Court of Appeal for Saskatchewan

Docket: CACV4525

Citation: *Nutrien Ltd. v United Steelworkers, Local 7916*, 2026 SKCA 34

Date: 2026-03-06

Between:

Nutrien Ltd.

Appellant
(Applicant)

And

United Steelworkers, Local 7916

Respondent
(Respondent)

Before:	Leurer C.J.S., Caldwell and Drennan JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Chief Justice Robert W. Leurer
In concurrence:	The Honourable Justice Neal W. Caldwell The Honourable Justice Jillyne M. Drennan
On appeal from:	KBG-SA-00501-2024, Saskatoon (SKKB)
Appeal heard:	October 7, 2025
Counsel:	Kris Noonan for the Appellant Gary Bainbridge, K.C., for the Respondent

Leurer C.J.S.

I. OVERVIEW

[1] Labour arbitration awards are regularly subject to judicial review, but only exceptionally so before the arbitration process has run its course. The issue in this appeal is whether this is one of those exceptional cases where judicial review of an arbitrator's decision on a preliminary jurisdictional issue should proceed before the conclusion of the arbitration.

[2] Nutrien Ltd. [Nutrien] and the United Steelworkers, Local 7916 [Union] are locked in a disagreement over the termination of the employment of several workers. The employees were fired in the fall of 2021, after they refused to adhere to Nutrien's workplace-safety policy designed to limit the spread of COVID-19.

[3] Under the applicable policy, all Nutrien employees were required to either provide proof of vaccination against the virus or undergo testing for infection. Nutrien's policy was consistent with *The Employers' COVID-19 Emergency Regulations*, RRS c S-15.1 Reg 13 [*Emergency Regulations*], which authorized, as a method of controlling the spread of COVID-19, private sector employers to require their employees to choose between vaccination and regular rapid antigen testing.

[4] The *Emergency Regulations* did not specifically direct an enforcement mechanism. However, Nutrien's policy stipulated that any employee who failed to provide proof of vaccination against the virus or to undergo testing for infection would first be given a warning and, if they persisted in doing neither, that person's employment would be terminated.

[5] Three Nutrien employees refused to either test or be vaccinated. Thus, in accordance with the company policy, they were first suspended and later dismissed.

[6] The Union grieved both the suspensions and the terminations. Because the grievances could not be resolved by agreement, the Union initiated arbitration proceedings. In doing so, the Union invoked provisions of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*], and the relevant collective agreement, which allow an arbitration board to substitute any other penalty for the termination or discipline of an employee that the board considers just and reasonable.

[7] Shortly after the grievances were filed, and before the arbitration was held, s. 9-10.1 of the *SEA* came into force, with retroactive effect. On its face, it protects employers against some types of liabilities if they have acted or made a good faith effort to act in accordance with the *Emergency Regulations* and were not grossly negligent. I will follow the lead of the parties and, from time to time, refer to s. 9-10.1 as the "Immunity Provision", but I do so with the express proviso that it remains to be determined whether that section shields Nutrien against the grievances.

[8] At the outset of the arbitration, Nutrien raised a preliminary jurisdictional objection contending that the Immunity Provision barred the grievances. In doing so, Nutrien asserted that, because it had acted or made a good faith effort to act in accordance with the *Emergency Regulations* and had not been grossly negligent, the arbitrator did not have the authority to substitute a remedy for the suspension and dismissal of the three employees.

[9] Nutrien and the Union agreed that the arbitrator should rule on the employer's preliminary objection before hearing evidence as to what was described as the "merits" of the dispute. The merits question was whether the circumstances resulting in the suspensions and terminations warranted the substitution by the arbitrator of different forms of discipline.

[10] In a written decision, the arbitrator concluded that, even if Nutrien had acted in good faith in accordance with the *Emergency Regulations* and had not been grossly negligent, s. 9-10.1 of the *SEA* did not prevent him from substituting a different penalty for that imposed by the employer: *Nutrien v United Steelworkers, Local 7916*, 2024 CanLII 47283 at paras 56 and 59 (SKLA) [*Preliminary Objection Award*].

[11] Nutrien applied to the Court of King's Bench for the judicial review of the *Preliminary Objection Award*. In the context of arguing the merits of that application in that Court, the Union raised what it cast as a preliminary issue, being whether Nutrien's judicial review application was premature.

[12] The judge agreed with the Union on the latter point, holding that, although he had received full argument on all issues, judicial review at this point would be premature. For this reason, the judge dismissed Nutrien's judicial review application on a without prejudice basis, with the direction that it could renew its application after the merits of the grievance were determined:

Nutrien Ltd. v United Steelworkers, Local 7916 (21 February 2025), Saskatoon KBG-SA-00501-2024 (SKKB) [*Chambers Decision*].

[13] Nutrien appeals from the *Chambers Decision* alleging that the judge erred in his analysis. I agree that the *Chambers Decision* discloses two errors that require the remittal of this matter to the judge to complete the judicial review of the *Preliminary Objection Award*.

[14] First, the judge based the *Chambers Decision* on the mistaken premise that either:

(a) the arbitrator had left open the possibility that he would revisit the issue of the proper interpretation of the Immunity Provision; or

(b) the fact that the *Preliminary Objection Award* was a final determination of the applicability of the Immunity Provision was legally irrelevant to the question of whether the judge should proceed with the judicial review,

when neither was available to the judge in the circumstances of this case.

[15] Second, the judge did not consider the material risk that, without an answer to the jurisdictional question raised in the judicial review, the parties will proceed to a hearing which will all be for naught.

[16] Although judicial review of preliminary arbitral awards is only to be undertaken in exceptional circumstances, this is a case where a review of the arbitrator's *Preliminary Objection Award* is appropriate before the arbitration proceeds on the dispute about the discipline imposed and the terminations. Accordingly, I would allow Nutrien's appeal and remit the matter to the judge to conclude the judicial review of the *Preliminary Objection Award*.

II. BACKGROUND

A. Events leading to the arbitration

[17] Nutrien operates a potash mine located near Rocanville, Saskatchewan. The Union is the certified bargaining agent for Nutrien's production employees.

[18] Nutrien owes a duty to "ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of [its] workers" (*SEA* at s. 3-8(a)). The evidence disclosed the existence of similar duties under both *The Mines Regulations, 2018*, RRS c S-15.1 Reg 8, and the collective agreement between Nutrien and the Union.

[19] In March of 2020, the World Health Organization declared the outbreak of COVID-19 to be a global pandemic. Shortly thereafter, the Government of Saskatchewan declared a provincial state of emergency with respect to the disease. To reduce the spread of the virus, the government issued a series of public health orders, including the shuttering of many businesses. However, as Nutrien was designated as an allowable service, it maintained its around-the-clock operations during the pandemic.

[20] Nutrien took many steps to reduce the risk of a COVID-19 outbreak at its mine. Material to this appeal, on September 9, 2021, it sent a memorandum to its employees specifying that, effective October 18, 2021, they would be required to either provide proof of vaccination against the virus or undergo regular testing for infection.

[21] The provincial government brought the *Emergency Regulations* into force on October 1, 2021. These regulations authorized, as a method of controlling the spread of COVID-19, private sector employers to require their employees to choose between vaccination and rapid antigen testing. At the same time, the Lieutenant Governor in Council promulgated *The Public Employers' COVID-19 Emergency Regulations*, RRS c S-15.1 Reg 12, not only authorizing public sector employers to institute the vaccination-or-test policy but mandating it be done.

[22] On October 13, 2021, Nutrien sent another memorandum to its employees outlining the consequences for failing to comply with the vaccination or test policy. It provided that, absent extenuating circumstances, an initial failure to comply would result in a suspension without pay for three working days and a subsequent failure to comply would result in termination of employment.

[23] Nutrien's vaccination-or-test policy was implemented on October 18, 2021. Three of Nutrien's workers who were scheduled to work that day refused to either disclose their vaccination status or provide a rapid antigen test result. Accordingly, each was disciplined with a three-day

unpaid suspension and was told that they were expected to provide proof of a negative rapid antigen test result or proof of vaccination when they returned to work following their suspension.

[24] On October 20, 2021, two days after the beginning of the suspensions, the Union and Nutrien held a dispute resolution meeting as required by the collective agreement. The Union told Nutrien that it disagreed with the disciplinary measures and stated its position that there were other options available to the employer, such as permitting the employees to take unpaid leave. The meeting concluded with no resolution.

[25] The employment of the three workers was terminated shortly after this meeting, on the day that each reported to work following the expiry of their suspensions without having provided proof of vaccination or a negative test result.

[26] On October 27, 2021, the Union filed two grievances for each of the employees. One grievance for each challenged the employee's suspension. The other took issue with their dismissal.

[27] On January 21, 2022, the Government brought into force amendments to the *SEA*, including the Immunity Provision:

> **9-10.1**(1) In this section, **"good faith effort"** includes an honest effort, whether or not that effort is reasonable.
>
> (2) Subject to the regulations, no action or proceeding lies or shall be commenced or maintained against an employer with respect to any act or omission of the employer if:
>
> (a) the employer acted or made a good faith effort to act in accordance with *The Public Employers' COVID-19 Emergency Regulations* or *The Employers' COVID-19 Emergency Regulations*; and
>
> (b) the act or omission of the employer does not constitute gross negligence.
>
> (3) Subsection (2) applies regardless of whether the cause of action on which the proceeding is purportedly based arose before, on or after the day on which this section comes into force.
>
> (4) Any action or proceeding mentioned in subsection (2) that is commenced before the day on which this section comes into force is deemed to have been dismissed, without costs, on the day on which this section comes into force.
>
> (5) No person is entitled to any compensation or any other remedy or relief for the extinguishment or termination of rights pursuant to this section.
>
> (6) This section applies, with any necessary modification, with respect to a person who is vicariously liable for the acts or omissions of another person if subsection (2) negates the liability of the other person in relation to the act or omission.

> (7) The Lieutenant Governor in Council may make regulations for the purposes of this section, including regulations respecting the scope of protection provided pursuant to subsection (2) or imposing terms and conditions on the protection.
>
> (8) A regulation made pursuant to subsection (7) may be made retroactive to a day not earlier than October 1, 2021.

B. The preliminary objection

[28] At the time relevant to this appeal, Nutrien and the Union were parties to a collective agreement with a term from June 1, 2018, to May 31, 2023. The Union's grievances were brought under s. 12.16 of that agreement, which allows an arbitrator to substitute any other penalty for the suspension or termination of an employee where the arbitrator considers it to be fair and reasonable in the circumstances:

> **12.16** In the event of an arbitration arising out of the discharge or other disciplinary action against an employee, the arbitrator may reinstate the employee without loss of pay or other penalty, or may substitute for such discharge or disciplinary action any other penalty which the arbitrator considers fair and reasonable in the circumstances.

[29] This provision of the collective agreement is in accordance with s. 6-49(4) of the *SEA*, which similarly provides that an arbitration board or arbitrator may substitute any other penalty for the suspension or termination of an employee:

> **6-49**(4) An arbitrator or arbitration board may substitute any other penalty for the termination or discipline of an employee that the arbitrator or arbitration board considers just and reasonable in the circumstances if:
>
> > (a) the arbitrator or arbitration board determines that an employee has been terminated or otherwise disciplined by an employer; and
> >
> > (b) the collective agreement governing in whole or in part the employment of the employee by the employer does not contain a specific penalty for the infraction that is the subject-matter of the arbitration.

[30] As previously noted, when the grievances came before the arbitrator, Nutrien raised a preliminary jurisdictional objection contending that the effect of s. 9-10.1 of the *SEA* was to bar the grievances. More specifically, Nutrien asserted that, provided that it had acted or made a good faith effort to act in accordance with the *Emergency Regulations* and had not been grossly negligent, the arbitrator did not have the authority to substitute remedies for the suspension and the termination of the employment of the three employees.

[31] The parties agreed to bifurcate the arbitration proceedings such that only Nutrien's preliminary objection would be heard and determined at the outset, with the necessity of a merits hearing thereafter depending on the outcome of the preliminary objection. The parties further agreed that, for the purposes of the preliminary objection application, Nutrien would provide affidavit evidence, and the Union would have the opportunity to cross-examine the witnesses on these affidavits (see *Preliminary Objection Award* at para 2). The Union called no evidence.

[32] At the hearing, Nutrien took the position that the uncontradicted evidence showed that it had acted or had made a good faith effort to act in accordance with the *Emergency Regulations* and had not been grossly negligent, and therefore the conditions for the application of s. 9-10.1 had been met. It also argued that the purpose for the prohibition in s. 9-10.1(2) against the *maintenance* of an action or proceeding where those conditions were met would be defeated if the arbitration was allowed to go ahead on the merits.

[33] For its part, the Union asserted that s. 9-10.1 of the *SEA* did not displace the arbitrator's authority to substitute a different form of discipline if he concluded that it was just and reasonable to do so. However, notwithstanding that it submitted that Nutrien's preliminary objection should be heard and determined by the arbitrator in its favour, it advanced the alternative position that the matter of the arbitrator's authority should be decided as part of the decision on the merits because of the intertwining of issues.

C. The *Preliminary Objection Award*

[34] The arbitrator accepted that "the purpose of the [*Emergency*] *Regulations* was to prevent non-compliant employees from being in the workplace" (at para 44). However, he rejected Nutrien's submission that s. 9-10.1 protected employers against grievances regarding disciplinary consequences for non-compliance. His conclusion in this regard was tied to the interpretation which he gave to the provision (see paras 50, 54 and 59).

[35] The arbitrator did not restrict the inapplicability of s. 9-10.1 to circumstances where the employer could not show that it had acted or made a good faith effort to act in accordance with the *Emergency Regulations* and had not been grossly negligent. Instead, he adopted the conclusion of the arbitrator in *Saskatchewan Power Corporation v International Brotherhood of Electrical*

Workers, Local 2067, 2022 CanLII 139464 (SKLA), who had interpreted s. 9-10.1 in association with *The Public Employers' COVID-19 Emergency Regulations* by stating that the "language of the provision is not sufficiently specific and clear to be interpreted to extinguish and override fundamental collective agreement rights, particularly the right to pursue a grievance to arbitration that alleges unjust discipline" (see para 54).

D. The *Chambers Decision*

[36] Nutrien applied to the Court of King's Bench for the judicial review of the *Preliminary Objection Award*. It requested an order quashing that award and a declaration that the grievances are statute barred pursuant to s. 9-10.1 of the *SEA*.

[37] When the matter came before the judge, as part of its submissions, the Union invited the judge to dismiss Nutrien's application as being premature, without addressing the merits of the judicial review itself. Nonetheless, the "parties argued the merits of the judicial review application" (*Chambers Decision* at para 5).

[38] In his reasons, the judge dealt only with the Union's prematurity argument. He identified four reasons for agreeing with the Union's position that a judicial review was premature.

[39] First, the judge stated that he was "not persuaded that there [was] much, if any, economy, savings, or efficiency that arises from determining the judicial review application at this stage" (at para 10). He explained this by noting the arbitrator had yet to deal with the merits, that "there is a possibility that the preliminary issue is moot as there is [the] potential that the grievances are dismissed by the Arbitrator on the merits", and that he thought it is "debatable whether there is any utility in the parties delaying the continuation of the arbitration on the merits – scheduled for April of 2025 – while they await [his] decision on this judicial review application" (at para 11). Also on the first point, he said that, were he to find the *Preliminary Objection Award* to be unreasonable, the issue "has the potential to go to the Court of Appeal", so, overall, "it is more efficient for the parties to proceed on the merits [of the arbitration] before any judicial review application is heard" (at para 12).

[40] Second, although the judge accepted that he had the discretion to hear the application, he said "the judicial review of a labour arbitrator's interim decisions should not in the normal course

be undertaken until the full award has been rendered" (at para 13). He found that the "benefit of waiting until after the final award of the Arbitrator to hear any judicial review application is to limit or mitigate the need for multiple judicial review proceedings potentially arising out of the same grievance" (at para 14).

[41] Third, the judge found comments in *University of Saskatchewan v University of Saskatchewan Faculty Association*, 2017 CarswellSask 761 (Westlaw) (SKQB) [*USask Faculty*], to be "helpful and applicable to this case" (at para 15).

[42] Finally, he distinguished *Sabo v Saskatoon Board of Police Commissioners*, 2003 SKQB 111 [*Sabo*], which had been relied on by Nutrien.

[43] In the result, the judge dismissed Nutrien's application on a without prejudice basis, directing also that it was "free to bring another judicial review application on the issue of the Immunity Provision after the merits of the grievance are determined and the Arbitrator's work is complete" (at para 17).

[44] The judge awarded taxable costs to the Union in the fixed amount of $3,000.

III. ISSUES AND STANDARD OF REVIEW

[45] Nutrien agrees that the judge had discretion to refuse to hear its judicial review application because it did not involve a final determination of the arbitration. However, it asserts that, in dismissing its application, the judge "misinterpreted and misapplied the law of prematurity".

[46] Notwithstanding this submission, and following questioning in the appeal hearing about the appropriate standard of review, Nutrien states that, for the purposes of this appeal, it is advancing what amount to allegations of errors of fact and mixed fact and law, which are to be assessed by this Court by applying the palpable and overriding error standard of review.

[47] In its factum, Nutrien reformulated its grounds of appeal into two assertions. I restate these assertions as questions and set them out as four distinct inquiries, as follows:

(a) Did the judge palpably err by not addressing the statutory context for the proposed judicial review?

(b) Did the judge palpably err by equating this case to others where the tribunal had not rendered a final decision on the issue of jurisdiction?

(c) Did the judge palpably err by not considering that the arbitrator is apt not to rule on the preconditions to the application of s. 9-10.1 of the *SEA*?

(d) Were the judge's errors, if any, overriding?

[48] To avoid confusion between the reasoning in this judgment under the palpable and overriding error standard and other decisions of this Court, I would observe that it may be that some of what Nutrien argues, such as the alleged misinterpretation or misapplication of the law of prematurity, could be said to give rise to an extricable error of law that would invite a correctness review. This Court has stated that "an error in the identification or application of the legal criteria that govern the exercise of the discretion" may constitute an error of law (*MacInnis v Bayer Inc.*, 2023 SKCA 37 at para 38 [*MacInnis*], quoting *Kot v Kot*, 2021 SKCA 4 at para 20; and generally *Yapi ve Kredi Bankasi Anonim Sirketi v Arslan*, 2026 SKCA 6 at paras 32-33). However, Nutrien did not argue its appeal in this way. I therefore proceed on the basis that, to succeed, Nutrien must show palpable and overriding error in the *Chambers Decision*. I do not determine whether it might have been able to invite this Court to adopt a different standard of review in connection with some of its arguments.

[49] Regardless of the applicable standard of review, "an appellate court is not entitled to substitute its own decision for that of the judge merely because it would have exercised the discretion differently" (*Saskatchewan Power Corporation v International Brotherhood of Electrical Workers, Local 2067*, 2025 SKCA 33 at para 21 [*SaskPower*], quoting *MacInnis* at para 39).

IV. ANALYSIS

A. General principles governing judicial review of preliminary arbitration awards

[50] Nutrien's arguments must be placed within the context of the principles that govern when it is appropriate for a court to judicially review a preliminary arbitration award.

[51] Among the discretionary grounds on which a court may refuse to undertake judicial review is that the application is premature. "Prematurity deals with preventing parties from delaying proceedings by coming to court for a remedy that may prove to be moot or overtaken when the tribunal renders its final decision" (*Saskatoon (City) v Wal-Mart Canada Corp*., 2019 SKCA 3 at para 35 [*Walmart*], quoting *McDowell v Automatic Princess Holdings, LLC*, 2017 FCA 126 at para 26).

[52] The doctrine of prematurity is "grounded on the theory that, *absent exceptional circumstances*, parties cannot seek the court's intervention in an administrative process until it has run its course" (*SaskPower* at para 23, emphasis added, quoting *Commissioner of Official Languages for New Brunswick v Nurses Association of New Brunswick*, 2023 NBCA 60 at para 48).

[53] The principle of prematurity, which operates to avoid looking into the merits of an interim question, is aligned with, but intellectually distinct from, the proposition that courts will not sanction judicial review when there exists an adequate alternative remedy. This Court explained the distinction between the two reasons for denying judicial review in *Walmart* (at para 34) by quoting from S. Blake, *Administrative Law in Canada*, 6th ed (LexisNexis, 2017) at s. 9.49:

> … Prematurity recognizes that an issue on which a party is unsuccessful during the statutory process may become moot if the party is successful in the final result. A focus on alternative remedies respects the other statutory forums in which a party may litigate the merits of the case. …

[54] Said somewhat differently, the prematurity doctrine does not question that judicial review is available as a matter of jurisdiction. Rather, it asks whether judicial review is appropriate *at this point in time*.

[55] There are several reasons why it is only in exceptional circumstances that judicial review will be allowed before an administrative process has run its course. Some are practical. Some are more theoretical. These reasons were summarized by Cromwell J. in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*], as follows:

> [36] While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint… Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes…

(Authorities omitted)

[56] Justice Cromwell further justified why judicial review prior to the completion of an administrative process is exceptional with reference to the deferential approach courts are to take towards administrative tribunals. He noted that "contemporary administrative law accords more value to the considered opinion of the tribunal on legal questions, whether the tribunal's ruling is ultimately reviewable in the courts for correctness or reasonableness" (at para 37). Later, he returned to discuss the risks associated with premature intervention, stating that the "focus here is mainly on the process and the concern for efficiency, the minimization of costs and the preservation of the administrative scheme's integrity" (at para 42).

[57] *Halifax* dealt with the question of judicial review of a decision by a tribunal to appoint a board of inquiry to hear a human rights complaint. The Supreme Court ultimately held that the decision to remit the matter to a board of inquiry "was not a determination of its jurisdiction but rather a discretionary decision that an inquiry was warranted in all of the circumstances" (at para 17). Nonetheless, the decision is widely understood to speak to issues of prematurity in a context where jurisdictional objections are raised.

[58] Prior to that case, the Court in *Bell v Ontario (Human Rights Commission*), 1971 CanLII 195, [1971] SCR 756 (SCC) [*Bell*], had broadly construed the discretion to engage in judicial review of preliminary decisions that went to a tribunal's jurisdiction. However, in *Halifax*, the Supreme Court held that, for the reasons given in that case for exercising restraint, *Bell* "should no longer be followed in relation to its approach to preliminary jurisdictional questions or when judicial intervention is justified in an ongoing administrative process" (at para 38).

[59] There is some disagreement as to whether *Halifax* reformed the law of prematurity, generally, or should be viewed as a decision relating to the standard of review to be applied when a referral-type decision is made by an administrative body. The disagreement, in part at least, relates to the extent to which the focus is to be on whether an adequate alternative remedy may be secured through a later review or on the reasonableness of the decision potentially under review (L. Sossin, R. Macauley & J. Sprague, *Practice and Procedure Before Administrative Tribunals*, (Thomson Reuters, 2021) (updated to release 2026-02) at s 38:30 [*Sossin et al*]).

[60] As I see it, the details of this debate have no bearing on the outcome of this appeal. *Halifax* mentioned several justifications for the doctrine of prematurity, including maintaining the integrity of legislative regimes and accounting for the decision maker's considered view of the relevant issues (see paras 36-37, 51). However, even those considerations have functional implications, primarily reflecting the central but limited role of superior courts in supervising administrative and other so-called inferior tribunals, such as boards of arbitration. That role includes holding those tribunals accountable without transgressing upon the Legislature's constitutionally valid choice of administrative scheme. On any conception of the doctrine of prematurity, it must consider if a deferral of judicial review will provide an adequate remedy. As I will come to, this was a central focus of this Court's decision in *SaskPower*. As I will also later explain, a deferred judicial review does not provide an adequate remedy in the circumstances of this case.

[61] Certainly, neither *Halifax* nor any case referred to us in this appeal has held that judicial review of tribunal decisions which are preliminary to a final one can never proceed. Indeed, the opposite was affirmed in *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 [*Laval*]. A review of the facts will assist in understanding its significance in the context of this appeal.

[62] In *Laval*, the Commission summoned the grievor to attend a special meeting of its executive committee charged with deciding whether to maintain his employment. The grievor's employment was terminated following *in camera* deliberations from which the grievor and his union were excluded. The union then filed a grievance and summoned parties who participated in the *in camera* deliberations as witnesses. The Commission raised objections to their examination, because it would disclose information that should not be made public. The arbitrator dismissed this objection and, as a result, the Commission sought judicial review, which the union argued was premature.

[63] Justice Delorme of the Quebec Superior Court rejected the union's prematurity argument (*Commission scolaire de Laval c Doré*, 2012 QCCS 248). He held, in substance, that postponing the judicial review would deprive the Commission of any opportunity to review the appropriateness of the arbitrator's ruling:

> [36] En effet, la décision finale de l'arbitre n'aurait pas permis de réparer le tort qu'aurait pu causer aux membres du comité exécutif le fait d'avoir rendu publics les motifs à l'appui de leur décision de mettre un terme au contrat de monsieur Burrugano.

[64] An unofficial translation of this passage is as follows:

> [36] In effect, *the final decision of the arbitrator would not present an opportunity to repair the harm* that the fact of having made public the motives driving the decision of the members of the executive committee to resile from the contract with Mr. Burrugano would have caused them.
>
> (Emphasis added)

[65] Justice Delorme ultimately granted the Commission's application for judicial review and barred the committee members from testifying about the *in camera* deliberations. While his decision on the merits was reversed by the Quebec Court of Appeal, it agreed with Delorme J.'s prematurity analysis (see *Fédération autonome de l'enseignement c Commission scolaire de Laval*, 2014 QCCA 591 at paras 29-30).

[66] By the time the matter came before the Supreme Court, the parties were no longer litigating the question of prematurity. On the merits, the Supreme Court agreed with the Quebec Court of Appeal but reached that decision by applying a different standard of review.

[67] While the issue of prematurity was not appealed to the Supreme Court, it affirmed the principle that courts are to exercise restraint when called to conduct a judicial review of an administrative decision that is preliminary to a final one. In doing so, it provided some additional guidance in identifying the types of decisions that might exceptionally qualify for early judicial review. On this subject, Gascon J., writing for the majority of the Supreme Court, offered the following comments:

> [74] In concluding, I must make one final comment. In my humble opinion, it is most unfortunate that, more than six years after filing a grievance with respect to a dismissal, the Union has not yet been able to begin presenting its evidence. The mission of the grievance arbitration system, that is, to provide employers and employees with justice that is accessible, expeditious and effective, has been forgotten. *I would note the importance of the sensible rule that, with only a few exceptions, a grievance arbitrator's interlocutory decision, in particular one concerning evidence and procedure, is not subject to judicial review*: *Syndicat des salariés de Béton St-Hubert — CSN v. Béton St-Hubert inc.*, 2010 QCCA 2270, at para. 23 (CanLII); *Sûreté du Québec v. Lussier*, [1994] R.D.J. 470 (C.A.); *Collège d'enseignement général et professionnel de Valleyfield v. Gauthier Cashman*, [1984] R.D.J. 385 (C.A.). The courts of several provinces have taken a similar deferential approach to interlocutory decisions of arbitrators: *Lethbridge Regional Police Service v. Lethbridge Police Association*, 2013 ABCA 47, 542 A.R. 252, at para. 21; *Canadian Nuclear Laboratories v. Int'l Union of Operating Engineers, Local 772*, 2015 ONSC 3436, at paras. 5-7 and 11 (CanLII); *Blass v. University of Regina Faculty Assn.*, 2007 SKQB 470, 76 Admin. L.R. (4th) 262, at para. 82. In the instant case, the arbitrator had offered to hear the testimony of the executive committee's members in camera (para. 22). That would in all probability have

> obviated any risk of consequences that would be impossible to correct at the time of the final award. The lengthy judicial review proceedings at the stage of an interlocutory decision that are now drawing to a close could then have been avoided.
>
> (Emphasis added)

[68] Some commentators have treated this passage as amounting to an admonishment that the judicial review should not have been entered into in that case because it was premature. For example, *Sossin et al* take this passage as indicating that the "Supreme Court of Canada took a dim view [of the] summary disregard of the prematurity principle" (at s. 38:20). Whether this was the Court's intention when offering the comments found in paragraph 74 of *Laval*, or it was simply indicating that its decision should not be taken as disregarding the prematurity principle, three things in this passage stand out.

[69] First, it is notable that Gascon J. emphasized that the prematurity doctrine is of particular importance in interlocutory rulings in areas concerning evidence and procedure. Of course, the decision in *Halifax* and many other cases demonstrate that the doctrine has wider application than simply matters of evidence and procedure.

[70] Second, Gascon J.'s observation that the parties might have avoided the lengthy judicial review and appeal process had they had accepted the arbitrator's suggestion to hear the committee members' evidence *in camera* is important. It speaks to the possibility that the purported need for an early judicial review might be answered by creative alternatives that could justify deferring an intervention until the hearing has run its course. In other words, I take Gascon J.'s direction to be that, before a court enters judicial review, it should carefully assess if there exists, at that moment, an alternative means of achieving the desired result.

[71] Third, the decisions that Gascon J. referred to are potent examples that assist in identifying the boundaries between an exceptional case, where judicial review of a preliminary decision is appropriate, and one where it is not.

[72] The case Gascon J. cited after setting out the presumptive rule against judicial review of decisions which are preliminary to a final one is *Syndicat des salaries de béton St-Hubert – CSN v Béton St-Hubert inc.*, 2010 QCCA 2270. The paragraph pinpointed by Gascon J. states as follows:

> [23] Recourse to judicial review of an interlocutory decision of an administrative tribunal is exceptional. Apart from instances of palpable lack of jurisdiction, [TRANSLATION] "when

> there is the prospect of a long trial that does not justify the clear and uncontestable groundlessness of the law [*sic*]" or *when the decision maker orders a thing or renders a decision that it will not be possible to correct at the time of his judgment upon the merits*, such an action is not allowed.
>
> (Emphasis added, translation in original)

[73] This passage recognizes three scenarios that might amount to exceptional circumstances justifying a judicial review of a preliminary decision, namely, where there is a obvious lack of jurisdiction, where there is a possibility of avoiding significant and ultimately unnecessary proceedings, and where, without judicial review, it will be impossible to correct an erroneous decision on a matter material to the rights of the parties or the outcome on the merits. Of course, the third circumstance mentioned in this passage aligns with the reasons given by Delorme J. in *Commission scolaire de Laval c Doré* for finding that judicial review was warranted ("the final decision of the arbitrator would not present an opportunity to repair the harm" to the witnesses' privacy rights arising from the examination).

[74] Of similar import is *Canadian Nuclear Laboratories v International Union of Operating Engineers, Local 772*, 2015 ONSC 3436, which affirms that an exceptional circumstance warranting judicial review may be "[w]here the decision…determines a particular issue (as in *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlom* (2005), 2005 FC 1000, 35 Admin. L.R. (4th) 213 (FC), in which *the summons issued would be dispositive of the witnesses' privacy rights*)" (at para 7, emphasis added).

[75] *Lethbridge Regional Police Service v Lethbridge Police Association*, 2013 ABCA 47, also cited by Gascon J., involved a judicial review of a finding of discriminatory treatment prior to the award of a remedy. The arbitrator's decision was released 25 months after the hearing. The Alberta Court of Appeal stated that it was "anomalous for the application for judicial review to be brought before the arbitrator has reached a final conclusion". However, it observed that, in the context of this delay, it was "not surprising that the parties and the chambers judge proceeded with the judicial review to avoid any further delay". It found that the "*rule against interlocutory judicial review has functional justifications*" and judicial review was allowable in that case because it involved "a matter which *goes foundationally to the conclusion of the arbitrator*" (at para 21, emphasis added).

[76] The final decision mentioned by Gascon J. was *Blass v University of Regina Faculty Association*, 2007 SKQB 470. That case involved an application for judicial review of several interim awards made by a board of arbitration constituted to hear grievances by a member of a faculty association. The merits issue involved was accommodation. Judicial review of some of the awards was granted and others dismissed. Thus, for example, Dawson J. found that it was appropriate for her to review an order that had directed that the grievor undergo a psychiatric assessment. On this, she found that while "jurisprudence indicates that an interlocutory ruling should not be reviewed, the issue of the Board's authority, the nature and broad extent of the ruling and the adjournment for the psychiatric assessment all lead me to the conclusion it was properly the subject of an application for judicial review" (at para 82). Likewise, she reviewed and quashed an order refusing the grievor representation that was independent from the faculty association (see para 93). On the other hand, she found that there were no exceptional circumstances that would justify a judicial review of several evidentiary decisions made by the board of arbitration (see paras 95-97).

[77] To be sure, Gascon J. cited these cases solely for the proposition that courts in several provinces have taken a deferential approach to interlocutory decisions of arbitrators. However, I would generally expect the Supreme Court to take care in the selection of the authorities it relies upon to make a point. Particularly in the present context where pinpoint citations are given, I would not take the Court to have intended to approve one part of the cited analysis, but to have silently rejected another part of it. I emphasize this because each of the cases referred to by Gascon J. approached the question of whether to entertain a judicial review of a decision on a preliminary

point by considering the effectiveness of a deferred review to address the matter put at issue by the preliminary application, and in some cases other factors.

[78] Many other cases have applied the prematurity doctrine with reference to the adequacy of a deferred judicial review as a remedy. Some of this jurisprudence was reviewed by this Court in *SaskPower*. In that case, after doing so, this Court observed that, like all discretionary decisions, a determination to grant or withhold prerogative relief "must be exercised judicially and in accordance with proper principles" (at para 29, quoting from *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 40). Reflecting this imperative, this Court provided a list of factors that are apt to bear on the exercise of judicial discretion to allow for judicial review of an interim administrative decision:

> [29] … for purposes of providing guidance to judges asked to determine whether a given situation rises to the level of an exceptional circumstance, factors to consider may include the following:
>
> (a) hardship or prejudice to the applicant;
>
> (b) waste of resources;
>
> (c) delay if judicial review proceeds;
>
> (d) fragmentation of proceedings;
>
> (e) the strength of the applicant's case; and
>
> (f) the statutory context.
>
> …

[79] This Court in *SaskPower* further emphasized that "this list is not exhaustive, and the relevance and weight assigned to these factors is contextual – the analysis is flexible and does not turn on any single factor" (at para 29).

[80] Overall, I read *SaskPower* as reiterating that part of the prematurity analysis must focus on the adequacy of judicial review at a later point in time to remedy the concern that has been raised and the costs and benefits – to the parties and to the adjudicative process – of an earlier versus a later judicial intervention.

B. The judge's errors

1. The judge did not palpably err by ignoring the statutory context

[81] Among the factors that *SaskPower* directs might be considered when assessing a prematurity argument is the "statutory context" (at para 29(f)). In this regard, Nutrien submits that the judge erred by not considering the implications of the direction in s. 9-10.1 that no action or proceeding "lies or shall be *commenced or maintained* against an employer" if the preconditions for its application are met (emphasis added). Its position is that if the arbitration proceeds it will have been deprived of the very benefit that the Legislature intended to confer, namely, that it would be subject to even having to defend a proceeding where it had acted or made a good faith effort to act in accordance with the *Emergency Regulations* and was not grossly negligent.

[82] In support of its argument, Nutrien points out that s. 9-10.1 was introduced into the *SEA* during the height of the COVID-19 pandemic. It asserts that the undoubted objective of the Immunity Provision was to increase vaccination rates and, failing that, mitigate the spread of the virus through testing, and that to do this the Legislature granted employers immunity from legal consequences when implementing vaccinate-or-test policies. As expressed in its factum, the contention is that the Immunity Provision was introduced as a shield to alleviate the risk of legal liabilities "so employers would feel empowered to implement and enforce vaccination-or-test polices and ultimately improve the health and safety of the workforce".

[83] Nutrien's argument is supported by the historical record, including statements made during the passage of the amendments to the *SEA* that included the Immunity Provision. For example, the Minister of Labour stated during the second reading of the amendment bill that the government had added "a good-faith liability protection provision that will give peace of mind to employers who are looking to protect their employees and the citizens that they serve" (Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 29th Leg, 2nd Sess, Vol 63, No 14A (22 November 2021) at p 1272).

[84] Also, Nutrien submits that the words used in s. 9-10.1, being that no action or proceeding lies or shall be commenced or *maintained*, must mean that the Legislature intended that at least some types of proceedings that are started should be *stopped*. This amounts to a legislative direction that there be a final determination of the application of the Immunity Provision, when it is raised.

[85] None of this was referred to by the judge in the *Chambers Decision*. However, I agree with the Union that this is not indicative of error on his part.

[86] Nutrien's argument – i.e., that the judge erred by failing to consider the implications of the direction found in s. 9-10.1 – assumes that it is correct in its interpretation of the wording of that statutory provision. Nutrien accepts that there are preconditions to the immunity conferred by s. 9-10.1, but, according to Nutrien, the only preconditions to it being immune from any sort of legal action for its disciplinary decisions taken pursuant to s. 9-10.1 are that it made a good faith effort to act in accordance with the *Emergency Regulations* and was not grossly negligent. According to the Union, there are other conditions and limitations, including that the actions under review were "in accordance with" the *Emergency Regulations*. All of this is to say there must be a forum within which the applicability of the legislative bar to maintaining a proceeding can be determined by an independent decision-maker.

[87] In the present context, there is no dispute that the arbitrator was responsible for making this determination, at least in first instance. In that regard, the Legislature can be deemed to have been aware that, when a determination as to the applicability of the Immunity Provision is made by a labour arbitrator, that determination could be subject to judicial review. However, the Legislature must then also be deemed to have known the limits to judicial review imposed by the prematurity principle.

[88] At the end of the day, Nutrien's argument that the judge erred by failing to consider the implications of the statutory language becomes circular. The arbitrator has ruled that the Immunity Provision does not apply. Nutrien's contention that a continuation of the arbitration would offend the direction in s. 9-10.1 against the *maintenance* of a proceeding presumes that it, not the arbitrator, has correctly interpreted that provision.

[89] None of this is to say that it is improper or unnecessary for the Court to consider the implications if the arbitrator erred in determining that s. 9-10.1 did not prevent him from assessing the appropriateness of the discipline imposed on the three employees. As I will examine in the next two sections of these reasons, that possibility must be accounted for when determining whether judicial review should occur now or whether it is premature. However, this flows from the nature

of the prematurity analysis, not because the Legislature has prohibited the *maintenance* of certain proceedings.

2. The judge's reasons equate this case to ones where the tribunal had not rendered a final decision on the issue of jurisdiction

[90] As mentioned earlier, the judge found the comments made in *USask Faculty* to be "helpful and applicable to this case" (at para 15). He then quoted a lengthy passage from Gabrielson J.'s judgment in that decision, which included the following discussion of that case, when compared to *University of Saskatchewan v Canadian Union of Public Employees, Local 1975*, 2014 SKQB 190 [*USask v CUPE*], and *Sabo*:

> [29] I find that the [*USask v CUPE*] case is distinguishable because in that case the ruling being challenged conclusively determined liability by ordering that reinstatement could be awarded and the only issue left was one of the amount of the damages owed. In this case, however, there has been no finding on the issue of liability. The *Sabo* decision involved a question of two competing statutes, *The Police Act, 1990*, SS 1990-91, c P-15.01, and *The Trade Union Act*, RSS 1978, c T-17, repealed by *The Saskatchewan Employment Act*, SS 2013, c S-15.1, and once the arbitrator determined which statute applied, the decision was final. That is not the situation in this case where the Arbitrator simply decided that he had authority to hear the grievance.
>
> [30] In this case, the Arbitrator was careful to maintain his discretion in respect to the ultimate issue, finding at page 21:
>
> > I accept that there clearly are such cases where collective agreement arbitration, even within the Weber framework can be excluded from, and do not arise out of, the collective agreement. In this case, if it proceeds to the merits, consideration will have to be given to the wording of s. 13.5.3 that letter of appointment "will in no case be inconsistent with the terms and conditions of the agreement. This would have to be considered to the extent that the University argued that subsidiary documents defined or limited Dr. Qureshi's service component.
>
> (Emphasis added)

[91] Nutrien argues that, based on the words I have emphasized in this passage from *USask Faculty*, the judge was wrong to find that decision was "applicable to this case". It says that, in contrast to what is described in *USask Faculty*, the arbitrator did not simply decide that he "had authority to hear the grievance", and he was not "careful to maintain his discretion in respect to the ultimate issue". Moreover, Nutrien argues that the present case is much more analogous to what occurred in *Sabo* and *British Columbia (Ministry of Public Safety and Solicitor General) v Mzite*,

2014 BCCA 220 [*Mzite*], than it is to *USask Faculty*. In both *Sabo* and *Mzite* a judicial review of a preliminary jurisdictional objection was allowed to proceed before an arbitration was concluded.

[92] I agree with the essence of these submissions.

[93] In this case, the arbitrator did not just decide that he had the authority to hear the grievances. He found that the grievances would proceed and that he had no more work to do to either interpret s. 9-10.1 or to conclude that it did not apply to bar the grievances. In this regard, the arbitrator accepted that "the purpose of the [*Emergency*] *Regulations* was to prevent non-compliant employees from being in the workplace" (at para 44). However, he rejected Nutrien's submission that s. 9-10.1 protected employers against grievances regarding disciplinary consequences for non-compliance.

[94] The arbitrator's conclusion on this point was tied to the interpretation that he gave to the Immunity Provision, which he summarized in the conclusion to the *Preliminary Objection Award* as follows:

> [59] … Section 9-10.1 of the *Saskatchewan Employment Act* does not preclude the grievances from proceeding to arbitration on the merits. While the immunity provision provides liability protection to an employer, neither it nor the *Regulations* addresses disciplinary consequences for breach of an employer's vaccination or test policy. An interpretation of Section 9-10.1 within the entire context and object of the *SEA*, and particularly Part VI which deals with labour relations (formerly the *Trade Union Act*), leads me to the conclusion that greater clarity in the section, or a different placement of the provision in the *SEA*, would be required to extinguish and override collectively bargained due process provisions. Nothing in this award is intended to be interpreted as a comment on the merits of any of the six filed grievances.

[95] Importantly, as I have noted, the arbitrator did not restrict the inapplicability of s. 9-10.1 to circumstances where the employer could not show that it had acted or made a good faith effort to act in accordance with the *Emergency Regulations* and was not grossly negligent. This finding by the arbitrator heightens the reasons why judicial review of the *Preliminary Objection Award* is required because it leaves the spectre that not only might it turn out that further arbitral proceedings after this point are unnecessary, but it also portends that they may need to be redone. I will return to discuss the significance of this augury later in these reasons.

[96] Based on all of this, the situation is very different than what is described in *USask Faculty*. Nonetheless, the Union offers several reasons why the judge's reliance on that case was reasonable.

[97] In this regard, the Union says that the lengthy extracts that the judge quoted from *USask Faculty* supported other aspects of the judge's reasons and unimpeachable principles of law. However, none of this detracts from the fact that, in the part of *USask Faculty* that the judge found to be applicable, Gabrielson J. expressed the conclusion that the arbitrator in that case did not simply decide that he "had authority to hear the grievance" (at para 29); he was "careful to maintain his discretion in respect to the ultimate issue" (at para 30).

[98] The apparent importance that Gabrielson J. attached to the fact that the arbitrator had retained discretion in connection with the jurisdictional question can be seen from the distinction that he offered between the facts of the case he was deciding and *USask v CUPE*. In this regard, Gabrielson J. observed that "in that case the ruling being challenged conclusively determined liability by ordering that reinstatement could be awarded and the only issue left was one of the amount of the damages owed" while in contrast, in the case before him, "there has been no finding on the issue of liability" (at para 29).

[99] Likewise, Gabrielson J. distinguished the case before him from the facts of *Sabo* wherein, "once the arbitrator determined which [of two statutes] applied, the decision was final" (at para 29). The judge correctly observed that the prematurity argument was not raised in *Sabo*. However, this does not detract from the distinction drawn by Gabrielson J. between the facts before him and those in *Sabo*.

[100] The Union also says that Nutrien is misreading *USask Faculty*. In this regard, it maintains that, when *USask Faculty* is closely examined, the work that the arbitrator had yet to undertake related to the merits of the dispute, but the issue of the arbitrator's jurisdiction to hear and determine the grievance was fully and finally decided by the arbitrator. However, the force of this argument is diminished by that fact that, in the parts of *USask Faculty* that the judge found to be helpful and applicable, Gabrielson J. had emphasized that the arbitrator's decision was not conclusive.

[101] All of this strongly supports Nutrien's argument that the judge in the present case grounded the exercise of his discretion in the mistaken idea that it was open to the arbitrator to revisit the question of the applicability of the Immunity Provision.

[102] However, I also see another possible way to interpret the judge's reasons, which also assists Nutrien's position.

[103] In the hearing before the judge, Nutrien had invited the judge to follow *Mzite* and proceed with the judicial review. In that case, a judicial review of a decision by the British Columbia Human Rights Tribunal to accept a late-filed complaint was allowed to proceed, even though the Tribunal had not concluded its work. The British Columbia Court of Appeal accepted that, because of *Halifax*, the law had changed and previous decisions, such as *Bell*, "broadly construing the discretion to engage in judicial review of interim decisions, particularly those going to a tribunal's jurisdiction, should no longer be followed" (at para 30). Nonetheless, it found that it was "appropriate for the reviewing court to consider whether the tribunal has finished its work in relation to the specific issue in question" (at para 37).

[104] Other than referring to the fact that Nutrien had brought *Mzite* to his attention (*Chambers Decision* at para 7), the judge did not analyze that decision. I accept the Union's basic proposition that, as a decision from another province, *Mzite* was "not binding upon any Saskatchewan Court". However, this misses the point that Nutrien is making, namely that the judge did not consider the legal relevance of the fact that the arbitrator had reached a final decision when assessing whether judicial review at this juncture was premature.

[105] All of this must be placed in the context of the fact that nowhere in the *Chambers Decision* does the judge give weight to the reality that the *Preliminary Objection Award* finally disposed of Nutrien's jurisdiction objection.

[106] Flowing from this fact, and in the further context I have described, I am left to conclude that it is plain that the judge reasoned in one of the following two ways. In this regard, he may have based the *Chambers Decision* on the mistaken premise that the arbitrator had left open the possibility that he would revisit the issue of the proper interpretation of s. 9-10.1 of the *SEA* – a proposition that is contradicted by the *Preliminary Objection Award* itself. If he did not do this, I am left to conclude that the judge erroneously thought the fact that the *Preliminary Objection Award* was a final determination of the applicability of s. 9-10.1 was legally irrelevant to the determination of whether he should proceed with the judicial review. Neither conclusion was available to the judge in this case.

[107] I do not, by these comments, intend to suggest that judicial review of a final decision on a preliminary jurisdictional point is always or routinely appropriate. However, the fact that the judge seems to have reasoned on the basis that either that the arbitrator had not reached a final decision in connection with the jurisdictional point, or else it was not relevant if he had, reflects a palpable error on his part.

3. The judge did not consider that the arbitrator is apt not to rule on the only preconditions to the protection provided by the Immunity Provision

[108] The judge's second error is related to his first. He did not consider that, because of the interpretation the arbitrator had given to the Immunity Provision, the arbitrator has no reason to rule on what may turn out to be the only true preconditions to the immunity provided by s. 9-10.1 of the *SEA*. This erroneously skewed the judge's view as to the benefits of an early judicial review of the *Preliminary Objection Award*.

[109] There is no dispute that s. 9-10.1 requires, as a condition to whatever immunity it provides, that the employer has acted or made a good faith effort to act in accordance with the *Emergency Regulations* and was not grossly negligent. As has been noted, the arbitrator concluded that the questions as to whether Nutrien had acted in good faith and was not grossly negligent are irrelevant to the outcome of the arbitration. Accordingly, there is no reason for him to rule on these two questions at the merits stage of the arbitration.

[110] None of this is to say whether Nutrien's interpretation of s. 9-10.1 is correct or incorrect. However, the judge had to account for the possibility that Nutrien will succeed in challenging the arbitrator's decision on this point when evaluating whether judicial review at this juncture is premature. In this regard, the possibility that Nutrien may succeed in its argument creates the spectre that, without judicial review at this point, the parties will proceed to a merits arbitration wherein the very question on which the jurisdictional dispute turns will not be decided. If this occurs, everything that follows will not only have been wasted but will need to be redone.

[111] This real, and material, possibility was not recognized or accounted for by the judge when he decided that judicial review was premature. Instead, the judge wrote that "the benefit of waiting until after the final award of the Arbitrator to hear any judicial review application is to limit or

mitigate the need for multiple judicial review proceedings potentially arising out of the same grievance, which again only adds cost and delay for the parties" (at para 14). This statement is accurate, so far as it goes. It is certainly the case that, if Nutrien wins at the merits stage, it will have no reason to seek judicial review, whereas the Union may be motivated to do so. But neither eventuality accounts for the possibility that, without a review now, what occurs after this point will all be for naught because the arbitration will not have decided the issue on which the applicability of the Immunity Provision may turn. The purpose of an immediate judicial review of the *Preliminary Objection Award* is to avoid protracted proceedings to later address that eventual reality.

[112] In substance, the judge looked at only one side of the coin. This is a palpable error.

C. The judge's palpable errors were overriding of the result in the *Chambers Decision*

[113] An important feature of this case is that, by any conception, the arbitrator had jurisdiction to determine the question of whether the Immunity Provision barred the grievances. This distinguishes this case from others where the question has arisen as to whether a tribunal had any power to consider an issue at all.

[114] If the arbitrator had simply concluded that until he heard the evidence he could not determine whether the Immunity Provision applied or not, the argument that judicial review at this juncture was premature would have been much stronger, if not unassailable. However, matters here are different because the arbitrator has finally disposed of Nutrien's preliminary objection in a way that means that all that follows in the arbitration may not only be unnecessary but will need to be redone if Nutrien's challenge to the arbitrator's interpretation of the Immunity Provision has merit. For this reason, and the fact that the parties had agreed to bifurcate their proceedings, and being mindful that the parties have already argued the full merits of the judicial review application itself before the judge, I am satisfied that this case is an exceptional one, justifying judicial intervention at this point. Doing so will put the interpretation of s. 9-10.1 of the *SEA* behind the parties and ensure that, if there is a need for the arbitration to continue, it will be focused on the issues that will be determinative between the parties.

[115] *Mzite* is a helpful exemplar for why a judicial review of the *Preliminary Objection Award* is not premature.

[116] As previously explained, in *Mzite*, the British Columbia Court of Appeal found that a judicial review of a decision by that province's human rights tribunal to accept a late-filed complaint was not premature. In doing so, the Court referred to the following factors that led it to conclude that a judicial review in that case was not premature:

(a) the decision under review was "a substantive, rather than a procedural decision" (at para 41);

(b) the "resolution of the question is of significant value to the parties" and, relatedly, the "resolution [of the issue] prior to the hearing of the substantive complaint could potentially result in a savings of significant time and expense on the part of all parties" (at para 41);

(c) the "decision arose out of a distinct preliminary process and the petition was brought before the substantive hearing had commenced" and it "cannot be said that the petition so interfered with the process of the Tribunal that it ought not to have been heard" (at para 41);

(d) the Tribunal would not receive further evidence with respect to the timeliness of the complaint, and therefore there was "no reason to expect that on judicial review following final determination by the Tribunal there would be a different or better evidentiary record" (at para 42); and

(e) the Tribunal had "finally answered the question whether the complaint should be allowed to proceed" (at para 43).

[117] Each of these factors applies in this case:

(a) the arbitrator's decision is a substantive decision grounded in the interpretation of s. 9-10.1 of the *SEA*, a law of general application;

(b) a resolution of whether the Immunity Provision has application, regardless of whether Nutrien acted in good faith and was not grossly negligent, will be of

significant value to the parties (and likely other employers, unions and employees), since it will guide the purpose and scope of the subsequent arbitration, if it is required at all, and a decision on this point will ensure there is no risk that such proceedings would need to be redone because potentially decisive issues are not addressed;

(c) the decision arose out of a preliminary process that was, by the agreement of the parties, distinct from an inquiry into the merits analysis of whether the arbitrator could substitute a form of discipline for that imposed by Nutrien or in lieu of the terminations;

(d) the arbitrator has no reason to receive further evidence that bears on the applicability of the Immunity Provision at the next phase of the arbitration, should it be necessary at all; and

(e) the arbitrator has finally answered the question as to whether the grievances should be allowed to proceed.

[118] I have expanded on most of these points earlier in these reasons. However, the third factor, namely, that the decision to be reviewed arose out of a distinct preliminary process, deserves amplification.

[119] In its factum, the Union explained that "[i]n the interests of efficiency, the parties agreed to bifurcate the arbitration proceedings, such that only the preliminary objection would be heard and determined at the outset, with the necessity of a merits hearing thereafter depending on the outcome of the preliminary objection application". This fact, although not dispositive of the issue, is directly relevant to whether to allow a judicial review of the *Preliminary Objection Award*.

[120] In *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 36, rev'd 2016 SCC 29 (but not on this point) [*Wilson*], the Federal Court of Appeal stated that an agreed upon bifurcation that creates a "natural break between two separate phases of the proceedings [in that case between merits and remedies] often does not cause the ills identified in [*C.B. Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61, 400 NR 367] unlike bifurcations in the middle of hearings on the merits, which often do". Similarly, in *Workers' Compensation Appeal Tribunal*

v Hill, 2011 BCCA 49 [*Hill*], the British Columbia Court of Appeal found that a Chambers judge had not erred when she agreed to hear a judicial review application of a decision by the British Columbia Human Rights Tribunal to refuse to dismiss a complaint because it had no reasonable prospect of success, after the Tribunal itself had bifurcated the proceedings before it. Justice Neilson, speaking for the Court on that occasion, contrasted the situation before it from an attempt to review an interlocutory decision on a point that arises during a merits hearing:

> [43] Further, this was not a review of an interlocutory decision on an evidentiary or procedural issue that arose in the middle of a hearing. The decision to embark on judicial review was taken between two discrete stages of the process. The s. 27 application was complete. The hearing before the Tribunal had not commenced. Thus the concern about fragmenting ongoing proceedings before the Tribunal was less significant. While the judicial review delayed the Tribunal's process, it was reasonable for the Chambers judge to consider that correction of the record before the Tribunal might better serve the interests of justice and efficiency than permitting a full hearing to proceed without that correction.

[121] The simple fact that the parties have agreed to a bifurcation to allow for a preliminary application does not in and of itself mean that a judicial review of the resulting decision is appropriate. Indeed, the Manitoba Court of Appeal made this point in *Dorn v Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2014 MBCA 25 at para 17 [*Dorn*], when saying that the "parties' agreement that it is convenient to delay the administrative process in favour of litigation does not constitute exceptional circumstances".

[122] In *SaskPower*, this Court wrote, with reference to *Wilson*, *Hill*, *Dorn* and other authorities that, "[a]lthough bifurcation of proceedings can occur at a natural break, that fact is not definitive nor does it give rise to a foregone conclusion that judicial review will always be allowed to proceed" and "the parties' agreement to bifurcate proceedings is not binding on a court" (at para 30). Later, the Court introduced a lengthy review of the jurisprudence by observing that while "bifurcation is an *important consideration*… it is not dispositive" (at para 45, emphasis added). It concluded by making much the same point (see para 62).

[123] Bringing this principle into the circumstances at hand, while not, on its own, constituting an exceptional circumstance to justify judicial review of an interim decision, the fact that the parties have agreed to a bifurcation is a relevant factor bearing on the exercise of discretion as to whether to allow the judicial review to proceed. This mutual position reflected the fact that there were costs

and other burdens of presenting a full case on the merits that would be unnecessarily incurred if it was determined that arbitration should not proceed because of s. 9-10.1 of the *SEA*. As has been noted, the Union acknowledged in its factum that the parties agreed to bifurcate for reasons of efficiency, with the necessity of a merits hearing thereafter *depending on the outcome of the preliminary objection application*.

[124] This rationale did not change simply because the arbitrator ruled against Nutrien on one of the questions of statutory interpretation. On the facts of this case, for this Court to ignore the parties' agreement to bifurcate the proceedings when deciding if judicial review is premature, one would have to imagine that the benefits of efficiency, expedience and costs of resolving this preliminary issue, which was the basis for the parties' agreement to obtain a determination of the issue, ended when the arbitrator rendered his decision.

[125] When the fact of the parties' agreement to obtain a preliminary determination of the applicability of the Immunity Provision is combined with the prospect that without a judicial review at this juncture all that follows may be wasted, I am satisfied that this is an exceptional case, justifying judicial review of the *Preliminary Objection Award*.

V. CONCLUSION

[126] The judge palpably erred when reaching his conclusion that it was premature to judicially review the *Preliminary Objection Award* and the errors are overriding of the result of his decision. I would, for this reason, allow Nutrien's appeal from the *Chambers Decision*.

[127] The parties agreed that, if this Court were to allow Nutrien's appeal, the appropriate remedy was to remit the matter to the judge to conclude the judicial review of the *Preliminary Objection Award*. I would so order. Although the *Chambers Decision* records, and the parties affirmed in argument before us, that the judge has already received their submissions on the merits of the judicial review application itself, it is for the judge to decide if a further hearing is required before he determines its outcome.

[128] Finally, I would also grant Nutrien its taxable costs of this appeal. I would reserve the question of costs in the Court of King's Bench to be determined by a judge of that Court in the context of deciding the judicial review.

"Leurer C.J.S."

Leurer C.J.S.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Drennan J.A."

Drennan J.A.