KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 80**

Date: **2025 06 12**
Docket: KBG-SA-01259-2023
Judicial Centre: Saskatoon

BETWEEN:

AFFINITY CREDIT UNION

Applicant

- and -

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400

Respondent

Counsel:

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

FIAT — DANYLIUK J.
June 12, 2025

Introduction

[1] This has become at least a two-part application. The underlying or main application is the originating application brought by the applicant ("Credit Union") for judicial review of a decision of an arbitration panel. I am not dealing with the main application at present although I will do so in the future.

[2] The subsidiary application is the motion of the respondent ("UFCW") to entirely strike out an affidavit filed by the Credit Union, namely the affidavit of Laura Sommervill sworn December 13, 2023. As matters evolved the chair of the arbitration panel, John Comrie, K.C., filed certain unsworn material in response and UFCW also seeks the striking of that material.

[3] Of necessity the parties need an early ruling on the admissibility of this material, and that is the ruling contained herein.

[4] For the reasons set out below I dismiss UFCW's application to strike out the affidavit, with costs reserved to the hearing of the main application.

Facts

[5] The background dispute may be summarized as follows. On July 16, 2020 the Credit Union fired a ten-year employee, allegedly for just cause. The basis of the termination of employment included allegations of harassment and bullying of other employees, and creating a toxic work environment.

[6] The terminated employee was a member of UFCW. UFCW grieved the termination on July 23, 2020 (Grievance #463 C4/20). UFCW's position might be summarized as the Credit Union having unjustly terminated the employee and in doing so breached the collective bargaining agreement then in place.

[7] A three-person arbitration panel was constituted. John Comrie was the chair. Lorraine St. Cyr was UFCW's nominee. Laura Sommervill was the Credit Union's nominee.

[8] The arbitration itself took a substantial amount of time. Hearing dates occurred in September to December in 2021, and in March, April and June in 2022.

The arbitration decision ("Decision") was delivered on January 10, 2023 and then a supplemental decision ("Supplemental Decision") came out on August 8, 2023, collectively ("Decisions"). The Decisions were not unanimous. The Credit Union's nominee, Ms. Sommervill, dissented on both of the Decisions.

[9] The majority of the arbitration panel determined that just cause to dismiss the employee did not exist even though her conduct did contribute to the existence of a toxic workplace. It was further held by the majority that the employee's conduct was not harassment within the meaning of *The Saskatchewan Employment Act*, SS 2013, c S-15.1. Under the majority decision the employee was not reinstated; rather damages were awarded as follows:

(a) Salary equivalent to 1.57 months' pay for each year the employee had worked for the Credit Union;

(b) Net aggravated damages of $10,000.00 (allowing for a human rights award); and

(c) Punitive damages of $20,000.00.

[10] Ms. Sommervill's dissent found the termination justified and lawful.

[11] On October 26, 2023 the Credit Union filed the main application for judicial review of the majority arbitration Decisions. In its main application the Credit Union seeks to quash both Decisions, have the grievance dismissed (confirming there was just cause for termination), and costs of the application.

[12] The grounds upon which the Credit Union's judicial review application rests are important. They may be summarized as:

(a) The majority of the arbitration panel violated the principles of

natural justice, procedural fairness and the right to be heard, and gave rise to a reasonable apprehension of bias; and

(b) The majority of the arbitration panel erred in fact and law in several respects.

[13] In support of its application the Credit Union filed Ms. Sommervill's affidavit. The content and nature of the Sommervill affidavit will be examined in more detail below, but in broad strokes it sets out an allegation that Ms. Sommervill was effectively excluded from the decision-making process by the other two arbitrators, and made that process adversarial in nature. Ms. Sommervill's affidavit is detailed and contained a number of exhibits, including intra-board correspondence prior to the Decisions each being issued. The Sommervill affidavit opens the door for this Court to examine the deliberations and the process used to reach the Decisions issued.

[14] In response to the Sommervill affidavit the arbitrator, Mr. Comrie, filed a folder of correspondence which significantly overlapped the material included in Ms. Sommervill's affidavit. This was not done at the behest of UFCW and now (presumably to remain consistent) UFCW also seeks to have that material struck.

[15] UFCW – quite properly given its position that the material of Ms. Sommervill and Mr. Comrie is improperly before this Court – did not file its own material from either majority arbitrator, or otherwise. Rather, the admissibility of the material now filed is being treated by the parties as a threshold issue and if the material is not struck, then UFCW will have to determine its position on further filing. This will necessarily add procedural layers to this application.

Issues

[16] The issues in this application are:

1. Should the impugned material be struck?

2. Should Ms. Sommervill be cross-examined?

3. What is the proper cost award?

Analysis

1. Should the impugned material be struck?

[17] I begin by examining the basis of UFCW's position in support of striking Ms. Sommervill's affidavit.

[18] In part, UFCW relies upon s. 6-121 of *The Saskatchewan Employment Act*:

> **6-121**(1) Notwithstanding any other Act or law, information obtained for the purposes of this Part is not open to inspection by any person or by any court if the information is acquired by any of the following persons and was acquired in the course of the person's duties pursuant to the Part:
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> (a) a member of the board;
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> (b) a labour relations officer;
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> (c) the director of labour relations;
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> (d) a special mediator;
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> (e) an arbitrator with respect to an arbitration of a matter governed by this Part;
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> (f) a member of a conciliation board appointed pursuant to this Part;
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> (g) a member of an arbitration board appointed pursuant to this Part.
>
> (2) None of the persons mentioned in subsection (1) shall be required by any court or the board to give evidence about

> information obtained for the purposes of this Part in the course of his or her duties.

UFCW in particular notes subsections (e) and (g).

[19] Further, UFCW relies upon the common law doctrine of deliberative secrecy. The nature and scope of this duty, and an important recognized exception to it, was explored in *Commission scolaire de Laval v Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8 at paras 57 and 58, [2016] 1 SCR 29:

> [57] The scope of deliberative secrecy is clearly defined in the case law. In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, the Court, per McLachlin J. (as she then was), stressed that the protection of the process by which judges reach their decisions is a core component of the constitutional principle of judicial independence:
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> > The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence .... As stated by Dickson C.J. in *Beauregard v. Canada*, [[1986] 2 S.C.R. 56,] the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence. [Emphasis added; pp. 830-31.]
>
> The need to shield the judicial decision-making process from review by the other branches of government flows from the principle of separation of powers that is reflected in the constitutional requirement of judicial independence.
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> [58] It is true that, as the appellants point out, the Court has held, since its decision in *MacKeigan*, that **deliberative secrecy**

> **also protects the deliberations of administrative tribunals** (*Tremblay*, at p. 966). For such decision makers**, however, the protection is not watertight. Although secrecy remains the rule, it can be lifted, for example, "when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice"** (*Tremblay*, at p. 966). Nonetheless, in the absence of procedural defects, deliberative secrecy continues to shield such decision makers from having to testify if their decisions are contested.
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> [Emphasis added]

[20] In *Bokhari v Top Medical Transportation Services*, 2025 ONSC 1208, Matheson J. summarized this concept at paras. 39 and 40:

> [39] Deliberative secrecy extends to internal communications and the administrative aspects of the decision-making process: *Summit Energy* [2012 ONSC 2753], at para. 79; *Chestacow v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 389, at paras. 33-34. However, the of the administrative decision-making is not absolute and will yield where there is an evidentiary basis to allege that the right of natural justice has been infringed: *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Payne* [(2000), 192 DLR (4th) 315 (Ont CA)], at para. 168; *Chestacow*, at para. 34.
>
> [40] **The secrecy can be lifted if a litigant can show a "clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed… [I]n view of the importance of the principle of deliberative secrecy in the administrative decision-making process, examinations based on conjecture or mere speculation will not be allowed":** *Payne*, at para. 172.
>
> [Emphasis added]

[21] The cloak of silence covers not only the decision and how it was made, but internal communications within that process. However, the relevant authorities all articulate an exception where a clear and objectively reasonable concern is provided. It is also often stated that deliberative secrecy does not protect administrative adjudicators

to the same extent as judges, “and it may be lifted to allow examination of the process followed”: *Ziolkoski v Unger*, 2023 ABKB 675 at para 197.

[22] This exception to the doctrine of secrecy appears to apply to both the decision and the process by which it was made.

[23] UFCW argues that the doctrine of secrecy applies to the deliberations of the arbitration tribunal in this case; that s. 6-121 of *The Saskatchewan Employment Act* prohibits this sort of information; that there is no applicable exception to same; and that this privilege cannot be unilaterally waived by one member of the tribunal.

[24] The Credit Union raises arguments to counter each of UFCW’s arguments.

[25] First the Credit Union argues that s. 6-121 is not a bar to the use of such material. This is because the information imparted by Ms. Sommervill was not, the Credit Union says, acquired in the course of the duties of the arbitration tribunal. In fact, the Credit Union alleges the two majority arbitrators engaged in violating procedural fairness and natural justice and/or acted in a way to give rise to a reasonable apprehension of bias. As a result, the protection of s. 6-121 does not pertain.

[26] I agree that in these unique circumstances s. 6-121 does not apply. One of the difficulties here is how else do the issues pertaining to procedural fairness and natural justice and reasonable apprehension of bias get before the Court? There must be objectively reasonable grounds to consider such a matter, and without a supporting affidavit it is difficult to see how this can ever happen.

[27] Both with respect to s. 6-121 and regarding the applicability of the doctrine of deliberative secrecy (and the recognized exception thereto) I find the filing

of the Sommervill affidavit is justified **on these facts**. In this regard I note the following authorities:

- *Tremblay v Quebec (Commission des affaires sociales),* [1992] 1 SCR 952. Counsel for the Credit Union noted these passages from pages 965 to 966, and I agree it is relevant to the situation here:

> Additionally, when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine *inter alia* the decision maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All these events accompany the deliberations or are part of them.
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> Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. This is indeed the conclusion at which the majority of the Court of Appeal arrived, at pp. 2074-75:
>
> > [Translation] However, this confidentiality yields to application of the rules of natural justice, as observance of these rules is the bedrock of any legal system. In exceptional cases, therefore, the confidentiality requirement may be lifted when good grounds for doing so are first submitted to the tribunal.

- In Saskatchewan the doctrine of deliberative secrecy has been held to apply, as has the exception to same. This was the case in *DeMaria v*

Law Society of Saskatchewan, 2015 SKCA 106, [2016] 2 WWR 589. See para. 37:

> [37] The other side of the evidence ledger is quite short. Although it was arguably open to the Law Society in the circumstances to supplement the record with affidavit evidence from the Benchers themselves, attesting to what occurred at their breakfast meeting with in-house counsel and after Mr. DeMaria had left the hearing room, they did not do so (*Tremblay c Quebéc (Commission des affaires sociales)*, [1992] 1 SCR 952 and at paras. 124-127 of *Québec (Régie des permis d'alcool)*). Thus, the Chambers judge had no evidence from the Law Society controverting or refuting what Mr. DeMaria had averred to in his affidavits.

- Also see *Mosaic Potash Colonsay ULC v United Steel Workers of America, Local 7656*, 2008 SKQB 238, 317 Sask R 22. Paragraphs 24 and 25 reference the ruling in *Hartwig v Saskatchewan (Inquiry into Matters Relating to the Death of Neil Stonechild, Commissioner)*, 2007 SKCA 74, 284 DLR (4th) 268, where at paras. 24 and 25 the Court of Appeal revisited the issue of whether affidavits may be filed to supplement the "classic" record of proceedings. Richards J.A. (as he then was) found this acceptable in certain circumstances.

- *Hartwig* was noted in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, 479 NR 189. Justice Stratas stated (para. 28) that some courts receive affidavit evidence which "facilitates their reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider". In turn, *Bernard* was recently cited with approval in *Dini v Canada (Citizenship and Immigration)*, 2024 FC 1969.

- The applicability of the procedural fairness exception to deliberative

> secrecy was put succinctly at para. 73 of *Nova Scotia (Attorney General) v Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, 429 DLR (4th) 359: "On the judicial review from a decision of an administrative tribunal, the reviewing court may receive fresh evidence to assess the exercise of procedural fairness at the tribunal".

[28] In these circumstances I find the Credit Union has placed itself squarely within the exception to the doctrine of deliberative secrecy. There is no other way to factually raise the concerns as to lack of fairness and natural justice. The jurisprudence dictates this Court must have a factual basis, and the affidavit is the only way to do this. I am not convinced by UFCW's assertion that these concerns were not raised in Ms. Sommervill's dissent. How would she do so? By stating her conclusions, opinions and arguments? How would she exhibit items to her dissent?

[29] Respectfully, UFCW conflates evidence, argument and conclusion. It is not Ms. Sommervill's conclusion to draw any more than it is for Mr. Comrie or Ms. St. Cyr to do so. The factual matrix is to be placed before this Court and based upon that background, as well as the certified record, the decision on judicial review will be made. UFCW seeks to elevate the concept that Ms. Sommervill "could have" included this matter in her dissent to "must". I cannot accede to that argument.

[30] Accordingly, UFCW's application to strike the Sommervill affidavit must be dismissed on this basis.

[31] In the event I am incorrect about this I will deal with the Credit Union's second argument, which is that any privilege that may have attached to the tribunal's deliberations (whether through s. 6-121 or the common law doctrine of deliberation secrecy) evaporated when it was waived. The Credit Union asserts that as soon as Ms.

Sommervill's affidavit was filed with the Court, privilege was waived for the entire tribunal. The Credit Union further argues this is bolstered by the filing of response material by Mr. Comrie. The Credit Union argues the intent of s. 6-121 is to prevent an arbitrator from being **forced** to divulge such information. Ms. Sommervill was not forced; she swore her affidavit voluntarily.

[32] The Credit Union filed no authorities to support this view of waiver, and respectfully I do not accept it in these circumstances. While the law recognizes that in some very limited instances privilege can be waived by one party, this is the exception. In the situation at hand I find UFCW's authorities are persuasive.

[33] I have specifically considered *Grogan v Ontario College of Teachers*, 2023 ONSC 2980. There, one member of a tribunal provided an affidavit to support one party and accused the other tribunal members of bias. The tribunal invoked deliberative secrecy, which the affiant countered with an assertion of waiver of privilege for the entire tribunal. The court did not accept the affiant's position and struck the affidavit, largely on the basis that the assertion was too vague. Nevertheless, the recognized exception to deliberative secrecy was affirmed in this decision (see, for example, para. 18). Notably for present purposes at para. 28 of *Grogan* the Court held that the privilege was not the affiant's to waive.

[34] I therefore do not give effect to the Credit Union's waiver of privilege argument. Ms. Sommervill could not waive privilege for the entire tribunal.

[35] However, the Credit Union has established that the recognized exception to deliberative secrecy applies in this case. Ms. Sommervill's affidavit stands.

2. Should Ms. Sommervill be cross-examined?

[36] Rule 3-54 of *The King's Bench Rules* states as follows:

> **3-54**(1) On any originating application, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making the affidavit.
>
> (2) The costs of any cross-examination pursuant to subrule (1) must be paid by the party applying for the cross-examination.

[37] On this issue the Credit Union opposes a cross-examination order, primarily on the basis that s. 6-121 of *The Saskatchewan Employment Act* prohibits this from occurring. I do not accept this argument.

[38] Respectfully, the Credit Union cannot have its cake and eat it too. It is easy to envisage situations where one member of an arbitral tribunal could effectively hold the proceedings hostage by only revealing what he or she wishes, and then taking the position that cross-examination is not available. Through her affidavit Ms. Sommervill is effectively a Credit Union witness. Neither she nor the Credit Union can expect that her averments cannot be tested. I cannot give credence to this objection of the Credit Union.

[39] *The Saskatchewan Employment Act* and *The King's Bench Rules* are aimed at different purposes. Rule 3-54 is very similar to Rule 6-13. In both cases it is contemplated that the deponent of an application filed on an application may be cross-examined if the Court so orders.

[40] The principles behind this process were summarized by Popescul J. (as he then was) in *Wallace v Canadian Pacific Railway*, 2009 SKQB 178 at para 5, 338 Sask R 174:

> [5] The law with respect to when a court ought to exercise its discretion in favour of a request to permit cross-examination on a deponent's affidavit is well settled. The general principles and criteria considerations gleaned from the jurisprudence in this jurisdiction may be summarized as follows:

> 1. There is no inherent right to cross-examine a deponent on his affidavit.
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> 2. Granting leave to cross-examine on an affidavit is a discretionary remedy.
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> 3. Permission to cross-examine on the affidavit may be granted by the Court pursuant to Rule 317.
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> 4. The party making the request must establish that the cross-examination will assist in resolving the issue before the Court and that it will not result in an injustice.
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> 5. Leave to cross-examine will be sparingly, and not routinely, granted.
>
> 6. Generally, leave to cross-examine ought only be granted where there is contradictory evidence before the Court; however, in the absence of contradictory evidence, the Court may nonetheless grant leave where there is a sincere and legitimate need for clarification of the information deposed to and that information is solely within the knowledge of the affiant.

[41] These principles have been reiterated and affirmed since, including after 2013 when there was a substantial revision of the Rules. See, for example, *Cheekinew v Government of Saskatchewan*, 2025 SKKB 49, and *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10, 429 DLR (4th) 269. At para. 27 of *Ter Keurs* Justice Schwann said:

> [27] It is settled law that a party does not have an automatic or inherent right to cross-examine an affiant on his or her affidavit (see, for example: *Wallace v Canadian National Railway*, 2009 SKQB 178, 338 Sask R 174; *Crown & Hand Pub Ltd. v Bank of America Corporation*, 2013 SKQB 348, 430 Sask R 80). A party making a request of this nature must establish that the cross-examination will assist in resolving the issue before the court and not result in an injustice. Granting leave to cross-examine on an affidavit is a discretionary remedy.

[42] Further, the Credit Union argues that UFCW has put forth no evidence as

to any attempts to elicit evidence from Mr. Comrie or Ms. St. Cyr. In fact UFCW addressed this in its argument before me, noting that it needs to know the disposition of its objection to the filing of the Sommervill affidavit prior to deciding whether to tender evidence of its own. I agree with UFCW in this respect. It is clear to me the within application was not brought lightly, nor is it frivolous. Real issues are engaged. I do not wish to add more stages to this proceeding but to me it makes sense to sort out the record that will exist prior to the parties engaging in their arguments on the main application.

[43] The difficulty here is that the record is not settled. Whether there is more evidence to come depends upon my decision in this application of UFCW. Deciding on cross-examination of Ms. Sommervill now is putting the cart before the horse. While the *Ter Keurs* case was in the context of a summary judgment the principles explored are apposite to the case at bar. At para. 33:

> [33] Other factors may include the need to test any conflict in the evidence, the need to allow for exploration of specific issues, and the possibility that evidence generated by cross-examination may actually assist parties in deciding whether to even proceed by way of summary judgment (*Regional Tire* [2016 SKQB 411] at para 12). On the other hand, there may be occasions where the purpose of cross-examination is not self-evidently to facilitate resolution, but to thwart it. Courts must be alert to "the need to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases their costs" (*Casbohm* [2018 SKQB 15] at para 62; see also: *Regional Tire* at para 11). Where cross-examination is considered unlikely to assist in resolving the substantive issues, or is little more than a fishing expedition, cross-examination will be denied (*Wells v General Motors of Canada Company*, 2018 SKQB 253).

[44] In the case at bar the record is possibly not yet complete, thus it is difficult to determine whether any conflicts in evidence need to be tested or whether cross-examination can assist in resolution of certain issues.

[45] As a result I have decided to defer my decision on cross-examination of Ms. Sommervill until after UFCW has decided whether to file any additional evidence on the fairness/natural justice ground of judicial review advanced by the Credit Union. The decision to defer this decision is grounded in fundamental fairness, and ensures that both parties have the right to put their best foot forward on the main application.

3. What is the proper cost award?

[46] In these circumstances I am exercising my discretion to defer the adjudication of costs of this striking application, and will determine those costs after the main application is argued and decided.

[47] Rule 11-1 sets out and codifies the court's broad inherent jurisdiction and discretion regarding costs, as well as a non-exhaustive list of relevant factors in subrule (4). In deferring the ruling on costs I am mindful of Rule 11-8.

[48] In reality this application – while procedurally separate from the main application – is a part of or an adjunct to the main application. This application involved a threshold determination that would chart the procedural course of the main application. I will therefore deal with costs of this application to strike at that time.

Conclusion

[49] I would be remiss if I did not mention two points at this juncture. First, I have not decided anything regarding the main application. That matter remains entirely open to argument. Second, I thank counsel for their excellent submissions on this preliminary matter.

[50] Accordingly, I hereby make the following order:

1. The application to strike the affidavit of Laura Sommervill is hereby dismissed.

2. Within 60 days of this ruling UFCW shall file any additional material for consideration on the main judicial review application, or advise that it is not doing so.

3. The application to cross-examine Laura Sommervill on her affidavit is deferred until after the respondent UFCW determines whether it will adduce more evidence on this application for judicial review.

4. The issue of costs of this application is deferred to the determination of the main application for judicial review.

5. The parties shall confer with the Local Registrar to arrange hearing dates for any remaining applications including the main judicial review application.

"R.D. Danyliuk" J.
R,W. DANYLIUK