Two routes to a remedy: Judicial review and statutory rights of appeal

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In *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, the Supreme Court of Canada (the SCC) held that the Divisional Court and Court of Appeal for Ontario erred in not permitting judicial review of a Licence Appeal Tribunal (LAT) decision on the basis that the *Licence Appeal Tribunal Act, 1999* provides for a limited statutory right of appeal on questions of law only.

The decision confirms that a statutory appeal mechanism that permits appeals on questions of law does not preclude judicial review for questions of fact or mixed fact and law but leaves for another day the hotly debated question of whether judicial review is available where there is a privative clause that seeks to bar or restrict judicial review.

Background

The appellant, Ms. Yatar, was injured in a motor vehicle accident in 2010. She applied for accident benefits, income replacement benefits, and housekeeping and home maintenance benefits. Her insurer initially paid her benefits, but subsequently denied the benefits over the course of three different letters sent in 2011. The first letter informed her all benefits were being stopped; the second letter denied housekeeping and home maintenance benefits, but reinstated income replacement benefits; and the third letter denied the income replacement benefits. Ms. Yatar sought to dispute this denial through a mediation process that concluded unsuccessfully in 2014. She also commenced a court action, which was dismissed on consent in 2017. She next brought an application for benefits to the LAT in March 2018, which was dismissed on the basis that the application was barred by the two-year limitation period. The LAT adjudicator found the benefits were validly denied when the first denial letter was sent in 2011, triggering the limitation period, which expired in April 2014. Ms. Yatar then sought reconsideration of the LAT adjudicator's decision; the adjudicator re-affirmed his decision.

The *Licence Appeal Tribunal Act, 1999* provides for a limited statutory appeal on questions of law. Accordingly, Ms. Yatar appealed on questions of law to the Divisional Court and sought judicial review on questions of fact or mixed fact and law. The Divisional Court dismissed the statutory appeal, finding that the appeal did not identify any errors of law, and declined to conduct a judicial review on the basis that judicial review would only be available in "exceptional circumstances", which were not present

here (2021 ONSC 2507). The Court of Appeal held the phrase “exceptional circumstances” was unfortunate but decided that it is only in “rare cases” that judicial review would be available from a LAT adjudicator reconsideration decision, given its view that the statutory right of appeal demonstrated legislative intent to restrict access to judicial review (2022 ONCA 446). The Court of Appeal further held that, in any event, the LAT adjudicator’s reconsideration decision was reasonable.

Supreme Court of Canada

In a unanimous decision, Justice Rowe allowed the appeal and sent the matter back to the LAT adjudicator for reconsideration.

Limited statutory appeal rights do not bar judicial review

The SCC was clear that, per *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, a statutory right of appeal does not preclude judicial review for questions not dealt with in the appeal. The SCC also emphasized that judicial review plays an important role in upholding the rule of law and ensuring that public authorities – including LAT adjudicators – are subject to the supervisory power of the superior courts.

In addition, the SCC reiterated the constitutional nature of the right to seek judicial review. Citing to Paul Daly, the SCC held that it cannot be the case that a court has discretion to not hear a judicial review application, as this would allow the court’s “perception of the quality and quantity of internal reconsiderations … to trump [a] constitutional principle”.

Judicial review remains a discretionary remedy

While the right to seek judicial review always remains available, this right does not guarantee relief. Judicial review is a discretionary remedy, and the court retains discretion to decide whether to grant relief or not.

Where an application for judicial review is brought, a judge must consider the application to determine, at minimum, if judicial review is appropriate. To determine if judicial review is appropriate, the court should refer to the approach set out in *Strickland v. Canada (Attorney General)*, 2015 SCC 37, which requires the court to consider available alternatives, as well as the suitability and appropriateness of judicial review in the circumstances. This will include the purposes and policy considerations underlying the applicable legislative scheme. The SCC confirmed that there are two instances in which a court may exercise its discretion to not grant relief on a judicial review application. First, the court may decline to consider the merits of the judicial review application if it finds that one of the discretionary bases for refusing a remedy is present. Second, a remedy may be refused even if the underlying decision is unreasonable.

Whether privative clauses preclude judicial review remains to be seen

At issue in this case was whether a limited right of appeal precluded the availability of judicial review; the *Licence Appeal Tribunal Act, 1999* does not contain any privative clause that seeks to bar or otherwise restrict judicial review. However, such privative clauses exist in other statutory schemes, and the impact of such clauses on the

availability of judicial review has arisen in a variety of federal court decisions. The SCC noted the recent jurisprudence on this point from the Federal Court of Appeal, including *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161; *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39; and *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208.

However, as the issue was not squarely raised in this case, the SCC expressly declined to address the issue as to whether judicial review is available where the statutory framework includes a privative clause that bars or restricts judicial review. This question was left "for another day".

The LAT adjudicator 's reconsideration decision should have been judicially reviewed

The SCC held that both the Divisional Court and Court of Appeal erred in their application of *Strickland* to this case. Properly applied, the *Strickland* framework indicated that the court should exercise its discretion to grant relief.

The Court of Appeal was mistaken when it held that the statutory appeal right reflected legislative intent to restrict judicial review. The fact that the legislature provided for a statutory right of appeal on questions of law can only demonstrate legislative intention to subject questions of law arising from an LAT adjudicator's decision to correctness review. The legislature specifically did not provide for a right of appeal on questions of fact or questions of mixed fact and law, though it could have done so. Allowing judicial review of such questions thus fully complies with the legislature's intentions.

In considering the statutory right to appeal, the SCC cited back to its statement in *Vavilov* that "because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely". The SCC, however, acknowledged the argument that the court's jurisdiction to conduct judicial review has been ousted where there is an appropriate alternative forum or remedy. Nevertheless, in this case, there was no adequate alternative remedy. Since the statutory right of appeal only allowed for an appeal on a question of law, the statutory right of appeal was not an adequate alternative remedy. The fact that the scheme provided for reconsideration by the LAT adjudicator also did not assist, as it was this very reconsideration decision that was under review.

Additionally, while the appropriateness of judicial review in the circumstances is a "balancing exercise", concerns over judicial economy were outweighed in this case by the need to ensure that individuals have meaningful and adequate means to challenge unreasonable or procedurally unfair administrative decisions.

The reconsideration decision was unreasonable

Applying the principles of judicial review, the SCC found that the LAT adjudicator's reconsideration decision was unreasonable. The decision failed to properly consider the fact that Ms. Yatar's benefits were reinstated in the second letter and the impact this reinstatement might have had on the applicable limitation period, given the existence of case law holding that where benefits are reinstated, they must be validly terminated

again to trigger the limitation period. The SCC thus referred the matter back to the LAT adjudicator for reconsideration.

Key takeaways

- The SCC's decision in *Yatar* upholds the principle from *Vavilov* that a statutory right of appeal does not preclude an individual from seeking judicial review for questions not covered by the right of appeal. The case reiterates the constitutional nature of the right to seek judicial review in Canada's administrative law framework, and the importance of the courts having a supervisory power over public authorities like the LAT adjudicator.
- The decision creates the potential for concurrent appeal and judicial review proceedings arising out of the same administrative decision. While the SCC was alive to practical concerns over judicial economy, the SCC did not discuss the procedural framework for concurrent proceedings articulated by the Court of Appeal for Ontario. The Court of Appeal indicated that to minimize the costs of duplicative judicial reviews and appeals, concurrent proceedings must be brought together and parties should seek to file a single appeal book/application record and factum.
- The SCC also declined to discuss the pressing question of whether a privative clause can bar or restrict the availability of judicial review. This question has dogged the jurisprudence of the Federal Court of Appeal in recent years: notably, in *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161; *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39; and *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208. The minority decision in *Best Buy* and comments by Stratas J.A. in the *Democracy Watch* cases, supported by academic commentary from Mark Mancini, take the view that no judicial review may be brought of factual issues in these circumstances. Review is limited by statutory provisions to questions of law or extricable errors of law. However, the majority in *Best Buy*, supported by academic commentary from Paul Daly and followed in *Pier 1 Imports*, held that judicial review is a constitutional requirement, such that all issues may be judicially reviewed notwithstanding any privative clauses. The result is a lack of clarity around the constitutional scope of judicial review, and whether parties have a right to judicial review of factual questions even where the legislature has restricted such review. *Yatar* left this question open, though answers may be coming soon: the Federal Court of Appeal is set to hear cases in the *Democracy Watch* proceeding in the coming weeks, where it will need to address the question of whether a privative clause can bar or restrict judicial review.

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