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JUDICIAL REVIEW IN LABOUR LAW

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This award-winning looseleaf service provides a comprehensive overview of what the courts have done, and are currently doing, when confronted with applications for judicial review of decisions made by labour tribunals. It discusses current case law from all Canadian jurisdictions and includes a discussion of the procedure and remedies available.

What's New in this Update:

This release features updates to Chapters 11 (Grounds for Review: Breach of Natural Justice), 12 (Effect of Privative Clauses), 13 (Basis and Constitutionality of Statutory Adjudication), 14 (Grounds for Review), 15 (Forums and Time for Bringing Judicial Review Proceedings), 16 (Interim Relief) and 17 (Final Relief).

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Highlights:

Part III. Judicial Review of Labour Arbitration Tribunals—Chapter 11. Grounds for Review: Breach of Natural Justice—IV. Bias—§ 11:15. Nominees and Personal Involvements—A reasonable apprehension of bias did not exist where the employer nominee on an arbitration board had filed an affidavit in support of a judicial review application by the employer concerning another grievance between the same employer and the same union (see *UFCW, Local 1400 v. Affinity Credit Union*, 2025 SKKB 45 (Sask. K.B.); cf *IBEW, Local 2038 v. Stuart Olson Industrial Constructors Inc.*, 2023 SKKB 39 (Sask. K.B.)). The nominee's affidavit had stated facts known only to the members of the arbitration board which had heard the other grievance and did not deal with the merits of the board's decision on the other grievance; it set out facts regarding an alleged reasonable apprehension of bias on the part of the chair of the other arbitration board. The court used correctness to review the arbitration board's decision. The arbitration board had found no reasonable apprehension of bias existed, given the nature of the employer nominee's affidavit in the other proceedings. The court found the arbitration board's decision was such that the union's claim of a reasonable apprehension of bias was unlikely to succeed on its merits. (The court was dealing with a judicial review application concerning the arbitration board's interlocutory decision on reasonable apprehension of bias.) The court rejected in particular the argument that the simple fact of having sworn the affidavit gave rise to a reasonable apprehension of bias.

Part IV. Judicial Review of Statutory Adjudicators—Chapter 14. Grounds for Review—II. Absence of Authority to Give Remedy; Reasonableness of the Decision—§ 14:7. Reasonableness of the Decision—The Federal Court of Appeal also found insufficient reasons in which the adjudicator failed to refer to the legal criteria established in the case law for a finding of sexual harassment; failed to refer to the specific facts on which he based his conclusion that a personal relationship between a manager and a subordinate had been consensual; cut and pasted the statement the employee complaining of sexual harassment had made to her employer's internal investigator without even bothering to change the "I"s to "she's"; made no mention of the alleged harasser's testimony before the adjudicator; and made no mention of which incidents were subject to factual disputes between the manager and the subordinate. All this "made it impossible to understand on what basis what facts [the adjudicator] relied on to reach his finding", despite his having heard 15 witnesses over 12 days of hearings (see *Canadian Pacific Railway Company v. Sauvé*, 2024 FCA 171 (F.C.A.), allowing appeal from 2022 FC 1758). The court accordingly quashed the adjudicator's decision. The court specifically rejected the argument that because the legal criteria for sexual harassment were a central issue before him, the

adjudicator could not have ignored them, even though he did not mention them in his reasons; such supplementing of reasons, the court noted, is expressly rejected in *Vavilov* (see also on this point *Giffen v. TM Mobility Inc.*, 2024 FCA 213 (F.C.A.)).

Part IV. Judicial Review of Statutory Adjudicators—Chapter 14. Grounds for Review—III. Breaches of Natural Justice—§ 14:8. General—In a few instances, lower courts have reviewed adjudicators' decisions allegedly leading to breaches of natural justice or procedural fairness on a reasonableness standard (see *Lopez v. Bank of Nova Scotia* (2024), 94 C.C.E.L. (4th) 255) (F.C.)). It may be noted that the decision in *Vavilov* expressly held in para. 23 that the framework for reasonableness review applied, "Where a court reviews the merits of an administrative decision (i.e. judicial review of an administrative decision other than review related to a breach of natural justice and/or procedural fairness.)." The Federal Court used reasonableness to review the adjudicator's decisions on motions that he recuse himself for alleged bias and on rulings on the admissibility of settlement documents into evidence, which the employee alleged denied her natural justice. In regard to the allegations of bias, the court found the adjudicator had reasonably considered the employee's submissions and engaged in a reasonable analysis of the facts and submissions, using the correct legal test for reasonable apprehension of bias; his decision on this issue was thus reasonable. In regard to the admission of settlement documents into evidence, the court found the adjudicator had reasonably exercised the discretion given him under the *Canada Labour Code* to admit matters inadmissible in evidence before a court.

Part V. Remedies—Chapter 15. Forums and Time for Bringing Judicial Review Proceedings—§ 15:2. Prematurity—Review of Interim Rulings—The Saskatchewan Court of Appeal again applied a strict approach to judicial review of arbitral decisions where the proceedings before the arbitrator have not been completed in *Saskatchewan Power Corporation v. International Brotherhood of Electrical Workers, Local 2067*, 2025 SKCA 33 (Sask. C.A.). The parties there had agreed to bifurcate a grievance arbitration hearing into a liability phase and, if needed, a remedy phase. The arbitrator issued a decision allowing the union's grievance on its merits and expressly stating that he remained seized of the matter and retained jurisdiction to determine the remedy. The employer sought judicial review of the arbitrator's award on the merits. The Saskatchewan Court of King's Bench and Court of Appeal both held that the judicial review application was premature, rejecting arguments that the agreement to bifurcate the hearing made the arbitrator's decision the merits a final one for purposes of judicial review. The Court of Appeal held that bifurcation alone does not determine whether judicial review should proceed and that parties' agreements cannot bind the courts in the exercise of their discretion as to when and whether to hear a

judicial review application.

Part V. Remedies—Chapter 15. Forums and Time for Bringing Judicial Review Proceedings—§ 15:7. Mootness—In *International Longshore and Warehouse Union-Canada v. British Columbia Maritime Employers Association*, 2024 FCA 142 (F.C.A.), leave to appeal refused 2024 CarswellNat 1336 (S.C.C.)., the Federal Court of Appeal dealt with the questions of whether a judicial review application concerning a decision of the CIRB was moot and, if so, whether the court should nonetheless rule on the merits of the application. The CIRB decision had held that a resumption of what had been a legal strike became an unlawful one because the union had failed to give a new 72-hour notice of strike action under s. 87.2(1) of the *Canada Labour Code* before resuming its work stoppage. The CIRB found that such a notice was required in the circumstances before it. The parties entered into a new collective agreement before the court heard the application, but the employer association had filed a grievance under the collective agreement seeking damages for the unlawful strike and had stated its intention to pursue a civil action for damages in the courts should its grievance be dismissed on any basis other than its merits. The Federal Court of Appeal found that the judicial review application was moot, since the ending of the strike and the signing of a collective agreement meant there was no longer any live controversy between the parties. Relying on the *Borowski* considerations, however, the court decided to hear the merits of the union's judicial review application. The court found that an adversarial context continued to exist, and the specific circumstance that the legality of the strike would be an important issue in the employer's grievance and in its contemplated civil action argued strongly in favour of hearing the merits of the union's judicial review application.