# KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 19**

Date: **2024 02 05**
File No.: QBG-RG-00054-2017
Judicial Centre: Regina

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BETWEEN:

DIANNE BANERJEE

PLAINTIFF

- and -

THE GOVERNMENT OF SASKATCHEWAN and JOHN DOE CORPORATION

DEFENDANTS

- and -

SASKATCHEWAN TELECOMMUNICATIONS

THIRD PARTY DEFENDANTS

- and -

UNIFOR LOCAL 1-S

INTERVENOR

**Counsel:**

| | |
|---|---|
| James W. Ludwar | for the plaintiff |
| Jason Clayards | for the defendant, The Government of Saskatchewan |
| Calen Nixon | for the third party defendant, Saskatchewan Telecommunications |
| Samuel Schonhoffer | for the intervenor, Unifor Local 1-S |

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JUDGMENT — LAYH J.
February 5, 2024

## Contents Paragraphs



### *THE BROAD ISSUES*

[1] The Government of Saskatchewan [Saskatchewan], through a statutorily created agency, the Public Employees Benefit Agency [PEBA], denied Dianne Banerjee long-term disability benefits in April 2016. Even though Ms. Banerjee, an employee of Saskatchewan Telecommunications [SaskTel], commenced an action in

January 2017 against PEBA and Saskatchewan, her claim has not been determined. Indeed, this decision does not deal with the merits of her claim. Instead, notwithstanding the advanced age of her action, this decision deals with a preliminary jurisdictional issue.

[2] In this application, four parties are arguing about under which of three potential adjudicative processes Ms. Banerjee's claim should properly proceed. The four parties are:

(a) Ms. Banjeree;

(b) Saskatchewan;

(c) Ms. Banerjee's employer, SaskTel; and

(d) Ms. Banerjee's union, Unifor Local 1-S [Unifor].

[3] Ms. Banerjee contends that litigation by statement of claim is the appropriate proceeding to advance her respecting the denial of her long-term disability benefits. Saskatchewan defended the action. Later, Saskatchewan's position began to morph and change, first suggesting that arbitration, not litigation, was the appropriate venue. Saskatchewan then altered course and suggested that judicial review was the appropriate venue to challenge the decision that denied Ms. Banerjee's benefits. Finally, as a late-developing position, Saskatchewan now argues that Crown immunity prevents Ms. Banerjee from suing Saskatchewan under a statement of claim and, consequently, judicial review or arbitration must be Ms. Banerjee's appropriate recourse.

[4] Ms. Banerjee's employer, SaskTel, and her union, Unifor, have also weighed in with their positions. They disagree with any suggestion that arbitration under the collective bargaining agreement [CBA] between SaskTel and Unifor is the

appropriate venue to determine Ms. Banerjee's entitlement to long-term disability benefits.



## *FACTUAL BACKGROUND*

### *What is PEBA?*

[5] The parties prepared an agreed statement of facts.

[6] The disability benefits offered to employees of Saskatchewan and its Crown corporations, including SaskTel employees, is apparently unique to Saskatchewan. Instead of using a recognized private insurance provider, Saskatchewan provides a disability benefits fund through PEBA, a legislatively established agency of the Ministry of Finance over which the Minister presides. Saskatchewan's counsel suggests that the genesis of this unique insurance coverage may be a consequence of Saskatchewan's comparatively large number of Crown corporations.

[7] PEBA takes its authority and responsibility from ss. 63-64 of *The Financial Administration Act, 1993*, SS 199, c F-13.4. They states:

> **Public Employees Benefits Agency continued**
>
> **63** The branch of the department 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 superannuation plan that the minister considers necessary.



[8] The "plan" referred to in ss. 64(1)(c), as managed by PEBA, is called the Disability Insurance Plan [DIP Plan]. The specifics of the plan are contained in a document entitled "Public Employees Disability Income Plan for Certain Public Employees in the Province of Saskatchewan". The DIP Plan is a self-insured plan that provides long-term disability benefits to participating employees. The DIP Plan is subject to the polices made by PEBA and is governed by the Disability Income Plan Advisory Council [DIP Council] established pursuant to s. 15 of *The Executive Government Administration Act*, SS 2014, c E-13.1. The Minister of Finance appoints the members of the DIP Council. The DIP Council is chaired by the Assistant Deputy Minister and is made up of an equal number of employer and union representatives (currently four members each, including one from SaskTel and one from Unifor). Notably, the Minister of Finance, not PEBA, acting with the approval of the Saskatchewan Cabinet, sets up the body responsible to hear appeals respecting the denial of benefits – the DIP Council.

[9] In addition to its governance function, DIP Council is the final arbiter of disability claims, as it was in Ms. Banerjee's instance. Significantly, however, the DIP Plan includes an intermediary, third-party administrator, Canada Life (formerly Great West Life). Under an Administrative Services Only Agreement with PEBA, Canada

Life administers the DIP Plan and provides claim payment services. Throughout, though, PEBA funds the DIP Plan's operation, including reimbursing Canada Life for any payments made under the DIP Plan.

[10] If Canada Life denies the payment of benefits, Article 10.2 of the DIP Plan provides a right of appeal to the DIP Council. An employee who disputes Canada Life's denial of a claim for disability benefits may appeal in writing to the DIP Council within 60 days from the date of Canada Life's decision. Employees who appeal to the DIP Council are entitled to make written submissions and argument to the DIP Council as they see fit. Because Saskatchewan argues that Ms. Banerjee should seek judicial review of the DIP Council's denial of her appeal and not proceed by statement of claim, the entirety of the appeal process under the DIP Plan is noteworthy. It states:

> **ARTICLE X**
>
> **DISPUTE RESOLUTION**
>
> **10.1 Administrator**
>
> The Administrator [Canada Life] shall be responsible to administer the Plan and approve or deny claims for Disability Benefits in its sole discretion but consistent with the terms of the Plan.
>
> **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.
>
> 10.5 The DIP Council may dispose of an appeal in one of the following ways:
>
> (a) by dismissing the appeal;
>
> (b) by allowing the appeal in whole or in part;
>
> (c) by substituting its own decision for that of the Administrator; or
>
> (d) by deeming the Participating Employee to be Occupationally Disabled if DIP Council is satisfied that:
>
> i) further medical evidence may prove that the Participating Employee is Occupationally Disabled;
>
> ii) rehabilitation program may prevent the Participating Employee from becoming Occupationally Disabled; or
>
> iii) the Participating Employee is unable to work at his or her Own Occupation by reason of illness in his or her immediate family;
>
> and by fixing a period of time for which the Participating Employee is deemed to be Occupationally Disabled.

[11] The DIP Plan sets out two levels of disability once a qualifying period of 17 weeks has passed. The first level of disability, which lasts for 20 months, covers the situation where employees are Occupationally Disabled, meaning they are unable to work at their own occupation and are under the regular care and treatment of a physician. After 20 months, an employee reaches the Definition Change Date when they must prove to Canada Life that they are continuously unable to work at any Reasonable Occupations because of disability and that they remain under the care and treatment of a physician.

[12] Article 8.4 of the DIP Plan also contains a limitation of action clause, a clause interpreted very differently by Saskatchewan than by either Ms. Banerjee, SaskTel or Unifor. It reads as follows:

> 8.4 **Limitation of Action**
>
> No action shall be brought to recover Disability Benefits pursuant to the Plan after the expiration of one year from the date the Application for Benefits or written medical evidence of the continuance of disability is required to be furnished.



[13] Predictably, as will be seen later in this decision, Ms. Banerjee argues that the word "action" anticipates the issuance of a statement of claim within one year. Given her interpretation of "action," Ms. Banerjee issued her statement of claim within one year of the denial of her benefits. Saskatchewan, on the other hand, argues the word "action" means that an employee must "appeal" a denial of disability benefits to the DIP Council within one year of the denial.

### *Terms of the Collective Bargaining Agreement*

[14] Ms. Banerjee is a member of Unifor and enjoys the rights and obligations found in the CBA between SaskTel and Unifor. The terms of the CBA ground Saskatchewan's alternative argument; that if the denial of Ms. Banerjee's claim is not subject to judicial review, it should be resolved by arbitration under the CBA and not litigated in a court action. Article 25 of the CBA, which deals with long-term disability becomes significant. It states:

> **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 [Saskatchewan Telecommunications].

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. **In the event the employee does not qualify for DIP benefits, the employee may re-apply for ESL benefits provided ESL credits remain.**

3. Employees who have received Disability Benefits under this Plan fall into three (3) categories:

   (i) Those able to be rehabilitated back into their previous job classification and wage and.

   - the Company guarantees their return to their old job classification and wage band and endeavours to assist in this rehabilitation.

   (ii) Those who remain disabled to the extent that they are unable to perform in a reasonable occupation.

   - these employees remain on DIP and continue to receive Plan coverage.

   (iii) Those who, due to partial disability, are unable to to return to their previous job classification and wage band, but are deemed able to perform some reasonable occupation:

   - Saskatchewan Telecommunications will attempt to return these employees to the corporation into a classification and wage band as close as possible to the classification and wage band from which they were disabled, providing that a job vacancy exists and the employee is evaluated as having a reasonable chance of successfully performing the work. The wage rate paid will be the rate for the actual work being performed.

   - If no reasonable vacancy can be found in the employee's original location, the employee will then be declared surplus under the provisions of Article 12. This does not include the wage maintenance provisions of Article 12.

> (iv) Any relocation expenses incurred due to the provisions of this clause will be covered by Corporate Procedure 144.01.
>
> (v) Where possible, the duties and qualifications of existing positions may be modified to accommodate particular disabilities.
>
> [Emphasis in original]



[15] Saskatchewan argues that the above provision incorporates the disability benefits under the DIP Plan as part of the CBA. Therefore any denial of Ms. Banerjee's benefits must be arbitrated. Ms. Banerjee, Unifor and SaskTel disagree. They say that the above provisions of the CBA do not incorporate the DIP Plan. They only oblige SaskTel to participate in a disability benefit plan as provided by PEBA and to pay the premiums. For that reason, they say arbitration is not the mechanism to resolve denial of disability benefits.

[16] Finally, the parties agree that because SaskTel is a federal undertaking, the *Canada Labour Code*, RSC 1985, c L-2, and not *The Saskatchewan Employment Act*, SS 2013, c S-15.1, applies to the terms and conditions of her employment.

***Ms. Banerjee's Claim***

[17] Ms. Banerjee started working for SaskTel as a sales representative in June 1994. From 2003 to 2014, she experienced health issues and worked no more than the equivalent of 54 days in any calendar year except for 2006, when she worked the equivalent of 131.5 days. In 2008 she was diagnosed with endometriosis following surgery.

[18] In late March 2014, Ms. Banerjee accessed sick leave under Article 24 of the CBA and received benefits from March 24, 2014 to August 2, 2014. After the 17-week sick leave period, Ms. Banerjee applied for benefits under the DIP Plan. In

November 2014, Great West Life (predecessor to Canada Life as administrator) retroactively approved the DIP Plan benefits to August 2, 2014 and Ms. Banerjee received DIP benefits during this "own occupation" period.

[19] Ms. Banerjee's Definition Change Date (the date an employee has received a total of 20 months of Occupational Disability Benefits and must prove eligibility for Total Disability Benefits) was April 2, 2016. Great West Life was not satisfied that Ms. Banerjee was disabled from working any Reasonable Occupation (gainful activity for which an employee may become able to engage in with training and which may provide income of 70 percent of pre-disability gross income) and denied her benefits. In correspondence dated March 14, 2016, Ms. Banerjee was advised that her benefits would be terminated effective April 1, 2016. She was advised of her right of appeal.

[20] On April 11, 2016, Ms. Banerjee appealed Great West Life's decision to the DIP Council and provided additional documents from her health care providers. The DIP Council heard her appeal on May 11, 2016. By correspondence of May 16, 2016, the DIP Council dismissed Ms. Banerjee's appeal. As she was entitled to do, Ms. Banerjee again appealed and submitted additional medical records. On June 8, 2016 the DIP Council heard her further appeal and dismissed it on June 16, 2016.

[21] Ms. Banerjee did not seek any further appeals or otherwise seek to challenge DIP Council's decision. She issued a statement of claim on January 6, 2017.

[22] Another intervention in Ms. Banerjee's employment history must be explained. On February 6, 2015, SaskTel terminated her employment for innocent absenteeism. On February 10, 2015, Unifor filed a grievance respecting her termination. The matter was arbitrated before Daniel Ish, Q.C. in November 2016. In *Sasktel v*

*Unifor, Local 1-S*, 2016 CanLII 95929 (Sask LA) [*Unifor 1-S*] Arbitrator Ish allowed the grievance and reinstated Ms. Banerjee's employment until the long-term disability issues were resolved or she returned to work. Unifor's grievance did not include the denial of Ms. Banerjee's disability benefits.

[23] In *Unifor 1-S* at paras 7 and 29 Arbitrator Ish noted that both Unifor and SaskTel acknowledged that there was a longstanding practice of employees pursuing benefit denials through an appeal or litigation, not grievance or arbitration. PEBA was not a party to the arbitration hearing.

***Procedural History***

[24] When Ms. Banerjee issued her claim against PEBA nearly six years ago, her allegation was succinctly stated in para. 11 of her claim, issued January 9, 2017:

> 11. The Defendant, Government of Saskatchewan, has refused and/or neglected to pay long term disability benefits to Dianne as required under the terms of the Policy [Group Plan Number: 57402, Employee ID Number: E11451, Division 30, Portfolio ID: 121109260] from and after April 2, 2016 to the present.

[25] Saskatchewan's defence to Ms. Banerjee's claim is equally to the point, stating at para. 6 of its statement of defence dated March 30, 2017:

> 6. The Defendant, Saskatchewan, states that while the Plaintiff has sought Total Disability Benefits, that application has been rejected because based on evidence available to the Defendant, the Plaintiff is not either subject to total disability or totally disabled as defined in the Plan Document.

[26] After the statement of defence was served, the matter proceeded through document production and written questions. A management pre-trial conference was held July 28, 2023.

[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 instate an insurance plan, arbitration could not be the mechanism to address Ms. Banerjee's denied claim.

[31] However, almost inadvertently, yet another issue arose on the eve of the application before me on November 1, 2023, almost six years after the action began. In her brief of law in preparation for the hearing before me, Ms. Banerjee cited and relied upon s. 252 of *The Insurance Act* (which, by 2020, had been replaced by s. 8-190) as support for the position that her action was properly constituted under a statement of claim. Neither Ms. Banerjee nor Saskatchewan had previously addressed the applicability of any provision of *The Insurance Act* to the question of the correct forum. Mention of *The Insurance Act* first appeared in Ms. Banerjee's brief of law when she suggested that s. 8-190 invites persons to enforce a right under a contract of insurance through a civil action. Section 8-190 states:

> **Enforcement of right re group insurance**
>
> 8-190 A group person insured may, in his or her own name, enforce a right given to the group person insured or to a person insured under the contract as a person dependent on or related to the group person insured, subject to any defence available to the insurer against the group person insured, the person insured or the insured.

[32] Rather ironically, and in response to Ms. Banerjee's new-found reliance upon s. 8-190, Saskatchewan reviewed the provisions of *The Insurance Act* as well as *The Legislation Act*. In its response brief, Saskatchewan leaned heavily upon what it had discovered under those two statutes: that Saskatchewan arguably enjoys Crown immunity from Ms. Banerjee's action. Saskatchewan vigorously advanced a new argument that Ms. Banerjee's statement of claim was inappropriate, and that judicial review was the correct forum to redress her denied insurance benefits.

[33] Ms. Banerjee's counsel rather briefly rebutted Saskatchewan's reliance on the principle of Crown immunity during oral argument on November 1, 2023. However, without the benefit of a responding brief of law to address this issue I re-

engaged counsel and asked for a refinement of this late-developing issue. This decision follows the further written arguments provided by counsel.

[34] Although not found in the agreed statement of facts, Mr. Ludwar, counsel for Ms. Banerjee, states that after 25 years of litigating claims denied by PEBA, Saskatchewan now argues that disability denials have been resolved in the wrong forum.

***CONCLUSION***

[35] After studying the positions of the four parties respecting a multitude of arguments that have evolved since Ms. Banerjee issued her statement of claim, including the scope of arbitration under the CBA, public policies favoring judicial review of the DIP Council's decision, the applicability of *The Insurance Act* and *The Legislation Act*, and principles of Crown immunity, I have found that Ms. Banerjee chose the correct forum to challenge the denial of her claim. Why? Because, among several reasons, she did precisely what PEBA asked her to do under the 30-page DIP Plan." She commenced an "action."

[36] Having reached this conclusion, I must explain why an "action" is the appropriate forum and, consequently, why other suggested forums are ill-conceived.

***THE PRIMACY OF THE DIP PLAN***

***The Terms of the DIP Plan are Paramount***

[37] Ms. Banerjee did not negotiate the disability coverage she would receive as a SaskTel employee. As an incident of her employment, she received what was stated in the DIP Plan current at that time, as it may have been later modified. Therein lay the entirety of the disability coverage provided to Ms. Banerjee, including sections entitled "Coverage" (Article IV), "Disability Benefits" (Article VI), and "Claims" (Article VIII).

[38] No one argues that PEBA lacks authority to describe the terms of the disability coverage it provides, and all matters and procedures incidental to accepting or denying claims. Section 64 of *The Financial Administration Act* specifically gives to PEBA the responsibility of "establishing, operating, administering or managing" the benefits program. Only PEBA, and no other agency, employer, employee or union, has had a hand in creating the DIP Plan. Saskatchewan has made clear – and I agree – that the terms of the DIP Plan are not a contract like other insurance plans.

[39] Saskatchewan forcefully made this point when arguing against Ms. Banerjee's late-come-upon argument that *The Insurance Act* supported her action (an argument that I have decided led the parties into an unnecessary litigation wild goose chase). When Ms. Banerjee relied upon ostensible rights under *The Insurance Act*, suggesting they supported her action, Saskatchewan reiterated that the DIP Plan is a unique benefits program solely established, operated, administered, and managed by the Crown through PEBA pursuant to s. 64 of *The Financial Administration Act.* Saskatchewan explained that *The Insurance Act* did not avail Ms. Banerjee of any rights because PEBA does not contract with participating employers and employees served by the DIP Plan as would a private insurer under a contract of insurance. Instead, ss. 64(2)(b) of *The Financial Administration Act* permits the Lieutenant Governor in Council to simply prescribe those employers who may participate in the DIP Plan.

[40] I agree. However, Saskatchewan cannot resile from any of the terms of the DIP Plan. The DIP Plan is authored by PEBA and Ms. Banerjee can expect no more than it provides. But, on the other hand, she is also equally entitled to rely upon all of its express terms. Those terms include her right to prosecute a denied disability claim – no party denies that – so long as she takes the appropriate steps within timeframes set out in the DIP Plan. As one would expect, the DIP Plan is not silent respecting those steps or the timeframes within which they must be taken.

### *A Confusing Limitation Provision*

[41] Among those steps, the DIP Plan sets out a limitation period, obviously meant for compliance by persons like Ms. Banerjee. Article 8.4 prompts an employee to initiate an "action" within one year of certain circumstances having occurred. It states:

> 8.4 **Limitation of Action**
>
> No action shall be brought to recover Disability Benefits pursuant to the Plan after the expiration of one year from the date the Application for Benefits or written medical evidence of the continuance of disability is required to be furnished.

[42] On its face Article 8.4 is rife with ambiguity and, as will be seen, caught in a time warp of legislative changes. Not surprisingly then, Saskatchewan and Ms. Banerjee press for different interpretations of Article 8.4. Ms. Banerjee states that "action" means an ordinarily commenced "action," just as she initiated by statement of claim in January 2017. On the other hand, Saskatchewan equates the word "action" with an "appeal" to the DIP Council after the administrator (now Canada Life) has denied a disability claim.

[43] Respecting ambiguity, under Article 8.4 Ms. Banerjee faced two potential dates that could have started the limitation period: 1) "the date of Application for Benefits" or 2) when she was "required" to provide written medical evidence of continuance of her disability. Frankly, both dates are confusing. Why would an "application" for a benefit trigger a limitation period when the results of the application remain unknown? Similarly, why would a requirement to merely furnish medical evidence trigger a limitation period without knowing the adjudicator's ultimate decision after considering the medical evidence?

[44] In any event, Ms. Banerjee issued her statement of claim on January 9, 2017, presumably because within the previous year she had either applied for benefits or was required to provide medical evidence of her continued disability. From the agreed statement of facts, one reads:

> 21. Ms. Banerjee was advised by way of letter dated March 14, 2016 [from Canada Life], that her benefits would be terminated effective April 1, 2016. That letter advised Banerjee of her right of appeal [to the DIP Council]. On April 11, 2016 Banerjee appealed the decision and provided additional documents from her health care providers. The appeal was heard by DIP Council on May 11, 2016 and Ms. Banerjee was advised it was dismissed by way of letter dated May 16, 2016.

[45] Ms. Banerjee initiated her appeal to the DIP Council within two months of Canada Life's denial of her claim as required by Article 10.2, and issued her statement of claim within one year of the denial of her claim by Canada Life and the DIP Council. This is a sensible reading of the limitation period but seemingly inconsistent with Article 8.4 because the limitation period under Article 8.4 is not triggered by the denial of her claim. Article 8.4 states that the limitation period is triggered on the date of her "Application for Benefits" or when she was required to provide medical evidence. Articles 8.1 to 8.3 provide direction when these dates arise. They give precise direction to whom employees apply for benefits (they apply to Canada Life); when they must apply (within 90 days after expiry of the Qualifying Period); what they must provide (written medical evidence); and how often they must provide such evidence (at such intervals as Canada Life may require). Articles 8.1, 8.2 and 8.3 read as follows:

**ARTICLE VIII**

**CLAIMS**

**8.1 Application for Benefit**

All Participating Employees who have a claim for disability under the Plan shall furnish an Application for Disability Benefits to the Administrator [Public Employees Benefits Agency] and Participating Employer in a form determined by the Administrator together with such other documentation as the Administrator may require within 90 days after the expiration of the Qualifying period.

8.2 Failure to furnish such application for benefits within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to provide such application for benefits within such time, provided it is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity of the employee, later than one year from that time Application for Disability Benefit is otherwise required.

8.3 The Participating Employee shall provide to the Administrator written medical evidence of the continuance of a disability subsequent to filing the Application for Benefit at such intervals as the Administrator may require.

[46] Article 8.4 – the limitation period provision – immediately follows these provisions and uses the phrases "Application for Benefits" and "medical evidence," terms also found in Articles 8.1 to 8.3. These phrases must be accorded the same meaning throughout Article VIII. Whatever "action" the limitation period is meant to prompt, that "action" apparently must be taken within one year of an application to Canada Life or when "written medical evidence" has been requested. Neither date seems sensible.

[47] The agreed statement of facts discloses neither the date that Ms. Banerjee applied to Canada Life nor the date that Canada Life may have required medical evidence to be furnished. Not only are these dates unavailable to the court, as previously stated they are puzzling if they mark the start of a limitation period.

[48] I have made these observations respecting the ambiguity of Article 8.4 not because any party has suggested that Ms. Banerjee has missed the limitation period. Instead, these observations lead one to believe that the terms of the DIP Plan may need a careful review. Regardless of the ambiguity of the commencement of the limitation period, the period is "one year" and the activity that must be undertaken by a person denied disability benefits is an "action."



### *A Problem of Interpretation Compounded by "New" Limitations of Actions Legislation*

[49] Compounding the confusion of Article 8.4 is the possible insensitivity of Article 8.4 to Saskatchewan's legislated alteration of statutory limitation periods in 2005. As a general principle, legislation sets time limits on one's right to commence an action. One might expect, then, that when the limitation period was first inserted into Article 8.4 it might have reflected and paralleled the statutory limitation period for claims against private insurers. Saskatchewan introduced new limitation of actions legislation in 2005 to standardize a plethora of differing and confusing limitation periods. The creation of PEBA pre-dates 2005 when the limitation period for actions against insurers under *The Saskatchewan Insurance Act*, RSS 1978, c S-26 (since rep) was one year. Prior to 2005, *The Saskatchewan Insurance Act* stated:

> **Limitation of action**
>
> 169(1) Subject to subsection (2), an action or proceeding against an insurer for the recovery of insurance money shall not be commenced more than one year after the furnishing of the evidence required by section 166, or more than six years after the happening of the event upon which the insurance money becomes payable, whichever period first expires.

[50] That one-year limitation period changed in 2005. Currently, the limitation period under *The Insurance Act* defers to *The Limitations Act*, SS 2009, c L-16.1. It reads as follows:

> **Limitation of actions**
>
> **8-5** An action or proceeding against an insurer must be commenced within the period as established in *The Limitations Act*.

[51] Section 21 of *The Limitations Act* specifies the standard two-year limitation period for many actions, including an action against an insurer.

[52] I agree with Ms. Banerjee's counsel's explanation that the one-year limitation period in Article 8.4 almost assuredly mimicked the statutory limitation period that was current at the time the DIP Plan was written, but never changed in the 2021 iteration of the DIP Plan to reflect the new two-year limitation period. I accept that Ms. Banerjee's explanation as found in her November 17, 2023 consolidated brief of law is highly plausible:

> 36. … It was not until 2005 that Saskatchewan cleaned up the limitations mess and developed the current *Limitations Act* [*sic*]. And prior to 2005, what was the limitation period in the Insurance Act [*sic*] to commence a claim for benefits? One year.
>
> 37. It is more likely that PEBA does not understand the difference between appeal and action, especially in the litigation context, or is it more likely that PEBA did not clean up its Plan when the Limitations Act [*sic*] (and Insurance Act [*sic*]) were amended? The answer is clear when one considers how PEBA has interpreted and followed the Plan regarding disputes since 1993 all the way to 2021 – **via court litigation.** No arbitration requirements, no mention of judicial review, and no argument that WCB [Workers' Compensation Board] had to be applied for prior to any Plan application.… Just a clean and clear Statement of Claim to be issued with PEBA retaining outside counsel to run the matter through Queen's/King's Bench. A procedure with which PEBA cooperated, followed, and facilitated for almost 30 years.
>
> [Emphasis in original]

[53] Saskatchewan does not accept Ms. Banerjee's explanation of the one-year limitation period as it appears in Article 8.4. However, Saskatchewan makes an initial admission, stating that Article 8.4 "…appears to shorten a participating employee's limitation period for suing to recover disability benefits on its face…" But Saskatchewan qualifies this initial admission, stating, "PEBA has adopted an alternate interpretation of it [Article 8.4] that is consistent with its authority under the FAA [*The Financial Administration Act, 1993*] and the Plan" [November 24, 2023 brief of law of Saskatchewan at para 37].

[54] Saskatchewan argues that because the DIP Plan cannot alter a two-year limitation period provided by statute, the one-year limitation period in Article 8.4 cannot be a true limitation period of an ordinary action. Instead, it must refer to an employee's obligation internally referenced under the DIP Plan. Saskatchewan's "alternate interpretation" of the limitation period suggests that an "action" under Article 8.4 is the "ultimate limitation to bring an appeal under article 10.2" [Para 28 of November 24, 2023 brief of law]. In other words, "action" in Article 8.4 really means "appeal."

[55] I cannot agree with Saskatchewan's reasoning.

[56] First, Saskatchewan suggests that the one-year limitation period of Article 8.4 cannot be a true limitation period because the one-year limitation period under the DIP Plan cannot purport to interfere with the two-year statutory limitation period. That may be true. However, no one has suggested that Ms. Banerjee has missed a limitation period, whether one year or two years. That has never been an issue. What is at stake is not a one-year or two-year limitation period, but what is meant by the word "action." I accept Ms. Banerjee's explanation: that Article 8.4 mirrored the statutory limitation period current at the time and the word "action" meant "action" and continues

to mean "action." Quite likely the one-year limitation period was not changed to accommodate the new limitation period introduced in 2005. That fact, though, does not alter the original or continued meaning of the word "action."

[57] Furthermore, it is an enormous leap of logic to suggest that because the limitation period under Article 8.4 cannot contradict a limitation period under *The Limitations Act* one must find an alternate limitation of "something else" that an employee must do within one year, which will be called an "action." Saskatchewan suggests that "something else" is an "ultimate limitation" on an employee's right to advance an appeal to the DIP Council as found in Article 10.2. However, as previously quoted, Article 10.2 has its own clearly stated limitation period: "A Participating Employee who disputes the … denial of 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." To suggest that the one-year limitation period under Article 8.4 creates a different and "ultimate limitation period" under the clearly stated 60-day limitation period is illogical. Why would Article 8.4 override unrelated Article 10.2? And, if it did, why would a clear 60-day limitation period be expanded by another 10 months?

[58] Saskatchewan makes yet another argument should the court not accept that the word "action" under Article 8.4 means "appeal." Saskatchewan suggests that if the court does not accept that the limitation period in Article 8.4 "relates to the internal appeal process [under Article 10.2]", then the word "action" "can refer equally to an application for judicial review…" [November 24, 2023 brief of law of Saskatchewan at para 49]. Saskatchewan suggests that if the court finds its first argument improbable, that it might consider a second, perhaps even more improbable argument. In legal argument, one cannot ride the same horse in opposite directions. Furthermore, seldom, if ever, does one see in legislation or in the adjudicative processes of an administrative

body an invitation to an aggrieved person to seek judicial review of a tribunal's decision. More commonly, one sees privative clauses attempting to prevent judicial review, not invite it.

[59] The court cites yet another reason why Saskatchewan's argument cannot succeed. Ms. Banerjee is not the first person to challenge PEBA's denial of long-term disability benefits. Her legal counsel, Mr. Ludwar, who has dealt with several instances of PEBA's denial of disability claims, states that never before has PEBA suggested that a regularly constituted action has been an inappropriate forum. Recognizing that the DIP Plan has remained unchanged, that PEBA solely authored the DIP Plan, and that PEBA has historically accepted that the DIP Plan contemplates an action, to now argue that the DIP Plan contemplates judicial review is a leap the court is unprepared to take. Saskatchewan is making an about-face respecting its own historic understanding of Article 8.4 and what is meant by "action."

[60] Saskatchewan admits that it is pressing for a new legal precedent. Never before has PEBA suggested that the decisions of the DIP Council should be resolved by judicial review. Saskatchewan is asking the court for an extraordinary remedy – to alter its previous interpretation of its own DIP Plan. Notably, this litigation is not about two parties contending for competing interpretations of a statutory provision, a common issue in litigation. Instead, PEBA is asking the court for a decision that would allow it to radically change its interpretation of its own document, and to the disadvantage of Ms. Banerjee who relied upon PEBA's interpretation in commencing her action. The court is unprepared to accede to Saskatchewan's request to allow it to adopt an "alternate interpretation" of a provision that it authored, that it promulgated to qualifying employees, and that it historically accepted as giving a right of a civil action.

***Can PEBA Unilaterally Interpret the DIP Plan?***

[61] Saskatchewan unabashedly states "PEBA has adopted an alternate interpretation of it [Article 8.4] that is consistent with its authority under the *FAA* [*The Financial Administration Act, 1993*] and the Plan." [November 24, 2023 brief of law of Saskatchewan at para 37]. As authority for its position, Saskatchewan then cites Article 2.1(s) of the DIP Plan that reads as follows:

> s) "**Plan**" means this Disability Income Plan and the terms thereof set forth in this document as well as any policies with regard thereto or interpretations thereof made by the Administrator [Public Employees Benefits Agency] or DIP Council.
>
> [Emphasis in original]

[62] If Article 2.1(s) means that PEBA can impose its interpretation of any terms of the DIP Plan as it might choose, including the ability to "adopt an alternate interpretation" of those terms, then the express terms of the DIP Plan are meaningless.

***A Word about The Insurance Act***

[63] In my view, the entirety of the respective arguments respecting *The Insurance Act* and the principle of Crown immunity are irrelevant. Ms. Banerjee switched gears in a last-minute strategy by citing and relying upon s. 8-190 of *The Insurance Act,* namely that a "group person insured may…enforce a right given to the group person insured under the contract…subject to any defence available to the insurer…".

[64] Ms. Banerjee's late-coming reliance on s. 8.190 was a surprising development for Saskatchewan, prompting it to respond with a detailed argument that *The Insurance Act* did not apply to the DIP Plan and, in any event, as a Crown agent,

PEBA enjoys immunity from any obligations that might otherwise have been imposed by *The Insurance Act.*

[65] I agree with Saskatchewan. Ms. Banerjee's position is not furthered by reliance upon s. 8-190 of *The Insurance Act.* For the very reasons this Court has determined that the unique terms of the DIP Plan make clear that an "action" is the appropriate forum to litigate her claim, those same terms take the DIP Plan out of *The Insurance Act.* The DIP Plan is not a contract of insurance. It is an obligatory insurance fund provided to Ms. Banerjee as an employee of SaskTel. Frankly, Ms. Banerjee gained nothing by attempting to rely upon s. 8-190 of *The Insurance Act.* As the court has already concluded, Ms. Banerjee's claim is against a uniquely established fund, not a contract of insurance with a private insurer.

[66] Given this conclusion, little is gained by explaining and then discounting Ms. Banerjee's misadventure into s. 8-190 of *The Insurance Act.* Briefly, though, Ms. Banerjee looks to *Canada Safeway Limited v Retail, Wholesale and Department Store Union, Local 950,* 1992 CanLII 7058 (Sask LA) [*Canada Safeway*], an arbitral decision to support her argument that *The Insurance Act* specifically contemplates an action to recover denied group disability benefits. In *Canada Safeway,* an arbitrator found that arbitration was the not an appropriate forum to decide benefits under a policy of insurance between Sunlife, a private insurer and Canada Safeway. Instead, the arbitrator found that the remedy "would be in bringing an action against Sunlife" under *The Saskatchewan Insurance Act.*

[67] I agree with Saskatchewan that *Canada Safeway* is distinguishable because the insurance provided by PEBA is a statutorily created plan and not a "contract" of insurance. PEBA, being a branch of the Ministry of Finance, is not a private insurer but, rather, the Crown in right of Saskatchewan.

[68] To make its point that the insurance offered by PEBA is not a "contract of insurance" as contemplated by s. 8-190 of *The Insurance Act,* Saskatchewan looks to *Saskatchewan Health-Care Association v Zipchen*, 2007 SKCA 136, 302 Sask R 229 [*Zipchen*] and compares the disability benefits offered by the Saskatchewan Association of Health Organizations [SAHO] to the disability benefits offered by PEBA. SAHO paid the employee benefits following a car accident and then claimed a subrogated interest in settlement funds paid to the employee as a result of civil actions. After SAHO successfully received summary judgment, the employee appealed on the basis that SAHO had failed to comply with various provisions of *The Saskatchewan Insurance Act.* The Court of Appeal drew a distinction between SAHO's insurance plan and a contract of insurance, writing:

> 17 The first difficulty with respect to this line of argument is that ss. 102 to 112 of the *Act* [*The Saskatchewan Insurance Act*, SS 1978, c S-26] operate with respect to "contracts of insurance". Ms. Zipchen makes her arguments by referring to the Plan [CUPE Disability Income Plan] and comparing the Plan to the requirements set out in those provisions of the *Act*. However, it is not entirely clear that the Plan is a contract of insurance. It appears that the coverage at issue in this case is not provided by a third party insurer but, rather, that the benefits in question are provided by the Health District itself and/or SAHO on its behalf. Neither Ms. Zipchen nor SAHO addressed the question of whether, in such circumstances, the Plan is a contract of insurance within the meaning of the *Act*. However, I need not resolve this question because of a second difficulty with Ms. Zipchen's argument.

[69] I agree with Saskatchewan's view of *Zipchen.* The DIP Plan is a benefits program established, operated, administered, and managed by the Crown through PEBA pursuant to s. 64 of *The Financial Administration Act.* PEBA does not contract with participating employers and employees serviced by the DIP Plan, as a private insurer would under a contract of insurance. Instead, ss. 64(2)(b) of *The Financial Administration Act, 1993* permits the Lieutenant Governor in Council to simply prescribe those employers who participate in the DIP Plan. The fund from which

benefits are paid, and to which contributions are made, is established by that *Act*, the same *Act* which establishes PEBA.

[70] Given my reasoning, I find certain irony and misadventures in the arguments raised by Saskatchewan and Ms. Banerjee.

[71] First, the irony: The reason why Saskatchewan argues that *The Insurance Act* does not apply to PEBA – because the DIP Plan is a unique insurance fund and is not a "contract of insurance" – is the precise reason why I have looked to the plain reading of the DIP Plan (and not to an "alternate interpretation" of the DIP Plan as Saskatchewan now suggests) to find that an ordinary "action" has always been contemplated by the DIP Plan when the DIP Council has denied long-term disability.

[72] Second, the misadventure: Ms. Banerjee's reliance upon s. 8-190 of *The Insurance Act* only served to lead the parties into a complicated and fruitless pursuit of an issue that has no relevance.

***WHY JUDICIAL REVIEW IS NOT AVAILABLE***

[73] Having decided for reasons stated above that the DIP Plan makes clear that an action, and not judicial review, is the appropriate venue for Ms. Banerjee to advance her claim, little needs to be said to explain why the court does not accept that the DIP Plan contemplates judicial review of the DIP Council's decisions. If PEBA wanted disability claims to be resolved through judicial review, it, as the author of the DIP Plan, could have easily stated as much.

[74] Although Saskatchewan has canvased significant case law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653*; Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall,* 2018

SCC 26, [2018] 1 SCR 750 [*Highwood*]; *Air Canada v Toronto Port Authority,* 2011 FCA 347, [2013] 3 FCR 605), to suggest that administrative bodies like the DIP Council often are subject to judicial review, the entirety of Saskatchewan's submissions are based on its assumption that the court would not conclude that the DIP Plan specifically contemplated an "action." The court has concluded that the DIP Plan specifically and historically has contemplated an action. That conclusion forecloses any argument that judicial review is the more appropriate forum to challenge the DIP Council's decision.

[75] Aside from this conclusion, 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.

***WHY ARBITRATION IS NOT AVAILABLE***

[84] Saskatchewan has mounted a cascading series of arguments. First, Saskatchewan suggests that the word "action" in Article 8.4, which sets a limitation period, should be read as "appeal to the DIP Council." For reasons given, I have not accepted this position. Nor have I accepted Saskatchewan's alternate argument that "action" should be read as "judicial review." In the further alternative, anticipating that if the court were to reject these arguments, Saskatchewan argues, as a last alternative, that Ms. Banerjee's claim should be resolved by arbitration under the CBA. I am unable to accept this final alternative position.

[85] Since I have found that a regularly constituted action is the appropriate venue for Ms. Banerjee to advance her claim, I see little reason to provide a deep analysis why arbitration is not the appropriate venue. However, for completeness I offer the following observations.

[86] First, the parties who negotiated and executed the CBA – SaskTel and Unifor – are emphatic that no provision of the CBA brings Ms. Banerjee's private claim

for disability benefits within the parameters of collective bargaining. Indeed, it is odd that Saskatchewan, a third-party to the CBA, argues that Ms. Banerjee's dispute with the DIP Council's decision comes within a collective bargaining agreement respecting which it neither negotiated nor signed. One might reasonably ask what standing Saskatchewan has to foist upon two parties an obligation to arbitrate a matter over which they have no dispute.

[87] Second, in *Unifor 1-S*, Arbitrator Ish recognized the irrelevance of Ms. Banerjee's claim for long-term disability benefits insofar as it related to her immediate grievance brought against SaskTel respecting her employment dismissal. In the grievance, neither Unifor nor SaskTel included any notice respecting Ms. Banerjee's wrestling with PEBA about the denial of her claim for long-term disability. Arbitrator Ish accepted that Ms. Banerjee's dissatisfaction with the denial of her claim for disability was outside the CBA and was a matter she was pursuing independently of her grievance initiated under the CBA. He explained that the DIP fund was external to SaskTel. He wrote:

> [7] …The grievor [Ms. Banerjee] has appealed the decision to discontinue her benefits pursuant to the provisions and processes in the LTD plan [the DIP Plan], and she has retained a lawyer to possibly pursue a legal claim. The LTD plan is external to SaskTel. It is the Saskatchewan Public Employees' Benefits Agency (PEBA) plan to which premiums are paid by SaskTel. Although PEBA is the holder of the plan, Great West Life administers the LTD plan, which includes determining eligibility. …
>
> [Emphasis added]

[88] Arbitrator Ish was correct. The DIP Plan benefits are external to SaskTel. SaskTel only pays premiums to PEBA. Furthermore, if PEBA provides long-term disability benefits and SaskTel does not, one must accept that seeking an arbitral award under the CBA would be unavailable and nonsensical.

[89] Arbitrator Ish returned to the distinction between Ms. Banerjee's grievance respecting her dismissal (the matter before him) and her concurrent quest for long-term disability benefits under the DIP Plan. Arbitrator Ish wrote at para 29:

> [29] The broad issue in this case is whether the employer [SaskTel] has grounds to terminate the grievor [Ms. Banerjee] for innocent absenteeism and, if it does, whether the employer is precluded from doing so by virtue of Article 25. At the outset I will address one aspect of this case that I do not believe is an issue between the parties. Although the grievor was not in receipt of LTD [Long Term Disability] benefits at the time of the hearing because the benefits had been discontinued by a decision of Great West Life, neither party argued that for the purposes of this arbitration the grievor should not be treated other than someone receiving benefits or having entitlement to LTD benefits. Stated differently, so long as appeal and litigation rights are open to the grievor Article 25 continues to apply to her. …

[90] Again, Arbitrator Ish saw a clear distinction between the matter being grieved before him (Ms. Banerjee's dismissal) and her quest for long-term disability benefits as offered and administered under the DIP Plan. The former was a matter resolved by arbitration; the latter was a matter to be resolved by appeal as provided by the DIP Plan and, if necessary, by litigation.

[91] Aside from the findings of Arbitrator Ish – which I find highly persuasive – Unifor has provided a detailed brief of law, canvasing several cases where courts have had to determine whether a matter is subject to arbitration under a collective bargaining agreement. In *Weber v Ontario Hydro,* [1995] 2 SCR 929 [*Weber*], an employee pursued two separate forums to resolve his termination. He grieved the termination under the collective bargaining agreement and he initiated a court action based on tort and breach of *Canadian Charter of Rights and Freedoms* rights. After the grievance was settled, he continued the lawsuit. Ontario Hydro successfully applied to strike his claim. Before the Supreme Court of Canada, Justice McLachlin held that if a matter is arbitrable, the court has no jurisdiction other than to determine which body has

exclusive jurisdiction. In determining which forum has exclusive jurisdiction, Justice McLachlin noted two key considerations:

> 51 On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> 52 In considering the dispute, the decision-maker must attempt to define its "essential character"… In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.
>
> [Emphasis added]

[92] The Ontario Court of Appeal applied *Weber* in *London Life Insurance Co. v Dubreuil Brothers Employee Assn.*, (2000), 190 DLR (4th) 428 (Ont CA) [*London Life*]. There the court relied upon the four categories identified in Donald J.M. Brown & David M. Beaty, *Canadian Labour Arbitration*, 3d ed (Aurora, ON: Canada Law Book, 1988) to determine the choice of forum for the denial of disability benefits. These categories are set out in para. 10 of *London Life,* as follows:

> [10] … These four categories…are as follows:
>
> 1. where the collective agreement does not set out the benefit sought to be enforced, the claim is inarbitrable;
>
> 2. where the collective agreement stipulates that the employer is obliged to provide certain medical or sick-pay benefits, but does not incorporate the plan into the agreement or make specific reference to it, the claim is arbitrable;
>
> 3. where the collective agreement only obliges the employer to pay the premiums associated with an insurance plan, the claim is inarbitrable; and

> 4. where the insurance policy is incorporated into the collective agreement, the claim in arbitrable.

[93] I agree with Unifor that the third category describes Ms. Banerjee's situation. SaskTel does not provide long term disability insurance. It only pays the premiums to PEBA. PEBA, not SaskTel, has denied Ms. Banerjee long term disability benefits. How then could arbitration between Unifor and SaskTel resolve Ms. Banerjee's dispute with a claim that PEBA had denied? Arbitration is not a forum for resolution of Ms. Banerjee's claim.

***CONCLUSION RESTATED***

[94] For the reasons provided, Saskatchewan's application is denied. Neither 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.

[95] Saskatchewan shall pay costs as follows: $5,000 in favour of Ms. Banerjee, $2,500 in favour of Unifor, and $2,500 in favour of SaskTel.

J.
D.H. LAYH