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Supreme Court rules limited statutory rights of appeal do not preclude access to judicial review

By **Cristin Schmitz**

Law360 Canada (March 15, 2024, 6:15 PM EDT) -- In a 9-0 judgment supportive of litigants' access to judicial review, the Supreme Court of Canada has ruled that a limited statutory right of appeal in a case does not preclude judicial review for matters not the subject of appeal, i.e. where there is an appeal right limited to questions of law, judicial review is available for questions of fact or mixed fact and law.

On March 15, 2024, the top court allowed the appeal of an Ontario car accident victim, Ummugulsum Yatar, from an Ontario Court of Appeal ruling that upheld the Ontario Licence Appeal Tribunal's (LAT) denial of her application for judicial review in a case where Yatar also unsuccessfully appealed the LAT adjudicator's rejection — as time-barred — of her bid to require her insurer to restore her income replacement and housekeeping/home maintenance benefits: *Yatar v.TD Insurance Meloche Monnex*, 2024 SCC 8.

Under Ontario's *Licence Appeal Tribunal Act, 1999*, Yatar's right of appeal from the LAT adjudicator's refusal to reconsider the decision that her challenge was time-barred was restricted to questions of law. She appealed on questions of law, but also applied for judicial review with respect to questions of fact or mixed fact and law.

The Divisional Court dismissed her appeal, holding there were no errors of law made by the LAT adjudicator. The Divisional Court also dismissed Yatar's application for judicial review, on the basis that there were no "exceptional" circumstances that would justify judicial review: 2021 ONSC 2507.

The Court of Appeal for Ontario then dismissed Yatar's appeal, and ruled that it would only be in "rare" cases that the remedy of judicial review would be exercised, given the legislated scheme for the resolution of such disputes and that Yatar had an appropriate alternative remedy: 2022 ONCA 446.

The Court of Appeal went on to hold that even if the judicial review application ought to have been considered, the LAT adjudicator's decision was reasonable.

In referring Yatar's case back to the LAT adjudicator for reconsideration, the Supreme Court of Canada ruled unanimously she can bring an application for judicial review with regard to matters not covered by the right of appeal provided for in the statute.

"As per *Canada (Minister of Citizenship and Immigration) v. Vavi*lov, 2019 SCC 65, a right of appeal does not preclude an individual from seeking judicial review for questions not dealt with in the appeal," Justice Malcolm Rowe wrote for the court. "In this case, despite the statutory right of appeal limited to questions of law, judicial review is available for questions of fact or mixed fact and law," he said. "It is then a matter of discretion whether to undertake judicial review, having regard to the framework for analysis set out" by the Supreme Court in *Strickland v. Canada (Attorney General)*, 2015 SCC 37.

Justice Malcolm Rowe

The Divisional Court panel below "erred when it concluded that only in 'exceptional circumstances' would judicial review be available where there is a limited right of appeal," Justice Rowe ruled, observing that this ignored the teaching of *Strickland*.

"The Court of Appeal for Ontario also erred when it held that only in 'rare cases' judicial review would be exercised, and that in this case, Ms. Yatar had an appropriate alternative remedy," Justice Rowe added.

Both courts below sought to apply *Strickland*, but erred in principle in doing so, Justice Rowe said. "They did so by relying on a statutory right of appeal for questions of law as indicative of legislative intent to restrict access to judicial review for questions of fact and mixed fact and law. No such inference is warranted. Properly applying *Strickland*, the Divisional Court should have exercised its discretion to undertake judicial review for issues not dealt with under the statutory right of appeal."

Justice Rowe went on to hold that the LAT adjudicator's reconsideration decision was unreasonable as the adjudicator "failed to consider the effects of the reinstatement of benefits on the limitation period, and he did not have regard to jurisprudence relevant to the matter."

Nabila Qureshi, who with Anu Bakshi and Anna Rosenbluth represented the Income Security Advocacy Centre, one of 11 interveners in the far-reaching administrative law appeal, told Law360 Canada "we're very happy with the decision," which she described as both clear and succinct.

Nabila Qureshi, The Income Security Advocacy Centre

"Basically, the court agreed with the arguments that we made both at the Court of Appeal and at the Supreme Court, that a statutory right of appeal on questions of law does not limit your ability to judicially review decisions that raise . . . questions of fact, or mixed facts and law. We had always maintained that other existing discretionary bars to judicial review will always continue to be applicable. . . things like: Is this premature? Is this moot? Did you exhaust the sorts of other internal remedies available to you before you brought the JR? Those things have always applied, and we'll continue to apply those considerations. But the mere fact that your governing statute happens to contain a provision that says you have a right of appeal on questions of law. . .should not limit or impact your ability to do a JR, so the court unanimously agreed with that and it's great."

Had the Ontario Court of Appeal decision been upheld, "I think that would have very bad implications from an access to justice perspective," she remarked, particularly for people of modest means appearing before tribunals with limited rights of appeal, like the social benefits tribunal and the landlord and tenant board. "It would mean that when these tribunals make decisions that seriously impact them, but they happen to not raise a question of law, . . that you would only be able to review those in rare or exceptional circumstances and. . .the decisions below didn't really say what would constitute 'rare' or 'exceptional' circumstances," Qureshi said.

"So my guess is that if the court had upheld that decision, we would then see future cases trying to figure out what are the factors that you have to meet to establish that you have met rare or exceptional circumstances? And there are already so many hurdles to having your JR heard, especially if you're a self-rep, and the idea that there would be now this new test that you have to jump over to establish that 'there's . . .exceptional circumstances, so you should hear my JR,' that's just another massive hurdle from an access to justice perspective."

University of Ottawa law professor Paul Daly, whose administrative law writings were cited by the top court, called *Yatar* "an important restatement of the fundamental importance of judicial review."

University of Ottawa law professor Paul Daly

The court of appeal had wrongly suggested that access to judicial review can be denied in all but rare cases where there is a statutory right of appeal, but the Supreme Court has "rejected this suggestion, reaffirming first principles: Canadians must be able to challenge allegedly unreasonable or procedurally unfair decisions," he explained.

"From a practical perspective, this decision means that in the many statutory regimes with limited rights of appeal, it will be possible to appeal on a point of law and also judicially review any questions of fact," said Daly, who represented the intervener Canadian Telecommunications Association.

"Practitioners need to be alert to this possibility and will have to think carefully about the procedural rules in their jurisdiction in order to maximize their clients' chances of success," he advised.

Daly noted that the top court did not, however, deal with a feature of many federal statutes, which combine a limited right of appeal and a privative clause. "That issue is left for another day, as is the suitability of Cabinet review of decisions of the CRTC and Canadian Transportation Agency, for example, as an alternative remedy to judicial review," he said. "Questions have been raised about these issues in the federal courts and will, no doubt, wind their way to the Supreme Court before too long," he remarked.

Sean Dewart of Toronto's Dewart Gleason LLP, who with Ian McKellar, Rebecca Ward and Tim Gleason represented Yatar, told Law360 Canada that the decision affirms that *Vavilov* — the leading decision and new departure for judicial review which identified the need for more exacting judicial review of administrative tribunals — "is here to stay."

"The Supreme Court has made it clear that it meant what it said in *Vavilov*," Dewart explained. "The pendulum has clearly swung away from unquestioning deference of administrative tribunals, and the law now recognizes the need for greater accountability on their part."

Dewart called this "a positive development for Canadians. These tribunals deal with issues as varied as housing, employee's rights, police misconduct and involuntary medical treatment, and in Ms. Yatar's case, benefits for injured persons. In *Yatar,* the court confirmed that tribunals that deal with these issues cannot be left as a law unto themselves."

He added that in Ontario "the government has starved tribunals of adequate resources, and it is an open secret that most of them are in crisis."

He suggested, "if courts insist on enhanced accountability, this might compel the government to appoint a sufficient number of qualified adjudicators so that the tribunals can properly perform their

duties."

In the wake of *Vavilov*, there were conflicting decisions about the availability of judicial review in cases where litigants have limited rights of appeal. In seeking leave to appeal, Yatar said in her successful application for leave to appeal to the Supreme Court that the Ontario Court of Appeal's decision diverged from the law in Alberta, Saskatchewan, Manitoba, Newfoundland and from the Federal Court of Appeal.

Justice Rowe's indexed 40-page judgment addresses a court's exercise of discretion as to whether to undertake judicial review on the merits in light of a limited statutory right of appeal. "However, while there is a right to seek judicial review, it is open to the judge before whom judicial review is sought to decide whether to exercise his or her discretion to grant relief — although this discretion does not extend to decline to consider the application for judicial review," Justice Rowe said.

"The discretion whether to undertake judicial review should be exercised by the judge having regard to the framework set out in *Strickland*," he advised. "At a minimum, the judge must determine whether judicial review is appropriate. If, in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application. The judge also has the discretion to refuse to grant a remedy even if they find that the decision under review is unreasonable."

Justice Rowe said that in the exercise of its discretion, a court should consider the available alternatives, in addition to the suitability and appropriateness of judicial review in the circumstances. "This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue," he said. "Alternative remedies exist where internal review processes have not been exhausted or where there is a statutory right of appeal that is not restricted, such that questions of law, fact and mixed fact and law could be considered on appeal."

The respondents, TD Insurance Meloche Monnex and the Licence Appeal Tribunal, did not have comments.

Photo of Justice Malcolm Rowe: Balfour Photography, SCC collection.

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