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## ***Yatar v TD Insurance Meloche Monnex*: Limited Statutory Rights of Appeal and The Availability of Judicial Review**

**By:** Shaun Fluker, Drew Yewchuk, and Nigel Bankes

**Case Commented On:** *Yatar v TD Insurance Meloche Monnex*, [2024 SCC 8 \(CanLII\)](#)

This post discusses the recent Supreme Court decision in *Yatar v TD Insurance Meloche Monnex*, [2024 SCC 8 \(CanLII\)](#) (*Yatar*). The decision addresses the availability of judicial review of administrative decisions when the legislature has established a restricted statutory right of appeal for those same decisions. This unanimous decision is an important affirmation of the continued availability of judicial review – at least for grounds of review not covered by the statutory appeal right. However, it seems likely that this decision, especially when read together with the Court’s decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) (*Vavilov*) will encourage parallel or sequential filings under both the statutory appeal provisions and for judicial review.

The post takes an atypical approach for ABlawg: it begins with a jointly written summary of *Yatar*, and then provides the commentary of the several co-authors of this post. Shaun Fluker argues that *Yatar* adds more uncertainty to the relationship between a statutory appeal and judicial review, particularly in cases where there is a permission requirement attached to the statutory appeal. He also questions why the Court is trying to delineate the relationship between a statutory appeal and judicial review without considering a privative clause. Drew Yewchuk’s commentary focuses on the need to distinguish between the right to judicial review and the discretionary nature of any resulting remedies. He also questions the utility and validity of statutory appeal provisions in light of the Court’s current jurisprudence. Nigel Bankes, building on both Fluker’s and Yewchuk’s commentary, concludes the post by arguing that the legal system should not encourage parallel proceedings but that given the constitutional status of judicial review this problem can only be addressed through provincial legislatures ridding the statute book of statutory appeal provisions – perhaps with the advice and assistance of provincial law reform bodies such as the Alberta Law Reform Institute.

### **Summary of *Yatar***

Ms. Yatar contested the denial of insurance benefits relating to an accident in 2010. The statutory scheme provided for mediation of the dispute. In the absence of a mediated resolution a claimant can seek a remedy from the Ontario Licence Appeal Tribunal (LAT). However, there is a limitation period (90 days from the conclusion of mediation) within which to initiate a claim before the LAT. Yatar’s claim was filed in 2018, several years after the conclusion of mediation. The LAT dismissed her applications (both initially and under reconsideration) as time barred in 2019. Yatar sought judicial review of the LAT decision and concurrently appealed the decision under the

*Licence Appeal Tribunal Act*, 1999, [SO 1999, c 12, Sch G](#) (*LAT Act*). Both matters were heard by the same court (the Ontario Divisional Court). These parallel proceedings were commenced because section 11(6) of the *LAT Act* limits statutory appeals from the LAT to questions of law. Ms. Yatar filed for the statutory appeal on questions of law and simultaneously filed for judicial review on questions of fact and mixed fact and law (at paras 2, 17). The Divisional Court dismissed the statutory appeal (at para 19), concluding that the LAT made no error of law in dismissing the claim as time barred. That issue was not appealed to the Court of Appeal (at para 23).

The legal question in *Yatar* of general interest for administrative law is the extent to which judicial review of a statutory decision is available where there is a statutory right of appeal to a court. Both the Ontario Divisional Court and the Court of Appeal confirmed that judicial review was, in principle, available on questions not subject to the statutory appeal (in this case, questions of fact or mixed fact and law) (at paras 20 and 25). However, both courts also ruled that judicial review should be limited to “exceptional circumstances” (Divisional Court, at para 22) or “rare cases” (Court of Appeal, at para 24). The Ontario Court of Appeal reasoned there was a legislative intention to limit access to the courts, based upon the availability of a legislated internal review by the LAT and an appeal on questions of law to the courts. So, while judicial review might be available, it should only be so in limited circumstances.

The Supreme Court ruled that the Ontario Court of Appeal erred by limiting judicial review to “rare cases” in the face of a statutory right of appeal limited to questions of law, because the jurisprudence clearly allows for parallel tracks of review on distinct questions:

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*). (at para 48)

The Court also ruled that the Court of Appeal erred in concluding the Ontario Legislature intended to restrict recourse to courts from the LAT:

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. (at para 58)

The Court acknowledged case law from the Federal Court of Appeal, finding that the availability of judicial review may be affected by the presence of a legislated privative clause, but found that was not the case here and left the implications of a privative clause “for another day.” (at para 50).

The Court emphasized the constitutional basis for judicial review as a means for implementing legal accountability on the exercise of statutory powers (at paras 45, 46). However, while courts *must* consider applications for judicial review, they have discretion over whether to grant remedies on judicial review (at paras 51-54).

The Court determined that a statutory right of appeal limited to questions of law was not an adequate alternative remedy to judicial review on questions of fact. As a result, the right of statutory appeal did not provide a basis on which the Divisional Court could refuse to consider an application for judicial review (at paras 57-62).

On the merits of the judicial review application, and following *Vavilov*, the Court assessed the decision of the LAT on the reasonableness standard of review (at para 42). It concluded that the LAT's initial decision was unreasonable as it failed to consider the impact that the reinstatement of benefits might have had on the limitation period. In particular, there were earlier LAT decisions holding that the limitations period could only be triggered once those reinstated benefits were again validly terminated (at paras 68-75). The Supreme Court allowed the appeal and sent the matter back to the LAT adjudicator to have it consider the effects of the reinstatement of benefits. The court also awarded costs to Ms. Yatar (at paras 77-78).

### **The Alberta Connection**

The *Yatar* decision will be important in Alberta because Alberta has frequently used statutory appeal provisions to channel the judicial supervision of statutory decision makers. Variables controlled by these statutory appeal provisions include providing for an appeal to either the Court of King's Bench or to the Court of Appeal, shortening limitations period (typically 30 days rather than the six months specified by the rules of court for an application for judicial review), limiting the scope of reviewable errors (error of fact, jurisdiction, or law or some subset thereof), adding the requirement to obtain the leave or permission of the court to which the appeal is to be taken, and finally the presence of a privative clause.

A typical formulation is that found in the home statutes of Alberta's two main energy regulators, the Alberta Energy Regulator (AER) (governed by the *Responsible Energy Development Act*, [SA 2012, c R-17.3](#)) (*REDA*) and the Alberta Utilities Commission (AUC) (governed by the *Alberta Utilities Commission Act*, [SA 2007, c A-37.2](#)) (*AUCA*). Both section 45 of *REDA* and section 29 of the *AUCA* provide that an appeal lies from a decision of the AER or AUC "to the Court of Appeal on a question of jurisdiction or on a question of law." Both provisions require an appellant to obtain the permission of the Court, and both require an application for permission to be filed and served within 30 days of the decision. Both statutes contain strong privative clauses (*AUCA* at s 30; *REDA* at s 46). There are similar provisions in sections 31 and 32 of the *Natural Resources Conservation Board Act*, [RSA 2000, c N-3](#). The *Police Act*, [RSA 2007, c P-7](#) establishes the Law Enforcement Review Board, and section 18 contains a similar provision, directing appeals to the Court of Appeal with a requirement to obtain permission of the Court, and restricting them to questions of law, but in that case there is no privative clause.

The *AUCA* also contains a singular exception in relation to the AUC's complaint jurisdiction over the Market Surveillance Administrator (MSA). Section 59 contemplates that a person may complain about the behaviour of the MSA to the AUC. The AUC is empowered to make a decision and provide direction in relation to such a complaint by section 59(4) which stipulates that "[a] decision of the Commission under [this section] is final and may not be appealed under [section 29](#)." There are parallel provisions in section 26 of the *Electric Utilities Act*, [SA 2003, E-5.1](#), with

respect to complaints to the AUC about the behaviour of Alberta Electric System Operator (AESO). As one of us has previously argued, the result must be that the AUC will be subject to judicial review in relation to its treatment of both categories of complaints (Banks, [“The Complaint Jurisdiction of the AUC with Respect to the AESO”](#)).

Another statute that is frequently the subject of litigation before Alberta’s courts is the *Municipal Government Act*, [RSA 2000, c M-26](#) (*MGA*). The *MGA* has several different provisions dealing with the judicial supervision of the various entities exercising statutory authorities under this Act. Some of these provisions clearly contemplate ordinary judicial review (see for example, section 273(1), validity of a borrowing by-law), but in other cases the legislature has chosen to channel that supervision through various appeal mechanisms including the following:

- Under section 548, a person may appeal a by-law enforcement matter to the Court of King’s Bench on an allegation that the procedure prescribed by the *MGA* was not followed or that the decision was patently unreasonable.
- Under section 688, a person may appeal a variety of development and subdivision decisions and orders to the Court of Appeal on a question of law or jurisdiction. The application requires the permission of a judge of the Court which may only be granted “if the judge is of the opinion that the appeal involves a question of law of sufficient importance to merit a further appeal and has a reasonable chance of success.” (*MGA*, section 688(3)). For some commentary on this leave requirement, see [“A Closer Look at Leave to Appeal Requirements Under the Municipal Government Act \(Alberta\)”](#).

The *Expropriation Act*, [RSA 2000, c E-13](#) (*EA*) also contains an appeal provision. Questions of compensation under the *EA* now go at first instance to the Land and Property Rights Tribunal, but section 37 of the *EA* provides that an appeal may be taken from a determination or order of the tribunal directly to the Court of Appeal “on questions of law or fact, or both” and with the need to first seek the leave or permission of that Court. The same provision is also incorporated in section 534 of the *MGA* dealing with appeals of tribunal decisions relating to injurious affection.

Section 26(1) of the *Surface Rights Act*, [RSA 2000, c S-24](#) offers yet another frequently invoked example in the form of a statutory right to appeal a compensation order of the Land and Property Rights Tribunal (LPRT) (formerly the Surface Rights Board) “to the Court of King’s Bench as to the amount of compensation payable or the person to whom the compensation is payable or both.” More generally, section 19 of the *Land and Property Rights Tribunal Act*, [SA 2020, L-2.3](#) (enacted post-*Vavilov*) stipulates a common standard of review for both appeals and judicial review applications relating to the LPRT: “On an application for judicial review of or leave to appeal a decision or order of the Tribunal or on an appeal of a decision or order of the Tribunal, the standard of review to be applied is reasonableness.” (See *Bateman v Alberta (Surface Rights Board)*, [2023 ABKB 640 \(CanLII\)](#), and *Pentelechuk v Grand Rapids Pipeline GP Ltd*, [2023 ABKB 692 \(CanLII\)](#)).

In sum, over the years, Alberta has adopted a variety of different appeal provisions to channel the judicial supervision of statutory decision-makers to a particular court. The statutes referenced above offer a range of examples, but they represent little more than the tip of the statutory iceberg. It is difficult, at least in some cases, to discern the rhyme or reason for the different formulations.

For example, why do the *REDA* and *AUCA* provisions provide for an appeal on a point of law or jurisdiction, while the *Police Act* simply refers to a point of law? And why did the legislature feel the need to offer the additional guidance of “sufficient importance” and “reasonable chance of success” to help direct a justice of the Court of Appeal to conclude that leave should be granted (or not) under the *MGA*? Each of these statutory constructs invites examination or re-examination in light of the decision in *Yatar* to assess the relationship and demarcation between these statutory appeal provisions and the power of superior courts to provide for judicial review.

In some cases, there has always been a clear understanding of that relationship and demarcation. For example, section 26 of the *Surface Rights Act* makes it clear that the statutory appeal right in that section is limited to “the amount of compensation payable or the person to whom the compensation is payable or both.” Hence, it has been well understood that any matters that fall outside that specific framing must be raised by way of an application for judicial review to the Court of King’s Bench (see *Peacock v Alberta (Surface Rights Board)*, [1989 CanLII 3381 \(AB KB\)](#); *Togstad v Alberta (Surface Rights Board)*, [2014 ABQB 485 \(CanLII\)](#)). But by the same token it is hard to imagine anybody commencing an application for judicial review in relation to either of the two issues on which there is a statutory appeal – even though the tribunal in question is not protected by a privative clause. That’s because in this instance the appeal right is actually broader than the supervision offered by way of judicial review insofar as the appeal takes the form of a new hearing and the Court “has the power and jurisdiction of the Tribunal in determining the amount of compensation payable and the person to whom the compensation is payable.” (*SRA* at s 26(6), (7)).

But in other cases, the “gap” in coverage between the statutory appeal right and the scope of an application for judicial review has been far less obvious. For example, while parties have commenced some judicial review applications against the AER (or the predecessor Energy Resources Conservation Board) or the AUC, there have been relatively few cases, and applicants for judicial review have generally been rebuffed. These cases include the *Rozander* cases from the 1970s (*Rozander v Alberta (Energy Resources Conservation Board)*, [1978 ALTASCAD 390 \(CanLII\)](#) (*Rozander #1*); and the related *Rozander v Alberta (Energy Resources Conservation Board)*, [1978 ALTASCAD 391 \(CanLII\)](#) (*Rozander #2*), dealing with an ERCB transmission line decision). They also include the so-called *Milner Power* line-loss decisions from the first decade of 2000 (*Milner Power Inc v Alberta (Energy and Utilities Board)*, [2007 ABCA 265 \(CanLII\)](#) (*Milner Power #1*) and *Milner Power Inc v Alberta (Energy and Utilities Board)*, [2010 ABCA 236 \(CanLII\)](#) (*Milner Power #2*). This is not the place to examine those cases in detail. Suffice it to say that these decisions effectively discouraged parallel proceedings in two ways.

First, these decisions concluded that the statutory appeal offered an adequate alternative remedy, and that the legislature was entitled to shorten the limitation period for the statutory appeal in the interests of providing earlier certainty for affected parties (see especially, *Rozander # 2*). Second, these decisions provided an answer to the concern that the record for the statutory right of appeal might be inadequate by comparison with the record on a judicial review application. The concern arises because of statutory provisions such as section 29(11)(a) of the *AUCA* to the effect that “no evidence may be admitted other than the evidence that was submitted to the Commission on the making of the decision or order that is being appealed from.” In short, the courts have responded to this concern by indicating that this sort of statutory provision will not be a bar to introducing

the evidence necessary to establish allegations of breach of natural justice including bias (see especially *Milner Power # 1* and *Sobeys West Inc v Edmonton (City)*, [2015 ABCA 32 \(CanLII\)](#). *Sobeys* considers the appeal provisions in the *MGA* and categorizes the various scenarios in which the Court “may not always apply a literal interpretation to the section, but rather may favour a purposive interpretation.” at para 13).

Both the *Rozander* and *Milner Power* decisions dealt with alleged breaches of natural justice – something that fell squarely within the “law or jurisdiction” ground of the appeal provision. But what we are starting to see post-*Vavilov* are cases of parallel proceedings exploring grounds of review that fall outside the scope of the “law and jurisdiction” clause. The recent decision in *Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, [2023 ABKB 700 \(CanLII\)](#) ([discussed on ABlawg by Nigel Bankes](#)) is one example. This decision must surely be vulnerable on appeal in light of the decision in *Yatar*, although any appeal will also need to grapple with the implications of the *REDA* privative clause.

### **Shaun Fluker: It’s Time to Get Rid of the Permission Requirement in Statutory Appeals**

To the casual observer (and probably many lawyers and some judges), the distinction between a statutory appeal and judicial review must be challenging, since it is impossible to distinguish a statutory appeal hearing from a judicial review hearing in the courtroom. They are both concerned with a review by the judiciary of the exercise of statutory power. What is all the fuss about? I’ve studied the distinction (see [here](#)), but I still find it bizarre that Canadian courts get twisted into knots over how to read and apply a statutory right of appeal provision.

As I noted in “[Vavilov on Standard of Review in Canadian Administrative Law](#)”, I believe it was a mistake for the Supreme Court of Canada to give the statutory appeal so much prominence in its *Vavilovian* standard of review framework governing judicial review, as there is no evidence to support the notion that legislature’s follow a rational or principled approach in deciding when to place a statutory right of appeal into a statute. Contrary to what the Court asserts in *Yatar*, there is certainly no evidence to support a reading that today’s legislatures enact a statutory right of appeal because they want courts to apply high scrutiny (or the standard of correctness) to the merits of statutory decision-making. Indeed, it is probably the opposite: it is an attempt to limit judicial scrutiny.

Unfortunately, *Vavilov* elevated the significance of the statutory appeal without paying much (if any) attention to the full historical and current use of these provisions. I would say this failure is one reason for the mess now facing the courts on having to sort out the exact relationship between a statutory appeal and judicial review. *Yatar* likewise misses the mark because the decision leaves unresolved arguably the most pressing issue in all of this: the availability of judicial review on a question of law in the face of a statutory right of appeal that requires an applicant to first obtain permission of the court to file the appeal, and where that court denies that permission. In such a case, can that applicant then proceed to seek judicial review on that question of law (and perhaps other questions)?

If we take the strong endorsement of *Yatar* for a constitutional right to judicial review on its own terms as an essential aspect of the rule of law, then surely the answer to this question has to be yes. One cannot be absolutely barred from seeking judicial review on a question of law. So, if the appeal route is not available, then judicial review must be. Moreover, it would be a strange, if not absurd, outcome if one were barred from seeking judicial review on a question of law but was welcome to seek review on a question of fact.

But if that is the way, then the explicit intention by a legislator to restrict access to an appeal is completely meaningless, because the unsuccessful applicant simply seeks judicial review on the very same question of law. And the need for permission to appeal is only one of several possible restrictions on an appeal. Others include providing a relatively short window of time within which to file a notice of appeal, limiting the evidence that may be placed on the appeal record, or restricting the remedies available to the appellate court. Why bother with these restrictions at all if judicial review is otherwise available where permission is not needed, and many, if not all, of these other statutory restrictions are not applicable? Statutory appeal provisions seem largely irrelevant, which is highly ironic given how important *Vavilov* tells us these provisions apparently are in guiding the whole enterprise of judicial review.

It is also difficult to understand the logistics of all this where the appeal is channelled to the same court that would hear a judicial review application. In a case, such as in *Yatar*, where an applicant applies for a statutory appeal on a question of law and judicial review on a question of fact, it would make sense for all sorts of reasons to combine both applications together. But then, what is the relevance or point of the statutory appeal? And if the relevance is tied to restrictions or other conditions placed by a legislature on the statutory appeal – say for example, limiting the appellate court to varying the impugned decision – then it seems possible that a reviewing court will have more power (quashing the decision) on an error of fact than it will on an error of law. Truly absurd. Things get even more complex when the limited statutory appeal provisions direct the appeal to an appellate court, and all other questions are reviewed by a superior court of first instance.

In the few instances where the statutory right of appeal has been the subject of law reform consideration, one recommendation has been to eliminate the permission to appeal requirement. Notably, this was a recommendation in Saskatchewan in 2012 (see “[A Closer Look at Leave to Appeal Requirements Under the Municipal Government Act \(Alberta\)](#)”). Legislators have not responded to this recommendation. Hopefully, *Yatar* will bring renewed scrutiny to the utility and appropriateness of permission requirements.

As a final comment, I am baffled as to why the Supreme Court is attempting to delineate the relationship between a statutory appeal and judicial review without giving any consideration to a privative clause. It is trite law that a privative clause cannot completely [oust judicial review](#). On the other hand, a privative clause is a statutory provision which, unlike a statutory appeal, directly speaks to the availability of judicial review, such as one that states “the decision is final and binding on the parties in respect of whom the decision is made and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court”. So, if there is an intention of the legislature to be deciphered on how or whether a statutory decision is subject to judicial scrutiny, then surely that intention is found in a privative clause.

*Yatar*, like *Vavilov* before it, loses much of its credence in my view because it simply ignores privative clauses.

### **Drew Yewchuk: Judicial Review is a Court Process and not a Form of Relief & Legislatures Need to Reconsider Their Statutory Appeal Provisions**

First, the issue in *Yatar* about whether judicial review is discretionary is the result of terminological confusion about the court process of judicial review and the relief or remedies available from judicial review. Judicial review is when the judicial branch reviews an administrative decision. It is a court process and not a form of relief. Mandamus orders, declarations, and remitting decisions for redetermination are common types of relief that a court might grant after hearing a judicial review. Canadian Courts and lawyers have long confused the name of the process leading to the remedies with the remedies themselves – the confused phrase of “judicial review is granted” used to mean that a remedy is being granted, appears [on CanLII in more than 2,000 decisions](#). *Milner Power #1*, discussed above, is a case in point. Another example of the widespread terminological confusion is in the Supreme Court’s *Strickland*, where the Court wrote:

*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*.” (*Strickland*, at para 37, emphasis added).

The first sentence says judicial review is discretionary, and the second sentence says that relief on judicial review is discretionary – the Court in *Strickland* confused those two ideas. That confusing statement is supplanted by the clearer *Yatar*: “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.” (at para 49) Judicial review (the process) is not discretionary – whether to grant relief following a judicial review is discretionary. Hopefully *Yatar* will convince lawyers and courts to be more attentive to the distinction between judicial review as a court process and the relief available on judicial review.

Second, while the outcome in *Yatar* fits the framework established by *Vavilov*, the Court takes an ahistorical view of the Ontario legislature’s intent in enacting section 11(6) of the *LAT Act*. The Ontario legislature almost certainly did intend to limit the availability of judicial review. The Supreme Court’s interpretation of section 11(6) of the *LAT Act* is only intelligible after the decision in *Vavilov* (see *Vavilov*, paras 36-52). It is not realistic to assume the Ontario legislature foresaw future developments in administrative law on the distinction between judicial review and statutory appeals and their impacts on the standard of review when they drafted the *LAT Act* - the Ontario legislature introduced the current wording of section 11(6) of the *LAT Act* based on what they believed to be the law in 2012, and attempted to block any appeal or judicial review on questions of fact or mixed fact and law. Section 11(6) of the *LAT Act* was intended as a limited privative clause, and that was thought to be legal at the time.

There was no need for the SCC to ignore this and construct a fake legislative intent (see *Yatar* at para 58). The major developments in administrative law between *Dunsmuir v New Brunswick*, [2008 SCC 9 \(CanLII\)](#) and *Vavilov* in 2019 mean that many statutes drafted prior to 2019 have



legislative intents that are unconstitutional or unworkable after *Vavilov*. A frank acknowledgment that the legislature intended to limit judicial review but that the Court now considers that unconstitutional would have honestly explained the situation and given legislatures notice that statutory appeal provisions drafted pre-*Vavilov* need to be reconsidered to meet the post-*Vavilov* situation. The Alberta legislature needs to get that message, as Alberta's statutory appeal rules no longer serve their intended purposes and produce pointless and wasteful results – and on that point...

### **Nigel Banks: It's Time to Get Rid of Statutory Appeals**

We have already acknowledged that there was always the risk that statutory appeal mechanisms would encourage parallel proceedings, i.e. both the statutory appeal route and an application for judicial review (often within very different time frames) (and see earlier commentary anticipating the consequences of *Vavilov*: [“Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response”](#)). But while there have been a few cases in Alberta exploring the circumstances in which the courts might entertain such proceedings, it seems fair to say that the decisions in these cases have not encouraged more widespread parallel filings. The risk that we now face is that the combination of *Vavilov* and *Yatar* will encourage parallel filings of the sort that we have recently seen in the Grassy Mountain Coal litigation (see the *Stoney Nakoda* decision and accompanying ABlawg commentary, above).

How serious that risk is remains to be seen; likely much will depend upon how the Supreme Court will deal with the case of statutory appeal provisions supported by a strong privative clause. My sense is that while a strong privative clause may serve to ensure that an applicant will not be able to use judicial review to relitigate precisely the same issues (e.g. law and jurisdiction) covered by an appeal clause, such clauses seem less likely to preclude judicial review for those grounds of review that fall outside the issues covered by the appeal clause. Equally, it seems unlikely that they will have much bite against an entity that is unable to exercise the appeal route perhaps, for example, because it was not a party to the underlying administrative proceeding (see *Peavine Metis Settlement v Whitehead*, [2015 ABCA 366 \(CanLII\)](#)). Such a party may, in appropriate circumstances, be able to claim public interest standing (see *Pembina Institute for Appropriate Development v Alberta (Utilities Commission)*, [2011 ABCA 302 \(CanLII\)](#)). It will also be interesting to see how permission to appeal clauses fare if their validity is directly attacked. These clauses are not a statutory reflection of the principle that *certiorari* is ultimately a discretionary remedy. Instead, they are intended to allow a court not to embark on the consideration of a party's application for judicial supervision. *Yatar* seems to suggest that that is not an option in a judicial review application. It would seem to follow from that that a party who fails to obtain permission, must, in at least some circumstances be able to have its application determined on the merits in an application for judicial review.

Of course, if there is no privative clause, then *Yatar* itself has confirmed the viability of parallel filings.

But if parallel filings must be accepted as a necessary consequence of enacting statutory appeal rights that attempt to channel and confine judicial supervision, then I think that it is time to

reconsider whether it is worth the effort. Parallel proceedings are wasteful. They engage parties in two tracks of litigation rather than one, with resulting increased fees and increased allocation of time from both the parties and the courts. Well-heeled corporate entities may have the resources to contest decisions that do not favour their interests but that in turn requires others, including those who might have intervened in the regulatory proceeding in question, to muster the resources not only to participate in a statutory appeal but also any application for judicial review. Resources may be further stretched where the appeal route itself entails two stages: a leave or permission application and, where leave is granted, a merits stage. Multiple tracks will inevitably involve sterile issues of categorization: does this aspect of the case belong in the appeal track or the judicial review track? Multiple litigation tracks are also confusing to the public and even harder to explain to the public; witness, for example, efforts to explain the multiple tracks in the Grassy Mountain litigation (above).

In sum, it may be preferable for both constitutional reasons and efficiency reasons to treat statutory appeals as a failed experiment and get rid of them. The result would be to restore all elements of judicial supervision to the superior courts of the provinces according to the ordinary rules, and to the Federal Court with respect to federal boards, commissions, and other tribunals. The Supreme Court of Canada in *Vavilov* instructs that, were such changes are made, the presumptive standard of review for most matters will be reasonableness. But *Vavilov* also made it clear that the legislature would be free to establish a more or less deferential standard in any particular case (*Vavilov* at para 37). Alberta's legislature relied on that advice in enacting a common standard of review for appeals and judicial review applications in the new *Land and Property Rights Tribunal Act* (above). Furthermore, the legislature would still be free to specify a shorter limitation period for particular categories of statutory decisions than the prevailing six months in the Rules of Court ([Alta Reg 124/2010](#) at s 3.15(2)). For example, a statute might provide that:

An originating application for judicial review to set aside a decision or act of a person or body made under the terms of this Act [or specified sections] must be filed and served within x months [or y days] after the date of the decision or act.

Unless “y days” were so few as to render the possibility of judicial review effectively meaningless, such a provision could not be impugned under s 96 of the *Constitution Act, 1867*.

### **A Postscript to Nigel Bankes' Commentary**

As we were finalizing this post, the Alberta Court of Appeal issued two permission to appeal (PTA) decisions dealing with the same decision of the Alberta Utilities Commission (October 9, 2023) dealing with the cost of capital and debt equity ratios for Alberta's regulated gas and electricity utilities. Both PTA decisions were authored by Justice Anne Kirker: *Apex Utilities Inc v Alberta Utilities Commission*, [2024 ABCA 111 \(CanLII\)](#) and *FortisAlberta Inc v Alberta Utilities Commission*, [2024 ABCA 110 \(CanLII\)](#). Justice Kirker granted PTA to FortisAlberta on the grounds that its application raised a pure question of law that was prima facie meritorious. Justice Kirker denied PTA to Apex on the basis that its application raised questions of mixed fact and law and therefore fell outside the statutory appeal provisions of the *AUCA* discussed above. The *Yatar* case suggests that Apex might have had the opportunity to file an application for judicial review on those mixed question of fact and law that fell outside the statutory appeal provisions of the

*AUCA* but, if my math is correct, that opportunity will have expired just as this post goes to press. Whether such an application would be admissible will largely turn, as suggested above, on how the Supreme Court of Canada will interpret and apply the strong form of privative clause in the *AUCA*. Will it be interpreted to preclude such an application as a matter of legislative intent, and, if so, is such a legislative intent contrary to s 96 of the *Constitution Act, 1867*?

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