
Court of Appeal for Saskatchewan
Docket: CACV4335

Citation: *Government of Saskatchewan v Banerjee*, 2025 SKCA 23
Date: 2025-02-20

Between:

The Government of the Province of Saskatchewan

Appellant
(Applicant/Defendant)

And

Dianne Banerjee

Respondent
(Respondent/Plaintiff)

Before: Leurer C.J.S., Caldwell and Kilback JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Neal W. Caldwell
In concurrence: The Honourable Chief Justice Robert W. Leurer
The Honourable Justice Keith D. Kilback

On appeal from: 2024 SKKB 19, Regina
Appeal heard: November 12, 2024

Counsel: Jason Clayards for the Appellant
James Ludwar for the Respondent

Caldwell J.A.

I. OVERVIEW

[1] In this appeal, the Public Employee Benefits Agency [PEBA], styled in this matter as “The Government of the Province of Saskatchewan”, seeks to overturn the decision of a Court of King’s Bench judge which ruled that Dianne Banerjee, who had commenced a civil claim for wrongful denial of disability income benefits, was not required to seek judicial review of the decisions denying her those benefits (*Banerjee v Saskatchewan*, 2024 SKKB 19 [Judgment]).

[2] PEBA is a branch of the Ministry of Finance established under *The Financial Administration Act, 1993*, SS 1993, c F-13.4. The decisions denying benefits in this case were made by a ministerial advisory committee called the Disability Income Plan Advisory Council [DIP Council] established by the Minister of Finance pursuant to s. 15 of *The Executive Government Administration Act*, SS 2014, c E-13.1.

[3] The disability income plan at issue is said, under an agreed statement of facts [Agreed Facts], to be “a self-insured, multiple-employer, plan operated by PEBA” [DIP]. The DIP is organised pursuant to a plan document dated December 9, 2021, prepared by PEBA entitled *Public Employees Disability Income Plan for Certain Public Employees in the Province of Saskatchewan* [Plan Document]. The DIP is funded by the government of Saskatchewan through the general revenue fund. The day-to-day administration of the DIP under the Plan Document is carried out by The Canada Life Assurance Company [Canada Life] pursuant to an agreement between it and PEBA. In the Agreed Facts, the DIP Council is said to have a “governance function” with respect to the DIP and to sit “as an appellate body of decisions of the plan administrator”, i.e., Canada Life. In its factum, Saskatchewan says that the DIP Council’s “extensive powers on appeal are set out in the [Plan Document]”.

[4] Ms. Banerjee is a member of Unifor Local 1-S [Unifor] and an employee of Saskatchewan Telecommunications [SaskTel]. In 2014, Ms. Banerjee applied for and received 20 months of sick leave benefits under the DIP [own-occupation benefits]. Benefits under the DIP were made available to her through the collective bargaining agreement between SaskTel and Unifor [CBA]. The Plan Document requires employees to establish that they are unable to work at any “reasonable

occupation” to receive income benefits [total-disability benefits] after their own-occupation benefits have expired.

[5] In its capacity as administrator of the DIP, on March 14, 2016, Canada Life determined that Ms. Banerjee had not established an entitlement to total-disability benefits [Denial]. Ms. Banerjee twice sought to have the Denial reversed by exercising an avenue of “appeal” made available to her under Article 10 of the Plan Document, which is entitled “Dispute Resolution”. The dispute resolution process entails an appeal to the DIP Council:

10.2 Appeal to DIP Council

A Participating Employee who disputes the approval or denial of a claim for Disability Benefits or any aspect of such a claim may appeal in writing to the DIP Council within 60 days from the date the Participating Employee received the decision from the Administrator.

10.3 A Participating Employee who appeals to the DIP Council shall be entitled to make such written submissions and provide such written information or argument to the DIP Council as they see fit.

10.4 The DIP Council shall consider the written appeal submitted by the Participating Employee, all existing information including medical evidence and consider any additional medical information submitted by the Participating Employee. In considering the appeal, the DIP Council may accept any evidence that it considers appropriate, fix its own procedures and processes and is not bound by the rules of law concerning evidence.

[6] On two occasions, the last being on June 16, 2016, the DIP Council rejected appeals from Canada Life’s denial of Ms. Banerjee’s total-disability benefits [Council Denials]. The dismissal of Ms. Banerjee’s appeals left her without income replacement benefits after April 1, 2016. Ms. Banerjee did not seek judicial review of the Denial or the Council Denials. The parties agree and told this Court that it has long been the practice for employees who have been denied DIP benefits to seek redress through a civil action.¹ Indeed, a central premise of PEBA’s arguments in this Court is that this long-standing practice is a product of legal error that this Court should remedy.

[7] During the course of the civil proceedings, PEBA asserted that Ms. Banerjee should not have commenced a civil action but rather should have had Unifor pursue redress through the grievance process under the CBA. That application was adjourned and PEBA never returned to it.

¹ See also the comments of Arbitrator Ish in *SaskTel v Unifor, Local 1-S (Dianne Banerjee)*, 2016 CanLII 95929 (Sask LA) at paras 7 and 29, to which the Chambers judge referred (*Judgment* at paras 22, 23 and 84).

However, in 2023, PEBA revisited the issue of jurisdiction, applying pursuant to Rule 7-1 of *The King's Bench Rules* seeking answers to two questions:

- (a) Are decisions of DIP Council properly challenged by way of judicial review?
- (b) If not, are decisions made by DIP Council or PEBA regarding entitlement to benefits arising out of the DIP Plan properly resolved through litigation or arbitration conducted in accordance with the relevant CBA?

[8] In the *Judgment*, the Chambers judge denied PEBA's application, ruling that "[n]either judicial review nor arbitration is the appropriate forum for resolution of Ms. Banerjee's claim for long-term disability benefits. Her claim was appropriately initiated by statement of claim" (at para 94). He also ordered PEBA to pay \$5,000 in costs to Ms. Banerjee as well as \$2,500 in costs to each of SaskTel and Unifor, who had intervened in the matter. In this appeal, PEBA only challenges the ruling that an application for judicial review is not the correct way for Ms. Banerjee to advance her claim for total-disability benefits. However, PEBA also seeks to set aside the award of costs to the intervenors.

[9] I would dismiss PEBA's appeal chiefly because the decisions of the DIP Council regarding an employee's entitlement to income-replacement benefits under the DIP do not have the characteristics of a government administrative or adjudicative decision that would be subject to judicial review. The Council Denials themselves were not subject to judicial review even before the Lieutenant Governor in Council and PEBA transferred PEBA's administrative functions with respect to the DIP to The Public Pension Benefits Administration Corporation (also known as *Plannera Pensions and Benefits* [Plannera]). Plannera is a special-Act corporation that, under its incorporating statute, "is not an agent of the Crown" (*The Public Pension and Benefits Administration Corporation Act*, SS 2023, c 39, s 3(2) [PPBACA]).

[10] In short, I would not interfere with the Chambers judge's conclusion that Ms. Banerjee's claims were properly brought before the Court of King's Bench by statement of claim and not by an originating application seeking judicial review. I would also not interfere with his awards of costs to SaskTel and Unifor. I would dismiss the appeal with \$15,000 in costs payable by PEBA to Ms. Banerjee.

II. ISSUES

[11] PEBA's appeal is taken upon the following grounds:

(a) The Chambers Judge erred in fact, law and mixed fact and law when deciding whether judicial review was the appropriate venue to challenge the decisions of the Disability Income Plan Advisory Council (the "DIP Council") and/or the Public Employees Benefit Agency ("PEBA"). Specifically, the Chambers Judge erred in finding that:

- (i) PEBA did not have the attributes of the types of administrative tribunals established by legislation to make adjudicative decisions;
- (ii) DIP Council was not an administrative decision maker;
- (iii) the power afforded to PEBA pursuant to *The Financial Administration Act* and *The Legislation Act* did not include the power to determine benefit entitlements arising from the Disability Insurance Plan (the "Plan");
- (iv) DIP Council's advisory role in accepting and rejecting claims for DIP benefits was not associated with the administration or management of the DIP fund or the DIP Plan;
- (v) the denial of the Plaintiffs claim to DIP Plan benefits did not raise a matter of concern respecting a public law matter; and
- (vi) despite recognizing that the fund from which benefits are paid is established by *The Financial Administration Act*, he failed to address that the fund is supplemented by the general revenue fund which "is available for appropriation for the public services of Saskatchewan", and thus is of a significant public character.

(b) The Chambers Judge erred in fact and law in deciding that the DIP Plan permitted the Plaintiff to commence an action by Statement of Claim to challenge the decision of PEBA and/or DIP Council. Specifically, the Chambers Judge erred:

- (i) by relying on statements made by Plaintiffs counsel not in evidence in deciding that the word "action" in Article 8.4 of the DIP Plan meant an "action" commenced by Statement of Claim;
- (ii) by adopting an overly broad interpretation of Article 2.1(s) of the DIP Plan and finding that its application would render the express terms of the DIP Plan meaningless;
- (iii) by failing to interpret the DIP Plan as a whole, instead focusing solely on the word "action"; and
- (iv) by determining that the Plaintiff had a private right of action "against a uniquely established fund" established by *The Financial Administration Act* without identifying any authority for such an action to be brought.

III. ANALYSIS

[12] This appeal is fully addressed under the first ground of appeal (ground (a) above).

[13] It is well-understood that a provincial administrative body may be authorised to exercise decision-making powers in private or public ways, or both, and that the power to do so is always derived, whether expressly or by implication, from a statute or regulation or from the execution of a power conferred by or pursuant to the authority of an Act. Nonetheless, even though such a body may be imbued with state authority, the exercise of its powers may not be subject to the public law remedy of judicial review. This is the case whenever the body's power may be characterised as a private power as opposed to a public power. Where a government body exercises a private power, a party aggrieved by that decision has recourse under private law through a civil action in the Court of King's Bench not under public law through an originating application seeking judicial review of the decision (e.g., see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]). Although *Dunsmuir* is well-known for other reasons, the case involved a provincial government that dismissed an employee it had hired under a contract that was subject to the common law of contract. When the employee sought judicial review of that decision on procedural fairness grounds, the Supreme Court held that the matter was private in character and, therefore, the decision-maker was not subject to the public law duty of procedural fairness.

[14] This Court recently applied the law in this regard in *Alie-Kirkpatrick v Saskatoon (City)*, 2019 SKCA 92, [2020] 3 WWR 629 [*Alie-Kirkpatrick*], where Tholl J.A. wrote that the Court of King's Bench "does not have the jurisdiction to review every decision made by a decision-maker that affects a member of the public" (at para 39). Citing *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 14, 421 DLR (4th) 381 [*Highwood*], and *J.W. v Canada (Attorney General)*, 2019 SCC 20 at para 101, 431 DLR (4th) 579 (per Côté J.), as well as appellate and superior court decisions, Tholl J.A. identified two general principles for determining whether a decision is subject to judicial review, namely, whether there has been "an exercise of state authority" and whether that exercise is "of a sufficiently public character" (*Alie-Kirkpatrick* at para 39).

[15] The Chambers judge in this case, because he had interpreted the text of the Plan Document as providing that an "action" was the appropriate venue for Ms. Banerjee to advance her claim following the Council Denials, did not conduct a detailed analysis of whether PEBA or the DIP Council had exercised state authority of a sufficiently public character for their decisions to be

subject to judicial review. He acknowledged the applicable law, citing *Highwood* and *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605 [*Air Canada*], and then wrote:

[75] Aside from this conclusion [i.e., that a civil action was the appropriate venue], PEBA does not have the attributes of the types of administrative tribunals specifically established by legislation to make definitive adjudicative decisions. These types of tribunals are often given precise statutory powers to investigate, hold formal hearings and impose penalties. The enabling statute may invite the court's oversight by including a right of appeal of the tribunal's decision or, on the other hand, attempt to keep court's oversight at bay by including a privative clause. The DIP Council has few of these attributes. *The Financial Administration Act* gives to PEBA the power of "establishing, operating, administering or managing" the PEBA fund. Those powers fall considerably short of quasi-judicial powers one finds allocated to an administrative tribunal.

[76] Notably too, s. 15 of *The Executive Government Administration Act*, SS 2014, c E-13.1 allows PEBA to create the DIP Council as an "advisory committee for a specific period and for a specific purpose." I agree with Ms. Banerjee's assertion that while the DIP Council may provide an advisory role in accepting or rejecting claims, these are roles associated with administration and management of the PEBA fund. Nothing in either enactments states that PEBA or its DIP Council have any authority to preside as a final adjudicator in interpreting the contractual benefits and obligations contained in the DIP Plan. Even the name of the governing legislation that created PEBA – *The Financial Administration Act* – speaks to financial matters that arise from the administration of a fund, but not to adjudicative, quasi-judicial matters.

[77] Nor do I see anything in the DIP Council's denial of Ms. Banerjee's claim as raising a matter of state concerns respecting a public law matter, one of the hallmarks of judicial review cited by Saskatchewan. Legality of state action is not engaged in Ms. Banerjee's claim. Ms. Banerjee's quest for long-term disability benefits engages the interpretation of her private rights under a unique insurance fund.

[78] *Highwood* speaks to the difference between Ms. Banerjee's situation and situations that might engage judicial review. The court wrote:

[14] ... Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature – such as renting premises and hiring staff – and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 at para 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament," but is rather exercising a private power....

[79] While I accept that classifying state authority as "private" or "public" is a matter of degree, not necessarily of kind, I find that Ms. Banerjee's entitlement or disentitlement to long-term disability leans to a private, not a public, matter.

[80] Although not cited by counsel, I find that the decision in *Re Steve Dart Co. and D. J. Duer & Co.*, [1974] 2 FC 215 [*Dart*] gives applicable direction to the issue at hand: whether the DIP Council is a type of administrative body capable of quasi-judicial decisions, which, in turn would make such decisions subject to judicial review. In *Dart*, the Agriculture Board of Arbitration was created pursuant to regulations under a federal Act. After the Agriculture Board of Arbitration rendered its decision, the petitioner applied

for a writ of prohibition, arguing that the *Produce Licensing Regulations* [Regulations] issued pursuant to the *Canada Agricultural Products Standards Act*, RSC 1970, c A-8 [Act] could not create an administrative tribunal as the Board purported to be. Consequently, the petitioner argued that the entirety of the Board's findings was ultra vires of the Act. Although the court found that the Act allowed for administrative personnel to be appointed as "persons necessary for the administration and enforcement of the Act," – much like s. 15 of *The Executive Government Administration Act* allows appointment of a DIP Council to act as an advisory committee for a specific purpose – the court in *Dart* found that such statutory authority did not contemplate that a *Regulation* could establish a legitimate administrative board.

[81] In *Dart*, the *Regulations* also purported to set out the Board's trial and appeal procedures. The court found no statutory authority to set up the procedures that the Board had adopted. The court wrote at 222:

There is no statutory authority whatsoever for the setting up of any such system of trial and appeal tribunals or for determining the issues which the above *Regulations* purport to have determined. The provisions of section 8 of the *Act*, which I have quoted above, do not come anywhere near to providing any such authority even by remote implication. ...

...

What was attempted by the Department [Department of Agriculture], in effect, was to create a tribunal or court by means of order in council. Under section 101 of the *British North America Act* [SS 92, 101], the power to create courts rests strictly with Parliament. It would be a sorry day indeed if tribunals with jurisdiction to determine the issues between citizens could be set up by mere order in council.

[82] As a consequence of the decision in *Dart*, new legislative provisions were enacted to create a legitimate tribunal to adjudicate the matters that the previous Board had attempted to do pursuant to *Regulations*. Similarly, I find that Saskatchewan, like the Board in *Dart*, is attempting to turn the DIP Council into a statutorily authorized administrative tribunal with the consequence that persons aggrieved of the DIP Council's decision must seek judicial review. Like the court in *Dart*, I find no express or implied power in *The Executive Government Administration Act* that makes the DIP Council an administrative tribunal whose decisions are subject to judicial review.

[83] Notably, administrative tribunals are usually constituted with a view to ensure that expertise resides with members of the tribunal. The merits of Ms. Banerjee's claim are largely medical in nature. Indeed, she had engaged medical experts to provide evidence at trial. The members of the DIP Council contain no one with medical expertise.

[16] Justice Tholl observed in *Alie-Kirkpatrick* that there is conflicting jurisprudence on the standard of appellate review that applies in an appeal from a Court of King's Bench Chambers judge's determination about whether a matter is subject to judicial review (at paras 43–44). I see no reason to resolve this issue because, for the following reasons, I am not persuaded that the Chambers judge's decision is incorrect or results from a palpable and overriding error of mixed fact and law.

A. An exercise of state authority

[17] There is no dispute about the fact that PEBA is a branch of the Ministry of Finance that exercises state authority pursuant to *The Financial Administration Act, 1993* and that the DIP Council is an advisory committee established pursuant to s. 15 of *The Executive Government Administration Act*. Statements to this general effect are contained in the Agreed Facts.

[18] In PEBA's case, it is continued and imbued with state authority under Part IX – Public Employees Benefits Agency – of *The Financial Administration Act, 1993*, which states:

Public Employees Benefits Agency continued

63 The branch of the ministry over which the minister presides called the Public Employees Benefits Agency is continued.

Duties of agency

64(1) Under the direction of the minister, the Public Employees Benefits Agency is responsible for:

- (a) establishing, operating, administering or managing any superannuation plan or benefits program that is designated by the Lieutenant Governor in Council;
- (b) creating and maintaining any records, data and other documents that, in the opinion of the minister, may be required for the operation and administration of a benefits program or a superannuation plan;
- (c) acting as an agent of a board that is responsible for administering a benefits program or a superannuation plan;
- (d) providing administrative, managerial or other services pursuant to a contract entered into by the minister with an employer or administrator with respect to a benefits program or superannuation program; and
- (e) performing any other duties with respect to a benefits program or superannuation plan that the minister considers necessary.

[19] As noted, the DIP Council is said to have been established pursuant to *The Executive Government Administration Act*, which governs the administration of the executive government in Saskatchewan. That statute outlines the structure and functions of executive council, which is principally comprised of the Premier and cabinet ministers. The statute details, among other matters, the establishment and operation of government ministries and the roles and responsibilities of those individuals who are appointed as ministers of the government. Within this statutory context, a minister may appoint an “advisory committee”:

Advisory committees

15 For the purposes of exercising any of the powers or performing any of the duties or functions conferred or imposed on the minister by or pursuant to this Act or any other law,

a minister may, subject to the approval of the Lieutenant Governor in Council, appoint one or more advisory committees for a specific period and for a specific purpose.

[20] While the *facts* agreed upon by parties, regardless of their nature or content, do not and cannot relieve a court of its obligation to correctly interpret and apply the law, PEBA points out it is an Agreed Fact that the DIP Council “is also established as an appellate body to hear appeals by Participating Employees with respect to disability claims”. However, PEBA has not identified the statute or regulation which grants the DIP Council that authority. Rather, as I understand it, PEBA maintains that the DIP Council obtained its appellate “authority” from a combination of the Plan Document, which cannot be characterised as a regulation, order, rule, bylaw, resolution or other instrument “enacted in the execution of a power conferred by or pursuant to the authority of an Act” (see the definition of *statutory instrument* under s. 1-2 of *The Legislation Act*, SS 2019, c L-10.2), *The Executive Government Administration Act* and Order in Council 513/2020 [OC 513/2020]:

Title: Appointment of the Government of Saskatchewan Disability Income Plan Advisory Council (January 1, 2021 to December 31, 2025)

Minister: Minister of Finance

Summary: Orders that the Minister of Finance is authorized to appoint an advisory committee called The Government of Saskatchewan Disability Income Plan Advisory Council, for the purpose of monitoring the administration of The Government of Saskatchewan Disability Income Plan, providing advice and recommendations to the Minister of Finance regarding the design and operation of The Government of Saskatchewan Disability Income Plan, to encourage the rehabilitation of beneficiary employees in order that they may return to work as soon as possible, and to resolve disputes and ensure benefits are paid in accordance with The Government of Saskatchewan Disability Income Plan document, for a term of January 1, 2021 to December 31, 2025.

See: The Executive Government Administration Act, section 15

The Financial Administration Act, 1993, clause 6(c) and section 64(2)

Date Signed: November 24, 2020.

[21] On this basis, PEBA submits that the Chambers judge erred when he concluded that there was “no express or implied power in *The Executive Government Administration Act* that makes the DIP Council an administrative tribunal whose decisions are subject to judicial review” (at para 82).

[22] When interpreting the statutes in question in this case, the Chambers judge relied on *Re Steve Dart Co. and D.J. Duer & Co.*, 1974 CanLII 2494 (FC), [1974] 2 FC 215 [*Dart*], as support for the proposition that adjudicative or quasi-judicial authority could not be conferred on

an advisory committee through an exercise of the power under s. 15 of *The Executive Government Administration Act*. The putative adjudicative tribunal in *Dart* had been created under a regulation that also delegated the power to appoint the tribunal's membership to two non-governmental agencies and a bureaucrat. In the *Judgment*, the Chambers judge observed that s. 15 of *The Executive Government Administration Act* allows for the creation of committees to provide advice to ministers for “the purposes of exercising any of the powers or performing any of the duties or functions conferred or imposed on the minister by or pursuant to this Act or any other law”, and he found that that was similar to the federal statute at issue in *Dart*, which allowed for the appointment of inspectors, graders and “other persons necessary for the administration and enforcement of the Act”. This parallel in the legislation was important to the Chambers judge because, among other holdings, Addy J. had held that the statute in *Dart* did not contain the authority to establish an administrative tribunal by way of a regulation (or to subdelegate the power of appointment). After equating the issue and circumstances before him to those in *Dart* and after quoting Addy J.'s eloquent conclusion that “[i]t would be a sorry day indeed if tribunals with jurisdiction to determine the issues between citizens could be set up by mere order in council” (at 222), the Chambers judge in this matter wrote:

[82] ...Similarly, I find that [PEBA], like the Board in *Dart*, is attempting to turn the DIP Council into a statutorily authorized administrative tribunal with the consequence that persons aggrieved of the DIP Council's decision must seek judicial review. Like the court in *Dart*, I find no express or implied power in *The Executive Government Administration Act* that makes the DIP Council an administrative tribunal whose decisions are subject to judicial review.

[23] I can see no legal error in the Chambers judge's bottom-line interpretation of s. 15 of *The Executive Government Administration Act*.

[24] PEBA submits that the Minister of Finance established the DIP Council through the exercise of the power afforded to ministers under s. 15 of *The Executive Government Administration Act*. That provision allows ministers to set up committees to give advice for the “purpose of exercising any of the powers or performing any of the duties or functions conferred or imposed on the minister by or pursuant to this Act or any other law”. The Legislature did not under either of *The Executive Government Administration Act* or *The Financial Administration Act, 1993* imbue the Minister of Finance with the authority to bestow quasi-judicial powers on the DIP Council, and no other relevant law has been brought to our attention. Moreover, PEBA also

submits that the DIP Council obtains much of its authority under the Plan Document, which is not a statutory instrument within the meaning of *The Legislation Act*. As the Chambers judge well understood, this circumstance is precisely analogous to that which Addy J. addressed in *Dart*.

[25] To explain, assuming without deciding that it falls within the authority of the Legislative branch of government to fully delegate its law-making powers under s. 92(14) of the *Constitution Act, 1867* to a minister of the Executive branch, s. 15 of *The Executive Government Administration Act* cannot be interpreted as a delegation of that power. The provision lacks the language that would be necessary for this Court to infer that the Legislative branch intended to bestow its exclusive law-making powers on the Executive branch. More critically, even if the Executive branch could be said to enjoy a delegation of that power, PEBA does not. If the Legislature had intended to leave it to an administrative tribunal, like PEBA, to ascribe *quasi-judicial powers* to another administrative tribunal, as PEBA argues it has done under the Plan Document, then the Legislature would have presumably set out at least some basic indication of the composition and structure of the adjudicative scheme under an enabling statute (see *Hodge v The Queen* (1883–84), 9 AC 117 at 132–133 (JCPC), and *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 24, [2001] 2 SCR 781; and see Paul Daly, “Administrative Tribunals in Canada: Constitutional Subordinates or Equal Partners?”, 2023 CanLIIDocs 2211 (Groves, Thomson and Weeks eds., *Administrative Tribunals in the Common Law World* (Hart, Oxford: 2024)).

[26] For these reasons, I would not interfere with the Chambers judge’s bottom-line conclusion that there is “no express or implied power in *The Executive Government Administration Act* that makes the DIP Council an administrative tribunal whose decisions are subject to judicial review” (at para 82). There is no error in that conclusion. Fundamentally, this means that the Council Denials were not made in an exercise of state authority, which conclusion fully disposes of this appeal.

B. Not of a sufficient public character

[27] Even if there were questions about whether an advisory committee established under s. 15 of *The Executive Government Administration Act* could be empowered by a minister to exercise state decision-making authority, the Chambers judge did not err when he concluded that the

purported exercise of state authority in this case was *not of a sufficient public character* to be subject to judicial review.

[28] In *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605 [*Air Canada*], Stratas J.A. identified a non-exhaustive list of factors to consider when determining whether a public body has acted in a private way when making a decision for the purpose of deciding whether judicial review of the decision is available. Writing on behalf of this Court in *Alie-Kirkpatrick*, Tholl J.A. adopted the *Air Canada* factors:

[41] Some decisions made by public bodies are private in nature and not subject to judicial review: *Highwood* (at para 14). In *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605 [*Air Canada*], Stratas J.A. stated that when considering “the public–private issue, all of the circumstances must be weighed ... [to determine] whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law” (at para 60). The Federal Court of Appeal then set out a non-exhaustive list of factors to consider when deciding whether an action is of sufficient public character to warrant judicial review. Those factors can be summarized as follows:

- (a) the character of the matter for which review is sought;
- (b) the nature of the decision-maker and its responsibilities;
- (c) the extent to which a decision is founded in and shaped by law as opposed to private discretion;
- (d) the body’s relationship to other statutory schemes or other parts of government;
- (e) the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
- (f) the suitability of public law remedies;
- (g) the existence of a compulsory power; and
- (h) an “exceptional” category of cases where the conduct has attained a serious public dimension.

See also *Setia v Appleby College*, 2013 ONCA 753 at paras 33–34, 370 DLR (4th) 356, [*Quewezance v Federation of Sovereign Indigenous Nations*, 2018 SKQB 313] at para 29, and [*C & D Septic Ltd. v Prince Albert (City)*, 2018 SKQB 185 at paras 17–18, 46 Admin LR (6th) 303].

[29] In my view, consideration of the *Air Canada* factors in the present context leads inexorably to two conclusions: (a) neither PEBA nor the DIP Council have the attributes of an administrative tribunal established to make decisions that are subject to judicial review; and (b) decisions about disputes as to benefits entitlement under the DIP are a matter of private not public law.

1. The character of the matter for which review is sought

[30] In *Air Canada*, Stratas J.A. held that the character of the matter for which review is sought will be indicative of whether it is a private, commercial matter or is of broader importance to members of the general public. Quoting from *Peace Hills Trust Co. v Saulteaux First Nation*, 2005 FC 1364 at para 61, 281 FTR 201, he reiterated that “administrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law” (at para 60).

[31] In its argument, PEBA accepts that a decision about a matter that is private or commercial falls within the realm of private law. That said, it submits that the Council Denials fall directly within its mandate under *The Financial Administration Act, 1993* to administer the DIP and the attribution of dispute resolution authority to the DIP Council under *OC 513/2020* and the Plan Document. Those circumstances do not, however, assist with answering questions regarding the character of Ms. Banerjee’s allegation that she has been wrongfully denied disability benefits owed to her as an employee of SaskTel and as a member of Unifor.

[32] Examples of matters that have been found to be private or commercial in character include retail-space leasing decisions (*DRL Vacations Ltd. v Halifax Port Authority*, 2005 FC 860), debt settlement (*Cairns v Farm Credit Corporation*, 1991 CanLII 13600 (FC)), expulsion from a private school (*Setia v Appleby College*, 2013 ONCA 753), and – importantly – dismissal of a contract employee (*Dunsmuir*). The question of whether an exercise of state authority to deny disability benefits to an employee is public or private in nature has not, however, arisen previously. In general terms, where an insurer has wrongfully denied insurance benefits or has otherwise wronged an insured, the insured’s proper course of action is to seek a civil remedy by filing a statement of claim in the Court of King’s Bench.

[33] Here, the character of Ms. Banerjee’s claim is the denial of disability benefits to which she became entitled under the CBA as an employee of SaskTel and a member of Unifor. Although the Chambers judge concluded that the DIP is not insurance and that the Plan Document is not a contract of insurance, the benefits program certainly operates very much like a private plan of insurance. It has all the essential hallmarks of a contract of insurance, but I do not disagree with the Chambers judge’s observation that the DIP is a unique form of disability income benefit since it was established by and is funded by the provincial government. However, the benefits under the

DIP are part of the package of remuneration that government employees receive for providing services to their employer. The characteristics of the disability benefits do not change simply because they are funded from a public source nor is the nature or character of Ms. Banerjee's dispute with PEBA any different than what might occur between a private sector employee and a private sector disability insurer.

[34] On this basis, the character of the matter for which Ms. Banerjee has brought suit against PEBA suggests that commencing a civil action by issuing a statement of claim was appropriate.

2. The nature of the decision-maker and its responsibilities

[35] This factor involves assessing whether the decision-maker is public in nature, such as a Crown agent or a statutorily established administrative tribunal, and whether it is charged with public duties and responsibilities (*Air Canada* at para 41). The first *Air Canada* factor – character of the matter – resurfaces here because the court asks whether the matter under review is closely related to the decision-maker's statutory responsibilities.

[36] In *Air Canada*, the private nature of the Toronto Port Authority was clear — it had received Letters Patent, one condition of which was that it had to be financially self-sufficient of government, and it was authorised to pursue private purposes and to generate revenue by doing so. In *Alie-Kirkpatrick*, the public nature of the City of Saskatoon — a municipality created under provincial legislation — was clear because it is a public decision-maker with responsibility for collecting tax arrears and was acting in the exercise of that public responsibility.

[37] In this case, PEBA itself is a statutorily created body or entity of some type – it is described in *The Financial Administration Act, 1993*, as a “branch of the ministry over which the minister presides” (s. 63) – which strongly suggests that it is public in nature. Its responsibilities or duties involve the establishment, operation, administration and management of any superannuation plan or benefits program that is designated by the Lieutenant Governor in Council (s. 64(1)(a)), again suggesting a public purpose. It is also charged with performing any duties with respect to a benefits program or superannuation plan that the Minister of Finance considers necessary (s. 64(1)(e)), also suggestive of a public role. The Lieutenant Governor in Council is authorised to, *inter alia*, designate the benefits program and prescribe the employers who may participate in the benefits program (s. 64(2)). The various other responsibilities and duties set forth under s. 64 of

The Financial Administration Act, 1993, also support the conclusion that PEBA is a public decision-maker with public duties and responsibilities. Importantly in this regard, PEBA is required to prepare, and the Minister of Finance must lay before the Legislative Assembly, annual financial statements showing the business of each designated benefits program (ss. 64(11), (12) and (13)).

[38] While PEBA has been empowered by statute as a benefits administrator, it has contracted the administration of the DIP to Canada Life, a commercial insurer. Speaking generally, the administration of an employment or group benefits program is not usually, by its nature, a public responsibility — although some employers self-establish in-house group benefits programs, it is safe to say that most retain the administration services of private or commercial insurers – just as PEBA has done.

[39] Even though PEBA has contracted the carrying out of its responsibilities to a private, commercial insurer, Canada Life, the matter at issue – whether Ms. Banerjee is entitled to disability benefits – clearly falls within PEBA’s sphere of responsibility as a public body established under *The Financial Administration Act, 1993*. This fact points directly to the matter being one of public law, although the outsourcing of PEBA’s statutory responsibilities to a private insurance company detracts somewhat from that conclusion.

[40] Moreover, while PEBA is a public body with the statutory responsibility of administering the DIP, the DIP Council is not, and it made the benefits denial decisions in question. If it is properly described as *authority* – something of which I am not convinced, the DIP Council’s appellate authority is detailed under the Plan Document, which describes the means for public employees to challenge the benefits decisions made by Canada Life through an appeal in writing to the DIP Council.

[41] The members of the DIP Council are appointed by the Minister of Finance. The council was until January 1, 2024, chaired by the Assistant Deputy Minister of Finance and is made up of an equal number of employer and union representatives. While administrative tribunals are typically composed of individuals who have some background, education or expertise in a relevant subject area, there is no requirement that any of the membership of the DIP Council have any experience with or expertise in assessing and adjudicating disputes about disability insurance.

[42] Nonetheless, in terms of its status, I conclude that the DIP Council, *qua* advisory committee established pursuant to s. 15 of *The Executive Government Administration Act*, is a public body. As to its responsibilities, it bears comment that the Minister of Finance appointed the (current) DIP Council and assigned responsibilities to it pursuant to *OC 513/2020*, quoted above. Further, as noted, PEBA – a government body – prepared the Plan Document, which contains the dispute resolution mechanism over which the DIP Council presides.

[43] Constitutionally, the Legislature may delegate decision-making authority to an administrative body, like it has to PEBA under *The Financial Administration Act, 1993*. However, I agree with the Chambers judge’s assessment when he wrote that, “while the DIP Council may provide an advisory role in accepting or rejecting claims, these are roles associated with administration and management of the PEBA fund. Nothing in either [*The Financial Administration Act, 1993* or *The Executive Government Administration Act*] states that PEBA or its DIP Council have any authority to preside as a final adjudicator in interpreting the contractual benefits and obligations contained in the DIP Plan”. The Chambers judge went on to state that, “[e]ven the name of the governing legislation that created PEBA – *The Financial Administration Act, 1993* – speaks to financial matters that arise from the administration of a fund, but not to adjudicative, quasi-judicial matters” (*Judgment* at para 76).

[44] Regardless, in strict terms, the DIP Council is public in nature because the Minister of Finance created it through an Order in Council, however, it is not charged with *public responsibilities*. It is charged with overseeing an employee-disability program and with resolving disputes arising thereunder, matters which are addressed typically under the principles of private law, namely, contract, insurance and employment law.

[45] Where the decision-maker is public in nature (such as a Crown agent or a statutorily recognised administrative body) and it is charged with public responsibilities, the decisions it makes will often be subject to judicial review, particularly where the matter under review is closely related to those responsibilities. While the case here is undoubtedly related to the DIP Council’s responsibilities under *OC 513/2020* and the Plan Document, those responsibilities are, on their face, private by nature. This weighs in favour of a finding that the matter is one involving private law.

3. The extent to which a decision is founded in and shaped by law as opposed to private discretion

[46] As will now be apparent, there is considerable overlap among many of the *Air Canada* factors. Under this third factor, the court examines the extent to which a decision is founded on and shaped by law as opposed to private discretion. What this means is that, if the decision in question was authorised by or emanated from a public law source (i.e., a *statutory instrument*, as defined in *The Legislation Act*), the court will be more apt to conclude that the matter is public in its nature. However, matters that are based on a power to act found outside of a statutory instrument (i.e., a power under a contract or under ownership rights or common law rights) are more likely to be viewed as private in nature and outside of the ambit of judicial review.

[47] In *Dunsmuir*, the fact that the contracting employee was a senior civil servant did not turn a private claim for breach of contract into a public law adjudication. Similarly, in *Alie-Kirkpatrick*, a municipal decision about the terms of sale of a residential property was held to be private in nature because, even though indirectly related to the tax enforcement process, the decision was made within private-sale negotiations for which there were no statutorily imposed requirements. On the other hand, in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 [*Mavi*], a statutorily mandated undertaking to repay monies, which the Supreme Court of Canada called a “valid contract” (at para 2), was found to be a matter of public law because, “while the [debtors’] undertakings here have some contractual aspects, it is the statutory framework that closely governs the rights and obligations of the parties” (at para 50).

[48] Here, but for the fact that it was published by PEBA, the text and context of the Plan Document, as well as the day-to-day administration of the DIP by Canada Life, indicates that the Plan Document is most closely akin to a policy of insurance. In which case, the Council Denials appear to be grounded in and shaped by a private discretion arising under contract. Any issue about the propriety of an exercise of such discretion would typically fall to private law for determination in an action commenced by statement of claim, which would be decided through the application of the principles of contract law in the insurance context. On the other hand, although it is not a statutory instrument, the fact that the Plan Document has its genesis in a statutorily authorised public body is suggestive of the Council Denials having been made through the exercise of a public discretion afforded under law. The fact that PEBA has unilaterally dictated the terms of the Plan

Document is not determinative under this factor because private insurers also do not generally permit insureds to negotiate the terms of disability benefits policies.

[49] More importantly, while the DIP Council ostensibly derives its authority to resolve disputes about disability benefit entitlement through the operation s. 15 of *The Executive Government Administration Act*, the delegation of PEBA's authority under *The Financial Administration Act, 1993*, and through *OC 513/2020*, those statutes and that order in council do not mention appeal procedures or processes or otherwise indicate what the rights and entitlements of individual employees are in that regard. Nothing in the legislation or *OC 513/2020* may be interpreted as transforming a matter that is typically one of contract law and insurance law into a matter of public law.

[50] Moreover, regardless of the forum in which decisions of the DIP Council are reviewed, a private source of law supplies the criteria upon which those decisions would be made (i.e., insurance law). That is to say that the terms of the Plan Document would fall to be construed under the same principles of interpretation as would apply to a private contract of disability insurance. Since there is no direction under legislation or in *OC 513/2020*, the DIP Council would have to decide whether an employee had met, in this instance, the definition of *totally disabled* under the Plan Document in the same way that insurers and courts would make that same decision under private disability income contracts (i.e., by interpreting the benefit conferred under the Plan Document in the factual context at hand).

[51] All of which leads me to conclude that it is the Plan Document, not the statutory framework, that "closely governs the rights and obligations of the parties" (*Mavi* at para 50), and that fact closes the door to judicial review. On the bottom line, the DIP Council's decisions to deny Ms. Banerjee total disability benefits were not founded on or shaped by public law in a way that suggests that those decisions should be subject to judicial review. The only indicia that tend to support the conclusion that the Council Denials are public decisions are the fact that the DIP Council was created by an order in council and that PEBA, a public body, wrote the Plan Document.

4. The decision-maker's relationship to other statutory schemes or other parts of government

[52] The fourth factor to consider is the DIP Council's relationship to other statutory schemes or other parts of government. In its factum under this heading, PEBA states perfunctorily that, "since PEBA and DIP Council are government, these factors suggest a public decision".

[53] For reasons already canvassed in this judgment, it is not enough to merely point out that the DIP Council was established pursuant to s. 15 of *The Executive Government Administration Act* and that it exercises powers delegated to it by the Minister of Finance and PEBA. Its very origin and the regime under which it operates are what sets the DIP Council apart from administrative tribunals established under statutory schemes in other parts of the government. In plain terms, the DIP Council is removed from the normal operations of government.

[54] Adjudicating disputes between employee insureds and PEBA regarding denials by Canada Life of employee disability benefits under the Plan Document can hardly be understood acting as an arm of government or as exercising a power of executive government. Nevertheless, the DIP Council's direct connection to the Minister of Finance is undoubted and, in making the Council Denials, the DIP Council was plainly fulfilling the dispute-resolution function attributed to it by the Minister.

[55] While aspects of this factor suggest that the Council Denials are public, the DIP Council's relationship to government is still more readily understood as that of a private administrator of an insurance benefits program. I cannot conclude that the DIP Council is "woven into the network of government and is exercising a power as part of that network" (*Air Canada* at para 60). I would give this factor a neutral value in the public versus private analysis.

5. The extent to which the decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity

[56] This fifth factor asks about the extent to which the DIP Council is an agent of government or is directed, controlled or significantly influenced by a public entity. The question is quite similar to that which is asked under the fourth factor (see *Alie-Kirkpatrick* at para 55). Indeed, PEBA addressed both factors under the single argument that, and I repeat, "since PEBA and DIP Council are government, these factors suggest a public decision".

[57] Looking to its composition, the DIP Council has four union-appointed members and four employer-appointed members, which suggests that it is removed from government. As noted, it is (or was, see below) chaired by an Assistant Deputy Minister of Finance, which maintains some connection with the government. However, since only its chairperson is appointed by government, this suggests that the Minister of Finance does not exercise much control or influence over the DIP Council or provide it with direction – and that the Minister had no intention that this would be the case. Again, nothing in the relevant legislation or other statutory instruments contradicts the conclusion that the Minister provides no instruction, direction, control or significant influence over the DIP Council. It is relevant that the chairperson of the DIP Council, who is a government official, would presumably chair or guide the meetings at which its decisions are made. There is, nonetheless, no requirement that the DIP Council’s policies, organisational structure or other matters be approved or reviewed by the Minister of Finance or any other government official.

[58] This factor weighs against a finding that the Council Denials are public decisions.

6. The suitability of public law remedies

[59] The suitability of public law remedies is an appreciably influential factor in this case, in my opinion. Under this factor, if the nature of the matter here is such that public law remedies would be useful, then this Court should be more inclined to regard the Council Denials as public in nature (see *Air Canada* at para 60, citing *Dunsmuir* and *Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116, 314 DLR (4th) 340 at paras 51–54).

[60] In terms of private law remedies, on January 6, 2017, Ms. Banerjee issued a statement of claim in the Court of King’s Bench naming “The Government of the Province of Saskatchewan” and “John Doe Corporation” as defendants. In her action, she claimed that PEBA “has refused and/or neglected to pay the long term disability benefits to [her] as required under the terms of the [Plan Document] from and after April 2, 2016 to the present”. She sought a declaration that she is totally disabled, relief from forfeiture of insurance coverage, judgment for general damages in the amount of the denied income benefits, unquantified special damages, unquantified damages for mental distress as well as unquantified aggravated damages.

[61] In this context, PEBA takes the position that the public law remedy of *certiorari* would be most helpful. It suggests that a judicial review application seeking an order of *certiorari* would

assist Ms. Banerjee because it would resolve her dispute much faster than civil litigation since it would not require mediation, document disclosure, questioning, a pre-trial conference, or a trial. PEBA submits as well that the Crown would bear the majority of the cost of a judicial review application.

[62] The fact that Ms. Banerjee's claims against PEBA are far broader than what can be addressed under a writ of *certiorari* is fatal to its position. Monetary awards are generally unavailable under public law (see Guy Régimbald, *Canadian Administrative Law*, 3rd ed (Toronto: LexisNexis, 2021) at 2.2; see also *Hewat v Ontario*, 37 OR (3d) 161 (Ont CA); and *Ontario v Dewar*, 37 OR (3d) 170 (Ont CA)). Awards of punitive and aggravated damages are not public law remedies. While Ms. Banerjee would be owed a duty of procedural fairness if these matters were addressed under public law, the usual remedy for a breach of natural justice is to order the decision-maker to re-make the decision, and there is no certainty that a remittal would be decided differently (see *Dunsmuir* at para 77).

[63] On these facts, I can easily conclude that public law remedies are not suitable for dealing with DIP benefit disputes.

7. The existence of a compulsory power

[64] The existence of a compulsory power over the public at large or over a defined group may be an indicator that the decision is public in nature. The counter to this is a circumstance where the interested parties have submitted consensually to the decision-maker's jurisdiction (see *Chyz v Appraisal Institute of Canada* (1984), 36 Sask R 266 (QB)).

[65] Here, the DIP Council does not exercise any power over the public at large, but the DIP does relate to a defined group. The Chambers judge found that the DIP is an obligatory insurance fund — i.e., all employees of SaskTel are required to participate as a condition of their employment. Ms. Banerjee counters that, while participation in the DIP is not optional, employment with SaskTel is a personal and voluntary decision that is not compelled by law. I would add to this that SaskTel has a contractual obligation under the CBA to participate in the DIP and to pay the premiums associated with it and, therefore, the DIP is subject in some measure to the collective bargaining process. Unifor could, hypothetically, bargain away its members' participation in the DIP. In its relevant parts, the CBA states:

ARTICLE 24 – SICK LEAVE

...

14. ...In the event of a chronic illness, the Company and the Union will have the ability to waive the continuous period required for reinstatement of sick leave benefits. Issues related to the reinstatement of sick leave benefits shall be referred to the joint DIP Committee. The Committee will review each case and decide on the basis of consensus as to the reinstatement of benefits. In the event that consensus cannot be reached, the matter shall be referred to the Bargaining Committee.

...

ARTICLE 25 - LONG TERM DISABILITY INCOME PLAN

1. The parties to this Agreement shall continue in the Disability Income Plan sponsored by the Saskatchewan Government under the conditions set forth in the supplementary booklet covering the details of the Plan, issued to each eligible employee. The premiums for this Plan will be paid for by the Company.

2. Eligible employees (as defined by the above-noted supplementary booklet) must join the Disability Income Plan. Disability benefits begin and Extended Sick Leave ceases seventeen (17) consecutive weeks after an eligible employee becomes disabled. To qualify for benefits, an employee has to be totally or occupationally disabled and under a doctor's supervision.

[66] At root, I conclude that the DIP Council in this context does not exercise a compulsory power over the public at large or a defined group. Its power is more akin to an authority arising consensually under a contract.

8. The “exceptional” category where the conduct has attained a serious public dimension

[67] The last factor describes a judicial discretion to find that, notwithstanding the first seven *Air Canada* factors, a decision has attained such a public dimension that it must be considered a public decision. Justice Stratas explains that where “a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable”. He provides the examples of “where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment” (at para 60).

[68] PEBA submits that, even if this Court were to find that Ms. Banerjee's case is a private matter, the fact that the DIP is funded through the general revenue fund is enough to require that the Court treat the Council Denials as public decisions. This argument was rejected in *Dunsmuir*, where public money used to pay government employees was not enough to convert a private employment matter into a public one (at paras 102–103).

[69] In my view, there is nothing exceptional about Ms. Banerjee’s case that would give it a “serious public dimension” (*Air Canada* at para 60).

C. Conclusion under the *Air Canada* factors

[70] Weighed in the balance, the *Air Canada* factors more strongly favour the conclusion that the Council Denials are private decisions against which relief may be sought in a civil action commenced by statement of claim.

D. A subsequently arising change of circumstances

[71] As may be seen from the foregoing analyses, the nature of PEBA and the DIP Council is an important factor in answering the legal question of whether Ms. Banerjee was required to seek judicial review of the Council Denials. It is notable, in that regard that, in its factum, PEBA advised this Court that:

[22] ...*The Public Pensions and Benefits Administration Corporation Act*, SS 2023, c 39, was passed and [*The Financial Administration Act*, 1993, SS 1993 c F-13.4] was amended, adding section 64(2)(d), to allow PEBA to delegate operation, administration or management of the benefits program to a statutorily-created not-for-profit corporation. Effective January 1, 2024, Plannera started handling those matters delegated by PEBA, although the Government of Saskatchewan ultimately remains liable for the Plan.

[72] More specifically, on January 1, 2024, pursuant to the *PPBACA*, the Legislature established a special-Act corporation called *The Public Pension and Benefits Administration Corporation*, i.e., Plannera:

Corporation established

3(1) The Public Pension and Benefits Administration Corporation is established as a not-for-profit corporation.

(2) The corporation is not an agent of the Crown.

(3) Subject to *The Business Names Registration Act*, the corporation may, with the approval of the members, choose a name or style other than its corporate name under which it carries on or intends to carry on business.

[73] To briefly return to the fifth *Air Canada* factor, which asks about the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity, it is notable that the Legislature enacted a specific provision to preclude the possibility of Plannera being considered “an agent of the Crown” (*PPBACA*, s. 3(2)).

[74] The *PPBACA* also amended s. 94(2) of *The Financial Administration Act, 1993* to enable PEBA to delegate the operation, administration, or management of certain programs to Plannera by adding clause (d), as follows:

(2) The Lieutenant Governor in Council may:

- (a) designate any superannuation plan or benefits program to be established, operated, administered or managed by the Public Employees Benefits Agency;
- (b) prescribe the employer or employers who may participate in the superannuation plan or benefits program designated pursuant to clause (a);
- (c) prescribe the fiscal year for any benefits program designated pursuant to clause (a); and
- (d) designate a superannuation plan or benefits program as a plan or program for which the Public Employees Benefits Agency may delegate the operation, administration or management to the corporation established by *The Public Pension and Benefits Administration Corporation Act*.

(Emphasis added)

[75] Pursuant to the power under s. 94(2) of *The Financial Administration Act, 1993*, on December 14, 2023, the Lieutenant Governor in Council designated the DIP as one of the approximately 30 pension plans and benefits programs for which PEBA “may delegate the operation, administration or management” to Plannera (see OC 627/2023 – *Public Employees Benefits Agency Delegation of Operation, Administration or Management of Superannuation or Benefits Programs to the Public Pension and Benefits Administration Corporation* (Minister of Finance)), repealed and replaced on May 1, 2024, by OC 194/2024 - *Public Employees Benefits Agency Delegation of Operation, Administration or Management of Superannuation or Benefits Programs to the Public Pension and Benefits Administration Corporation Amending Order* (Minister of Finance)).

[76] Under a different order in council made effective January 1, 2024, the Lieutenant Governor in Council transferred all of PEBA’s contracts and assets to Plannera (OC 628/2023 - *Public Employees Benefits Agency Transfer of Contracts and Assets to The Public Pension and Benefits Administration Corporation* (Minister of Finance)).

[77] As a result of these events, Plannera now operates, administers, and manages the DIP, and Plannera is not an agent of the Crown. As such, even if the DIP Council’s decisions could have been considered an exercise of state authority in the past, the regime under which the DIP is now operated, administered and managed is at arm’s length from the Government of Saskatchewan.

IV. COSTS AWARDED TO THE INTERVENORS

[78] As noted, the Chambers judge awarded costs of \$2,500 to each of Unifor and SaskTel as intervenors before the Court of King’s Bench. PEBA challenges those awards arguing that SaskTel and Unifor are not parties but rather “were invited to make submissions with respect to the arbitration question and actively participated in the preparation of materials”. However, that is not the whole story.

[79] When describing in the *Judgment* how Ms. Banerjee’s employer and union came to be involved in this litigation, the Chambers judge set the context for an award of costs in their favour, saying as follows:

[27] Notably, in its statement of defence, Saskatchewan raised no argument that the forum of Ms. Banerjee’s claim was ill-conceived, that she was obliged to seek judicial review of the DIP Council’s decision, that she should have arbitrated the denial of her claim or that *The Legislation Act*, SS 2019, c L-10.2 or *The Insurance Act*, SS 2015, c I-9.11 provided immunity to Saskatchewan against a civil action.

[28] Four years after the entering of its defence, Saskatchewan brought a notice of application filed May 13, 2021 for an order “striking the entirety of the Statement of Claim” because “disputes between Unifor members and their employer, the Government of Saskatchewan, [should be resolved] through a prescribed grievance and arbitration procedure.” For reasons unclear to the court, then counsel for Saskatchewan later advised the Local Registrar that the application could “simply be adjourned or withdrawn.”

[29] Another two years passed. Saskatchewan (then represented by different legal counsel) refined and broadened its earlier application. By notice of application filed April 17, 2023, Saskatchewan sought an order that decisions of the DIP Council should be properly challenged by way of judicial review and if not by judicial review, through arbitration.

[30] By fiat of Justice Klatt on May 4, 2023, Unifor and SaskTel (as parties to the CBA) were granted intervenor status and permitted to make submissions whether arbitration was the appropriate venue for Ms. Banerjee to advance her claim. Both Unifor and SaskTel wished to argue that because the CBA did not provide an insurance plan and only obliged SaskTel to institute an insurance plan, arbitration could not be the mechanism to address Ms. Banerjee’s denied claim.

[80] *The King’s Bench Rules* recognise that a judge’s authority to award costs is a discretionary power (see Rule 545). In *Benson v Benson* (1994), 120 Sask R 17 (CA), Cameron J.A. wrote that “[i]n general, costs are in the discretion of the court with full power to determine *by whom and to what extent they are to be paid*” (at para 88; emphasis added). As to the applicable standard of appellate review, he wrote:

[89] That [i.e., that the exercise of discretion is only limited by the need to act judicially on the facts of the case] combined with the nature of our function in relation to appeals

concerning the exercise of judicial discretion, serves to significantly narrow the scope for appeal. The discretion is vested in the trial judge, not us. And our function, at least at the outset, is one of review only, review for error vitiating the exercise by the judge of that discretion. The obvious aside, vitiating error is to be found either in misapplication of some governing principle or rule or in disregard of some critical fact or other consideration. Either that or it is to be assumed in the case of an order so obviously unjust as to invite intervention. But in the absence of something of that sort we are not to wade in, substituting our discretion for that of the trial judge.

[81] I acknowledge that intervenors are generally not entitled to their costs (*Harper v Harper*, [1980] 1 SCR 2 at 16), but this is not a circumstance where it can be said that SaskTel and Unifor had *voluntarily* decided to intervene in the litigation or that the interventions were not essential to the disposition of the case (see *Iron v Saskatchewan (Minister of the Environment & Public Safety)* (1992), 106 Sask R 247 at para 10 (QB)). While they chose to participate, they did so because PEBA was advancing an interpretation of the CBA and asking for a ruling about its effect that neither of them, as the only parties to that agreement, sought or supported. As noted, PEBA's overall position in this appeal was that this Court should decide that the long-standing practice relating to the procedure for resolving DIP benefit disputes, to which SaskTel and Unifor had adhered, should not continue to be followed. Moreover, if the Chambers judge had ruled that Ms. Banerjee ought to have launched a grievance instead of commencing a civil action, his decision would have directly affected the collective bargain struck between union and employer and would have complicated future collective bargaining negotiations. That is, PEBA put the interpretation of the CBA and the intervenors' relationship at issue in the litigation in a way that easily explains why they decided that they had to intervene in this litigation, and why the judge awarded costs in their favour.

[82] While there may be a general rule against awarding costs to intervenors, I would not wade any further into the Chambers judge's exercise of discretion in these circumstances.

V. CONCLUSION

[83] I would not disturb the conclusions in the *Judgment* that judicial review is not the appropriate forum for resolution of Ms. Banerjee's claim to long-term disability benefits and that her claim "was appropriately initiated by statement of claim" (at para 94). I would also not interfere

