review, SaskEnergy sought to supplement the record provided by the arbitrator by filing affidavits from two of its employees who had attended the hearing. In one affidavit, Bree Kozakewich provided her recollection of parts of what some of the witnesses had said. In the other, Kate Brown stated that Ms. Kozakewich's recollection was consistent with her own. The judge ruled these affidavits were inadmissible and could not be considered (*SaskEnergy Incorporated v Unifor Local 649*, 2024 SKKB 96 [*Affidavit Decision*]).

[4] In a separate decision, the judge found that the *Award* was reasonable and dismissed SaskEnergy's application for judicial review (*SaskEnergy Incorporated v Unifor Local 649*, 2024 SKKB 160 [*Review Decision*]).

[5] SaskEnergy appeals both the *Affidavit Decision* and the *Review Decision*. I would dismiss the appeal because I am not persuaded the judge erred in any of the ways alleged by SaskEnergy.

II. BACKGROUND

[6] To inform the discussion that follows, it is helpful to briefly review relevant aspects of the two workplace incidents that led to the employees being sent for drug and alcohol testing.

[7] The first incident occurred on July 17, 2019, when four SaskEnergy employees were excavating a trench to connect a new natural gas pipeline to a house on an acreage near Moose Jaw. Doug Lansdell was the crew lead and on-site supervisor. The other workers were Tyler Thauberger (welder), Ryan Manz (hydrovac machine operator), Tyler Malinowski (trenching machine operator), and Brett Labrash (labourer/swamper).

[8] Six days before the work was scheduled to begin, the location of the existing gas pipeline was marked by other SaskEnergy employees. The location of a telephone line had previously been marked by a third-party contractor. The flags identifying the location of the two lines showed they were close together, which was unusual. For this reason, Mr. Lansdell contacted another SaskEnergy employee a day or two before the job began and asked him to double check the location of the natural gas line. Mr. Lansdell also contacted the third-party contractor and was assured that the location of the telephone line was accurate.

[9] When the work began, Mr. Malinowski started trenching from the house to the tie-in point while Mr. Manz used a hydrovac machine to expose the lines. The hydrovac unit excavates by using a high pressure water spray to soften the soil and a vacuum to remove the resulting slurry, in a process called “daylighting” the buried line.

[10] Mr. Manz found the telephone cable but could not find the gas line where the markers indicated it should be located. He told this to Mr. Lansdell, but neither of them asked Mr. Malinowski to stop trenching because the line had not been located. Mr. Malinowski then hit the gas line with the trenching machine, approximately 135 metres from the house and 35 metres from where the tie-in point had been marked. The damaged line emitted natural gas under pressure.

[11] Mr. Lansdell immediately reported the incident to his superintendent, Armand Claude. Following an investigation, SaskEnergy management sent Mr. Lansdell, Mr. Malinowski, Mr. Manz, and Mr. Thauberger for drug and alcohol testing later that day. They all tested negative, and no one was disciplined.

[12] The second incident occurred on March 4, 2020, when five employees were installing natural gas service to three new homes on White Bear First Nation. Dan Pelly was the crew lead and on-site supervisor. Mr. Thauberger was the welder on the job, and the other workers were

Nathan Bitz (equipment operator), Levi Milani (labourer/swamper), and Cortney Mead (backhoe operator).

[13] The crew had exposed an eight-foot section of a buried gas line and excavated a bell hole around it where the new service would tie in. The bell hole was not large enough for Mr. Thauberger to perform the welding required, so Mr. Pelly instructed Mr. Mead to use the backhoe to remove more dirt to make the bell hole larger.

[14] A hydrovac unit would normally have been used to expose the gas line in the area to be excavated, but there was none on site. As Mr. Mead started digging alongside an uncovered eight-foot section of the pipe that appeared to be straight and level, a tooth on the backhoe bucket contacted the buried gas line. The line had unexpectedly deviated 18 inches vertically and 18 inches horizontally into the excavation path. This deviation had not previously been detected because a tracer wire used for locating the pipe had become separated from the pipe itself.

[15] Mr. Pelly reported the incident to his superintendent, Richard Davies. Following an investigation, SaskEnergy management decided the incident had been caused by operator error and sent Mr. Mead for drug and alcohol testing later that day. Mr. Mead also tested negative and was not disciplined.

[16] Each of the five employees grieved management's decision to require them to undergo testing on the basis that SaskEnergy had not complied with its Drug and Alcohol Policy governing post-incident testing for employees in safety sensitive positions [Policy]. The relevant part of the Policy obliges employees to undergo testing after a significant work-related incident "where requiring a test is a reasonable line of enquiry for the investigation" or otherwise "where there are reasonable grounds to believe" that substances may have been a contributing factor. The union argued these prerequisites were not met and that the testing ordered by management was, therefore, contrary to the Policy. SaskEnergy submitted that, by inexplicably ignoring their training and applicable safety protocols, the employees had behaved in such an abnormal manner that it raised concerns they might have been under the influence of alcohol or drugs, which made the testing a reasonable line of inquiry in its investigation of the incidents.

[17] The arbitrator did not accept SaskEnergy's argument and found in favour of the union. With respect to the 2019 incident, the arbitrator determined that SaskEnergy required the employees to submit to testing not because they might have consumed alcohol or drugs "but as a deterrent to ensure they would be more cognizant of safety rules in the future" (*Award* at para 112). Similarly, with respect to the 2020 incident, the arbitrator found that SaskEnergy did not require Mr. Mead to submit to testing because of concerns about drug and alcohol use being a potential cause of the incident but rather "because he had operated the backhoe without daylighting before digging when the line strike occurred" (*Award* at para 126).

[18] The arbitrator upheld the grievances and issued a declaration that SaskEnergy had improperly required the employees to submit to testing. The arbitrator also ordered SaskEnergy to pay compensation of \$1,500 to each of Mr. Lansdell, Mr. Manz, Mr. Malinowski and Mr. Thauberger, and \$2,000 to Mr. Mead. The judge found the *Award* was reasonable and dismissed SaskEnergy's application for judicial review.

III. APPEAL OF THE *AFFIDAVIT DECISION*

[19] On the appeal of the *Affidavit Decision*, the issue is whether the judge erred in ruling that the Kozakewich and Brown affidavits were inadmissible by misapplying the test for admitting affidavit evidence on judicial review or finding that the evidence was hearsay. To explain why the judge did not err in ruling that the affidavits were inadmissible, it is useful to begin by briefly examining the record and the content of the proffered evidence.

A. The record and the proffered evidence

[20] When SaskEnergy filed its originating application for judicial review, the arbitrator provided a certified record of proceedings in accordance with Rule 3-58 of *The King's Bench Rules* that included the *Award* and written submissions filed by counsel. The arbitrator could not provide copies of the hearing exhibits because they had been discarded and there was no transcript of the oral evidence taken at the hearing (*Affidavit Decision* at para 2). Copies of the exhibits were later appended to a second affidavit sworn by Ms. Kozakewich that was received in evidence without objection and is not in issue on this appeal.

[21] SaskEnergy advanced numerous grounds for overturning the *Award* on judicial review, which the judge noted were set out “in three and one-half pages, divided into three broad categories and sometimes subcategorized” (*Review Decision* at para 46). One theme was that the arbitrator had “failed to consider all relevant evidence, ignored relevant evidence, fundamentally misapprehended evidence and/or made erroneous findings of fact on the basis of no evidence” (*Affidavit Decision* at para 6, quoting SaskEnergy’s originating application). Since SaskEnergy challenged the arbitrator’s factual findings, the absence of a transcript of the testimony at the hearing was problematic.

[22] The judge found that SaskEnergy had filed the Kozakewich affidavit to address what it perceived as a shortcoming in the evidentiary record:

[7] The Kozakewich affidavit attempts to rectify alleged shortcomings in the evidentiary record as otherwise found in the arbitration decision. Respecting the testimony of each of the grievors – Doug Lansdell, Ryan Manz, Tyler Malinowski, Tyler Thauberger and Cortney Mead – Ms. Kozakewich introduces her recollection of each of their testimony with the following introductory statement:

I was present during the testimony of [grievor’s name]. To the best of my knowledge, [grievor’s name] testified to a number of facts about his position with the Employer and the incident on July 17, 2019. [Name of grievor] testified:

[8] Following this introduction, Ms. Kozakewich itemizes and summarizes what each of the grievor-witnesses said during the hearing. For example, respecting Mr. Lansdell’s testimony, Ms. Kozakewich summarizes 12 points of his testimony, 10 offered during cross-examination and two during direct examination.

[9] Ms. Kozakewich also summarizes testimony provided by four witnesses called by SaskEnergy, including Jason Stoudt, Construction South Division Manager; Armand Claude, Construction Superintendent; Richard Davies, Construction Superintendent; and Jason Kotylak, Construction Superintendent.

(Bracketed information in original)

[23] To illustrate how the evidence was presented, it is helpful to provide two examples. The Kozakewich affidavit includes the following statements regarding the evidence of Mr. Malinowski in relation to the 2019 incident and the evidence of Mr. Mead in relation to the 2020 incident:

7. I was present during the testimony of Mr. Malinowski. To the best of my knowledge, Mr. Malinowski testified to a number of facts about his position with the Employer and the incident on July 17, 2019. Mr. Malinowski testified:

- (a) he has a duty to ensure safety: in cross-examination, Mr. Malinowski agreed that he has a responsibility to follow the Employer’s safety rules, practices and procedures.

- (b) he breached the Employer's rules: in cross-examination, Mr. Malinowski agreed that he broke the Employer's safety rules because he did not verify the accuracy of the locates before directing trenching to begin.
- (c) daylighting before excavation is a requirement: in cross-examination, Mr. Malinowski agreed that it is a requirement buried gas lines must be daylighted before excavation or trenching begins.
- (d) he was trained: in cross-examination, Mr. Malinowski agreed that he was trained on the Employer's locating policies. Mr. Malinowski agreed that if there was any doubt as to the accuracy of a line locate, the crew should not be trenching.
- (e) he had doubt: in cross-examination, Mr. Malinowski agreed that prior to when he started trenching, there was doubt about the accuracy of the line locates.
- (f) he told the Crew Lead what happened: in cross-examination, Mr. Malinowski agreed that once the gas line hit occurred, he spoke to Mr. Lansdell and told him what happened.

...

9. I was present during the testimony of Mr. Mead. To the best of my knowledge, Mr. Mead testified to a number of facts about his position with the Employer and the incident on March 4, 2020. Mr. Mead testified:

- (a) he has a duty to ensure safety: in cross-examination, Mr. Mead agreed that he has a responsibility to follow the Employer's safety rules, practices and procedures.
- (b) he breached the Employer's rules: in cross-examination, Mr. Mead agreed that he broke the Employer's safety rules because he did not verify the accuracy of the locates before directing trenching to begin.
- (c) daylighting before excavation is a requirement: in cross-examination, Mr. Mead agreed that it is a requirement buried gas lines must be daylighted before excavation or trenching begins.
- (d) he was trained: in cross-examination, Mr. Mead agreed that he was trained on the Employer's locating policies.
- (e) the buried gas line could have been daylighted: in cross-examination, Mr. Mead agreed that the buried gas line could have been daylighted through hand-digging prior to the gas line hit.
- (f) he told the Crew Lead what happened: in cross-examination, Mr. Mead agreed that once the gas line hit occurred, he spoke to Dan Pelly, his Crew Lead, and told him what happened.

(Emphasis in original)

[24] Ms. Kozakewich presented the evidence of seven other witnesses in a similar manner.

[25] SaskEnergy relied on *Hartwig v Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, for the proposition that affidavit evidence is admissible on judicial review. The judge recognized that affidavits may be admitted on a judicial review application in certain circumstances but found *Hartwig* did not assist SaskEnergy in this case. The judge concluded the Kozakewich affidavit was also inadmissible because there was no assurance her recollection was accurate and because the proffered evidence was hearsay.

[26] The judge found the Brown affidavit was inadmissible because it was oath helping. However, since Ms. Brown merely confirmed that Ms. Kozakewich's recollection of what the witnesses had said at the hearing was consistent with her own, the judge's handling of the Brown affidavit is a peripheral issue. SaskEnergy's appeal of the *Affidavit Decision* turns on the judge's assessment of the admissibility of the Kozakewich affidavit.

B. The relevant principles

[27] SaskEnergy's initial argument is that the judge misapplied the principles governing the admission of affidavit evidence on judicial review set out in *Hartwig* and *Saskatchewan (Workers' Compensation Board) v Gjerde*, 2016 SKCA 30.

[28] Traditionally, the evidence presented to an administrative tribunal could not be considered by a court conducting a judicial review hearing where the application was grounded in an error of law on the face of the record. This general principle, which had its roots in *R v Northumberland Compensation Appeal Tribunal* (1951), [1952] 1 All ER 122 (CA), was revisited in *Hartwig*.

[29] Writing for the Court, Richards J.A. (as he then was) noted that the scope of judicial review had evolved significantly since *Northumberland*, observing that "we are currently at a point where, on one hand, the factual findings of administrative decision-makers made within jurisdiction can be reviewed from the perspective of reasonableness but, on the other hand, the evidence on which those findings are made cannot be put before the courts" (*Hartwig* at para 19). Although other provinces had passed legislation or rules of court requiring administrative decision makers to provide the reviewing court with a transcript of the oral evidence called at the hearing as part of the record, there was no such requirement in Saskatchewan under Rule 669 of *The Queen's Bench Rules*, which was then in effect (at paras 21-23).

[30] Since this situation often created injustices and precluded meaningful review, the Court held that “parties to a judicial review application should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make” (at para 32) and recognized a party’s ability to bring forward the evidence that was before the decision maker by way of an affidavit:

[33] Thus, in all of the circumstances, the best course in this area for now is to simply recognize the right of participants in judicial review proceedings to bring forward the evidence which was before the administrative decision-maker. This may be done by way of an affidavit which identifies how the evidence relates to the issues before the court and which otherwise lays the groundwork for its admission. That was the general approach taken by Hartwig.

[31] The Court in *Hartwig* accepted that participants could put the evidence that was before the administrative decision maker before the court on judicial review. The *Northumberland* prohibition on the reviewing court considering that evidence was no longer controlling.

[32] The requirement for an administrative decision maker to include the evidence as part of the record on judicial review is now reflected in Rules 3-57(2)(d) and 3-58 of *The King’s Bench Rules*, which replaced former Rule 669 of *The Queen’s Bench Rules* considered in *Hartwig*. In relevant part, the current rules require the decision maker to comply with a notice to produce the record of the proceedings before it, which includes the evidence and exhibits, or to explain why they cannot be produced. In most circumstances, the evidence considered by the decision maker is now put before the reviewing court through this process, rather than by way of an affidavit filed by one of the parties.

[33] As a general proposition, judicial review should be restricted to the evidentiary record that was before the decision maker (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 86 [*Tsleil-Waututh Nation* 2017]). This ensures that courts will properly apply the governing standards of review instead of simply substituting their own views for those of the decision maker (*Tsleil-Waututh Nation v Canada (National Energy Board)*, 2016 FCA 219 at para 80).

[34] However, there are exceptions when it is permissible to supplement the record transmitted to the reviewing court by the administrative decision maker. In *Gjerde*, this Court adopted the

approach set out by Stratas J.A. of the Federal Court of Appeal in *Association of Universities*, with one addition. In general terms, the record may be supplemented on judicial review where the proffered evidence: (i) provides background that assists in understanding the issues; (ii) reveals procedural defects not found in the evidentiary record; (iii) highlights the absence of evidence in relation to a particular finding; or (iv) where appropriate, elucidates the record upon which the administrative decision was based:

[44] In my view, the appropriate approach to when the “record” should be supplemented on judicial review was set out by Stratas J.A. of the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19 and 20, 428 NR 297. After acknowledging the general rule that judicial review should be restricted to the evidentiary record that was before the Board when it made its decision, Stratas J.A. went on to recognize there will be exceptions to that general rule, including evidence (i) that provides general background (as opposed to addressing the merits) in circumstances where that information might assist in understanding the issues for judicial review, (ii) to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record such as fraud, bribery, or bias, and (iii) to highlight the complete absence of evidence before the administrative decision maker when making a particular finding. (See also *Keeprite Workers’ Independent Union and Keeprite Products Ltd.* (1980), 29 OR (2d) 513 (CA); *Mr. Shredding Waste Management v New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69 at para 64, 274 NBR (2d) 340; *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 20, 466 NR 44.) To these I would add the exception highlighted by *Hartwig* and *SELI* where, in appropriate circumstances, evidence may be received by a reviewing court to elucidate the record upon which the administrative body’s reasons were based.

C. The judge did not misapply the relevant principles

[35] In ruling that the Kozakewich and Brown affidavits were inadmissible, SaskEnergy contends the judge misapplied these principles in two ways. First, it says the judge failed to appreciate that *Hartwig* stands for the proposition that parties to a judicial review should be able to put before a reviewing Court all material bearing on the arguments they are entitled to make, including the testimonial evidence that was before the decision maker. Second, SaskEnergy submits that its summary of some of the evidence called at the hearing was admissible in accordance with *Gjerde* because it was adduced to elucidate the record upon which the *Award* was based by filling in the evidentiary gap created by the absence of a transcript.

[36] On the first point, I am not persuaded the judge erred in concluding *Hartwig* did not assist SaskEnergy in this case. In *Hartwig*, the Court allowed a *transcript* of the evidence presented to

the Commission of Inquiry into the death of Neil Stonechild to be considered on judicial review, which was not permissible under the prior jurisprudence that followed *Northumberland*. In doing so, the Court departed from that line of authority and recognized that participants in judicial review proceedings should have the right to bring forward “the evidence which was before the administrative decision-maker” (at para 33; see also para 24). However, this statement of general principle does not assist SaskEnergy because the Kozakewich affidavit is not persuasively characterized as bringing forward the evidence that was before the arbitrator. Rather, it is a summary of a partisan observer’s recollection of some selected facts testified to by each witness, prefaced by argument about the conclusion the Court is asked to draw from those facts.

[37] In distinguishing *Hartwig* and concluding that decision did not support the admission of the affidavits, the judge held that “[a] transcript of testimony is clearly distinguishable from the synopsis of evidence offered by a lay person who is an employee of the party seeking judicial review, like Ms. Kozakewich” (*Affidavit Decision* at para 26). I see no error in this observation.

[38] SaskEnergy’s second argument on this ground of appeal is that the judge erred in declining to admit the affidavits because they were adduced to elucidate the record provided by the arbitrator (in this case, by bringing forward information about something that happened at the hearing not reflected in the record), which is a permitted purpose for admitting affidavit evidence on judicial review recognized in *Gjerde*.

[39] SaskEnergy again contends the judge misapplied *Hartwig* by not giving effect to the idea that parties to a judicial review application should be able to put forward all material bearing on the arguments they are entitled to make. It says that if the judge had properly applied this principle, he would have allowed the affidavits because they were necessary to elucidate the record in accordance with *Gjerde*. SaskEnergy submits that, because there is no transcript, it cannot argue the arbitrator misapprehended or failed to consider the evidence unless it is able to fill in the evidentiary gap by providing summaries of the evidence in affidavit form, as it has done.

[40] In some cases, it will be true that a reviewing court cannot logically assess the reasonableness of a decision where it is alleged that the decision maker misapprehended or failed to consider evidence without examining both the decision and the relevant evidence (see *Toronto (City) Board of Education v O.S.S.T.F., District 15*, 1997 CanLII 378, [1997] 1 SCR 487 at

paras 47-48 (SCC); *Hartwig* at paras 18 and 20; *Tsleil-Waututh Nation 2017* at para 71). However, the general direction in *Hartwig* that a party should be able to put forward all material bearing on the arguments they wish to make on judicial review must be understood in context. As noted, the Court was departing from the general principle set out in *Northumberland* that the evidence presented to an administrative tribunal could not be considered by a reviewing court (*Hartwig* at paras 15 and 32-33; see also *British Columbia (Lieutenant Governor in Council) v Canada Mink Breeders Association*, 2023 BCCA 310 at para 41). The Court effectively qualified that jurisprudential barrier to the admission of evidence to ensure the scope of the record aligned with the arguments that could be advanced on judicial review.

[41] Considering this context, I do not read *Hartwig* as supporting the proposition that a party is entitled to put evidence before a reviewing court without restraint or regard to the manner in which it is presented. The goal of ensuring the record contains all information required for meaningful judicial review is not the only relevant consideration. When it comes to affidavit evidence proffered to supplement the record, I agree with the observation that the direction in *Hartwig* “must find its place in the context of other principles, which if offended, would prohibit a supplemented record” (*Chaboyer v Saskatchewan*, 2021 SKQB 200 at para 53). This includes the principles discussed in *Gjerde* governing when it is permissible to supplement the record on judicial review.

[42] The admissibility of an affidavit is understood to be a question of law in most cases, reviewable on a correctness standard (see *Prairie Pride Natural Foods Ltd. v United Food and Commercial Workers, Local 1400*, 2024 SKCA 84 at para 112). However, deciding whether the record provided by the administrative decision maker may be supplemented on judicial review (that is, determining whether an exception identified in *Gjerde* applies, as distinct from determining whether a proffered affidavit is otherwise legally admissible) is a discretionary decision because it depends on the application of legal criteria in this specific context (see *Pimicikamak v Manitoba*, 2018 MBCA 49 at paras 69-70). A discretionary decision such as this may only be interfered with on appeal “if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being ‘so clearly wrong as to amount to an injustice’)” (*Canada (Transportation Safety Board) v Carroll-*

Byrne, 2022 SCC 48 at para 41; see also *Saskatchewan (Environment) v Métis Nation – Saskatchewan*, 2025 SCC 4 at para 32; *Resler v Anglin*, 2026 SCC 23 at para 24; *Kot v Kot*, 2021 SKCA 4 at para 20).

[43] Here, the judge determined it was not appropriate to admit SaskEnergy’s evidence to elucidate the record for two main reasons: (i) the Kozakewich affidavit was a selective presentation of only some of the relevant evidence that was before the arbitrator; and (ii) he was concerned about the reliability of Ms. Kozakewich’s recollection of the testimony at the hearing. I see no error in the judge’s decision to decline to admit the affidavit for those reasons.

[44] There is no “one size fits all” rule governing when it is appropriate to supplement a record on judicial review (*Gjerde* at para 41). However, the completeness and reliability of evidence proffered for that purpose have often been treated as relevant considerations (for example, where completeness has been considered, see: *SELI Canada Inc. v Construction and Specialized Workers’ Union, Local 1611*, 2011 BCCA 353 at para 70; *Li v Jean*, 2012 NSCA 125 at para 16 citing *Yorke v Northside-Victoria District School Board*, 1992 CanLII 2614, 90 DLR (4th) 643 at para 3 (Westlaw) (NSCA); *University of Saskatchewan v Canadian Union of Public Employees, Local 1975*, 2022 SKQB 49 at paras 20-21; *Saskatchewan Health Authority v Service Employees International Union-West*, 2019 SKQB 282 at paras 13-15; and where reliability has been considered, see: *Li* at para 16; *Fineday v Public Complaints Commission and The Chief of Police of The Saskatoon Police Service*, 2024 SKKB 6 at para 26; *Nova Scotia Union of Public & Private Employees Local 13 v Halifax Regional Municipality*, 2021 NSSC 171 at para 44; *142445 Ontario Limited (Utilities Kingston) v International Brotherhood of Electrical Workers, Local 636*, 2009 CanLII 24643, 251 OAC 62 (ONSCDC) at para 42; *Halifax Regional Centre for Education v Nova Scotia Union of Public and Private Employees*, 2025 NSSC 6 at para 39).

[45] The judge’s concern that SaskEnergy was proffering only selected parts of the relevant testimony that was before the arbitrator was well founded because evidence adduced to elucidate or fill in evidentiary gaps should normally not represent only a one-sided view of the record. A similar situation arose in *Prairie Pride* where affidavits were filed on judicial review to “fill blanks created by the absence of a transcript” (at para 114). This Court found that the judge hearing the application did not err by disregarding that evidence because it was “an obvious, impermissible

attempt by the Employer to backfill its position on judicial review by colouring and highlighting selective testimony” (at para 115):

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

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

(Emphasis added)

[46] The same reasoning is applicable here. At the admissibility hearing, SaskEnergy acknowledged its affidavits included only selected points that assisted its position. The affidavits did not purport to represent a complete and balanced account of all testimonial evidence adduced at the arbitration hearing relevant to the judicial review application.

[47] SaskEnergy argued the union’s objection to the Kozakewich affidavit on the ground that it was a highly selective review of the evidence was unfounded because any concerns about the accuracy and completeness of Ms. Kozakewich’s recollections of the witnesses’ testimony could have been addressed by allowing each party to file duelling affidavits containing their own summaries of the testimonial evidence before the arbitrator. The judge rejected that approach, noting it would leave a reviewing court “hopelessly lost to make any determination in face of competing affidavits” (*Affidavit Decision*):

[29] If the court were to accept SaskEnergy’s assertion that the Union could have challenged the accuracy of Ms. Kozakewich’s evidentiary summary with an opposing affidavit, where would a reviewing court find itself? In an unresolvable quagmire – that result seems to be self-evident. Without a transcript of the evidence, a reviewing court would be hopelessly lost to make any determination in face of competing affidavits, one saying a witness said “this” and the other saying a witness said “that.”

[48] Other courts have expressed similar concerns. In *142445 Ontario Limited*, the Ontario Divisional Court recognized that where no transcript is available “there may be real difficulties in

trying to recreate the evidence before the tribunal, where the parties have conflicting views as to what has been said”:

[32] If extensive affidavits can be filed on applications for judicial review in order to permit parties to challenge findings of fact before such tribunals, there would be a significant incentive for parties to seek judicial review since they could then attempt to reframe the evidence that was before the arbitrator. As a result, the process of judicial review is likely to be more prolonged and more costly.

[33] Moreover, there may be real difficulties in trying to recreate the evidence before the tribunal, where the parties have conflicting views as to what has been said. Where there is a dispute about the evidence, the reviewing court will be put in the unfortunate position of trying to determine what the evidence was before the tribunal in order that it can then decide whether the decision was unreasonable. Such a process is unfair to the administrative tribunal and undermines its role as a fact finder in a specialized area of expertise.

See also: *Rainy River First Nations v Bombay*, 2022 FC 1434 at paras 42-43 and *SELI* at paras 68-69, recognizing that this concern will not be determinative in all cases.

[49] SaskEnergy argues this was not a sufficient reason for its affidavits to be inadmissible because, if the union had filed a duelling affidavit, any conflict could have been resolved through cross examination. However, having a new hearing to ascertain what evidence was called at the arbitration is problematic. There is no certainty that cross examination would allow a reviewing judge to accurately determine what was said where each observer had a different recollection. Moreover, allowing duelling affidavits from observers with new evidence taken on cross examination would effectively create a new evidentiary record that was not before the arbitrator. For example, if SaskEnergy’s suggested approach had been followed in this case, the supplemental part of the record would have been comprised of (i) each side’s partisan recollection of selected parts of the evidence given by the witnesses who testified, and (ii) answers given by Ms. Kozakewich and Ms. Brown (who were not witnesses) to new questions that were not asked of any witness during the hearing. While they could be cross examined on their recollections of what they heard, they would not likely be able to reliably recount all relevant parts of what the witnesses had said – or how they had said it – with a material degree of accuracy. In those circumstances, it is difficult to see how the reasonableness of the arbitrator’s decision could be fairly determined by assessing his factual findings against what would almost certainly be two inaccurate and incomplete synopses of the evidence before the arbitrator.

[50] The general rule that judicial review should be restricted to the record exists “to ensure that the review is conducted on the evidence that was before the decision-maker” and does not “expand into a hearing *de novo*” (*Pimicikamak* at para 71). In most circumstances, this goal is not served by allowing the record to be supplemented with only a one-sided or materially incomplete summary of the relevant evidence. Here, the judge did not err in concluding the Kozakewich affidavit should not be admitted to elucidate the record because it was a selective presentation of only certain aspects of the relevant evidence before the arbitrator that were favourable to SaskEnergy’s position on the judicial review application.

[51] The judge also made no error when he declined to admit the affidavits because he was concerned about the accuracy and reliability of Ms. Kozakewich’s recollection of the testimony at the hearing:

[30] Yet further reasons augur for the inadmissibility of the Kozakewich affidavit. The court has no assurance that her recollection of testimony is accurate. The arbitration hearing was conducted in November 2022. Her affidavit was affirmed approximately seven and a half months later, in mid-June 2023. Did Ms. Kozakewich recall the testimony from memory? Did she take notes during the hearing? How accurately did she hear and understand the testimony? As the Employee Relations Business Partner for SaskEnergy was she involved in the incidents in July 2019 that led to the drug testing of the grievors, which may have affected her assessment of the testimony?

[52] The accuracy of the evidence against which the *Award* was to be evaluated was an important consideration because SaskEnergy sought to challenge the reasonableness of the *Award* on the basis that the arbitrator misapprehended or failed to consider certain evidence. The judge recognized this and did not err by finding he was not satisfied the Kozakewich affidavit was sufficiently reliable to warrant admission.

[53] I see no error in the judge’s determination that the affidavits proffered by SaskEnergy were inadmissible for the purpose of elucidating the record on the judicial review hearing. Given this conclusion, it is unnecessary to address SaskEnergy’s second argument that the judge erred in ruling that the affidavits were inadmissible because they were hearsay. I would dismiss the appeal from the *Affidavit Decision*.

IV. APPEAL OF THE REVIEW DECISION

[54] On an appeal from a judicial review decision, the question for an appellate court is whether the reviewing judge (i) identified the appropriate standard of review, and (ii) applied it correctly (*Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at para 10; *Dr. Q. v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43; *Chaboyer v Saskatchewan Power Corporation*, 2025 SKCA 31 at para 91). In practical terms, this means that once the appropriate standard of review is identified, the appellate court “steps into the shoes of the lower court and reviews the decision of the administrative tribunal in accordance with that standard” (*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 at para 35; see also *Prairie Pride* at para 46).

[55] Both parties agree that the judge correctly identified reasonableness as the appropriate standard of review. However, SaskEnergy contends the judge misapplied that standard in concluding that the *Award* was reasonable. 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” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). In determining whether an administrative decision is reasonable, a reviewing 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” (*Vavilov* at para 15).

[56] The issues raised in SaskEnergy’s appeal of the *Review Decision* are addressed by answering the following questions:

- (a) Did the judge err in determining that the *Award* was reasonable because:
 - (i) the arbitrator mischaracterized SaskEnergy’s central argument that post-incident testing was a reasonable line of inquiry into the cause of the incidents and failed to consider evidence relevant to that argument?
 - (ii) the arbitrator did not address the role of the crew lead in SaskEnergy’s investigation?

- (iii) the arbitrator made factual findings based on a misapprehension of the evidence?
- (iv) the arbitrator erred in law by requiring SaskEnergy to prove it had reasonable grounds to believe the employees were impaired?
- (v) the judge provided additional reasons to buttress the reasonableness of the *Award*?

[57] Each of these questions will be addressed in turn.

A. The arbitrator did not mischaracterize SaskEnergy’s argument or fail to consider relevant evidence

[58] SaskEnergy submits the arbitrator mischaracterized its central position, which was that post-incident testing was a reasonable line of inquiry into the cause of the incidents, and that he failed to consider or address evidence relevant to that argument. It says the judge erred by failing to find that those errors rendered the *Award* unreasonable. I am not persuaded by these arguments.

[59] First, expressed in the language of a reasonableness review, I understand SaskEnergy to contend that the *Award* is unreasonable because it demonstrates a failure of rationality internal to the reasoning process. 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” (*Vavilov* at para 103).

[60] SaskEnergy submits the *Award* was based on an irrational chain of analysis because the arbitrator mistakenly understood it to be saying that the employees were rightfully sent for testing because they had made a mistake they should have known to avoid. However, SaskEnergy says its real argument was that the circumstances of the incidents, combined with a lack of explanation from the employees for why they did not follow their training and the applicable safety procedures, made testing to investigate their capacity a reasonable line of inquiry into the cause of the incidents, which was a permissible ground on which SaskEnergy was entitled to compel testing. The relevant provision of SaskEnergy’s Policy reads as follows:

3. **Post-Incident/Accident Testing for Employees in Safety-Sensitive Positions**

- a) As part of a complete investigation, *testing for Unauthorized and/or Unlawful Substances will be required for Employees involved in a “significant work-related incident” or “high potential incident” (as defined below) where requiring a test is a reasonable line of enquiry for the investigation.* In addition, management may, at its discretion, require a post-incident test after any other work-related incident or near miss as part of an investigation where there are reasonable grounds to believe that Unauthorized and/or Unlawful Substance use may have been a contributing factor.

(Emphasis added)

[61] With respect to the 2019 incident, SaskEnergy says the arbitrator failed to appreciate that four experienced employees had inexplicably started trenching when the location of the buried gas line was in doubt and had not been visually confirmed, contrary to the applicable written safety procedure that required daylighting of the gas line before trenching. However, the arbitrator clearly understood this was SaskEnergy’s main argument, which he summarized and rejected in the *Award* as follows:

[96] I will deal first with the Employer’s argument that the four Grievors’ “aberrant decision” not to follow established safety rules made requiring them to submit to drug and alcohol tests a “reasonable line of inquiry”. The essence of the argument is that the line strike was so dangerous, and the breach of the safety policy (i.e. digging before daylighting) so egregious, that the Employer was justified in requiring all of the experienced crew members to undergo drug and alcohol testing.

[97] Counsel for the Employer argues that because the orange SaskTel pin flags had been placed along approximately the same line as the yellow SaskEnergy pin flags, all four of the Grievors “ought to have known” before the trenching even started that the locate markers placed by the crews of specialized SaskEnergy employees were wrong. Alternatively, the Employer posits that one or more of the Grievors ought to have stopped the trenching when the buried gas line could not be located.

[98] In a written submission counsel for the Employer uses several adjectives to describe the Grievor’s behaviour (“inexcusable”, “unreasonable”, “abnormal”, “illogical”, “reckless”, “inexplicable”) in positing that their condition needed to be confirmed by testing.

[99] There is no doubt that the line hit would not have happened if the buried gas line had been exposed before any trenching started. In hindsight, that is apparent. However, I do not accept that any of the Grievors behaved in such an abnormal manner that it could have (or did) raised doubts about whether they might have been under the influence of alcohol or drugs. Nor do I accept that the Employer’s inquiry satisfied the requirements set out in the arbitral jurisprudence.

[62] The arbitrator also understood SaskEnergy was advancing the same argument in relation to the 2020 incident:

[124] The Mead Grievance stated that although the Employer found him solely responsible for the gas line strike, there was nothing he could have done to avoid it. At the arbitration hearing, counsel for the Employer characterized the accident as very serious and asserted that the Grievor's failure to daylight the line before digging was an egregious disregard of established safety policies. Again, the argument was that the nature of the accident justified requiring drug and alcohol testing as a "reasonable line of inquiry".

[63] In the *Review Decision*, the judge found that the arbitrator had not mischaracterized SaskEnergy's main argument:

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

68. The Applicant [SaskEnergy] spends a great deal of time reviewing its Policy and the merits thereof, the circumstances of each incident, and how the Grievors did not follow proper "daylighting" procedure, as well as the implications of a gas line hit. But all of this misses the point. The question is not whether a gas line hit is a "significant incident" (it is, as the Respondent conceded at the arbitration hearing), nor whether its implications are serious (they are, which again was never disputed), nor whether the Applicant's Policy is meritorious (this was never disputed) nor even whether the Grievors, individually or collectively, had made an error (the Arbitrator did find that Lansdell and Manz, at least, had had a lapse in judgment). Workers make mistakes – sometimes serious ones – without impairment becoming a reasonable line of inquiry, and that was the finding of the Arbitrator. Whatever mistakes had been made, there was no reasonable suggestion on these facts that impairment was a cause, or potential cause, of them.

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

(Emphasis added)

[64] I see no error in this assessment. I agree that the arbitrator did not mischaracterize SaskEnergy's main argument. The *Award* was not based on an irrational chain of analysis for that reason.

[65] SaskEnergy’s second argument on this ground of appeal is that the arbitrator failed to “grapple” with the evidence of SaskEnergy’s safety protocols and procedures, which it says revealed flaws in the arbitrator’s chain of logic and resulted in his misapprehension of key evidence that rendered the *Award* unreasonable. For a decision to be reasonable, a 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). Regarding the assessment of evidence, a decision is reasonable where it is justified in light of the factual matrix that bears on it and will be unreasonable “where the decision maker has fundamentally misapprehended or failed to account for the evidence before it” (*Vavilov* at para 126).

[66] Before addressing this submission, I pause to make one observation. I appreciate that an administrative 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” (*Vavilov* at para 128; see also *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 74). However, describing an alleged error as a failure to “grapple” or “engage” with an argument or evidence is rarely helpful or effective on appeal without precisely identifying the argument or evidence alleged to have been overlooked. In the *Review Decision*, the judge expressed a similar concern about SaskEnergy’s choice to articulate its grounds of judicial review in unfocused and imprecise terms, which left him “less than certain of the specific grounds upon which SaskEnergy challenges the Arbitrator’s *Decision*” (at para 46; see also para 47). I share this sentiment in relation to the argument now under consideration.

[67] Having said that, I take SaskEnergy to posit that the *Award* was not justified because the arbitrator did not consider, understand, or address the evidence of SaskEnergy’s written safety protocols (called Construction, Operations and Maintenance Practices or “COMPs”), when finding that drug and alcohol testing was not a reasonable line of inquiry for its investigation into the cause of the incidents. This argument reduces to the unconvincing proposition that the *Award* was unreasonable because there was evidence before the arbitrator on certain points that was not mentioned.

[68] After rejecting SaskEnergy’s contention that the employees involved in the 2019 incident had behaved in such an abnormal manner that it raised concerns about whether they might have

been under the influence of alcohol or drugs, the arbitrator reviewed some of the evidence he found relevant to that conclusion. SaskEnergy takes issue with several aspects of that review, but three examples are sufficient to illustrate the argument.

[69] One example concerns the arbitrator's determination that Mr. Malinowski "was not intentionally, recklessly, or carelessly 'digging blind'; he was relying on locate markers placed there by SaskEnergy employees who intended them to be relied upon" (*Award* at para 104). The arbitrator found it was not unreasonable for members of the work crew to rely on the markers showing the location of the gas and telephone lines because that was contemplated by s. 259(1) of *The Occupational Health and Safety Regulations, 1996*, RRS c O-1.1 Reg 1 [*OH&S Regs*] (*Award* at para 102). SaskEnergy says this was inconsistent with the Trenching COMP, which required daylighting the line before beginning trenching. In its factum, SaskEnergy asserts this reveals an irrational reasoning process because "[t]he Arbitrator does not grapple or engage with how SaskEnergy's safety requirements and expectations interact with his interpretation of the *OH&S Regs*, nor does he explain why s. 259(1) of the *OH&S Regs* overruled SaskEnergy's actual workplace requirements".

[70] In another example, the arbitrator found that Mr. Lansdell had taken extra precautions to ensure the location of the buried gas line was correct by calling the employee who had placed the markers to confirm they would be verified again (*Award* at para 105). SaskEnergy says this reveals a flaw in the arbitrator's logic because it was at odds with the Locating Buried Facilities COMP, which stated that the location of a buried gas line could only be confirmed through daylighting and visual examination.

[71] The arbitrator also found that Mr. Malinowski's actions did not raise a reasonable concern about his condition because it was not until Mr. Manz was unable to daylight the buried gas line at the tie-in point that there was a concrete reason to believe the locate markers were wrong, and Mr. Malinowski hit the buried line only minutes later (*Award* at para 106). SaskEnergy says this finding demonstrates irrational reasoning because it improperly shortened the period of time within which management was permitted to question the employees' conduct when concerns had arisen significantly earlier because of the employees' failure to follow applicable COMPs before beginning trenching.

[72] With respect to the 2020 incident, SaskEnergy says Mr. Mead violated the “two-foot rule” that prohibited employees from mechanically excavating within two feet of a buried gas line. In its factum, SaskEnergy says this fact reveals an irrational reasoning process because “[t]he Arbitrator did not grapple with this safety requirement and how that affected the decision of the managerial employees to send the Grievor for testing”.

[73] These points are all variations on a central theme – the idea that the *Award* is unreasonable because the arbitrator failed to expressly account for the evidence of SaskEnergy’s COMPs that were not followed and its argument that the employees’ actions were so abnormal that testing for drugs and alcohol was a reasonable line of inquiry under the Policy.

[74] I am not persuaded any of these arguments demonstrate error in the judge’s conclusion that the *Award* was reasonable. Reasons given by an administrative body “must not be assessed against a standard of perfection” (*Vavilov* at para 91). Similarly, “[r]eviewing courts cannot expect administrative decision makers to ‘respond to every argument or line of possible analysis’ (*Newfoundland Nurses*, at para. 25), or to ‘make an explicit finding on each constituent element, however subordinate, leading to its final conclusion’ (para. 16)” (*Vavilov* at para 128; see also *Mason* at para 74). Provided the reasons show that the decision maker has seized the substance of the matter, detailed recitations of evidence are not required (see *R v R.E.M.*, 2008 SCC 51 at para 43; *Edmonton (City of) v Edmonton Police Association*, 2020 ABCA 182 at para 27).

[75] In this case, the arbitrator was aware that the actions taken by the employees had violated the applicable COMPs. He quoted relevant parts of the Trenching COMP and the Locating Buried Facilities COMP upon which SaskEnergy relies and found that SaskEnergy’s safety policies had been breached (*Award* at paras 82-83, 113 and 126). In these circumstances, there is no basis to conclude the arbitrator fundamentally misapprehended or failed to account for this evidence in a way that rendered the *Award* unreasonable. He plainly seized the substance of the matter before him and meaningfully “grappled” with the key issues in the arbitration, including SaskEnergy’s central arguments and the relevant evidence. I would dismiss this ground of appeal.

B. The arbitrator considered the role of the crew lead in the investigation

[76] In its factum, SaskEnergy argues the *Award* was unreasonable because “the Arbitrator did not engage with or grapple with SaskEnergy’s arguments and evidence regarding the role of the Crew Lead as an on-site, in-scope supervisor and what that means for investigations”. Expressed in terms of a reasonableness review, I understand SaskEnergy to submit that the *Award* was not justified by the reasons because the arbitrator failed to address its evidence and arguments that the crew lead was an important source of information in post incident investigations.

[77] In support of this argument, SaskEnergy says the arbitrator did not refer to the function of the crew lead in collecting and reporting information to the superintendent or to the evidence that each of the employees spoke to their crew lead before management decided to send them for testing. However, this argument is not supported by the arbitrator’s reasons.

[78] First, the arbitrator understood the role of the crew lead in the post-incident investigations. He expressly referred to steps taken by the crew lead, Mr. Lansdell, during the investigation of the 2019 incident. The arbitrator noted that Mr. Lansdell called his superintendent, Mr. Claude, to report the incident and explain that the crew had hit a mislocated gas line. During that call, Mr. Lansdell confirmed that they should not have been trenching without daylighting the line (*Award* at paras 26-27). The arbitrator also noted that Mr. Lansdell took photographs of the site and sent them to Mr. Claude and that Mr. Lansdell spoke with and was interviewed by Mr. Stoudt, Mr. Kotylak, and Mr. Davies, who were management representatives participating in the investigation (see *Award* at paras 28-30). Similarly, with respect to the 2020 incident, the arbitrator noted that the crew lead, Mr. Pelly, called his superintendent, Mr. Davies, to report the accident and explain what had happened. Mr. Pelly provided his view that weather and soil conditions were not factors. He also took photographs of the bell hole excavation where the line hit had occurred and provided them to management (*Award* at paras 52-53).

[79] Second, the arbitrator did not fail to appreciate that each of the employees spoke to their crew lead as part of the investigation before management decided to send them for testing.

[80] One of the factors considered by the arbitrator in determining that the employees should be awarded compensation was the fact that SaskEnergy required them to submit to testing without

providing any of them an opportunity to be heard (*Award* at paras 131(2) and 133(1)). SaskEnergy says the *Award* is unreasonable because the arbitrator made this finding but again “failed to grapple” with the evidence that each of the employees had spoken to their crew lead during the investigation. This argument is not persuasive. Read in context, the arbitrator’s comment that the employees were not given an opportunity to be heard was a reference to the fact that none of them were directly interviewed by SaskEnergy management during the investigation, as only the crew leads were interviewed (see *Award* at paras 31, 58, and 119). The arbitrator was not making a finding that the employees had not discussed the incidents with the crew leads.

[81] There is no basis to conclude the *Award* was unreasonable for the reasons raised on this ground of appeal.

C. Factual findings were not made based on a misapprehension of the evidence

[82] SaskEnergy contends the *Award* was not reasonable because the arbitrator made factual findings based on a misapprehension of the evidence (see *Vavilov* at para 126).

[83] The first argument on this ground of appeal centres on the arbitrator’s description of the investigation of the 2020 incident. The arbitrator found that one of the superintendents responsible for the investigation, Mr. Kotylak, only knew what he had been told by the other superintendent, Mr. Davies:

[58] Although Pelly did not give evidence, Kotylak and Davies did. Davies acknowledged that he had not spoken to Mead before deciding he would be required to submit to alcohol and drug tests. He also acknowledged that he had not asked Pelly if he had any reason to believe Mead (or any other crew member) might have consumed any alcohol or drugs. He did not ask Pelly if Mead’s behaviour had been unusual.

[59] *Kotylak knew only what he had been told by Davies.* Neither Davies nor Kotylak suggested that they had any reason to suspect alcohol or drugs might possibly have been a factor in the line strike. The evidence disclosed no discernable reason why they might have had any such suspicion.

(Emphasis added)

[84] SaskEnergy says this finding reflected a misapprehension of the evidence because the evidence before the arbitrator was that both Mr. Kotylak and Mr. Davies had participated in the investigatory call with Mr. Pelly, as shown by Mr. Davies’ notes of the call. SaskEnergy submits

this made the *Award* unreasonable because the extent of the investigation was central to its argument that, given the information gathered, drug and alcohol testing was a reasonable line of inquiry into the cause of the incidents.

[85] This argument is not convincing. There is no suggestion that any misapprehension about Mr. Kotylak's participation in the call with Mr. Pelly affected the arbitrator's assessment of the substantive *content* of the investigation. SaskEnergy does not contend that the facts obtained during the investigation were different from what the arbitrator found because he mistakenly stated that Mr. Kotylak knew only what he was told by Mr. Davies. As a result, the *Award* is still justified in relation to the facts and is not unreasonable for that reason (see *Vavilov* at para 85).

[86] SaskEnergy says the arbitrator also misapprehended the evidence when he found that management had required the employees to submit to testing without providing them with an opportunity to be heard. As mentioned, this argument is based on a misreading of the *Award* because the arbitrator was referring to the fact that none of the employees had been directly interviewed by management during the investigation.

[87] On this ground of appeal, there is no basis for intervention.

D. The arbitrator did not require SaskEnergy to prove it had reasonable grounds to believe the employees were impaired

[88] As noted, the relevant part of the Policy obliged employees to undergo testing after a significant work-related incident "where requiring a test is a reasonable line of enquiry for the investigation" or otherwise "where there are reasonable grounds to believe" that substances may have been a contributing factor. SaskEnergy argues the arbitrator conflated post-incident testing with reasonable cause testing because he required proof that management had reasonable grounds to believe the employees were impaired by alcohol or drugs instead of considering whether testing was a reasonable line of inquiry under the Policy.

[89] SaskEnergy says the *Award* was unreasonable because the arbitrator failed to follow arbitration jurisprudence supporting the view that an employer is not required to prove it had reasonable grounds to suspect an employee was impaired by drugs or alcohol to require a post-incident test (see, for example, *Weyerhaeuser Company Ltd. and Communications, Energy and*

Paperworkers Union, Local 447 (2006), 154 LAC (4th) 3 at paras 155-161 (Westlaw) (ABLA), and *Vancouver Shipyards Co. Ltd. v CMAW, Local 506 Marine and Shipbuilders*, 2020 CanLII 75894, 318 LAC (4th) 329 (BCLA)). In some circumstances, past decisions can operate as a constraint on what an administrative decision maker can reasonably decide (see *Vavilov* at para 131). However, I am not persuaded the arbitrator departed from or misapplied relevant arbitration jurisprudence or that he required SaskEnergy to demonstrate it had reasonable grounds to believe the employees were impaired.

[90] In support of the argument that the arbitrator was improperly looking for reasonable grounds to believe the employees were impaired, SaskEnergy points to several passages in the *Award* where the arbitrator notes that management had no reason to suspect impairment. However, those statements must be read and understood in context of the entire decision.

[91] As a starting point, the arbitrator was alive to the differences between post-incident and reasonable cause testing. He observed that “[a]rbitrators have commented on the difference between ‘just cause’ testing and ‘post incident’ testing and, with respect to the latter, have consistently held there must be some form of investigation or ‘line of inquiry’ to determine if testing might reasonably be required to rule out impairment by drugs or alcohol as a contributing factor” (*Award* at para 89). He quoted *Weyerhauser* at length, including a passage where Arbitrator Sims stated, “[t]here needs to be less evidence to support the employee’s impairment [for a post-incident test] than there would need to be to justify a reasonable cause test, but there needs to be other significant information about the event and the employee’s connection to or role in the event, that themselves serve to justify testing” (*Award* at para 90, quoting *Weyerhauser* at para 161). The arbitrator then applied these principles and found that SaskEnergy’s investigation revealed nothing beyond the incidents themselves that was sufficient to make drug and alcohol testing a reasonable line of inquiry into their cause under the Policy.

[92] With respect to the 2019 incident, the arbitrator found the investigation revealed nothing that made it reasonable to inquire into whether the employees had consumed alcohol or drugs in order to fully understand why it had occurred (*Award*):

[109] I find that the evidence did not disclose any sort of behaviour on the part of any of the Grievors that might have raised reasonable concerns about their condition. Nor did any of the managers suggest they had any cause for such concern. Their investigation was

confined to discussions with Lansdell. None of them spoke to, or asked to speak to, any of the other Grievors. Lansdell said nothing that might have given the managers any reason to believe alcohol or drugs might have been consumed by any of the four Grievors. None of them asked him if any of the Grievors had exhibited any unusual behaviour. None of them made any inquiry into the possibility of drug or alcohol consumption.

[110] The Employer did not consider the line strike to have been sufficiently egregious to warrant discipline for any of the Grievors. The Employer's report filed pursuant to the *OHSR, 1996* indicated it had received a satisfactory explanation for why the accident had occurred.

[111] *I conclude that the Employer:*

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

(Emphasis added)

[93] The arbitrator reached substantially the same conclusions with respect to the 2020 incident. He found that SaskEnergy had no reason to inquire into whether Mr. Mead had consumed alcohol or drugs in order to fully understand why the gas line strike had happened (*Award*):

[125] Based on the arbitral jurisprudence outlined above and the evidence relating specifically to the Mead Grievance, I reach essentially the same conclusions as set out in the other four Grievances, namely, *I conclude that the Employer:*

- *had no discernible reason to inquire into whether Mead had consumed alcohol or drugs to fully understand why the accident had happened;*
- did not inquire into whether Mead had consumed any alcohol or drugs;
- did not speak to Mead, even though he had been readily available;
- did not in fact suspect that Mead's impairment by alcohol or drugs might possibly have been a factor in the gas line strike;
- did not give any consideration into whether, in the circumstances, requiring Mead to wait for two hours and then transporting him to

Whitewood, Saskatchewan to undergo drug and alcohol tests would be a justified intrusion into his individual right to privacy and personal dignity.

(Emphasis added)

[94] In the *Review Decision*, the judge rejected SaskEnergy's argument that the arbitrator misapplied relevant arbitration jurisprudence by focussing solely on whether there was evidence of impairment or a reasonable basis to suspect the employees were impaired. He determined that this argument oversimplified the arbitrator's reasoning, and that the arbitrator did not require evidence of impairment as a precondition for testing:

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

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

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

(Underline emphasis in original; italic emphasis added)

[95] I see no error in this determination. The thrust of SaskEnergy's position before the arbitrator was that testing was a reasonable line of inquiry because (i) serious incidents had occurred, (ii) the employees behaved contrary to their training and applicable safety procedures, and (iii) they offered no explanation for why they had done so. However, it is axiomatic that workplace accidents often involve employees behaving in a way that contravenes training or safety procedures designed to prevent such accidents, even in the absence of any impairment concern. Although SaskEnergy relied on the lack of any explanation for the employees' behaviour, the arbitrator found that management had not spoken directly to them to ask for an explanation. As I read the *Award*, the arbitrator was looking for other significant information about the incidents and the employees' connection to or role in them that made testing a reasonable line of inquiry into their cause. Given SaskEnergy's position, the absence of any evidence of abnormal conduct or any

basis to suspect that impairment may have been a factor in the cause of the incidents were relevant, but not determinative, considerations.

[96] Reading the *Award* as a whole, I see no error in the judge's determination that the arbitrator did not require evidence of impairment as a precondition for testing. It follows that the *Award* is not unreasonable on the basis that the arbitrator conflated post-incident testing with reasonable cause testing and failed to follow relevant arbitration jurisprudence.

E. The judge did not buttress the *Award*

[97] A reasonable decision is often described as one that is justified by the reasons given for it. Consequently, where the reasons given by an administrative decision maker "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". A reviewing court should not "disregard the flawed basis for a decision and substitute its own justification for the outcome" (*Vavilov* at para 96). SaskEnergy argues the judge did so in this case by improperly buttressing the arbitrator's reasons in the *Review Decision*. I disagree.

[98] As I understand the argument, SaskEnergy submits the *Award* was unreasonable because the arbitrator did not understand how egregiously the employees had failed to follow their training and the applicable safety procedures. It says the arbitrator did not address this argument, and that the reviewing judge buttressed the arbitrator's reasons by explaining that the seriousness of the incidents was not in dispute. SaskEnergy relies on the following paragraph in the *Review Decision* as illustrating this point:

[71] For example, in paras. 33 to 51 of its Brief of Law, SaskEnergy argues (often relying upon the disallowed Kozakewich affidavit) that the Arbitrator did not understand how egregiously the employees failed to follow SaskEnergy's established training and safety procedures. I see little consequence in this belaboured multi-page criticism. The Arbitrator accepted (as did SaskEnergy and the Union) that the two incidents were, as defined in the Policy, "significant work-related incident[s]" or "high potential incident[s]". No party disputed that a significant and potentially dangerous incident had occurred. In my view, the take-away of the entire *Decision* was how SaskEnergy should have proceeded after the incident and in light of the circumstances of the incident.

[99] In its factum, SaskEnergy states that “[a] mere acknowledgement of the fact that the circumstances meet the definition of ‘significant work-related incident’ in the Policy does not equate to meaningfully engaging and grappling with the crux of SaskEnergy’s argument. By holding otherwise, the [judge] has erred in law by substituting and buttressing the Arbitrator’s reasons with his own”.

[100] SaskEnergy’s argument is again not supported by the reasons given in the *Award* or the *Review Decision*. As already discussed, the arbitrator understood SaskEnergy’s position that the employees had behaved in such an abnormal manner by inexplicably ignoring their training and applicable safety protocols that it raised concerns about whether they might have been under the influence of alcohol or drugs, which made testing a reasonable line of inquiry into the cause of the incidents. In the *Award*, the arbitrator prefaced his analysis of both incidents by summarizing this very argument (see *Award* at paras 96 and 116). There is no basis to conclude the arbitrator failed to understand or consider SaskEnergy’s submission about how egregiously the employees had failed to follow their training and safety procedures.

[101] There is also no basis to conclude the judge buttressed the arbitrator’s reasons for rejecting this argument. In the passage from the *Review Decision* quoted above, the judge properly provided no alternative or additional justification for the arbitrator’s conclusion that the employees’ actions in contravention of their training and the relevant safety procedures did not make testing a reasonable line of inquiry. Rather, the judge was responding to SaskEnergy’s argument that the arbitrator failed to understand the seriousness of the employee’s behaviour. I see no basis to intervene on this ground of appeal.

V. CONCLUSION

[102] I would dismiss the appeal from the *Affidavit Decision* and *Review Decision* with costs to the union calculated in accordance with Rule 54(1) of *The Court of Appeal Rules*.

“Kilback J.A.”

Kilback J.A.

I concur.

“Caldwell J.A.”

Caldwell J.A.

I concur.

“Bardai J.A.”

Bardai J.A.