
Court of Appeal for Saskatchewan
Docket: CACV4627

**Citation: *Construction and General Workers
Union Local 180 v KDM Constructors LP,***
2026 SKCA 75

Date: 2026-07-15

Between:

Construction and General Workers Union Local 180

*Appellant
(Applicant)*

And

KDM Constructors LP

*Respondent
(Respondent)*

And

Saskatchewan Labour Relations Board

*Respondent
(Respondent)*

Before: Drennan, Bardai and Kilback JJ.A.

Disposition: Appeal allowed

Written reasons by: The Honourable Justice Keith D. Kilback
In concurrence: The Honourable Justice Jillyne M. Drennan
The Honourable Justice Naheed Bardai

On appeal from: KBG-SA-00256-2023 (SKKB), Saskatoon
Appeal heard: February 9, 2026

Counsel: Andrea Johnson for the Appellant
Steve Seiferling for the Respondent

Kilback J.A.

I. INTRODUCTION

[1] This appeal concerns the judicial review of a decision of the Saskatchewan Labour Relations Board in which the Board applied the doctrine of *res judicata* and the principles governing a nonsuit to dismiss an application for certification.

[2] KDM Constructors LP employs workers at the BHP Jansen Potash Project near Saskatoon. In the spring of 2020, Construction and General Workers Union Local 180 applied to the Board under Part VI, Division 13 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [SEA], to be certified as bargaining agent for a unit of labourers employed by KDM.

[3] The Board dismissed the application on March 30, 2021. It concluded the evidence did not establish that the work done by the proposed unit fell within the definition of “construction industry” in s. 6-65(a) of the SEA (*Construction & General Workers Local Union, No. 180 v KDM Constructors Inc.*, 2021 CanLII 25131 (SKLRB) [2021 Decision]). The union applied for reconsideration of the 2021 Decision, which was also dismissed (*Construction & General Workers Local Union 180 v KDM Constructors LP*, 2021 CanLII 78804 (SKLRB)).

[4] On January 17, 2022, the union filed a second application for a construction industry certification. In response, KDM applied under s. 6-111(1)(o) of the SEA for an order summarily dismissing the application without an oral hearing. KDM argued the union’s request for certification was *res judicata* and not within the jurisdiction of the Board because it had already been conclusively determined in the 2021 Decision. The union opposed the application on two main grounds relevant to this appeal: (i) that the doctrine of *res judicata* did not apply to the Board’s determination of the appropriateness of a bargaining unit; and (ii) if the doctrine applied, it did not bar the application because the size and composition of the proposed unit and the amount of work it performed had changed since the union’s initial certification application was heard in 2021. The Board concluded an oral hearing was required to determine whether *res judicata* applied and dismissed KDM’s application for summary dismissal (*KDM Constructors LP v Construction and General Workers Union Local 180*, 2022 CanLII 52912 at para 54 (SKLRB) [Summary Dismissal Decision]).

[5] The union's application for certification was then heard by the Board on October 13-14, 2022. At the end of the union's case, KDM applied for a nonsuit, which it said was based on *res judicata*. The Board found *res judicata* applied to certification applications and that all requirements of the doctrine were met. On that basis, the Board granted the nonsuit and dismissed the union's application (*KDM Constructors LP v Construction and General Workers' Union Local 180*, 2022 CanLII 122538 (SKLRB) [2022 Decision]).

[6] The union then applied for judicial review of the 2022 Decision. A judge of the Court of King's Bench found that the 2022 Decision was reasonable and dismissed the application for judicial review (*Construction and General Workers Union Local 180 v KDM Constructors LP* (30 July 2025), Saskatoon KBG-SA-00256-2023 (SKKB) [Review Decision]). The union now appeals the Review Decision.

[7] In my respectful view, the judge erred in finding that the 2022 Decision was reasonable. The Board conflated the doctrine of *res judicata* and the principles governing a nonsuit. This rendered the 2022 Decision unreasonable because it was untenable in light of the legal constraints bearing on that decision. I would allow the appeal, set aside the Review Decision and the 2022 Decision, and remit the union's application for construction industry certification to the Board for reconsideration.

II. ANALYSIS

[8] On an appeal from a judicial review decision, the question for an appellate court is whether the reviewing judge (i) identified the appropriate standard of review, and (ii) applied it correctly (*Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at para 10; *Dr. Q. v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43; *Chaboyer v Saskatchewan Power Corporation*, 2025 SKCA 31 at para 91). In practical terms, this means that once the appropriate standard of review is identified, the appellate court "steps into the shoes of the lower court and reviews the decision of the administrative tribunal in accordance with that standard" (*Andritz Hydro Canada Ltd. v The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69 at

para 35; see also *Prairie Pride Natural Foods Ltd. v United Food and Commercial Workers, Local 1400*, 2024 SKCA 84 at para 46).

A. The identified standard of review

[9] On judicial review, the parties agreed and the judge accepted that the appropriate standard of review was reasonableness (*Review Decision* at para 21).

[10] As recognized by the judge, there is “a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16; see also: *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27; *Andritz* at para 41). This presumption can be rebutted where the legislature intends a different standard of review to apply or where the rule of law requires application of the standard of correctness (see *Vavilov* at para 17; *Canada Post* at para 27). The latter category includes cases raising questions of law of central importance to the legal system as a whole requiring a single determinate answer (*Vavilov* at paras 58 and 62).

[11] In *Vavilov*, the Supreme Court provided several examples of general questions of law that have been held to be of central importance to the legal system as a whole attracting a correctness standard of review. One such question is “when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process” (*Vavilov* at para 60, citing *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at para 15; see also *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para 68 per Côté J.). As that very issue was raised in this case, this passage suggests that the applicable standard of review is correctness, not reasonableness as the parties had agreed.

[12] However, one of the rationales discussed by the Supreme Court in *Toronto (City)* for why questions involving the application of *res judicata* attract a correctness standard of review in this context is because the application of that doctrine “is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to [it]” (at para 15). In *Vavilov*, the Supreme Court cautioned that “this jurisprudence must be read carefully, given that expertise [of the tribunal] is no longer a consideration in identifying such questions” (*Vavilov* at para 60).

[13] Since *Vavilov*, some courts have cited this caution and held that an administrative decision applying *res judicata* or abuse of process should not necessarily be reviewed on a correctness standard in all cases – only where “the narrowly construed issue, not the application of a broadly stated legal doctrine, has to be of general importance to the legal system” (*Del Grande v Toronto Catholic District School Board*, 2024 ONCA 769 at para 17, leave to appeal to SCC refused 2025 CanLII 44356, citing *Victoria University (Board of Regents) v GE Canada Real Estate Equity*, 2016 ONCA 646 at para 89). To similar effect, see also: *Beach Place Ventures Ltd. v Employment Standards Tribunal*, 2022 BCCA 147 at paras 25-29, leave to appeal to SCC refused 2023 CanLII 8264; *Immigration Consultants of Canada Regulatory Council v Rahman*, 2020 FC 832 at para 13; *Cerna v Canada (Citizenship and Immigration)*, 2021 FC 973 at paras 31-32; *Kamara v Canada (Citizenship and Immigration)*, 2021 FC 1117 at paras 18-19).

[14] This is not an appropriate case to further consider this jurisprudence and definitively determine whether the standard of review applicable to the question of when an administrative proceeding will be barred by *res judicata* is correctness in all cases or reasonableness in some cases. The parties did not provide submissions on this point, and they agreed before the judge and this Court that the appropriate standard of review is reasonableness. It is also unnecessary to resolve this question to decide this appeal because grounds for appellate intervention are established regardless of whether a reasonableness or correctness standard of review is applied to the Board’s application of *res judicata*.

[15] I now turn to explain why I conclude the 2022 *Decision* was unreasonable.

B. The 2022 *Decision* was unreasonable

[16] A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). In general terms, a reviewing court must “consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified” (*Vavilov* at para 15).

[17] Conceptually, there are two types of fundamental flaws that render a decision unreasonable. The first is where there is a failure of rationality internal to the reasoning process.

The second, which is relevant to this appeal, is where the decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it (*Vavilov* at para 101; see also *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 at para 51, and *P&H Milling Group a Division of Parrish & Heimbecker, Limited Saskatoon v United Food and Commercial Workers Local 1400*, 2023 SKCA 14 at para 8).

[18] For a decision to be reasonable in the latter respect, it “must be justified in relation to the constellation of law and facts that are relevant to the decision” (*Vavilov* at para 105). One asterism of the legal constellation within which the reasonableness of a decision is determined is the common law, which will “impose constraints on how and what an administrative decision maker can lawfully decide” (*Vavilov* at para 111, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; see also *Auer v Auer*, 2024 SCC 36 at para 63). In part, this is because a reasonableness review is concerned with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47).

[19] Although the common law imposes an important constraint, “administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable” (*Vavilov* at para 113). In some circumstances, it may be reasonable for a decision maker to adapt a common law doctrine to a particular administrative context (*Vavilov* at para 113). In this case, the 2022 *Decision* was unreasonable because the Board conflated the common law doctrine of *res judicata* and the legal principles governing a nonsuit in a way that is not readily understood as an adaptation of those concepts to the administrative context.

[20] To inform the discussion that follows, it is helpful to briefly review relevant aspects of the 2022 *Decision*. At the conclusion of the union’s case, KDM applied for a nonsuit. It asserted that the union’s second certification application was barred by the doctrine of *res judicata* because the Board had already decided in the 2021 *Decision* that the work done by the proposed unit of labourers at the BHP Jansen Potash Project did not fall within the definition of “construction industry” in s. 6-65(a) of the *SEA*. KDM contended that the union was applying to certify the same unit of labourers performing the same work at the same site, and there was insufficient evidence of a change in circumstances that would permit the Board to reach a different result. KDM argued

that, to avoid a nonsuit, the union must show there is sufficient evidence that, if left uncontradicted, could support the conclusion that there was a material change in circumstances such that *res judicata* would not apply (see *2022 Decision* at paras 8-10).

[21] The Board saw the issue before it in the same way. It had previously held that “the exact nature of the change which will be sufficient to warrant taking the matter outside of *res judicata*, assuming *res judicata* applies, would have to be decided based on the evidence” (*2022 Decision* at para 6, citing the *Summary Dismissal Decision* at para 54). After finding that the doctrine of *res judicata* applied to certification applications, the Board characterized the question on the nonsuit as “whether there is sufficient evidence which if left uncontradicted could demonstrate a material change in circumstances” such that *res judicata* would not bar the second certification application (*2022 Decision* at paras 73-74). The Board concluded the evidence of a material change in circumstances was insufficient and that all elements of *res judicata* had been established. It granted the nonsuit and dismissed the union’s certification application.

[22] The Board’s decision therefore rested on its application of the nonsuit test to the question of whether the union’s application was *res judicata*. It appears that the Board understood its task as determining whether the union had adduced sufficient evidence that, if left uncontradicted, could support a finding that there was a material change in circumstances, thereby making the doctrine of *res judicata* inapplicable. Respectfully, that understanding was rooted in a misapprehension of both the test for a nonsuit and the nature of *res judicata*, which rendered the *2022 Decision* unreasonable. The Board failed to appreciate that (i) a nonsuit is concerned with the sufficiency of evidence relevant to the plaintiff’s claim, and (ii) *res judicata* is a rule of evidence.

1. The Board misapprehended the test for a nonsuit

[23] On a nonsuit application, “[t]he question to be decided is whether the plaintiff has led sufficient evidence, which if left uncontradicted, could satisfy a properly instructed and reasonable trier of fact that the case has been made out on a balance of probabilities” (*Hander v Kumar*, 2022 SKCA 33 at para 31; see also *Reid v Kraus*, 2000 SKCA 32 at paras 12-13; S.N. Lederman, M.K. Fuerst & H.C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (LexisNexis Canada, 2022) at para 5.4 [Sopinka]). Consistent with this, the Board held it would

apply the same test for a nonsuit utilized by the Court of King’s Bench. It relied on the expression of that test set out in *Ceapro Inc. v Saskatchewan*, 2008 SKQB 76, which it described in the 2022 *Decision* as follows:

[33] Thus, the Board will rely on the legal test that applies to non-suit applications as described by the Court in *Ceapro* and applied in *Potash Corp.* and *McDonald*. [KDM] bears the onus to demonstrate that there is an absence of sufficient evidence which if left uncontradicted could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities. In other words, [KDM] bears the onus to demonstrate that there is no *prima facie* or arguable case.

[24] At common law, the “*prima facie* or arguable case” that is the subject of a nonsuit inquiry is the case for the relief sought by the plaintiff. In *FL Receivables Trust 2002-A (Administrator of) v Cobrand Foods Ltd.*, 2007 ONCA 425 at para 35, Laskin J.A. for the Court explained that a trier of fact faced with a nonsuit application is concerned with whether the plaintiff has adduced evidence “on all elements of its claim”:

[35] On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some *evidence on all elements of its claim*, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign “the most favourable meaning” to evidence capable of giving rise to competing inferences. ...

(Emphasis added)

[25] A nonsuit application “will fail if the plaintiff has adduced some *evidence on each of the essential elements of her claim*” (*Capital Estate Planning Corporation v Lynch*, 2011 ABCA 224 at para 20, emphasis added). Conversely, a nonsuit application “will be granted where the plaintiff fails to adduce some *evidence on all legal or evidentiary elements which must be proven* in order for the lawsuit to succeed” (*Bruen v University of Calgary*, 2019 ABCA 211 at para 11, emphasis added). To similar effect, see also: *Reid* at para 17; *Ceapro* at paras 73-74; *D’Addario v Smith*, 2018 ONCA 163 at para 22; *Moffitt v TD Canada Trust*, 2023 ONCA 349 at para 6; *Horizon Resource Management Ltd. v Blaze Energy Ltd.*, 2013 ABCA 139 at para 25; *Elan Construction Limited v South Fish Creek Recreational Association*, 2016 ABCA 215 at para 11; *Insurance Corporation of British Columbia v Mehat*, 2018 BCCA 242 at para 48; *Shane v 3104854 Nova Scotia Ltd.*, 2013 NSCA 84 at para 22; *Sopinka* at para 5.5.

[26] Here, the Board misapplied the legal test for a nonsuit by considering the sufficiency of the evidence of a material change in circumstances since the 2021 *Decision* instead of the sufficiency

of the evidence of the union's case for construction industry certification. Put in the terms cited by the Board, it should have considered whether there was a *prima facie* or arguable case for certification, not whether there was a *prima facie* or arguable case for a material change in circumstances that would render the doctrine of *res judicata* inapplicable. The sole issue on the nonsuit was whether the union had a case for certification to be met (see *Active Construction Ltd. v Routledge Gravel Ltd.*, 1958 CanLII 587, 27 WWR 287 at para 3 (Westlaw) (BCCA)).

2. The Board misapprehended the doctrine of *res judicata*

[27] In addition to misapplying the legal test for a nonsuit, the Board also misapprehended the doctrine of *res judicata*. To illustrate this, it is helpful to briefly examine how *res judicata* operates at common law.

[28] In *Patrick Street Holdings Ltd. v 11368 NL Inc.*, 2026 SCC 15, the Supreme Court confirmed that *res judicata* is “a rule of evidence that applies to estop a party from introducing evidence to contradict a result that has been decided in a prior proceeding” (at para 35). Chief Justice Wagner for the majority provided the following summary of the doctrine:

[33] There are two branches of *res judicata*: cause of action estoppel and issue estoppel (*Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at p. 254; *Toronto (City)*, at para. 23). Cause of action estoppel bars the relitigation of a cause of action by either party, whereas issue estoppel precludes a litigant from rearguing an issue that was “fundamental to the decision arrived at” in a prior proceeding (*Angle*, at p. 255, citing *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 (P.C.), at p. 165).

[34] *Res judicata is and has long been a rule of evidence* (S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶19.86). Historically, when *res judicata* became part of English law in the 12th century, it was referred to as estoppel by matter of record — that is, estoppel arising from the written record of a court (*Angle*; W. S. Holdsworth, *A History of English Law* (3rd ed. 1944), vol. IX, at p. 147; W. Freedman, *Res Judicata and Collateral Estoppel: Tools for Plaintiffs and Defendants* (1988), at p. 7). Matters “solemnly recorded” by the court had to be “accepted as proof, so that no averment to contradict them [could] be received” (Holdsworth, at p. 147). In this sense, estoppel by matter of record permitted the admission of a court's decision as proof of the findings contained therein (p. 147). A plea of estoppel involved producing the decision said to give rise to the estoppel in the subsequent proceeding to allow a court to conclude that the matters at issue in the prior proceeding were the same matters at issue in that proceeding (A. Caspersz, *Estoppels and the Substantive Law* (4th ed. 1915), at p. 460).

[35] While now referred to as *res judicata*, the doctrine remains a rule of evidence that applies to estop a party from introducing evidence to contradict a result that has been decided in a prior proceeding (Lederman, Fuerst and Stewart, at ¶19.86).

(Emphasis added)

[29] Conceptually, when the requirements of *res judicata* are met, “the doctrine operates to admit into evidence at the second proceeding, the judicial determination of the relevant issue at the earlier proceedings. Not only is that earlier determination rendered admissible, it is also declared to be conclusive with respect to that issue” (*Canadian Union of Public Employees, Local 1394 v Extendicare Health Services Inc.*, 1993 CanLII 8515, 104 DLR (4th) 8 at para 60 (Westlaw) (ONCA); see also: D.J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (LexisNexis, 2021) at p 12 [Lange]; and *Canadian Imperial Bank of Commerce v The Queen*, 2022 TCC 26 at para 9).

[30] The Board took a different approach. Instead of analysing *res judicata* as an exclusionary rule of evidence and determining whether the *2021 Decision* was conclusive with respect to the issues raised in the union’s second certification application, the Board considered *res judicata* in assessing KDM’s nonsuit application (*2022 Decision* at para 35).

[31] The Board identified three criteria for determining whether *res judicata* applied, which it described as “that the same question has been decided; the prior decision was final; and the parties were the same persons” (*2022 Decision* at para 36; see also *Toronto (City)* at para 23). The Board found that the *2021 Decision* was final with respect to the conclusion that the union had not met its onus to prove that the proposed unit was appropriate for collective bargaining and that the work done by the unit came within the definition of “construction industry” in s. 6-65(a) of the *SEA*. However, the Board held that if there had been a material change in circumstances since then, it could find that the union’s new application was not *res judicata*. The Board then applied the nonsuit standard and considered “whether there is sufficient evidence which if left uncontradicted could demonstrate a material change in circumstances”:

[73] In conclusion, in the matter before us, there is no existing certification order. Instead, the Board has previously found that there was insufficient evidence to conclude that the unit was appropriate. The Board’s decision with respect to whether the Union met its onus was final. However, if there has been a material change in circumstances, then the Board may find that the second criterion under the doctrine of *res judicata* has not been satisfied.

[74] *Next, the Board will consider whether there is sufficient evidence which if left uncontradicted could demonstrate a material change in circumstances.*

(Emphasis added)

[32] The Board concluded the nonsuit should be granted because the evidence with respect to a material change in circumstances was insufficient such that the requirements for *res judicata* were met (2022 *Decision* at paras 93 and 102).

[33] Respectfully, this analytical approach reflects a misapprehension of the doctrine of *res judicata*. As an exclusionary rule of evidence, the Board was called upon to decide whether it operated to estop the union from proffering evidence to contradict the relevant result in the 2021 *Decision* (*Patrick Street* at para 35; *Sopinka* at para 19.86). This was a separate issue that could not appropriately be addressed as part of the nonsuit because whether the union’s second certification application was *res judicata* was a legal question that did not depend on the sufficiency of the union’s evidence on a nonsuit standard.

[34] Whether *res judicata* applies is widely regarded as a question of law (see *K. v Miazga*, 2003 SKQB 451 at para 17; *Bollhorn v Lakehouse Custom Homes Ltd.*, 2024 BCCA 192 at para 45; *Anderson et al. v Manitoba et al.*, 2010 MBCA 113 at para 51; *Ernst & Young Inc. v Central Guaranty Trust Co.*, 2006 ABCA 337 at para 26; *EnerNorth Industries Inc. (Re)*, 2009 ONCA 536 at para 52; *Rogers Communications Partnership v Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2016 FCA 28 at para 57; *Lange* at pp. 17-19). Questions of law are generally understood as “questions ‘about what the correct legal test is’” (*Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 43; *Housen v Nikolaisen*, 2002 SCC 33 at para 36).

[35] In a general sense, “[a] question of law is related to the legal framework applied to the facts of the case” (M. Rowe, J. Topan., F. Méthot, J. Khaled & J. Mayrand-Thibert, “The Appellate Function and Standards of Review” (2025) 47:2 *Manitoba Law Journal* at p 70, 2025 CanLIIDocs 1823). Questions of law have normative dimensions. Analytically, asking a question of law often amounts to asking whether a conclusion drawn during the development or assessment of the legal framework governing the dispute accurately reflects the state of the law (see F. Bachand, “Le traitement en appel des questions de fait, questions de droit et questions mixtes” (2007) 86:1 *Canadian Bar Review* at p 107, 2007 CanLIIDocs 97). Understood in this way, answering whether *res judicata* applies, as a question of law, establishes the legal framework to be applied to the facts of the case. In the circumstances before the Board, the issue of whether the union’s second

application was *res judicata* needed to be determined first in order to set the record for the assessment of KDM's nonsuit application.

[36] To conclude that *res judicata* applied, the Board had to find that the preconditions for its application had been met and then determine, as a matter of discretion, that it ought to be applied (see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 33). Since *res judicata* is a rule of evidence, the Board had to decide whether it applied in order to know what effect to give the union's evidence. If the Board determined that the preconditions for *res judicata* were established and that it was appropriate to apply the doctrine, then KDM's nonsuit would necessarily have succeeded because the union would have been precluded, as a matter of law, from adducing any evidence to contradict the result of the *2021 Decision*, which would be conclusive. Expressed another way, the union's evidence would not be admissible for that purpose. On the other hand, if the Board determined that the preconditions were not established or that it should not exercise its discretion to apply the doctrine, then the union would have been able, as a matter of law, to proffer evidence to contradict the result of the *2021 Decision*. In that case, the union's evidence would be admissible for that purpose on the nonsuit application.

[37] In framing the *res judicata* issue, the Board stated that "the question out of which the alleged estoppel is said to arise is whether the bargaining unit is appropriate for collective bargaining, and specifically, whether the nature of the work being performed is construction industry work" (*Summary Dismissal Decision* at para 51). As the nature of the work being performed by the new proposed unit was contested, the Board held that it could not determine whether *res judicata* applied without an oral hearing (*Summary Dismissal Decision* at paras 54 and 60; *2022 Decision* at para 6). The reason the Board needed to consider evidence of a material change of circumstances was because that evidence was regarded as relevant to whether the question raised by the union had previously been decided in the *2021 Decision* and whether that decision was final, which were preconditions for *res judicata* to apply (see *Summary Dismissal Decision* at para 47).

[38] Put another way, the Board found it needed to determine the nature of the work now being performed by the proposed unit to assess whether the elements of *res judicata* were established. Conceptually, this was not problematic. Whether *res judicata* applies is ultimately a question of

law, but logically, the doctrine “applies only in circumstances where it is clear from the facts that the question has already been decided” (*R v Van Rassel*, 1990 CanLII 124, [1990] 1 SCR 225 at para 41 (Westlaw) (SCC); see also *Lange* at p 44). However, there were two issues with how the Board proceeded. First, the factual determination of the nature of the work could not appropriately be made on a nonsuit standard because, on a nonsuit application, the trier of fact does not find the facts or decide whether the case will be proven if no further evidence is called (*Hander* at para 32). Second, the issue of whether the union’s second certification application was *res judicata* was a question of law that needed to be determined first so the Board would know what effect to give the union’s evidence when assessing KDM’s nonsuit application.

3. The Board’s misapprehensions rendered the decision unreasonable

[39] As noted, common law principles “impose constraints on how and what an administrative decision maker can lawfully decide” (*Vavilov* at para 111). Here, the Board decided to apply the same common law test for a nonsuit used by the Court of King’s Bench.

[40] The Board also appears to have decided to apply *res judicata* as it is understood at common law, as there is nothing in the *2022 Decision* suggesting the Board was adapting that principle to the administrative context in deciding whether the union’s second application was barred (see *Vavilov* at para 113; *Pepa* at para 49). For example, the Board quoted the *Summary Dismissal Decision* in which it reviewed and accepted the purpose of the doctrine at common law, relying on *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 (*2022 Decision* at para 38). The Board also articulated and applied the same three-part test for *res judicata* set out by the Supreme Court in *Toronto (City)* (*2022 Decision* at para 36). Notably, the Board referred to its “responsibility to exercise a measure of flexibility in its application of legal principles where those principles do not sufficiently take into account the unique context of labour relations” when determining that *res judicata* could, as a general proposition, apply to construction industry certifications under Part VI, Division 13 of the *SEA* (*2022 Decision* at para 65). However, no similar analysis was undertaken when the Board applied the same three-part test for *res judicata* used at common law to the union’s second certification application and concluded that those requirements had been met.

[41] Since the Board chose to apply the test for a nonsuit and the doctrine of *res judicata* as they are understood at common law without adapting them to the administrative context, the traditional

operation of those principles constrained what the Board could reasonably decide. By misapplying the nonsuit test and the doctrine of *res judicata* in a material way, the Board did not respect those constraints. This rendered the 2022 *Decision* unreasonable because it was not justified in relation to the legal principles constraining the Board on the nonsuit application. In other words, the 2022 *Decision* did not fall within a range of acceptable outcomes that are defensible in respect of the law applied by the Board in deciding the application. The shortcomings were not merely superficial or peripheral, they were sufficiently serious to the Board’s reasoning such that the decision “cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100).

[42] KDM offers two main reasons why the Board’s approach did not render the 2022 *Decision* unreasonable. However, I do not find them persuasive.

[43] First, relying on *Amenity Health Care L.P. v Workers United Canada Council*, 2018 CanLII 38254 at para 18 (SKLRB), KDM submits there is no material difference between the test for a nonsuit and the test applied by the Board on an application for summary dismissal under s. 6-111(1)(p) of the *SEA* on the ground that there is no arguable case. As I understand the argument, KDM submits the 2022 *Decision* is reasonable because the Board’s finding that there was no arguable case can also be understood as a finding made in connection with the Board’s summary dismissal power.

[44] This argument is not convincing. The Board held that the test for a nonsuit outlined in *Amenity Health* was “essentially the same test as that which is applied by the Court of King’s Bench” (2022 *Decision* at para 30). As already observed, the Board determined that it would apply the test for a nonsuit set out in *Ceapro*:

[31] In making reference to the Court’s test, the Board in *Amenity Health Care* relied on *Travel West (1987) Inc. v Langdon Towers Apartments Ltd.*, 2000 SKQB 294 (CanLII) [Travel West]. In *Travel West*, the Court followed the approach taken in *Reid v Kraus*, 2000 SKCA 32 (CanLII), explaining that the test on a non-suit is whether there is insufficient evidence which if left uncontradicted could lead a reasonable trier of fact to find for the applicant. It did not expressly adopt the language of “*prima facie*” or “arguable case”.

[32] The Court, as demonstrated in *Ceapro*, has since adopted the language of *prima facie* case. The suggestion that there is a distinction in the tests applied by the Board and the Court seems to have come about because of the language used in *Travel West*. However,

each of the tests is substantially the same, as disclosed by the following passage from *Ceapro*:

17 I use the term *prima facie* case to indicate that the applicants have a lesser onus than having to demonstrate the absence of “any” evidence on a material issue. The case law clearly establishes that the applicants need only demonstrate the absence of “sufficient” evidence, which if left uncontradicted, could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities. The ruling on a non-suit motion is a question of law. The determination of the credibility or believability of the evidence is a question of fact to be subsequently determined in the action if the non-suit application fails.

[33] Thus, the Board will rely on the legal test that applies to non-suit applications as described by the Court in *Ceapro*...

(Emphasis added)

[45] It is apparent from this passage that the Board was applying the common law test for a nonsuit set out in *Ceapro*.

[46] Second, KDM argues that the Board is not subject to the same rigidity as a Court when applying the rules of evidence. It points to s. 6-111(1)(e) of the *SEA*, which empowers the Board “to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not”. KDM says that this power, coupled with the fact that a technical irregularity does not invalidate a proceeding before the Board (*SEA*, s. 6-112(1)), means that any irregular application of the nonsuit test or the doctrine of *res judicata* does not render the decision unreasonable.

[47] I do not see the Board’s misapplication of the nonsuit test and the doctrine of *res judicata* as mere technical irregularities making s. 6-112(1) operative. It has been stated that *res judicata* “is hardly a technicality. Indeed, it is commonly described as a ‘fundamental doctrine of the justice system’” (*CUPE, Local 1188 v Sackville (Town)*, 2007 NBCA 18 at para 36; see also *Patrick Street* at para 1; *Lange* at p 1). I also do not see the Board’s power to accept evidence and information that may not be admissible in a court of law as answering the issues with the Board’s analysis discussed above.

[48] For a decision to be reasonable, it is not enough for the outcome of a decision to be justifiable, it must also be justified by the reasons. An otherwise reasonable outcome cannot stand if it was reached on an improper basis (see *Vavilov* at para 86; see also *Teamsters Canada Rail*

Conference v Canadian National Railway Company, 2021 SKCA 62 at para 44). There is nothing in the 2022 *Decision* suggesting that the Board invoked ss. 6-111(1)(e) or 6-112(1) of the *SEA* as a basis for applying the nonsuit test and the doctrine of *res judicata* differently from how those concepts operate at common law.

[49] In reaching the conclusion that the 2022 *Decision* was unreasonable, I appreciate that the parties had asked the Board to determine, at the nonsuit stage, “whether the doctrine of *res judicata* can and does apply in the circumstances of this case” (2022 *Decision* at para 28). Notwithstanding that request, it was still incumbent on the Board to render a decision that was justified and defensible in relation to the legal principles constraining the Board on the nonsuit application.

[50] As I have determined that the 2022 *Decision* was unreasonable, it follows that the reviewing judge erred in reaching the opposite conclusion.

III. CONCLUSION

[51] I would allow the appeal, set aside the *Review Decision* and the 2022 *Decision*, and remit the union’s application for construction industry certification to the Board for reconsideration. The union is granted costs of the appeal calculated in accordance with Rule 54(1) of *The Court of Appeal Rules*.

“Kilback J.A.”

Kilback J.A.

I concur.

“Drennan J.A.”

Drennan J.A.

I concur.

“Bardai J.A.”

Bardai J.A.