KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 92**

Date: **2024 05 22**
Docket: KBG-SA-01455-2023
Judicial Centre: Saskatoon

BETWEEN:

MORGAN PAYNE

APPLICANT

- and -

THE SASKATOON HOUSING AUTHORITY, THE OFFICE OF RESIDENTIAL TENANCIES and THE ATTORNEY GENERAL OF SASKATCHEWAN

RESPONDENTS

Counsel:

Catriona E.S. Kaiser-Derrick		for Morgan Payne
Haley B.P. Stearns and Milad Alishahi		for the Saskatoon Housing Authority
Theodore J.C. Litowski		for the Attorney General of Saskatchewan

---

FIAT (CONSTITUTIONAL CHALLENGE) CURRIE J.
May 22, 2024

---

1. Introduction

[1] Morgan Payne is a tenant of the Saskatoon Housing Authority. By a written decision dated November 20, 2023, 2023 SKORT 3131, issued under *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, a hearing officer ordered that possession of the rental premises be granted to the Housing Authority.

[2] The *Act* and *The Residential Tenancies Regulations, 2007*, RRS c R-22.0001 Reg 1, provide that a person against whom such an order has been made may appeal to this court, provided that the person files a certificate of payment of rent. Such a certificate can be obtained by paying one month's rent to the director of residential tenancies.

[3] Mr. Payne did not obtain such a certificate, for reasons described below. Within the statutory appeal period, though, Mr. Payne filed with the court:

(a) a notice of appeal of the hearing officer's order;

(b) a "without notice" application for an order directing the local registrar to accept the filing of Mr. Payne's notice of appeal in the absence of a certificate of payment of rent, and granting an interim stay of the order for possession;

(c) an application for an order dispensing with the certificate requirement;

(d) an application for an order declaring unconstitutional those provisions of the *Act* and of the *Regulations* that establish the certificate requirement; and

(e) an application for judicial review of the hearing officer's decision.

[4] A judge of this court granted the "without notice" application, thereby directing the local registrar to accept the filing of Mr. Payne's notice of appeal in the absence of a certificate of payment of rent, and granting an interim stay of the order for possession.

[5] The Housing Authority then filed an application for an order setting aside the entirety of that "without notice" order.

[6] The Attorney General of Saskatchewan also filed an application, seeking an order setting aside that part of the "without notice" order that directed the local registrar to accept the filing of Mr. Payne's notice of appeal in the absence of a certificate of payment of rent.

[7] These applications (except the "without notice" application, which already had been dealt with by another judge) have been argued before me. This is my decision on the application to declare the certificate requirement unconstitutional.

[8] I am issuing this decision concurrently with my decisions as to setting aside the "without notice" order (2024 SKKB 93), as to dispensing with the certificate requirement and as to Mr. Payne's statutory appeal (2024 SKKB 94), and as to Mr. Payne's application for judicial review (2024 SKKB 95).

2. Statutory appeal provisions

[9] The requirement that a prospective appellant in Mr. Payne's situation must file a certificate of payment of rent is established in the *Act* and in the *Regulations*. By operation of law, the references to the Court of Queen's Bench now (since the passing of Queen Elizabeth) are read as references to the Court of King's Bench.

[10] The *Act* provides:

> **72**(1) Subject to subsections (1.1) and (1.3), any person who is aggrieved by a decision or order of a hearing officer or the director, whether or not the decision or order is made without notice, may appeal the decision or order on a question of law or of jurisdiction to the Court of Queen's Bench within 30 days after the date on which the decision or order is signed and dated by a hearing officer.
>
> …

> (1.3) A tenant may only appeal an order that includes a writ of possession pursuant to subsection 70(13) with respect to a failure to vacate a property in accordance with a notice served pursuant to subsection 57(1) or (5) or clause 58(1)(b) if the tenant files with the Court of Queen's Bench a certificate of payment of rent issued pursuant to the regulations.

[11] The *Regulations* provide:

> **10.1**(1) For the purposes of subsection 72(1.3) of the Act, a tenant may not appeal an order issuing a writ of possession pursuant to subsection 70(13) of the Act with respect to a failure to vacate a property in accordance with a notice served pursuant to subsection 57(1) of the Act unless the tenant files with the Court of Queen's Bench a certificate of payment of rent issued by the director pursuant to subsection (2).
>
> (2) For the purposes of subsection (1), the director shall issue a certificate of payment of rent to any tenant who deposits with the director one month's rent in the amount set out in the order to be appealed.

3. Context of the application

[12] There is no dispute that the provisions of the *Act* and the *Regulations* are intended to strike a balance between the interests of tenants and those of landlords. In that vein, the certificate requirement is aimed at balancing:

(a) the tenant's entitlement to remain in the rental unit until the appeal has been disposed of, by virtue of the possession order being stayed on the filing of a notice of appeal (s. 78(1) of the *Act*); and

(b) the landlord consequently having the tenant continuing to occupy the rental unit, perhaps without paying rent, until the appeal has been disposed of.

[13] The evidence in this case establishes that Mr. Payne got into arrears not in rent payment but in the payment of his natural gas utility bills. Under the *Act*, arrears of utility payments give the landlord a right to lease termination in the same manner as

do arrears of rent. The Housing Authority served the appropriate notices on Mr. Payne, and eventually a hearing was held, under the *Act*, before a hearing officer. The purpose of the hearing was to determine whether the Housing Authority would be granted an order for possession based on the arrears of utilities. Mr. Payne and a representative of the Housing Authority attended the hearing.

[14] Mr. Payne was not at any time in arrears of rent. This was because his rent is paid directly by Saskatchewan Income Support Services to the Housing Authority. He pays for utilities and other living expenses through receipt of the Canada Child Tax Benefit. In addition to receiving these forms of support, Mr. Payne regularly relies on the Food Bank to feed his teenaged daughters, who reside with him in the rental unit. Mr. Payne does not have employment income because he had stopped working so that he can care for his daughters, both of whom have certain challenges. In the context of falling behind on his utility payments Mr. Payne has received further financial assistance from Red Pheasant First Nation and through Jordan's Principle funding.

[15] By the time of the hearing, Mr. Payne had made some significant payments towards the utility arrears, although it was not established at the hearing whether he had paid them all. In any event, after the hearing the hearing officer granted the order for possession. As I have outlined, that order has been stayed and Mr. Payne remains in the rental unit.

[16] After the possession order was granted, Mr. Payne asked Saskatchewan Income Support Services whether it would pay one month's rent to the director of residential tenancies, so that he could obtain the certificate and appeal from the possession order. Saskatchewan Income Support Services declined to do so, but it continues to pay Mr. Payne's rent to the Housing Authority while these court applications have proceeded.

[17] There is provision, in *The Fee Waiver Act*, SS 2015, c F-13.1001, for court fees and similar charges to be waived on the basis of an applicant's inability to pay. The relevant provisions of that statute are these:

> **1** This Act may be cited as *The Fee Waiver Act*.
>
> **2**(1) In this Act:
>
> (a) **"court"** means:
>
> (i) the Provincial Court of Saskatchewan;
>
> (ii) the Court of Queen's Bench; or
>
> (iii) the Court of Appeal;
>
> (b) **"fee"** means a prescribed fee that is payable to a court or public body with respect to a proceeding in or before that court or public body and includes a fee that is payable with respect to the enforcement of an order of a court or public body;
>
> (c) **"fee waiver certificate"** means a fee waiver certificate issued pursuant to section 3;
>
> …
>
> **3**(1) A person, other than a corporation, may apply pursuant to this section for a fee waiver certificate with respect to a proceeding by submitting an application in the prescribed form to an official of the court or public body in which the proceeding is or is to be commenced.
>
> …
>
> **5** On and after the date a fee waiver certificate is issued by a court or public body, the person who is issued the fee waiver certificate is excused from paying any fee of the court or public body with respect to a proceeding in or before that court or public body.

[18] The parties are agreed, as am I, that *The Fee Waiver Act* does not apply to the payment that is to be made to the director of residential tenancies in order to obtain a certificate of payment of rent. This is because a "fee" under that statute is payable to the tribunal that is hearing the matter, whereas the payment that is required to obtain the certificate is neither a fee (it is rent) nor an amount that is to be paid to the tribunal that is hearing the matter (this court).

[19] In contrast, *The Fee Waiver Act* does apply to the other proceedings that are before me.

[20] To round out my summary of the context of this matter, including the circumstances of Mr. Payne's financial circumstances, I add that in all of these proceedings Mr. Payne is represented by counsel from Classic Community Legal Assistance Services, which provides free legal services to people who experience poverty.

4. Summary of the parties' positions on this application

[21] The essence of Mr. Payne's position is that the certificate requirement prevents him from accessing the province's superior court, the Court of King's Bench. Access to a superior court, he observes, is guaranteed by way of s. 96 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3.

[22] The Attorney General and the Housing Authority respond that s. 96 guarantees access to a superior court only with respect to the core jurisdiction of the court. They say that the core jurisdiction of the court does not include hearing a statutory appeal. Rather, they say, the core jurisdiction includes judicial review, which remains available to Mr. Payne.

[23] Mr. Payne counters that judicial review, in the circumstances of this case, is not an adequate alternative to the statutory appeal, so that Mr. Payne remains barred from exercising his s. 96 right to a superior court review of the possession order.

5. Initiating document

[24] Mr. Payne initiated this challenge to the constitutionality of the certificate requirement by way of a document that is entitled "Notice of Constitutional Question". The Attorney General observes that the notice was not generated in the context of an

action that had been commenced by a statement of claim, asserting that such a notice should be generated in such a context. The Attorney General asserts that Mr. Payne's attack of the constitutionality of the certificate requirement therefore is not properly before the court, and that it should be dismissed for that reason.

[25] It is not necessary for me to delve into the reasons advanced by the Attorney General for asserting that a notice of constitutional question should be generated in the context of an action that was commenced by statement of claim. This is because no prejudice has arisen from Mr. Payne initiating this application as he has. Ultimately the Attorney General has had a full opportunity to receive notice of the application and to respond to it, both in writing and in making oral submissions. Declining to consider Mr. Payne's application because of the manner of its initiation would not serve the administration of justice, since doing so would only delay or deny his opportunity to have the constitutional question heard and determined.

[26] In considering these circumstances I adopt the approach of Justice Keene in *Director Under the Seizure of Criminal Property Act, 2009 v Warnecke*, 2024 SKKB 43 at paras 11-15.

[27] In these circumstances, I direct that any irregularity arising from the manner in which this constitutional question was brought to the court is cured under Rule 1-6(1)(a) of *The King's Bench Rules*.

6. Constitutional right of access to the superior court

[28] Mr. Payne's application is based on s. 96 of the *Constitution Act, 1867*:

> **96** The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[29] As Mr. Payne has observed, the Supreme Court of Canada has explained that s. 96 recognizes that superior courts, such as the Court of King's Bench, have a core jurisdiction that cannot be eliminated by provincial legislatures. Put another way, a person has a right to access the superior court and a provincial legislature may not eliminate that right.

[30] The core jurisdiction of the superior courts was explained by Justice LeBel in *Noël v Société d'énérgie de la Baie James*, 2001 SCC 39, [2001] 2 SCR 207 at para 27:

> **27** Under the constitutional arrangements that prevail in Canada, each province has a superior court whose members are appointed under s. 96 of the *Constitution Act, 1867*. That court is the cornerstone of the Canadian judicial system. It has what has been characterized as a "core" jurisdiction, which cannot be removed from it by the provincial legislatures. (See *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at p. 740, Lamer C.J.) Among the essential powers reserved for a superior court, as a court of general jurisdiction, is the judicial review of lower tribunals and administrative bodies. While that power may be circumscribed, it cannot be totally removed from the Superior Court or transferred to another body. (See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 235; *Alliance des Professeurs catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140, at p. 155; *Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638; *Séminaire de Chicoutimi v. City of Chicoutimi*, [1973] S.C.R. 681.)

[31] As Justice LeBel said, this core jurisdiction includes judicial review. Justices Bastarache and LeBel further explained that aspect of the core jurisdiction in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 28:

> **28** By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[32] Here Mr. Payne argues that his situation is analogous to that in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 ("*BC Trial Lawyers*"). In that case the provincial legislature had implemented a requirement that a hearing fee must be paid by a person who wished to have a matter dealt with by the superior court. Some exceptions were provided for, but those provisions still left some people unable to access the court at all.

[33] Writing for the majority, Chief Justice McLachlin recognized that a province may impose such fees, under the province's power to impose some conditions on people's access to the court, a power derived from s. 92(14) of the *Constitution Act, 1867*. Such conditions, though, must be consistent with s. 96. She said at paras. 35, 36 and 45:

> **35** Here, the legislation at issue bars access to the superior courts in yet another way -- by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction -- the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court.
>
> **36** It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.
>
> …
>
> **45** Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[34] There is a significant difference between the circumstance in *BC Trial Lawyers* and the circumstance here. The effect of the British Columbia requirement was to prevent some people's access to the superior court entirely. The effect of the certificate requirement here is to prevent access to the superior court by way of appeal, but access to the court by way of judicial review remains available.

[35] Mr. Payne, though, asserts that the core jurisdiction of the superior court includes a right of appeal, not just a right of judicial review. In so asserting he relies on the decision of Justice Welsh in *Butler v Snelgrove*, 2015 NLCA 46, 68 RFL (7th) 7. Justice Welsh said at paras. 20-21:

> 20 In considering the right of access to the courts, there is no basis on which to draw a distinction between proceeding with a trial as opposed to an appeal. The right of appeal constitutes a core jurisdiction of superior courts under section 96 of the Constitution Act, 1867. In the Trial Lawyers Association of British Columbia case McLachlin C.J.C., referring to sections 92(14) and 96 of the Constitution Act, 1867, wrote:
>
> > [29] ... Taken together, these sections have been held to provide a constitutional basis for a unified judicial presence throughout the country: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 11 and 52. Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but "[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel*, at para. 15). In this way, the Canadian Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'" (*MacMillan Bloedel*, at para. 52).
>
> Similarly, in *MacMillan Bloedel*, [1995] 4 SCR 725, McLachlin J. wrote:
>
> > [51] ... [The section 96 courts established across the country] are united by the fact that they exercise similar jurisdiction, by the fact that their judges are federally appointed and paid, and by the fact that appeals lie from all to the Supreme Court of Canada, which exercises a unifying influence. The result is a network of related Canadian courts ensuring judicial independence, interprovincial

> uniformity, and minimum standards of decision making throughout the country. ...
>
> 21 The right of appeal is an essential part of the core jurisdiction of the section 96 superior courts. Accordingly, just as access to the courts for purposes of a trial may not be precluded by reason of lack of financial means, the same principle applies to an appeal.

[36] Mr. Payne focuses on the first sentence of para. 21: "The right of appeal is an essential part of the core jurisdiction of the section 96 superior courts." The context of the matter that was before Justice Welsh was a question of fees to be paid in order to access the Court of Appeal. That context is different from the context here. Here it is a matter of a person having access to the Court of King's Bench, which is a superior court of general jurisdiction.

[37] Delineating the core jurisdiction of a s. 96 superior court is not a simple matter. Chief Justice McLachlin said in *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para 59:

> 59 There is no clear test for defining what is considered to be the "core jurisdiction" of a s. 96 court. In *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, Lamer C.J. stated at para. 56:
>
> > Section 96's "core" jurisdiction is a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system.

[38] The remarks of the Supreme Court of Canada in cases such as *Noël*, *Dunsmuir*, *BC Trial Lawyers* and, more recently, *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 SCR 291, lead me to conclude that this court's core jurisdiction, in relation to reviewing a decision of a lower court or a tribunal, includes judicial review but does not include appeal. Judicial review in this sense is the review that includes the prerogative writs such as *certiorari* and *mandamus* and that now commonly is referred to as "judicial review". The court's power of such review arises from the common law. In contrast, the court's jurisdiction to hear appeals arises

from legislation. Appeals are statutory, and legislatures are empowered to create, modify and eliminate rights of appeal – all without affecting the court's s. 96 jurisdiction.

[39] The relevance of appeals being statutory was remarked on by Justice La Forest in *Kourtessis v M.N.R.*, [1993] 2 SCR 53 (QL) at para 69:

> 15 Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court…

[40] It is significant that Justice La Forest observed that "there is no inherent jurisdiction in any appeal court". A thread common to the Supreme Court's decisions examining the s. 96 core jurisdiction of a superior court of general jurisdiction is the principle that the core jurisdiction is the inherent, common law, jurisdiction of the court. Appeals do not arise from the common law, and hearing appeals is not part of the inherent jurisdiction of the court.

[41] Furthermore, the remarks of Chief Justice Lamer that were quoted by Chief Justice McLachlin in *Babcock* were part of his discussion of core jurisdiction in the residential tenancy context, in *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 SCR 186 at para 56:

> 56 I begin by noting that jurisdiction over residential tenancy disputes is not part of the "core" jurisdiction which our s. 96 jurisprudence protects. Section 96's "core" jurisdiction is a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system. In *MacMillan Bloedel, supra*, this Court was satisfied, for example, that a superior court's inherent jurisdiction to punish for contempt fell within the "core" jurisdiction of s. 96.

[42] This court's s. 96 core jurisdiction, then, includes judicial review but does not include hearing a statutory appeal.

[43] The focus of this decision, therefore, must turn to the availability of judicial review to Mr. Payne in the face of his inability to access the court by way of statutory appeal.

7. Judicial review availability in this case

[44] Judicial review is available in this case. Notwithstanding the certificate requirement relating to a statutory appeal, Mr. Payne has the right to have this court consider his application for judicial review. In *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8, 489 DLR (4th) 191 at para 3, Justice Rowe said:

> 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.

[45] Justice Rowe explained the matter of determining whether to undertake judicial review at paras. 51-54 and 64:

> 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* [[1989] 2 SCR 49], 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 [by Justice Rowe].]
>
> 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 [by Justice Rowe].]

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* [[1995] 1 SCR 3], 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).

…

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* [2010 SCC 62], 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 [by Justice Rowe].]

[46] The Housing Authority argues here that the *Act* provides the alternative remedy of an appeal, and that such an appeal is an adequate remedy, so that the court should decline to conduct a judicial review of the possession order. This argument can be persuasive only if one does not consider Mr. Payne's circumstances – the circumstances that render him unable to take advantage of the right to appeal because of the rules that are attached to that right of appeal.

[47] In fact, the particular circumstances of a case are to be considered in the determination of whether to undertake a judicial review, as explained by Justice Cromwell in *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 at para 42:

> 42 The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: *Matsqui*, at para. 37; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332, at para. 31; *Mullan* [Mullan, David J. "The Discretionary Nature of Judicial Review", in Robert J. Sharpe and Kent Roach, eds., *Taking Remedies Seriously*: 2009. Montréal: Canadian Institute for the Administration of Justice, 2010], at pp. 430-31; Brown and Evans [Brown, Donald J. M., and John M. Evans, with the assistance of Christine E. Deacon. *Judicial Review of Administrative Action in Canada*. Toronto: Carswell, 2013 (loose-leaf updated December 2014, release 3)], at topics 3: 2110 and 3: 2330; *Harelkin*, at p. 588. In order for an

> alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": topic 3: 2100 (emphasis added [by Justice Cromwell]).

[48] The fact that a statutory right of appeal is available in this case does not automatically mean that an appeal is an adequate alternative remedy. Here the barrier to Mr. Payne using the statutory appeal mechanism is cost, which is one of the factors listed by Justice Cromwell. In Mr. Payne's circumstances the statutory appeal patently is not an adequate remedy, since he cannot use it. Judicial review effectively is the only avenue that is available to Mr. Payne for review of the possession order by the superior court.

[49] Deciding whether to undertake the judicial review, though, is not just a matter of determining whether there is some reason not to do so (e.g. the presence of an adequate alternative remedy). It also is a matter of determining whether judicial review is appropriate. This point was confirmed by Justice Rowe in *Yatar* at para 64, in quoting from *Strickland* at para 43 (set out above).

[50] To determine whether judicial review is appropriate in this case, it is necessary to address the scope of the judicial review that is available to Mr. Payne.

8. Availability of judicial review on questions of fact and questions of mixed fact and law in this case

[51] In *Yatar* the statutory right of appeal was restricted by the provincial legislature to questions of law. Similarly, Mr. Payne's right of appeal under the *Act* is restricted, in s. 72(1), to questions of law or jurisdiction:

> 72(1) Subject to subsections (1.1) and (1.3), any person who is aggrieved by a decision or order of a hearing officer or the director, whether or not the decision or order is made without notice, may appeal the decision or order on a question of law or of jurisdiction to

> the Court of Queen's Bench within 30 days after the date on which the decision or order is signed and dated by a hearing officer.

[52] In *Yatar* at paras 57-58 and 62 Justice Rowe explained that where the statutory right of appeal was restricted to questions of law, a right of judicial review on questions of fact and on questions of mixed fact and law remained available:

> 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.
>
> …
>
> 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.

[53] Judicial review is available to Mr. Payne on questions of fact, and on questions of mixed fact and law.

9. Availability of judicial review on questions of law in this case

[54] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, the court majority said at para. 52:

> 52 Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example,

> appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, 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… (emphasis added)

[55] Here the appeal mechanism in the *Act* permits an appeal on questions of law and jurisdiction, leaving for judicial review questions of fact and questions of mixed fact and law. Mr. Payne argues, though, that his inability to obtain the certificate of payment means that in fact he has no right of appeal, so that his application for judicial review can include an examination of questions of law.

[56] I am not persuaded by this argument. Having no right of appeal is not the same thing as having a right of appeal but being unable to exercise that right. Mr. Payne is in the latter situation. He has a right of appeal, but he is unable to exercise that right. The Supreme Court decisions that discuss the availability of judicial review in the face of a right to appeal do not contemplate characterizing a right of appeal as non-existent for the reason that a person is unable to exercise the right.

[57] The scope of the judicial review that is available to Mr. Payne is as described by Justice Rowe in *Yatar* at para 48:

> 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 *Vavalov*).

[58] Judicial review is not available to Mr. Payne on questions of law.

10. Whether judicial review is appropriate

[59] Judicial review is available to Mr. Payne in this case on questions of fact, and on questions of mixed fact and law, but not on questions of law. Thus, while the certificate requirement prevents Mr. Payne from accessing the superior court by way of the statutory appeal, Mr. Payne still has access to the court, to review the possession order, by way of judicial review. The certificate requirement has not eliminated that right to access.

[60] Mr. Payne points out that, if there were no statutory appeal procedure at all, judicial review in this case may have extended also to questions of law, since there would be no overlap with the scope of a statutory appeal. He argues that the certificate requirement thus has eliminated part of the court's core jurisdiction, which is contrary to s. 96 and which constitutes the judicial review an inappropriate process.

[61] That is not the case. Justice LeBel said in *Noël* at para 27 that, while a superior court's core power of judicial review "may be circumscribed, it cannot be totally removed". An example of such a circumscription without elimination is a privative clause, by which a provincial legislature limits the scope of superior court judicial review. A provincial legislative limit on the scope of judicial review is not contrary to s. 96 of the *Constitution Act, 1867*, so long as the availability of judicial review is not eliminated.

[62] Justice LeBel's observation is consistent with the Supreme Court of Canada decision in *Crevier v A.G. (Québec)*, [1981] 2 SCR 220. The essence of that decision was described by Justice Near in *Canada (Attorney General) v Best Buy Canada Ltd.*, 2021 FCA 161 at para 57:

> 57 *Crevier* has since oft been cited for the proposition that a legislature cannot completely oust judicial review: see e.g. *Vavilov* at para. 24; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.

> 190 at para. 31. As Stratas J.A., for this Court, recently framed it, "[p]ut positively, *Crevier* stands for the proposition that there must always be at least some prospect or degree of review": *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, 2021 CarswellNat 1003 at para. 102 [*Canadian Council for Refugees*]. This is indeed all it stands for. It does not imply that the legislature cannot limit or preclude judicial review of administrative decisions for certain types of issues: see e.g. *Canadian Council for Refugees* at para. 102, citing *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 at 333; *Capital Regional District v. Concerned Citizens of British Columbia et al.*, [1982] 2 S.C.R. 842, 141 D.L.R. (3d) 385; *Vavilov* at paras. 45-52. On the contrary, as the emphasized portion of the above cited passage makes clear, *Crevier* actually explicitly states that the legislature may oust judicial review on issues not touching jurisdiction. (emphasis added)

[63] Mr. Payne further argues that judicial review is not an appropriate avenue for him to pursue because it requires an applicant to become engaged in a process that is much more complicated than is a statutory appeal. I do not accept this argument, as adopting it would amount to rejecting the Supreme Court's confirmation that judicial review typically is an appropriate avenue for seeking access to a superior court other than by way of a statutory appeal.

[64] Mr. Payne is unable to take advantage of his right to appeal under the *Act*, but judicial review is available to him. Judicial review is an appropriate avenue for him, particularly because it is the only available avenue that accommodates his constitutional right of access to the superior court in this matter.

[65] In the end, in light of the above discussion, I conclude that the certificate requirement is not unconstitutional. The requirement does not eliminate Mr. Payne's right of access to the Court of King's Bench. He is entitled to apply to the court for judicial review of the possession order.

11. Request to direct notice regarding judicial review

[66] Mr. Payne asks the court to make an ancillary order, in the event that the court rules that:

(a) the certificate requirement is not unconstitutional;

(b) Mr. Payne may not proceed with his statutory appeal; and

(c) Mr. Payne may proceed with his application for judicial review.

[67] In this decision I have ruled as set out in items (a) and (c), and in one of my concurrent decisions (2024 SKKB 94) I have ruled as set out in item (b).

[68] In these circumstances, Mr. Payne asks the court to order the Office of Residential Tenancies to amend the materials that it provides to tenants, to notify the tenants not only of the possibility of a statutory appeal but also of the possibility of applying for judicial review of a hearing officer's decision.

[69] Such an order would not be merely ancillary to my decision here. Offhand, I am unaware of the court's authority to make such an order. Certainly, the Office of Residential Tenancies has not been served with notice of an application for an order requiring it to amend its materials. Consequently, it would not be appropriate for me to make such an order – both because I would be doing so without the benefit of a response from the organization that would be subject to the proposed order and because that organization has not had an opportunity to address the suggestion.

[70] I decline to make the order.

12. Costs

[71] The Attorney General has successfully opposed this application, but she does not ask for costs.

[72] The Housing Authority, having successfully opposed the application, asks for costs. Typically the successful party on an application is awarded taxable costs, to partially compensate that party for the expense of the litigation. In the circumstances of this case, though, I will not order Mr. Payne to pay costs.

[73] Aside from the fact that Mr. Payne has no ability to pay costs, it is not appropriate to order him to pay costs because the subject of this application was worthy of bringing to the court for a determination. This is so not only in the context of Mr. Payne's own circumstances but also with reference to other members of society who can be expected, from time to time, to fall into circumstances similar to those that brought Mr. Payne to this litigation. Bringing this matter to the court for a determination has served to advance the law and I am not persuaded that, even though Mr. Payne was unsuccessful on the application, he should be ordered to pay costs of the application to the Housing Authority.

[74] Each party will bear his, her or its own costs of this application.

13. Conclusion

[75] *The Residential Tenancies Act, 2006* and *The Residential Tenancies Regulations, 2007* include a requirement in some cases that a prospective appellant file a certificate of payment of rent before being entitled to proceed with an appeal from a decision of a hearing officer. That requirement is not unconstitutional.

[76] The application for a declaration of unconstitutionality is dismissed, and each party will bear his, her or its own costs of this application.

J.
G.M. CURRIE