



**SUPREME COURT OF CANADA**

**CITATION:** Yatar v. TD Insurance  
Meloche Monnex, 2024 SCC 8

**APPEAL HEARD:** November 15,  
2023

**JUDGMENT RENDERED:** March  
15, 2024

**DOCKET:** 40348

**BETWEEN:**

**Ummugulsum Yatar**  
Appellant

and

**TD Insurance Meloche Monnex and Licence Appeal Tribunal**  
Respondents

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General  
of Quebec, Attorney General of British Columbia, Attorney General of  
Alberta, Income Security Advocacy Centre, Advocacy Centre for Tenants  
Ontario, Canadian Telecommunications Association, Insurance Bureau of  
Canada, Forest Appeals Commission, Aboriginal Council of Winnipeg, Inc.  
and Social Planning Council of Winnipeg**  
Interveners

**CORAM:** Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,  
O'Bonsawin and Moreau JJ.

**REASONS FOR  
JUDGMENT:**  
(paras. 1 to 78)

Rowe J. (Wagner C.J. and Karakatsanis, Côté, Martin,  
Kasirer, Jamal, O’Bonsawin and Moreau JJ. concurring)

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**Ummugulsum Yatar**

*Appellant*

v.

**TD Insurance Meloche Monnex and  
Licence Appeal Tribunal**

*Respondents*

and

**Attorney General of Canada,  
Attorney General of Ontario,  
Attorney General of Quebec,  
Attorney General of British Columbia,  
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Income Security Advocacy Centre,  
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*Interveners*

**Indexed as: Yatar v. TD Insurance Meloche Monnex**

**2024 SCC 8**

File No.: 40348.

2023: November 15; 2024: March 15.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Administrative law — Judicial review — Limited statutory right of appeal on questions of law — Tribunal finding insured's application contesting denial of statutory accident benefits by insurer time-barred — Provincial legislation limiting right of appeal from tribunal's decision to questions of law — Insured appealing decision on questions of law and seeking judicial review on questions of fact and mixed fact and law — Appeal and application for judicial review dismissed — Whether courts should have exercised discretion to undertake judicial review on merits in light of limited statutory right of appeal on questions of law — Proper approach to judicial review where limited statutory right of appeal.*

*Insurance — Automobile insurance — Statutory accident benefits — Denial — Limitation period — Insured injured in automobile accident — Insurer denying statutory accident benefits — Tribunal finding insured's application contesting denial of benefits time-barred — Whether Tribunal's decision was reasonable.*

Y was injured in an automobile accident in 2010. Her insurer initially paid her accident benefits. However, in January 2011, the insurer informed Y by letter that payment of all benefits had been stopped in the absence of a completed disability

certificate. A dispute resolution form was attached to the letter. Then, in February 2011, the insurer informed Y that following a medical assessment her income replacement benefits were reinstated but her claim to the other two benefits — housekeeping and home maintenance — was denied. Finally, in September 2011, the insurer informed Y that her income replacement benefits were denied and payments would be stopped. No dispute resolutions forms were attached to either of the last two letters.

Y applied for mediation, which was mandatory at the time, to dispute the denial of her benefits. The mediation process came to an end in January 2014 and the mediator released his report. At the time of Y's accident, Ontario's *Insurance Act* provided for a two-year limitation period after the insurer's refusal to pay the benefits to commence a proceeding to contest the denial. It also provided that the limitation period was extended by a period of 90 days after the mediator provided their report. Y commenced a proceeding before the Licence Appeal Tribunal ("LAT") in March 2018. Her application was dismissed as being time-barred and her request for reconsideration was dismissed.

Pursuant to Ontario's *Licence Appeal Tribunal Act, 1999*, Y's right of appeal from the LAT adjudicator's reconsideration decision was restricted to questions of law. Y pursued an appeal on questions of law, and also sought judicial review regarding questions of fact or mixed fact and law. The Divisional Court dismissed the appeal, holding that Y showed no errors of law made by the LAT adjudicator. It also dismissed Y's application for judicial review, on the basis that there were no

exceptional circumstances that would justify judicial review. The Court of Appeal dismissed Y's appeal, holding 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 Y had an appropriate alternative remedy. It also concluded that even if the judicial review application ought to have been considered, it would have been denied as the LAT adjudicator's decision was reasonable.

*Held:* The appeal should be allowed and the matter remitted to the LAT adjudicator.

It was an error for the courts below to hold that, where there is a limited right of appeal, judicial review should only be exercised in exceptional or rare cases. The limited right of appeal from LAT decisions to pure questions of law does not reflect an intention by the legislature to restrict recourse to the courts on other questions arising from the LAT's administrative decision. The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject LAT decisions on questions of law to correctness review, and proceeding with judicial review on questions of fact or mixed fact and law is fully respectful of the legislature's institutional design choices. Furthermore, the LAT adjudicator's reconsideration decision was unreasonable, as he failed to take into account relevant legal constraints. The matter should be referred back to the LAT adjudicator for reconsideration.

As held by the Court in *Vavilov*, a right of appeal does not preclude an individual from seeking judicial review for questions not dealt with in the appeal.

Where there is a statutory right of appeal limited to questions of law, judicial review is available for questions of fact or mixed fact and law. 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. The discretion whether to undertake judicial review should be exercised by the judge having regard to the framework set out in *Strickland v. Canada (Attorney General)*, 2015 SCC 37. 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.

In exercising its discretion, in addition to the suitability and appropriateness of judicial review in the circumstances, the court should consider the available alternatives. This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue. 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. It would be ignoring *Strickland* to conclude that only in exceptional circumstances would judicial review be available where there is a limited right of appeal. It would also be an error to hold that judicial review should only be exercised in rare cases.

In the instant case, the Divisional Court should have exercised its discretion to undertake judicial review for issues not dealt with under the statutory right of appeal. The statutory right to appeal and the LAT adjudicator's reconsideration decision do not constitute adequate alternative remedies. Y raises errors of fact or mixed fact and law which are not reviewable under the statutory right of appeal, and access to internal reconsiderations cannot be an adequate alternative remedy, as the reconsideration decision itself is the subject of the review.

Furthermore, the LAT adjudicator's reconsideration decision is unreasonable, as he failed to have regard to the effect of the reinstatement of the income replacement benefits between February and September 2011 on the validity of the initial denial. In addition, he did not consider earlier tribunal decisions, some of which had held that when an applicant's benefits are reinstated, the limitation period can only be triggered when they are validly terminated again. It is arguable that there needed to be a valid denial of the income replacement benefits to start the clock running on the limitation period, and this question is one to be properly decided by the LAT.

### **Cases Cited**

**Applied:** *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713; **referred to:** *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Canada (Auditor General) v. Canada (Minister of Energy, Mines*



*and Resources*), [1989] 2 S.C.R. 49; *Smith v. The Appeal Commission*, 2023 MBCA 23, 479 D.L.R. (4th) 121; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2022 ABQB 545, 61 Alta. L.R. (7th) 170; *Zarooben v. Workers' Compensation Board*, 2021 ABQB 232, 84 Admin. L.R. (6th) 96, aff'd 2022 ABCA 50, 95 Admin. L.R. (6th) 163; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *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, 14 Admin. L.R. (7th) 42; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Veldhuizen v. Coseco Insurance Co.*, 1995 ONICDRG 144 (CanLII); *Rudnicki v. Certas Direct Insurance Co.*, 2001 ONFSCDRS 60 (CanLII).

### **Statutes and Regulations Cited**

*Insurance Act*, R.S.O. 1990, c. I.8, ss. 280(3), 281(2), 281.1(1), (2)(b) [rep. 2014, c. 9, Sch. 3, s. 14].

*Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1).

*Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sch. G, s. 11(6).

*Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996*, O. Reg. 403/96, s. 51(2) [rep. & sub. 45/16, s. 5].

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Nordheimer and Zarnett JJ.A.), 2022 ONCA 446, 25 C.C.L.I. (6th) 1, [2022] O.J. No. 2602 (Lexis), 2022 CarswellOnt 7863 (WL), affirming a decision of Swinton, Penny and Kristjanson JJ., 2021 ONSC 2507, 157 O.R. (3d) 337, [2021] O.J. No. 2154 (Lexis), 2021 CarswellOnt 5678 (WL), dismissing an application for judicial review of a decision of the Licence Appeal Tribunal, 2020 CanLII 34442, 2020 CarswellOnt 6879 (WL). Appeal allowed.

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*Allison Fenske and Natalie Copps*, for the interveners Aboriginal Council of Winnipeg, Inc. and the Social Planning Council of Winnipeg.

The judgment of the Court was delivered by

ROWE J. —

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## I. Overview

[1] This case deals with 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.

[2] Ummugulsum Yatar is contesting the denial of her insurance benefits, following an accident in 2010. After having her application dismissed by the Licence Appeal Tribunal (“LAT”) in 2019, due to the matter being time-barred, Ms. Yatar requested reconsideration of this decision, which was dismissed. Then, she simultaneously appealed the decision before the Divisional Court of Ontario, and applied for judicial review. Section 11(6) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sch. G (“*LAT Act*”), provides that an appeal from a decision of the LAT relating to a matter under the *Insurance Act*, R.S.O. 1990, c. I.8, may be made on a question of law only.

[3] As per *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, a right of appeal does not preclude an individual from seeking judicial review for questions not dealt with in the appeal. 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. It is then a matter of discretion whether to undertake judicial review, having regard to the framework for analysis set out in *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713.

[4] The Divisional Court erred when it concluded that only in “exceptional circumstances” would judicial review be available where there is a limited right of appeal (2021 ONSC 2507, 157 O.R. (3d) 337, at para. 4); this ignored *Strickland*. The Court of Appeal for Ontario also erred when it held that only in “rare cases” judicial review would be exercised (2022 ONCA 446, 25 C.C.L.I. (6th) 1, at para. 42), and that in this case, Ms. Yatar had an appropriate alternative remedy. Both courts sought to apply *Strickland*, but erred in principle in doing so. 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.

[5] As to the LAT adjudicator’s reconsideration decision (2020 CanLII 34442 (“reconsideration decision”)), it is unreasonable, as he 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. Accordingly, the appeal is allowed and the matter is referred back to the LAT adjudicator for reconsideration.

## II. Factual Context

### A. *The Underlying Insurance Claim*

[6] Ms. Yatar “was injured in an automobile accident in February 2010 and sought benefits under the *Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996*, O. Reg. 403/96 (‘SABS’)” (Divisional Court decision, at para. 5). One of the two respondents, TD Insurance Meloche Monnex, was her insurer at the time, and received Ms. Yatar’s application for accident benefits on February 22, 2010, as well as her employer’s confirmation form on March 13, 2010. Ms. Yatar’s claim also included income replacement benefits (“IRBs”) as well as housekeeping and home maintenance benefits.

### B. *Denial of Requested Benefits and Subsequent Proceedings*

[7] Ms. Yatar’s request for benefits was initially considered valid by TD Insurance, which paid benefits to Ms. Yatar. In the months that followed, however, TD Insurance denied the benefits in three letters:

- (a) *The January Letter*: On January 7, 2011, TD Insurance informed Ms. Yatar that payment of IRBs, as well as housekeeping and home maintenance benefits, had been stopped in the absence of a completed disability certificate. The letter contained directions for a medical

examination, which Ms. Yatar attended on January 17 and January 27.

A dispute resolution form was attached to that letter.

(b) *The February Letter*: On February 16, 2011, Ms. Yatar was informed by TD Insurance that following the medical assessment, her claim to housekeeping and home maintenance benefits was denied. However, her IRBs were reinstated. No dispute resolution form was attached to that letter.

(c) *The September Letter*: On September 19, 2011, Ms. Yatar was advised that her IRBs were denied by TD Insurance, and that the payments would be stopped on September 28, 2011. No dispute resolution form was attached to that letter.

[8] There have been significant legislative amendments since Ms. Yatar commenced her procedures. At the time of the accident, in 2010, the *Insurance Act* provided for a two-year limitation period after the insurer's refusal to pay the benefits to commence a proceeding (s. 281.1(1)), as well as mediation as a mandatory first step to resolve a dispute (s. 281(2)), which extended the limitation period to 90 days after the mediator provided their report (s. 281.1(2)(b)). Ms. Yatar applied for mediation on September 13, 2012, to dispute the denial of her benefits. The mediation process came to an end on January 14, 2014.



[9] However, what is most relevant in this case is that when Ms. Yatar commenced her proceeding before the LAT in March 2018, both the *Insurance Act* and the *SABS* had been redesigned. Under the amended *Insurance Act*, the LAT was given exclusive jurisdiction at first instance over the resolution of *SABS* disputes. As well, mandatory mediation was eliminated. The *LAT Act* was also amended to provide for an appeal from a decision of the LAT on a question of law only (s. 11(6)).

[10] On March 31, 2016, Ms. Yatar commenced an action in the Superior Court of Justice. The action was dismissed through a consent order on March 27, 2017, and the application underlying this appeal was brought to the LAT in March 2018.

### III. Judicial History

#### A. *Licence Appeal Tribunal*

[11] In the LAT adjudicator's first decision in April 2019 (2019 CanLII 43918 ("preliminary decision")), the LAT adjudicator considered Ms. Yatar's claim for IRBs, housekeeping benefits and home maintenance benefits and dismissed it, concluding that the claim was time-barred since April 2014. When Ms. Yatar proceeded with mediation in early 2011, both s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a limitation period that expired 90 days after the mediator's report was released.

[12] The LAT adjudicator found that TD Insurance denied the IRBs, home maintenance and housekeeping benefits in a letter dated January 7, 2011. Given that “[Ms. Yatar] filed this Application before the [LAT] on March 16, 2018, more than seven years after these benefits were denied on January 7, 2011” (para. 19), and even taking into account the extensions of the limitation period due to the evaluation and mediation, the LAT adjudicator found that the claims were time-barred since April 2014.

[13] The LAT adjudicator noted that “[f]rom counsel’s evidence, it is clear that lawyers at her firm should have been aware of the applicable two-year limitation period. It is also clear that [Ms. Yatar] relied on the expertise of her counsel, to her detriment, in the face of the statutory limitation period” (preliminary decision, at para. 25).

[14] In the reconsideration decision, the LAT adjudicator reviewed his earlier reasons as well as the evidence. A factual error was corrected at para. 12 of the decision, but the LAT adjudicator re-affirmed the original decision.

[15] The LAT adjudicator relied on *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129. He concluded that the dispute resolution form, attached to the January 2011 letter, “clearly sets out three steps in the dispute process and warns in clear straightforward language of the two-year limitation period” (para. 13). The LAT adjudicator stated that, in *Smith v. Co-operators*, the Supreme Court of Canada sought to ensure that the applicant is aware of the dispute resolution process.

He noted that there was an “implicit acceptance of the denials effective January 4, 2011” and affirmed his previous finding that the January 7, 2011 letter constituted a valid denial of benefits (reconsideration decision, at para. 15; see also para. 16).

[16] The limitation period was extended into April 2014 following the mediation. However, Ms. Yatar made the application to the LAT for benefits on March 16, 2018. Thus, the request was time-barred. The application was dismissed.

B. *Ontario Superior Court of Justice (Divisional Court), 2021 ONSC 2507, 157 O.R. (3d) 337 (Swinton, Penny and Kristjanson JJ.)*

[17] Ms. Yatar’s right of appeal from the LAT adjudicator’s reconsideration decision was restricted to questions of law, per s. 11(6) of the *LAT Act*. In light of this, Ms. Yatar pursued an appeal on questions of law, and also sought judicial review regarding questions of fact or mixed fact and law.

[18] The Divisional Court held that its authority to hear the judicial review application stemmed from s. 280(3) of the *Insurance Act* and s. 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; this authority was not precluded by the limited right of appeal on questions of law provided by s. 11(6) of the *LAT Act*.

[19] The appeal was dismissed, as Ms. Yatar showed no errors of law made by the LAT adjudicator and, instead, recited “findings of fact made by the [LAT] adjudicator and then baldly assert[ed] that the [LAT] adjudicator erred in law, without

identifying the legal error or any extricable legal principle” (Divisional Court decision, at para. 27).

[20] On judicial review with respect to the questions of fact and mixed fact and law, the Divisional Court concluded that, per *Vavilov*, the limited right of appeal in the *LAT Act* did not “deprive this court of jurisdiction to consider other aspects of a decision in judicial review proceedings” (para. 36). The court added that judicial review is a discretionary remedy, and should thus be declined when alternative remedies are adequate (see *Strickland*, at paras. 37 and 40).

[21] As to whether to exercise its discretion to undertake judicial review in this case, the Divisional Court considered four factors: (i) the legislative intent to limit judicial review of LAT decisions on statutory accident benefits to questions of law only, (ii) the breadth of the LAT’s reconsideration power, (iii) the nature of the alleged errors, and (iv) the systemic difficulties associated with dealing with judicial review and an appeal (paras. 41-45).

[22] The Divisional Court concluded that there were “no exceptional circumstances” in this case that would justify judicial review (para. 46). On this basis, the Divisional Court declined to grant the application for judicial review.

C. *Court of Appeal for Ontario, 2022 ONCA 446, 25 C.C.L.I. (6th) 1 (Lauwers, Nordheimer and Zarnett J.J.A.)*

[23] Two issues were appealed to the Court of Appeal: (i) whether “the Divisional Court err[ed] in limiting judicial review, in cases where there has been a statutory appeal . . . to ‘exceptional circumstances’” and (ii) whether “the [LAT]’s reconsideration decision [was] reasonable” (para. 27).

[24] The Court of Appeal observed that when the Divisional Court referred to the availability of judicial review, “the use of the language ‘exceptional circumstances’ was an unfortunate one” and led to potential confusion (para. 35). The Court of Appeal held that what the Divisional Court “was attempting to communicate is 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 disputes over SABS” (para. 42).

[25] The Court of Appeal held that a limited statutory right of appeal does not preclude judicial review. The right to seek judicial review is always available, but this does not “change the fact that judicial review is a discretionary remedy” (para. 41). The Court of Appeal also stated that “[t]he court’s discretion with respect to judicial review applies both to its decision to undertake review and to grant relief”, relying on *Strickland* (para. 44).

[26] The Court of Appeal held that the Divisional Court correctly considered the factors in *Strickland* as to whether there are alternative remedies to judicial review. There is “legislative intent to limit access to the courts regarding these disputes” (para. 43).

[27] The Court of Appeal concluded that even if “the judicial review application ought to have been considered”, Ms. Yatar had failed to show that the LAT adjudicator’s reconsideration decision was unreasonable: “. . . that application would have failed on the presumptive standard of review of reasonableness . . .” (para. 52).

[28] The Court of Appeal held that the LAT adjudicator’s underlying finding, that the valid denial of benefits triggered the beginning of the limitation period, was also reasonable:

. . . the limitation period would have expired in 2013, but for the . . . mediation process that extended that limitation period to April 2014. In either event, the fact that [Ms. Yatar] had not launched her application to the [LAT] until March 16, 2018 meant that it was outside of the limitation period. [para. 51]

[29] Thus, while the Court of Appeal concluded that judicial review of the LAT adjudicator’s decision ought not to have been considered, the application for judicial review would have been denied as the LAT adjudicator’s decision on the reconsideration was reasonable.

#### IV. Issues on Appeal

[30] Ms. Yatar raises two questions on appeal: first, whether the Court of Appeal erred when it concluded that the legislature’s decision to limit the right of appeal from LAT decisions to “pure” questions of law restricted the availability of judicial review of LAT decisions for errors of fact or mixed fact and law to “rare” or

“unusual” cases; and second, whether the Court of Appeal erred in concluding that the LAT adjudicator’s reconsideration decision was reasonable (A.F., at para. 28).

V. Submissions of the Parties

A. *Ms. Yatar*

[31] Ms. Yatar submits that the Court of Appeal erred in finding that the existence of a limited statutory right of appeal can be a basis to decline to undertake judicial review regarding issues outside the scope of the statutory appeal. *Vavilov* confirms that “a right to appeal on a question of law is not an adequate remedy if a litigant seeks judicial review of a question of fact, or a question of mixed fact and law, . . . the two remedies are compl[e]mentary” (A.F., at para. 52).

[32] Regarding judicial review in this case, Ms. Yatar argues that since no dispute resolution form accompanied the letters in February and September 2011, the latter cannot be considered valid denials of benefits. The LAT adjudicator erred in considering that the letter from January 2011 was a valid denial, as it was a temporary suspension of benefits and “did not constitute notice in ‘straightforward and clear language, directed towards an unsophisticated person’ that benefits would not be provided” (A.F., at para. 79). Thus, the letter from January 2011 cannot be the starting point for the limitation period.

[33] The fact that the LAT adjudicator did not address the issue of “ambiguities” in the January 2011 letter, Ms. Yatar submits, is a central flaw in the analysis and, therefore, the decision is unreasonable.

B. *TD Insurance and Licence Appeal Tribunal*

[34] TD Insurance submits that the Divisional Court did not err in exercising its discretion to decline to undertake judicial review of the LAT adjudicator’s reconsideration decision. The Ontario legislature chose to limit the courts’ involvement in appeals on questions of law.

[35] Judicial review is discretionary and the Divisional Court’s exercise of this discretion is entitled to deference. As this Court recognized in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, prerogative writs are an “extraordinary remedy”. The right to seek judicial review does not entail “a right to require the court to undertake judicial review” regardless of the nature of the question (para. 30; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 93).

[36] TD Insurance submits that the *Strickland* factors provide a sufficient basis on which to dismiss this appeal. If the alternatives to judicial review are adequate, as they are here, then it is “appropriate” to give effect to the legislature’s intent and to decline to undertake judicial review. Other factors from the jurisprudence confirm that judicial review was not appropriate here, including: the nature of the statutory scheme,



the nature of the decision and the process followed in making it, the importance of the decision to the individual or individuals affected, and whether the case is of public interest.

[37] In the alternative, TD Insurance submits, if the LAT adjudicator's reconsideration decision is to be judicially reviewed, the LAT adjudicator reasonably determined that the application was statute-barred.

[38] The LAT submits that the Court of Appeal correctly held that the discretion to entertain judicial review on questions of fact and mixed fact and law should be exercised "only . . . in rare cases" (C.A. reasons, at para. 42). Otherwise, the legislative intent in enacting the restrictive appeal clause would be undermined.

[39] The LAT submits this is consistent with *Strickland's* holding on the exercise of discretion on judicial review. *Vavilov* did not change the law on the discretion to decline to undertake judicial review where there is an alternative remedy; *Vavilov* did not overrule *Strickland*.

[40] In the LAT's view, reading *Vavilov* and *Strickland* together leads to the conclusion that the exercise of discretion on judicial review must consider the adequacy of the restrictive appeal as an alternative remedy while also being respectful of the legislature's choice to create a right of appeal limited to questions of law only. The LAT takes no position on the reasonableness of its decision.

## VI. Analysis

### A. *Standard of Review*

[41] The main issue in this appeal relates to the decision by the Divisional Court and the Court of Appeal not to undertake judicial review. As this is a discretionary decision, deference is to be shown (see *Strickland*, at para. 39). However, the exercise of discretion can be set aside when a judge “considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion” (*Matsqui Indian Band*, at para. 39). As I will explain, the Divisional Court and the Court of Appeal erred in their application of *Strickland* in that they acted on the basis of a “wrong principle” (*Matsqui Indian Band*, at para. 112, per Sopinka J.).

[42] Once it is determined that it is appropriate to undertake judicial review in this case, the issue arises whether the LAT adjudicator’s reconsideration decision was reasonable. Per *Vavilov*, there is “a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions” (para. 16). That presumption is not rebutted here.

### B. *The Existence of a Circumscribed Right of Appeal Does Not, on Its Own, Preclude Applications for Judicial Review*

[43] When the dispute arose in early 2011, mediation was a mandatory first step to challenge an insurer’s denial of benefits. Both s. 281.1(2)(b) of the *Insurance Act*

and s. 51(2) of the *SABS* provided for a 90-day extension of the limitation period after the mediator's report is released. Ms. Yatar undertook mediation in September 2012. When Ms. Yatar commenced her proceeding before the LAT in March 2018, the statutory scheme had been amended and provision was made for an appeal from a decision of the LAT on a matter under the *Insurance Act* on questions of law only.

[44] In the case at bar, the Divisional Court and the Court of Appeal held that a party can both exercise a statutory right of appeal and seek judicial review for questions outside the scope of the statutory right of appeal. Other courts have also determined that a statutory right of appeal does not alter the availability of judicial review (see *Smith v. The Appeal Commission*, 2023 MBCA 23, 479 D.L.R. (4th) 121; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2022 ABQB 545, 61 Alta. L.R. (7th) 170; *Zarooben v. Workers' Compensation Board*, 2021 ABQB 232, 84 Admin. L.R. (6th) 96, aff'd 2022 ABCA 50, 95 Admin. L.R. (6th) 163).

[45] The question remains: what role does the right of appeal play in the exercise of discretion to undertake judicial review? In settling this question, it is important to have regard to first principles. In *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, this Court held that “[t]he principle that public authorities are subordinate to the supervisory power of the superior courts is the cornerstone of the Canadian and Quebec system of administrative law. Such judicial review is a necessary consequence of the rule of law” (p. 360).

[46] The importance of judicial review was affirmed by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 27:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.

[47] This Court held in *Vavilov*, at para. 52, that the legislative intent to restrict statutory rights of appeal does not, on its own, affect the availability of judicial review:

. . . the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal.

[48] This Court's precedent contemplates a person pursuing both a statutory appeal on questions of law and judicial review on questions of fact and mixed fact and law. In such an instance, as set out in *Vavilov*, at para. 37, the questions of law being appealed would be subject to review on a standard of correctness (see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235), and questions of fact and mixed fact and law would be subject to review on a standard of reasonableness on judicial review (see *Vavilov*).

[49] A person has a right to seek judicial review, and “[t]o give courts a discretion not to hear judicial review applications because of their perception of the quality and quantity of internal reconsiderations would allow judicial discretion to trump [a] constitutional principle” (P. Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (2023), at p. 226, note 94). While there is discretion to hear the application on the merits and deny relief, this discretion does not extend to decline to consider the application for judicial review, as will be explained below.

[50] I would note recent jurisprudence from the Federal Court of Appeal as to the availability of judicial review where there is a privative clause, i.e. a clause that seeks to bar or restrict judicial review (see, e.g., *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, 14 Admin. L.R. (7th) 42; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208). But that is not the question at issue in this case. Accordingly, I leave that question for another day.

### C. *The Exercise of Discretion To Grant Relief on Judicial Review*

[51] 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. This Court stated in *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90:

Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief . . . . Declarations of right, whether sought in judicial review proceedings or in actions, are similarly a discretionary remedy: “. . . the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded” . . . . [Emphasis added.]

[52] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 135, Rothstein J. stated:

The traditional common law discretion to refuse relief on judicial review concerns the parties’ conduct, any undue delay and the existence of alternative remedies: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 364. As *Harelkin [v. University of Regina]*, [1979] 2 S.C.R. 561, affirmed, at p. 575, courts may exercise their discretion to refuse relief to applicants “if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty”. As in the case of interlocutory injunctions, courts exercising discretion to grant relief on judicial review will take into account the public interest, any disproportionate impact on the parties and the interests of third parties. [Emphasis added.]

[53] In the case at bar, the Court of Appeal stated that “[t]he court’s discretion with respect to judicial review applies both to its decision to undertake review and to grant relief” (para. 44). This wording is unclear; thus, there is need for clarification.

[54] 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 (*Strickland*, at paras. 1, 38 and 40; *Matsqui*, at para. 31). The judge also has the discretion to refuse to grant a remedy, even if they find that the decision under review is unreasonable (*Khosa*, at para. 135; *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90).

[55] The Court of Appeal initially found no reversible error in the Divisional Court's decision to refuse to hear the judicial review application and agreed with the Divisional Court that: (i) there were alternative remedies, and (ii) the legislative scheme demonstrates "the legislative intent to limit access to the courts regarding these disputes" (para. 43). The Court of Appeal then went on to conduct a judicial review, as had the Divisional Court.

[56] Per *Strickland*, the exercise of discretion requires the court to determine the appropriateness of judicial review: "The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. . . . This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue . . ." (paras. 43-44).

[57] Respectfully, the Court of Appeal erred in its application of the *Strickland* factors. As I will explain, there is no proper basis to infer legislative intent to eliminate judicial review for issues (of fact and mixed fact and law) outside the scope of a

statutory appeal. Furthermore, there was no adequate alternative remedy for Ms. Yatar on questions of fact and mixed fact and law.

[58] 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. The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject LAT decisions on questions of law to correctness review. The idea that the LAT should not be subject to judicial review as to questions of facts and mixed facts and law cannot be inferred from this.

[59] The respondent TD Insurance argues that the legislative scheme and its amendments in 2016 reflects a policy choice by the legislature to severely limit the courts' involvement in accident benefits disputes: "Section 11(6) of the *LAT Act* restricts appeals to questions of law. . . . For LAT decisions made under nearly twenty other statutes, the legislature has made appeals available on all questions" (R.F., at paras. 62-63). TD Insurance further submits that "applying a deferential standard of review (reasonableness) to factual and mixed questions arising out of LAT decisions concerning SABS would not be appropriately respectful of the legislature's institutional design choices" (para. 84).

[60] With respect, I do not agree. The legislature could have decided to encompass all types of errors in the right to appeal, but it did not. Moreover, s. 2(1) of the *Judicial Review Procedure Act* preserves the right of litigants to seek a judicial



review “despite any right of appeal”. Errors of fact or mixed fact and law, thus, are not subject to a correctness standard of review. With that in mind, proceeding with judicial review of questions of fact or mixed fact and law is fully respectful of the legislature’s institutional design choices.

[61] In *Vavilov*, this Court held that “because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely” (para. 24). Professor Paul Daly argues that “[w]here the judicial review jurisdiction of the courts *has been* successfully ousted by statute . . . the legislature has provided a particular channel for oversight of the legality, rationality and procedural fairness of administrative action” (*Understanding Administrative Law in the Common Law World* (2021), at p. 188 (emphasis in original)). In other words, there was an appropriate alternative forum or remedy.

[62] The statutory right to appeal and the LAT adjudicator’s reconsideration decision do not constitute adequate alternative remedies. The right to appeal under s. 11(6) of the *LAT Act* is restricted to errors of law only. Ms. Yatar raises errors of fact or mixed fact and law. Review of these questions is not available under the statutory right of appeal.

[63] The access to internal reconsideration cannot be an adequate alternative remedy, as the reconsideration decision itself is the subject of the review. Alternatives do exist where internal review processes have not been exhausted or where there is a

statutory right to appeal that is not restricted, such that questions of law, fact, and mixed fact and law could be considered on appeal. But, that is not so here.

[64] This Court in *Strickland*, at para. 43, also emphasizes the appropriateness of judicial review in the circumstances, referring to a “balancing exercise”:

The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing [*Minister of Energy, Mines and Resources*], at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: “Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . .” [*Minister of Energy, Mines and Resources*], at p. 96). [Emphasis added.]

[65] It has been argued by both respondents that judicial review was not appropriate in the circumstances, as the legislative intent was to “streamline dispute resolution and reduce costs” (R.F., TD Insurance, at para. 61). Respectfully, I do not agree. Judicial economy is a legitimate concern. However, the countervailing consideration is to ensure that those whose interests are being decided by a statutory delegate have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification, or were taken in a way that was procedurally unfair.

[66] Thus, in this case, the elements of the reconsideration decision that are not covered by the limited right of appeal should be judicially reviewed.

[67] I turn now to whether the LAT adjudicator's decision was reasonable.

D. *The LAT Adjudicator's Decision Was Unreasonable*

[68] Ms. Yatar received a letter from the insurer in January 2011 advising her that she would not receive further IRBs, housekeeping and home maintenance benefits, as she had not submitted a disability certificate. Attached to the letter was a dispute resolution form.

[69] Ms. Yatar provided the disability certificate and per the letter she received from the insurer in February 2011, her IRBs were reinstated, but her housekeeping and home maintenance benefits were denied. Following another medical examination, the insurer denied further IRBs as set out in the letter of September 2011.

[70] Ms. Yatar argues that the letters of February and September 2011 are not valid denials as no dispute resolution form was attached. While the LAT adjudicator also arrived at that conclusion, Ms. Yatar submits that the LAT adjudicator erred in finding that the letter from January was a valid denial.

[71] Per *Vavilov*, two types of flaws can render a decision unreasonable: first, a "failure of rationality internal to the reasoning process", and second, "when a decision

is in some respect untenable in light of the relevant factual and legal constraints that bear on it” (para. 101). The LAT adjudicator’s reconsideration decision should be “approached as an organic whole, without a line-by-line treasure hunt for error” (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54).

[72] The LAT adjudicator relied on *Smith v. Co-operators* and concluded from the affidavit adduced by Ms. Yatar that there was an “implicit acceptance of the denials effective January 4, 2011” (reconsideration decision, at para. 15) and that her counsel should have been aware of the two-year limitation period, but that nothing was done to protect her rights.

[73] At the time, both s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a 90-day extension of the limitation period after the mediator’s report was released. The LAT adjudicator took into account the fact that Ms. Yatar commenced the mediation process after receiving the September letter. The LAT adjudicator had regard to the letters as well as the mediation process, and concluded that “[t]he limitation period lapsed April 14, 2014, [at the end of] the statutory ninety-day extension following the report of the mediator” (preliminary decision, at para. 26, aff’d in reconsideration decision, at para. 17).

[74] However, the LAT adjudicator failed to have regard to the effect of the reinstatement of the IRBs between February and September. The LAT adjudicator did

not consider earlier tribunal decisions, some of which had held that when an applicant's benefits are reinstated, the limitation period can only be triggered when they are validly terminated again (see *Veldhuizen v. Coseco Insurance Co.*, 1995 ONICDRG 144 (CanLII); *Rudnicki v. Certas Direct Insurance Co.*, 2001 ONFSCDRS 60 (CanLII)).

[75] It is not in question that Ms. Yatar initiated mediation in September 2012. The mediation took place between June 18, 2013 and January 14, 2014. On January 14, 2014, the mediator released his report. However, s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* (as they existed at the time) do not *trigger* a 90-day limitation period from the release of the mediator's report. Rather, they provide for an *extension* of the two-year limitation period from the mediator's report. In other words, it is arguable that there still needed to be a valid denial of the IRBs to start the clock running. I do not purport to decide this question; it is one properly to be decided by the LAT.

[76] The LAT adjudicator failed to take into account relevant legal constraints. In light of this, his decision is unreasonable.

## VII. Conclusion

[77] The appeal is allowed. Having concluded that the reconsideration decision is unreasonable, I send the matter back to the LAT adjudicator to consider the issue of the effects of the reinstatement of benefits on the validity of the initial denial and, thus, on the limitation period.

[78] As Ms. Yatar succeeded on the jurisprudential question relating to the exercise of discretion to undertake judicial review when there is a limited statutory right of appeal, and in the judicial review, she is awarded her costs in this Court and the courts below payable by TD Insurance.

*Appeal allowed with costs.*

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