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**Court of Appeal for Saskatchewan**

**Docket: CACV4304**

**Citation: *Saskatchewan Power Corporation  
v International Brotherhood of Electrical  
Workers, Local 2067, 2025 SKCA 33***

**Date: 2025-03-20**

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Between:

**Saskatchewan Power Corporation**

*Appellant  
(Applicant)*

And

**International Brotherhood of Electrical Workers, Local 2067 and  
William F.J. Hood, K.C.**

*Respondents  
(Respondents)*

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Before: Caldwell, Schwann and Bardai JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Lian M. Schwann  
In concurrence: The Honourable Justice Neal W. Caldwell  
The Honourable Justice Naheed Bardai

On appeal from: KBG-RG-02305-2023 (Sask KB), Regina  
Appeal heard: September 17, 2024

Counsel: Michael Phillips and Alyssa Phen for the Appellant  
Rick Engel, K.C., and Heather Robertson for the International  
Brotherhood of Electrical Workers, Local 2067  
No one appearing for William Hood, K.C.

## Schwann J.A.

### I. INTRODUCTION

[1] The International Brotherhood of Electrical Workers, Local 2067 [Union] represents a unit of roughly 1,700, in-scope employees who are employed by Saskatchewan Power Corporation [SaskPower] in multiple locations throughout Saskatchewan. The parties' employment relationship is governed by the terms of a collective bargaining agreement [Agreement]. In May of 2016, the Union filed a grievance against SaskPower, alleging that the employer had violated the terms of the Agreement by refusing to provide vacation pay to its members in the amount and at the time established under Article 17.01 of the Agreement, as modified by a 2013 memorandum of agreement [2013 MoA].

[2] Unable to resolve their differences through mediation, the parties proceeded to arbitration in 2021 to have the merits portion of the Union's grievance determined. On July 18, 2023, the labour arbitrator who heard the matter, William F.J. Hood, K.C., issued a decision in which he agreed with the Union's interpretation of Article 17.01: *International Brotherhood of Electrical Workers, Local 2067 v Saskatchewan Power Corporation*, 2023 CanLII 67828 (Sask Labour Arbitration Awards) [*Award Decision*]. The arbitrator also stated that, absent settlement, he remained seized with jurisdiction respecting the monetary remedy and any other issues surrounding implementation.

[3] In response to the *Award Decision*, SaskPower applied to the Court of King's Bench for an order quashing or setting it aside. That application was met by one brought by the Union to dismiss or strike SaskPower's judicial review application on grounds of prematurity. A Chambers judge agreed with the Union's prematurity argument and struck SaskPower's judicial review application: *Saskatchewan Power Corporation v International Brotherhood of Electrical Workers, Local 2067* (19 December 2023) Regina, KBG-RG-02305-2023 (Sask KB) [*Strike Decision*].

[4] SaskPower appeals from the *Strike Decision*. It principally argues that the Chambers judge erred in finding the *Award Decision* was not a final decision and, alternatively, in how he balanced the factors relevant to determining whether there were exceptional circumstances that militated in favour of allowing its judicial review application to proceed prior to the conclusion of the remedial phase of the arbitration.

[5] As discussed below, I would dismiss SaskPower's appeal.

## II. BACKGROUND

[6] The Union's grievance involves a dispute about the interpretation of a provision contained in the 2013 MoA between the parties following their 2013 round of collective bargaining. The provision, entitled "Article 17 Annual Vacations – Add Note" [Note], reads as follows (emphasis omitted, at 9):

ARTICLE 17 ANNUAL VACATIONS – ADD NOTE as follows:

Extra Item Pay (vacation pay on total wages) will be calculated at the end of the calendar year to determine if additional vacation pay for extra item pay is required.

[7] The concept of extra item work is also relevant and was described by the arbitrator in this way (*Award Decision*):

4. Extra Item Work refers to the work an employee performs for overtime, substitution, height pay, insufficient notice, helicopter pay, Saturday night shifts, temporary instructor duties, travel time, and so forth. These items are "extra" in the sense they are compensation for services rendered over and above "regular" work.

[8] More specifically, the parties disagreed on whether the Note altered the way vacation pay was calculated for those employees who performed extra item work. The Union's position was that the Note only changed the date on which vacation pay for extra item work was to be paid and that the 2013 round of bargaining did not bring about a substantive change to vacation pay entitlement. In other words, as the Union described it, "the Note simply changed the practice from calculating and paying vacation pay on Extra Item Pay semi-monthly to annually at the end of the calendar year" (respondent's factum at para 6).

[9] SaskPower was of a different mind. It took the stance that the Note reduced the amount of vacation pay for many of its employees and that Article 17.01 represented the Union's concession in exchange for SaskPower agreeing to a new job classification scheme and pay system for the affected employees. According to SaskPower, the Note changed the calculation of the amount of vacation pay for employees who do extra item work.

[10] From the time when the grievance was filed in 2016, until 2021, the parties attempted to resolve their dispute through mediation and other consensual measures. When those attempts proved ineffective, they proceeded to an arbitration hearing in mid-2021 before a seasoned Saskatchewan arbitrator. Prior to the commencement of the hearing, the parties agreed to bifurcate their dispute between the merits and remedy phases. It is common ground that no evidence was adduced at the hearing concerning damages or the appropriate monetary remedy.

[11] The arbitrator rendered the *Award Decision* two years later, on July 18, 2023, sustaining the Union's grievance. In the final paragraph of his decision, the arbitrator wrote as follows: "The parties have agreed to deal with the monetary remedy separately. I remain seized with jurisdiction to determine the quantum if the parties are unable to agree, and to determine any other disagreements in implementing the remedy" (at para 314).

[12] It is undisputed that a significant number of SaskPower employees are affected by this dispute and that there has been a substantial lapse of time since the disagreement first arose. Barring agreement, critical issues left to be decided by the arbitrator include the following:

- (a) how far back the *Award Decision* applies, given the number of collective agreements negotiated since the grievance was filed;
- (b) the timing and applicability of any reimbursement arising from the incorrect calculation of the extra item pay;
- (c) whether the *Award Decision* applies to former employees; and
- (d) the impact of the delay up to the time of the *Award Decision*.

[13] As mentioned, shortly after the *Award Decision* was rendered by the arbitrator, SaskPower brought an application in the Court of King's Bench to have it judicially reviewed. That application was met by one brought by the Union to have the judicial review application struck on the grounds of prematurity.

### III. THE UNION'S STRIKE APPLICATION

[14] The Chambers judge began his decision by acknowledging that, while the doctrine of prematurity is not an absolute bar to judicial review, “it will require exceptional circumstances to justify judicial review before the proceedings below are completed” (*Strike Decision* at para 12). He identified several Saskatchewan decisions that have applied the doctrine with different results, noting that each case turned on its own facts and that an agreement to bifurcate proceedings, although relevant, is but one factor that bore upon his assessment of the matter.

[15] Next, the Chambers judge considered the issue from the perspective of the possible outcomes for both sides if judicial review were allowed to proceed at this juncture in the arbitration proceedings. He observed that, if the *Award Decision* was quashed at this time because of a lack of jurisdiction or was found to be unreasonable (as so alleged by SaskPower), the arbitration would not proceed to the remedy phase. On the other hand, if the Union's strike motion was granted and the process was allowed to run its course to the remedy phase, at its conclusion either party could apply for judicial review of both the liability and the remedy award at that time.

[16] Factors central to the Chambers judge's reasoning included the possible retirement of the arbitrator, which meant, he said, that “a new arbitrator would not have the same background and knowledge of the case” (*Strike Decision* at para 19). Also relevant to the Chambers judge was the undisputed fact that the parties had agreed to bifurcate the proceedings and that they needed to respect the overall grievance process. Along that same vein, the Chambers judge rejected SaskPower's argument that their agreement to bifurcate reflected an implied or tacit agreement for judicial review to take place following the liability phase of proceedings.

[17] Taken together, those factors – along with “the other arguments presented by the parties” – led the Chambers judge to conclude that judicial review should not proceed at this time: “Better to let the process continue to its natural end, at which time judicial review will still be available” (at para 21). The Union's application was accordingly granted.

### IV. ISSUES ON APPEAL

[18] The issues raised by SaskPower on appeal require answers to the following questions:

- (a) Did Chambers judge err by failing to determine the *Award Decision* was final?
- (b) Did the Chambers judge incorrectly weigh the relevant factors in how he exercised his discretion?
- (c) Did the Chambers judge misapply the doctrine of comity?

## V. STANDARD OF REVIEW

[19] The issue before the Chambers judge was narrow. He was asked to determine whether the Union’s application to strike SaskPower’s application on grounds of prematurity should be granted. A decision of that sort involves the exercise of a discretionary power that, in very general terms, implies a measure of deference on the part of a reviewing court: see *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at para 41, 489 DLR (4th) 191 [*Yatar*].

[20] However, as both sides agree, even when an appeal is taken from a discretionary decision, the standard of review is not determined by its label but by the nature of the error alleged by the appellant: see *Hoedel v West Jet Airlines Ltd.*, 2023 SKCA 135 at para 20; *Bell v Insulation Applicators Ltd.*, 2023 SKCA 128 at para 23; *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114 at paras 22–30, 489 DLR (4th) 300; and *MacInnis v Bayer*, 2023 SKCA 37 at paras 38–39 [*MacInnis*].

[21] This means that questions of law are reviewed on a correctness standard, with questions of fact or mixed fact and law subject to the palpable and overriding error standard of review: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. An appellate court may intervene where a “judge made a palpable and overriding error in her assessment of the facts (including by misapprehending or failing to consider material evidence), or if she made a legal error by failing to correctly identify the legal criteria” (*Arkell v Komodowski*, 2023 SKCA 79 at para 44, 37 CCLI (6th) 33, leave to appeal to SCC refused 2024 CanLII 30087): “However, 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” (*MacInnis* at para 39, citing *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76–77).

## VI. ANALYSIS

### A. Prematurity as a discretionary bar

[22] This appeal concerns the discretionary nature of judicial review and the well-defined bars to this remedy. It also engages the supervisory power of superior courts over the relief sought. The Supreme Court reinforced these underlying and related principles in *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713, where it said, “Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief” (at para 37). More recently in *Yatar*, Rowe J. reaffirmed the principle that, “[i]f in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application” (at para 54).

[23] It is trite law that prematurity can operate as a discretionary bar: “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” (*Commissioner of Official Languages for New Brunswick v Nurses Association of New Brunswick*, 2023 NBCA 60 at para 48, 484 DLR (4th) 431): see also, Lorne M. Sossin and Gerard Kennedy, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 3d ed (Toronto: Thomson Reuters, 2024) at §4:4. Premature applications are discouraged principally because they fragment proceedings and tend to defeat the expeditious nature of them.

[24] In *C.B. Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61, 400 NR 367 [*C.B. Powell*], Stratas J.A. discussed the significant shift away from earlier jurisprudence, where judicial intervention in judicial review matters proceeded prior to its conclusion. He succinctly expressed the current state of law in this area: “absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted” (at para 31). Justice Stratas outlined the rationale underlying this doctrine, writing as follows:

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, [[1998] 1 SCR 706], at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68, at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798 (Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, above, at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), affd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians of Ontario* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 48.

[25] As Stratas J.A. went on to observe, what constitutes an exceptional circumstance is narrow and “the threshold for exceptionality is high” (at para 33); indeed, relatively few cases meet the exceptional circumstance criterion. He then concluded as follows:

[33] ... Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are *not* exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted.

(Emphasis added)

[26] The doctrine of restraint was reinforced by the Supreme Court in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 36, [2012] 1 SCR 364 [*Halifax*], and has been adopted and applied repeatedly in this jurisdiction. In *Nadler v College of Medicine, University of Saskatchewan*, 2017 SKCA 89, 33 Admin LR (6th) 124, a somewhat more recent example, Jackson J.A., drawing from *C.B. Powell* and *Halifax*, emphasized the point that, while there is discretion to intervene in proceedings before their final conclusion, courts have shown restraint: see para 36 and also *Saskatoon v Wal-Mart Canada Corp.*, 2019 SKCA 3 at para 72, 430 DLR (4th) 697 [*Wal-Mart*], and *Cameron v The Association of Professional Engineers and Geoscientists of Saskatchewan*, 2022 SKCA 118 at para 13, 33 CLR (5th) 364, leave to appeal to SCC refused, 2023 CanLII 39587. Appellate decisions from other jurisdictions have also adopted this approach: *Chu v British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174 at para 65, 53 BCLR (6th) 211 [*Chu*], and *McDowell v Automatic Princess Holdings, LLC*, 2017 FCA 126 at para 26, 148 CPR (4th) 1 – see, generally, Donald J.M. Brown et al, *Judicial Review of Administrative Action in Canada*, loose-leaf (Rel 2024-04) (Toronto: Thomson Reuters, 2024) at §3:39 [Brown and Evans].

[27] In *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17, 467 NR 201, rev'd 2016 SCC 29 (but not on this point) [*Wilson*], the Federal Court of Appeal reaffirmed the idea that derogation from the prematurity principle is rare, equating the existence of exceptional circumstances with situations “where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court’s concern about the rule of law is aroused” (at para 33). In another decision from that Court – *Dugré v Canada (Attorney General)*, 2021 FCA 8, leave to appeal to SCC refused, 2021 CanLII 91646 [*Dugré*] – the threshold was described as “next to absolute” (at para 37) unless the consequences of the interlocutory decision are “immediate and radical” (at para 35): see also *Budlakoti v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139, 35 Imm LR (4th) 1, leave to appeal to SCC refused, [2016] 1 SCR vii [*Budlakoti*].

[28] That said, although the prematurity principle is narrowly applied, I would restate that it is not absolute; it involves the exercise of judicial discretion. The Federal Court of Appeal in *Budlakoti* summarized the principle of law emerging from that Court’s jurisprudence in this way: “The cases show that the general rule can be relaxed where concerns about the rule of law are aroused or where the public law values implicated by the case favour early, immediate access to a reviewing court” (at para 60). As I discuss below, *Wilson* was an example of the former.

[29] While I recognize that the Federal Court of Appeal in *Dugré* eschewed the need to refine the test for what constitutes an exceptional circumstance or to establish a list of relevant factors in that regard, other courts have identified matters that could or should be taken into account: see *Chu* at para 66 and *Thielmann v Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8 at para 50, 442 DLR (4th) 272 [*Thielmann*]. The approach described in *Chu* and *Thielmann* makes abundant sense because, like all discretionary decisions, a determination to grant or withhold prerogative relief “must be exercised judicially and in accordance with proper principles” (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 40, [2009] 1 SCR 339). As such, 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.

To be clear, 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: see *Chu* at para 66 and *Thielmann* at para 50.

[30] As bifurcation of proceedings is central to SaskPower's argument, a brief word about it is in order. There is no dispute that bifurcation of proceedings, particularly between two discrete stages – either by the parties themselves or by the decision maker – can serve as a natural break between two phases of a tribunal's proceedings. As the Federal Court of Appeal noted in *Wilson*, bifurcation of the merit and remedy stages of a proceeding “often does not cause the ills identified in *C.B. Powell* ... unlike bifurcations in the middle of hearings on the merits, which often do” (at para 36): see also *Workers' Compensation Appeal Tribunal v Hill*, 2011 BCCA 49 at para 43, 16 BCLR (5th) 142. Although 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. Moreover, the parties' agreement to bifurcate proceedings is not binding on a court: see *Brown and Evans* at §3:39, *Traders General Insurance Company v Rumball*, 2019 ONSC 1412, 90 CCLI (5th) 261 [*Rumball*], and *Dorn v Association of Professional Engineers and Geoscientists of Manitoba*, 2014 MBCA 25, 303 Man R (2d) 204 [*Dorn*].

[31] In a number of decisions from this province, bifurcation appears to have been central to the assessment of whether a judicial review application should proceed before the adjudicative process has concluded: *Sabo v Saskatoon (Board of Police Commissioners)*, 2003 SKQB 111, 231 Sask R 95 [*Sabo*]; *Saskatchewan v Saskatchewan Government and General Employees' Union*, 2008 SKQB 341, 325 Sask R 263 [*SGEU*]; *The University of Saskatchewan v Canadian Union of Public Employees, Local 1974*, 2014 SKQB 190 [*U of S 2014*]; and *The University of Saskatchewan v University of Saskatchewan Faculty Association*, 2017 CanLII 149684 (Sask QB) [*U of S 2017*]. I will return to those decisions later in my reasons.

[32] Those points made, I now turn to SaskPower's grounds of appeal.

## **B. The *Award Decision* was not final**

### **1. The parties' positions**

[33] SaskPower makes two interrelated arguments in connection with its first ground of appeal. It first asserts that, when faced with a motion to strike or defer a judicial review application because of prematurity, the judge hearing the matter must, at the outset, address the question of whether the decision at issue is final or interlocutory. SaskPower asserts the Chambers judge's failure to undertake this threshold analysis constitutes an error in principle. Second, SaskPower argues that, even if the Chambers judge can be understood to have implicitly concluded that the *Award Decision* was interim or interlocutory to the overall grievance arbitration, he failed to appreciate that bifurcation was the dominant, if not the controlling, factor in his consideration of the Union's application. When a matter is bifurcated, SaskPower says, it creates a *natural break* where the concerns around prematurity are not engaged. In any event, SaskPower claims that none of the factors considered by the Chambers judge applied to the circumstances at hand.

[34] The Union profoundly disagrees with the way in which SaskPower has framed its argument. As the arbitration is not finished, it says that the appropriate analytical framework required the Chambers judge to assess whether there were any exceptional circumstances justifying judicial interference with the arbitral process prior to its conclusion and thereby interrupting the integrity of the hearing process.

### **2. Application of the legal principles**

[35] SaskPower's argument under this ground of appeal must be placed in its proper context. The Chambers judge's decision not to entertain judicial review at this juncture of the grievance arbitration proceedings involved the exercise of judicial discretion. Determining whether this Court should interfere with the *Strike Decision* turns on the specific allegations of error and the standard of review applicable to them.

[36] SaskPower took the position before the Chambers judge that the prematurity principle did not apply because the *Award Decision* was final, not interim or interlocutory. This was so, it said, because the parties had agreed to bifurcate proceedings and understood that a decision on the merits disposed of the sole substantive issue, i.e., the interpretation of Article 17.01 of the Agreement. The proposition underlying SaskPower's argument is that bifurcation between the merit and remedy necessarily creates two discreet phases – in other words, a natural break – and that the *Award Decision* therefore represented a final, not an interim, adjudicative decision on the issue of liability.

[37] SaskPower says it encouraged the Chambers judge to make a finding to that effect, and that, relying on *Chu* and *Diaz-Rodriguez v British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221 [*Diaz-Rodriguez*], the Chambers judge was required to determine that threshold issue. It submits that he erred in principle by failing to turn his mind in that direction. Further, had the Chambers judge found the *Award Decision* to be final, SaskPower submits it logically follows that he also erred by applying the prematurity principle to the *Award Decision* when, on the facts of this case, he ought not to have done so.

[38] For the reasons that follow, I am not persuaded the Chambers judge erred in the ways suggested by SaskPower.

**a. A finding was made**

[39] First, I do not consider the decisions in *Chu* or *Diaz-Rodriguez* to be of much assistance to SaskPower. While both focussed on the importance of determining whether the decision sought to be reviewed was final, that issue was particularly relevant in those cases because of the unique features of the legislative framework at issue. For instance, *Chu* involved legislation where the administrative decision-making was divided into discrete screening, investigative, and merits stages, and *Diaz-Rodriguez* concerned a decision made by a commissioner performing a strictly gatekeeper function, as opposed to an adjudicative one. It can be readily seen why a more rigorous examination of the final versus interlocutory question was required, given the distinct legislative context at play in those matters.

[40] Second, even though the Chambers judge’s reasons are sparse and he did not dig into the issue to any degree, he clearly understood the importance of SaskPower’s argument in the context of the prematurity principle, writing as follows: “the decision must be final before the court will entertain judicial review” (*Strike Decision* at para 11).

[41] The Chambers judge was also aware of the fact the parties had agreed to bifurcate the arbitration between the liability and remedy phases and said as much in his reasons: “The parties agreed to proceed to grievance arbitration before William F.J. Hood, K.C. [Arbitrator]. The parties also agreed to bifurcate (or divide) the hearing of the grievance between liability and damages” (at para 3). Further, the Chambers judge’s reasons also demonstrate that he was alive to SaskPower’s argument that the *liability* part of the arbitration was final, having paraphrased its submissions in this way:

[10] SaskPower’s position is that the Decision is final as to liability. Liability was the main issue in dispute. Judicial review is the most effective way to proceed at this point, because: liability was the main issue in dispute; there was agreement to bifurcate the issues of liability and damages; and there has already been lengthy delay. Judicial review is likely to provide finality to this dispute in a more timely way than continuing with arbitration of the damages issue.

[42] In the result, I see no basis for appellate intervention. The Chambers judge understood SaskPower’s argument, knew that the liability phase had concluded and that the parties had agreed to bifurcate the arbitration, but found, as fact, that the *arbitration proceedings* were not finished. In his view, segregation into two discrete phases (reflected in paragraph 10 above) was an appropriate consideration in determining whether it gave rise to an exceptional circumstance.

#### **b. Bifurcation is not dispositive**

[43] The second prong to SaskPower’s argument is that the doctrine of prematurity does not apply where parties have agreed to bifurcate proceedings in a way that creates a natural break in the proceedings – particularly where, as here, it does not fragment the administrative proceedings. It asserts that the *Award Decision* is effectively final and that the rationale underlying the rule against premature judicial review does not apply.

[44] There are several reasons why this argument cannot succeed.

[45] First, and most significantly, the prematurity principle does not turn on the simple question of whether the parties had agreed to bifurcate proceedings. While bifurcation is an important consideration, as Brown and Evans observe, it is not dispositive: “Although the agreement of the parties to bifurcate a proceeding will usually be accepted, it may not always suffice to permit review before the whole proceeding is completed” (footnotes omitted, at §3:39) – see also *Rumball and Dorn*.

[46] *SGEU* provides an example of the need for a more nuanced, case-specific approach to the significance of bifurcation. That decision concerned a grievance arbitration arising from the dismissal of an employee. The arbitrator set aside the dismissal but ruled that an award of damages in lieu of reinstatement was the appropriate remedy. Because the parties had not made submissions on damages, the arbitration was adjourned to allow them time to resolve the remedy issue, failing which, the hearing would reconvene. However, before that occurred, the employer applied to have the merits decision judicially reviewed. Much like here, the employer argued that judicial review was not premature, that a damage award was a discrete issue and that, before the parties engaged in the additional time and expense of negotiating damages, a superior court of jurisdiction should quash the arbitrator’s decision.

[47] The Chambers judge in *SGEU* disagreed with the employer’s argument, finding the remaining matter was not a discrete issue. He viewed the grievance arbitration in more holistic terms, writing, “the work of the arbitrator in that respect is not finished” (at para 28) and also noted the following:

[28] ... determination of damages is not separate from the merits of the arbitration. Determination of damages is a part of the determination on the merits. A determination on the merits includes a determination of both the parties’ rights under the collective bargaining agreement and the remedy flowing from those rights in the circumstances.

[48] While *SGEU* does not support SaskPower’s position, I recognize there are cases where bifurcation played a key role in a court’s assessment of the prematurity objection.

[49] One such decision is *Lethbridge Regional Police Service v Lethbridge Police Association*, 2013 ABCA 47, 355 DLR (4th) 484, leave to appeal to SCC refused 2013 CanLII 35702 [*Lethbridge*]. In that case, the labour arbitrator determined that a probationary constable had been

discriminated against and unfairly terminated at the end of his probationary period. In the merits award, the arbitrator held in favour of the employee but reserved jurisdiction on the question of remedy, to give the parties an opportunity to resolve the matter themselves. A Chambers judge allowed the police service's application for judicial review of that decision to proceed, despite the respondent's prematurity argument.

[50] On appeal, although the prematurity bar did not appear to be at issue, the Alberta Court of Appeal nonetheless affirmed the Chambers judge's decision allowing the judicial review to proceed, stating as follows:

[21] ... in this case the arbitrator's decision was released 25 months after the hearing. In the circumstances, it is not surprising that the parties and the Chambers judge proceeded with the judicial review to avoid any further delay. The rule against interlocutory judicial review has functional justifications. But in this instance "the rationales for the general rule have limited application": see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para. 28, [2011] 3 SCR 654.

[51] However, the Alberta Court of Appeal did *not* say that a lengthy delay in receiving a merits decision always displaces the prematurity principle. In fact, the Court was careful to express the following cautions: "In normal circumstances, the Chambers judge should have declined to adjudicate until that was done", that the circumstances at issue were unique, and the decision to proceed with judicial review "should not be taken as detracting from the general rule that the arbitrator should provide a final decision before judicial review is undertaken" (at para 21).

[52] *Wilson* is another decision where judicial review was allowed to proceed where proceedings had been bifurcated and not fully concluded. There, after finding in favour of the applicant's unjust dismissal complaint under the *Canada Labour Code*, RSC 1985, c L-2, the adjudicator adjourned proceedings for the parties to attempt settlement, failing which, he would continue with the hearing on the question of remedy. Before it resumed, the employer applied for judicial review and, in the face of that application, the adjudicator, of his own motion, adjourned proceedings until the judicial review application was resolved. The Chambers judge dismissed the appellant's prematurity objection and heard the judicial review on its merits.

[53] The Federal Court of Appeal upheld the lower court's ruling on prematurity, characterizing the circumstances in the matter at hand as "unusual". The adjudicator's decision to adjourn while judicial review was ongoing, the Federal Court of Appeal said, was a discretionary choice that was

“suffused by factual and policy appreciation that deserve respect” (at para 38) and that “the rationales underlying the general rule against premature judicial reviews do not sound loudly here” (at para 40). Coming at it from another perspective, that Court can be seen as allowing judicial review to proceed because the circumstances met the exceptional circumstance test, not due to the fact matters had been bifurcated.

[54] Turning to the jurisprudence in this jurisdiction, SaskPower asserts there is unequivocal support for the proposition that judicial review is not barred by the doctrine of prematurity where parties chose to bifurcate proceedings between liability and remedy. It relies on *U of S 2014* and *Sabo* in support of its position.

[55] Respectfully, I do not interpret either decision as establishing new or even binding law. Both are highly fact specific. In each case, the court’s decision not to bar judicial review from proceeding was a result that was responsive to the factors relevant to each case.

[56] The facts in *U of S 2014* are as follows. Three long-time cafeteria employees were dismissed by the University of Saskatchewan for theft of food, contrary to established university policy. They grieved their dismissal. The majority of the board of arbitration concluded that, although the thefts had been established, discharge was an excessive disciplinary response. However, the board of arbitration did not determine the appropriate remedy for the grievors and reserved jurisdiction to determine that matter if the parties were unable to resolve it amongst themselves. The University’s application for judicial review of the dismissal decision was opposed by the respondent union on grounds of prematurity.

[57] The central issue dividing the parties in *U of S 2014* was whether reinstatement was an available disciplinary option when theft had been proven. All sides recognized this was a highly contentious issue within the arbitral community. The Chambers judge concluded that bifurcation made practical sense in the circumstances of that case, writing as follows:

[15] ... The University’s position was that they had terminated employees for theft in a context where the trust inherent to maintain an employment relationship had been destroyed, whereas the grievors were seeking full reinstatement. Implicit in the parties’ agreement to restrict the award as it did was the opportunity for either party to seek judicial review of the resulting award.

[58] That being so, the Chambers judge was persuaded that it gave rise to a sense of urgency and practicality, which caused him to conclude that it made no practical or policy sense to force the university to conclude the remedy part of the arbitration (i.e., to decide what the appropriate disciplinary response to employee theft should be) because it would put “both parties to unnecessary expense and delay in a situation where the parties have by express agreement chosen to bifurcate issues” (at para 16).

[59] Properly read, the decision in *U of S 2014* does *not* stand for the proposition that an agreement to bifurcate an arbitration into discrete phases makes the liability or merits part final for purposes of the application of the prematurity doctrine. Nor, for that matter, does it suggest that the decision to bifurcate overwhelms and subverts the exceptional circumstance analysis in an application for judicial review. In my view, allowing judicial review to proceed in *U of S 2014* turned on the fact that everything revolved around an issue that was intertwined with liability and remedy. On the merits side, the university was adamant that dismissal of the employees was the only appropriate result when theft had been established, while the union sought full reinstatement. In other words, there was no middle ground. As far as the university was concerned, the merits decision (theft) drove out the only available remedy (dismissal); as such, the question of damages was irrelevant. In other words, it was the parties’ respective stances on the core issue that led the judge to conclude that, implicit in their agreement to bifurcate, was an underlying recognition that either side could pursue judicial review of the arbitrator’s merits decision. It was that particular context that led the Chambers judge to conclude that it made no practical or policy sense to force the parties to defer judicial review for the remedy portion of the arbitration to conclude. In light of all of that, *U of S 2014* does *not* stand for the proposition that when parties decide to bifurcate proceedings it always makes the merits award final. If anything, this case illustrates how the prematurity question turns on the unique facts and context of each case and the need for courts to properly weigh all relevant factors.

[60] *Sabo* is another decision that appears to adopt the stance that an agreement to split the arbitral hearing on a pure jurisdictional issue meant the parties had envisioned that judicial review was open to the unsuccessful party after that ruling was made. However, *Sabo* involved a narrow jurisdictional question involving which of two competing statutes prevailed. Once again, this decision turned on its unique facts and does not represent a firm statement of law.

[61] In contrast, there are several Saskatchewan decisions where the prematurity objection prevailed in the face of bifurcated proceedings. *SGEU* (discussed above) is one such decision: another is *Communications, Energy and Paperworks Union of Canada, Locals 1S, 2S and 3 v SaskTel*, 2012 SKQB 264, 400 Sask R 238. *U of S 2017* is also of interest for how it distinguished *U of S 2014*, which was the reason why I mentioned it above: the ruling sought to be challenged in that case had conclusively determined liability by ordering reinstatement. That said, I acknowledge that *U of S 2017* could be read as standing for the proposition that the doctrine of prematurity does not apply where the arbitrator renders a final award on the merits.

[62] To summarize, even where parties agree to bifurcate proceedings between the liability and remedy phases of an arbitration, that fact alone is not dispositive of whether judicial review should proceed before the conclusion of the arbitration. Nor are courts bound by a prior agreement between the parties to have judicial review proceed at an early stage. Courts retain supervisory powers over prerogative relief and must remain focussed on whether the matter at hand gives rise to an exceptional circumstance.

### c. The labour law context

[63] The third reason for rejecting SaskPower's argument under this ground of appeal is that a position of restraint is called for in labour law matters because early intervention can often frustrate the policy objectives of labour legislation. The comments of Richards J.A. (as he then was) in *Wal-Mart Canada Corp. v Saskatchewan Labour Relations Board*, 2010 SKCA 89, 321 DLR (4th) 397, allude to the importance of the prematurity principle in such matters:

[20] In general, there are compelling reasons why courts should be reluctant to review interim or non-final decisions of administrative tribunals. Richard Charney and Thomas Brady outline these reasons in *Judicial Review In Labour Law*, looseleaf (Aurora: Canada Law Book; Rel.: December 2007) at para. 15.80:

15.80 Applications for judicial review brought prior to the release of a final decision have frequently been rejected by the courts on the ground of prematurity. A combination of factors provides the basis for such a result. First, judges are reluctant to delay the proceedings of labour relations tribunals by entertaining (or encouraging) judicial review applications concerning interim decisions. Second, the court's time may be used more efficiently if all possible grounds for judicial review are dealt with in one proceeding and hearing. Third, the application may become moot or hypothetical, depending on the tribunal's disposition of the case. Fourth, on occasion, technical considerations arising under the particular jurisdiction's labour relations statute or rules of procedure justify rejection of a judicial review application for prematurity.

[64] A similar caution was expressed in *Saskatchewan Union of Nurses v Sherbrooke Community Centre* (1996), 144 Sask R 15 (CA) [*SUN*], albeit in the context of a discipline hearing:

[3] In general we agree with the principles set out in *University of Toronto v. Canadian Union of Education Workers, Local 2*, (1988) 28 O.A.C. 295 which was confirmed in *Placer Dome Inc. Dona Lake Mine v. United Steelworkers of America, Local 853 et al.*, (1994) 69 O.A.C. 388, that courts should discourage the interruption of labour relations matters, in particular discipline hearings by declining to hear judicial review applications of interim decisions. The overriding principle is that the matters should be heard with as little delay as possible. This case is proof positive the fragmentation of proceedings is a sure recipe for delay and potentially for the denial or defeat of the rights of the parties. Reviewing courts should be slow to accede to requests to review interim decisions of administrative tribunals.

[65] While the decision in *SUN* refers to an interlocutory decision on a procedural issue, there is no reason the restraint principle should not also embrace circumstances where the parties had agreed to bifurcate the liability and remedy phases in a labour matter. SaskPower has cited no authority to suggest otherwise.

[66] The general principle of restraint in labour arbitration matters was also underscored in *University of Toronto v Canadian Union of Education Workers, Local 2* (1988), 52 DLR (4th) 128 (WL) (Ont Sup Ct (Div)) at para 48 [*Education Workers*], where the Ontario Divisional Court adopted the following passage from *Journal Publishing Company of Ottawa v Ottawa Newspaper Guild, Local 102*, 1977 CarswellOnt 2842 (WL) (Ont CA) at para 4: “In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied” (at para 48).

#### **d. No agreement to proceed with judicial review**

[67] Finally, SaskPower argues that the parties had agreed to proceed with judicial review at the conclusion of the liability phase of the arbitration. Not only does the Union dispute that suggestion but I find no support for it in the evidence.

### **3. Conclusion on finality**

[68] I would not give effect to this ground of appeal. The Chambers judge understood SaskPower’s argument and, contrary to its position, determined that, for purposes of the application of the prematurity doctrine, the *Award Decision* was not final as the arbitration had not

concluded. Neither did he fail to appreciate the law with respect to the operation of the prematurity principle in the face of bifurcated proceedings, including where parties had agreed to bifurcate proceedings between liability and remedy. The question to be addressed was whether there was an exceptional reason to proceed with a judicial review. He concluded no such circumstances existed here.

### C. Weighing of the relevant factors

[69] In the alternative, SaskPower submits the Chambers judge erred in not concluding that the situation presented an exceptional circumstance that warranted judicial review of the *Award Decision* proceeding prior to the conclusion of the arbitration. It says if the Chambers judge had considered the relevant factors, or placed greater emphasis on others, it would have tipped the scales in favour of allowing its application to proceed.

[70] The standard of review looms large in my assessment of this ground of appeal. The Chambers judge was called upon to make a discretionary decision. As I have previously discussed, while decisions of that nature are entitled to a measure of deference on appeal, an appellate court may intervene where it finds the judge misdirected themselves on the applicable law. No such error is alleged here. The argument, rather, pertains to how the Chambers judge assessed the factors that bore on his determination and how he applied the law to the facts. This is a question of mixed fact and law that engages appellate review on the palpable and overriding error standard. Coming at it a different way, this standard does not allow an appellate court to exercise discretion afresh and “substitute its own decision for that of the judge merely because it would have exercised the discretion differently” (*MacInnis* at para 39).

[71] While the Chambers judge understood that he could exercise his discretion in favour of allowing SaskPower’s judicial review application to proceed, he ultimately declined to do so for the reasons expressed in his decision and “the other arguments presented by the parties” (*Strike Decision* at para 21). Factors most relevant to the Chambers judge were these:

- (a) The length of time it took to resolve the merits side of the 2016 grievance. As the Chambers judge properly noted, delay serves no one’s interests and the matter had been outstanding for seven years by the time the *Award Decision* was rendered.

- (b) SaskPower was not precluded from having its day in court, which meant that “[u]pon receipt of [a decision with respect to damages], either party may or may not seek judicial review of either the liability decision or the damages decision or both” (*Strike Decision* at para 17).
- (c) The need for the parties to respect the grievance arbitration process, which is intended to be faster and less costly than court proceedings.
- (d) The very real prospect that the arbitrator would retire before the matter reaches its final conclusion: “The point made by [the Union] that delay resulting from judicial review might result in the loss of Arbitrator Hood, should he retire, *is significant*. The parties seemed to agree that Arbitrator Hood, who was called to the Bar in 1974, has indicated he may be retiring before long. While another arbitrator could be selected, the new arbitrator would not have the same background and knowledge of the case” (emphasis added, at para 19).

[72] SaskPower argues the Chambers judge failed to turn his mind to the most applicable factors: waste of time and money and delay.

[73] SaskPower’s argument on waste is tied to the proposition that it was more likely than not that it would prevail on judicial review, given the strong case it says it has for quashing the *Award Decision*. It follows, says SaskPower, that a decision on remedy logically becomes a moot issue, which, in turn, means that both time and resources would be squandered on having the quantum issue adjudicated first.

[74] While the Chambers judge did not use the word *waste* and did not dig deeply into this issue, paragraph 16 of his reasons demonstrates that he was alert to SaskPower’s argument:

[16] If judicial review is allowed to proceed, there are two possible outcomes. If the Arbitrator is found to have decided without jurisdiction or if his decision is found to be unreasonable, then the liability Decision may be quashed. In that case, the arbitration would not proceed to consider the quantum of damages.

I note, as well, that SaskPower’s position is premised on the bald assertion that its case has obvious merit. Not only is this little more than a one-sided, optimistic view of its prospect for success, there was no ready way for the Chambers judge – or, for that matter, this Court – to assess it.

[75] SaskPower also points to how a 24-month delay in receiving the arbitrator's decision strongly favoured judicial review proceeding, much like it did in the *Lethbridge* decision. As discussed above, I acknowledge that delay can sometimes play a prominent role in determining whether prematurity should bar judicial review. However, like all decisions where this discretionary bar is raised, the exercise of discretion follows from the reviewing judge's assessment of whether the facts and context of the case at hand satisfy the governing criteria in a way that allows the judge to permit the application for judicial review to proceed. It will be recalled that *Lethbridge*, for instance, was about whether a probationary constable had been discriminated against and unfairly terminated at the end of his probationary period. While delay was a factor, the result of that question and the need to resolve the constable's employment status more logically drove out the reviewing judge's decision.

[76] In any event, the Chambers judge was alive to the significant two-year delay that took place between the time of the arbitration hearing and when the arbitrator rendered his decision. However, he was not satisfied that fact alone tipped the balance in SaskPower's favour. To the contrary, he was persuaded by the Union's argument that it was more efficient to use the same arbitrator on the remedy portion of the arbitration, which was even more pressing due to the fact the arbitrator was edging toward retirement. He saw this as a significant concern. Second, although the Chambers judge did not allude to the affidavit of Trent McClement (the Union president), he can be taken to have understood from it that the time taken up with judicial review, and a possible appeal from that decision, would be harmful to its members and would impair the Union's ability to call evidence due to the passage of time. In short, the Chambers judge had to weigh the prospect of even further delay if SaskPower did not prevail on judicial review. That is precisely what he did.

[77] SaskPower also asserts in its written argument that the Chambers judge failed to appreciate the benefits of bifurcation and how it "implies an agreement by the parties that no inefficiency will result if remedy is decided without resort to any pre-existing knowledge of the interpretation and liability issue" (appellant factum at para 50). The Chambers judge flatly rejected SaskPower's argument of an implied agreement to have judicial review proceed immediately following the liability ruling. Plainly stated, there is no evidence to support this argument. Other than suggesting that the Chambers judge should have found otherwise, SaskPower does not point to an error of law or palpable and overriding error of fact or mixed fact and law in deciding that point as he did.

[78] Finally, SaskPower says there was no evidence that the arbitrator would retire, apart from the general knowledge of his year of call to the bar. SaskPower's argument cannot be sustained. Nothing precluded the Chambers judge from drawing this inference based on the arbitrator's 1974 call to the bar. Further, as the Chambers judge appropriately noted in his reasons, the parties seemed to agree that the arbitrator may retire soon. SaskPower does not take issue with having made that submission. Once again, I see no palpable or overriding error.

[79] Pulling this all together, the Chambers judge's assessment of factors relevant to the question of whether there were exceptional circumstances justifying judicial review proceeding before the conclusion of the arbitral process involves the exercise of discretion. The specific error alleged under this ground of appeal is one of mixed fact and law, which is assessed on the palpable and overriding error standard of review. I see no such error, and, accordingly, there is no basis for appellate intervention.

#### **D. The doctrine of comity**

[80] In its final argument, SaskPower asserts the Chambers judge erred in law when he declined to follow *U of S 2014* and *Sabo* and thereby failed to adhere to the doctrine of comity.

[81] Judges of coordinate jurisdiction observe the principle of comity, barring exceptional circumstances. The Supreme Court extensively reviewed this doctrine in *R v Sullivan*, 2022 SCC 19, [2022] 1 SCR 460, and provided the following synopsis:

[86] To summarize, a court is required by the principles of judicial comity and horizontal *stare decisis* to follow a binding prior decision of the same court in the province. A decision may not be binding if it is distinguishable on its facts or the court has no practical way of knowing it existed. If it is binding, a trial court may only depart if one or more of the *Spruce Mills* [[1954] 4 DLR 590] exceptions apply.

[82] Underpinning this doctrine is the assumption that there can be only one correct answer to a question of law. The Federal Court of Appeal made this point in *Apotex Inc. v Allergan Inc.*, 2012 FCA 308, 440 NR 269, leave to appeal to SCC refused, 458 NR 390 (note), where it wrote as follows:

[44] As a manifestation of the principle of *stare decisis*, the principle of judicial comity only applies to determinations of law. It has no application to factual findings. As was stated by the Ontario Court of Appeal in *Delta Acceptance Corporation Ltd. v. Redman*, [1966] 2 O.R. 37, paragraph 5 at page 785 (C.A.):

The only thing in a [j]udge's decision binding as an authority upon a subsequent [j]udge is the principle upon which the case was decided.

[83] I would not give effect to SaskPower's argument about the Chambers judge's purported failure to adhere to the principle of comity. As I discussed above, *U of S 2014* and *Sabo* were decided on their own facts and are thus both distinguishable from the matter at hand. In any event, those decisions do not stand for the proposition that bifurcation of proceedings into two discrete phases in a way that creates a natural break is the controlling factor when determining whether the prematurity bar to judicial review applies, let alone that that proposition is an ironclad principle of law that the Chambers judge was bound to follow.

## VII. CONCLUSION

[84] Determining whether a court should intervene before an administrative process has run its course involves the exercise of judicial discretion. As pointed out by the Supreme Court in *Halifax*, courts have traditionally shown restraint when prematurely asked to review an ongoing administrative process, and, as expressed in *Wal-Mart*, judicial intervention in those occasions should be undertaken only “in the most exceptional of circumstances” (at para 72, quoting *Greater Moncton International Airport Authority v Public Service Alliance of Canada*, 2008 FCA 68 at para 1). This is a high threshold to meet. It is both fact and context specific.

[85] I see no basis to conclude that the Chambers judge operated from a misunderstanding of the law with respect to the application of the prematurity bar to judicial review in the face of bifurcated proceedings or the parties' agreement to bifurcate them. Bifurcation was not, on its own, dispositive of the issue. The question he was required to address was whether there was an exceptional reason or circumstance that called for judicial review to proceed before the arbitration was complete. I see no palpable and overriding error in how he assessed the relevant factors.

[86] Accordingly, SaskPower's appeal must be dismissed.

