KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 45**

Date: **2025 03 18**
Docket: KBG-SA-00581-2024
Judicial Centre: Saskatoon

BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400

APPLICANT

- and -

AFFINITY CREDIT UNION

RESPONDENT

Counsel:

Heath P. Smith — for the applicant
Robert J. Frost-Hinz — for the respondent

JUDGMENT — GERECKE J.
March 18, 2025

A. OVERVIEW

[1] The United Food and Commercial Workers Union, Local 1400 [UFCW] and Affinity Credit Union [Affinity] are currently engaged in a grievance arbitration. From 2021 to 2023, they were engaged in an arbitration [Other Arbitration] involving

an unrelated grievance concerning Affinity's termination of an employee.

[2] This arbitration is linked to the Other Arbitration in three respects. The employer and union are the same. Affinity named Laura Sommervill as its nominee to serve on the arbitration panel in both cases. Ms. Sommervill swore an affidavit in Affinity's judicial review application [KBG-SA-01259-2023] that aims to quash the arbitral award in the Other Arbitration. Distilling to its essence, her affidavit alleges that the chair and union nominee in the Other Arbitration froze her out for most of the decision-making process.

[3] Because Ms. Sommervill swore that affidavit, UFCW seeks to have her disqualified from the arbitration panel [Tribunal] in this matter on the basis of reasonable apprehension of bias. UFCW believes that Ms. Sommervill should never again be permitted from serving on an arbitration panel, and perhaps even a labour relations board panel, that involves this UFCW local. I am not asked to order that, but it represents the position that UFCW signaled it would take in future matters.

[4] Affinity contends that UFCW's application in this matter must be dismissed for prematurity. The prematurity question must be determined before I consider whether to grant UFCW a judicial review remedy.

[5] Both parties addressed both the prematurity and bias issues in their briefs. I requested that they be prepared to argue both issues before me, which they did. Only if I find UFCW's application to not be premature would I determine UFCW's application on the merits.

[6] I conclude that UFCW's judicial review application is premature and must be dismissed. As I explain below in greater detail, courts are generally reluctant to intervene in administrative proceedings that are not final, except in extremely rare circumstances. UFCW has alleged no meaningful hardship that would result if the

currently constituted Tribunal hears and decides the grievance. Courts need to consistently apply the prematurity principle to deter premature judicial reviews in the future and thus minimize delay and fragmentation in future cases. UFCW's apprehension of bias case is also weak, reducing the likelihood that it would succeed after the Tribunal completes its work. UFCW also has failed to establish that the circumstances of this case are so exceptional that I should exercise my discretion to permit the judicial review to proceed.

[7] Accordingly, I conclude that UFCW's application is premature and must be dismissed. My reasons follow.

B. BACKGROUND

[8] The parties agree that the underlying grievance in this matter is factually unconnected to the Other Arbitration. The Other Arbitration related to the termination of an Affinity employee. This grievance relates to alleged violations of the collective agreement that UFCW says Affinity committed at two of its locations.

[9] The Tribunal has heard no evidence on the merits of the underlying grievance. Before the hearing was to begin, UFCW raised a preliminary objection to Ms. Sommervill serving as a member of the panel. The Tribunal (which included Ms. Sommervill) heard the parties concerning that preliminary objection, which took the form of an application to disqualify Ms. Sommervill.

[10] On April 17, 2024, the Tribunal rendered its decision [*Decision*] on the objection. It determined that no reasonable apprehension of bias existed and dismissed UFCW's application to disqualify Ms. Sommervill. That decision was unanimous, meaning that the union nominee concurred.

[11] On May 13, 2024, UFCW filed this application for judicial review and the Tribunal adjourned the hearing *sine die* pending determination of this application.

C. ANALYSIS

[12] The prematurity issue must be determined first. If I find that this application is not premature, then I would proceed to analyse the apprehension of bias issue at the heart of this dispute.

1. Principles concerning prematurity of judicial review

[13] As the Court of Appeal held in *Saskatoon (City) v Wal-Mart Canada Corp.*, 2019 SKCA 3, 430 DLR (4th) 697 [*Wal-Mart 2019*], a court should undertake judicial review at the interlocutory stage only in truly exceptional circumstances. The existence of procedural fairness, natural justice and jurisdictional issues do not typically qualify as exceptional circumstances. The Court explained the point as follows (though the entire discussion from para. 72 to para. 91 is to be commended):

> [72] Similarly, prematurity may act as a discretionary bar to applications for judicial review. As stated in *McDowell* [2017 FCA 126], "Prematurity deals with preventing parties from delaying proceedings by coming to court for a remedy that may prove to be moot or overtaken when the tribunal renders its final decision" (at para 26). Courts should refuse to entertain an application for judicial review where the decision from which review is sought is interlocutory or interim in nature and does not finally determine the rights of the parties. Judicial review of interlocutory decisions should only be undertaken "in the most exceptional of circumstances" (*Greater Moncton International Airport Authority v Public Service Alliance of Canada*, 2008 FCA 68 at para 1; see also *Powell* [2010 FCA 61] at para 33).
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> …
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> [85] In *Black v Canada (Attorney General)*, 2013 FCA 201, 448 NR 196, the Federal Court of Appeal stated that to justify judicial intervention the "circumstances must be truly exceptional" (at para 10) and noted that the allegation of a jurisdictional error does not, in and of itself, "constitute an exceptional circumstance which justified a pre-emptive recourse to judicial review" (at para 11): see also *Air Canada v Lorenz*, [2000] 1 FC 494.
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> [86] Concerns about procedural fairness and natural justice do not typically qualify as exceptional circumstances (see *Aviva Canada Inc.*

> *v Taylor*, 2017 ONSC 2661 at para 23, 67 CCLI (5th) 71 (Div Ct); and *BP Canada Energy Company v Alberta*, 2003 ABQB 875 at para 40, 356 AR 363): for example, "neither a breach of natural justice nor a question of true jurisdiction entitles an aggrieved party to automatic access to the courts" (*Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 OR (3d) 561).
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> [Emphasis added]

[14] Courts express numerous reasons for declining to engage in premature judicial review. First, administrative decision-makers should be permitted to deal with and decide the entire issue before courts intervene: *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 [*Halifax*]. To do otherwise risks reducing deference that courts pay to tribunal decisions, encourages multiplicity of proceedings, and detracts from carefully crafted and comprehensive legislative regimes: *Halifax* at para 36. At para. 38, *Halifax* instructed that the principle is sufficiently important that *Bell v Ontario Human Rights Commission*, [1971] SCR 756, should no longer be followed regarding prematurity.

[15] Second, proper application of the prematurity principle discourages delay: *Wal-Mart Canada Corp. v Saskatchewan Labour Relations Board*, 2010 SKCA 89 at para 21, [2010] 9 WWR 387, and *Saskatchewan Union of Nurses v Sherbrooke Community Centre*, (1996), 144 Sask R 15 (CA) at para 3. Or, it *should* have that effect. Here the grievance has now been stalled for nearly a year by this application.

[16] Third, as explained in *C.B. Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 FCR 332 [*C.B. Powell*], the potential exists that the judicial review turns out to be pointless or moot, as the party seeking review might succeed following the substantive hearing: para. 32.

[17] Fourth, only at the end of the administrative process will a reviewing court have a complete record and the decision-maker's findings on all issues. Those findings may be "suffused with expertise, legitimate policy judgments and valuable regulatory experience". See *C.B. Powell* at para 32.

[18] Finally, the above approach to prematurity supports judicial respect for decision-makers who have their own responsibilities to discharge.

[19] In *Air Canada v Lorenz (T.D.)*, [2000] 1 FC 494 [*Air Canada*], the Court identified six factors to consider in determining whether to permit the judicial review to proceed. Those factors were:

a. hardship to the applicant;

b. waste;

c. delay;

d. fragmentation at the court level;

e. strength of the case; and

f. statutory context.

[20] That list of factors has been applied in several cases, including *Thielmann v The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8, 442 DLR (4th) 272 [*Thielmann*], to which I return below.

[21] With respect to what amounts to exceptional circumstances, I cannot improve on the discussion of Stratas J.A. in *C.B. Powell*, as follows:

> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D. J. M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Toronto: Canvasback, 1998), at paragraphs 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pages 485–494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against

> administrative decision makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin* [[1979] 2 SCR 561], above; *Okwuobi* 2005 SCC 16], above, at paragraphs 38–55; *University of Toronto v. C.U.E.W., Local 2* (1988), 65 O.R. (2d) 268 (Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts. [Emphasis added]

For a further discussion of the rarity of true exceptional circumstances, see *Wal-Mart 2019* at paras 83 to 90. In addition to the courts discussed above, *C.B. Powell* has been followed at the appellate level in *Neufeld v Manitoba Securities Commission*, 2018 MBCA 101, *Hemminger v Law Society of British Columbia*, 2023 BCCA 36, 12 Admin LR (7th) 184, and *College of Physicians and Surgeons of Ontario v Kilian*, 2024 ONCA 52.

[22] *Thielmann* at paras 29 to 35 and *C.B. Powell* at para 33 reinforce that no automatic exception exists for issues of jurisdiction, apprehension of bias and procedural fairness.

[23] For examples of where this Court found it premature to engage in judicial review, see *University of Saskatchewan and University of Saskatchewan Faculty Association*, 2017 CanLII 149684 (Sask QB), *Saskatchewan Polytechnic Faculty Association v Ponak*, 2018 SKQB 236, *Saskatchewan v Saskatchewan Government and General Employees' Union*, 2008 SKQB 341, 325 Sask R 263 [*Saskatchewan*], and *Patel v Practitioners Staff Appeals Tribunal*, 2019 SKQB 291.

[24] Exceptions exist. For example, in *Commissioner of Official Languages for New Brunswick v Nurses Association of New Brunswick*, 2023 NBCA 60, 484 DLR (4th) 431, the Court concluded that the decision under review (which was a decision to investigate) was final, such that it was not premature to seek its review. Nothing would

be halted midstream. That appears at least in part to have been based on the specific legislative context in which the dispute arose. As well, the dispute had already gone years without a resolution and the Court considered it "high time" that the investigation occur. See paras. 30 and 52-53.

[25] UFCW relies heavily on *University of Saskatchewan v Canadian Union of Public Employees, Local 1975*, 2014 SKQB 190, 449 Sask R 107 [*University*], to argue that its application is not premature, so it warrants examination. I introduce it here and discuss it further below.

[26] In *University*, this Court determined that the judicial review was not premature because the parties expressly agreed to bifurcate, such that the award in issue was effectively a final determination. In short, with the parties' agreement the tribunal had rendered a decision on liability, finding that the dismissal of the grievors was excessive, but did not decide what discipline would have been appropriate, leaving that to the parties to resolve but reserving jurisdiction to decide that question if the parties failed to reach agreement. On that basis, the chambers judge distinguished this Court's decision in *Saskatchewan*.

[27] To recap, courts are reluctant to permit judicial review applications to proceed until the matter has been resolved with finality by the tribunal. Appellate courts caution that exceptions should be only in truly rare and exceptional circumstances. Generally, challenges on apprehension of bias, procedural fairness and jurisdiction are not exceptional circumstances. This predisposition against interlocutory judicial reviews has strengthened considerably since about 2010. Concerns expressed by courts include multiplicity of court proceedings, impact on legislative regimes, delay, fragmentation (also referred to as bifurcation) at the administrative level, increased potential for mootness, and interference with the roles of administrative decision-makers. In addition to those considerations, it is appropriate that the Court weigh

hardship and strength of the judicial review case.

2. Application of principles to UFCW's application

[28] I conclude that UFCW's application is premature. UFCW has failed to persuade me that this is an exceptional circumstance as contemplated by the caselaw. Accordingly, the judicial review application must be dismissed. Below I explain how prematurity principles apply here.

(a) Finality

[29] UFCW argues that it is not necessary to consider whether exceptional circumstances exist because the *Decision* was a final one. For this argument, UFCW relies heavily on *University*. It argues that no bifurcation has occurred, because the Tribunal rendered its bias decision, and that this proceeding has already been separated. It also contends that no delay or fragmentation will occur because the Tribunal has rendered its *Decision*.

[30] If I give effect to that stance, the strong preference for exhausting administrative remedies before involving courts would be mitigated modestly in two respects. First, the record concerning the bias issue might not be different after the full hearing process. Second, nothing can fix the delay of some ten months that has already occurred.

[31] Most of the remaining rationales that underpin the prematurity principle are unaffected by UFCW's concept of finality.

[32] For the following reasons, I conclude that I should not follow *University*, and that the *Decision* should not be treated as final for the purpose of the prematurity analysis.

[33] First, *University* did not refer to any of *Halifax*, *Wal-Mart* or *C.B. Powell*,

each of which represents an influential pillar of the current state of the law. Nor did it discuss the main considerations that courts now routinely apply when receiving judicial reviews of interlocutory decisions, including whether the circumstances were genuinely exceptional. *University* is clearly in the minority of decisions concerning prematurity.

[34] Those three pillars, in combination with the great majority of more recent jurisprudence, contradict the fundamental logic of *University* that it is better to carry out judicial review early to avoid a party having to participate in an administrative proceeding that might later be ordered to restart because of findings of lack of jurisdiction or bias or procedural unfairness. The prevailing view of courts favours the *opposite* approach from what *University* adopted.

[35] *University* characterized the liability determination (which was the subject of the judicial review there) as effectively amounting to a final decision because liability was fully decided and only remedy remained to be determined. That leads to the second point.

[36] The second point is this. *University* held that the judicial review there was on effectively a final decision. Liability had been determined. Only if the parties failed to reach agreement on remedy would it be necessary for the hearing to continue. Thus, potential existed for it to be a truly final decision.

[37] Unlike that situation, UFCW's application relates to a *preliminary* issue. This is unquestionably an interlocutory judicial review. The *Decision* does not resolve the overall matter, which is how most courts measure the finality question. If it were truly final, there would be no risk of mootness, i.e., no risk that if I grant the relief UFCW seeks here then that would be rendered a waste of time if UFCW were to succeed on the grievance proper. But that risk of mootness does exist here. If I dismiss for prematurity and the Tribunal upholds the grievance, that renders this application unnecessary and wasteful.

[38] The third point relates to strength of case. In *University* the applicant had a strong case, to the point that after rejecting the respondent's submissions on prematurity, the Court determined that the judicial review application was well-founded and that the tribunal's decision on liability must be quashed. Here, as I discuss below, UFCW's position on reasonable apprehension of bias is weak and unlikely to succeed.

[39] Accordingly, I am not prepared to follow *University*.

[40] I also cannot accept UFCW's finality theory for the reasons expressed above. The Court can see why the tribunal's decision was characterized as final in *University* given that the issue on the merits might never return to the tribunal. Here, it could be fair to characterize the *Decision* as being clearly demarcated from the rest of the proceeding in that it does not relate to the merits of the grievance (as opposed to a preliminary determination on disclosure, which would relate more closely to the merits). Nonetheless, that does not equate to finality regarding the whole proceeding. UFCW does not suggest that any prospect exists that the *Decision* will result in a final resolution. It cannot be treated as a final decision.

(b) The Air Canada factors

[41] In *Thielmann*, the Court analysed the issues by reference to the six factors set out in *Air Canada*. I will do the same here, as those factors address many of the arguments advanced here by the parties. They strike me as relevant partly as to whether prematurity exists and partly to assist in determining whether truly exceptional circumstances exist.

Hardship to the applicant

[42] UFCW has alleged no particular hardship that would result from requiring this judicial review to await a final resolution of the grievance hearing. It is not a hardship to be required to start and proceed in the appropriate forum: *Thielmann*

at para 53.

[43] A potential countervailing factor is that UFCW seeks to have Ms. Sommervill disqualified from all proceedings involving that union local. That likely needs to be litigated case by case, however, even if reasonable apprehension of bias is established in a single case. Short of a truly clear appellate decision, it seems improbable that a judge of this Court would bar Ms. Sommervill from future proceedings that have not yet been commenced. Therefore, I conclude that no hardship has been established. That supports a finding of prematurity and that exceptional circumstances do not exist.

Waste

[44] This factor relates to the UFCW's view that it would be wasteful to require it to go through the grievance hearing only to have the resulting decision be quashed on judicial review because of bias.

[45] As discussed in *Thielmann*, the factor is more influential if the Court knows that the hearing will be particularly lengthy and costly. I have no information on that.

[46] *Thielmann* also explained that this factor is weakened if the applicant's case on the judicial review is not strong. That is because weak arguments on the merits of the judicial review are less likely to result in later quashing for that issue.

[47] Much of the recent jurisprudence discounts the weight that should be attributed to the waste concept, preferring to focus on delay and fragmentation, which I discuss next. As such, this factor favours UFCW, but only modestly.

Delay

[48] The judicial review is capable of being resolved quickly on the merits, so

further delay is not the issue here. Nonetheless, *delay of at least 10 months has already resulted from the judicial review application being filed*. If the judicial review is premature and UFCW does not establish exceptional circumstances, it should not be rewarded because the delay already exists as a sunk cost.

[49] As well, broader policy considerations arise concerning delay. If parties get the clear message that they should not seek judicial review until their administrative proceedings are concluded, that should reduce the occurrence of delay in future cases. On the other hand, if Courts do not consistently exercise their discretion to decline to hear for prematurity except in the clearest and most exceptional cases, the slight crack in the door represented by that exception will gradually widen until it no longer is limited to exceptional circumstances.

[50] In *Thielmann* the Court made essentially the same point (in the context of fragmentation, but it applies equally concerning delay) as follows:

> [58] … Fragmentation will be significantly reduced if courts consistently refuse to entertain early judicial review applications, for reasons of prematurity … absent truly exceptional circumstances. …

[51] Delay therefore weighs heavily in favour of a finding of prematurity.

Fragmentation

[52] In addition to the passage I cite in the preceding section, *Thielmann* also held that even in a case where the judicial review arises in the context of a preliminary issue, fragmentation still exists because the underlying proceeding is on hold until determination of the judicial review. Fragmentation (in the sense of court level proceedings) is also the heading under which some courts place their mootness analysis. I discuss that above. This factor will usually favour dismissal for prematurity. It does so here.

Strength of case

[53] *Air Canada* observed that the potential harmful consequences of determining the merits of a premature judicial review application are largely premised on the application's prospects for success. That makes strength of case relevant. *Thielmann* analysed the strength of case factor as follows in respect of the bias issue before it:

> [72] With respect to the apprehension of bias allegation, the case is not one which is clear and obvious. The main concern is that the experts who opined that the applicant's work was below standard are past presidents of the Association and were presidents during the time period when most of the IC and discipline committee members were appointed (although the president of the Association does not appoint members). The apprehension of bias test is a high one and will not be met by niggling concerns or mere suspicion (see *R v S (RD)*, [1997] 3 SCR 484 at 487). The test is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker would not decide fairly (see *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 60). Although arguments could be made on both sides, given the high standard and the onus upon the applicant to prove the presence of an apprehension of bias, the strength of this allegation is low.
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> [Emphasis added]

I have highlighted the test to be applied in that passage.

[54] In the UFCW's view, when Ms. Sommervill filed an affidavit in the Other Arbitration, that represented a failure to act judicially such that she became a witness for the employer in that proceeding. They characterize her as "prosecuting her issue" in the judicial review concerning the Other Arbitration and aligning with the employer and against the union.

[55] The parties disagree about the appropriate standard of review on the bias issue. UFCW says it is correctness; Affinity contends that reasonableness governs. In *International Brotherhood of Electrical Workers, Local 2038 v Stuart Olson Industrial*

Contractors Inc., 2023 SKCA 115 [*Stuart Olson*], the chambers judge had concluded that correctness was the applicable standard of review. That was not disturbed by the Court of Appeal. In the procedural fairness context, *Prairie Pride Natural Foods Ltd. v United Food and Commercial Workers, Local 1400*, 2024 SKCA 84, stated that the correctness standard applies. For this discussion, I have assumed that correctness would govern. The case would be more challenging for UFCW on a reasonableness standard.

[56] I consider UFCW's apprehension of bias case to be weak for the following reasons.

[57] UFCW accepts that the Tribunal identified the correct test. It does not suggest that the Tribunal erred in its description of the role and expectations of what the *Decision* describes as "side panel nominees".

[58] The Tribunal found that Ms. Sommervill's affidavit provided evidence known only to panel members in the Other Arbitration. It further held as follows:

> [33] … The facts deposed to were factual and were not critical of the Union or its processes. The facts point to issues of procedural fairness in the decision-making process. This does not indicate to me that Ms. Sommervill would not fairly decide other cases involving the same parties. Simply, Ms. Sommervill's affidavit raises concern with the chairperson's conduct and makes no negative commentary against the union. The affidavit does not disclose any predisposition against the Union.
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> [34] At first blush, the actions of the Employer Nominee may have raised a concern of an apprehension of bias, but once the context of what occurred is discovered, and with a proper analysis of the facts surrounding the decision-making process in [the Other Arbitration], it is evident that a reasonable person, fully informed of the facts, would not think it more likely than not that the Employer Nominee would not fairly make decisions in the present case.

[59] I see no error in that analysis.

[60] With one narrow exception, Ms. Sommervill's affidavit addressed no matters in issue before the panel in the Other Arbitration, restricting itself to the decision-making process followed by the other two panel members. The exception related to the process of arriving at a determination of damages, with a brief reference that she and the panel chair agreed that the evidence did not support an award of aggravated damages. But even that focused on the decision-making process concerning that issue and not its merits.

[61] Ms. Sommervill attested to nothing that suggests she would have anything other than an open mind in future arbitrations involving UFCW. Her affidavit expressed concern about how the other two panel members prepared the majority decision largely without her being invited to participate. It did not stray from that.

[62] Although UFCW portrays her as "prosecuting" the issue in the judicial review of the Other Arbitration, Ms. Sommervill did not apply for judicial review; that was the employer. Her affidavit filed in that judicial review states that it was filed in support of the employer's judicial review application. Ideally that language would not have been present, but it is so common and almost standard in this jurisdiction that it is far from fatal. The substantive averments are far more significant.

[63] I view *Stuart Olson* as a fairly strong parallel. There, the union sought to disqualify a labour board panel member for apprehension of bias because of a Reply that panel member swore in a separate proceeding, in which the panel member referred to the union as a fierce competitor of the panel member's own union. The Court of Appeal's analysis distinguished between the roles played by chairs in such proceedings, and the roles played by union and employer nominees. It determined that there was no suggestion that the panel member was hostile to the union. It held that the statements in the Reply were aimed at something other than the union. Each of those rationales could apply equally here. Much of paras. 25-29 of *Stuart Olson* applies equally to

UFCW's position on Ms. Sommervill. Specifically, the following passages could apply with minimal revision for context if "the Member" referred to Ms. Sommervill and the union's name were substituted. Below I underline what would need to be revised:

> [25] A reasonable and informed person would also be aware that members of the Board's hearing panels have taken an oath or affirmation binding them to carry out the duties of their office appropriately and that they are subject to a conflict-of-interest policy that requires them to refrain from adjudicating matters in which they have a direct interest. A reasonable apprehension of bias is not established simply because it is possible to identify a scenario in which a representative member of a panel may be seen as having an indirect interest in a matter, or because they may have certain knowledge or preconceptions …
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> [26] In this case, the Board correctly took all of this into account. It recognized that the mere fact the Member in question had an affiliation to a particular labour union that may have taken a position contrary to an *affiliate* of IBEW 2038 did not automatically raise a reasonable apprehension of bias. …
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> [27] The second arm of IBEW 2038's argument is that both the Board and the Chambers judge erred by overlooking what it describes as prominent and troubling evidence of personal bias on the part of the Member. IBEW 2038 roots this submission in portions of the Reply that the Member swore in the 2018 proceeding that it characterizes as personal attacks on its president, Jeff Sweet, and on the building trades in general. IBEW 2038 describes these statements as being "as stark an example as you can get of a panel member with a sworn opposition to a party".
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> [28] With respect, in my view, IBEW 2038's position rests upon a significant mischaracterization of what the Member actually said in the Reply in question. I see nothing in the Reply that is directed specifically at IBEW 2038 or any of its members. At most, the Member describes *SBTC* as a "fierce competitor" of CLAC 151. As is obvious, that comment is not directed at IBEW 2038 or any of its individual members, and to read it as a personal attack, in any sense, strains credulity.
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> [29] Moreover, as I see it, there is nothing in the Reply that can be reasonably read as evincing a pervasive or continuing hostility on the part of the Member towards IBEW 2038. In that document, the Member was speaking about SBTC's role in relation to the specific facts of an intervenor application. Viewed in context, this cannot reasonably be interpreted as a blanket statement of his views regarding SBTC as a whole. More importantly, in the context of the present case,

> there is absolutely no basis to view his comments as extending to IBEW 2038.
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> [Emphasis added]

[64] As an aside concerning my reliance on *Stuart Olson*, I recognize that legislative differences exist between, on the one hand, the selection of panel members for a labour board hearing pursuant to s. 6-95 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1, and, on the other hand, the regime arising from the combination of s. 6-47 of that *Act* and the collective agreement's provisions concerning arbitration. The collective agreement was not filed, so I have not reviewed its provisions and cannot know to what extent they displace s. 6-47.

[65] Returning to the discussion of *Stuart Olson*, its logic as to what would not create a reasonable apprehension of bias in a similar context is persuasive here. Further, its discussion at para. 24 resembles what UFCW argued before me as representing the normal expectations that employer and union nominees should act judicially.

[66] As argued by Affinity, s. 6-47(9) of *The Saskatchewan Employment Act* also provides guidance. It sets out circumstances where a person is prohibited from serving on an arbitration board: if they have a pecuniary interest in the matter, or if they have acted as lawyer or agent to any of the parties to the arbitration. And s. 18.03 of the collective agreement prevents participation on an arbitration panel where the person is directly involved in the labour controversy in issue. Each of those represents a very clear case and it cannot be said that only those situations disqualify a person from serving on an arbitration. But they are consistent with the judicial philosophy that reasonable apprehension of bias is a high bar to clear.

[67] Finally, in its submissions to me, UFCW contended that the contents of Ms. Sommervill's affidavit are essentially irrelevant to the bias issue. Rather, they say that the mere fact of her swearing the affidavit is enough. I do not agree. *Stuart Olson*

makes clear that the contents of the impugned statement are relevant to apprehension of bias. To support a bias complaint, she needs to have said something suggesting that she would not decide this case fairly. That did not occur.

[68] I conclude that UFCW's case on the merits of the judicial review is weak and unlikely to succeed. To be clear, I am not deciding the merits of that application but assessing its strength for the purpose of the six *Air Canada* factors. This factor weighs in favour of a determination of prematurity. It alone outweighs the waste factor.

Statutory context

[69] As the parties made no arguments concerning the statutory context, and I do not know the extent to which the collective agreement displaces s. 6-47 of *The Saskatchewan Employment Act*, I will treat this as a neutral factor.

3. Summary of analysis

[70] The *Air Canada* factors combined with other factors I discuss above weigh heavily in favour of a finding of prematurity. Even if I viewed the strength of case factor as a close call, I would have found this judicial review to be premature.

[71] The evidence and arguments also do not establish that exceptional circumstances exist here. Indeed, UFCW's stance on exceptional circumstance, which I discuss above in the context of the waste factor, amounts to nothing more than a contention that an allegation of reasonable apprehension of bias should always represent an exceptional circumstance. That notion was entirely discredited by *C.B. Powell*, *Thielmann* and *Wal-Mart 2019*.

[72] I determine that this judicial review application was brought prematurely. Further, no exceptional circumstances exist. Accordingly, it is appropriate that I

exercise my discretion to dismiss this application for prematurity.

D. CONCLUSION

[73] UFCW's application is dismissed with costs to Affinity.

J.
D.G. GERECKE