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# Right of appeal: Why it may not preclude judicial review

By **Marco P. Falco**

Law360 Canada (April 3, 2024, 2:20 PM EDT) -- Canadian courts have ample discretion to oversee a challenge to a tribunal decision through judicial review. In Ontario, this discretion is codified under the *Judicial Review Procedure Ac*t, R.S.O. 1990, c.J.1 (the JRPA).

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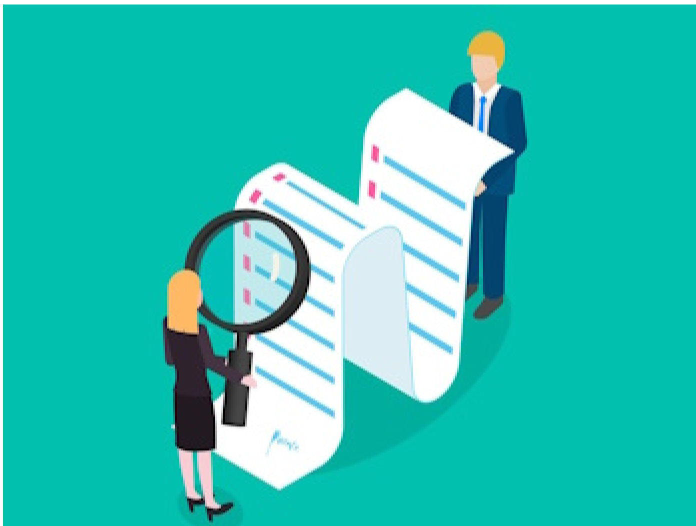
The ability of a court to grant relief on judicial review exists “despite any right of appeal” under s. 2(1) of the JRPA. A recent decision of the Supreme Court of Canada, *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, gives legal heft to the court’s ability to engage in judicial review, despite limited appeal rights set out in the governing statute.



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*Yatar* recognizes that a court may hear a parallel judicial review application on questions of mixed fact and law or on the question of fact, where a claimant’s appeal rights are restricted to questions of law.

In effect, a limited appeal right should not act as a form of “privative clause,” shielding the tribunal’s decision from more fulsome judicial scrutiny.

**To appeal or not to appeal**

*Yatar* arises from a challenge by the applicant to the denial of various insurance benefits from her insurer following a motor vehicle accident.

Ontario’s Licence Appeal Tribunal (the LAT) dismissed the applicant’s challenge to the denial of her benefits as being statute-barred under the applicable limitation period. This decision was upheld by the LAT on a reconsideration application, which is a secondary form of appeal from the original LAT decision (the Reconsideration Decision).

Under s. 11(6) of the *Licence Appeal Tribunal Act*, 1999, S.O. 199, c.12, Sched. G. (the LAT Act), the applicant had a right to appeal the Reconsideration Decision to the Ontario Divisional Court but only on a "question of law." That is, the applicant had a limited right to appeal the Reconsideration Decision if the appeal raised questions in the form of a pure legal error and not if the appeal concerned factual questions or the application of legal principles to the facts of the case, i.e., questions of mixed fact and law.

The applicant, therefore, commenced an appeal under s. 11(6) of the LAT Act to the court on questions of law (the appeal), as well as a parallel application for judicial review (JR) on questions of fact or mixed fact and law, which she also intended to raise (the JR application).

The Divisional Court dismissed the appeal and declined to grant the JR application, holding that there were no "exceptional circumstances" that would justify judicial review.

The Ontario Court of Appeal held that while a limited statutory right of appeal in this case did not preclude the JR Application, judicial review remained a "discretionary remedy." Thus, the court had the discretion to decide whether to undertake the review and to grant relief under the JR application.

In this case, the Legislature indicated its intention that the applicant only had limited rights of appeal under the LAT Act; therefore, the legislature had signalled its intent to "limit access to the courts regarding these disputes."

The Supreme Court of Canada reversed.

Following its previous analysis in *Strickland v. Canada (Attorney General)*, 2015 SCC 37, a unanimous court held that where there is a limited right of appeal, judicial review should not only be exercised in "exceptional or rare cases."

**Narrow right of appeal does not preclude judicial review**

The court began its analysis by affirming the fact that the mere existence of a statutory right of appeal does not preclude judicial review: citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

Thus, the applicant was within their rights to pursue both the appeal from the Reconsideration Decision on questions of law alone and the parallel JR application on questions of fact and questions of mixed fact and law.

The legal questions on the appeal would be subject to scrutiny on the less deferential standard of review of correctness while the questions of fact and mixed fact and law would be subject to the deferential standard of reasonableness on the JR application.

The crux of the court's analysis, however, was that, while a court on the JR application had the discretion to deny relief, it did not have the jurisdiction to decline to merely consider the JR application itself:

> 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.
>
> …
>
> When an applicant brings an application for judicial review, a judge must consider the application: that is, 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.

Citing *Strickland, supra*, the court noted that in deciding whether judicial review is appropriate, the court should have regard to a number of non-exhaustive factors, including whether the applicant has

an "adequate alternative remedy" to judicial review.

Overall, the court has to engage in a "balance of convenience" exercise, deciding which factors to isolate and consider.

In this case, the Supreme Court of Canada concluded that the Court of Appeal "erred by holding that the limited right of appeal reflected an intention to restrict recourse to the courts on other questions arising from the administrative decision and that judicial review should thus be rare."

While the limited right of appeal under the LAT Act indicated an intention to review LAT decisions on the less deferential "correctness" standard of review, the limited appeal right did not preclude judicial review applications on questions of fact or mixed fact and law.

The Ontario Legislature, in creating the LAT Act, could have precluded all "types of errors in the right of appeal" but chose not to. Accordingly, the court could not gloss over a legislative intent to preclude judicial review in its entirety from LAT decisions.

Moreover, the fact that there was a statutory right of appeal and the ability to have the LAT's initial decision reviewed by way of the Reconsideration Decision did not constitute "adequate alternative remedies" for the applicant.

The right of appeal denied the applicant the right to challenge questions of fact and mixed fact and law. The Reconsideration decision "itself is the subject of the review."

**Court's residual discretion to review administrative decisions**

Canadian courts will guard their jurisdiction to engage in judicial review, despite circumscribed statutory rights of appeal.

The Legislature or Parliament cannot shield the decisions of the administrative State from judicial scrutiny by creating a form of "privative" clause by way of a limited right of appeal.

Where an application for judicial review has been brought in parallel with a limited appeal, the courts have a duty to consider the judicial review application. This obligation does not mean that the court must grant relief — but, at a minimum, it secures the applicant's right to be heard by way of judicial review.

The effect of *Yatar* remains to be seen. It may very well result in a multiplicity of parallel proceedings before the courts, which will be tasked with considering both appeals and applications for judicial review on the same subject matter.

That being said, *Yatar* recognizes that judicial review is a robust remedy. Limited rights of appeal cannot oust the courts' discretion to scrutinize tribunal decision-making.

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