

Federal Court



Cour fédérale

Date: 20250623

Docket: T-2519-22

Citation: 2025 FC 1128

Toronto, Ontario, June 23, 2025

PRESENT: The Honourable Justice Battista

BETWEEN:

CONNIE TUHARSKY

Applicant

and

O’CHIESE FIRST NATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] A robust administrative state cannot exist without an appropriate amount of judicial deference to the work of administrative decision makers. One way that courts show their respect for administrative adjudication is through the doctrine of prematurity. This doctrine allows administrative decision-making processes to unfold completely before the judicial process is engaged.

[2] The Applicant, Ms. Tuharsky, was dismissed from her position as general counsel for the Respondent, O’Chiese First Nation. She began proceedings under the *Canada Labour Code*, RSC 1985, c L-2 (CLC), for a determination that she was unjustly dismissed, and that she was entitled to a range of remedies, including reinstatement, aggravated and punitive damages, and costs.

[3] The Adjudicator agreed that Ms. Tuharsky was unjustly dismissed, but found that the circumstances did not justify reinstatement, or punitive or aggravated damages. The proceedings were then adjourned for further evidence and conclusions on issues related to remedy. Ms. Tuharsky began judicial review proceedings prior to the Adjudicator’s final resolution of those issues, which remained unresolved.

[4] In short, Ms. Tuharsky obtained most, but not everything, that she sought from the Adjudicator. She comes to this Court with a request that the Adjudicator’s decision be quashed so that she can begin the process—again—of trying to obtain everything that she sought.

[5] For the reasons below, this application for judicial review is premature and is dismissed with costs.

II. Background

[6] Ms. Tuharsky was general counsel for the Respondent from 2010 until her dismissal in 2019. She brought a successful claim against the Respondent for unjust dismissal under section 242 of the CLC. To remedy the unjust termination, she sought reinstatement. In the alternative, she sought damages for mental anguish, punitive damages, and aggravated damages.

[7] Hearings into the complaint were conducted in 12 sittings which took place over approximately ten months, between July 2020 and May 2021.

[8] In a decision dated November 2, 2022, the Adjudicator found that Ms. Tuharsky had been unjustly dismissed by the Respondent but declined to award aggravated or punitive damages or to reinstate Ms. Tuharsky as general counsel for the Respondent.

[9] The Adjudicator retained jurisdiction to address questions regarding the implementation of the decision, to correct errors or omissions, and to determine the appropriate quantum of damages to award against the Respondent. The Adjudicator adjourned to consider the issue of damages because she required further information from Ms. Tuharsky.

[10] Ms. Tuharsky filed a notice of application for judicial review in this Court on December 2, 2022, prior to the completion of the unjust dismissal proceedings. She argues that the Adjudicator was biased by favouring counsel for the Respondent and changing procedures to Ms. Tuharsky's disadvantage. She also submits that the Adjudicator unreasonably found that she was not eligible for aggravated and punitive damages or reinstatement of her employment with the Respondent. Finally, she argues that the award compensating her for costs was unreasonably low.

[11] On February 3, 2023, the Respondent filed a motion to strike these proceedings on the basis that they were premature, with alternate requests. Associate Judge Crinson dismissed the motion, finding that the burden of demonstrating that the application was "so clearly improper as to be bereft of any possibility of success" had not been met. Associate Judge Crinson also determined

that it was more appropriate that the issue of prematurity be determined by the judge assigned to decide the judicial review application.

III. Issue

[12] Ms. Tuharsky attacks the reasonableness and fairness of the Adjudicator's decision. However, in my view the determinative issue is whether this application is premature.

[13] The determination of prematurity is a court's response to a preliminary objection to a judicial review proceeding. It is based on the principles governing the timeliness of judicial review of administrative action. It is not amenable to a standard of review analysis because no decision is being reviewed.

IV. Analysis

[14] The rule against prematurity is alternatively referred to as the doctrine of exhaustion. This rule is a preliminary objection to judicial review which prevents access to courts when an administrative decision-making process has not been completed. It is also applicable when there is an "adequate alternative remedy": an administrative process has an available, effective remedy which should be accessed prior to a request for a judicial remedy in the courts.

[15] When an administrative process has not completed, parties can proceed to courts only in exceptional circumstances, and the threshold for exceptional circumstances is high (*Camara v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1329 at para 32 [citations omitted]). The Federal Court of Appeal (FCA) has held that this rule can be relaxed in rare

circumstances when there are issues of rule of law or public law values that implicate early access to a court (*Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 at para 60 [citations omitted], leave to the Supreme Court of Canada (SCC) dismissed on January 28, 2016, No. 36591).

[16] Canadian common law provides several justifications for the rule against premature judicial intervention, including:

- The demonstration of judicial respect for administrative decision makers;
- The prevention of fragmented and piecemeal legal proceedings, which reduces delays and costs; and
- The recognition that a court will benefit from a complete set of findings from the administrative decision maker.

(*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 (*CB Powell*) at para 32).

[17] As described below, these justifications support a finding that the rule is appropriately applied in this application.

A. *The present statutory context requires judicial restraint*

[18] The governing statute for administrative action provides the foundational ground rules that define the relationship between the administrative decision maker and the courts. Therefore, determining the scope and availability of judicial review requires an examination of that statute, which is the expression of the legislative perspective on that relationship.

[19] As stated above, this matter originated as a proceeding under the CLC. Sections 242 and 243 of the CLC govern the disposition of a complaint of unjust dismissal.

[20] Section 242 requires a decision of unjust dismissal to be implemented by order, which has not yet been issued in this case. At this stage, the Adjudicator issued only an “award”.

[21] Section 243 addresses the finality of orders and the integrity of CLC unjust dismissal processes. It states:

243 (1) Every order of the Board is final and shall not be questioned or reviewed in any court.	243 (1) Les ordonnances du Conseil sont définitives et non susceptibles de recours judiciaires.
No review by certiorari, etc.	Interdiction de recours extraordinaires
(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, <i>certiorari</i> , prohibition, <i>quo warranto</i> or otherwise, to question, review, prohibit or restrain the Board in any proceedings under section 242.	(2) Il n’est admis aucun recours ou décision judiciaire — notamment par voie d’injonction, de <i>certiorari</i> , de prohibition ou de <i>quo warranto</i> — visant à contester, réviser, empêcher ou limiter l’action du Conseil exercée au titre de l’article 242.

[22] Subsection 243(1) is a privative clause, intending to prohibit or restrict judicial review of decisions and processes under the CLC.

[23] The extent to which privative clauses can circumscribe judicial review has not been resolved in Canadian law (see *Democracy Watch v Canada (Attorney General)*, 2024 FCA 158,

leave to the SCC granted May 1, 2025, No. 41576). However, this Court has held that subsection 243(1) of the CLC does not oust the Court’s jurisdiction to conduct judicial review. The subsection does, however, indicate a “legislative desire for deference” (*Hristova v CMA CGM (Canada) Inc*, 2019 FC 1611 at para 11 [citations omitted]). I agree that the subsection represents a clear Parliamentary intention that judicial interference in decisions is to be minimal, if at all.

[24] Subsection 243(2) represents a stronger expression of Parliamentary intent to restrict judicial interference in the unjust dismissal process. While subsection 243(1) restricts judicial review of unjust dismissal orders, subsection 243(2) restricts judicial interference in “proceedings”. This demonstrates Parliamentary intent to restrain judicial review of ongoing proceedings, in addition to final orders.

[25] The CLC’s statutory purpose of efficient proceedings and minimal judicial oversight has been previously articulated by this Court:

...Parliament conferred on adjudicators, appointed *ad hoc*, jurisdiction to determine unjust dismissal complaints in order to minimize the expense and delays that dismissed employees, often still out of work and typically far from being among the highest income earners, could have expected to encounter in the courts. The absence of a right of appeal and the inclusion of a strong preclusive provision in the Code (section 243) evidence a legislative intention to keep to a minimum judicial oversight of the proceedings before adjudicators.

(*Air Canada v Lorenz* (TD), [2000] 1 FC 494 at para 33).

[26] Allowing Ms. Tuharsky access to this Court for a preliminary review of the Adjudicator’s findings works against the procedural efficiency intended by Parliament in the unjust dismissal process. It also offends one of the justifications for the rule against premature intervention, namely,

the demonstration of judicial respect for the administrative decision-making process (*CB Powell* at para 32).

B. *Disallowing fragmentation of the Adjudicator's proceedings prevents delay and expense*

[27] Proceeding with judicial review prior to a final order from the Adjudicator is not only discordant with the statutory context; it also promotes delay and expense.

[28] A timeline of these proceedings illustrates the delay in the process designed to resolve the legal dispute regarding Ms. Tuharsky's termination:

- June 3, 2019: Ms. Tuharsky was advised of her termination;
- July 8, 2020 - May 5, 2021: Hearings into the unjust dismissal complaint were conducted;
- November 2, 2022: The Adjudicator rendered a decision determining that Ms. Tuharsky was unjustly dismissed, reserving jurisdiction to determine issues related to damages after a subsequent hearing;
- December 2, 2022: Ms. Tuharsky commenced this judicial review application;
- June 3, 2025: The judicial review hearing occurred.

[29] The parties were previously advised that the Adjudicator required at most one additional hearing day for the determination of damages. Rather than proceed to completion of the

proceedings, Ms. Tuharsky commenced this application for judicial review. The proceedings have since been paused pending the disposition of this application for judicial review.

[30] As can be seen above, almost three years have elapsed since Ms. Tuharsky obtained a decision that she was unjustly dismissed. Despite being case managed, these proceedings have resulted in volumes of documents filed, a record that exceeds 4000 pages, and motions to strike documents as well as the entire matter for prematurity.

[31] If the Court were to proceed with this application, the administrative proceedings would need to resume before the Adjudicator to resolve the outstanding issues, regardless of whether the application for judicial review was granted or dismissed. Regardless of the disposition of the application, the Adjudicator upon resumption would need to assess the Court's reasons and determine which issues are and are not still open for resolution. Once the Adjudicator makes a final order, it could be subject to further judicial review, requiring a judge on judicial review to untangle the issues. In short, it would result in a voluminous, multi-tiered, confusing mess.

[32] In this way, the suspension of the adjudicative process pending this request for judicial review has delayed finality, increased the risk of confusion, and heightened costs for the Respondent. These consequences directly contradict the goals of efficiency and judicial restraint, which are clearly articulated in the statutory scheme. The doctrine of prematurity is therefore appropriately applied in these circumstances to prevent these proceedings becoming even more unruly, resulting in further delay and expense (*CB Powell* at para 32).

C. *A complete record and complete findings are optimal for judicial review*

[33] As stated above, this application was commenced prior to the completion of the Adjudicator's task, which was the issuance of an order reflecting the rights of the parties and conclusions on the issues. This order was the legislative goal, or outcome.

[34] The SCC has recently described the importance of an administrative outcome in the process of judicial review:

It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome ... This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

(*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at paras 83, 87 [emphasis in original])

[35] Judicial review, when examining a decision's reasonableness, is therefore the process of examining the reasoning process and its outcome. There is no indication in *Vavilov* that either reasons or outcome uniformly takes precedence over the other; in fact, reasonableness review may be conducted based on outcome alone, in the absence of reasons, using the record (*Vavilov* at paras 137-138; *Auer v Auer*, 2024 SCC 36 at para 52).

[36] In the present case there has been no outcome, and this renders judicial review less effective because "only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience" (*CB Powell* at para 32). If the

review proceeds, the “reasons first” methodology described by the SCC would be disadvantaged by the Court’s inability to examine the interaction between the reasons, outcome, and evidence before the Adjudicator (see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 58-63).

[37] Ms. Tuharsky disputes the Adjudicator’s findings on remedy, challenging the refusal to grant reinstatement, or punitive or aggravated damages. However, the Adjudicator has not completed her assessment of the proper remedy in this matter. Only with the Adjudicator’s final conclusions can the Court effectively assess the reasonableness of the decision.

[38] In addition, an examination of the record as a whole is required for effective judicial review (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 36; *Vavilov* at para 137). One of the essential features of reasonableness review is examining a decision’s justification in light of the facts (*Vavilov* at paras 101, 126).

[39] Here, the Adjudicator specifically requested additional evidence related to remedy, but that evidence is not part of the record before the Court. Despite this, Ms. Tuharsky has made extensive submissions on the proper remedy, including charts with detailed financial analyses that the Adjudicator never saw. The Court would usurp the Adjudicator’s role by considering this evidence, let alone reaching any conclusions based on it.

[40] With an incomplete record and an incomplete set of findings from the Adjudicator, the rule against prematurity is justified (*CB Powell* at para 32).

D. *No exceptions to the application of prematurity are justified in this application*

[41] The common law has recognized certain exceptions to the application of the rule against prematurity (Honourable Mr. Justice Gerald Heckman, “Developments in Remedial Discretion on Judicial Review: Prematurity and Adequate Alternative Remedies” (2017) 30:1 Can J Admin L & Prac 1 at 5-16). Two of these exceptions have potential application in this case: the allegation of serious breaches of fairness, and the existence of a natural break or “interval” in the proceedings.

(1) No serious breach of fairness justifies intervention at this stage

[42] Serious, “clear and obvious”, or “cast-iron” breaches of procedural fairness, particularly when there is a risk that such breaches will continue in an administrative process, have justified judicial intervention in ongoing proceedings (Heckman at 9-12).

[43] In the present case, Ms. Tuharsky alleges a reasonable apprehension of bias of the Adjudicator based on the following allegations:

- Ms. Tuharsky was asked her position on disclosing her witness list, while the Respondent did not have to disclose their witness list;
- The Adjudicator advised Ms. Tuharsky not to interrupt counsel for the Respondent during closing submissions, but allowed the Respondent’s counsel to “interrupt” Ms. Tuharsky during her closing submissions;
- The Adjudicator “berating” Ms. Tuharsky for arriving close to the hearing’s commencement time;

- The Adjudicator asked Ms. Tuharsky to point out evidence to support her claims in her closing submissions, but did not ask the same of the Respondent's counsel; and
- The Adjudicator asked Ms. Tuharsky to refer to opposing counsel as O'Chiese counsel while allowing opposing counsel to refer to her as "Connie".

[44] The test for an apprehension of bias is whether an informed person, viewing the matter realistically and practically, would conclude that the decision maker would not decide the matter fairly (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 (*Yukon Francophone School Board*) at paras 20-21). Administrative decision makers are presumed to be impartial, and it is a high threshold to establish bias, requiring a "real likelihood or probability of bias" (*Patanguli v Canada (Citizenship and Immigration)*, 2015 FCA 291 at para 50; *Yukon Francophone School Board* at paras 25-26). Evidence to establish bias must have clear support in the evidence (*Atay v Canada (Citizenship and Immigration)*, 2021 FC 1151 at para 30 [citation omitted]).

[45] The incidents described above reflect hearing management and do not rise to the threshold of a "clear and obvious" breach of fairness justifying judicial intervention at this stage.

[46] Moreover, there is no indication that Ms. Tuharsky raised these allegations of bias with the Adjudicator during the hearing or in the approximately 18 months between the conclusion of the hearing and the decision.

[47] Therefore, there is a strong case that Ms. Tuharsky waived her right to allege bias and it would be improper for the Court to entertain these claims on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-23). As this Court has held, “[i]ssues of procedural fairness must be raised at the earliest opportunity and a failure to do so amounts to an implied waiver of any perceived breach of procedural fairness”, which can include issues of bias (*Sanusi v Canada (Citizenship and Immigration)*, 2020 FC 1004 at para 7 [citations omitted]; *Oh v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 161 at para 13 [citations omitted]).

(2) There was no natural break or “interval” in the proceedings

[48] An exception to the application of prematurity has been recognized when administrative proceedings are bifurcated due to a “natural break” in the proceedings. The FCA has described these situations as follows:

Administrative decision-makers, like courts, occasionally bifurcate the merits and the remedy. That sort of bifurcation—at a natural break between two separate phases of the proceedings—often does not cause the ills identified in *C.B. Powell*, above, unlike bifurcations in the middle of hearings on the merits, which often do. Certainly the adjudicator considered the bifurcation to be natural and practical, as is evident from his emails in the record before us. Also of significance is the absence of any objection or submissions to the contrary to the adjudicator by the appellant.

(*Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 (*Wilson*) at para 36, rev’d 2016 SCC 29 (but not on this point)).

[49] By contrast to the situation in *Wilson*, there is no neat separation between the merits and the remedy in the present application. Ms. Tuharsky is in fact challenging the Adjudicator’s

conclusions on remedy in this application, before the Adjudicator has completed her examination and findings on the issue. In this case, as in many cases, the merits and the remedy are intertwined.

[50] Moreover, in *Wilson* (at paras 38-39) the adjudicator's support for judicial intervention was a critical factor in the FCA's decision not to find the application premature:

In the unusual circumstances of this case, the adjudicator's decisions to adjourn and to remain adjourned while judicial review was ongoing were discretionary procedural choices suffused by factual and policy appreciation that deserve respect. ... The adjudicator had many defensible reasons based on policy and fact for acting as he did.

As is apparent from his reasons, the adjudicator was well-aware of the legal point before us, one that has festered for many years and has divided adjudicators into two schools of thought. Perhaps in adjourning and remaining adjourned, this adjudicator, a knowledgeable and experienced participant in this regulated sector, took the view that while the judicial review might delay this particular case, it would settle once and for all this nagging legal point. ...

[51] By contrast, in the present case the Adjudicator clearly preferred to complete her work prior to judicial review proceedings. In a letter to the Court dated December 30, 2022, she filed an Objection to Production under Rule 317 of the *Federal Courts Rules*, SOR/98-106. One of the three bases for her objection was that the request is premature because she had not issued an order.

[52] In an email to counsel dated January 19, 2023, the Adjudicator expressed her intention to suspend further adjudication "in this unusual circumstance—when an application for judicial review has been made when not all issues have been adjudicated".

[53] Unlike the situation in *Wilson*, the present application demonstrates a disrespect, rather than respect, for the adjudicative process. There has not been an appropriate interval which justifies the Court's intervention at this stage.

V. Conclusion and costs

[54] Justice is weakened when decisions are based primarily on technicalities, and the rule against prematurity may, from a certain perspective, be viewed as a technicality. However, as this case illustrates, the rule against prematurity is at the heart of clear, effective, and disciplined judicial review. This application is dismissed because Ms. Tuharsky has failed to allow the administrative proceedings to unfold to completion.

[55] The Respondent has requested costs. While costs are rarely awarded against self-represented litigants in the service of access to justice, Ms. Tuharsky is a lawyer who has faced no apparent impediments in representing herself before the Adjudicator and before this Court.

[56] It is clear that the legal proceedings to date involve more than employment matters for Ms. Tuharsky. These proceedings have implicated the meaning she derives from her roles as an Indigenous woman, a member of her community, and a lawyer. While I dismiss this application, I do not dismiss the impact of the proceedings on her.

[57] However, the Respondent has been placed in the unusual position of prematurely defending a decision made against them, which included several unfavourable references to their witnesses. They do so because they desperately seek finality to the issues surrounding Ms. Tuharsky's

termination, which have stretched on for over five years. In my view, they are entitled to that finality, and also entitled to their costs of this premature application.

JUDGMENT in T-2519-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs.

"Michael Battista"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2519-22

STYLE OF CAUSE: CONNIE TUHARSKY v O'CHIESE FIRST
NATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: JUNE 3, 2025

JUDGMENT AND REASONS: BATTISTA J.

DATED: JUNE 23, 2025

APPEARANCES:

Connie Tuharsky	FOR THE APPLICANT (Self-Represented)
J. Trina Kondro	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Emery Jamieson LLP Edmonton, Alberta	FOR THE RESPONDENT
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