S.C.C. FILE NO. 40348

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

UMMUGULSUM YATAR

APPELLANT

– and –

TD INSURANCE MELOCHE MONNEX
and LICENCE APPEAL TRIBUNAL

RESPONDENTS

– and –

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INTERVENERS

FACTUM OF THE INTERVENER
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(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I — OVERVIEW AND STATEMENT OF FACTS

1. Poor and vulnerable persons are regularly subject to administrative decisions with serious consequences on their lives. They need meaningful access to judicial review of those decisions where appeal routes are not available. This appeal concerns whether a limited statutory right of appeal on questions of law ousts the right to judicial review except in "rare cases." A statutory right to appeal on questions of law demonstrates "the legislature's choice of a more involved role for the courts in supervising administrative decision making."[1] It does not demonstrate legislative intent that decisions raising other questions be presumptively insulated from judicial scrutiny except in "rare" cases, and therefore not subject to the same requirements for transparency, justification, and intelligibility. Decisions with harsh consequences for the most vulnerable must be transparent, intelligible, and justified to the individuals they impact. In that sense, they must be consistent with the principle of "responsive justification" articulated by this Court in *Vavilov*.[2]

2. The Income Security Advocacy Centre (ISAC) is a specialty legal clinic funded by Legal Aid Ontario to advance the rights, interests and systemic concerns of low-income Ontarians with respect to income security and employment law. Social assistance schemes are central to ISAC's work. How this Court decides this appeal will impact Ontario social assistance recipients because social assistance legislation, like the legislation governing the Licence Appeal Tribunal, provides a statutory right of appeal that is restricted to questions of law.[3]

3. The Court of Appeal's new bar to judicial review, if affirmed, would have a detrimental impact on social assistance recipients in Ontario because it would impact their ability to challenge decisions about their basic health, survival, and dignity. Social assistance recipients live in deep poverty and social assistance is their "last resort". They have unmet housing and health needs and live with chronic food insecurity. Individuals who disagree with a decision about their eligibility for these "last resort" benefits, but who have no right of appeal, need meaningful access to judicial

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") at para. 46.
[2] *Ibid.*
[3] *Ontario Works Act*, 1997, S.O. 1997, c. 25, Sched. A ("*OWA*"), s. 36(1): "The Director and any party to a hearing may appeal the Tribunal's decision to the Divisional Court on a question of law"; *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sched. B ("*ODSPA*"), s. 31(1): "Any party to a hearing before the Tribunal may appeal the Tribunal's decision to the Divisional Court on a question of law."

review. Social assistance recipients are often self-represented and requiring them to establish that their circumstances are sufficiently "rare" makes judicial review even more inaccessible for self-represented persons attempting to navigate the legal system to pursue subsistence income.

4. Judicial review is always discretionary. ISAC does not argue for an automatic right to judicial review. However, restricting availability of judicial review to "rare circumstances" in the face of limited appeal rights goes too far in narrowing access to a vital mechanism for vulnerable persons. Such an approach is not necessary. There are numerous well-established discretionary bars to judicial review, and these are sufficient for courts to refuse relief where necessary.

PART II - STATEMENT OF QUESTIONS IN ISSUE

5. ISAC makes submissions on two issues:

a. A limited right of appeal does not indicate a legislative intent to restrict access to judicial review for non-appealable decisions.

b. Restricting judicial review of non-appealable decisions would detrimentally impact social assistance recipients in Ontario in a manner that is inconsistent with the principle of responsive justification.

PART III - STATEMENT OF ARGUMENT

A. A limited right of appeal on questions of law does not indicate a legislative intent to restrict access to judicial review.

The Court of Appeal's new discretionary bar is based entirely on presumed legislative intent

6. The Court of Appeal interpreted a limited appeal clause to signify legislative intent to "greatly restrict resort to the courts".[4] Contrary to LAT's submission, this is a new bar.[5]

7. Judicial review is discretionary, but courts' discretion to conduct judicial review must be exercised in accordance with the two principles underlying judicial review: maintaining the rule of law while respecting legislative intent.[6] In this sense, the new discretionary bar set by the Court of Appeal is different from existing discretionary bars in that it is based solely on presumed legislative intent. In contrast, existing bars are connected to the rule of law. They exist to further the interests of justice by: promoting efficient dispute resolution (discretionary bars of

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[4] *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446 at para. 38.
[5] Factum of Licence Appeal Tribunal, beginning at p. 11, para. 31.
[6] *Vavilov*, at para 2.

prematurity,[7] mootness,[8] and adequate alternative remedy[9]); preventing abuse of process (discretionary bars of delay,[10] waiver/misconduct[11]); and ensuring that judicial intervention does not do more harm than good (discretion to refuse relief based on a balance of convenience[12]).

8. The Court of Appeal framed its reasoning in relation to the existing discretionary bar of adequate alternative remedy,[13] rather than purporting to create a new discretionary bar. However, this frame does not fit. As recognized by the Manitoba Court of Appeal in *Smith v. The Appeal Commission*,[14] a statutory appeal offers no alternative remedy at all with respect to an issue that cannot be appealed.[15] This Court stated in *Strickland* that "the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate".[16] However, the secondary consideration of whether "judicial review is appropriate" can only make another remedy "adequate" if another remedy is available to begin with.

9. Further, access to internal reconsideration cannot be an adequate alternative remedy if, as in the decision under appeal, it is the reconsideration decision itself that is the subject of the application for judicial review. And, in any event, a blanket presumption that reconsideration constitutes an adequate alternative remedy is not appropriate. Courts must consider the nature and effectiveness of the recourse in the particular context. In the Ontario social assistance context, for example, the Social Benefits Tribunal often issues standard reasons in response to requests for reconsideration, regardless of the grounds set out in a particular request.[17] In this context, it should not be assumed that reconsideration is an adequate alternative remedy to judicial review.

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[7] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras. 35-36.
[8] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342.
[9] *Strickland v. Canada (Attorney General)*, 2015 SCC 37 ("*Strickland*").
[10] *Immeubles Port Louis Ltée v. Lafontaine (Village)*,1991 CanLII 82, [1991]S.C.J.No. 14.
[11] *Homex Realty & Development Co v. Wyoming (Village)*, [1980] 2 S.C.R. 1011, 1980 CanLII 55 (SCC).
[12] *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.
[13] *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446 at paras. 37, 45.
[14] *Smith v. The Appeal Commission*, 2023 MBCA 23.
[15] *Ibid* at paras. 5 and 70.
[16] *Strickland, supra*, at para. 43.
[17] See *SBT 2208-03391R* (5 May 2023; Van Delft) and *SBT 2205-01952R* (8 June 2023; Henrie), at Tabs 2 and 4 of ISAC's Book of Authorities, both where requests for reconsideration were

Legislative intent to restrict judicial review must be assessed in accordance with existing principles of statutory interpretation

10. This Court has already recognized that a limited right of appeal indicates legislative intent that appealable questions be subjected to a higher level of scrutiny and does not demonstrate intent to restrict scrutiny of questions that cannot be appealed. As Côté and Brown JJ. stated in *Edmonton (City) v. Edmonton East*[18] in reasoning that was subsequently adopted by the majority of this Court in *Vavilov*[19]:

> [78] The legislature must have known that judicial review is available for any question not covered by a limited right of appeal [citations omitted], given that the legislature is presumed to know the law: [citations omitted]. The legislature only designated some questions to be the subject of this right of appeal, thereby signalling its intention that these important questions of law and jurisdiction be treated differently from all other questions which are subject to ordinary judicial review. These issues, after all, transcend the particular context of a disputed assessment and have broader implications for the municipal assessment regime. …

11. The Manitoba Court of Appeal, too, has rejected the argument that permitting appeal on some questions demonstrates legislative intent to extinguish judicial review of other questions. In *Smith v The Appeal Commission*,[20] the Court held that such an inference would defeat the clear language of *Vavilov*, which affirmed that limited statutory appeal rights do not restrict judicial review of decisions to which the appeal mechanism does not apply.[21]

12. This reasoning is consistent with the principles of statutory interpretation whereas the Court of Appeal's reasoning is not. When text, context and purpose are taken into consideration, a limited right of appeal clause that makes no reference to judicial review cannot be interpreted as reflecting legislative intent to restrict judicial review of non-appealable issues:

a. Text: Where a statute limits the right of appeal but contains no text restricting access to judicial review, presuming legislative intent to restrict judicial review in addition to appeal

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denied by way of form letter referencing the "oral evidence" in a context where there was no oral evidence because the appellant missed their hearing. The decisions under reconsideration, which dismiss the underlying appeals in absentia, are at Tabs 1 and 3 of the Book of Authorities.

[18] *Edmonton (City) v. Edmonton East*, 2016 SCC 47 at para 78.
[19] *Vavilov*, *supra*, at paras. 36-37, 45-46.
[20] *Smith v. The Appeal Commission*, 2023 MBCA 23.
[21] *Ibid*, at para. 59; *Vavilov*, *supra* at paras. 45-46 and 52.

requires reading language into the text that is not there. A plain reading of such clauses indicates legislative intent for judicial scrutiny on a more probing correctness standard where questions of law are engaged.[22] It says nothing about access to judicial review for those questions that cannot be appealed. Where a legislature wishes to restrict judicial oversight, it legislates a privative clause or a highly deferential standard of review.[23] Counter-intuitively, the Court of Appeal's interpretation leaves individuals subject to decisions under schemes with limited rights of appeal with less judicial oversight than where the legislature explicitly restricts all review of tribunal decisions by way of a full privative clause.

b. Context: When assessing legislative intent, courts should consider the statutory interpretation principle of presumed knowledge: that the legislature has vast knowledge of the law and it intends the legal effect of its provisions. A legislature creating an appeal clause must be presumed to be aware that "judicial review is available for any question not covered by a limited right of appeal".[24] Further, in Ontario, s. 2(1) of the *Judicial Review Procedure Act*[25] ("*JRPA*") permits courts to conduct judicial review "despite any right of appeal." Where an Ontario statute contains appeal-limiting provisions that post-date the enactment of the *Judicial Review Procedure Act*, the legislature can be presumed to have been aware of section 2(1) at that time and to have intended that judicial review be available where appeal was not. Courts should also consider the statutory interpretation principle of presumption against interference.[26] In order to adversely affect an individual's right, the Legislature must do so expressly. As this Court stated in *Morguard Properties Ltd. v. City of Winnipeg*[27]:

> In more modern terminology the courts require that, in order to adversely affect a citizen's right, … the Legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced. This principle of construction becomes even more important and more generally operative in modern times because the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved. The Legislature has complete control of the process of

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[22] *Smith v. The Appeal Commission*, 2023 MBCA 23 at paras. 50-70.
[23] For example, British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c. 45: ss. 58 and 59.
[24] *Edmonton (City) v. Edmonton East*, 2016 SCC 47 at para 78.
[25] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1
[26] *Morguard Properties Ltd. v. City of Winnipeg*, 1983 CanLII 33, [1983] 2 SCR 493 at p. 509.
[27] *Ibid.*

> legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. …

c. Purpose: Courts should have regard to the purpose of the statute at issue when considering whether a limited appeal clause indicates a legislative intent to restrict judicial review. This is important where the statute has a remedial purpose such as consumer protection, and particularly where, as in the social assistance context, it is benefits-conferring. Such legislation requires purposive interpretation that should not limit parties from adequate adjudication of their entitlement to benefits they need to survive.[28] Such statutes should not be interpreted to presumptively insulate from review decisions that can significantly impact an individual's dignity, health, security and life. In this context, if the legislature intended to limit parties' access to judicial review, it must do so explicitly.

B. Restricting judicial review of non-appealable decisions will detrimentally impact Ontario social assistance recipients in a manner inconsistent with the principle of responsive justification

13. Social assistance recipients live in deep poverty. To cover the cost of shelter and basic needs (such as food and clothing), a single individual receiving Ontario Works benefits gets $733 per month, and a single individual receiving Ontario Disability Support Program benefits gets $1,308 per month.[29] These amounts are well below the poverty line. Many individuals will have few (if any) alternative options for income support if social assistance is denied. Social assistance decisions can therefore have a serious impact on the health, dignity, and lives of poor individuals.

14. These are precisely the circumstances that this Court has identified as demanding heightened and responsive decisions from decision makers, or "responsive justification." In *Vavilov*, this Court clarified that the level of justification required for an administrative decision may depend on its impact on the affected party, particularly where that person is vulnerable.[30] The "principle of responsive justification" means that administrative decision makers are subject to a

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[28] *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 36; *Legislation Act, 2006,* S.O. 2006, c. 21, Sched. F at s. 64.

[29] O. Reg. 134/98 (General) under the *OWA*, ss. 41 and 42; O. Reg. 222/98(General) under the *ODSPA*, ss. 30 and 31.

[30] Sossin, Lorne. "The Impact of Vavilov: Reasonableness and Vulnerability. " *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 100. (2021).

higher duty of justification with respect to decisions that impact the life, liberty, dignity or livelihood of an individual.

15. This is because many administrative decision makers "are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law."[31]

16. An interpretation of limited appeal rights as restricting the review of non-appealable issues to "rare" cases undermines the principle of responsive justification. If vulnerable individuals can challenge unreasonable determinations of fact and mixed fact and law only in rare circumstances, then what is the point of responsive justification?

17. The Court of Appeal's approach could leave some vulnerable persons without any means to challenge decisions that seriously impact their lives. And this, in turn, would remove incentive for first-instance decision makers to adopt responsive justification in their decisions.

18. In the Ontario social assistance context, some, but not all front-line decisions can be appealed to the Social Benefits Tribunal ("the Tribunal"). Social assistance recipients can appeal decisions of the Tribunal to the Divisional Court "on a question of law". Accordingly, there are two categories of social assistance decisions that cannot be appealed to the Divisional Court and that must instead be judicially reviewed. These are: (i) Tribunal decisions raising errors of fact or mixed fact and law; and (ii) decisions by front-line decision-makers that cannot be appealed to the Tribunal. These decisions impact the dignity and/or life interests of social assistance recipients. They are subject to the principle of responsive justification, as articulated in *Vavilov*.

Decisions of the Tribunal concerning questions of fact or mixed fact and law

19. **Overpayment calculations:** When a social assistance recipient receives more assistance than they are entitled to, this is called an "overpayment". The recipient is ordinarily required to repay the overpayment. Recipients can appeal an overpayment calculation decision to the

[31] *Vavilov*, *supra* at para. 135.

Tribunal,[32] but they cannot appeal calculation errors beyond that. This is because the Divisional Court has stated that the accuracy of overpayment calculations is a question of fact, not law.[33]

20. As the Court of Appeal has recognized, social assistance overpayments "occur quite frequently, often for innocent reasons", and can impose "an enormous hardship on persons already living well below the poverty line".[34] Overpayments can be very substantial and based on complex calculations with multiple opportunities for error. As a result, recipients who cannot judicially review an unreasonable overpayment calculation could experience devastating consequences.

21. For example, in *SBT 2108-03491 (Re)*[35], the appellant appealed an overpayment originally calculated at $102,274.84 to the Tribunal, which found the calculations were off by $82,447.28, causing the overpayment to be re-assessed at $19,827.56. The overpayment arose because the appellant had started a business while receiving Ontario Disability Support Program benefits and there was substantial confusion as to which of her business expenses should be included in the calculation of her entitlement. In another example, *SBT 0304-03647R*[36], the appellant was assessed with an overpayment of $143,440.10, concerning payments made over a ten year period. The Tribunal determined that the entire overpayment had been based on an erroneous determination that the appellant had been living with a spouse.

22. **Financial eligibility assessments:** The Divisional Court has stated that assessment of financial eligibility for social assistance is a question of mixed fact and law.[37] An individual who is deemed to be financially ineligible will receive no income support at all. Such determinations engage the individual's dignity and life interests: as Justice Arbour stated in her dissenting reasons in *Gosselin*, the refusal of social assistance can drive applicants "to resort to other demeaning and often dangerous means to ensure their survival."[38] Financial eligibility decisions involve complex factual determinations that are vulnerable to the types of "failures of rationality internal to the reasoning process" identified in *Vavilov*.[39]

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[32] *OWA*, s. 26; *ODSPA*, s. 21.
[33] *Volnyansky v. Regional Municipality of Peel*, 2014 ONSC 6193 at para. 6.
[34] *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240 at para. 35.
[35] *SBT 2108-03491(Re)*, 2022 ONSBT 4572.
[36] *SBT 0304-03647R* (14 August 2008; Reynolds), Book of Authorities, Tab 5.
[37] *Filipska et al v. Ministry of Community and Social Services*, 2017 ONSC 5462 at paras. 8-9.
[38] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, at paras. 371-377.
[39] *Vavilov*, *supra*, at paras. 101-104.

23. For example, in *SBT 1902-00972 (Re),*[40] a disabled mother of three was refused income support on the basis that her alleged spouse's income and assets exceeded the allowable limit. On appeal, the Tribunal found that the appellant's male friend should not be considered her "spouse" and there was no compelling evidence that they had resided together during the relevant period. As a result, the male friend's income should not have been included in calculating the appellant's household income to determine her financial eligibility.

24. In some instances, it may be possible to pull extricable questions of law from these determinations. However, in other instances, there is simply a disconnect between the adjudicator's statement of the law and its statement of the facts and it is impossible to ascertain how the adjudicator arrived at the conclusion it did. Such cases would not withstand reasonableness review because they would contain a "fundamental gap" in reasoning, or be based on an "irrational chain of analysis".[41] However, they may not be appealable on a question of law.

Non-appealable decisions

25. Some decisions concerning social assistance cannot be appealed to the Tribunal at all.[42] The Ontario Court of Appeal left unclear whether these types of decisions may be captured by the restriction of judicial reviews to "rare" circumstances where the statute at issue contains limited appeal rights. These non-appealable decisions can have a profound impact on individuals who rely on social assistance. For example:

a. Discretionary benefits: social assistance recipients can apply for additional "discretionary benefits" to cover the cost of dental services, medical travel and transportation, prosthetic devices including eyeglasses, and other items.[43] These items or services can sometimes cost thousands of dollars per year and are often inaccessible for poor individuals. A decision refusing such benefits can impact a disabled recipient's mobility, access to necessary health care, and their quality of life. These decisions cannot be appealed and can only be judicially reviewed.[44]

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[40] *SBT 1902-00972 (Re*), 2020 ONSBT 2238.
[41] *Vavilov* at para. 96.
[42] Non-appealable decisions are set out at *OWA* s. 26, O. Reg. 134/98 s. 68, *ODSPA* s. 21 and O. Reg 222/98 s. 57.
[43] O. Reg. 134/98 under the *OWA*, s. 59.
[44] OWA s. 26; ODSPA s. 21.

b. Decisions that deny a request for extension of time for internal review: When social assistance authorities deny or suspend benefits, social assistance recipients must request an internal review of that decision within 30 days.[45] Vulnerable individuals sometimes miss that deadline due to health issues, precarious housing, poor literacy and language, and other barriers. The Ministry may grant an extension of time for internal review,[46] but if it refuses to do so, the recipient's appeal rights are extinguished. This is because internal review is a mandatory pre-requisite to a Tribunal appeal.[47] The refusal to extend time cannot be appealed to the Tribunal.[48] Judicial review is the only recourse available.

C. Conclusion

26. Restricting judicial review in statutory schemes that contain limited rights of appeal will create additional barriers for social assistance recipients, perpetuate their disadvantage, and threaten their dignity and access to the basic necessities they require to survive.

PART IV – COSTS

27. ISAC does not seek costs and asks that no costs be awarded against it.

PART V – ORDERS SOUGHT

28. ISAC takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August 2023.

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Nabila F. Qureshi, Anu Bakshi,
Anna Rosenbluth

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[45] O. Reg. 134/98 under the *OWA*, s. 69; O. Reg. 222/98 under the *ODSPA*, s. 58.
[46] O Reg 134/98, s. 69 (3); and O Reg 222/98, s. 58 (3).
[47] *OWA*, s. 28; *ODSPA* s. 23.
[48] *OWA* s. 27(1), O Reg 134/98 at s 68; and *ODSPA* at s. 22(1), O Reg 222/98 at s. 57; *Walsh v. Director*, 2012 ONCA 463.

PART VI — TABLE OF AUTHORITIES

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